BAKER & McKENZIE

Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006-4078, USA

Tel: +1 202 452 7000
Fax: +1 202 452 7074
www.bakernet.com

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Mr. Jeffrey Owens
Director
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André-Pascal
75775 Paris Cedex 16
France

Re: **Proposed Revision to Transfer Pricing Guidelines**

Dear Mr. Owens:

We are writing to share the thoughts of the Treaty Policy Working Group on the Proposed Revision to the OECD Transfer Pricing Guidelines, as released on 9 September 2009. The Treaty Policy Working Group is an informal association of large companies based throughout the world, which have global operations and represent a broad spectrum of sectors. Our member companies began working together in 2005 to analyze and address tax policy and administration concerns relating to permanent establishment, profit attribution, transfer pricing, and related issues.

We applaud the OECD for taking on the important work of updating the 1995 Transfer Pricing Guidelines. The development of clear guidance reflecting an international consensus on transfer pricing issues is critically important to us, as global companies seeking to avoid double or unexpected taxation and the resulting uncertainty and cross-border controversies.

The Proposed Revision to the Guidelines addresses many issues of importance to taxpayers and tax administrations alike. At this juncture, however, we would like to focus our comments on one issue of particular interest to Treaty Policy Working Group members as a group: the potentially increased scope under the Proposed Revision for use of transactional profit methods.

We do not necessarily oppose the use of transactional profit methods; in fact, some of our member companies have used the TNMM or other profit-based methods where appropriate under the current Guidelines. However, the Proposed Revision would remove transactional profit methods from their current status as methods of last resort and permit their use where they are considered “the most appropriate method to the circumstances of the case”.

We would caution only that care must be taken to ensure that transactional profit methods are not used except in appropriate circumstances and in an appropriate manner. We have seen some instances in the past in which a profit-based method has been applied to support substantial adjustments, where an available comparable uncontrolled price (CUP) method analysis would have yielded a reliable—but smaller—arm's length adjustment. In other cases, the transactional profit split method has been asserted when the group as a whole was profitable, but the tested party itself performed only limited functions and bore limited risks, making the transactional profit split method inappropriate in the circumstances. It would be unfortunate if the Proposed Revision were taken to bless the expansion of such practices.

The Proposed Revision helpfully provides additional guidance regarding the appropriate application of transactional profit methods and acknowledges their limitations. It clearly articulates several important principles:

- As under the current Guidelines, transactional profit methods should be used only where compatible with comparability standards and other aspects of the arm's length principle of Article 9, given the facts and circumstances of each case.

- Transactional profit methods cannot be used in a manner that results in "over-taxing enterprises mainly because they make profits lower than the average".

- Transactional profit methods may not be applied automatically simply because of difficulties in obtaining data.

- The transactional profit split method must be applied to approximate "the division of profits that would have been anticipated and reflected in an agreement made at arm's length" and must be consistent with the functional analysis of the controlled transaction, including the allocation of risks among the parties and the assets used by each.

These points provide much welcome confirmation. Still, there remains potential uncertainty regarding the manner in which the "most appropriate" method will be determined in practice and the manner in which the new guidance concerning transactional profit methods will be applied in particular cases. It would, therefore, also be very helpful for the Proposed Revision to confirm explicitly that the removal of transactional profit methods from last-resort status should not be read to endorse a general lowering of the threshold of reliability which a taxpayer or tax administration must demonstrate before applying these methods. Rather, it should be clear that any transactional profit method may be used only if it can be demonstrated that such method clearly is indeed appropriate under the circumstances. This would help ensure that the careful and nuanced work done in updating the Guidelines will not have unintended negative consequences for the application of the arm's length principle.

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Please do not hesitate to let us know if we can provide further information or be of assistance in any way.

Sincerely,

Carol A. Dunahoo

Gary D. Sprague

For the Treaty Policy Working Group

cc: Mary C. Bennett
Caroline Silberztein