TAX EXECUTIVES INSTITUTE – TREASURY DEPARTMENT –
OFFICE OF TAX POLICY
LIAISON MEETING
February 24, 2016
AGENDA

I. Welcome and Introductions

II. 2016 Priorities and Challenges

We invite discussion of the Office of Tax Policy's (OTP or Treasury) priorities, as well as the challenges OTP is facing in the current environment of declining budget and staffing resources.

III. OECD Base Erosion and Profit Shifting Project

A. Proposed U.S. Country-by-Country (CbC) Reporting Regulations and BEPS Action 13

The IRS and Treasury proposed regulations in December 2015 to implement CbC reporting under Action 13 of the OECD's BEPS Project. There are several differences between the proposed regulations and OECD's final report on Action 13.

- Effective date: The proposed regulations would require collection of CbC data for taxable years beginning after the regulations are finalized (*e.g.*, for calendar year taxpayers, not until 2017). The final Action 13 BEPS report recommended that data collection for CbC reporting purposes begin in 2016 for reporting in 2017, and many countries will expect U.S. headquartered multinationals to report this information for 2016. This raises the question of whether such multinationals must file the CbC report directly with those other countries absent a requirement to file it with the IRS. Filing the report directly with those countries means that the information will not be subject to the confidentiality and other protections provided by a treaty or TIEA. Will there be a mechanism for multinationals in this situation to apply the final CbC regulations to filings in 2017 for 2016 years, allowing the IRS to share the reports with other countries via proper, confidential channels? If not, would the IRS and Treasury refuse to share future CbC reports with countries that violate the data confidentiality protections in this one year period?

- Filing Deadline: The proposed CbC regulations would require multinationals to file the CbC report with their U.S. federal income tax return (*e.g.*, September 15 for a calendar year taxpayer at the latest). The final BEPS report, in contrast, recommends a filing deadline of one year from the end of the relevant fiscal year (*e.g.*, December 31 for a calendar year taxpayer). Why did the IRS and Treasury choose a different filing deadline than that recommended by the OECD?

Taxpayers that wish to use foreign statutory account or tax return data in the CbC report may find this deadline difficult to meet.

- Counting Employees: The preamble to the proposed CbC regulations states, "[t]he number of full-time equivalent employees in a tax jurisdiction of residence should be determined by reference to the employees that perform their activities for the U.S. MNE group within such tax jurisdiction of residence." In contrast, the final OECD report provides that a multinational report employees of "all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction." In other words, the U.S. regulations require (according to the preamble) reporting employees in a tax jurisdiction based on where individual employees perform their duties, whereas the OECD recommendation requires employee reporting based on the tax residence of the constituent entity employer. This added physical/geographic requirement in the proposed regulations would materially increase the reporting burden for multinationals. Moreover, the additional U.S. requirement would likely lead to potentially unwarranted permanent establishment assertions by local countries. We welcome a discussion of the reasoning underlying this additional requirement in the proposed regulations and the implications of possible inconsistencies with CbC reports from multinationals headquartered in other jurisdictions.

- Master/Local File – The IRS and Treasury have not proposed to require U.S. companies to file transfer pricing documentation in the local/master file format proposed by the OECD. TEI welcomes a discussion of why the proposed regulations do not require these reports.

- Information Sharing with the States – TEI appreciates Treasury's efforts to protect the confidentiality of information exchanged pursuant to BEPS Action 13 and the U.S. CbC reporting regulations. Information reported under the proposed regulations constitutes confidential tax return information under section 6103 and, as such, will be exchanged with a competent authority of a tax jurisdiction only to the extent provided in, and subject to the terms and conditions of, an information exchange agreement.

  TEI members are concerned about the extent to which CbC reports, both those filed by U.S.-based multinationals with the IRS and those received by the IRS from foreign tax administrators, will be shared with U.S. state and local jurisdictions. Section 6103(d) authorizes the IRS to disclose federal tax information to state and local tax authorities, but only to the extent necessary for such jurisdictions to administer their tax laws. In TEI's view, CbC reports are not relevant to state and local tax administration. Further, the wider the information is shared the greater the confidentiality concerns and chances of improper disclosure. We invite discussion of whether Treasury believes it is appropriate to share CbC reporting information with state and local tax authorities and, if so, steps that can be taken to ensure such information is used for intended purposes.

B. Action 7 – Permanent Establishment (PE)

The BEPS project made many changes to the definition of a PE in the OECD model treaty. While Treasury generally agreed with suggested changes to the dependent agent definition in Article 5(5), it was generally opposed to amendments to the specific activity exceptions in Article 5(4) in the final BEPS report on Action 7. Does Treasury continue to object to the changes to the OECD model under Article 5(4), and will it continue to negotiate bilateral U.S. tax treaties on that basis?

C. Actions 14/15 – Dispute Resolution and Multilateral Instrument

TEI appreciates Treasury's tireless efforts to advocate mandatory binding arbitration as a method for resolving MAP cases, both in the context of BEPS Actions 14 and 15 and more broadly. What is the current status of these efforts? What additional progress has been made toward making the MAP process more effective, especially in anticipation of a substantial increase in MAP cases as countries implement the OECD's recommendations under the BEPS project?

In addition, we invite an update on negotiations concerning a multilateral instrument to implement the treaty-based BEPS recommendations under Action 15.

IV. European Commission State Aid Cases

The European Commission "state aid" investigations continue apace. Recently, the EC issued decisions ordering EU Member States to recoup back taxes from multinationals due to pricing agreements that the EC views as illegal state aid under EU law. Most of the companies subject to these EC state aid investigations appear to be U.S.-based multinationals. TEI appreciates Treasury's strong public statements objecting to these investigations on various grounds, especially noting that the outcome of the investigations may ultimately come at the cost of the U.S. fisc.

TEI invites a discussion of actions Treasury has taken and may take regarding these investigations, including what formal actions U.S.-based multinationals can take to protect their interests during the course of the investigations, both abroad and in the United States.

V. U.S. International Corporate Tax Reform

A. Short-Term Prospects

TEI invites a discussion of OTP's views on the possibility of reforming the U.S. system of international taxation and what form such a revision may take. What would be required for the Administration to sign an international tax reform bill?

Last year, the Administration proposed a 19% minimum tax on foreign earnings going forward, with a 14% tax on offshore earnings as a "transition" tax that may be

designated to fund infrastructure improvements. Are these proposals still on the table and/or has the Administration's views changed on their desirability of implementing either proposal in the context of international tax reform?

B. Inversions

The Administration has stated that without further legislation from Congress it can do little else to combat inversions beyond the Notices it has recently issued (*i.e.*, Notices 2014-52 and 2015-79). What is the anticipated timeframe for issuing regulations implementing these two inversion Notices?

What type of legislation does the Administration envision to further stem the tide of inversions? Would the envisioned legislation apply to all foreign companies and not just inverted companies? If the latter, what is the justification for treating inverted companies differently than historically foreign companies? What additional code provisions addressing earnings stripping does the Administration favor implementing? Last year the Administration issued a proposal to address "excessive interest of members of financial reporting groups," does this continue to be part of the approach? Does the Administration view continued inversion activity as a reason to reform the U.S. international tax system and the U.S. tax code generally?

VI. FATCA

TEI members appreciate all the work Treasury and the IRS have put into FATCA implementation. It has truly been a monumental undertaking. Many businesses, particularly non-financial groups, continue to struggle with the internal processes and procedures necessary to comply with the complex rules. Is Treasury aware of any discussions surrounding extension of the transition period under Notice 2014-33 to calendar year 2016? We invite discussion on whether this is a realistic possibility.

TEI has identified some technical "foot-faults" in FATCA compliance that non-financial groups may experience.[1] We are eager to renew our proposal to address these matters, but also recognize core implementation issues may be top priority at this early stage in the FATCA lifecycle. We invite discussion of when might be the right time to approach Treasury and the IRS with our recommendations.

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[1] For example, unanticipated changes during a taxable year that might cause a nonfinancial to fail the "nonfinancial group" test. Consequences of such a foot-fault are severe—the group's treasury centers and holding companies would become financial institutions retroactive to the beginning of the year and must register with the IRS as PFFIs or suffer withholding.

VII. Tax Treaty Update

TEI welcomes an update on the status of ongoing bilateral tax treaty and exchange of information negotiations. When does Treasury expect to release the next U.S. model treaty?

VIII. Guidance Projects

A. Publicly Traded Partnerships

On August 3, 2015, TEI submitted comments on proposed regulations under Section 7704(d)(1)(E) that would create an exclusive list of activities of publicly traded partnerships that qualify for pass-through status. In that comment, we offered that such listing should not be an exclusive one. We also suggested that grandfathering of entities that previously qualified for pass-through status by way of private-letter ruling be permanent rather than for a ten-year period.

Since issuing the proposed regulations, the government has received over 100 comment letters, many of them from individuals expressing concern about investments they made in reliance on PLRs that might be overruled by these proposed regulations. We invite a discussion on the status of these proposed regulations, in particular:

- Is summer 2016 still the expected timeframe for release of final regulations?
- What is the status of the information gathering process? Is the comment process complete? Are meetings with industry experts still being conducted?

Many commenters, including TEI, voiced concern over limiting qualifying activities to an exclusive list. Has the IRS and Treasury changed their views on this issue? If not, what steps have been taken to fully understand the science of refining/processing? How should the exclusive list be applied to new technologies that are materially similar to activities in the list but are not specifically listed?

We understand the IRS has stopped issuing private rulings on applicability of the natural resource exception and, because of the pause, several taxpayers are still awaiting responses on previously filed private ruling requests. TEI invites discussion of the plan for clearing the back log of ruling requests. Specifically, when can a taxpayer expect to receive a ruling on a request submitted before or during the pause?

B. Domestic Production Activities Deduction

Treasury and the IRS recently issued proposed regulations in REG-136459-09 regarding the section 199 Domestic Production Activities Deduction. The preamble to the proposed regulations discusses the definition of qualified production activities and states that Treasury and the IRS disagree with *United States v. Dean*, 945 F.Supp.2d 1110 (C.D. Cal. 2013). In that case, the district court held a taxpayer's production of gift baskets was qualifying production for section 199 purposes. The proposed regulations

suggest a new Example 9, which sets forth an abbreviated version of the facts at issue in *Dean* and concludes that the gift-basket assembly described therein does not constitute qualifying production. TEI invites a discussion of the intent underlying proposed Example 9. Is it intended to overrule the holding in *Dean*? If so, why does the fact pattern omit facts the court relied upon in reaching its decision? Is the example intended to have wider application outside gift-basket assembly?

Since the release of the proposed regulations, the District Court for the Western District of Illinois handed down its decision in *Precision Dose, Inc. v. United States*, Civ. No. 12-50180-PGR, 2015 WL 5664908 (N.D. Ill. Sept. 24, 2015). In that case, the district court relied upon *Dean* to hold that the taxpayer's creation of unit-dose versions of medications was qualified production. We invite discussion of Treasury's views of the holding in *Precision Dose* and whether it will impact revisions made to the proposed regulations (if any) before they are finalized.

C. Revenue Recognition

We anticipate many businesses will experience an increase in book-tax differences resulting from the new financial accounting standards for recognizing revenue. In Notice 2015–40, the IRS invited comments on the effect the new financial accounting standards may have on taxpayers' methods of tax accounting. To the extent Treasury is involved in this project, we invite discussion of the concerns Treasury and/or the IRS may have with allowing, but not requiring, taxpayers to adopt the accounting rule changes as their tax accounting methods, whether through advance or automatic consent procedures.

D. Priority Guidance Plan Update

TEI invites an update on the status of regulations under sections 901(m), 987, and other significant regulatory projects.