TAX EXECUTIVES INSTITUTE, INC.

2014-2015 OFFICERS

MARK C. SILBIGER
President
The Lubrizol Corporation
Wickliffe, OH

C.N. (SANDY) MACFARLANE
Senior Vice President
Chevron Corporation
San Ramon, CA

JANICE L. LUCCHESI
Secretary
Chicago, IL

ROBERT L. HOWREN
Treasurer
BlueLinx Corporation
Atlanta, GA

PAUL T. MAGRATH
Vice President, Region I
AstraZeneca Canada, Inc.
Mississauga, ON

LINDA A. KLANG
Vice President, Region II
Lehman Brothers Holdings Inc.
Jersey City, NJ

PETER F. DE NICOLA
Vice President, Region III
FUJIFILM Holdings America Corp.
Valhalla, NY

JAMES D. HOLLINGSWORTH
Vice President, Region IV
United States Steel Corporation
Pittsburgh, PA

DAVID J. GOEKE
Vice President, Region V
Emerson Electric Co.
St. Louis, MO

J. MITCHELL FRANK
Vice President, Region VI
American Airlines
Ft. Worth, TX

WINIFER TONG
Vice President, Region VII
UPS
Atlanta, GA

DANIEL R. GOFF
Vice President, Region VIII
Xilinx, Inc.
San Jose, CA

DAMIEN HENNEKEN
Vice President, Region IX
Abu Dhabi Investment Authority
Abu Dhabi, UAE

ELI J. DICKER
Executive Director

W. PATRICK EVANS
Chief Tax Counsel

29 April 2015

Achim Pross
Head, International Co-Operation and
Tax Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-Operation
and Development
Paris, France

Via Email: MandatoryDisclosure@oecd.org

RE: Public Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Dear Mr. Pross:

On 19 July 2013, the OECD published an *Action Plan on Base Erosion and Profit Shifting* (hereinafter the Action Plan or the Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries' tax bases are being eroded or profits shifted improperly. Pursuant to Action 12 of the Plan, on 31 March 2015 the OECD published a document entitled *BEPS Action 12: Mandatory Disclosure Rules* (hereinafter the Discussion Draft or Draft). The OECD solicited comments from interested parties on the Draft no later than 30 April 2015.

On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD's request for comments. In addition, TEI requests the opportunity to speak in support of these comments at the Public Consultation regarding Action 12, to be held in Paris on 11 May 2015.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws,

at all levels of government. Our nearly 7,000 individual members represent over 3,000 of the largest companies in the world.[1]

TEI Comments

TEI commends the OECD for its thorough overview of the components of a potential mandatory disclosure regime and its comprehensive discussion of various options that countries may adopt to implement disclosure rules into their domestic law. TEI appreciates tax authorities' need to obtain a better view into the aggressive tax planning engaged in by some businesses and we do not oppose a mandatory disclosure regime in principle. Indeed, an objective, clear, uniform, and easy-to-apply mandatory disclosure rule could help level the playing field between multi-national enterprise (MNE) competitors that might have differing appetites for tax risk. While the flexible approach in the Discussion Draft gives countries the ability to tailor a disclosure regime to their particular domestic tax policy concerns, varied approaches to mandatory disclosure across jurisdictions present several concerns for MNEs.

In particular, the Draft does not recommend a single approach to mandatory disclosure, but instead offers a list of options that countries may select when designing their disclosure rules. This is a departure (as is much of the BEPS project) from the OECD's traditional role of building consensus, setting the "gold" standard and devising model rules. For example, even when the Draft sets forth "recommendations," they are often stated in the alternative or as a minimum requirement, rather than a definitive approach to disclosure.[2]

The option approach of the Discussion Draft will lead to differing disclosure regimes across jurisdictions. A transaction may therefore be reportable in some jurisdictions, not be reportable in other jurisdictions, and reporting may be unclear in a third set of jurisdictions. A taxpayer would need to analyse a transaction multiple times from the perspective of the disclosure rules in each jurisdiction that might be impacted by the transaction. A local disclosure regime that includes subjective elements or uses a "hypothetical" approach to identify the features of schemes that might interest tax authorities would further complicate the analysis. For these reasons, TEI recommends that the OECD set forth a model approach that

---

[1] TEI is a corporation organised in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. federal income tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

[2] *See, e.g.*, the recommendations for "hallmarks," which provide that countries may adopt a single step or multi-step/threshold approach, choose between a hypothetical approach or purely factual objective tests, and state that "[t]he design and selection of specific hallmarks should be left to each country taking into account their own tax policy and enforcement priorities." Discussion Draft, p.39-40.

includes specific, clear, and limited recommendations for each issue[3] that a mandatory disclosure regime must address. With respect to the hallmarks of a suspect transaction under a disclosure rule, TEI recommends that the hallmarks be objective and not hypothetical to provide greater certainty to the process and ease of application.

A uniform disclosure regime along with a common reporting standard that applies across jurisdictions would limit the burden placed on taxpayers while providing tax authorities with the information necessary to combat transactions the authorities view as problematic. A recommended uniform (in terms of what needs to be disclosed, when, and who needs to disclose it) and limited (in terms of what transactions are targeted) mandatory disclosure rule would also avoid the problem of local tax authorities adopting whatever disclosure rules they prefer, claiming that their approach was "sanctioned" by the OECD's option approach and is therefore representative of a global consensus on disclosure.

A broader concern is that the Discussion Draft recommends imposing yet another information reporting system on MNEs. Under Action 13 of the BEPS project, the OECD has already recommended that MNEs prepare master and local files for transfer pricing documentation purposes and submit these files to tax authorities around the world. In addition, the OECD has recommended that jurisdictions require MNEs to file the Action 13 country-by-country reporting template for tax years beginning on or after 1 January 2016, which will also be shared internationally. Further, the public discussion draft under Action 11 *Improving the Analysis of BEPS* raises the possibility that tax authorities may ask MNEs to provide additional, "firm-level" information to assist authorities in analysing the extent of base erosion and profit shifting. Outside of the BEPS Project there is the U.S.-led FATCA reporting system and its accompanying Intergovernmental Agreements, which impact financial and non-financial companies, as well as the Common Reporting Standard for automatic exchange of financial account information, targeted primarily at financial institutions. Thus, MNEs are already required to report, or soon will be, voluminous information to tax authorities that will be shared across jurisdictions.

Moreover, tax authorities currently have difficulty analysing and effectively utilising the information and data already at their disposal, such as tax returns of specific taxpayers and other information acquired through domestic reporting requirements. An additional mandatory disclosure regime requiring taxpayers to produce additional information may merely result in the information disappearing within the tax bureaucracy without being utilised by the revenue authority – a cost to taxpayers with no benefit to tax authorities.

---

[3] *See* Discussion Draft, Section III.A through G (who has to report, what has to be reported, hallmarks, when information is reported, *etc.*).

The proliferation of tax reporting regimes has inundated MNEs with tax compliance obligations. Indeed, in certain cases it seems that an MNE cannot conduct routine business operations without filling out and filing a tax reporting or disclosure form (*e.g.*, under FATCA by opening a bank account or taking on a new customer). This will only increase should multiple jurisdictions adopt non-uniform, mandatory disclosure rules, especially if they include easily triggered reporting obligations, such as a broad definition of "marketing" as a hallmark. Indeed, TEI members now see contract terms in negotiations whereby, for example, suppliers attempt to pass on their tax administration and compliance costs to their customers as a separate provision of the supply contract. These provisions arise not in the context of financial transactions or institutions, where reporting for tax and other purposes is a regular part of the business, but in operating contracts between non-financial institutions. Tax compliance and administration is a concrete burden on MNEs and therefore on cross-border commerce.

Thus, before urging that Member States and other jurisdictions participating in the BEPS project adopt yet another reporting regime for MNEs, TEI recommends that the OECD be sure that (i) the benefits tax authorities expect to reap outweigh the cost and administrative burden to taxpayers (and tax authorities) in the face of multiple other disclosure and information reporting regimes, and (ii) the information required to be reported is not already available to tax authorities in the taxpayer-specific information currently requested. Moreover, the overall international information sharing and disclosure environment further illustrates the need for the OECD to set forth a recommended uniform approach in the final guidance under Action 12.

TEI also recommends that the OECD suggest measures to ensure the confidentiality of sensitive taxpayer information that may be contained in any disclosure under the recommended mandatory disclosure regime. Unauthorised disclosure of confidential information is a persistent MNE concern with many BEPS action items and is present under Action 12 as well. Moreover, a number of tax authorities are introducing measures to toughen the consequences for tax evaders and those who assist them, which include publicly naming evaders and enablers of evasion (*e.g.*, the United Kingdom) or disclosing taxpayers' tax information (*e.g.*, Australia). The mandatory disclosure information of taxpayers' complex tax planning should not be prematurely released to the public before the taxpayers (and others) have a chance to exercise their right to fair and due process as some of the transactions may not be considered tax avoidance or evasion once thoroughly reviewed.

With respect to other specific points regarding the mechanics of a mandatory disclosure regime, and in the interest of fostering a uniform approach to disclosure rules across jurisdictions, TEI recommends the following:

1. <u>When information is reported</u>: Some domestic mandatory disclosure rules require reporting within a relatively short timeframe (*e.g.*, within five days of a certain event). In an international environment, a longer lead time would be

needed because it is extremely difficult to obtain information in a short period of time even if the information is contained within a corporate group. Moreover, timing disclosure for when a transaction is "made available for implementation" or a promoter "makes a firm approach/marketing contact" is too early, especially if taxpayers are required to provide the disclosure. Large MNEs are often approached by promoters or advisors with tax planning opportunities, most of which are not implemented after a taxpayer's due diligence. Therefore, requiring disclosure when marketing contacts occur would create administrative and compliance burdens for taxpayers even though taxpayers do not enter into most of the transactions that are marketed to them. Thus, TEI recommends that taxpayer disclosure only be required when the taxpayer files its return for the relevant tax year that contains a tax benefit of reportable transaction.

2. Who should report: TEI recommends that taxpayers only be required to disclose a transaction if (i) the promoter is offshore; (ii) there is no promoter or the MNE uses multiple advisors to implement a transaction; or (iii) the promoter asserts a legal privilege, including where the provision of the client list may breach confidentiality or violate domestic law.

3. Primary purpose or *de minimis* filter: The Discussion Draft does not recommend the inclusion of a test to require a disclosure only where a primary purpose of the transaction is tax avoidance or where the tax benefit is material. Such filters would reduce the administrative and compliance burden on taxpayers as well as the tax authorities and should be recommended by the OECD.

4. Maintenance of a list of tax planning schemes: Many of the examples provided in the Discussion Draft are longstanding aggressive tax planning schemes that are well known by tax authorities. TEI recommends that the OECD collaborate with tax authorities to prepare an annual list and brief description of the known aggressive tax planning schemes. Tax administrators can then use the list to determine whether they need additional information from their counterparts in other countries to determine whether they view the transaction as inappropriate, whether they need to change the law to close a loophole, or whether they need additional information from promoters or taxpayers.[4] To reduce the administrative and compliance burden on both taxpayers as well as tax authorities, reporting should be limited to new or innovative aggressive tax planning that has not previously been disclosed, is not on the OECD annual list of known or existing aggressive tax planning schemes, or where the tax

[4] This work may already be done under the auspices of the Joint International Tax Shelter Information Centre.

administrators specifically request additional information. Where information on a scheme had been provided in a previous year (*e.g.*, for a transaction that spans multiple tax years), taxpayers should be allowed to reference or attach the previously disclosed information.

5. Protection against self-incrimination: TEI agrees that in most cases a mandatory disclosure regime will not impinge upon the privilege against self-incrimination for the reasons set forth in the Discussion Draft. However, for countries that impose criminal liabilities on taxpayers for undertaking certain tax avoidance transactions (*e.g.*, some countries impose criminal liability if the amount of tax at issue is above a certain threshold), TEI recommends that (i) such transactions be excluded from the scope of the disclosure regime, and (ii) a properly asserted privilege against self-incrimination be specifically listed as an acceptable reason for not disclosing the transaction.

6. Penalty protection: TEI recommends that a proper and timely disclosure of a transaction under a mandatory disclosure regime protect taxpayers from the assertion of penalties by the tax authorities. This would provide an additional incentive for taxpayers to proactively and transparently disclose their aggressive tax transactions and restore some balance to the disclosure process on the side of taxpayers.

Conclusion

TEI appreciates the opportunity to comment on the OECD Discussion Draft regarding mandatory disclosure regimes. As noted above, TEI requests the opportunity to speak in support of its comments at the scheduled public consultation in Paris on 11 May.

These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of TEI's legal staff, at +1 202 464 8353, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.

Mark C. Silbiger
International President