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Via email: <u>largebusinessconsultation.mailbox@hmrc.gsi.gov.uk</u>

RE: Improving Large Business Tax Compliance Consultation

Dear Ms. Wall:

HM Revenue and Customs (HMRC) released a public consultation document entitled *Improving Large Business Tax Compliance* (the Consultation) on 22 July 2015. The Consultation solicits input from interested stakeholders regarding several measures intended to improve large business tax compliance in the United Kingdom. HMRC requested comments on the Consultation no later than 14 October 2015. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to HMRC's request.

TEI Background

Founded in 1944 to serve the needs of business tax professionals, TEI is the preeminent association of in-house tax professionals worldwide. Today, the organization has 56 chapters in Europe, North and South America, and Asia. TEI's approximately 7,000 professionals manage the tax affairs of over 2,800 of the leading companies across all industries around the world. TEI's members are accountants, lawyers, and other corporate and business employees responsible for the tax affairs of their employers in an executive, administrative, or managerial capacity. TEI is committed to promoting fair tax policy and the efficient administration of the tax laws, at all levels of government, seeking to achieve an effective yet dynamic balance between the policy objectives of tax authorities and the business objectives of multinational enterprises.



TEI's Europe, Middle East, and Africa (EMEA) Chapter was chartered in 1999 to address the advocacy, networking and educational needs of in-house tax professionals within those geographies. Our EMEA chapter has grown to more than 250 members since its chartering and has been actively involved in various tax advocacy projects and initiatives. These include leading TEI's efforts to contribute to debates within the Organisation for Economic Co-Operation and Development (OECD) and the European Commission on such areas as the OECD's BEPS project and Model Tax Convention, transfer pricing, as well as value added taxes.

General Comments on the Consultation

TEI commends HMRC for soliciting business and other input regarding the proposals in the Consultation. TEI supports tax transparency and a collaborative and professional working relationship between tax administrators and taxpayers. The Consultation seeks to advance these objectives by addressing three subjects: (i) a requirement for large businesses to publish their tax strategy; (ii) a voluntary "Code of Practice on Taxation for Large Business" (Code of Practice), which sets forth HMRC's expectations with respect to the taxation approach of HMRC's large business customers; and (iii) a narrowly targeted "Special Measures" regime for the small number of continually aggressive taxpayers.

TEI appreciates the principal aims of the Consultation, especially as applied to large taxpayers. TEI also generally supports the special measures set forth in the Consultation, so long as appropriate safeguards are in place to keep such measures from being applied to compliant taxpayers. These measures should be the focus of the Consultation, in TEI's view, and will reap the most benefit for HMRC in discouraging abusive behavior by non-compliant taxpayers. TEI has several concerns with respect to the requirement for large taxpayers to publish a tax strategy and the expectation to sign a voluntary Code of Practice. The Consultation takes a broad approach on these topics, advancing general principles outlining HMRC's expectations of taxpayers. TEI recommends, however, HMRC take a narrower approach with more specific rules and expectations so taxpayers can be reasonably assured they are in compliance with the final legislation resulting from the Consultation.

TEI is cognizant, in particular, of the impact the legislation will have on multinationals based outside of the United Kingdom, which generally do not have as much experience interacting with HMRC as U.K. headquartered companies. Indeed, the Consultation appears to be drafted as if every company is headquartered in the United Kingdom and listed on The London Stock Exchange. However, for many non-U.K. groups there will be few U.K. stakeholders, particularly where a group primarily or solely operates in the business-to-business realm, and thus has few U.K. suppliers, customers, or shareholders. The only U.K. stakeholder may be HMRC for these groups. TEI thus recommends HMRC adjust the proposals to take into account, or provide special rules for, businesses operating in the United Kingdom not



headquartered there (*i.e.*, businesses operating through a branch or U.K. subsidiary of a global group).

TEI submits, in addition, that the underlying principle of the Consultation is unclear. It appears HMRC is attempting to influence taxpayer behavior with respect to U.K. taxes by, for example, "bringing responsibility for tax into the boardroom " Alternatively, HMRC may intend the Consultation to improve stakeholder information about large business tax strategy and policy. Perhaps the purpose is to provide HMRC with additional tools to combat aggressive tax avoidance. Assuming the Consultation is intended to encompass all these objectives, it seems inappropriate to apply them to non-U.K based multinational groups. Should the objective be to provide improved stakeholder information, in TEI's view tax legislation is not the best method to improve corporate governance and these requirements should be introduced via legislation in another area of corporate law, or be made applicable only to U.K.-parented companies. TEI recommends, if these objectives are to remain in tax legislation, HMRC substantially modify, and provide flexibility in, the Consultation's proposals for non-U.K. groups to avoid imposing excessive reporting requirements with minimal practical utility.

For some groups, depending on the parent company's financial accounting method, the approach to deferred tax accounting, and home country tax law, U.K. taxes paid or accrued may be of little relevance in computing or managing the tax provision of the group as a whole. U.K. taxes paid or accrued in those cases will receive scant attention from management and will rarely rise to the level of being on the agenda of the Executive Board of a non-U.K. company. Thus it is unrealistic to expect such groups to have a separate and distinct U.K. tax strategy, which might be distilled and published in a workable manner. If HMRC requires such groups to publish a tax strategy, then what would likely result is little more than a general statement that the group attempts to legally minimize its worldwide tax burden, which would be unhelpful to HMRC and other stakeholders. HMRC requiring a more detailed publication would implicate competitiveness concerns for taxpayers whose competitors are not otherwise required to publish a detailed tax strategy. HMRC should also not require or expect a non-U.K. to adopt a Code of Practice for the entire group implicating concerns specific to the United Kingdom, for similar reasons.

HMRC already has many tools at its disposal to combat tax avoidance and other improper corporate behavior by both U.K. and non-U.K. groups. These include the General Anti-Abuse Rule (GAAR), the newly enacted Diverted Profits Tax, and the Senior Accounting Officer (SAO) rules. HMRC generally has, in addition, a professional working relationship with large taxpayers through its Customer Relationship Managers (CRM). This relationship can be used to address the issues set forth in the Consultation on a taxpayer-by-taxpayer basis (in many instances this is already the case for large taxpayers and their CRMs). It is difficult to see what the rules of the



Consultation would add to HMRC's tax administration capabilities beyond what is already in place.

TEI recommends, for these reasons, HMRC's CRM discuss tax strategy and general corporate governance principles of a non-U.K. group with the relevant group personnel, as often occurs today. Many large taxpayers that have experienced the discussions held with their respective HMRC CRMs as being productive and provide HMRC with useful and relevant taxpayer-specific information, which can be used effectively, efficiently, and appropriately for tax administration and compliance. Requiring non-U.K. groups to publish a U.K.-specific tax strategy and sign a U.K. tax-specific Code of Practice would provide other stakeholders with a limited view into a non-U.K. multinational group's overall approach to tax compliance and corporate governance, and may therefore be misleading and not contribute productively to the public debate on these matters. TEI fears a requirement to publish a tax strategy and the ability to sign on to a voluntary Code of Practice will merely amount to additional compliance burdens for already compliant taxpayers who have a professional and transparent working relationship with HMRC.

TEI does not have any specific responses on the questions relating to the proposed Special Measures. However, TEI does have a concern that the behaviors that would result in entry into Special Measures are not clearly specified. A "lack of transparency and cooperation," for example, is not defined and the proposed draft legislation should therefore establish clear criteria to ensure that this Strand is based on objective measures and avoid the risk that it is determined based upon the views of individuals within HMRC. The test of "significant risk to the Exchequer" appears to be based on objective measures, and it would be consistent for the test of lack of transparency and cooperation to be similarly objective. Care should also be taken that the legislation does not retrospectively define unacceptable behaviors and then assess a businesses' past actions against these new criteria. TEI recommends, as an additional safeguard before any group is placed in Special Measures, an independent review, by the GAAR Panel or similar body, be undertaken to confirm HMRC's decision to implement the Special Measures regime is appropriate and reasonable.

Responses to Selected Individual Consultation Questions

Scope

Q1. Do you agree that the threshold above (£200 million / £2 billion) is appropriate for these measures? What other thresholds might we use?

The proposed threshold derives from the SAO rules, as noted in the Consultation. Thus, there is precedent for using this threshold and in TEI's view it is preferable to coordinate thresholds across reporting rules rather than have a different threshold for each rule. However, like the rules proposed by the OECD with respect to country-by-country reporting for transfer



pricing purposes under Action 13 of the OECD's base erosion and profit shifting project (the OECD CbC Template), the measures should only apply to companies headquartered in the United Kingdom. A multinational company based outside the United Kingdom is unlikely to have a tax strategy specific to its U.K. operations, as noted above. Such a company may operate in hundreds of countries around the world, each with its own political, legal, and cultural practices driving complicated and varied tax approaches on a global basis.

TEI also recommends there be a *de minimis* threshold for activities in the United Kingdom, below which U.K. activities would not trigger the Consultation's reporting or governance requirements, even if the group as a whole is large.

Transparency

Q2. Do you agree there should be a named individual at Executive Board level with accountability for a business's published tax strategy? If so, do you have any views on who should this be?

The United Kingdom may represent a small part of the geographic footprint of a non-U.K. headquartered group. Asking for Board level accountability for tax strategies implemented in the United Kingdom (if any) may therefore not be proportionate to the policy aims of the Consultation. It would be more appropriate, in TEI's view, to give a non-U.K. group wide flexibility to designate a suitable person – with the agreement of HMRC's CRM – to accept this responsibility on behalf of the group to achieve the stated policy objectives. At a minimum, a non-U.K. group should be permitted to designate an executive, based in the U.K. or elsewhere, as the responsible person depending on where, within the group's existing organization, an individual of sufficient seniority and accountability to take on the role is located. This may in some cases be the U.K. Chief Financial Officer, but many groups will not have this role or group structure. The SAO may be the appropriate person in some other cases.

Q3. Do you think the areas above are the right areas for a published tax strategy to include? If not, what other aspects of tax strategy are more relevant? Equally, what aspects do you think are less relevant?

TEI has several concerns about publication of business tax strategies as proposed in the Consultation. The key concerns include:

 There would need to be a reasonable amount of detail included in the publication of a tax strategy for it to be useful to HMRC and other stakeholders. This would result in a loss of confidentiality for businesses conducting operations in the United Kingdom because similar sized businesses accessing the U.K. market without a taxable presence will not be required to publish their strategy. Less detail is thus important for competitive protection, but it would likely result in less meaningful information for stakeholders, including HMRC.



- 2. The Consultation's approach is to publish the business' tax strategy for the U.K. only, there may be accusations of double standards if a statement did not reflect the entire group's tax strategy. This reflects the variation in political, legal, and cultural practices in the area of tax around the world and may not be appreciated by the general public when engaged in the debate over large business tax compliance.
 - a. <u>Relationship with HMRC</u>. How the policy objectives of influencing taxpayer behavior and encouraging scrutiny of tax arrangements in business can be achieved by business disclosing the nature of its relationship with HMRC is unclear. Disclosing a close relationship between HMRC and business may well be counterproductive and undermine public trust on this issue.
 - b. Planning appetite and approach to risk. An important policy objective of the Consultation is to differentiate between what is acceptable and unacceptable tax planning, and delineate each business' approach in this area. This is not easy to define, and there should be a stronger demarcation to separate the acceptable from the unacceptable to allow for effective communication from business. Using the spirit of the law as the standard or guide to distinguish between the two may not always give the "right" answer, particularly in the context of cross-border transactions where there are interactions with foreign tax laws. Moreover, it is unclear what can be achieved by a business providing a statement about its planning appetite or approach to risk as the statement is likely to be highly subjective and open to misinterpretation. All of this undermines the U.K.'s efforts to encourage investment.
 - c. <u>U.K. Effective Tax Rate (ETR)</u>. A company's ETR may be misleading for the public as a measure of tax avoidance because it does not differentiate between measures/incentives intended by Parliament (as positive measures) and tax arrangements or behaviors HMRC would prefer were not practiced. Use of such a measure may weaken the effectiveness of future Government developed incentive programs. The Consultation, moreover, references the U.K. target effective tax rates but does specify whether it is referring to the cash or book reserve rate. Local management for many groups, particularly where there is not a U.K. accounting consolidation, may not be measured on or use the U.K. effective rate of tax as a management tool and the tax rate may only be known when U.K. statutory accounts are finalized.



Q4. Should the tax strategy be supported by publication of factual information on how it has been applied in practice? If so, what information would be most relevant to demonstrate the application of the strategy?

The extent of the factual data required to support a tax strategy may resemble the information included in the OECD CbC Template, which the participating states in the BEPS project have agreed will be kept confidential. Publication of business tax strategies would be a unilateral measure by the United Kingdom and deliver mixed messages of being open for business, but where the overall tax compliance burden may well discourage investment. TEI therefore recommends HMRC not require publication of factual information.

Q5. Do you think that businesses should be required to publish whether they are or are not a signatory to the 'Code of Practice on Taxation for Large Business' as part of this measure?

A non-U.K. group may find it difficult to sign the Code of Practice, even in cases where the group as a whole is a conservative and compliant taxpayer. (As an example, early dialogue on significant transactions may not be possible by a compliant taxpayer if the transactions are highly confidential.) Publication of being a signatory (or not) to such a Code should not be required as it could be misleading and damaging for many compliant taxpayers.

Q6. What is the right medium for publication of a tax strategy? Where do you think a business's tax strategy should be published?

TEI generally opposes the requirement for publication of a specific U.K. tax strategy for a non-U.K. group. A "one size fits all" disclosure policy for businesses operating in the United Kingdom raises competitiveness concerns across global competitors and, as noted, many non-U.K. groups will not have such a tax strategy and may be forced to compose one merely to satisfy U.K. tax disclosures. The companies who have published tax strategies to date have generally done so voluntarily for many reasons, including because they believe it improves their standing with stakeholders and the general public. These reasons, however, are not present in all businesses and in TEI's view an adequate picture of a non-U.K. group's approach to U.K. taxes can be developed in discussions between the taxpayer and HMRC's CRM.

If HMRC requires such publication, however, the group accounts or parent company website is an appropriate medium for U.K. headquartered groups. The non-U.K. groups should have the opportunity to discuss the appropriate medium with HMRC's CRM and it should not be prescribed by legislation.

Q7. What would you see as an effective sanction for non-publication? To whom should this apply?

The SAO regime is effective and similar sanctions should apply here.



Code of Practice on Taxation for Large Business

Q8. Do you agree that the openness and relationship behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?

The openness and relationship behaviors are attractive for business, but only if HMRC has the resources to engage in the open dialogue necessary to resolve disputes and uncertainties in a timely manner. It will be unlikely, in TEI's view, that HMRC will be in a position to do this in the timeframe that business operates in practice, undermining the very benefits this arrangement seeks to achieve for both taxpayers and HMRC. TEI is also concerned that the business-HMRC relationship might be viewed as too close and thus undermine public confidence in fair tax administration.

Q9. Do you agree that the governance behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?

Keeping HMRC apprised of transactions and how decisions are made is already implied in the openness and relationship behaviors. However, demonstrating governance in action may be difficult given the iteration that occurs in finalizing transactions and the varied media (email, phone calls, *etc.*) in which those decisions are captured in practice. Putting in processes to ensure auditability to provide this level of confidence to HMRC may not be proportionate to the policy aims of the Consultation.

Q10. Do you agree that the tax planning behaviour contained within the Code of Practice is appropriate for large businesses? Are there any other behaviours you would expect to see?

This behavior requires taxpayers to pass three hurdles in the reporting of transactions – intentions of parliament, the economic reality of the transaction, and the law (as interpreted in the courts). The policy intention appears to counter behaviors that seek to arrive at the lower of these results. Although this goes against the long held principle that taxpayers can arrange their affairs so as to minimize their tax liability, it is clear some planning is unacceptable in this environment. However, these behaviors are likely to cause tax to be paid on the higher of these results, rather than a "right" result the policy was intended to achieve and may undermine the U.K.'s efforts to encourage investment. The goals sought here can be achieved instead in the special measures. The approach also fails to understand the impact on international trade, and interactions with tax laws outside the U.K. have not been taken in account.

In sum, the code requires companies to commit to understand the intentions of parliament, as well as settled case law and the substance of all transactions. Considering the courts have great difficulty in understanding parliament's intentions, TEI does not believe any company could, with a clear conscience, commit publicly to understanding and complying with unspecified and unpublished intentions.



Conclusion

TEI appreciates the opportunity to comment on HMRC's Business Compliance Consultation. These comments were prepared under the aegis of TEI's European Direct Tax Committee. If you have any questions about the submission, please contact Giles Parsons, Vice Chair of the Committee, at +44 (0)1455 826561, Parsons_Giles@cat.com, or Benjamin R. Shreck of TEI's legal staff, at +1 202 464 8353, bshreck@tei.org.

Sincerely yours,

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