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Legal Update
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The OECD's Action Plan on Base Erosion and Profit Shifting

On July 19, 2013, the Organisation for Economic Co-operation and Development ("OECD") released its highly anticipated *Action Plan on Base Erosion and Profit Shifting* (the "BEPS Action Plan"), which was then unanimously approved by the G-20 Finance Ministers at their July 20, 2013 meeting in Moscow. While BEPS is an OECD project, it was commissioned and is driven by the G-20 amid intense political pressure by its member states for action to address perceived problems of corporate income avoidance and to ensure that all multinational enterprises pay their so-called "fair share" of taxes. The BEPS Action Plan complements other measures and proposals that have been put forward by governments around the world in recent years, such as the tax reform proposals of the Obama administration and House Ways and Means Committee Chairman David Camp in the United States and the proposals of the European Commission to tackle aggressive tax planning in the European Union ("EU"), which were endorsed by the European leaders in May.

The Action Items

The BEPS Action Plan follows-up on an earlier report issued by the OECD on February 12, 2013 on the same topic (the "BEPS Report") by proposing fifteen specific actions that the OECD intends to take in the next two years and beyond. The proposed actions, time frames and a few observations about each action item follow below.

1. ADDRESS THE CHALLENGES OF THE DIGITAL ECONOMY

Identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation. Issues to be examined include, but are not limited to, the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location/relevant data through the use of digital products and services, the characterization of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services. Such work will require a thorough analysis of the various business models in this sector.

Output and Timing: Report identifying issues raised by the digital economy and possible actions to address them by September 2014.

Observation: The placement of this item as the very first action item is curious given the lack of international consensus in this area. It has been reported that this action item was proposed by

the French government, which published a controversial proposal for a "virtual PE" concept for the digital economy in a February 2013 report, and that the United States does not support this proposal.[1] It is perhaps for this reason that the anticipated deliverable is a report that will serve as the basis for further discussions, rather than specific proposals for changes to treaties or domestic law.

2. NEUTRALIZE THE EFFECTS OF HYBRID MISMATCH ARRANGEMENTS

Develop model treaty provisions and recommendations regarding the design of domestic rules to neutralize the effect (e.g. double non-taxation, double deduction, long-term deferral) of hybrid instruments and entities. This may include: (i) changes to the OECD Model Tax Convention to ensure that hybrid instruments and entities (as well as dual resident entities) are not used to obtain the benefits of treaties unduly; (ii) domestic law provisions that prevent exemption or non-recognition for payments that are deductible by the payor; (iii) domestic law provisions that deny a deduction for a payment that is not includible in income by the recipient (and is not subject to taxation under controlled foreign company (CFC) or similar rules); (iv) domestic law provisions that deny a deduction for a payment that is also deductible in another jurisdiction; and (v) where necessary, guidance on coordination or tie-breaker rules if more than one country seeks to apply such rules to a transaction or structure. Special attention should be given to the interaction between possible changes to domestic law and the provisions of the OECD Model Tax Convention. This work will be coordinated with the work on interest expense deduction limitations, the work on CFC rules, and the work on treaty shopping.

Output and Timing: Changes to the OECD Model Tax Convention on Income and on Capital (the "Model Tax Convention") and recommendations regarding the design of domestic rules by September 2014.

Observation: This action item comes as no surprise as the OECD's February BEPS Report identified hybrid entities and instruments as a "key pressure area" where action is needed. However, the proposal for domestic law provisions that expressly condition deductibility of payments on their tax treatment in other jurisdictions (i.e., that the payments must be includible in income somewhere else and deductible nowhere else) is a fundamental change from the status quo in which sovereign governments determine the character and deductibility of payments solely by reference to their own domestic rules. This action item is part of a new broader focus that would shift the tax enforcement emphasis away from a strict focus on each country protecting its own domestic tax base and towards a new paradigm in which domestic tax authorities work together to police the perceived problem of "double non-taxation."

This action item also parallels the recent recommendations of the European Commission, which, on December 6, 2012, issued a Recommendation on aggressive tax planning as part of its own action plan to fight tax fraud, evasion and aggressive tax planning (the "EC Action Plan") following a public consultation on double non-taxation. In the Recommendation, the Commission encourages the EU member states to include an appropriate clause in their double taxation conventions that prevents taxpayers from using the conventions to avoid taxation in one contracting state of items that are not subject to tax in the other contracting state. In the same Recommendation, the European Commission also promotes the adoption by the member states of a General Anti-Abusive Rule ("GAAR"). An expert group

called the “Platform for Tax Good Governance,” which includes representatives of the tax authorities, civil society and business, is advising the Commission on the actual implementation of this Recommendation including its compatibility with the existing European Court of Justice (“ECJ”) jurisprudence.

3. STRENGTHEN CFC RULES

Develop recommendations regarding the design of controlled foreign company rules. This work will be coordinated with other work as necessary.

Output and Timing: Recommendations regarding the design of domestic rules by September 2015.

Observation: While this action item is devoid of details, it confirms earlier public statements of an OECD tax official that the OECD is mulling recommendations for strengthened CFC rules as a backstop to the arm’s length principle.[2] The action item also coincides with the current proposals of the Obama administration and House Ways and Means Committee Chairman David Camp to subject the so-called “excess returns” of CFCs attributable to intangibles to current taxation under subpart F.

In Europe, any expansion of the CFC rules would need to be aligned with the jurisprudence of the ECJ interpreting the EU freedom of establishment,[3] and in particular, with the ECJ’s *Cadbury-Schweppes* decision of September 12, 2006 (C-196/04). In *Cadbury-Schweppes,* the ECJ decided that the UK CFC rules (as existing at that time) resulted in an infringement of the freedom of establishment. The ECJ’s decision restricts member states’ ability to adopt more stringent CFC rules, explaining that a restriction to the freedom of establishment (which CFC rules entail) can only be justified to prevent the creation of a “wholly artificial arrangement” that does not reflect economic reality.

4. LIMIT BASE EROSION VIA INTEREST DEDUCTIONS AND OTHER FINANCIAL PAYMENTS

Develop recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense, for example through the use of related-party and third-party debt to achieve excessive interest deductions or to finance the production of exempt or deferred income, and other financial payments that are economically equivalent to interest payments. The work will evaluate the effectiveness of different types of limitations. In connection with and in support of the foregoing work, transfer-pricing guidance will also be developed regarding the pricing of related party financial transactions, including financial and performance guarantees, derivatives (including internal derivatives used in intra-bank dealings), and captive and other insurance arrangements. The work will be coordinated with the work on hybrids and CFC rules.

Output and Timing: Recommendations regarding the design of domestic rules by September 2015; changes to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the “Transfer Pricing Guidelines”) by December 2015.

Observation: This is also one of the less-developed and specific action items, with few hints given about what the ultimate recommendations may be. The domestic rule recommendations could potentially include model thin-capitalization rules. There is a long-recognized need for transfer pricing guidance specially tailored to financial transactions such as guarantees, so the OECD’s work in this area may reinvigorate interest among governments in developing domestic law guidance in this largely neglected area.

5. **COUNTER HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE**

   Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework.

Output and Timing: Finalization of review of OECD member country regimes by September 2014; strategy to expand participation to non-OECD members by September 2015; revision of existing criteria by December 2015.

Observation: This action item involves revisiting the work in this area that culminated in the OECD's 1998 report entitled *Harmful Tax Competition: An Emerging Global Issue*. By the OECD's own standards, there are no longer *any* tax regimes among OECD member countries that meet the definition of a "harmful preferential tax regime" targeted by the 1998 report.[4] Clearly, a broader focus on a wider range of preferential regimes is now being contemplated. However, the brief description suggests more of a focus on requiring greater transparency and information exchange rather than on suggesting that most preferential tax regimes be prohibited..

The EC Action Plan on tax fraud, evasion and aggressive tax planning addresses the perceived problem of harmful tax practices through a Recommendation regarding measures intended to encourage third-party countries to apply minimum standards on good governance in tax matters. This Recommendation's objective is to improve compliance of third-party countries with EU standards and will rely on the existing criteria of the EU Code of Conduct regarding harmful tax measures. The European Commission is also fully supportive of the OECD's proposals regarding exchange of information. As stated in a July 23 letter addressed to the G-20 by the European Commission President, Mr. Barroso, and the European Council President, Mr. Van Rompuy, the EU has "considerable expertise on automatic exchange of information and is fully supporting the OECD's work on developing a multilateral standard of automatic exchange of information."

6. **PREVENT TREATY ABUSE**

   Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. Work will also be done to clarify that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. The work will be co-ordinated with the work on hybrids.

Output and Timing: Changes to the Model Tax Convention and recommendations regarding the design of domestic rules by September 2014.

Observation: This action item was foreshadowed by the February BEPS Report which suggested anti-avoidance measures such as limitation of benefits rules and other anti-treaty abuse provisions as a complement to the action items addressing hybrid instruments and entities, transfer pricing and the digital economy.

7. **PREVENT THE ARTIFICIAL AVOIDANCE OF PE STATUS**

   Develop changes to the definition of PE to prevent the artificial avoidance of PE

status in relation to BEPS, including through the use of commissionaire arrangements and the specific activity exemptions. Work on these issues will also address related profit-attribution issues.

Output and Timing: Changes to the Model Tax Convention by September 2015.

Observation: While the focus of this action item on commissionaire arrangements and PE exceptions (e.g., for preparatory or auxiliary activities) suggests a relatively narrow focus that will not result in a fundamental change, an international consensus on any lowering of the PE threshold may be very difficult to obtain. Under current treaty standards, the question of whether a PE exists in any given fact pattern is often a hotly contested issue that gives rise to many disputes under the mutual agreement procedure of tax treaties, so to reach an international consensus on changing the standard is truly ambitious. Moreover, a US Treasury official has expressed skepticism about the notion of changing the PE definition as a key component of the plan to address BEPS.[5]

8. INTANGIBLES

Develop rules to prevent BEPS by moving intangibles among group members. This will involve: (i) adopting a broad and clearly delineated definition of intangibles; (ii) ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation; (iii) developing transfer pricing rules or special measures for transfers of hard-to-value intangibles; and (iv) updating the guidance on cost contribution arrangements.

Output and Timing: Changes to the Transfer Pricing Guidelines and possibly also the Model Income Tax Convention regarding Intangibles by September 2014 and Cost Contribution Arrangements by September 2015.

Observation: This action item is a continuation through completion of the work that the OECD kicked-off last year with the release of its Discussion Draft on *Revision of the Special Considerations for Intangibles in Chapter VI of the OECD Transfer Pricing Guidelines and Related Provisions* (the "Intangibles Discussion Draft") in June 2012. As such, this action item contains few new developments, with the notable exception that the project is now expanded to include an update to Chapter VIII of the OECD Guidelines on cost contribution arrangements, in addition to a revision of Chapter VI on intangibles. As expected, the action item confirms that the forthcoming intangibles guidance is expected to include more stringent requirements for both economic substance and valuation, but that non-arm's length alternatives such as formulary apportionment are not under serious consideration. However, this action item needs to be read in light of the Action Plan as a whole in order to determine its true impact on arrangements involving intangibles; for example, action item 3 regarding strengthened CFC regimes and item 10 regarding other high-risk transactions.

9. RISKS AND CAPITAL

Develop rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members. This will involve adopting transfer pricing rules or special measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The rules to be developed will also require alignment of returns with value creation. This work will be coordinated with the work on interest expense deductions and other financial payments.

Output and Timing: Changes to the Transfer Pricing Guidelines and possibly to the Model Tax Convention by September 2015.

Observation: This action item was also foreshadowed by the 2012 Intangibles Discussion Draft, but takes on a broader scope, addressing the role of risk and capital in other contexts, including financial transactions. This is a very nuanced action item, with the key words perhaps being "inappropriate" and "solely." This action item also needs to be read in light of action item 10, which suggests that proposals to expand the authority to recharacterize related party transactions are also under consideration.

10. OTHER HIGH-RISK TRANSACTIONS

> Develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties. This will involve adopting transfer pricing rules or special measures to: (i) clarify the circumstances in which transactions can be recharacterised; (ii) clarify the application of transfer pricing methods, in particular profit splits, in the context of global value chains; and (iii) provide protection against common types of base eroding payments, such as management fees and head office expenses.

Output and Timing: Changes to the Transfer Pricing Guidelines and possibly to the Model Tax Convention by September 2015.

Observation: This action item should be closely watched, because it suggests a significant change from current transfer pricing rules that promote certainty and predictability by generally respecting related party transactions *as actually structured*. This long-standing view was espoused as recently as 2010, when the OECD confirmed in its updated Transfer Pricing Guidelines that "other than [in] exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them."[6] While related party transactions must have *economic substance* to be respected as structured,[7] it has long been understood that related party transactions do not need to conform to the terms of actual unrelated party transactions to have economic substance. In light of the implicit promise of action items 8 and 9 to strengthen the economic substance requirements for related party transactions, it is unclear why this additional measure is necessary or what additional changes may be contemplated.

On a separate point, the reference to "management fees and head office expenses" as "types of base eroding payments" is somewhat surprising. Countries that are host to a significant number of parent companies and headquarters organizations (e.g., the United States) tend to view these payments as base-protecting rather than base-eroding. This view is implicit in the current section 482 regulations' broad definition of a chargeable services transaction as essentially any activity that, subject to certain narrow exceptions, results (or can be reasonably anticipated to result) in a benefit.[8]

11. ESTABLISH METHODOLOGIES TO COLLECT AND ANALYZE DATA ON BEPS AND THE ACTIONS TO ADDRESS IT

> Develop recommendations regarding indicators of the scale and economic impact of BEPS and ensure that tools are available to monitor and evaluate the effectiveness and economic impact of the actions taken to address BEPS on an ongoing basis. This will involve developing an economic analysis of the scale and impact of BEPS (including spillover effects across countries) and actions to address it. The work will also involve assessing a range of existing data sources, identifying new types of data that should be collected, and developing methodologies based on both aggregate

(e.g., FDI and balance of payments data) and micro-level data (e.g., from financial statements and tax returns), taking into consideration the need to respect taxpayer confidentiality and the administrative costs for tax administrations and businesses.

Output and Timing: Recommendations regarding data to be collected and methodologies to analyze them by September 2015.

Observation: Unlike the other action items that focus on providing solutions to perceived problems, the focus of this action item is diagnostic in nature. Because it is not possible to effectively solve perceived problems until they are fully diagnosed and understood and counterproductive to attempt to solve problems that might not exist, this is a very important action item that seemingly should be one of the highest priorities. For this reason, it seems illogical and unfortunate that the anticipated completion date for this item is not until September 2015, by which time most of the other action items will be completed.

12. REQUIRE TAXPAYERS TO DISCLOSE THEIR AGGRESSIVE TAX PLANNING ARRANGEMENTS

Develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules. The work will use a modular design allowing for maximum consistency but allowing for country specific needs and risks. One focus will be international tax schemes, where the work will explore using a wide definition of "tax benefit" in order to capture such transactions. The work will be coordinated with the work on cooperative compliance. It will also involve designing and putting in place enhanced models of information sharing for international tax schemes between tax administrations.

Output and Timing: Recommendations regarding the design of domestic rules by September 2015.

Observation: This action item is also no surprise in light of the increasing focus of the OECD and governments around the world on transparency and disclosure. The development of criteria for determining what constitutes an "aggressive or abusive transactions, arrangements, or structures," should be closely watched, as should the efforts to define a "tax benefit" and the relevance of receiving such a benefit in determining whether a transaction is "aggressive or abusive." At one end of the spectrum, the recommended rules could be modeled after Treas. Reg. §1.6011-4(b), which requires disclosure of certain specific "listed transactions" determined by the IRS to be tax avoidance transactions in published guidance, along with a number of other types of specifically enumerated reportable transactions (confidential transactions, transactions with contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period). But at the other end of the spectrum, the recommendations could seek to require disclosure of transactions on the basis of quantitative measures of the tax benefits they generate, without regard to whether the transaction is actually abusive or aggressive.

13. RE-EXAMINE TRANSFER PRICING DOCUMENTATION

Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE's provide all relevant governments with

needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.

Output and Timing: Changes to Transfer Pricing Guidelines and recommendations regarding the design of domestic rules by September 2014.

Observation: This action item contemplates a "sea change" in the focus of the transfer pricing documentation rules away from the pricing of specific transactions between specific related parties (e.g., Entity A sells widgets to Entity B) to the total global value chain of a multinational enterprise. If implemented, the changes could bring about the greatest expansion of the transfer pricing compliance burden since the United States adopted the first transfer pricing documentation rules under I.R.C. section 6662(e) in 1994, if not in history.

It is also significant that the action item contemplates a requirement for multinationals to include information on "taxes paid among countries" in their transfer pricing documentation, as the amount of taxes paid provides no meaningful indication of whether the prices charged on any given related party transaction were arm's length. As such, this proposed requirement would appear to transform the transfer pricing documentation rules into a vehicle for governments to obtain a complete big-picture view of multinationals' tax planning and tax positions on a country-by-country basis.

Nevertheless, Europe is generally already ahead of the curve in transforming its transfer pricing documentation rules from a transaction-by-transaction to a "big picture" focus. In Europe, the guidelines for transfer pricing documentation produced by the Joint Transfer Pricing Forum and endorsed by the European Council have been implemented by most of the member states. Significantly, these guidelines require both (i) a "Masterfile" describing the group and the intra-group transactions in general and (ii) for each country where the group is operating, a country file describing the specific features of each local subsidiary. The implementation of these guidelines is being monitored by the Joint Transfer Pricing Forum, which includes representatives of the 28 member states as well as representatives of business.

14. MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

Develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.

Output and Timing: Changes to the Model Tax Convention by September 2015.

Observation: While most of the other action items focus on the perceived problem of "double non-taxation," this action item focuses on resolving and avoiding double taxation. As such, it will likely be regarded as one of the more welcome and least controversial of the action items. Despite efforts to coordinate domestic policies, it is not possible to close the gaps between tax systems that allow double non-taxation without creating overlaps where double tax may occur. Access to MAP, with arbitration as a backstop, will be absolutely essential to mitigate the harsh effects of double taxation that are likely to result from the enforcement of any new rules related to transfer pricing, jurisdiction to tax, or the characterization of payments.

15. DEVELOP A MULTILATERAL INSTRUMENT

Analyse the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend

> bilateral tax treaties. On the basis of this analysis, interested Parties will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.

Output and Timing: Report identifying relevant public international law and tax issues by September 2014; development of a multilateral instrument by December 2015.

Observation: The proposed multilateral instrument is truly ambitious and could be the ultimate "end game" for the BEPS project. If successfully negotiated among enough countries, it could implement many of the treaty-based actions in the PE, transfer pricing, anti-abuse, hybridity, and dispute resolution (among other) areas on a multilateral basis, in a much more efficient manner than negotiating amendments to existing treaties on a bilateral basis. Nevertheless, it seems highly unlikely that a broad-based international consensus on an expansive multilateral treaty can be reached anytime soon. Moreover, to the extent that a multilateral treaty is successfully negotiated, its "teeth" may be weakened to the extent countries reserve on specific articles, as many countries had done with respect to the OECD's multilateral treaty on exchange of information.[9]

Analysis and Outlook

Although the BEPS Action Plan calls for some very significant changes to the international tax system in an ambitious time frame, the specific policy changes that will be necessary to fully implement the plan's objectives are unknown and their time frame is uncertain. While the OECD is undoubtedly influential in policy circles and its current political backing by the governments of the G-20 (which significantly include both OECD and non-OECD member states) is unprecedented, as a non-governmental organization it is generally only able to recommend that individual governments take action by changing their own domestic law and/or negotiating income tax treaties consistent with the BEPS Action Plan.

In this regard, many of the Action Plan's outputs are mere "recommendations" for domestic law changes; for example, on rules regarding hybrid instruments and entities and changes to the CFC regimes. OECD members and non-member states are, of course, free to accept or reject these recommendations. Even among member states that accept the recommendations, there will likely be significant variations in how the recommendations are interpreted and implemented, and the time frame in which the changes are adopted.

Nevertheless, domestic law "recommendations" that take the form of model statutes have the potential to bring about rapid change. Unlike traditional domestic law changes that would need to be carefully drafted and debated in the legislatures of each country, OECD model statutes would provide "turnkey" legislative solutions that could be adopted expeditiously because they would have already been drafted and well-vetted within the OECD and G-20. And unlike the Action Plan's proposed Model Tax Convention changes, governments would not need to negotiate amendments to bilateral treaties (or sign-on to the proposed multilateral treaty) for these purely domestic law changes to take effect.

Moreover, the Action Plan's emphasis on domestic law solutions might also have the inadvertent effect of inspiring countries to independently develop their own domestic law solutions to the perceived problems, in contravention of the OECD's strong admonition about the need for international coordination in order to effectively address BEPS. In this regard, the United States may already be ahead of the curve, with the proposals of the Obama administration and House Ways and Means Committee Chairman David Camp to subject the so-called "excess returns" of CFCs attributable to

intangibles to current taxation under subpart F seemingly gaining traction before the OECD's BEPS project even began.

In Europe, implementation of some of the BEPS Action Plan items may be expedited by the European Commission's parallel work on the EC Action Plan, which addresses many of the same issues and, like the BEPS Action Plan, is supported by the G-20. As discussed above, the European Commission is willing to implement very concrete actions to address perceived aggressive tax planning and tax havens in a relatively short period of time. Beside the recommendations discussed above regarding the limitation of treaty benefits, GAARs and harmful tax practices, the Platform for Tax Good Governance (which held its first meeting on June 10) is being asked to work on other topics selected among the other 34 actions of the EC Action Plan, which range from the identification of beneficial owners to the organization of joint audits.

In the transfer pricing area, the Action Plan's outputs consist primarily of revisions to the Transfer Pricing Guidelines. To the extent some OECD member states' transfer pricing rules directly incorporate the Transfer Pricing Guidelines, the revisions to the Guidelines may effectively amount to self-executing policy changes in some countries. For this reason, these action items could also result in potentially rapid change. However, the exact role that the OECD Transfer Pricing Guidelines play in transfer pricing administration varies from country-to-country, and many domestic law changes would likely be necessary. The United States, for instance, generally administers its section 482 regulations without regard to the Transfer Pricing Guidelines, although it maintains the position that its regulations and the Guidelines are fully consistent.[10]

In summary, while the release of the BEPS Action Plan may rightly be regarded as a historic turning point in international taxation, the real changes that will affect multinational enterprises in specific, concrete ways will be the domestic law changes and treaty amendments that may eventually result. What specific changes will be made, by which countries and when, remain largely unknown. In light of this uncertain and rapidly changing environment, Mayer Brown Tax lawyers are committed to providing our clients and contacts with periodic updates on the latest developments in the OECD's BEPS project that may affect their businesses and tax planning and compliance.

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Endnotes

[1] *See* Dolores W. Gregory, Rick Mitchell, and Kevin A. Bell, "OECD 'Action Plan, Raises Questions About Scope, Timing, and Feasibility of Reaching International Consensus on BEPS," 22 Transfer Pricing Report 351 (Jul. 25, 2013).

[2] *See* Kevin A. Bell and Alison Bennett, *No Move to Formulary Seen Under BEPS; OECD's Approach to Risk Allocation Debated*, 22 Transfer Pricing Report 234 (Jun. 13, 2013) (reporting testimony of OECD top tax official Pascal Saint-Amans that the OECD "absolute" intends to consider strengthened CFC rules as a means of buttressing the transfer pricing rules).

[3] Treaty in the Functioning of the European Union, Articles 49 and 54.

[4] *See* Committee on Fiscal Affairs releases outcome of review of preferential tax regimes in OECD countries, *available at* http://www.oecd.org/ctp/harmful/committeeonfiscalaffairsreleasesoutcomeofreviewofpreferentialtaxregimesinoecdcountries.htm.

[5] *See* Kevin A. Bell, "Changes to Pricing of Risk, Intangibles On the Table, Treasury's Stack Says." 22 Transfer Pricing Report 71 (May 16, 2013) ("[E]xamination of the PE standard 'all by itself' is not a key element of the BEPS project 'because it doesn't all by itself lead to base erosion and profit shifting'") (quoting Treasury Assistant Secretary for Tax Policy Robert Stack).

[6] Transfer Pricing Guidelines, ¶1.64.

[7] *See, e.g.*, Treas. Reg. §1.482-1(d)(3)(ii)(B). Except as otherwise indicated, all section references are to the U.S. Internal Revenue Code of 1986, as amended (the "I.R.C.") or to Treasury Regulations promulgated thereunder.

[8] Treas. Reg. §1.482-9(l)(3)(i).¶

[9] *See* OECD Convention on Mutual Administrative Assistance in Tax Matters, *available at* http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf. A list of the signatory countries' declarations and reservations with respect to the treaty is available at: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=127&CV=1&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG.

[10] *See* IRS AM 2007-007, 2007 TNT 58-22.

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