



Global TP Alert 2016-001

U.S. issues country-by-country reporting regulations

By: Philippe Penelle (Washington DC), Alan Shapiro (Tokyo), and Joseph Tobin (Washington DC)

The U.S. Treasury on December 21, 2015, released proposed regulations that require annual country-by-country (CbC) reporting by U.S. entities that are the ultimate parent entity of a multinational enterprise (MNE) group with annual revenue of \$850 million or more.

Treasury based the proposed regulations on the model template for CbC reporting developed by the OECD as part of its base erosion and profit shifting (BEPS) project and released by the OECD in October 2015 as part of the final BEPS reports. The regulations are based on the Treasury's authority under sections 6001, 6011, 6012, 6031, 6038, and 7805 of the Internal Revenue Code rather than under its authority under section 6662 of the Code for the transfer pricing documentation penalty protection regime. The CbC

Useful links

[2015 Global Transfer Pricing](#)

[Country Guide](#)

[Arm's Length Standard](#)

[Transfer pricing alerts](#)

[Deloitte tax@hand](#)

[Join Dbriefs](#)

www.deloitte.com/tax

report will be due with the timely filed tax return (with extensions) for the parent entity of a U.S. MNE group.

The regulations are proposed to apply to taxable years of parents of U.S. MNE groups that begin on or after the date of publication of the Treasury decision adopting these rules as final regulations. The final regulations will likely be published sometime in 2016. Thus, the regulations will apply to a fiscal year taxpayer for a fiscal year beginning after the date of publication. Calendar year taxpayers will first apply the regulations for the 2017 tax year, provided the regulations are finalized in 2016. Other countries may require filing for the first fiscal year beginning on or after January 1, 2016, which will raise an issue as to whether members of a U.S. MNE group that are organized or operating in those jurisdictions will be subject to CbC filing requirements for 2016. The treatment of the 2016 tax year for non-U.S. entities is an issue that Treasury will need to address as Treasury and the IRS coordinate the U.S. reporting rules with those imposed by other treaty partners.

The proposed regulations require that the ultimate U.S. parent entity file, along with its timely filed annual tax return (with extensions), a form -- the CbC report -- that provides the following information:

Constituent entity information

- The tax jurisdiction, if any, in which the constituent entity is resident for tax purposes
- The tax jurisdiction in which the constituent entity is organized or incorporated (if different from the tax jurisdiction of residence)
- The tax identification number, if any, used for the constituent entity by the tax administration of the constituent entity's tax jurisdiction of residence
- The main business activity or activities of the constituent entity.

Tax jurisdiction of residence information

Aggregate information for each tax jurisdiction in which the parent has constituent entities (and in the aggregate for all constituent entities that have no tax jurisdiction):

- Revenues generated from transactions with other constituent entities of the U.S. MNE group
- Revenues not generated from transactions with other constituent entities of the U.S. MNE group
- Profit (or loss) before income tax

- Income tax paid on a cash basis to all tax jurisdictions, including any taxes withheld on payments received
- Accrued tax expense recorded on taxable profits (or losses), reflecting only the operations in the relevant annual accounting period and excluding deferred taxes or provisions for uncertain tax liabilities
- Stated capital, except that the stated capital of a permanent establishment must be reported by the legal entity of which it is a permanent establishment unless there is a defined capital requirement in the permanent establishment tax jurisdiction for regulatory purposes
- Accumulated earnings, except that accumulated earnings of a permanent establishment must be reported by the legal entity of which it is a permanent establishment
- Number of employees on a full-time equivalent basis in the relevant tax jurisdiction
- Net book value of tangible assets other than cash or cash equivalents

The regulations specify that the U.S. parent entity must maintain records to support the reported information, but it is not required to maintain records that reconcile the reported information to tax returns or applicable financial statements.

A constituent entity is any separate business entity of a U.S. MNE group, but the definition does not include a foreign corporation or foreign partnership for which the ultimate parent entity is not required to furnish information under section 6038(a) (determined without regard to §1.6038-2(j) and §1.6038-3(c)), or any permanent establishment of such foreign corporation or foreign partnership. A business entity is any entity, even if it has elected to be treated as a disregarded entity under the U.S. entity classification rules. Therefore, a single-member limited liability corporation would be considered a constituent entity. An entity that operates through a permanent establishment in another country will be treated as a resident in that country to the extent of the income attributable to the permanent establishment.

A business is considered a “resident” in a tax jurisdiction if, under the laws of that tax jurisdiction, the business entity is liable to tax therein based on place of management, place of organization, or other similar criteria. If a business entity is resident in more than one tax jurisdiction, then the applicable income tax convention rules, if any, will be used to determine the business entity’s tax jurisdiction of residence. If a business entity is resident in more than one tax jurisdiction and no applicable income tax convention exists between

those tax jurisdictions, or if the applicable income tax convention provides that the determination of residence is based on a determination by the competent authorities of such jurisdictions, then the business entity's tax jurisdiction of residence is the business entity's place of effective management in accordance with Article 4 of the OECD Model Tax Convention on Income and on Capital 2014.

The IRS and Treasury acknowledge in the preamble that a business entity that is treated as a partnership in the tax jurisdiction in which it is organized and that does not own or create a permanent establishment in another tax jurisdiction generally will have no tax jurisdiction of residence. In those cases, the IRS will expect the partners to report their share of the partnership items in the partners' respective tax jurisdictions of residence to determine the aggregate amounts reported on the CbC report, regardless of whether the partnership has elected to be treated as an association for U.S. federal tax purposes. This interpretation of the regulations assumes that the income is taxed at the partner level on a residence basis. Treasury states in the preamble that it is still considering whether a different rule is needed in the case of entities that are not treated as fiscally transparent in the owner's country of residence but are treated as fiscally transparent in the entity's country of organization, and has requested comments with respect to these entities.

The regulations do not contain any requirement that a non-U.S. ultimate parent company provide any information to the IRS. The IRS will only get CbC information from another country that provides the information to the IRS. Thus, there are no provisions to compel a U.S. subsidiary of a non-U.S. MNE to produce the report when the headquarters country does not require it. The regulations do not contain any mechanism for a non-U.S. ultimate parent to elect to file in the United States so that the United States can send the CbC report to other jurisdictions; therefore, a so-called "Surrogate Parent Entity" is not covered.

The IRS and Treasury indicate in the preamble that the CbC report will be exchanged with tax jurisdictions that have entered into an income tax convention or tax information exchange agreement (TIEA) with the United States. The Treasury also expects that the U.S. competent authority will enter into competent authority arrangements for the automatic exchange of CbC reports under those conventions or TIEAs that will further limit the permissible uses of such reports to assessing high-level transfer pricing and other tax

risks and, when appropriate, for economic and statistical analysis.

The Treasury also states in the preamble that the U.S. competent authority will not enter into a reciprocal automatic exchange of information relationship with respect to CbC reports unless it has reviewed the tax jurisdiction's policies and procedures regarding confidentiality, and has determined that such an automatic exchange relationship is appropriate. Moreover, the U.S. competent authority does not anticipate allowing CbC reports to be used by other tax jurisdictions to take the place of a comprehensive transfer pricing analysis as required by the arm's length standard. The U.S. competent authority will continually review how other jurisdictions are using the CbC reports that are exchanged, and the United States will pause such exchanges if it determines that a tax jurisdiction is not in compliance with such confidentiality requirements, data safeguards, and appropriate use standards. The Treasury has requested comments on whether there is a need for an exception to the filing requirement for some or all of the information on the CbC report for national security reasons.

Comments and requests for a public hearing on the proposed regulations are due by March 22, 2016. The Treasury is requesting specific comments in a number of areas, including:

- Whether additional guidance is needed for determining which U.S. persons must file the CbC form or which entities are considered constituent filers;
- The procedures that a U.S. person should be required to follow to demonstrate a national security reason to receive an exception from filing some or all of the CbC information;
- The treatment of hybrid entities in the CbC report;
- Whether further clarification or refinement is warranted with respect to the information that is requested on the CbC form;
- Whether any of the items should be further refined or whether any additional guidance is needed with respect to how to determine any of the items in proposed §1.6038-4(d)(2)(i)-(ix); and
- Whether guidance is needed regarding the treatment of other employment situations.

The proposed regulations, if implemented, would require U.S. MNE groups to evaluate each business entity and determine the tax residence for its income and other

information attributed to the entity. In many cases, this analysis will require a review of income associated with hybrid entities and hybrid transactions. The impact on tax examinations should also be considered, particularly for business entities doing business in high tax rate countries that engage, directly or indirectly, in transactions with related parties in lower-tax jurisdictions.

Contacts

Kerwin Chung

kechung@deloitte.com

Dave Varley

dvarley@deloitte.com

Todd Izzo

tizzo@deloitte.com

Gretchen Sierra

gretchensierra@deloitte.com

[Deloitte.com](#) | [Legal](#) | [Privacy](#)



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see <http://www.deloitte.com/about> for a more detailed description of DTTL and its member firms.

Deloitte provides audit, consulting, financial advisory, risk management, tax and related services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte's more than 220,000 professionals are committed to making an impact that matters.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte network") is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2016. For information, contact Deloitte Touche Tohmatsu Limited.

