



税务快讯

OECD 发布《金融交易转让定价指南》（讨论稿）

经济合作与发展组织（OECD）于 2018 年 7 月 3 日发布了 [《金融交易转让定价指南》（讨论稿）](#)（以下简称“《讨论稿》”），并向公众公开征询意见。反馈意见收集截止日为 2018 年 9 月 7 日。虽然此文件尚不能代表 OECD 的共识立场，但是为金融交易的转让定价分析提供了有用的参考。

《讨论稿》主要分为四个部分。第一部分是独立交易原则在金融交易中的应用指南，其余三个部分则针对不同金融交易类型提供指导内容。

独立交易原则在金融交易中的应用指南

OECD 发布的税基侵蚀和利润转移（BEPS）最终报告，包括“确保转让定价结果与价值创造相匹配——第 8-10 项行动计划”。该报告修订了 OECD 转让定价指南中有关独立交易原则在关联交易分析中的应用指引，并表示将针对金融交易的经济特性和独立交易原则的适用另行发布额外指导意见。

《讨论稿》B 部分为识别关键商业和财务关系、金融交易的相关经济特征以准确描述受控交易提供了关键性指导。《讨论稿》重点强调了准确描述受控交易的重要性，包括将之应用于评估贷款合同利率、判断贷款合同是否属于经济意义上的贷款或其他形式的安排（例如股权投资）。上述指导意见概述了进行转让定价分析时，应考虑该融资交易的合同条款、交易中贷款方和借款方执行的功能（并考虑所使用的资产和承担的风险）、金融产品或服务的特征、合同订立时的经济环境，以及交易各方的经营策略。

对假设为关联贷款的交易进行分析时，贷款方和借款方各自执行的功能可考虑以下几个方面：

贷款方	借款方
分析和评估贷款交易的固有风险	审查并确保有足够资金偿还本金和利息
向借款方提供资金的能力	提供抵押品
确定贷款的条款和条件、贷款资金筹措和贷款记录	履行其他合同条款
贷中监控和复核	

财资职能

《讨论稿》讨论了集团资金理财职能的定位以及相应的回报。《讨论稿》指出财资职能通常属于主要价值创造活动的支持性服务，从而据此获得服务类的回报。

集团内贷款

《讨论稿》重点讨论了贷款利率的转让定价分析，要求同时从贷款方和借款方的角度进行分析，包括功能分析和合同条款的审视分析（如与合同双方实际履行功能风险的差异性）。

《讨论稿》对贷款利率的定价提供了详细的指导，同时也提出了一些有意思的观点：

- 现行定价方法（可比非受控价格法和基于资金成本的定价方法）被认为是合适的转让定价机制。但值得注意的是，银行提供的报价意见通常不能作为证明关联贷款利率符合独立交易原则的依据。
- 无风险回报率是否适用于那些不履行决策功能的贷款人的交易？如果没有实际雇员的控股公司被用来举债，由此而造成的持续性亏损问题有待 OECD 做进一步讨论。

资金池

《讨论稿》提供了一系列关于资金池的指导意见，包括准确描述资金池安排的方法。与资金池利率分析相关的事项包括：

- 纳税人需考虑本质上运营资金池的利弊，收益或损失的金额以及在集团内如何进行分配；
- 纳税人可能要考虑资金池成员的持续资金盈余或缺口，形成的交易安排不再是短期流动性而是长期贷款的情况；
- 资金池牵头方一般情况下执行协调或代理职能，因此获取服务商的回报是合理的。这也意味着资金池牵头方不应收取贷款和存款的利差；
- 在不同情况下给资金池参与方补偿的方法，包括为所有参与方提供更优利率，对所有参与方采用相同的利率，或将资金池收益分配给存款方（因承担信用风险而获得的相应资金回报）。

对冲

《讨论稿》指出跨国集团经常使用对冲合约，常通过财资职能集中并实施部分风险减缓策略，涉及利率、汇率、大宗商品等。

《讨论稿》概述了跨国集团不同的集中对冲机制，包括：

- 以各运营公司的名义进行集中对冲；

- 以集团除运营公司外另一家公司的名义进行集中对冲；
- 集团内自行确定对冲，没有正式的对冲合约。

OECD 意识到处理第二和第三种机制是一个棘手的问题，就此特别向公众征求意见。

值得一提的是，企业在中国可能面临对冲监管限制的问题；与此同时，中国税务机关也已经开始关注跨国集团的对冲安排及对集团中国子公司的影响。

担保

《讨论稿》概述的担保交易的转让定价方法，主要包括可比非受控价格法、收益法，与目前通行的实践做法是一致的，预计不会引发特殊争议。《讨论稿》还提到一项关键点，即担保所获得的利益应该由双方共享。

自保险

自保险是指跨国集团为便于进行内部风险管理，将保费支付给集团内的自保险公司的交易安排。《讨论稿》针对自保险公司提供了一些建议以及转让定价方法和定价需要考虑的因素。

我们的建议

尽管《讨论稿》尚未最终定稿，但涉及关联金融交易的企业应重视该《讨论稿》，因其可以作为支持交易定价以及与税务机关进行谈判的重要参考。例如，虽然合同分析一直是关联融资交易转让定价分析的一部分，但是很多企业以往容易忽略同时针对贷款方和借款方进行功能分析的步骤。实际上分析交易双方的方法已经广泛应用在其他类型的关联交易分析当中，希望能引起这些企业的重视。

我们建议企业关注以下行动要点：

- 财资部及相关人员在实施新的关联金融交易之前应了解相关的指导内容；
- 评估本指导内容对新的金融交易的影响，并制定相应的转让定价政策；
- 审查现有关联金融交易，特别是资金池安排、集团内贷款和担保交易，从而识别重大风险。

我们将持续关注针对该《讨论稿》的反馈意见或进展并将与您分享相关资讯。

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Tax Newsflash

OECD Discussion Draft on Financial Transactions

The Organization for Economic Cooperation and Development ("OECD") issued on 3 July 2018 the long awaited ["Discussion Draft on Financial Transactions"](#) (the "Discussion Draft") to seek feedback from stakeholders on a number of questions – with feedback due by 7 September 2018. Although this is a draft and is non-consensus document, it provides a useful reference to support the pricing of financial transactions.

The Discussion Draft has four main sections. The first section provides guidance on applying the arm's length principle for financial transactions, and the remaining three focused on specific types of arrangements.

Guidance for applying the arm's length principle with financial transactions

In 2015 the OECD issued the Base Erosion and Profit Shifting ("BEPS") Final Reports, including the "Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10" report. This replaced large sections of the OECD TP Guidelines with new commentary for applying the arm's length principle.

Those changes cover all related party transactions, but included a note that additional guidance would be provided for the economically relevant characteristics for determining the arm's length conditions for financial transactions.

Part B of the Discussion Draft provides the key guidance on identifying commercial and financial relations, and the economically relevant characteristics of a financial transaction for the purpose of accurately delineating transactions. The emphasis on accurate delineation is reinforced throughout the discussion draft, and applies both to assessing the rate of interest on a loan contract as well as whether loan contract is economically a loan or another form of arrangement (for example, equity).

This new guidance outlines that taxpayers should consider the contractual terms, a functional analysis for the lender and borrower in respect of the financial transaction, the characteristics of the financial products or services, economic circumstances at the time the contract was entered into, and the business strategies of the parties involved.

For a functional analysis of a hypothetical related party loan, lenders and borrowers will be expected to take into consideration:

Lender	Borrower
Analysis and evaluation of risks inherent in the loan	Reviewing and ensuring the availability of funds to repay lender principal and interest
Capability to commit capital to the borrower	Providing collateral
Determining terms and conditions of the loan, and organizing and documenting the loan, etc.	Fulfilling other loan contract terms
Ongoing monitoring and review of the loan	

Treasury functions

The role of group treasury is discussed, as well as the corresponding remuneration – concluding that treasury functions will normally be support services to the main value creating activities and should generally receive a service type return.

Intra-group loans

The Discussion Draft focuses on interest rate pricing, requiring that both lender and borrower perspectives be taken into account – requiring a functional analysis and contractual analysis.

Loan pricing is considered at some length, and raises some interesting issues:

- Existing pricing approaches (Comparable Uncontrolled Price method and the cost of funds) are considered appropriate pricing mechanisms. However, bank quotation letters will not generally provide evidence of arm's length terms and conditions.
- There is a question whether a risk free rate of return could be applied to a transaction where the lender does not perform decision making functions. This may be problematic where holding companies are used to issue debt, but have no employees. The impact of giving these companies a permanent loss will need to be considered further by the OECD.

Cash pooling

The Discussion Draft includes a number of comments on cash pooling, including an approach for the accurate delineation of a cash pool arrangement. Issues of particular interest include:

- Taxpayers should consider the nature of any advantage or disadvantage from being the cash pool, the amount of any benefit or detriment, and how that should be shared.
- Taxpayers can consider situations where pool members have surpluses or borrowing positions, which cease to be short term liquidity arrangements, and become long term loans.
- The Discussion Draft considers that in general cash pool headers provide a co-ordination or agency functions, and that a service provider remuneration is appropriate. This means they should not receive a spread of the deposit and credit interest rates.
- The options for rewarding cash pool members are addressed, including enhancing interest rates for all participants, applying the same interest rate for all participants, or allocating the cash pooling benefits to the depositors (as they are bearing credit risk and should receive the return on capital).

Hedging

The Discussion Draft recognizes that hedging contracts are frequently used by MNEs, and that treasury functions will often centralize these as part of risk mitigation strategies relating to interest rates, currencies, commodities, etc.

The different mechanisms for how MNEs may centralize hedging are outlined, including:

- Centralized hedging in the name of the operating companies
- Centralized hedging in the name of another group company
- Identifying natural hedges within the group, with no formal hedging contracts.

In respect of the second and third options, the OECD recognizes that this is a difficult issue and specifically seeks comments from stakeholders about how this should be managed. This is an issue that taxpayers in China may face, given regulatory restrictions on hedging, and tax authorities have previously paid attention to hedging arrangements of MNE groups and its impact on Chinese subsidiaries.

Guarantees

The pricing mechanisms outlined in the draft are consistent with standard practice of using CUPs and the yield approach primarily, and should not be particularly controversial. A key point is made that the benefit obtained by the guarantee does need to be shared between the two parties.

Captive insurance

Captive insurance refers to situations where MNE groups may manage risks within the group, with premiums being paid to the "captive insurer" within the group. The Discussion Draft

provides several comments on captive insurers and considerations for TP methods and pricing.

Our comments

Although the Discussion Draft is not finalized yet, taxpayers with related party financial transactions should pay attention to this Discussion Draft as an important reference for supporting transactions, and for any negotiations with tax authorities. For instance, while contractual analysis has always been part of analyzing financial transactions, a functional analysis for both lender and borrower is a step that most taxpayers will not have taken in previous years. However, this is consistent with the approach now expected for other transactions, and taxpayers should be able to take these additional considerations into account.

Affected taxpayers should consider taking actions as follows:

- Ensuring that treasury departments are aware of the new guidance before entering into new financial transactions;
- Evaluating the impact of this guidance on new financial transactions and devise the transfer pricing policy accordingly;
- Reviewing existing related party financing arrangements in particular cash pooling arrangements, intra-group loans, and guarantees, to identify any significant risks.

Once there is further feedback or developments we will issue further tax newsletter to keep taxpayers informed.

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