



Status of US-Brazil bilateral Competent Authority agreement on automatic exchange of country-by- country report

Global Transfer Pricing Alert 2017-013

As the deadline for filing Brazil's country-by-country report (CbCR) approaches, the United States and Brazil have not yet entered into a competent authority agreement (CAA) on CbCR automatic exchange. If the United States and Brazil have not entered into such a CAA before 31 July 2017, US multinational enterprises (MNEs) that meet Brazil's CbCR secondary filing requirements will need to either file the CbCR in Brazil by 31 July 2017 or choose a surrogate parent entity that has a CbCR exchange relationship with Brazil to file their 2016 CbCR.

IRS Large Business and International Division Commissioner Douglas O'Donnell told attendees at the Pacific Rim Tax Institute on 9 March that the IRS will work to conclude the CAAs in a timely manner, and that concluding the CAAs was a priority for the IRS. He also remarked that model agreements were currently being negotiated among treaty and tax information exchange agreement (TIEA) partners, and that the platform for effecting the automatic exchange of CbCR is largely in place from a data processing perspective.

In the event that the US-Brazil CAA for CbC exchange is not concluded before 31 July 2017, taxpayers may choose a surrogate parent entity in a jurisdiction that has signed the OECD multilateral CAA on CbC exchange, because Brazil is also a signatory of the multilateral CAA. The OECD maintains a full [list of countries that have signed the MCAA](#) as of 26 January 2017, but care should be taken when selecting a surrogate to

ensure that the jurisdiction allows entities in that jurisdiction to serve as the surrogate reporting entity. Canada, Ireland, and the United Kingdom are among the countries that have signed the OECD CbC MCAA and have also indicated that an entity resident in their jurisdiction may serve as a surrogate reporting entity.

In terms of CbCR notifications, the Brazilian subsidiary of a US MNE should notify, on its annual income tax return (Form W100), that either the US parent will file the CbCR, or that the US MNE will use a surrogate parent ("substitute" parent, as used in Brazil's law) in the event that a US-Brazil CAA has not been executed as of 31 July 2017. There is no requirement to file locally in Brazil, as long as the Brazilian constituent entity correctly notifies the Brazilian tax authorities and files the CbCR in either the parent's jurisdiction or that of the surrogate parent. Thus, so long as the reporting entity's jurisdiction and Brazil have a multilateral or bilateral CAA in effect by 31 July 2017, proper notification on Form W100 should also preclude imposition of the 3 percent penalty¹ that may apply in Brazil.

Considerations for year-end mismatch between reporting entities and other constituent entities

In Brazil, the fiscal year is the calendar year -- 1 January to 31 December. Therefore, for US MNEs that have non-calendar taxable years, there will be a mismatch between the fiscal/taxable year-end of the reporting entity and that of the Brazilian constituent entities. The first effective reporting period to which the CbC reporting requirement applies is defined by reference to the US parent's taxable year-end. For example, if a US MNE has a 30 November fiscal and taxable year end, the first fiscal year to which Brazilian CbC reporting rules would apply would be the fiscal year that began on 1 December 2016 and ends on 30 November 2017 (that is, the fiscal year of the reporting entity), even though the Brazilian subsidiary has a fiscal year that began on 1 January 2016. Note, however, that the Brazilian subsidiary must still meet Brazil's notification requirements for its fiscal year ended 31 December 2016.

In terms of period covered by the CbCR, under the US regulations and OECD guidance, the reporting entity (e.g., US ultimate parent entity) may choose to report information for the Brazilian subsidiary for either (1) the annual period ending with or within the reporting period of the US parent (i.e., 1 January 2016 to 31 December 2016) or (2) the same reporting period as that of the US parent (i.e., 1 December 2016 to 30 November 2017). The choice should be applied consistently at the jurisdiction level.

Although there is no corresponding rule in Brazil's CbC rules, which generally provide that the reporting period is the 12-month period from 1 January to 31 December, the OECD multilateral CAA and model bilateral CAA both provide that after consultation between the two competent authorities, the reporting entity's jurisdiction is responsible for enforcement using its domestic laws. Thus, as long as the reporting entity follows the rules in its jurisdiction, Brazil's tax authority should

¹ Monthly fixed penalties for failure to file (depending on the corporate income tax regime elected) that range from BRL 500 to BRL 1,500, as well as up to 3 percent of the value of commercial or financial operations disclosed for inexact, incomplete, or omitted information. The amount to which the 3 percent penalty would be applied is subject to interpretation. The worst-case scenario would be if Brazil imposed the 3 percent penalty on the MNE group's annual revenue.

respect the reporting entity's decision. As part of the CbCR notification process, the Brazilian subsidiary should note the US (or other non-Brazilian ultimate) parent's fiscal year on Form W100, which covers the Brazilian subsidiary's 2016 fiscal year (1 January 2016 to 31 December 2016).

The same process would apply to other instances of fiscal year-end mismatches between the reporting entity and other constituent entities, when CbCR rules in the reporting entity's jurisdiction do not contradict the revised OECD guidelines with respect to limiting the reporting entity's discretion, and if there is a competent authority agreement in effect between the reporting entity's jurisdiction and the jurisdiction of the other constituent entities.

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