



OECD releases additional implementation guidance on CbC reporting

Global Transfer Pricing Alert 2018-026

The OECD on 14 September released [additional guidance on the implementation of the country-by-country \(CbC\) reporting requirement](#) introduced in the BEPS Action 13 final report.

The new guidance consolidates and expands on all the implementation guidance issued by the OECD since the release of the Action 13 final report. Therefore, going forward, it will only be necessary to refer to the September 2018 guidance when consulting OECD guidance on the implementation of CbC reporting.

Although OECD guidance may be helpful in understanding how countries may implement CbC reporting requirements, it is not controlling on US taxpayers unless formally adopted by the IRS. The observations below compare some of the new guidance to the current US CbC regulations.

New implementation guidance

The new implementation guidance addresses four specific issues:

- Treatment of intercompany dividends for purposes of “profit (loss) before income tax,” “income tax accrued (current year),” and “income tax paid (on cash basis)” in Table 1 of the CbC report;
- The use of shortened amounts in preparing Table 1 of the CbC report;
- Reporting the number of employees when the financial data of a constituent entity is reported on a pro-rata basis; and

- Interpretation on mergers/demerger/acquisitions (summary table).

Treatment of intercompany dividends for purposes of "profit (loss) before income tax," "income tax accrued (current year)," and "income tax paid (on cash basis)" in Table 1 of the CbC report (new)

Action 13 provided clear guidance that dividends received from other constituent entities should be excluded from "revenue," but it did not provide similar guidance as to the treatment of such dividends for purposes of "profit (loss) before income tax." The September 2018 guidance addresses that absence, and provides flexibility for jurisdictions as to whether intercompany dividends should be excluded from profit/loss before tax in Table 1 of the CbC report. That flexibility is provided to avoid the compliance burdens for taxpayers that may ensue if a jurisdiction were required to change its approach.

The new guidance also states that Inclusive Framework member countries and jurisdictions are encouraged to require their taxpayers, as soon as possible and taking into account the specific domestic circumstances, to indicate in Table 3 whether intercompany dividend income or shares of earnings of another constituent entity are included in "Profit (loss) before income tax" in Table 1 and if so, for which jurisdictions.

The guidance also provides that if intercompany dividends (or similar distributions) are excluded from profit/loss before tax, then income taxes accrued and paid data should not include income taxes paid on intercompany dividends, and vice versa.

Observation - The US CbC regulations state that "revenue does not include payments received from other constituent entities that are treated as dividends in the payor's tax jurisdiction of residence."¹ While the US CbC regulations do not specifically require or permit the elimination of intercompany dividends from profit before tax, taxpayers may have excluded such dividends to be consistent with the exclusion from revenue. Under the new OECD implementation guidance, if such a consistency approach is taken, the more appropriate practice may be to also exclude any income tax paid or accrued on intercompany dividends, but the United States has not issued any specific guidance or instructions on this issue.

The use of shortened amounts in preparing Table 1 of the CbC report (new)

The September 2018 guidance clarifies that amounts in Table 1 should be reported in full whole units and should not be shortened. For example, an amount of 123,456,789 should be reported as 123,456,789 and should not be shortened, for example, to 123,457.

Reporting number of employees when the financial data of a constituent entity is reported on a pro-rata basis (new)

The implementation guidance previously clarified that for purposes of applying the EUR 750 million CbC reporting

¹ Treas. Reg. §1.6038-4(d)(3)(ii).

threshold, revenues of minority interest entities should be accounted for based on whether local accounting rules require proportionate consolidation in the presence of minority interests.

The September 2018 guidance adds that, when the financial data of a constituent entity is reported on a pro-rata basis, the number of employees of the constituent entity should also be reported on a pro-rata basis. Taxpayer should also note the following in Table 3 of the CbC report: "The number of employees of the constituent entity A (specified) in Jurisdiction X (specified) is reported on a pro-rata basis in accordance with the pro-rata reporting of the financial data of A."

Observation – US GAAP generally does not provide for proration of revenue in consolidated financial statements based on the existence of non-controlling interests. In addition, under US CbC reporting requirements, 100 percent of a constituent entity's income is included in profit before tax even if there are minority interests held by owners outside the multinational enterprise (MNE) group. As a result, the new guidance on reporting the number of employees on a pro-rata basis when financials are reported on a pro-rata basis does not appear to be relevant for US MNEs.

Summary table on interpretation on mergers/demergers/acquisitions (new)

The September 2018 guidance added a table that summarizes previously released implementation guidance -- the five sample fact patterns regarding the potential impact that mergers/demergers/acquisitions may have on determining if an MNE group's revenue exceeds the reporting threshold.

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