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Tax and Domestic Economic Policy

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Internal Revenue Service
CC:PA:LPD:PR (REG 109822-15)
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted through Federale Rulemaking Portal: www.regulations.gov

RE: REG 109822-15, Country-by-Country Reporting

Attention: Melinda E. Harvey

Dear Ms. Harvey:

The National Association of Manufacturers (NAM) – the largest manufacturing association in the United States representing manufacturers in every industrial sector and in all 50 states – appreciates the opportunity to provide comments on proposed regulations implementing annual country by country reporting by certain U.S. multinational enterprise (MNE) groups.

Overview

Manufacturers know first hand how critically important it is for U.S. companies to invest and compete effectively in the global marketplace. Indeed, 95 percent of the world's customers are outside the United States. Investment by U.S. global companies has paid off for the U.S. economy: U.S. global companies employ 35.2 million workers and are responsible for 20 percent of total U.S. private industry employment¹. Moreover, U.S. companies that invest abroad export more, spend more on U.S. research and development performed by U.S. workers and pay their workers more on average than other companies.

In an effort to develop a comprehensive approach to address aggressive global tax planning that resulted in perceived inappropriate corporate tax avoidance, the Organisation for Economic Development (OECD) spearheaded the Base Erosion and Profit Shifting (BEPS) Action Plan. The BEPS recommendations were approved late last year by G-20 finance ministers and leaders. According to the BEPS plan, country by country reports (CbCRs), which contain aggregated financial, employment, and tax data by tax jurisdiction, are intended to provide governments with information necessary to conduct high-level transfer pricing risk assessments.

Manufacturers have been highly vocal about their concerns with some of the recommendations in the BEPS plan, particularly new information sharing and disclosure requirements on companies that, in many cases go well beyond the stated goal of the BEPS plan. While the CbCRs – which U.S. multinational companies will file with the Internal Revenue Service (IRS) – could impose a significant, additional administrative burden on companies, we recognize that these reports will be submitted to foreign countries by the United States Treasury under bilateral

¹ Bureau of Economic Analysis, August 2014.

treaties and information exchange agreements. Providing CbCRs to foreign tax authorities only through information exchange provides protections to ensure confidentiality, consistency and appropriate use of the information by foreign countries. Treasury officials have said the U.S. would halt CbCR exchange with any jurisdiction makes them public.

Unfortunately, this would not be the case with the master file, which could be required directly by any country where a company does business. The master file asks for extremely sensitive information unrelated to actual taxpayer activities in the country requesting the information. In this way, the master file is similar to the CbCR. However, unlike the CbCR, the master file information does not have the confidentiality protections of the information exchange process and is not subject to any confidentiality, consistency, or appropriate use conditions beyond those that may apply locally. We urge IRS and Treasury to provide adequate safeguards for master file information, such as withholding CbCRs from jurisdictions that abuse master file documentation requirements or fail to keep master file information confidential. This would give the federal government the same tools to protect master file information as it has to protect CbCRs.

The NAM continues to have serious concerns about some of the proposed information sharing and disclosure rules in the BEPS plan. At the same time, we recognize the challenges facing U.S. multinational companies competing in the global marketplace. Our members have a critical need for guidance from the IRS and Treasury on filing CbCRs. Thus, the NAM appreciates the opportunity to comment on a several different areas covered in REG 109822-15.

Protecting Confidentiality and Appropriate Use of Information

As noted above, protecting the confidentiality of the CbCRs and ensuring the appropriate use of the information are key issues for NAM members. Thus we are pleased to see that the preamble to the regulations defines a CbCR as “return information” under Section 6103 and thus subject to strict confidentiality rules. Manufacturers also appreciate language in the regulations indicating that the United States intends to enter into competent authority arrangements for the automatic exchange of CbCRs with other tax authorities, and that the information exchanged will be treated as confidential by both parties and used only for tax administration. Furthermore, manufacturers support efforts by the United States and other tax jurisdictions to further limit the permissible uses of CbCR information to “assessing high-level transfer pricing and other tax risks and, where appropriate, for economic and statistical analysis.”

The regulations indicate that the United States will review the legal framework of each jurisdiction to ensure robust enforceable confidentiality agreements. If a country fails to abide by these conditions with respect to CbCRs, Treasury has stated its intent to suspend CbCR information exchange. Manufacturers believe that the strength of this process and the willingness of the United States to make a decision to not exchange information with a country will be key in preventing misuse of the information. We encourage Treasury to allow sufficient time to review each jurisdiction’s framework and to specify strong and appropriate safeguards that need to be in place for each jurisdiction before information can be exchanged.

CbCRs Required Before 2017

The BEPS action plans recommends that taxpayers file CbCRs for tax years beginning in 2016 with the tax residence country of the parent of the multi-national group (e.g., the United States for U.S. multinationals). The Treasury regulations, which likely would apply to tax years beginning in 2017, could pose a challenge for U.S. multinationals. Many countries have already begun to implement reporting requirements for the 2016 tax year and U.S. multinationals could be required to submit CbCRs directly to foreign governments if they have operations in countries with a 2016 CbC reporting requirement. Reports submitted directly to foreign countries by companies would not have

the same confidentiality and appropriate use protections as CbCRs transmitted from one country to another. In addition to the confidentiality concerns, the need to file separate CbCRs with every foreign jurisdiction would impose a significant cost and burdensome workload on U.S. multinationals compared to filing the U.S. version of the template directly with the IRS.

Furthermore, although many of the countries have generally adopted the CbCR recommendations as outlined by the OECD, many countries have adopted nuanced differences. If filed with the home country, the home country's CbCR rules would apply. However, if a company is required to file a CbCR directly with a foreign jurisdiction, the individual jurisdiction's CbCR rules would apply and U.S. multinationals could be forced to compile different versions of CbCRs depending on the location of their global operations. In addition, we are concerned that once a foreign jurisdiction receives their CbCR directly from a company rather than confidentially through the U.S. Treasury, they will request that the same information be shared every year creating an annual expectation of receiving it directly.

In light of manufacturers' strong support for the exchange of CbCR information through information exchange agreements to preserve the confidentiality and appropriate use of the CbCR information, we are concerned about recent statements from IRS officials that IRS will not accept voluntary filings of CbCRs for 2016, thus forcing many U.S. companies to submit these reports to foreign countries without the benefits of oversight and confidentiality protection. Not addressing this "gap year" issue also will raise long-term problems for the IRS because other countries will have the CbC data a year earlier than the IRS and could use it to make unfounded assessments that the IRS will need to address in competent authority or similar processes.

In order to ensure that these protections cover 2016 CbCRs, we strongly encourage Treasury to reach agreement with our treaty partners that U.S. multinational groups are not required to file CbCRs for the 2016 tax year or alternatively, to issue guidance that allows elective filing of CbCRs for 2016.

Exception for National Security Reasons

We believe it is appropriate for IRS and Treasury to allow an exemption from CbC reporting for national security purposes. For companies that conduct business as contractors for the U.S. Department of Defense or U.S. government intelligence or security agencies, we are concerned that military sensitive information would be contained in or extractable from CbCRs envisioned by the Proposed Rule, particularly with respect to reporting on personnel, sales, and tangible assets in each country in which they operate. While the OECD has established confidentiality standards, they are intended to protect business sensitive matters, not military sensitive information, and are not adequate to do so. Furthermore, as CbC reporting requirements are adopted by more countries, it is becoming evident that certain information contained in the reports will not be kept confidential (as evidenced by the recent agreement of the EU Finance Ministers to publicly release certain data).

More fundamentally, the objectives of the entire project have little or nothing to do with the tax practices of defense contractors, whose effective tax rates are high, and whose tax practices are, as a consequence, transparent. We believe an appropriate exemption for national security should be crafted so that sensitive data does not fall into the wrong hands.

Specifically, we recommend that Treasury and IRS provide a bright line test allowing U.S. MNE groups that conduct a majority of their business with the U.S. Department of Defense or U.S. government intelligence or security agencies to claim an automatic exemption from reporting any data other than identifying information (company name, jurisdiction of incorporation, identifying number, address). Further, affiliated groups that conduct more than 25 percent of their business with the U.S. Department of Defense or U.S. government intelligence or security agencies (including

Foreign Military Sales and direct military sales to allied governments) should be allowed, with the approval of IRS, to claim a similar exemption from reporting.

Pass-throughs and CbCRs

Pass-through entities, like subchapter S corporations, face a unique issue with CbCRs. The CbC format shows the profit and tax paid by corporations in individual countries. Pass-through businesses however, do not pay tax at the entity level. Rather, the tax is paid by shareholders. Since the tax paid by shareholders cannot be tracked or shown on the CbC form, it would appear, at first glance, that a pass-through is not paying U.S. tax on U.S. income. While the regulations, which generally follow the OECD template, call for a comment section where companies can clarify and add additional information, a better approach would be to allow businesses on the actual reporting form to identify themselves as pass-through entities. This change would help ensure that automated systems used by some countries to identify companies to audit or review would not automatically flag pass-through businesses for non-payment of taxes.

Conclusion

NAM members recognize the crucial role tax policy plays in the ability of businesses around the world to compete and grow, and we support tax rules that are pro-growth, pro-competitiveness, fair, clear, and predictable.

When it comes to tax policy, manufacturers believe a fair and transparent tax climate in the United States – including competitive business tax rates and modern international tax rules – will boost standards of living and economic growth worldwide. At the same time, an appropriate balance needs to be struck between transparency and confidentiality of the proprietary information that enables companies to compete and prosper in a global economy.

Thank you in advance for considering our comments. If you have any questions, please feel free to contact me at (202) 637-3077 or dcoleman@nam.org.

Sincerely,



Dorothy Coleman
Vice President
Tax and Domestic Economic Policy