Deloitte Tax Services Pty Ltd
ACN 092 223 240

Grosvenor Place
225 George Street
Sydney NSW 2000
PO Box N250 Grosvenor Place
Sydney NSW 1220 Australia

Tel: +61 2 9322 7000
Fax: +61 2 9322 7001
www.deloitte.com.au

2 September 2015

General Manager
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: taxlawdesign@treasury.gov.au

Dear Sir/Madam

Submission: Country-by-country reporting and penalties

We welcome the opportunity to provide comments on the exposure draft (ED) legislation in respect of the Country-by-Country ('CbC') reporting and penalties.

We would be pleased to discuss any aspect of this submission with you.

Yours sincerely

David Watkins
Director
Tax Insights & Policy
02 9322 7251

A: Country-by-Country reporting

1 Policy considerations

1.1 Appropriate use of CbC reports

The OECD's CbC reporting implementation package of 8 June 2015 contains suggested model legislation, and at Article 6.1 states:

> The [Country Tax Administration] shall use the country-by-country report for purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in [Country], including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, and where appropriate for economic and statistical analysis. Transfer pricing adjustments by the [Country Tax Administration] will not be based on the CbC Report.

There is no equivalent provision in the ED. We believe it is important that the legislation and explanatory material ('EM') specify the intended purpose and use of CbC reports, consistent with the recommended OECD approach referred to above, to ensure the appropriate use of CbC reports by the ATO.

2 Technical and design issues

Section references are to the *Income Tax Assessment Act 1936 or1997*, as appropriate, unless otherwise noted.

2.1 Transitional arrangements

Where an Australian entity's foreign parent is not yet required to file a CbC report such as where the parent jurisdiction has not yet implemented CbC reporting, imposing an obligation on the Australian subsidiary to file CbC, master and local files will create onerous compliance obligations for that entity – and in many cases, the Australian entity will simply not be able to comply if the data is not yet being gathered by the parent entity.

In these circumstances, we believe an exemption from the CbC reporting requirements should be provided to the taxpayer. To address cases where some countries do not implement CbC reporting, this exemption could be issued on a year-by-year basis, acknowledging that after a reasonable period to allow for implementation, the ATO may at that time reasonably be able to ask the Australian subsidiary for some or all of the CbC, master and local files.

2.2 Advance pricing agreement

Where an entity has a current advance pricing agreement (APA) in place, we believe some relief from the CbC, master and local file requirement should be provided to these taxpayers. The extent of relief to be provided would have regard to the nature and scope of the taxpayer's existing APA agreement and the information already provided to the ATO as part of the APA process.

2.3 Exemption process

The legislative language in proposed section 815-355(1)(b) refers to the Commissioner providing a "determination" under proposed section 815-360.

- Section 815-360(4) uses the term "determine" but does not refer to a "determination"
- neither of the terms "determine" or "determination" are used in subsections 815-360(1)-(3), rather the term "notify" is used in section 815-360(1).

The requirements to satisfy section 815-355(1)(b) should be clearly reconciled with the actions in section 815-360.

The legislative language is also somewhat confusing at present in that it uses a "double negative" in the interaction of subsections 815-355 and the 815-360.

At present, the requirement to give a statement under section 815-355 exists where a taxpayer is **not** covered by a determination under section 815-360. In section 815-360,the result of a taxpayer receiving a notification is that "this section" (being section 815-360) does not apply to them.

Consideration should be given to simplifying the interaction of these provisions to avoid possible confusion. The legislation should clearly articulate that:

- where a taxpayer receives a notification from the Commissioner pursuant to section 815-360;
- the taxpayer will be exempt from a requirement to provide the approved form under section 815-355.

2.4 Circumstances for granting exemptions

The OECD model proceeds on the basis that the prima facie obligation is on the parent entity to lodge the CbC reports with the tax authority in the parent country jurisdiction. It is only in limited cases, such as systemic failure, that a subsidiary jurisdiction can request CbC reports. By contrast, the ED starts from the basis that as a subsidiary country, the ATO will request CbC reports from all foreign owned subsidiaries, unless an exemption is granted. This approach differs to the OECD Model.

Furthermore, the legislation provides no guidance as to the circumstances in which a taxpayer may be exempt from the CbC reporting requirements.

This issue of when exemption may be granted is considered in the EM at paragraphs 1.21 and 1.22 of the EM. Paragraph 1.21 deals with a de minimis exemption. At paragraph 1.22, the he EM provides that an Australian subsidiary of a multinational company "may not be required to provide a statement" where:

- the local entity's worldwide parent entity is resident in another jurisdiction;
- the parent provides CbC reports to a tax authority in that jurisdiction;
- there are arrangements in place for the automatic exchange of CbC reports between that authority and the ATO; and
- the ATO is, in practice, able to obtain CbC reports from that authority.

The situation in the 4 bullet points is clearly in line with the OECD's desired objective that a prima facie obligation to lodge the CbC report is with the parent entity. A subsidiary should not have to file a CbC reports where its parent entity has done so and the report will be exchanged with the subsidiary's local tax authority.

In these circumstances, we submit that it is clear that an Australian exemption from CbC reporting should automatically apply to the relevant subsidiary. The phrase "may not be required" should be revised to provide for an automatic exemption where these conditions have been satisfied to provide certainty for taxpayers in these circumstances.

2.4.1 Consolidated and MEC Groups

Allowing a single entity within a group of entities in a particular country to assume the filing obligations is proposed in the OECD implementation guidance:

> *Where there are more than one Constituent Entities of the same MNE Group that are resident for tax purposes in [Country] and one or more of the conditions set out in subsection (ii) above apply, the MNE Group may designate one of such Constituent Entities to file the country-by-country report conforming to the requirements of Article 4 with [Country Tax Administration] with respect to any Reporting Fiscal Year on or before the date specified in Article 5 and to notify the [Country Tax Administration] that the filing is*

intended to satisfy the filing requirement of all the Constituent Entities of such MNE Group that are resident for tax purposes in [Country].[1]

It is submitted that any CbC reporting obligation should only be imposed upon the head company of a consolidated or MEC group, in accordance with the OECD Action 13 recommendations to ensure unnecessary compliance costs are not incurred by these groups.

The EM states as follows:

- "Every Australian resident entity … will generally be required to provide the master file … However, if multiple entities from the same group are resident in Australia, the Commissioner could specify that only one of those entities must provide the master file in its statement " (refer paragraph 1.23)
- "Each Australian resident entity … will generally be required to provide the local file" (refer paragraph 1.24)

These comments assume that the master file / local file requirements are imposed in respect of each company, rather than at the level of a tax consolidated group. On the other hand, current transfer pricing documentation is prepared for tax consolidated group.

The legislation should clarify the filing position of consolidated and MEC groups for the purposes of master and local file reporting.

2.5 Approved form

The exposure draft legislation provides no guidance on the precise content of the 'approved form' which is required to be lodged pursuant to section 815-355(1), nor does the EM provide guidance as to the practical issues associated with the compilation of a CbC report. These issues present a number of important concerns that should be addressed which are discussed below.

While we acknowledge that there may be some advantages to having flexibility in the approved form (refer paragraph 1.27 of the EM) there is a need for appropriate and considered guidance to be provided to taxpayers on fundamental requirements in the CbC reporting exercise. Specifically, certainty is required in respect of:

- What information (ie, the headings of the columns) is to be captured in the CbC report?
- Having identified the headings of the columns, what are the supporting guidelines / definitions as to exactly what information is required
- What disclosure is required in the master file?
- What disclosure is required in the local file?

In respect of the CbC report, Article 4 of the OECD model legislation ties the relevant disclosure to the OECD CbC template.

It is submitted that the current approach provides no guidance to taxpayers and will create considerable uncertainty for affected taxpayers. The ED should, similar to the model legislation provided by the OECD, refer back to the September 2014 deliverable, or any updated version thereof. Thus the ED would provide the framework for the content/ definitions in the "approved form".

Clarity on content and definitional issues is required as soon as possible to allow affected taxpayers to begin the process of compiling the required data and implementing system changes in line with the proposed start date for CbC reporting of 1 January 2016.

[1] Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD, 8 June 2015, Article 2.2

B: Penalties

3 Technical and design issues

Section references are to the *Income Tax Administration Act 1953* unless otherwise noted.

3.1 Application of penalty provisions

3.1.1 Linking MAAL to penalty provisions

In determining whether a taxpayer should be liable to penalties under Division 284, the threshold test of purpose contained in section 284-145(1)(b)(i) requires a "sole or dominant" purpose, consistent with the provisions of Part IVA of the Income Tax Assessment Act 1936.

The current exposure draft legislation in respect of the MAAL assesses the purpose of a taxpayer by reference to a different threshold, being that of a "principal purpose" under proposed section 177DA(1)(c).

It is submitted that the provisions in section 284-145 will require amendment to appropriately reflect the different tests set out in the MAAL.

3.1.2 Commencement date

As drafted, the legislation's date of affect is as follows:

- "applies in relation to any scheme benefit that an entity gets on or after 1 July 2015, whether the scheme to which the scheme benefit relates was entered into, or commenced to be carried out, before, on or after that day"

Our **primary submission** is that this is retrospective and that the legislation should only apply to benefits arising under schemes entered into on or after 1 July 2015.

Our **secondary submission** is that if it is to apply to schemes entered into before 1 July 2015, it should only apply to any scheme benefit that arises in respect of **years of income** commencing on or after 1 July 2015.

As drafted, the new penalties apply to a scheme entered prior to 1 July 2015 and in respect of "any scheme benefit that an entity **gets** on or after 1 July 2015" (emphasis added).

It is not clear when an entity "gets" a tax benefit – eg, date of entry into scheme, lodgement of tax return, issue of amended assessment, or some other date.

As drafted, the Application provision potentially could apply in respect of the following:

- a scheme entered into in say the year ended 30 June 2013 (ie, prior to 1 July 2015);
- the scheme benefit (or some part of the scheme benefit) arises in respect of the year ended 30 June 2013 (ie, a year prior to 1 July 2015);
- depending on upon what is meant by an entity getting a scheme benefit, the Commissioner makes a Part IVA determination after 1 July 2015, but in respect of the year ended 30 June 2013.
    - In that case, does the entity "get" the scheme benefit after 1 July 2015?

The relevant trigger point is when the taxpayer "gets" the scheme benefit, and not the year of income to which the scheme benefit relates.