OECD Releases 2014 BEPS Deliverables

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Related Expertise

- Tax: M&A, Reorganizations and Restructuring Transactions
- Transfer Pricing

On September 16, 2014, the Organisation for Economic Co-operation and Development (OECD) released its first seven of 15 deliverables under the OECD/G20 base erosion and profit shifting (BEPS) project (the 2014 BEPS Package). The 2014 BEPS Package arises from the *Action Plan on Base Erosion and Profit Shifting* (the BEPS Action Plan), which contains 15 specific recommendations for international tax reform (see our Update on the BEPS Action Plan, "OECD/G20 International Tax Reform: Potential Impact on Canadian Companies," July 19, 2013). A summary overview of the 15 recommendations is included at the end of this Update.

The 2014 BEPS Package contains reports and proposed recommendations and guidance on the following topics:

- Tax Challenges of the Digital Economy (Action 1);
- Hybrid Mismatch Arrangements (Action 2);
- Harmful Tax Practices (Action 5);
- Tax Treaty Abuse (Action 6);
- Transfer Pricing & Intangibles (Action 8);
- Transfer Pricing Documentation and Country-by-Country Reporting (Action 13); and
- Developing a Multilateral Instrument on BEPS (Action 15).

The 2014 BEPS Package will be presented to the G20 Finance Ministers at their meeting in Cairns, Australia, on September 20 and 21, and then (if approved) to the G20 Leaders at their meeting in Brisbane in November 2014.

The remaining eight BEPS Action Plan deliverables are due in 2015. These relate to: strengthening controlled foreign company rules (Action 3); limiting base erosion via interest deductions and other financial payments (Action 4); the permanent establishment definition (Action 7); preventing BEPS arising from risk transfers or capital allocation to group members (Action 9); preventing BEPS arising from related party transactions which would rarely occur between third parties (Action 10); methodologies to collect and analyze data on BEPS (Action 11); require taxpayers to disclose aggressive tax planning (Action 12); and making dispute resolution mechanisms more effective (Action 14).

This Update summarizes the principal aspects of the 2014 BEPS Package. The recommendations proposed by the OECD/G20, if implemented into tax treaties and domestic law, could have a significant impact on cross-border trade and investment around the world. In particular, the 2014 BEPS Package represents a consensus view of 44 countries which make up about 90% of the global economy. While the 2014 deliverables were agreed by consensus, they remain in draft form so that outstanding technical issues and the impact of the 2015 deliverables can be incorporated before finalizing. The OECD/G20 intends to continue consulting on the remaining BEPS Action Plan items in 2014 and 2015, with further discussion drafts expected in November/December of 2014 followed by public consultations between January and March of 2015. Canadians should closely monitor how Canada and other countries react to the 2014 BEPS Package, together with the further work on BEPS that the OECD/G20 intends to continue in 2015.

Background

The BEPS Action Plan was developed at the request of the G20 to respond to growing international concern regarding base erosion and profit shifting. BEPS generally refers to tax-planning strategies that exploit gaps and inconsistencies in current international tax rules (such as differences in domestic tax rules and international standards) that shift profits to jurisdictions with favourable tax treatment where there may be little or no economic activity. While the OECD has considered similar issues for many years, the BEPS Action Plan was developed in 2013 at the request of the G20 to review 15 specific items over a two year period with a view to improving the coherence, substance and transparency of the international tax system.

The 2014 BEPS Package

(a) The Digital Economy

Addressing the Tax Challenges of the Digital Economy (Action 1)

The 2014 BEPS Package includes a final report on Addressing the Tax Challenges of the Digital Economy (the Digital Economy Report). The Digital Economy Report builds upon a March 2014 discussion draft which identified the major tax challenges raised by the rapidly developing digital economy and which summarized several possible options to address these challenges. For more background, see our Update on Action 1, "OECD Releases Discussion Draft on Tax Challenges of the Digital Economy," March 25, 2014). These tax challenges arise from the rapid growth in e-commerce and cloud-based services, the increasing importance of intangible assets and personal data use, as well as from new business models based on distributing "free" information, and related jurisdictional issues.

The Digital Economy Report discusses the fundamental principles of direct and indirect taxation, the evolution of information and communication technology (ICT), and its impact on the economy, and the strategies to be considered to address some of the resulting BEPS consequences.

The Digital Economy Report identifies some key trends in the evolution of ICT which are contributing to the tax challenges of the digital economy. These include the rapid rise in the importance of mobile and wearable devices; the business opportunities presented by consumer need to synchronize data and accounts across a variety of home, office and mobile devices; the continuing emphasis on creating and marketing internet content; the collection and sale of personal data collected and inferred from users through their devices; and the growth of cloud-based processes and services. Virtual currencies, robotics and 3D printing are also identified as emerging technological developments that will present additional tax challenges in the future.

Key features of the digital economy identified in the Digital Economy Report include mobility, volatility, data reliance and multi-sided business models (e.g., a payment system acting as a third participant in an e-commerce sales transaction). This means that a business can have a significant presence in a jurisdiction without being subject to tax there. The ubiquity of ICT across the economy means that the digital economy is increasingly just "the economy" and cannot be ring-fenced or segregated for tax purposes. BEPS risks also overlap with other components of the BEPS Action Plan, including controlled foreign company rules (Action 3), artificial permanent establishment (PE) avoidance (Action 7) and transfer pricing (Actions 8 to 10).

In general terms, the Digital Economy Report identifies three main tax policy concerns raised by the digital economy: (a) nexus to a jurisdiction when participants have no physical presence there; (b) attributing value to transactions in which data is collected, used or supplied; and (c) characterization of new digital products and services. More particularly, several BEPS strategies permitted by the digital economy currently attract tax authority concern:

- Minimizing taxation in a high-tax market jurisdiction by avoiding a taxable presence there or dealing with intermediaries in jurisdictions with low or no withholding tax requirements;
- Minimizing VAT by making remote digital supplies from a low-VAT jurisdiction to exempt businesses such as financial institutions in a high-VAT jurisdiction;
- Frustrating the collection of VAT by making a large volume of low-value supplies from a low-VAT jurisdiction to consumers in a high-VAT jurisdiction (i.e., because enforcing a requirement on consumers to self-assess and remit VAT on digital purchases is impracticable).

These strategies both reduce tax revenue and result in competitive disadvantages for domestic businesses.

Tax authorities face additional administrative challenges in identifying and collecting tax from remote sellers and domestic customers and in determining the extent of e-commerce activities. Strategies considered to address these challenges included replacing the PE rule with a test for "significant presence" in a jurisdiction; imposing new withholding tax on digital transactions; and taxing digital bandwidth.

The Digital Economy Report concludes that VAT collection on business-to-consumer transactions is a high priority and that further work on this issue will be completed by the end of 2015. Further consideration will also be given in the context of Action 7 to narrowing the PE exemption where certain activities formerly considered "preparatory and auxiliary" may be core components of a business. The OECD Committee on Fiscal Affairs will also work towards clarifying the characterization of cloud-computing payments under existing tax treaty rules.

(b) Hybrid Mismatch Arrangements

Neutralizing the Effects of Hybrid Mismatch Arrangements (Action 2)

The 2014 BEPS Package includes a report on Neutralising the Effects of Hybrid Mismatch Arrangements (the Hybrid Report). The Hybrid Report is focused largely on recommendations relating to domestic law rules (although certain treaty issues are also addressed). For further background, see our Update on Action 2, "OECD Releases Discussion Drafts on Hybrid Mismatch Arrangements," March 20, 2014).

A hybrid mismatch arrangement arises where, as a result of different tax treatments in two jurisdictions, there is a mismatch in tax outcomes. Such an arrangement can arise either from a hybrid instrument or a hybrid entity (including a dual resident entity). The Hybrid Report is not intended to address other situations (such as differences in treatment within one country, differences for tax and regulatory purposes, or differences arising due to deemed tax deductions). The Hybrid Report is intended to neutralize tax mismatches without disturbing the commercial or regulatory consequences.

The Hybrid Report focuses on “deduction/no inclusion” (D/NI) outcomes in which payments are deductible under the rules of the payer’s jurisdiction and not includible in income in the recipient’s jurisdiction, as well as “double deduction” (DD) outcomes in which a single economic expenditure results in deductions in two taxing jurisdictions. The rules are not intended to apply where double non-taxation arises as a result of one party being exempt from tax (such as a charity) or not being subject to tax (such as due to the use of losses).

The Hybrid Report recommends linked domestic rules. The linking element arises because the treatment of an amount in one jurisdiction would be linked to its treatment in the other jurisdiction. The linking approach is not intended to harmonize tax systems in different countries. Rather, the intent is for one country to link the tax results of certain hybrid arrangements to the tax treatment of such arrangements in another country. The Hybrid Report recommends a “primary” response, as well as a defensive measure that would apply if the other jurisdiction has not adopted the primary rule. The intent is for the rules to prevent double non-taxation, without resulting in double taxation, regardless of whether another country has adopted similar hybrid rules.

For D/NI outcomes, the primary response would deny a payer a deduction for a payment where the recipient is not required to include the payment in ordinary income. As a defensive measure, the recipient jurisdiction would include the amount in ordinary income. The application of the rules would be limited to transactions between related parties (for hybrid financial instruments) or among members of a controlled group (for payments made to or by a hybrid entity). Suggested definitions for “related” and “controlled group” are provided, with “related” generally including 25% common ownership, and “controlled group” generally including effective control, consolidation for accounting, or at least 50% common ownership. The rules would also apply to “structured arrangements.” A structured arrangement arises where the hybrid mismatch is priced into the terms of the arrangement, or where the arrangement has been designed to produce the hybrid mismatch.

For DD outcomes, where a hybrid entity makes a payment, under the primary rule the parent of the hybrid entity would be denied a deduction, without any limitation as to scope. The defensive rule would deny the deduction to the hybrid entity itself, but only in case of controlled groups and structured arrangements. Where a DD outcome arises because of dual residence, each country would deny the deduction to the extent that it does not offset dual-inclusion income.

The Hybrid Report proposes to add a new provision to Article 1 of the OECD Model Treaty that would address income of fiscally transparent entities. Specifically, income of an entity treated as wholly or partly fiscally transparent by either state would be treated as income of a resident of a state for treaty purposes only to the extent that it is treated as income of a resident of that state under that state’s domestic tax law.

The Hybrid Report acknowledges that further work is required to ensure that its recommendations are co-ordinated with other actions. There is also a commitment to a second phase of work relating to implementation. In particular, a detailed Commentary (to be published by September 2015) will provide further explanation and examples relating to the practical implementation of the rules. Additional work will also consider matters such as intragroup hybrid regulatory capital and certain on-market stock lending and repo transactions.

The recommendations in the Hybrid Report represent sweeping measures that, if enacted into Canadian law and tax treaties, could have a significant impact on various entities and transactions. While Canada has addressed some of the issues identified– such as through hybrid entity rules in the Canada-U.S. Tax Treaty and by implementing foreign tax credit generator rules – adopting the linking rules recommended in the report would represent a significant departure from how the Canadian tax system currently operates (particularly the rules related to interest deductibility and dividends received deductions). Changes to the domestic laws of many other OECD countries, including the United States, would be similarly dramatic. Crafting rules that are appropriately scoped and linked to the tax treatment afforded a particular payment in another country appears to be a daunting task. Many of the complex tax policy and technical issues associated with the proposals remain unresolved, and will presumably be addressed in the second phase of the work relating to implementation. For example, significant transitional issues may arise where a delay in implementation in one country leaves other countries uncertain about whether to apply a primary or defensive measure.

Nevertheless, the Hybrid Report represents the consensus view of the OECD and G20 countries that hybrid mismatches should be neutralized although it is unclear what measures will be taken to reflect this consensus.

(c) Harmful Tax Practices

Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance (Action 5)

The 2014 BEPS Package includes an interim report on Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance and provides that the Forum on Harmful Tax Practices (FHTP) will revamp the work that has been ongoing since the OECD's 1998 report on Harmful Tax Competition. The intention is not to harmonize tax systems or rates, but rather to create a "level playing field" and avoid a "race to the bottom" that would ultimately result in no taxes on certain sources of income. The focus is on curbing countries' use of preferential regimes in which no or low effective tax rates apply to certain geographically mobile activities, as such regimes are perceived as unfairly eroding other countries' tax bases. Various factors are reviewed in determining whether a regime is preferential, including ring-fencing from the domestic economy and lack of transparency. If a regime is identified as being potentially harmful, additional analysis is done to determine whether the regime creates harmful economic effects (such as shifting activity from another country). Where a preferential regime is found to be harmful, the country is given an opportunity to abolish the regime or remove its harmful features. Other countries may take defensive measures to counter the effects of a harmful regime.

The FHTP will focus on (a) requiring substantial activity to access the benefits of preferential regimes (such as reduced tax rates on intangibles); (b) improving transparency and compulsory exchange of information on rulings for preferential regimes, and (c) reviewing member and associate country regimes. Various approaches were considered to realign the taxation of profits with substantial activities. The FHTP will focus primarily on a "nexus" approach, which requires a direct nexus between the income receiving benefits under a preferential regime and the expenditures contributing to that income. Under this approach, the proportionate amount of expenditures is used as a proxy for substantial activity. Initial guidance is provided on how proportionate expenditures will be determined (such as outsourced R&D only being an eligible expenditure if outsourced to a third party, or expenditures on acquired IP only being eligible if incurred for post-acquisition improvements). All intangible regimes in member countries are being reviewed at the same time (none of which were previously reviewed). The FHTP will also consider how to apply an elaborated substantial activity test to non IP regimes. The FHTP intends to develop a strategy by September 2015 to expand participation to non-OECD countries, and will consider whether existing criteria should be revised by December 2015.

The FHTP's review process includes 30 preferential regimes together with its conclusions on whether they are harmful. The only Canadian regime on the list is the life insurance business regime, which the FHTP concludes is "potentially harmful but not actually harmful." Canada has previously eliminated various preferential tax regimes, such as the former non-resident owned (NRO) corporation rules and international banking centre rules.

(d) Treaty Abuse

Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (Action 6)

The 2014 BEPS Package addresses the perceived abuse of tax treaties in a report on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (the Treaty Report). Action 6 in the BEPS Action Plan had identified treaty abuse, and in particular treaty shopping, as an important source of BEPS concern. The Treaty Report makes recommendations in three distinct areas for preventing the facilitation of BEPS through the use of tax treaties.

1. Developing model treaty provisions and recommendations regarding the design of domestic rules to prevent granting treaty benefits in inappropriate circumstances

The Treaty Report acknowledges that flexibility is needed for countries to address treaty abuse in different ways, and that there was agreement that a minimum level of protection should be provided against treaty abuse. However, the Treaty Report notes that further work is needed with respect to implementing the minimum standard to collective investment vehicles (CIVs) and non-CIV funds. Otherwise, the Treaty Report suggests that the minimum standard is for countries to include in their tax treaties (a) an express statement that their common intention is to eliminate double taxation without creating opportunities for treaty shopping, and (b) one or both of the following alternatives:

> (i) a detailed objective "limitation on benefits" (LOB) rule (similar to those used in US tax treaties) supplemented by a mechanism to address certain conduit arrangements; or(ii) a more subjective general anti-abuse rule based on the principal purposes of the transactions or arrangements (the PPT rule).

The LOB test is based on the legal nature, ownership in, and general activities of, persons that qualify as treaty residents. Simplifying it greatly, the LOB test is intended to deny treaty benefits where a person that otherwise qualifies as a treaty resident of a country does not have sufficient nexus to that country, such as majority ownership by persons resident in the country or the active conduct of a business in the country. The Model Treaty provisions and related Commentary, in particular the LOB rule, are in draft form and need to be refined.

Noting that the LOB test can be under-inclusive, however, the Treaty Report suggests supplementing the LOB test with the PPT rule. The PPT rule would deny a treaty benefit if obtaining that benefit was "one of the principal purposes" of any arrangement or transaction that resulted in that benefit, unless granting that benefit would be consistent with the object and purpose of the relevant treaty provisions. The PPT rule is not intended to apply in every situation where obtaining treaty benefits was an important consideration. For example, the Treaty Report notes that where an arrangement is inextricably linked to a core commercial activity, and its form has not been driven by considerations of obtaining a treaty benefit, it is unlikely that the PPT rule will apply to deny benefits. Outside of the Treaty Report, representatives from the US government have expressed concern with the inherent uncertainty of any PPT rule, suggesting that the US will likely choose not to include such a rule in its tax treaties.

The Treaty Report's proposals for treaty changes also include specific anti-avoidance rules to target more narrow examples of abusive tax planning to obtain treaty benefits, such as splitting-up of contracts, hiring out of labour, dividend transfer arrangements and other strategies that have come to the attention of tax authorities.

The Treaty Report also proposes extensive additional commentary on the OECD Model Tax Convention concerning the interaction between treaties and domestic anti-abuse rules, noting that domestic rules still have an important role to play in preventing the inappropriate use of treaties, such as the use of treaties to circumvent domestic tax law restrictions. Additional work on treaty abuse is expected to occur by September 2015.

2. "Clarification" of the purpose of treaties

The Treaty Report also recommends preventing the facilitation of BEPS through the use of tax treaties through changes to the title and preamble of the OECD Model Tax Convention. Specifically, the Treaty Report suggests that countries could adopt these changes when drafting a new treaty, making it clear that that the treaty is not intended to be used for tax avoidance or to generate double non-taxation. The objective is for these wording changes to form part of the context for interpreting and applying treaty provisions.

3. Tax policy considerations for entering into treaties

The Treaty Report also identifies tax policy considerations that countries should consider before deciding to enter into a tax treaty, or in deciding whether to maintain an existing treaty relationship. Generally speaking, the Treaty Report suggests that there is a less compelling basis for entering into tax treaties with low- or no-tax countries or countries that are not co-operative in terms of assistance in information sharing and tax collection.

A number of the proposals in the Treaty Report remain subject to future modification and elaboration of details.

Canada's domestic general anti-avoidance rule (GAAR) already applies to prevent misuses or abuses in Canada's tax treaties. The 2014 Canadian Federal Budget proposed for consultation an additional domestic "anti-treaty shopping" rule that would have denied tax treaty benefits in certain circumstances. However, on August 29, 2014 the Department of Finance indicated that, after engaging in consultations on the proposed anti-treaty shopping measure, Canada will instead await further work by the OECD and G20 in relation to the BEPS initiative.

(e) Transfer Pricing and Intangibles

Guidance on Transfer Pricing Aspects of Intangibles (Action 8)

Transfer prices are the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises. Countries that follow the OECD Model in their tax treaty networks agree to tax each enterprise within a multinational group as a separate entity and on the basis of the arm's length principle – namely, that the conditions of the cross-border transactions between them conform to those that would have existed between parties dealing at arm's length. The OECD has established guidelines to assist tax authorities and multinational groups with the interpretation and application of the arm's length principle.

The BEPS Action Plan asserted that existing transfer pricing rules can be used by multinationals in some instances “to separate income from the economic activities that produce [it],” allowing for anomalous results. The chief sources of these anomalies were identified as transfers of intangibles and other mobile assets for less than full value, the over-capitalization of entities in low-tax jurisdictions and the contractual allocation of risk to low-tax environments in transactions that would be unlikely to occur between unrelated parties. To this end, three of the BEPS Action Plan items proposed to develop rules to prevent BEPS related to transfer pricing:

- Action 8 – Develop rules to prevent BEPS resulting from moving intangibles among group members;
- Action 9 – Develop rules to prevent BEPS resulting from transferring risks among, or allocating excessive capital to, group members; and
- Action 10 – Develop rules to prevent BEPS resulting from related parties engaging in transactions which would not, or would only very rarely, occur between third parties.

The Guidance on Transfer Pricing Aspects of Intangibles included in the 2014 BEPS Package (the Guidance on Intangibles) constitutes the final deliverable on Action 8, while work on Actions 9 and 10 is slated to be completed in 2015.

The Guidance on Intangibles includes revisions to Chapters I, II and VI of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2010) (the Transfer Pricing Guidelines). Some of these revisions are identified in the Guidance on Intangibles as being interim rather than final, in light of the close relationship between transfer pricing issues relating to intangibles and those relating to the 2015 deliverables on risks and capital and “high-risk” transactions.

Final revisions to the Transfer Pricing Guidelines include the expansion of Chapter I (The Arm’s Length Principle) to discuss comparability issues relating to location savings and other local market features, the existence of a uniquely qualified or experienced group of employees or “assembled workforce”, and multinational enterprise group synergies, as well as guidance in new Chapter VI (Special considerations for intangibles) on identifying intangibles, principles to be followed in conducting a comparability analysis in relation to transactions involving intangibles, and the application of transfer pricing methods in matters involving intangibles. Numerous examples are provided.

Interim guidance includes several examples relating to:

- The allocation of returns between the legal owners of intangibles and those who control or perform functions relating to the development, enhancement, maintenance, protection and exploitation of intangibles;
- Arm’s length pricing relating to intangibles whose valuation is uncertain at the time of the transaction;
- The use of “other methods” to determine arm’s length pricing; and
- The application of the profit split method.

Consistent with the BEPS Action Plan, the Guidance on Intangibles does not propose a move away from the arm’s length principle (e.g., to global formulary apportionment or a similar model). However, the Guidance on Intangibles does indicate that, in completing further transfer pricing work, the OECD will “consider both the application of the arm’s length principle and special measures in order to identify effective responses” to BEPS concerns. Specific special measures identified as being under consideration are:

- Permitting tax authorities in appropriate instances to apply rules based on “actual results” to price transfers of hard to value intangibles and, potentially, other assets, suggesting a retrospective approach to the valuation of some transfers of property within multinational groups;

- Treating entities whose activities are limited to providing funding for the development of intangibles (i.e., rather than performing "people functions") as lenders under some circumstances, or otherwise limiting the return to such entities;
- Requiring contingent payment terms and/or the application of profit split methods to certain transfers of hard to value intangibles; and
- Applying analogous rules to the Authorised OECD Approach to certain situations involving excessive capitalisation of low function entities.

The Guidance on Intangibles notes that work on these measures will be coordinated with other ongoing BEPS work to "come to a coherent set of rules that will effectively address transfer pricing concerns related to BEPS", emphasizing that no decisions have yet been made with respect to the adoption of special measures.

(f) Transfer Pricing Documentation and Country-by-Country Reporting

Guidance on Transfer Pricing Documentation and Country-by-Country Reporting (Action 13)

The Guidance on Transfer Pricing Documentation and Country-by-Country Reporting included in the 2014 BEPS Package responds to Action 13 of the BEPS Action Plan by setting out revised standards for tax administrations to take into account in developing rules and procedures on transfer pricing documentation to be obtained from taxpayers, including a template for country-by-country reporting of income, earnings, taxes and certain measures of economic activity. This guidance is set out in the form of a new Chapter V (Documentation) of the Transfer Pricing Guidelines, and is intended to strike a balance between providing valuable information to tax administrations while minimizing compliance costs.

The new Chapter V provides for a three-tiered approach to transfer pricing documentation and reporting, consisting of a Master File, a Local File, and a Country-by-Country Report. These three documents are intended to require taxpayers to articulate consistent transfer pricing positions, as well as to "provide tax administrations with useful information to assess transfer pricing risks, make determinations about where audit resources can most effectively be deployed, and, in the event audits are called for, provide information to commence and target audit enquiries."

Master File

The Master File will require multinational groups to provide tax administrations with high-level information relating to their global business operations and transfer pricing policies, and is intended to be available to all relevant country tax administrations (see below for discussion of implementation considerations).

Local File

The Local File includes more detailed information in relation to specific transactions between a local country affiliate and associated enterprises in different countries, and which are "material in the context of the local country's tax system". The Local File is intended to supplement the Master File, and to speak to the taxpayer's compliance with the arm's length principle in its material transfer pricing positions affecting a specific jurisdiction.

Country-by-Country Report

The Country-by-Country Report calls for multinational groups to provide aggregate information relating to the global allocation of income, taxes, and certain indicators of economic activity among tax jurisdictions in which they operate, with the objective of assisting tax administrators with high-level transfer pricing and other BEPS-related risk assessment purposes. The Country-by-Country Report will require taxpayers to set out, by jurisdiction, aggregate financial information relating to revenues, profit or loss before income tax, taxes paid, stated capital and accumulated earnings, number of employees, and tangible assets (other than cash or cash equivalents). The Country-by-Country Report will also require taxpayers to identify the constituent entities for which financial information is reported, the tax jurisdictions of such entities, and the nature of their main business activities.

Implementation

Although guidance as to the contents of these reports has been finalized with this instalment, their implementation, including appropriate mechanisms for filing and disseminating the Master File and Country-by-Country Report to the relevant tax authorities, remain to be addressed. This work will be undertaken over the next several months, and will take into account several factors, including the protection of confidentiality of the information and the need to make it available on a timely basis to relevant jurisdictions. Potential options for filing and disseminating documentation include direct filing with all relevant tax administrations, central filing in an appropriate jurisdiction, use of treaty information exchange provisions by relevant tax administrations, and technological solutions. Phase-in rules are also being considered, with regard to the importance of a successful transition to the new documentation regime.

Acknowledging that the transfer pricing documentation standards and country-by-country reporting standards are "new and untested", the Guidance calls for active review of their implementation, and for the countries participating in the BEPS project to revisit them no later than the end of 2020.

(g) Developing a Multilateral Instrument on BEPS

Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (Action 15)

The BEPS Action Plan considered whether a multilateral instrument (i.e., a treaty or convention signed by multiple countries) could be used as an alternative to separately amending over 3,000 bilateral tax treaties in a more timely and efficient manner. The 2014 BEPS Package includes a report on Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (the Multilateral Instrument Report) in response to this action item. The

Multilateral Instrument Report concludes that a multilateral instrument is (a) feasible, based on non-tax precedents; and (b) desirable, to ensure the sustainability of the consensual framework to eliminate double taxation on cross-border trade and investment.

The Multilateral Instrument Report refers to the desire to use a multilateral instrument to address BEPS in a targeted and synchronized manner. While the Report focuses on implementing treaty measures, a multilateral instrument could potentially also be used to express commitments to implement certain domestic law measures. In an effort to expedite and streamline the implementation of BEPS initiatives and amending tax treaties, an international convention to begin negotiations for a multilateral instrument will be convened in 2015. The negotiating mandate is to be limited in scope (implementing the BEPS Action Plan) and in time (no more than two years). While many of the details will need to be confirmed, the multilateral instrument would likely coexist with existing bilateral treaty networks. The multilateral instrument could modify (or add) a limited number of provisions common to most existing bilateral tax treaties, including new provisions specifically designed to counter BEPS. A multilateral instrument could include provisions to address mutual agreement procedures, dual-residence structures, hybrid mismatch arrangements, "triangular" cases involving PEs in third states, and treaty abuse. A multilateral instrument could be accompanied by an explanatory report to facilitate its interpretation and implementation. Ratification of a multilateral instrument would likely take place according to each country's national laws.

The Multilateral Instrument Report uses the Convention on Mutual Administrative Assistance in Tax Matters as an example of a successful multilateral instrument. Sixty-six countries have signed that agreement, including Canada and all other G20 countries. Other examples of multilateral agreements include the North American Free Trade Agreement and various European agreements.

For further information on the BEPS initiative (including the 2014 BEPS Package) and Canada's international tax regime, please contact any member of our Tax Department.

OECD/G20 BEPS Action Plan – Overview