Morgan, Lewis & Bockius LLP
2 Palo Alto Square
3000 El Camino Real, Suite 700
Palo Alto, CA 94306
Tel. 650.843.4000
Fax: 650.843.4001
www.morganlewis.com

Rod Donnelly
Partner
650.843.7289
rdonnelly@morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

September 30, 2013

VIA E-MAIL

Mr. Pascal Saint-Amans
Director, Center for Tax Policy and Administration (CTPA)
OECD, 2, rue André Pascal
75775 Oarus / Cedex 16
France

Re: Comments on the OECD's *White Paper on Transfer Pricing Documentation*

Dear Mr. Saint-Amans,

This letter is in response to the request for comments on the OECD's *White Paper on Transfer Pricing Documentation* ("***White Paper***"), issued July 30, 2013. I'm writing to share the views as representative of, and on behalf of, the Information Technology Industry Council ("ITI"),[1] Semiconductor Industry Association ("SIA"),[2] the Software Finance and Tax Executives Council (SoFTEC),[3] TechAmerica,[4] and TechNet.[5]

---

1 ITI is the premier advocacy and policy organization for many of the world's leading innovation companies. ITI navigates the constantly changing relationships between policymakers, companies, and non-governmental organizations. ITI engages in policy advocacy and provides creative solutions that advance the development and use of technology around the world. ITI matches its members' breakthrough innovations with cutting-edge approaches to help people and governments better understand our members and the work they do.

2 SIA is the leading voice of the U.S. semiconductor industry. SIA represents U.S. companies involved in research, design, and manufacture of semiconductors. Semiconductors are a foundation of the information technology sector and essential to modern communications, entertainment, national defense, health care, transportation, and other aspects of the world's economy. SIA works to encourage policies and regulations that fuel innovation, propel business, and drive international competition in order to maintain a thriving semiconductor industry in the United States.

3 SoFTEC is a trade association providing software industry focused public policy advocacy in the areas of tax, finance, and accounting. SoFTEC represents the leading developers of software and is the voice of the U.S. software industry on tax issues.

The White Paper was issued soon after the OECD released the *Action Plan on Base Erosion and Profit Shifting*, on July 29, 2013, which at Action 13 discusses transfer pricing documentation issues. Given the relatively short period before the comment deadline, our comments here should be taken as preliminary—we focus on a few provisions of the White Paper, as described below. We may submit further, or revised, comments after October 1, 2013.

I. Introduction

We thank Working Party No. 6 for preparing the White Paper and for inviting interested parties to provide written comments. We agree the global transfer pricing compliance burden on MNEs is increasing, and we share the desire to reduce such burden and improve the utility of transfer pricing documentation. We also recognize the significant challenges in formulating uniform transfer pricing documentation principles to reduce this burden.

The White Paper's fundamental objective is to simplify and consolidate the transfer pricing obligations of MNEs, while at the same time providing tax administrations with more useful information to conduct transfer pricing enforcement. To achieve this primary objective, the White Paper proposes a Coordinated Document Approach ("***CDA***") aimed at satisfying three essential transfer pricing documentation functions: (1) allowing tax authorities to perform efficient risk assessment, (2) providing information necessary to support an audit, and (3) providing taxpayers with a means and incentive to meaningfully consider and describe their compliance with arm's length pricing.

We agree with the White Paper's fundamental objective and its formulation of the essential functions of transfer pricing documentation. Our primary concerns, discussed below, relate to instances where the CDA falls short of these objectives or strays from the essential functions. Additionally, we're concerned that certain unintended consequences may result from the proposed CDA.

---

[4] TechAmerica is the leading voice for the U.S. technology industry—the driving force behind productivity growth and jobs creation in the U.S. and the foundation of the global innovation economy. Representing approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy, it is the industry's largest advocacy organization. TechAmerica is also the technology industry's only grassroots-to-global advocacy network.

[5] TechNet is the U.S. national, bipartisan network of CEOs that promotes the growth of technology industries and the economy by building long-term relationships between technology leaders and policymakers and by advocating a targeted policy agenda. TechNet's members represent more than one million employees in the fields of information technology, biotechnology, e-commerce and finance.

II. Specific concerns

A. Creating both a masterfile and separate country files will be unduly burdensome and costly

The CDA proposes a two tier structure consisting of a masterfile and a local file.[6] The masterfile seeks to elicit a reasonably complete picture of an enterprise's global business, financial reporting, debt structure, and tax situation.[7] Information to be included in the masterfile falls into five categories: (a) group information, (b) business information, (c) intangibles information, (d) intercompany financial activities, and (e) financial and tax positions.[8] Table 1 of the White Paper outlines seventeen specific documents, lists, or descriptions to be included in the masterfile.

While the masterfile is intended to simplify and standardize transfer pricing documentation provided to international tax administrations, the masterfile creates an additional onerous layer of required documentation. Much of the information requested in the masterfile would need to be newly created solely to satisfy the proposed documentation requirements. For example, even some of the largest MNEs are unlikely to maintain all the following items as part of their regular course of business:

- a chart showing important related party service arrangements
- a written functional analysis showing the principal contributions to value creation by individual entities within the group
- a description of important business restructuring transactions during the last five years
- a description of strategy for development, ownership, and exploitation of intangibles
- a list of material intangibles or group intangibles and details as to which companies are entitled to returns from relevant intangibles
- a description of any material transfers of interests in intangibles during the relevant year
- a description of material intercompany loans
- a description of the group's transfer pricing system for its financial activities

6 White Paper, ¶ 78.

7 White Paper, ¶ 80.

8 *Id.*

Enterprises will inevitably spend considerable time (or will expend considerable advisory fees, or both) interpreting the definitional boundaries of the masterfile contents. This will be particularly true for the materiality thresholds, which are intended to reduce documentation volume (e.g., "material intangibles," "principal contributions to value," and "important business restructuring transactions"). Such difficulties will be compounded by the fact that simple or general descriptions may not be able to adequately reflect important legal differences between taxing jurisdictions (e.g., what constitutes an intangible).

To further the objective of simplification, transfer pricing documentation requirements should be limited to information readily available to an enterprise (or otherwise easily modifiable by an enterprise to meet the documentation requirement). The masterfile described by the CDA will require newly created documentation resulting in costly drafting and compiling exercises.

Given that the purpose of the masterfile is to "enable tax authorities to identify the presence of significant transfer pricing risks,"[9] on a world-wide basis, enterprises are likely to spend an inordinate amount of time and advisory fees in completing and perfecting such a file. We anticipate that the masterfile obligation, while intended to constitute a "big picture" business profile that an enterprise should be capable of developing internally, will instead result in a standard service offering provided by global advisory firms. Such an outcome will lead to commoditized analyses the OECD disfavors, rather than encouraging mindful compliance by enterprises.[10]

We recognize the White Paper reserves on the issue of timing with respect to when the proposed CDA packages should be provided to tax administrations.[11] We're nonetheless concerned that the aggregate information sought by both the masterfile and the local file would impose an excessive contemporaneous documentation requirement. The information sought goes beyond what an enterprise subject to transfer pricing audit would normally provide over a multi-year period. Regardless of timing, the global scope of the information needed for the masterfile will be excessive in many cases for jurisdictions in which enterprises operate on a limited basis. For example, it's common for a MNE to own one or more foreign subsidiaries whose sole function is to provide sales & marketing services. Under such circumstances, there's no justification under the arm's length standard that a comprehensive masterfile be provided to the local taxing administration in such subsidiary's jurisdiction, describing the MNE's global operations and intangible development strategy.

---

9 *Id*.

10 White Paper, ¶¶ 55 and 56.

11 White Paper, ¶ 83, first bullet.

For multi-national conglomerates, the White Paper contemplates the development of both a "company wide basis" masterfile and a "line of business" masterfile, depending on which file would provide the most relevant transfer pricing documentation to tax administrations.[12] We agree that the overall concept of limiting the masterfile to relevant transfer pricing documentation is appropriate, although we're concerned about the possibility that conglomerates may have to prepare several masterfiles, one for each line of business.

B. The transfer pricing documentation requirements may put company confidential information at risk

We have significant concerns that the CDA will put at risk confidential information of MNEs. The masterfile requires an enterprise to provide, *inter alia*: (1) its strategy for development and exploitation of intangibles, (2) a list of material intangibles, (3) supply chain information, (4) lists of main markets for material products and services, (5) a list of key competitors, (6) a description of important business restructuring transactions, (6) a description of financial arrangements, (7) a description of the group's transfer pricing policy and system for its financial activities, (8) a list of consolidated accounts, and (9) a list of APAs and relevant tax rulings. Some of this information—e.g., development and exploitation strategy—continuously changes. More importantly, such information likely includes confidential or sensitive data that would be damaging to an enterprise if inadvertently disclosed, or if such information was obtained by third parties through public disclosure laws.

Confidentiality of sensitive business information is undoubtedly a critical issue to all business enterprises that would have to adopt the CDA. Legal issues about confidentiality of transfer pricing documentation can present significant challenges to MNEs within the borders of their primary taxing jurisdictions. For MNEs, it's daunting to consider how their confidential information might be treated and what protections will be afforded them in every taxing jurisdiction where they would be required to disclose sensitive information under the CDA. Legally prescribed confidentiality protections are often imperfect. With respect to a multi-jurisdictional release of an enterprise's detailed masterfile, the security of any enterprise's sensitive information would be determined by the jurisdiction providing the least amount of confidentiality safeguards.

We encourage the OECD to address the issue of transfer pricing documentation confidentiality in the next iteration of its proposal. Article 26 of the OECD Model Tax Convention on Income and Capital (the "***OECD MTC***"), governing information exchanges between contracting states, provides that no contracting state is obligated to disclose confidential business information, the disclosure of which would be contrary to public policy. At a minimum, the CDA should adopt a similar standard with respect to the disclosure of transfer pricing documentation by multi-national enterprises.

---

[12] White Paper, ¶ 76.

C. The White Paper doesn't address information exchange provisions of tax treaties or intergovernmental agreements

The White Paper doesn't mention the exchange of information provision in most tax treaties. For example, Article 26 of the OECD MTC provides in relevant part:

> The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States . . . insofar as the taxation thereunder is not contrary to the Convention.

It's burdensome to require taxpayers to compile and provide information already available to tax authorities through existing treaty or other intergovernmental agreement mechanisms. The OECD should encourage tax authorities to use these existing mechanisms to get relevant information.

D. The White Paper's TP documentation requirements go beyond what is required under the arm's length standard in Article 9 and could lead to formulary apportionment.

The thrust of the CDA is too far removed from the transactional and functional focused documentation traditionally considered by tax administrations in applying the arm's length standard. Paragraph 72 of the White Paper provides:

> It seems possible for businesses to provide without undue burden individual country data based on either management accounts, consolidating income statements and balance sheets, and/or tax returns that would provide tax administrators with a general sense as to how their global income is allocated and where pressure points in the transfer pricing arrangements might lie.

Paragraph 72 must be read in context. The White Paper continues that disclosure of country-by-country income allocation information would be intended only to serve as a risk assessment tool for taxing authorities, rather than a substitute for functional analyses conducted under arm's length principles. Once provided with apportionment information (whether relating to sales, assets, employees or income), however, administrations may choose to base transfer pricing adjustments on formulary apportionment.[13] Given that this information is ostensibly to be used for "risk assessment," it could lead to unduly extensive audits in situations where an arm's length adjustment isn't appropriate (e.g., a jurisdiction in which a company has numerous employees but only conducts routine operations, such as distribution or manufacturing).

---

[13] *See*, OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* ("***TPGs***"), ¶¶ 1.19–1.32, explaining why formulary apportionment should be rejected.

We urge the OECD to consider the proper scope of the CDA where an adjustment to a related party transaction is governed by a tax treaty. To the extent the CDA requires enterprises to provide information to administrations that could support an adjustment based on formulary apportionment, such a requirement isn't consistent with Article 9 of the OECD MTC (or any equivalent provision in a bilateral treaty). Under Article 9, a contracting state may only base a transfer pricing adjustment on a transaction between related parties if such transaction differs from a transaction "which would be made between independent enterprises." Thus, apportionment related information couldn't support an adjustment authorized under most tax treaties.[14]

III. Recommendations

We have the following recommendations for changes to the transfer pricing documentation approach described by the White Paper:

A. Only readily available financial information should be requested for the CDA

To further the objective of simplification, transfer pricing documentation requirements should be limited to information that is either readily available to an enterprise or that is otherwise easily modifiable by an enterprise to meet the required format.

B. No strategic or competitive information should be requested for the CDA

Reflecting OECD model treaty principles, transfer pricing documentation requirements should be drafted to clearly exclude an enterprise's sensitive or confidential business information from disclosure.

C. Requested information should not go beyond what's necessary or relevant to the requesting jurisdiction

The OECD should urge tax administrations to use existing treaty and other intergovernmental agreement mechanisms to obtain relevant information. Relevance should be determined by reference to what's needed to apply the arm's length standard, not formulary apportionment.

[14] Paragraph 2 of the OECD MTC Commentary on Article 9 is clear in this regard: "No re-writing of the accounts of associated enterprises is authorised if the transactions between such enterprises have taken place on normal open market commercial terms (on an arm's length basis)." *See also*, rejection of transfer pricing adjustments based on formulary apportionment in TPGs, ¶¶ 1.19-1.32.

D. OECD member states should specify whether the recommended TP documentation requirements are sufficient to avoid penalties.

The White Paper expressly reserves on penalties or incentives relating to transfer pricing documentation.[15] We believe a workable standardized documentation regime may be more easily achieved if OECD member states were required to formally specify whether compliance with such a regime would be sufficient to avoid applicable penalties.

Thank you in advance for your consideration of the above comments.

Respectfully yours,

Rod Donnelly

[15] White Paper, ¶ 83, third bullet.