



# COUNCIL HIGHLIGHTS

## NATIONAL FOREIGN TRADE COUNCIL

*“ADVANCING GLOBAL COMMERCE FOR NEARLY A CENTURY “*

*Council Highlights is a bi-monthly summary of news and events of the National Foreign Trade Council exclusively for its members.*

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### Message from the NFTC Chair

**F**rom the perspective of the National Foreign Trade Council’s (NFTC) trade priorities, year one of President Obama’s second term is dramatically different from year one of his first term, and, not unrelated, so is the international environment for trade agreements. That is cause for very substantial optimism – without having unrealistic expectations.

Instead of the Administration hitting the pause button (for two years) as it did on coming into the White House, and the U.S. trade agenda consisting of doggedly struggling in Geneva with the ill-fated Doha negotiations (kudos to Amb. Michael Punke), re-examining three pending free trade agreements (FTAs), approaching trade as partially a domestic issue of repealing tax deferral for foreign source income (although on the positive side, the National Export Initiative was born at the end of that first year – in January 2010), the Administration is now pressing forward with Trans-Pacific Partnership (TPP), a transatlantic partnership (to be started soon), the international services agreement (ISA), ITA-2 and maybe there can be a WTO trade facilitation agreement.

*(Continued on page 3)*

### A Word From the President

*Now’s the Time for a Transatlantic Leap of Faith*

In December 2011, the United States and EU launched an effort to determine whether there was a future in closer transatlantic trade relations. Now, after a year of discussion, the President announced the launch of negotiations in his State of the Union speech. The business community received this announcement enthusiastically, and the coalition to support an agreement has already been formed, with the NFTC’s active participation.

*(Continued on page 2)*

### Miller & Chevalier and NFTC Announce Results of the Seventh Annual Tax Policy Forecast Survey

Miller & Chevalier Chartered and the NFTC on February 19 released the results of their 2013 Tax Policy Forecast Survey measuring the current perspectives of leading business tax executives on the tax legislative agenda in 2013. The results demonstrate a leading concern that in light of the current political and fiscal environment, Congress will enact revenue offsets to fund other legislative initiatives rather than to make the U.S. tax system more competitive.

Business tax executives continue to believe that fundamental tax reform is necessary, but expressed increased doubt that such reform will be enacted in the near future. Respondents said the lack of activity is attributable to a variety of factors, including the existence of competing legislative priorities, a lack of public agreement, budget constraints and a lack of Administration interest.

A majority of respondents also believe that an increase in the U.S. taxation of their international operations will be used for revenue, which is a top business concern in 2013.

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# News for Our Members

## A Word From the President

*(Continued from page 1)*

Despite our enthusiasm, however, we are well aware these will not be easy negotiations. There is a long history to our trade relations with the EU, most of it not promising, and there is suspicion on both sides that the other will not be able to deliver meaningful commitments.

This mutual suspicion is the product, first, of years of relatively fruitless negotiations over standards and regulations (remember the chickens!), and, second, of the realization that there are issues on both sides that pose severe political repercussions if conceded. For the United States, the *Jones Act* and a number of agriculture programs like sugar and dairy. For the EU, GMOs and geographical indications, among others. The parties are also divided by conflicting regulatory philosophies, which are most easily described as prescriptive (EU) and descriptive (U.S.).

The way to get beyond that suspicion is simply to start negotiating with everything on the table and seeing where it leads. The dirty little secret here is that politicians, in their own eyes, never fail. (When was the last time the White House announced the President made a mistake?) Once begun, U.S.-EU trade negotiations will never “fail.” At most, they will become less ambitious, throwing intractable issues over the side until agreement can be reached over what remains on board. At that point, victory will be declared, however modest the result, and the issues left bobbing in the wake will be taken up in a subsequent round. This strategy requires a leap of faith, but the potential gains are well worth it.

*“A Word From the President” is written by NFTC President, Bill Reinsch; if you have questions or comments please forward them to [breinsch@nftc.org](mailto:breinsch@nftc.org).*

## Trans-Pacific Partnership Enters 16th Round of Negotiations

The nations of the Trans-Pacific Partnership (TPP) – Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, Mexico, Canada and United States – will meet in Singapore from March 4-13, 2013, for the 16th round of negotiations

December of 2012 saw the 15th round of negotiations among nine early partners and the addition of two new major economies, Canada and Mexico. Progress slowly emerged along two negotiating lines, the concrete and abstract. At the concrete level, negotiators made substantial progress in working through the difficult technical bulk of the agreement, negotiating market access schedules, rules of origin, the development for the first time for several countries of a negative list for services, and the formulation of TBT annexes. In the abstract, the work of explaining new proposals such as that for the adoption of disciplines for state-owned enterprises (SOEs) was a lengthy exercise before other negotiating partners began to formulate their own positions on U.S. proposals.

To substantially conclude negotiations by the perennially self-imposed deadline of the APEC Leaders’ Summit, this year in October, it is generally believed that the technical negotiations must be concluded by May and countries must move beyond articulation of opposing or differing positions on key issues and put forth compromises and alternatives for agreement. At this point, the negotiations will have to enter a new phase, characterized by a high level of political engagement and deal making.

Additionally, countries must close the door early this year on the tabling of new proposals. For the United States, this means tabling its positions on drug patents, WTO+ proposals on sanitary and phytosanitary measures that are subject to dispute resolution, and deciding whether it will follow through on signals that it plans to table new “safe harbor” regulations presumably targeting tobacco.

For more information, contact Chuck Dittrich at [cdittrich@nftc.org](mailto:cdittrich@nftc.org).

# *News for Our Members*

## **Message from the NFTC Chair**

*(Continued from page 1)*

And tax “reform,” for better and worse, does not appear to be on the immediate agenda. I would like the Administration to put forward trade negotiation legislation this year, but it is not going to do so. While the Administration has other legislative priorities, its argument has some logic – that it makes sense not to receive a list of negotiating objectives from Congress for an agreement that has already taken shape. Fortunately, the House Ways and Means Committee appears willing to at least start the process of considering what a new Trade Negotiating Authority (TPA) should look like. Talks aiming at a U.S.-China BIT may be re-invigorated as well, although appears to be a long shot.

So the table is finally set for great initiatives for international trade agreements.

A threshold question is who the new U.S. chief negotiator, the USTR will be. The position, created in 1963 has had a variety of occupants. By my count, the job has been held by one former Secretary of State, the first incumbent; four former CEOs: three in manufacturing and one in services; one former party chair; one former U.S. Senator; one former Governor; one former Mayor; one politically connected Washington lawyer; two former USTR Deputies elevated from that position; two Washington policy persons who were former senior Administration officials; one former Assistant Secretary of Agriculture who had also been a former Deputy USTR; and one former Member of Congress.

Success in this position is seen as bringing home major international agreements and getting them approved by Congress. A lot depends on luck – how ripe international agreements were for the picking and what U.S. domestic politics of the time are. Skills can help create that luck, such as having a political base in the White House and on the Hill, and superb judgment in assessing individuals, politics and issues, strong justified self-confidence, a good sense of the substance. USTR does not really offer the kind of institutional power base that State, Treasury and Defense have. It is in the Executive Office of the President, but not in the White House. So much depends on the individual chosen.

Also vital is strong support from the business community. Our members are actively engaged on all the negotiating fronts listed above, and at home on tax. The area that I have been following most closely is the negotiation of the Trans-Pacific Partnership, with particular emphasis on new disciplines for state-owned enterprises. I have been fortunate to be able to participate as a “stakeholder” in all of the Rounds during 2012 and will be in Singapore for Round 17. The U.S. text has been the subject of discussions throughout the last year, but not negotiation. That process, I hope, will begin in Singapore. The addition of Mexico and Canada to the negotiations in Auckland in December has been more of a shot in the arm than just a complicating factor so far for the TPP.

My commercial message: Find the issues of greatest concern to your company and take advantage of the platform for involvement that the NFTC offers.

*Ambassador Alan Wm. Wolff is a Senior Counsel of the International Trade Practice at McKenna Long & Aldridge LLP and is the Chairman of the NFTC Board of Directors.*

## News for Our Members

### NFTC Urges States Not to Enact Foreign Policy Sanctions and Protectionist Legislation

As state legislatures reconvened in January, bills were introduced in several states to enact state foreign policy sanctions on target countries. Protectionist bills to restrict state procurement to U.S. providers of goods and services or to in-state providers have also been introduced. In each case, the NFTC has written the state's governor, legislative leaders and sponsors of the legislation to urge them not to enact the bills.

In its ruling in 2000 in *Crosby v. NFTC*, the Supreme Court found unconstitutional the Massachusetts selective purchasing ban on state procurement from companies doing business in Burma. The Court ruled that state foreign policy sanctions violate the Supremacy Clause of the Constitution. Although the case under review dealt with state government procurement, the Court set an important precedent limiting the latitude allowed to states to affect the foreign relations of the United States. Since then the NFTC has alerted state governments to the *Crosby* ruling when selective purchasing bills have been introduced in their legislatures. In cases where states have enacted procurement bans despite being alerted by the NFTC about their unconstitutionality, the NFTC monitors the state's implementation with a view to bringing suit to overturn the law.

So far this year two states have passed laws in conflict with *Crosby*. Maryland enacted a law requiring its Board of Public Works to implement a bill passed in late 2012 banning procurement from a list of companies doing business in Iran. In January, Missouri enacted a similar bill that prohibits state contracting with companies on a list of companies invested in Iran's energy sector. That makes seven states which have laws on their books that are in conflict with the *Crosby* decision.

Many more states have passed laws requiring divestment by state or local public pension funds of shares invested in companies listed as doing business in a target country. These laws are predicated on the notion that selling equity in a multinational corporation (in almost all cases a non-U.S. company) will depress the share price, cause the company to disinvest from the target country, which will in turn incentivize the host government to change its behavior. On this logic, 25 U.S. states have enacted divestiture laws targeting different countries.

So far in 2013 disinvestment bills have been introduced in six states targeting Iran and in two states targeting Sudan. In some cases these bills reference a section in the *Comprehensive Iran Sanctions and Accountability and Divestment Act of 2010* providing that subject to certain procedures state governments may divest from companies involved in Iran's energy sector. In 2013, divestment bills have been introduced in six states targeting Iran and in two targeting Sudan. In 2005, the NFTC challenged an Illinois public pension fund divestment law and Federal District Court found in *NFTC v. Giannoulis* that the law violated the Foreign Commerce Clause of the Constitution. Although the decision does not constitute a national precedent, it reinforced the Federal courts' view of the limited role that states should play in sanctioning foreign governments.

The NFTC also opposes state and national preferential purchasing legislation for state procurement. The NFTC has written officials in Arizona and Maryland opposing "Buy America" bills and in Nebraska opposing a "Buy Nebraska" bill.

The NFTC monitors state legislation on a regular basis and will continue to oppose state sanctions bills and protectionist legislation.

For more information, contact Dan O'Flaherty at [doflaherty@nftc.org](mailto:doflaherty@nftc.org).

# *International Trade & Export Finance*

## **President Obama Announces the Launch of a U.S.-EU Trade and Investment Agreement Negotiation in the State of the Union**

In his February 2012 State of the Union Address, President Obama announced that the United States and the EU will embark on a historic negotiation of a transatlantic trade and investment agreement. His announcement reflected the release one day earlier of the final report of the U.S.-EU High Level Working Group for Jobs and Growth, which “recommend[ed] to Leaders that each side initiate as soon as possible the formal domestic procedures necessary to launch negotiations on a comprehensive trade and investment agreement.”

The preliminary report of this working group, issued in June 2012, laid out an internal process of review on the feasibility and likely success of launching a full scale effort to deepen trade and investment. Since that time, several technical SPS confidence building measures were put on the table to test the commitment of both sides to work through complex regulatory approaches that separate the U.S. and EU models of regulation. These proposed measures, such as the EU allowing the use of lactic acid in preparing U.S. beef carcasses for export to the EU and finding a way to allow the export of live hogs for breeding purposes from the United States to the EU within the framework of EU livestock disease prevention regulations are emblematic of the gap between political will to deepen world’s largest economic relationship, accounting for half of global economic output and nearly one trillion dollars in goods and services, and the deeply entrenched bureaucratic and regulatory hurdles that will have to be overcome to make progress. Both of these issues were solved in the run up to the HLWG recommendation, and new EU rules went into effect on February 25.

The NFTC and the U.S. business community have strongly advocated for the launch of negotiations, and call on the highest level of political leadership to streamline regulations, remove tariffs and open our respective markets to jumpstart the global economy. Increasingly, despite entrenched ways of dealing with each other, both the United States and the EU find more common ground than not in dealing with emerging economies and third countries. If successful, a U.S.-EU agreement would be a powerful balance to the rise of China, and offer other countries an alternative model for trade and investment liberalization.

On the U.S. side, the next step is an imminent official notification to Congress under lapsed Trade Promotion Authority protocols of the President’s intention to negotiate an agreement with the EU. That starts a 90 day clock for Congressional consultation before negotiations can take place. As we gear up for this effort, NFTC President Bill Reinsch and Chuck Dittrich, Vice President for Regional Trade Initiatives, would like to learn more about your company’s priorities in such a negotiation and determine how NFTC can best serve your objectives. Please contact them at [cdittrich@nftc.org](mailto:cdittrich@nftc.org) or [breinsch@nftc.org](mailto:breinsch@nftc.org) to share your views.

Additionally, the NFTC is a partner association in the recent formation of the U.S. Business Coalition for Transatlantic Trade (BCCT), co-chaired by Amway, Chrysler, Citi, Dow, FedEx, Ford, GE, IBM, Intel, Johnson & Johnson, JP Morgan Chase, Lilly, MetLife and UPS. The coalition is open to all U.S. companies and associations supporting the mission of promoting growth, jobs and competitiveness on both sides of the Atlantic through an ambitious, comprehensive and high-standard trade and investment agreement between the United States and the EU. We encourage you to join the coalition and sign up for specific working groups. You can do this by visiting [www.transatlantictrade.net](http://www.transatlantictrade.net).

## *News for Our Members*

### **U.S.-Middle East Free Trade Coalition Hosts USTR/Department of Commerce for Discussion on Middle East Standards Issues**

In January, the U.S.-Middle East Free Trade Coalition met with Jennifer Stradtman, Director of Technical Barriers to Trade, and Jason Buntin, Director of Europe and Middle East Affairs, of the Office of the U.S. Trade Representative; Naomi Wiegler, Office of the Middle East at U.S. Department of Commerce; and Megan McMillan, Attorney Advisor for Commercial Law Development Program at USDOC, to discuss a U.S. government (USG) inter-agency group effort to its work with standards groups in the MENA region to organize a regional conference on good regulatory practices and transparency, including a discussion of how to work together on standards, conformance and technical regulations so that they do not serve as non-tariff trade barriers.

U.S. officials would like input from U.S. companies on areas of interest in the various markets of the region, such as:

- 1) Technical Regulations: What problematic mandatory technical regulations are your companies facing in the Middle East? (Examples could be regulations that are not developed in an open and transparent process so that industry input can be taken into account, regulations that discriminate against U.S. suppliers and goods, regulations that incorporate EU regional standards that U.S. suppliers cannot meet, confusing/costly/burdensome regulations that are not in line with relevant international standards, a bureaucracy that does not clearly understand how to implement standards policy, etc.)
- 2) Standards: Are there problematic voluntary standards your companies must meet in the Middle East? Does the standards development process exclude U.S. interests?
- 3) Conformity Assessment: Are there problems with any of the conformity assessment programs that make getting U.S. goods into the market difficult? We have heard numerous complaints about various conformity assessment schemes, and would like to know more detail.
- 4) Key areas of standardization for new/emerging technologies: Is there interest in growth sectors (such as green buildings) or other upcoming technologies in which you see possibility for cooperation between the U.S. and Middle East region?

Please provide any input to Chuck Dittrich, NFTC Vice President for Regional Trade Initiatives, at [cdittrich@nftc.org](mailto:cdittrich@nftc.org). He can also answer any questions you may have or put you in touch directly with USG officials.

### **2013 World Trade Dinner Scheduled for, October 9th**

The NFTC Foundation's Annual World Trade Dinner and Award Ceremony will take place on Wednesday, October 9, 2013. The dinner is a black tie event and the venue is the elegant and historic Organization of American States, 17th Street & Constitution Avenue, NW, Washington, DC. Please save the date and plan to attend!

The World Trade Dinner is a popular event for senior corporate and public officials and foreign dignitaries; a night featuring a formal address by our keynote speaker, presentation of our annual world trade award, and, of course, much socializing. Company sponsorship opportunities for the dinner are still available, as are a limited number of individual reservations. Contact the NFTC at 202-887-0278 or [nftcinformation@nftc.org](mailto:nftcinformation@nftc.org) for details.

## Rethinking Economic Sanctions: The Emperor Has No Clothes?

The financial bubble blowout of 2008 dealt a self-inflicted body blow to the U.S. economy. We avoided a collapse of the financial system by means of federal government intervention just in time. Many Americans do not realize the material calamities they were spared.

Over the past several years, Congress has enacted – and the Administration has multilaterally implemented – the equivalent of a financial system meltdown on the Islamic Republic of Iran and on Syria, by means of sanctions targeting the countries’ financial systems. We do so to compel Iran’s leaders to forego nuclear weapons and Syria’s to accept regime change.

While the sanctions are presumed to exempt humanitarian trade in food and medicine, in fact such commerce is severely constrained, because of executive orders blocking the financial transactions attendant to such trade.

As was the case with the similar “oil for food” sanctions placed on Iraq in the 1990s, it’s the ordinary citizens of both countries who bear the brunt of the economic carnage the sanctions produce. The members of the respective regimes, on the other hand, escape the effects, precisely because they are in power. In economies reduced to scarcity, leaders manage benefits to reward loyalty.

No informed observer – including the Congressional proponents of sanctions – believes that Iran’s leaders will forego their nuclear ambitions, whatever those might be, because of the sanctions-induced economic hardships occurring for ordinary Iranians. And the Assad regime has made clear its murderous indifference to sanctions.

While policy repetition despite repeated failure is scarcely limited to economic sanctions, it is curious that sanctions remain the first resort as U.S. response to the evils that bedevil other countries and are deemed a threat to U.S. national security or other vital interests. It is “curiouser” that indeed the sanctions process has become institutionalized in multiple government bureaucracies, raising yet more dead weight compliance/risk management costs for companies engaged in global commerce. It is more than curious that the counter-productive effects of sanctions on the citizens of the targeted countries are ignored. Imagine, in this regard, if the U.S. banking system had collapsed.

Because the devotion to sanctions as a politically convenient aspect of U.S. power projection is comprehensively bipartisan, there is scant prospect for a conversion experience. And yet, as the pace of technology-driven globalization and its discontents quickens, and with it, the opportunities for direct engagement, citizen to citizen, country to country, increase, perhaps Congress and the Administration can be persuaded to take a hard, empirical look at the actual costs and consequences of economic sanctions.

For more information, contact Richard Sawaya at [rsawaya@nftc.org](mailto:rsawaya@nftc.org).

## Miller & Chevalier and NFTC Announce Results of the Seventh Annual Tax Policy Forecast Survey

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“Worldwide American companies favor tax reform that will modernize the U.S. corporate tax rate and tax system to bring it in line with the rest of the world and are clearly concerned that their competitive situation will be further jeopardized by new U.S. taxes being imposed on them to offset pending budgetary problems. The focus on raising revenue from the business sector has business leaders worried about the future of tax reform,” said Catherine Schultz, NFTC’s Vice President for Tax Policy.

The 2013 Tax Policy Forecast Survey is located at: [http://www.nftc.org/default/Tax%20Policy/2013%20Tax%20Survey%20Report\\_Final.pdf](http://www.nftc.org/default/Tax%20Policy/2013%20Tax%20Survey%20Report_Final.pdf)

### **NFTC Tax Lunch Forum Welcomes Tom Barthold, Chief of Staff, Joint Committee on Taxation**

On Tuesday, February 5, Tom Barthold, Chief of Staff of the Joint Committee on Taxation, spoke to a packed room of the NFTC Tax Committee. Mr. Barthold discussed the current agenda of the Joint Committee on Taxation and the prospects for tax reform in 2013.

Mr. Barthold said that there are reasons to be both optimistic and pessimistic about the chances for tax reform in 2013. The reasons to be optimistic include the fact that House Ways and Means Committee Chairman Camp has released two discussion drafts so far. The first was released in October 2011 on the reform of the international tax provisions, and the second was a recently released discussion draft on financial products. Chairman Camp has expressed his intention to continue to work to draft a tax reform package in 2013. Another reason for possible optimism, according to Mr. Barthold, is that Senate Finance Committee Chairman Baucus is still moving forward on the assumption that tax reform is still a possibility in 2013. The final reason for optimism is the brief mention of tax reform in President Obama's inaugural address.

The reasons to be pessimistic about the chances for tax reform in 2013 include the mention of tax reform in the President's inaugural address and the mention that tax reform should include "fairness." Chairman Camp will work to be sure that the distributional tables provide for "fairness," but the President's vision for tax reform varies significantly from Chairman Camp's. The President and Democrats would like to raise additional revenue to help reduce the debt through tax reform. Chairman Camp would like to draft a revenue neutral tax reform package. Another reason for pessimism about the chances for tax reform in 2013 includes the Republican leadership hesitation on whether doing tax reform is a good political move. If the House adopts a comprehensive tax reform package, which includes many changes on the individual income tax side that are not politically popular, and the Senate does not act on that package, the House leadership believes that those difficult votes on tax reform could hurt them in the next election cycle. The current fiscal situation is difficult, and could provide little time to act on a tax reform package. The process of making each section of tax reform neutral within itself – corporate, individual, international, also adds a layer of complexity to the process that makes it harder to do.

Overall, there are difficult political decisions to be made on both sides before any tax reform package can even be considered in 2013.

Congress must deal with the sequester, continuing resolution and the long-term debt ceiling in the next few months, and that economic activity could take time away from the time needed to draft a tax reform package.

Mr. Barthold spent some time discussing how the JCT does its macroeconomic analysis, and answered questions on revenue scores, accounting issues and the confidentiality in which the Committee operates.

For more information, contact Catherine Schultz, [cschultz@nftc.org](mailto:cschultz@nftc.org).

## International Focus Turns to Tax Base Erosion and Profit Shifting Concerns

According to a November 20, 2012, OECD paper on Base Erosion and Profit Shifting (BEPS):

*“There is a growing perception that governments lose substantial corporate tax revenue because of planning aimed at eroding the taxable base and/or shifting profits to locations where they are subject to a more favourable tax treatment. Civil society and non-governmental organisations (NGOs) have been vocal in this respect, sometimes addressing very complex tax issues in a simplistic manner and pointing fingers at transfer pricing rules based on the arm’s length principle as the cause of these problems.”*

Beyond this perception based on a few high-profile cases, there is a more fundamental tax policy issue – most domestic tax laws have not kept pace with the new global economy, which could result in income being taxed at a low rate or not taxed anywhere. While international organizations and tax treaties historically have focused on minimizing double taxation, there are several projects and proposals currently underway in the OECD, the European Commission, the G20, and elsewhere, to address perceived double non-taxation, base erosion and profit shifting.

### OECD

At the G20 meeting in Mexico on June 18-19, 2012, the Leaders explicitly referred to “the need to prevent base erosion and profit shifting” in their final declaration. At the November 2012 meeting, the G20 stated “We also welcome the work that the OECD is undertaking into the problem of base erosion and profit shifting and look forward to a report about progress of the work at our next meeting.” Following that meeting, the U.K., Germany and France called for strengthening international tax standards and urged other countries to back efforts by the OECD to identify possible gaps in the tax law. The OECD has agreed to deliver a progress report to the G20 in early 2013 on actions necessary to tackle the issue of Base-Erosion and Profit-Shifting.

According to the OECD, corporate tax planning strategies aim to move profits to where they are taxed at lower rates and expenses to where they are relieved at higher rates. By using the OECD to look at base-erosion concerns, governments hope to establish a level playing field among countries while ensuring that domestic businesses are not disadvantaged compared to multinational corporations. Collaboration to address BEPS concerns is expected to enhance and support individual governments’ domestic policy efforts to protect their tax base while protecting multinational corporations from uncertainly or double taxation.

The OECD BEPS project will have an effect on other on-going OECD work, such as the Working Party 6 Intangibles Discussion Draft. When the last draft was released in June 2012, the BEPS project had not yet started. After the November 2012 public consultation, changes made as result of that consultation could be layered on to other changes that could be made because of the BEPS project. The next Intangibles Discussion Draft is due in 2013 could reflect these changes. Companies should pay attention to the OECD BEPS work, and should participate in any discussion projects put forward by the OECD in this area.

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## International Focus Turns to Tax Base Erosion and Profit Shifting Concerns

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### European Commission

On December 6, 2012, the European Commission presented an “Action Plan for a more effective EU response to tax evasion and avoidance” to “help Member States protect their tax bases and recapture billions of euros legitimately due.” The commission encouraged Member States to create tax haven blacklists, reinforce their tax treaties to prevent income from not being taxed, adopt general anti-abuse rules, reinvigorate the EU Code of Conduct on business taxation, and other measures.

### According to the Commission:

“If solutions to remove particular mismatches are not agreed and implemented in a timely and effective way, the Commission will, where appropriate, come forward with legislative proposals for action. It is also recommended that the Code of Conduct is extended in scope to include special tax regimes for wealthy individuals. Today’s Action Plan will serve as a robust EU contribution to the international debate on evasion and avoidance, particularly within the OECD and G20. As such, it will support the EU’s position in pushing for higher standards of tax good governance globally.”

### U.K.

In November 2012, a Parliament Common Public Accounts Committee held a hearing regarding U.K. taxes being paid by Google, Amazon and Starbucks. Although the Members of Parliament agreed that the companies were paying the amount of tax legally owed to the U.K., they criticized their legal tax planning as immoral. According to the Committee report, “we were not convinced that their actions, in using the letter of the tax laws both nationally and internationally to immorally minimize their tax obligations, are defensible. They all accepted that the perceived ethical behavior of corporations could affect consumer behavior.”

Companies are being criticized in the United States and abroad for following the laws enacted by the very governments that are calling them “immoral.” The U.K. hearings followed very closely along the lines of the U.S. Senate Permanent Subcommittee on Investigation hearing in 2012, with the same moral vs. legal overtones.

Prime Minister David Cameron told a business audience, “We do need a debate in this country, not only what is against the law—that’s tax evasion, that is against the law, that’s illegal and if you do that HMRC will come down on you like a ton of bricks—but what is unacceptable in terms of really aggressive tax avoidance.” He added, “I’m not asking people to pay massive rates of tax. We’ve got a low top rate of corporate tax now; we are a fair tax country. But I think it’s fair then to say to business, you know, we’re playing fair by you – you’ve got to play fair by us.” Mr. Cameron noted that he will make tax evasion and avoidance a top priority while he is chair of the G8 in 2013.

The U.K. has floated a number of ideas about how the U.K. tax system could be changed, through international consensus or Parliamentary action. These ideas include:

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### **International Focus Turns to Tax Base Erosion and Profit Shifting Concerns**

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- Requiring companies to publish how their taxable and accounting profits are linked;
- Requiring multinational corporations to disclose all of their cross-border transactions with related parties, for example, listing the royalties and management fees they pay to each jurisdiction;
- Setting a maximum royalty and management fee, and disallowing them as a deduction if they are disproportionate to profits, for example, via the ability-to-pay test so that such payments do not wipe out U.K. profits;
- Further scope for disallowance of foreign interest payments to related parties;
- Disallowance of intra-group payments unless they go directly to the country where the relevant value was generated, potentially with automatic disallowance of payments to tax havens; and
- Adopt a narrowly-drawn GAAR embodying a general avoidance principle in U.K. law.

#### **Australia**

The U.K. is not alone. Australia recently announced the formation of a special reference group on multinational corporate taxation. The group is made up of tax professionals, business representatives, academics and the community sector and is the Treasury's first step in the examination of multinational tax minimization strategies and its risks to the sustainability of Australia's corporate tax base. Assistant Treasurer David Bradbury said that the way companies do business is changing and Australia needs to ensure that international tax systems keep pace.

Australia has also focused on multinational companies who they think are not paying adequate taxes in Australia relative to the amount of business being conducted in the country.

#### **Conclusion**

The international drum beat of base erosion and profit shifting will continue, and will focus on successful U.S. companies. As more governments face difficult fiscal situations, they will become more aggressive in adopting tax rules that could hamper the competitiveness of worldwide American companies. The OECD BEPS Project and European Commission's "fight against tax avoidance and tax evasion" is not to be taken lightly. As the U.S. budget and possible tax reform projects move forward, we expect the focus on base erosion and profit shifting will grow stronger in the United States as well.

For more information, contact Catherine Schultz, [cschultz@nftc.org](mailto:cschultz@nftc.org).

**This issue of Council Highlights brought to you  
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