



June 25, 2015

The Honorable Jacob J. Lew
Secretary of the Treasury
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Lew,

The undersigned organizations are writing to highlight significant concerns with the direction of the OECD/G-20 BEPS project. US business has been constructively engaged in the BEPS project submitting comments, participating in public consultations, consulting with the US Treasury, the Congress, other governments, and the OECD. This effort has been directed at ensuring that the BEPS outcomes are appropriately targeted to genuine BEPS concerns and such outcomes are administrable by business and governments. At this stage we are concerned that the emerging outcomes are not sufficiently targeted, and will result in increased double taxation, complexity, costs and reduced cross-border trade and investment. In order to improve the outcome, we believe it is important that the US Treasury continue to advocate strongly for clear, detailed agreement on international tax rules that are consistent with the initial goal of the BEPS project; that is, to “provide countries with domestic and international instruments that will better align rights to tax with economic activity.”

A high level agreement on a general principle is inconsistent with the recent statement by the G-7 supporting “concrete and feasible” BEPS outcomes. Even though the BEPS process is supposedly nearing a conclusion the documents are still non-consensus documents. The non-consensus nature of the documents highlights the continuing disagreement on what it means to align taxation with value creation. Some argue this means countries should be able to tax a “fair share” or tax income “where it is earned”, without defining these terms. In the absence of a detailed consensus, the emerging documents create the potential for increased double taxation which will be both costly for US business and result in a relative increase in foreign tax credits for US companies the cost of which the US Treasury will ultimately bear.

Currently, the proposed changes to the international tax standards are lacking in clarity and will permit countries to define their taxing jurisdiction as they wish without regard to the functions, assets and risks that take place in that country. Such an approach will allow tax auditors a great deal of flexibility in defining whether a taxpayer is subject to tax within a particular jurisdiction and if so how much income is subject to tax.

Throughout the BEPS process, US business has been pressing for clarity. The lack of clarity and threat of double taxation will create uncertainty which will have a negative impact on global trade and investment. The lack of clarity persists throughout the action items including, for example, interest deductibility limitations, modifications to the permanent establishment rules, subjective rules limiting treaty benefits, ambiguity in the transfer pricing rules and transfer pricing documentation rules. A few of these are described in more detail below.¹

Concerning transfer pricing, the OECD has reiterated its support for the arm's length standard ("ALS"). The OECD proposals will increase the difficulty of relying on third party comparables, indirectly promoting the use of the profit split method (finalization of which has been deferred because consensus cannot be reached). Many of the transfer pricing proposals reflect fundamental differences in opinions between countries over the ALS and its continuing viability. Special measures that go beyond the arm's length standard have been suggested, but it is not clear where such measures are going. The recent activity of the European Commission defining a single price for a "prudent independent market operator" throws doubt on the ability to reach a lasting consensus. We are also concerned about the scope and use of transfer pricing documentation. In particular, the information required in the master file is unclear, overbroad, and will be costly to provide. The master file is proposed to be filed locally and, therefore, the treaty safeguards that apply to the country-by-country report would not apply to the master file making this information less secure. It also remains unclear how countries will be prevented from using sensitive, proprietary information inappropriately.

The permanent establishment line is supposed to define the agreed upon taxing jurisdiction between two countries. If the line is unclear how can a country know when it is ceding taxing jurisdiction to the other country? If the line is unclear, and therefore essentially un-agreed, dispute resolution will be impossible. If the permanent establishment line is acceptable to a country, then the fact that a company decides to stay below that line should not raise any policy issues for that country. The UK's diverted profits tax is a perversion of this logic. The UK objects because companies have stayed under the agreed upon permanent establishment line. If the UK is dissatisfied with the standard then its remedy should be to renegotiate the UK treaties, not adopt a domestic law that abrogates treaty obligations.

Lack of clarity will result in a significant increase in controversies. At best, controversies will be resolved through dispute resolution proceedings that can be expensive and create significant uncertainty. At worst, disputes will not be resolved and earnings will be subject to double tax, significantly reducing after-tax return on investment. Under either scenario, the effect will be to burden and reduce cross-border trade and investment.

Disputes are costly and unproductive. In addition to the possibility of double taxation, business must take into account the possibility of disputes and the projected costs of those disputes in determining whether to make an investment. Thus, effective dispute resolution is an essential part of a positive investment environment. Business has, therefore, been advocating strongly

¹ BIAAC has prepared a paper summarizing business concerns with respect to all of the Action Items. This document is attached for further reference.

for improved dispute resolution including mandatory binding arbitration. Although clear guidance is the best dispute resolution tool, in its absence improved dispute resolution is critical. The G-7 strongly supports mandatory binding arbitration. Nevertheless, many countries engaged in the BEPS process are unwilling to accept mandatory binding arbitration.

Multinational businesses are prepared to comply with revised tax rules that may be adopted. It is, however, important that businesses understand their tax obligations and that there be an expeditious method of achieving certainty when disputes arise.

The US business community remains willing to work with the Treasury and other governments to achieve appropriate results on the OECD/G-20 BEPS project in light of the original intent of the project.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "W. A. Reinsch". The signature is fluid and cursive, with a large initial "W" and "A".

William A. Reinsch
President
National Foreign Trade Council

A handwritten signature in black ink, appearing to read "Mark E. Nebergall". The signature is cursive and somewhat stylized, with a large "M" and "N".

Mark E. Nebergall
President
Software Finance & Tax Executives Council

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is cursive and somewhat stylized, with a large "P" and "R".

Peter Robinson
CEO and President
United States Council for International Business (USCIB)