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Statement for the Record

of Dorothy Coleman

Vice President, Tax & Domestic Economic Policy
National Association of Manufacturers

For the Hearing of the Senate Finance Committee

on “International Tax: OECD BEPS & EU State Aid”

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Chairman Hatch, Ranking Member Wyden and members of the committee, thank you for the opportunity to testify today about the Base Erosion and Profit Shifting (BEPS) project spearheaded by the G-20 and the Organisation for Economic Cooperation and Development (OECD). I appreciate the chance to highlight on behalf of the National Association of Manufacturers (NAM) our concerns about some of the recommendations in the BEPS project that would impose substantial and unnecessary compliance costs on companies and, in some cases, force disclosure of sensitive, confidential U.S. taxpayer information. These recommendations would create a new set of challenges for manufacturers and stand to harm our competitiveness in an already difficult global economic environment.

The NAM is the nation’s largest industrial association and voice for more than 12 million women and men who make things in America. Manufacturing in the United States supports more than 17 million jobs, and in 2014, U.S. manufacturing output reached a record of nearly \$2.1 trillion. It is the engine that drives the U.S. economy by creating jobs, opportunity and prosperity. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturing has the biggest multiplier effect of any industry and manufacturers in the United States perform more than three-quarters of all private-sector R&D in the nation – driving more innovation than any other sector.

Manufacturers know full well how critically important it is for U.S. companies to be able to invest and compete effectively in the global marketplace. Indeed, 95 percent of the world’s customers are outside the United States. Investment by U.S. global companies has paid off for the U.S. economy: U.S. global companies employ 35.2 million workers and are responsible for 20 percent of total U.S. private industry employment¹. Moreover, U.S. companies that invest abroad export more, spend more on U.S. research and development performed by U.S. workers and pay their workers more on average than other companies.

Background

In 2012, representatives from the G-20 asked the OECD to develop a comprehensive approach to address aggressive global tax planning that resulted in inappropriate corporate tax avoidance. The OECD released its final recommendations in October 2015 and the recommendations were approved by the G-20 Finance Ministers on October 9, 2015, and by the G-20 Leaders on November 16, 2015.

¹ Bureau of Economic Analysis, August 2014.

In July 2013, the OECD released the G20/OECD Base Erosion and Profit Shifting (“BEPS”) Action Plan, which provided for 15 actions designed to reach consensus among members for recommended changes in tax policy. The BEPS Action Plan included Action 13, “Re-examine Transfer Pricing Documentation,” to develop rules to require multinational companies (MNEs) “to provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.”

On October 5, 2015, the OECD released its final report on Action 13 (along with reports on all 15 BEPS Actions). The OECD identified Action 13 as one of the areas where all countries agreed to consistent implementation. The Action 13 report was virtually identical to an earlier draft (released in September 2015) and previously released implementation guidance (released in February and June 2015). Action 13 adopts a three-tiered approach to achieve transfer pricing documentation: a master file containing information to provide a complete picture of the MNE’s global operations, including an organizational chart, consolidated financial statements, and analyses of profit drivers, supply chains, intangibles, and financing; a local file providing more detailed information relating to specific intercompany transactions of the MNE group impacting the specific tax jurisdiction; and a country-by-country report (CbCR) containing aggregated financial and tax data by tax jurisdiction. According to the OECD, the two documents that provide group-wide information – master file and CbCR – are intended to provide governments with information necessary to conduct high-level transfer pricing risk assessment.

The CbCR will only be required of multinational groups with annual consolidated group revenue of at least 750 million Euro in the immediately preceding year. The first CbCRs would be filed for tax years beginning in 2016 with the tax residence country of the parent of the MNE group (e.g., the United States for U.S.MNEs). Other countries could obtain CbCRs through exchange of information processes under bilateral treaties and tax information exchange agreements.

In order to obtain CbCRs, countries must agree to certain conditions related to confidentiality, consistency and appropriate use of the information. In this document, appropriate use is defined as “assessing high level transfer pricing risk” and “other BEPS-related risks.” If the tax residence country of the parent company does not collect CbCRs, or has not agreed to provide CbCRs via information exchange, then other countries would be authorized to collect CbCRs directly from subsidiaries in their jurisdictions.

Action 13 includes model legislative language for adopting CbCR requirements and model competent authority agreements for use by governments to implement CbCR exchange. It also provides a detailed framework for confidentiality and data safeguards that need to be in place for countries to receive the CbCR through information exchange.

Under Action 13, the master file and the local file would be collected directly by each local jurisdiction in which the MNE conducts business. Confidentiality, consistency, and appropriate use standards that apply to the CbCR do not explicitly apply to the master file or local file, although participating countries have agreed that the confidentiality and consistent use standards associated with transfer pricing documentation generally “should be taken into account.”

Potential Impact of the CbCR and Master File Requirements

The CbCRs on a company's financial and tax data that companies file with their own country could impose a significant, additional administrative burden on companies. These reports however, would be submitted to foreign countries under bilateral treaties and information exchange agreements and thus have protections to ensure confidentiality, consistency and appropriate use of the information by foreign countries.

Unfortunately, this would not be the case with the master file, which could be required directly by any country where a company does business. The master file asks for extremely sensitive information unrelated to actual taxpayer activities in the country requesting the information. In this way, the master file is similar to the CbCR. However, unlike the CbCR, the master file information does not have the confidentiality protections of the information exchange process and is not subject to any confidentiality, consistency, or appropriate use conditions beyond those that may apply locally.

If a country fails to abide by these conditions with respect to the CbCR, Treasury has stated its intent to suspend CbCR information exchange. To the extent this threat is effective in ensuring that other countries maintain confidentiality of CbCRs of U.S. MNEs, it is irrelevant to the master file, which is arguably more intrusive. With respect to maintaining confidentiality of the master file, U.S. MNEs are at the mercy of foreign governments.

Manufacturers are concerned that the master file requirement would force them to disclose an unprecedented amount of proprietary information about their global operations to foreign governments. The master file would include organizational charts, consolidated financial statements and analyses of profit drivers, supply chains, intangibles, and financing. In short, it would provide a comprehensive plan that includes every aspect of a company's worldwide business.

While a small amount of the required information in the master file may be contained in public filings with the Securities and Exchange Commission (SEC), most of the required information is descriptive in nature and even publicly traded companies will need substantial input from across the business enterprise to recompose the data. Information about global supply chains, for example, can be considered sensitive commercial information that, if disclosed, would be of high value to the MNE's market competitors. For privately held companies, the requirements to include a global organizational chart and consolidated financial statements would constitute an unprecedented level of disclosure to foreign governments. Disclosure, misappropriation, or inappropriate use of this information could be extremely detrimental to the ability of U.S. manufacturers to create value in the United States and global marketplaces.

The fact that taxpayers may have some level of control over what information is included in the master file does little to address confidentiality concerns since it is unclear how much flexibility taxpayers have to exclude sensitive information.

In the Action 13 report, the OECD recommends taxpayers use a "prudent business judgment" standard to determine the "appropriate level of detail" to be included in the master file. Information that is "important," however, cannot be omitted. The OECD considers information to be important "if its omission would affect the reliability of the transfer pricing outcomes."

Manufacturers believe that this standard provides little comfort for taxpayers that want to omit sensitive information and avoid penalties for failing to comply with the filing requirements. There is, at best, a questionable nexus between the master file information and transfer pricing outcomes within a particular country under the arm's length standard, since that is the purpose of the local file. For example, a taxpayer could reasonably take the position that omitting a global organizational chart or consolidated financial statements would not "affect the reliability of the transfer pricing outcomes" within any particular jurisdiction, yet be concerned that such omissions would constitute non-compliance.

Addressing Confidentiality Concerns

Even though the BEPS recommendations were finalized this fall, the NAM strongly believes that taxpayer confidentiality concerns can and should be addressed during the BEPS implementation phase. Specifically, we believe that Treasury should link master file information to its agreements to provide the CbCR to other countries through information exchange. Thus, we urge Congress to ensure that Treasury enters into agreements with foreign countries specifying that:

- Treasury agrees to provide CbCRs for U.S. MNEs only if U.S. MNEs or their subsidiaries are not required to provide master file information to the foreign country;
- The foreign country agrees that it will not collect CbCRs from U.S. MNEs or their subsidiaries; and
- Treasury agrees to provide to the foreign country only the master file information that a U.S. MNE chooses to file with its CbCR in order to provide context for its CbCR data.

Conclusion

NAM members recognize the crucial role tax policy plays in the ability of businesses around the world to compete and grow, and we support tax rules that are pro-growth, pro-competitiveness, fair, clear, and predictable. In contrast, the proposed information sharing and disclosure rules included in the BEPS recommendations described above would impose new and unnecessary compliance costs on companies and, in some cases, force disclosure of proprietary business information, creating a new set of challenges for global companies.

In particular, the master file requirement would provide foreign governments with a comprehensive roadmap detailing every aspect of a company's worldwide business. Many manufacturers in the United States with operations overseas would have to comply with this provision, which represents an unacceptable and unprecedented expansion of required proprietary data sharing and a very real competitive threat for some of America's most innovative firms.

Manufacturers are particularly concerned about the lack of safeguards to protect the confidentiality of this very sensitive information in the master file. Unlike the CbCR, the master file is not provided through information exchange and is not subject to any confidentiality, consistency, or appropriate use conditions beyond those that may apply in a local jurisdiction. If a country fails to meet these conditions on CbCRs, Treasury can suspend the information exchange. Unfortunately, this option does not apply to the master file information, which is even more intrusive.

On a positive note, the United States has not announced plans to collect the master file. We urge Treasury officials to go one step further and only provide CbCRs to foreign countries that do not require a master file. At a company's option, Treasury can provide any master file information the company chooses to provide as context for its CbCR data that is provided through information exchange.

When it comes to tax policy, manufacturers believe a fair and transparent tax climate in the United States—including competitive business tax rates and modern international tax rules—will boost standards of living and economic growth worldwide. At the same time, an appropriate balance needs to be struck between transparency and confidentiality of the proprietary information that enables companies to compete and prosper in a global economy.