



October 9, 2012

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Financing for Development Office
U.N. Dept. of Economic and Social Affairs
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Dear Michael,

This letter is in response to the release on October 2, 2012, of a new draft of the UN Transfer Pricing Manual (“UNTPM”). The United States Council for International Business¹ (“USCIB”) recognizes the importance of this work to both developing countries and the business community operating in those countries. USCIB strongly supports your efforts to provide a manual based on the OECD Transfer Pricing Guidelines² that gives targeted advice to developing countries at their relevant stage of capacity development.

Comments on Process

USCIB recognizes the tremendous efforts of the drafters of the UNTPM to produce a polished and useful document. The recently released version of the manual is clearly a product of hard and thoughtful work and the Subcommittee on Transfer Pricing – Practical Issues (hereinafter the “Subcommittee”) is to be applauded both for their efforts and their accomplishments. Location savings and the treatment of secret comparables are two areas where we believe that significant improvements have been made. Nevertheless, we believe that finalizing the manual at this point is premature and recommend that the UN Committee of Experts on International Cooperation in Tax Matters (hereinafter the “Committee”) schedule a formal public consultation on the UNTPM.

Although the Subcommittee working on the draft has been engaged in this project for some time, it is our understanding that the members of the Committee who will be required to approve the UNTPM only received the draft (containing 330 pages) when it was posted to the website on October 2, 2012. If Committee members are expected to evaluate the manual before approving it, they simply do not have enough time. Additionally, the purpose of transfer pricing, ultimately, is the development of a system of principles, acceptable to all or, at least, most jurisdictions that avoid double taxation. Consequently, the manual ought to reflect a consensus

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

² OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter OECD Transfer Pricing Guidelines or OECD TPG).

on principles-based standards. Achieving consensus requires a formal process in which all stakeholders have an avenue for making sure their concerns are heard by the appropriate parties. Thus, the formal process ought to include a formal public consultation that includes the Committee, the Subcommittee, representatives of business, and any other interested parties. Such a process ensures that all parties have an opportunity to express their views on important issues in a manner that ensures the parties charged with making a decision on the final content are aware of all relevant issues.

There has simply not been sufficient opportunity to review the most recent draft of the manual and we seriously doubt that all relevant issues have been aired. Although USCIB is submitting comments on specific issues below, we have certainly not had enough time to review the manual in detail and develop comprehensive comments. Our comments are limited to a few issues that we have noted and think are of substantial importance.³ However, we do not claim, nor do we think it likely, that we have identified all the important issues raised by the most recent draft of the manual.

Comments on the Transfer Pricing Manual

Recognition of actual transactions undertaken. Taxpayer's transactions should be respected, absent exceptional circumstances. Restructuring legitimate business transactions is arbitrary and significantly increases the risk of double taxation. Paragraphs 5.3.1.2.1, 5.4.10.1, and 5.4.10.2 of the draft manual deal with this issue. These paragraphs are very similar to the OECD language on disregarding the transaction, with one extremely important difference. The OECD TPGs⁴ provide "there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by the taxpayer in entering into a controlled transaction." This language is generally seen as a limitation, that is, if neither of these circumstances existed it would not be appropriate to disregard the controlled transaction. Elimination of this language could be interpreted as a broadening of the ability to disregard the transaction as structured and therefore the language quoted above ought to be added to paragraphs 5.3.1.2.1 and 5.4.10.1 of the manual.

Intangibles. The Subcommittee concluded that they did not have time to adequately address issues relating to intangibles and therefore deferred work on that topic to the next revision of the manual.⁵ Nevertheless, the manual seems to reach conclusions on a number of key intangible transfer pricing issues; this is premature. In USCIB's view, paragraph 5.3.2.2.13 should be deleted. The issue of ownership of marketing intangibles is one that requires careful analysis and should be dealt with in the context of the overall review of intangibles. Similarly, paragraph 6.1.2.7 concludes that the party that "developed the intangibles should be able to obtain benefits from those intangibles". Identifying the developer of an intangible is not necessarily straightforward. Is the developer the person who funds the development, the person actually performing the functions, a participant in a cost contribution arrangement? This is a complex issue that ought to be considered in depth when the topic of intangibles is taken up. Therefore, the final sentence of section 6.1.2.7 ought to be deleted. Paragraph 6.3.17.3 provides that "this allocation is based on relative R&D expenses which are assumed to be a reliable key to measure the relative value of each company's intangible property." Again, valuation issues are complex

³ We make no comments on Chapter 10 since "[i]t represents an outline of particular country administrative practices as described in some detail by representatives of those countries, and it was not considered feasible or appropriate to seek a consensus on how such country practices were described." Preface, UNTPM.

⁴ OECD TPGs paragraph 1.65.

⁵ UNTPM, Chapter 6, footnote 2.

and this conclusion ought not to be reached without a thorough analysis of the issues relating to intangible valuation. Thus, this sentence ought to be deleted.

Information requests. Chapter 8 covering Audits generally provides guidance that USCIB believes will be helpful to developing countries initiating transfer pricing audits. In the section on information requests, however, the manual recommends requesting one item that we believe many taxpayers may not be able to provide. Paragraph 8.6.9, item 12 provides: “Group global consolidated basis (sic) profit and loss statement and ratio of taxpayer’s sales towards group global sales for five years.” It is not clear precisely what this requires. If global consolidated profit is determined based on the company’s financial statements, then this information should be available for publicly traded companies. However, this number is unlikely to be useful for transfer pricing purposes since it does not bear any relationship to any particular transaction. As the manual points out in paragraph 8.6.6.2 the accurate review and assessment of financial results would be impossible without segmented profit and loss statements. This item needs to be either clarified or deleted.

Dispute resolution. USCIB believes that Chapter 9 contains a balanced discussion of dispute prevention, administrative remedies including APAs and MAP, arbitration and litigation. We have two concerns with the chapter. First, we believe that section 9.4.2 (Multilateral Agreements) ought to be deleted in its entirety. In our view, the only purpose of this section is to undercut the value of the OECD TPGs as the global standard in the area of transfer pricing. This is inconsistent with the mandate of the Subcommittee. The preface to the manual provides: “consistency with the OECD Transfer Guidelines has been sought, as provided for in the Subcommittee’s mandate and in accordance with the widespread reliance on those Guidelines by developing as well as developed countries.” As the manual recognizes in a number of places, global consistency of transfer pricing rules and interpretations promotes cross border trade and investment. Global consistency therefore promotes foreign direct investment, which benefits developing countries. This section of the manual potentially undercuts consistency, serves no other useful purpose and thus ought to be deleted.

The manual contains a number of statements concerning the global transfer pricing policies of MNEs. Generally, the statements concerning global transfer pricing policies recognize the usefulness of such policies. However, two paragraphs (9.3.1.6. and 2.4.9) seem to misconstrue the role of global transfer pricing policies. Paragraph 9.3.1.6 provides: “Many multinational enterprises apply transfer pricing policies to their intercompany transactions on a consistent basis globally, so the absence of national legislation may not encourage compliance by an MNE.” If the national legislation contains no rule, then it would neither encourage nor discourage compliance. However, since the MNE will apply its consistent global policy in any event, the absence of legislation does not, in this case, change the transfer pricing result. It would therefore be more accurate to say that the absence of legislation does not “discourage” compliance with the global transfer pricing policy.

Paragraph 2.4.9 provides:

In principle, designing, implementing and documenting an appropriate transfer pricing policy should not be viewed solely as a compliance issue for MNEs. The main goal should be to develop a consistent global policy which cannot be altered to exploit tax laws. A well developed and consistently applied transfer pricing policy should reduce an MNE’s risk of transfer pricing adjustments and the potential for double taxation, thereby increasing profitability by minimizing transfer pricing costs. Moreover, a global transfer pricing policy may be used as evidence in negotiations with tax authorities when transfer pricing disputes occur.

The main goal of MNEs in “designing, implementing and documenting an **appropriate** transfer pricing policy” probably is compliance. The main goal of governments in encouraging the adoption of such policies may be the development of a policy that “cannot be altered to exploit the tax laws”. MNEs want governments to respect their global policies. If governments want them to be unalterable, so that they cannot be used to exploit tax laws, then governments should have to respect global policies absent some clear abuse (in which case the policies would likely not be appropriate). Governments cannot require taxpayers to comply with their global policies, but feel free to reject prices computed under such policies merely to bring more revenue into their jurisdiction.

We appreciate the opportunity to provide these comments, which are a preliminary response to a complex set of documents. We hope to have an opportunity to work with the Committee of Tax Experts in the context of a public consultation on this important work.

Sincerely,



William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

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