U.S. Treasury Department Representatives Provide a Mixed Review of the BEPS Initiative

By Jared Walls

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News: During what had, until recently, been a relatively quiet month for the Organization for Economic Cooperation and Development's ("OECD") Base Erosion and Profit Shifting ("BEPS") initiative, representatives of the U.S. Treasury Department have managed to bring BEPS back into focus. In an interview with Kevin Bell of Bloomberg BNA—published on April 16 (*23 Transfer Pricing Report 1579*)—Robert Stack (Deputy Assistant Secretary for International Affairs) and Michael McDonald (Financial Economist in the Office of Tax Analysis) provided a qualified, yet generally affirmative assessment of the OECD's Country-by-Country ("CbC") reporting initiative. On April 16, however, Stack presented at the *15th Annual Tax Planning Strategies – U.S. and Europe* conference in Munich, where he offered a less enthusiastic assessment of the broader tenor of the BEPS initiative.

Views: In February, Brian Jenn, an Attorney-Adviser in the Treasury Office of International Tax Counsel, announced with little fanfare that U.S. multinationals would be required to comply with the OECD's CbC reporting requirements for fiscal years ending on or after December 31, 2016. The comments by Stack and McDonald provide some additional insight into the process and reveal a certain level of support and optimism for the CbC reporting template within the U.S. Treasury Department.

One of the primary concerns that taxpayers and other stakeholders expressed in public comments to the OECD on the initial CbC draft report was that widespread sharing of sensitive company information could lead to data breaches—both unintentional and intentional. In addition, stakeholders questioned whether governments would limit their use of the CbC reporting template to its stated purpose as a risk assessment tool. Stack responded to these concerns by indicating first that he believes that countries understand their responsibility to maintain confidentiality and use the information for its intended purpose. He went on to emphasize that the U.S. "will be diligent to stop exchanging information with countries that don't do what they said they would do. To the extent countries misuse the information, or use it to do formulary apportionment, [the Internal Revenue Service] will have the right to stop sending the information."[1]

Despite Stack's support for the CbC initiative, he took a decidedly less positive tone at the *15th Annual Tax Planning Strategies – U.S. and Europe* conference. In response to the assertion by a co-panelist that the BEPS initiative may not be sufficient to dissuade U.S. companies from engaging in aggressive tax planning, Stack replied that—in addition to being a political mistake—the focus of the BEPS project on U.S. multinationals is undeserved and has been a great source of frustration. He continued by intimating that BEPS Action 7 could facilitate further erosion of the U.S. tax base by encouraging foreign tax authorities to assert that U.S. multinationals have permanent establishments in their respective jurisdictions.

[1] Bloomberg BNA 23 Transfer Pricing Report 1579.

While the international community has largely rallied around the objective of the OECD's BEPS initiative, Stack's comments should serve as a reminder that the BEPS project will create "winners" and "losers," and that not all of the losers will be low (or no) tax jurisdictions. The transition from a theoretical framework to a functional post-BEPS world will require an extraordinary level of coordination among tax authorities to develop a common understanding and interpretation of the BEPS recommendations.

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