

# Agenda

1. BEPS Action 7: Discussion Draft on Attribution of Profits to PEs
2. BEPS Actions 14 & 15: Dispute Resolution and the Multilateral Instrument
3. BEPS Actions 8-10: Hard to Value Intangibles and Profit Splits
4. BEPS Action 13: Country-by-Country Reporting
5. BEPS 2.0: Implications for U.S. tax reform?

2008

2010



2008

2010

- Functionally separate entity approach
- 2008 Report: [T]he authorised OECD approach is that the profits to be attributed to a PE are the profits that the PE would have earned at arm's length if it were a legally distinct and separate enterprise performing the same or similar functions under the same or similar conditions, determined by applying the arm's length principle under Article 7(2).
- 2010 Report: The authorised OECD approach is that the profits to be attributed to a PE are the profits that the PE would have earned at arm's length, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

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- 2016 Discussion Draft
  - Guidance via examples with numbers and specific facts on people functions
  - Gaps in AOA analysis
  - Article 9 vs Article 7 ordering
  - Based on 2010 Article 7 – “full AOA” vs. more widely applicable “partial AOA”
- 2017 Discussion Draft
  - Guidance via high-level general principles
  - No numbers and no real detail on how to attribute profits
  - Gaps in AOA analysis

- Where do we now stand on guidance on attribution of profits to a PE?
- Implications for adoption of revised PE thresholds by countries?
- Application of AOA under US tax treaty network?
- Implications for competent authority cases?
- Planning strategies for multinational companies

# OECD BEPS: Actions 14 & 15

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## BEPS Actions 14 & 15: MAP Process and MLI

- Multilateral Instrument (MLI)
  - Developed to quickly implement BEPS treaty-related actions
  - Action 6 Treaty Abuse – preamble, LOB or principal purpose test (PPT)\*
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# Mutual Agreement Procedure (Action 14)

- A BEPS “minimum standard”
- Provides for best practices to make dispute resolution mechanisms, including MAP, more effective
- Also calls for peer review
  - Eight batches from December 2016 to April 2019
  - U.S. in the first batch, report issued in September
- Results of U.S. peer review report
- Current U.S. MAP Process update
- U.S. Japan/Korea Developments

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## How much consensus or divergence will there be among tax authorities about the interpretive issues?

### Addressing hindsight bias

- HTVI approach creates a presumption, not a rule
- Taxpayer should be able to rebut presumption – how?

216.0- ) Use of contingency clauses in de HTV approach

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### **When is a TPSM likely to be the most appropriate method?**

- Strengths and weaknesses of TPSM
- Nature of transaction
  - Unique and valuable contributions by each party
  - Highly integrated business operations
  - Shared assumption of economically significant risks, separate assumption of closely related risks

### **Guidance for application of a TPSM**

- Approaches to splitting profits – contribution analysis, residual analysis
- Determining the profits to be split – measures of profit, anticipated vs actual profit
- Splitting the profits

### **Ten examples illustrating the TPSM principles**

### **Three questions posed to commentators from the OECD**



### **How will tax authorities interpret the profit split guidance?**

- What is meant by unique and valuable contributions, highly integrated operations?

### **Selection of the most appropriate method – *relative* reliability important**

### **Relationship with other guidance from BEPS action plan**

- DEMPE
- Control over risks
- Role of contracts
- Attribution of profit to PE

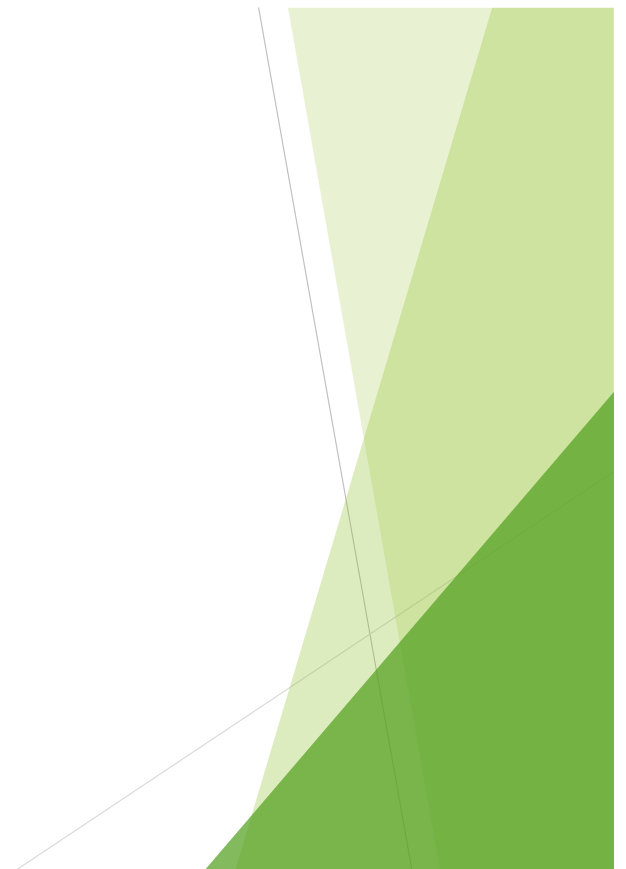


# OECD BEPS – CbC Update

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Potential tax risk indicator	What this could mean	How else it might be explained
A group has mobile activities located in jurisdictions where the group pays a lower rate or level of tax	A group may have shifted mobile activities to a jurisdiction to ss	



# OECD CbC: Guidance on Appropriate Use

- CbC reports only to be used for:
  - high level transfer pricing risk assessment
  - assessment of other base erosion and profit shifting related risks
  - economic and statistical analysis, where appropriate
- CbC reports not to be used:
  - As a “substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis”
  - “to propose transfer pricing adjustments based on a global formulary apportionment of income”
  - To “propose adjustments to the income of any taxpayer on the basis of an income allocation formula based on the data from the” CbC report
- Guidance: (1) as a defense; (2) to ensure appropriate use; (3) measures to restrict access/keep confidential (4) consequences for misuse

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## OECD and IRS CbC Web Resources

- OECD:
  - Compilation: <http://www.oecd.org/tax/beps/country-by-country-reporting.htm>
  - Handbook on Risk Assessment: <http://www.oecd.org/tax/beps/country-by-country-reporting-handbook-on-effective-tax-risk-assessment.pdf>
  - Guidance on Appropriate Use of CbC Info: <http://www.oecd.org/ctp/beps/beps-action-13-on-country-by-country-reporting-appropriate-use-of-information-in-CbC-reports.pdf>
- IRS:
  - Guidance: <https://www.irs.gov/businesses/international-businesses/country-by-country-reporting-guidance>
  - FAQs: <https://www.irs.gov/businesses/international-businesses/frequently-asked-questions-faqs->

# BEPS 2.0: Implications for U.S. Tax Reform

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