

Exchange of Information in the New Era of Multilateral Transfer Pricing Enforcement

by Kent P. Stackhouse, Donna McComber, and
Giulia Di Stefano

Reprinted from *Tax Notes International*, April 29, 2024, p. 661

Exchange of Information in the New Era of Multilateral Transfer Pricing Enforcement

by Kent P. Stackhouse, Donna McComber, and Giulia Di Stefano



Kent P. Stackhouse



Donna McComber



Giulia Di Stefano

Kent P. Stackhouse and Donna McComber are principals and Giulia Di Stefano is a senior in the international tax and transaction services practice at EY's National Tax Department in Washington.

In this article, the authors provide an overview of exchange of information programs commonly used by the IRS that are relevant to an audit in the United States and abroad, offer examples of taxpayer concerns with exchange of information, suggest approaches to manage potential implications, and identify future concerns.

The views expressed below are those of the authors and do not necessarily reflect the views of Ernst & Young LLP or any other member firm of the global EY organization. The information in this article is provided solely for the purpose of enhancing knowledge. It does not provide accounting, tax, or other professional advice.

Copyright 2024 EY LLP.
All rights reserved.

The IRS has signaled that taxpayers should expect to see multilateral transfer pricing enforcement activity increase in the future.¹ While this seems to be the natural consequence of OECD

initiatives and increased financial and tax transparency,² taxpayers should be familiarizing themselves with how information is exchanged

¹ See Kristen A. Parillo, "IRS Refining Its Transfer Pricing Approach," *Tax Notes Int'l*, June 27, 2022, p. 1696; Michael Rapoport, "IRS Seeks Better Targeting for Advance Pricing Agreement Program," *Daily Tax Report*, Nov. 30, 2022; EY, "IRS Officials Highlight Latest Transfer Pricing Developments," *Tax News Update* 2023-0951, May 25, 2023.

² The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes has 171 members and is the leading international body working on the implementation of global transparency and EOI standards. See OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, "Putting an End to Offshore Tax Evasion" (last updated Jan. 2024). Under the OECD EOI on request peer review process, the United States was rated largely compliant in both of its reviews. OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, "Compliance Ratings Following Peer Reviews Against the Standard of Exchange of Information on Request" (Nov. 2023).

among tax authorities.³ In many instances, information is exchanged without the taxpayer's knowledge. Therefore, it is as important as ever to take steps to manage potential inputs into the exchange of information (EOI) process and the impact of sensitive information in another tax authority's hands.

In addition, with \$58.6 billion of funding over a 10-year period⁴ to expand enforcement for taxpayers with complex tax filings and high-dollar noncompliance, pay for operations, improve taxpayer service, and update technology, the IRS dynamic will be modernized for the 21st century.⁵ The IRS stated that it plans to increase audit rates and other compliance treatments for large corporations and partnerships by using data analytics and pursuing noncompliance through a variety of mechanisms, including audit and non-audit treatment.⁶ The IRS also stated that it intends to "improve [its] ability to receive and use data from foreign jurisdictions."⁷ With increased audits, the IRS will have many volumes of taxpayer information on hand that may be requested by foreign tax authorities.

In this article we provide (1) an overview of certain EOI programs commonly used by the IRS that are relevant to audits both inside and outside the United States, (2) examples of taxpayer concerns with EOI, (3) possible approaches to manage potential implications from EOI, and (4) potential future EOI concerns.

Spontaneous EOI

Spontaneous EOI occurs when one tax authority unilaterally provides information that it

considers to be of potential interest to another tax authority, even though the other tax authority has not specifically requested it. Foreign-initiated spontaneous EOI is far more common than is U.S.-initiated spontaneous EOI. In the United States, a spontaneous EOI could originate when (1) an IRS examiner discovers information during an audit that may indicate noncompliance with a foreign exchange partner's tax laws or be potentially useful for tax purposes or (2) the IRS EOI team handles a foreign-initiated exchange and identifies potentially helpful supplemental information. The information exchanged may belong to someone other than the taxpayer at issue, such as nonresident aliens, U.S. citizens, domestic or foreign corporations, or other taxpayers.⁸

For U.S.-initiated spontaneous EOI, the IRS examiner would forward information to the IRS EOI analysts, who review it and determine whether it is potentially useful to the foreign tax authority.⁹ The IRS may decide a spontaneous EOI is warranted if officials see inconsistent treatment of a cross-border transaction. Thus, taxpayers should make sure they document and benchmark both sides of their cross-border transactions in a consistent manner. Likewise for foreign-initiated spontaneous EOI, an EOI analyst would forward the incoming information to the relevant IRS office for risk assessment.¹⁰

Template exchanges relating to certain tax rulings under the OECD's base erosion and profit-shifting project's action 5,¹¹ including unilateral advance pricing agreements or other transfer-pricing-related rulings, are also handled as spontaneous EOI.¹² The template serves as a tool with which the tax authority receiving the

³ Internal Revenue Manual 4.60.1 (Feb. 23, 2023); IRS Large Business and International Division International Practice Service Concept Unit, "Overview of Exchange of Information Programs" (Dec. 3, 2015).

⁴ The Inflation Reduction Act originally allocated \$80 billion to the IRS, but the Fiscal Responsibility Act of 2023 revoked \$1.4 billion in unobligated IRS funds from the IRA. In 2023, the White House agreed to reallocate an extra \$20 billion of IRS funding in appropriations funding between 2024 and 2025. See Doug Sword and Alexander Rifaat, "IRS to Lose \$21 Billion Under Debt Limit Deal," *Tax Notes Federal*, June 5, 2023, p. 1724. On January 7 House and Senate negotiators reached a budget deal accelerating the \$10 billion rescission of fiscal 2025 IRS funds into fiscal 2024. Letter from House Speaker Mike Johnson, R-La., to members of the House of Representatives (Jan. 7, 2024).

⁵ IRS, "IRS Inflation Reduction Act Strategic Operating Plan: FY 2023-2031" (Apr. 5, 2023).

⁶ *Id.* at 68.

⁷ *Id.* at 99.

⁸ IRM 4.60.1.3.1.

⁹ *Id.*

¹⁰ IRM 4.60.1.3.2. For large business U.S. taxpayers, the information is forwarded to the LB&I Cross Border Activities office unless the taxpayer is under audit, in which case the information is sent to the manager of the group conducting the audit.

¹¹ The template provides information such as taxpayer name, address, business activity, and taxpayer identification number; date of issuance; tax years covered; type of ruling; financial information relating to the entity and transaction; a summary of the issue covered by the ruling; reason for exchange with the recipient jurisdiction; and details of the entities in the recipient jurisdiction. OECD, "Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance — 2015 Final Report, Action 5" (Oct. 5, 2015).

¹² IRM 4.60.1.3.3.

template can determine whether to request a copy of the unilateral APA or ruling itself.¹³ According to the 2022 action 5 peer review report,¹⁴ of the 131 examined jurisdictions, 73 had implemented the standard OECD transparency framework. Notably, the United States did not receive any recommendations for improvement, and it provided information relating to 24 unilateral APAs or other unilateral transfer-pricing-related rulings (down from 61 in 2021) with 18 jurisdictions in 2022.¹⁵ In addition, 1,800 tax rulings were shared across all jurisdictions.¹⁶

The IRS is not required to inform a taxpayer of spontaneous EOI in either direction, although the IRS will share the BEPS action 5 template relating to any U.S. unilateral APA or ruling of the kind noted above with other tax authorities.

Automatic EOI

Automatic EOI (AEOI) is the IRS's most prominent EOI program. As its name suggests, AEOI is how a tax authority automatically provides information to another tax authority via an agreed obligation, without the need for a specific request. This occurs for three types of information: (1) country-by-country reports under competent authority agreements for BEPS action 13, (2) Foreign Account Tax Compliance Act financial account data exchanged between the IRS and the FATCA partner, and (3) information on certain U.S.-source fixed or determinable annual or periodic payments to foreign persons and foreign-source FDAP payments to U.S. persons (traditional automatic exchange).¹⁷ This

type of exchange allows for the forwarding of bulk taxpayer information from the source jurisdiction to the residence jurisdiction.

The information is routinely collected in the source jurisdiction, usually through reporting of the payments of the payer, but it also may include information on changes of residence, the purchase or disposition of immovable property, VAT refunds, financial accounts, and other information. The payer, paying agent, or foreign financial institution collects this information and reports it to the tax authorities, who then consolidate it by jurisdiction of residence, encrypt it, and send it to the tax authorities of the applicable jurisdictions. The information is then decrypted and analyzed to make sure it matches the information stored in domestic records. If the information does not match, the tax authority may take the appropriate compliance actions.¹⁸

From 2018 through 2022, the IRS issued about 2.7 million disclosures¹⁹ per year to foreign tax authorities. The information primarily comprised CbC information (Form 8975 and its Schedule A), information reported by U.S. withholding agents (Form 1042-S), and other taxpayer-specific returns or return information.²⁰ As of October 2022 there were more than 3,300 bilateral exchange relationships in place for jurisdictions committed to exchanging CbC reports.²¹ These relationships include exchanges between (1) the 100 signatories to the CbC multilateral competent authority

¹³ OECD, *supra* note 11, at paras. 130-131.

¹⁴ OECD, "Harmful Tax Practices — 2022 Peer Review Reports on the Exchange of Information on Tax Rulings Inclusive Framework on BEPS: Action 5" (Dec. 13, 2023).

¹⁵ *Id.* at 448. See also Rev. Proc. 2015-41, 2014-35 I.R.B. 263, section 9.04, "Exchange of Information":

APAs, annual reports, and factual information contained in APA requests are subject to exchange of information under U.S. tax treaties or U.S. income tax information exchange agreements in accordance with the terms of such treaties and agreements (including terms regarding relevancy, confidentiality, and the protection of trade secrets). In cases in which the exchange of information would be discretionary, information may be exchanged to the extent consistent with principled, effective, and efficient tax administration and the practices of the relevant foreign competent authority(ies).

¹⁶ OECD, *supra* note 14, at 9.

¹⁷ IRM 4.60.1.10.

¹⁸ See OECD, "Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to Be Done" (2012).

¹⁹ "The number of disclosures of tax information depends on the type of record disclosed and the provision of the Code it was disclosed under as defined under IRC Section 6103(p)(3)(A). A disclosure is making known to any person return or return information. Generally, when the IRS discloses a taxpayer's record, or portion of the record, for one tax year or tax period, the IRS counts that as one disclosure." Joint Committee on Taxation, "Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(c) for Calendar Year 2022," JCX-6-23 (Apr. 18, 2023). The exact number of disclosures for the five years mentioned are 4,484,566 in 2022 (see JCX-6-23); 595,653 in 2021 (see JCX-8-22); 2,564,229 in 2020 (see JCX-17-21); 2,977,832 in 2019 (see JCX-13-20); and 2,944,078 in 2018 (see JCX-21-19).

²⁰ "Disclosures from Other Sources: consisting of taxpayer-specific return or return information made to a competent authority of a foreign government with which the United States has an income tax convention or other bilateral agreement relating to the exchange of tax information with the United States." JCX-6-23, *supra* note 19.

²¹ OECD, "Activated Exchange Relationships for Country-by-Country Reporting" (last updated Mar. 13, 2024).

agreement,²² (2) EU member states, and (3) signatories to bilateral competent authority agreements for exchanges under tax treaties or tax information exchange agreements, including 46 bilateral agreements with the United States.²³

Specific EOI

Specific EOI, or EOI on request, involves both U.S.-initiated and foreign-initiated requests for information relating to specific taxpayers for specified periods.²⁴ Most requests result from the examination of a particular tax return. Before making a specific EOI request, tax authorities must pursue “all domestic means of obtaining information,” unless there are disproportionate difficulties (for example, extraordinary costs).²⁵

U.S.-Initiated Request

U.S. taxpayers typically have no influence on, or knowledge of, a U.S.-initiated request because they are only informed of the request if the foreign tax authority contacts a local related entity for the requested information and that entity informs the U.S. taxpayer. The process begins with IRS staff directing targeted inquiries for tax-related data located within a foreign jurisdiction to the U.S. competent authority.²⁶ Each request must include enumerated information and be addressed to a single foreign jurisdiction with which the United States has a tax treaty, TIEA,²⁷ or other agreement covering EOI. The request then undergoes several stages of approval, from (1) the IRS agent who submits the request to the EOI office, (2) an EOI analyst, and (3) an EOI manager who sends the approved request to the foreign competent authority. When the information is ready, an EOI

analyst will receive and review the foreign competent authority’s response before sending it to the requesting IRS office.²⁸

In a transfer pricing audit, the IRS exam team is instructed to “consider obtaining information or foreign-based documentation from [the] treaty partner using collateral requests, information requests pursuant to treaties, and the Simultaneous Examination Program.”²⁹ In addition, any tax information the IRS receives is subject to confidentiality under the applicable treaty or agreement covering EOI, section 6105, and the general restrictions for returns and return information under section 6103.³⁰

Foreign-Initiated Request

Foreign-initiated specific EOI requests are far more common than U.S.-initiated requests. Upon receiving a foreign-initiated request, an EOI analyst will confirm whether the content of the request meets the standards for the applicable tax treaty, TIEA, or other EOI agreement and contains the required information (for example, location of information, specific taxpayer identification, and indications that the information is necessary, relevant, or foreseeably relevant to the foreign examination).³¹ If the request is deemed valid and complete, it will be assigned to IRS personnel who will then try to gather the requested information.³²

The EOI analyst or other IRS personnel assisting with the request generally will first attempt to obtain the information by making a request to a U.S. party in possession or control of the information through an information document request (Form 4564). At this stage, the U.S. party has an opportunity to discuss the merits of the request with the IRS based on the relevant EOI standard. The U.S. party can then

²² OECD, “Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and Signing Dates” (last updated Mar. 21, 2024).

²³ OECD, *supra* note 21.

²⁴ IRM 4.60.1.2.

²⁵ *Id.*

²⁶ Authority has been delegated to the program manager, exchange of information (EOI program) and the program manager, offshore compliance initiatives (who oversees the Joint International Taskforce on Shared Intelligence and Collaboration) to examine and handle these inquiries. IRM 4.60.1.2.1.

²⁷ For a full list of U.S. income tax treaties, see IRS, “United States Income Tax Treaties — A to Z” (last updated Feb. 6, 2024). For a list of U.S. TIEAs, see U.S. Department of the Treasury, “Tax Information Exchange Agreements (TIEAs)” (undated).

²⁸ IRM 4.60.1.2.1.

²⁹ IRS, “Transfer Pricing Examination Process,” Publication 5300, at 9 (Sept. 8, 2020). The simultaneous examination program allows the IRS and the treaty partner to each independently audit a taxpayer at the same time. The two tax authorities typically meet to coordinate strategies and discuss technical issues. See IRM 4.60.1.4.

³⁰ IRM 4.60.1.1.2.1.

³¹ IRM 4.60.1.2.2. Authority has been delegated to the program manager, exchange of information (EOI program) and the program manager, offshore compliance initiatives (who oversees the Joint International Taskforce on Shared Intelligence and Collaboration) to examine and handle these inquiries. *Id.*

³² IRM 4.60.1.2.2.1.

decide whether to comply with the request. If the U.S. party does not provide the information and it cannot be obtained elsewhere, the EOI analyst can prepare and serve an administrative summons to the U.S. party.³³ It is important to note that the IRS is bound by law to employ the same procedures to obtain information requested by a foreign tax authority as it would domestically.³⁴ Accordingly, to enforce the summons, the IRS needs to demonstrate good faith in issuing the summons under the legal requirements set forth in *Powell*.³⁵ This means that the IRS must show that (1) there is a legitimate purpose for the examination, (2) the information summonsed may be relevant to that purpose, (3) the information is not already in the IRS's possession, and (4) the IRS has complied with the administrative steps required by the Internal Revenue Code and the regulations.³⁶ No fishing expeditions are allowed.³⁷

In optimal conditions, the process should take at most 90 days from receiving the request to submitting the response.³⁸ If that is not feasible, the IRS will try to provide the requesting authority with a partial response or, at minimum, a status update. In any case, within 15 days of having obtained all requested information, the IRS should get the EOI program manager's review and approval and then transmit the information to the foreign tax authority.³⁹

Joint Audits

A joint audit involves two or more tax authorities creating a single, coordinated audit team to examine the transactions of one or more related taxpayers with cross-border activities in which the tax authorities have a common or complementary interest.⁴⁰ A joint audit may be proposed by IRS personnel, the taxpayer, or a foreign tax administration. Throughout the

process, the audit team from each jurisdiction will exchange relevant information with the other in accordance with the applicable tax treaty or EOI agreement. Once information has been exchanged, it is then in the recipient tax authority's files and subject to further exchange with other tax authorities.

Joint audits appear to remain a relatively rare creature in the United States.⁴¹ Recently, however, the IRS issued internal guidance that implements a rigorous screening process whereby taxpayers may be shifted from analyzing their related-party transactions through the APA process to alternative workstreams, including joint audits.⁴² The OECD transfer pricing guidelines also indicate that coordinated tax audits in transfer pricing cases could be more efficient.⁴³ In addition, the "International Compliance Assurance Programme: Handbook for Tax Administrations and MNE Groups" suggests that taxpayers whose tax positions cannot be accepted through ICAP (more on ICAP below) could see their information disclosed through ICAP further shared with the covered tax administration's audit function (subject to domestic rules and processes), which then could consider bilateral or multilateral actions, as appropriate, including joint audits.⁴⁴ Finally, the Transfer Pricing Subcommittee of the United Nations Committee of Experts on International Cooperation in Tax Matters has recently proposed to focus on joint audits (along with ICAP and APAs) to review their utility in preventing transfer pricing disputes.⁴⁵

³³ IRM 4.60.1.2.2.4.

³⁴ See *Lidas Inc. v. United States*, 238 F.3d 1076, 1081 (9th Cir. 2001).

³⁵ *United States v. Powell*, 379 U.S. 48 (1964); IRM 25.5.4.5.3 (July 14, 2015).

³⁶ See *Powell*, 379 U.S. at 58.

³⁷ IRM 25.5.4.5.3.

³⁸ IRM 4.60.1.2.2.1.

³⁹ *Id.*

⁴⁰ For more information on the IRS joint audit program, see IRM 4.60.1.11.

⁴¹ See Ryan Finley and Justyna Pecalak, "Transfer Pricing Roundup," *Tax Notes Int'l*, Jan. 10, 2022, p. 143 (reporting proposed transfer pricing and reallocation of income adjustments in a joint audit among Dutch, German, and U.S. tax authorities).

⁴² See IRS, "Memorandum for Treaty and Transfer Pricing Operations Employees," LB&I-04-0423-0006 (Apr. 25, 2023). See also EY, "IRS Interim Guidance on Review and Acceptance of Advance Pricing Agreement Submissions Fundamentally Changes Early Stages of the Process," Tax Alert 2023-0800, May 3, 2023.

⁴³ OECD, "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations," at para. 4.79 (2022).

⁴⁴ Forum on Tax Administration, "International Compliance Assurance Programme: Handbook for Tax Administrations and MNE Groups," at para. 21 (Feb. 18, 2021).

⁴⁵ U.N. Transfer Pricing Subcommittee provisional program, Committee of Experts on International Cooperation in Tax Matters, E/C.18/2022/CRP.13 (Mar. 17, 2022). See also U.N., Transfer Pricing Compliance Assurance — An End-to-End Toolkit, Annex B to E/C.18/2023/CRP.26 (2023).

Taxpayer Experience With EOI Issues

One very tangible outcome of the OECD's BEPS project and its scrutiny of business taxation is that the tax transparency environment is undergoing a transformational change. Central to this new era of transparency is that information shared with one tax authority may now be more readily available to other tax authorities subject to the relevant EOI rules, leading to the disclosure of more details about a taxpayer's affairs and increased risks involving tax audits and reputation. There simply is more taxpayer information available to share, and more programs encouraging or requiring that it be shared (for example, CbC reporting, EU Directive 2018/822 (DAC6),⁴⁶ and the pillar 2 global anti-base-erosion (GLOBE) information returns⁴⁷). The most common audit risk arising from increased information sharing is that related parties may have inconsistent transfer pricing documentation or audit responses in their respective jurisdictions. Below we highlight a few examples in which issues commonly arise with EOI.

A U.S. taxpayer may receive an information document request (Form 4564) related to a foreign-initiated EOI request that appears to be a "form request" but is not sufficiently tailored to the scope of the foreign tax audit. It is the IRS's duty to properly screen the request and push back on its scope if it does not meet the relevancy standard in the tax treaty or EOI agreement. If a taxpayer nonetheless receives an overly broad request, the taxpayer should contact the IRS to discuss the relevance of the request in relation to the ongoing audit issues. The IRS then can determine whether the request should be denied or, at minimum, narrowed. The taxpayer also may argue that the request would be overly burdensome if, for example, the request asks for information not kept in the taxpayer's ordinary course of business. In this example, after the taxpayer discusses the EOI request with the IRS, the agency may agree to push back on the scope with the foreign tax authority. That said, a taxpayer that cooperates with a request can retain

some control over the timing element — that is, when the taxpayer provides the information. At minimum, responding to an EOI request requires that the taxpayer fully understand the information available and if it may be privileged from disclosure.

In another example, a foreign tax authority could request from a second foreign tax authority information that is confidential to the taxpayer in the second exchange partner jurisdiction. Many EOI agreements, however, contain a provision whereby a tax authority is not obligated to share information that it cannot otherwise obtain under its domestic law. Accordingly, any information that cannot be obtained by a tax authority because it is privileged, such as attorney-client or work product privilege in the United States, should therefore be protected from disclosure after the taxpayer proves that privilege.⁴⁸ There are similar provisions in income tax treaties that say there is no duty to supply information that would disclose "any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy."⁴⁹ Therefore, taxpayers should understand the limitations on information sharing in the relevant tax treaty or EOI agreement and develop any defenses against that kind of disclosure.

Aside from these examples, some taxpayers may be concerned with foreign governments sharing information among government functions (for example, from the competent authority handling a mutual agreement procedure case to the tax authority involved in a court case). This can be problematic because the tax authority may confuse facts across years and related parties and ultimately misconstrue the facts against the taxpayer. While certain taxpayers may be concerned about the possibility of a

⁴⁶"DAC6: EU's New Mandatory Disclosure Regime," Bloomberg Tax, Mar. 2022 (providing an overview of DAC6).

⁴⁷Mindy Herzfeld, "The GLOBE Information Return in the Crosshairs," *Tax Notes Int'l*, Jan. 16, 2023, p. 297.

⁴⁸See, e.g., U.K.-U.S. tax treaty, art. 27(3)(b) (July 24, 2001) ("In no case shall the provisions of paragraphs 1 and 2 of this Article be construed so as to impose on a Contracting State the obligation . . . to supply information that is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State."); Argentina-U.S. TIEA (Dec. 23, 2016) ("The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws.").

⁴⁹See, e.g., Ireland-U.S. tax treaty, art. 27(2)(c) (July 28, 1997, together with a protocol and exchange of notes done on the same date).

foreign tax authority leaking information to the press, this situation is rare and runs against the construct of EOI, and there is limited recourse when it occurs. Taxpayers have a legal right to expect that any information exchanged remains confidential and is used for the strict purposes permitted by the relevant EOI agreement.

Taxpayers participating in ICAP may have concerns about the degree of transparency and the documentation package they are required to provide to tax authorities.⁵⁰ Taxpayers will need to balance their desire for efficient use of transfer pricing resources and likely (but not guaranteed) tax audit certainty⁵¹ in ICAP with the possibility that information shared among tax authorities during the process may be further shared with other tax authorities through a tax treaty or other EOI agreement, potentially leading to additional tax exposures. That said, the taxpayer's ICAP risk assessment may resolve a significant portion of its major transactions (depending on the number of jurisdictions involved) such that any risk of information being disseminated to other tax authorities would relate to less significant transactions. Also, the short turnaround for ICAP (that is, 12 months or less), and the very clear information request used in the risk assessment, likely limit the opportunity for misuse of information or unwarranted exchanges.

Concerns on the Horizon

Pillar 2, which seeks to implement a global minimum tax of 15 percent, contemplates automatic exchanges of information returns when a "Qualifying Competent Authority Agreement" is in effect and that return has been appropriately filed.⁵² A qualifying competent authority agreement means a bilateral or multilateral

agreement or arrangement between competent authorities that provides for the automatic exchange of annual GLOBE information returns.⁵³ The commentary to pillar 2 indicates that AEOI is for administrative ease and is intended to alleviate GLOBE information return filing obligations for multinational enterprise groups.⁵⁴ At this stage, it is difficult to predict the implications of EOI in pillar 2, but MNE group information will be shared broadly under the current rules.

We would be remiss if we did not mention public disclosure initiatives. Going beyond EOI itself, for example, is the EU directive on public CbC reporting, for which the first financial year of reporting on income tax information will be the year starting on or after June 22, 2024, at the latest.⁵⁵ The directive will require EU-based and non-EU-based companies doing business in the EU through a branch or subsidiary, with total consolidated revenue of more than €750 million in each of the last two consecutive financial years, to disclose publicly the income taxes paid and other tax-related information, such as a breakdown of profits, revenues, and employees per jurisdiction. Similarly, the Financial Accounting Standards Board will soon require, at minimum, both public and private companies to break down the income taxes paid to authorities at the federal, state, and foreign levels for the full year in their annual financial reports.⁵⁶ Taxpayers will need to carefully consider the release of information under these new transparency rules and how it may be interpreted by interested stakeholders, including the public.

Conclusion

With the push for increased tax transparency, pillar 2 implementation in numerous jurisdictions, and governments trying to replenish coffers from COVID-19 spending, the IRS and other tax authorities may increasingly seek to use

⁵⁰ The taxpayer is required to submit a "main documentation package" that largely includes information the taxpayer has readily available, such as the group's master file/local file, consolidated financial statements, and CbC reports, but also will require some additional drafting (e.g., a schedule detailing covered transactions and a CbC reporting self-assessment). IRM 4.60.11.7.2.

⁵¹ See National Association for Business Economics, "International Compliance Assurance Program (ICAP) — The Best Kept Secret in Transfer Pricing," YouTube, Oct. 6, 2022.

⁵² OECD, "Tax Challenges Arising From the Digitalisation of the Economy — Global Anti-Base Erosion Model Rules (Pillar Two)," at art. 8.1.2 (Dec. 20, 2021); OECD, "Tax Challenges Arising From the Digitalisation of the Economy — GloBE Information Return (Pillar Two)," at para. 18 (2023).

⁵³ GLOBE model rules, *supra* note 52, at art. 10.

⁵⁴ *Id.* at art. 8.1.2.

⁵⁵ Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (Nov. 24, 2021).

⁵⁶ Financial Accounting Standards Board, "Income Taxes (Topic 740)," Accounting Standards Update No. 2023-09 (Dec. 2023).

EOI programs during transfer pricing enforcement. Now more than ever, taxpayers should consider how tax authorities share information across borders as part of their overall approach to global tax controversy. ■

taxnotes[®]

Print | Online | Direct Mail



Our space, your business.

Advertise your business with the leader in worldwide tax coverage. Reach decision-makers and policymakers in government, law and accounting firms, corporations, and higher education.

If your audience cares about tax, you should be in Tax Notes.

taxnotes.com/advertise

advertise@taxnotes.com
703-533-4460