



## International Tax ADVISORY ■

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### The PFIC Regulations Get a Facelift

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#### **IRS Issues Draft Form and Instructions for Country-by-Country Reports**

Country-by-Country (CbC) reporting is now generally required for the ultimate parent of a U.S. multinational enterprise (MNE) for tax years that begin on or after June 30, 2016. On January 11, 2017, the IRS released a draft of Form 8975 (the Country-by-Country Report) and Schedule A to Form 8975 (Tax Jurisdiction and Constituent Entity Information). On February 23, 2017, the IRS released draft instructions for Form 8975 and Schedule A. Meanwhile, on January 19, 2017, the IRS issued Revenue Procedure 2017-23, which sets forth a process by which ultimate parents of U.S. MNEs can voluntarily file Form 8975 for reporting periods beginning on or after January 1, 2016, but before June 30, 2016 (the “early reporting period”).

#### **Background**

On October 5, 2015, the Organisation for Economic Co-operation and Development (OECD) issued its final report on BEPS Action 13, which rewrote Chapter V of the OECD transfer pricing guidelines. New Chapter V sets forth a uniform approach to documentation that includes a master file, a local file and a CbC report. The final report recommended that MNEs be required to file their first CbC report for tax years beginning on or after January 1, 2016, and several foreign jurisdictions have adopted this approach. In addition, many of these jurisdictions also implemented OECD-recommended “secondary” reporting rules that could potentially require a local subsidiary to file a CbC report if the ultimate parent of the subsidiary was not required to file a CbC report in its own jurisdiction.

Reacting to the final report on BEPS Action 13, the U.S. Treasury issued proposed regulations in December 2015 that generally accepted the OECD approach for CbC reporting. Final regulations (TD 9773; Reg. § 1.6038-4) were issued on June 30, 2016, that apply to U.S. MNEs with revenue exceeding \$850 million. Because these regulations could not apply retroactively, they apply to “reporting periods” of ultimate parents of U.S. MNE groups that commence on or after June 30, 2016. The effective date of the U.S. regulations created a mismatch with the

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foreign jurisdictions that implemented CbC reporting for years beginning on or after January 1, 2016, and raised the possibility that a U.S. MNE group may be required to file a CbC report in the jurisdictions of one or more of its subsidiaries because the ultimate parent was not required to file in the U.S. for the so-called “gap” year.

However, the preamble to the U.S. CbC reporting regulations indicated that a procedure would be provided to allow for the voluntary filing of CbC reports by the ultimate parent of a U.S. MNE for the early reporting period in order to address this mismatch, and such guidance has been issued in the form of Revenue Procedure 2017-23.

### **Rev. Proc. 2017-23**

Revenue Procedure 2017-23 describes a voluntary process for the ultimate parent of a U.S. MNE group to file Form 8975 for a year beginning during the early reporting period. Beginning September 1, 2017, Form 8975 may be filed for years beginning during the early reporting period by attaching the form to the tax return or other return for the relevant tax year. If the ultimate parent entity has previously filed a tax return for a tax year that began during the early reporting period without a Form 8975 attached, the taxpayer must follow the procedures for filing an amended tax return, attaching Form 8975, within 12 months of the close of that tax year. An amended tax return filing made solely to attach Form 8975 will have no effect on the return’s statute of limitations for assessment of tax.

The IRS encourages ultimate parents that are able to file their returns electronically through the IRS Modernized e-File system to do so in order to facilitate the timely automatic exchange of information under relevant tax treaties, although a paper version of the form will also be available. The IRS intends to provide specific electronic filing information on Form 8975 to the software industry in early 2017 so that developers will be able to make Form 8975 available in their software ahead of the September 1, 2017, implementation date.

There was some doubt early on that the OECD would accommodate the U.S. on this issue. Now, however, there is a cautious consensus that, consistent with OECD guidance originally issued on June 30, 2016 (and since revised on October 16, 2016, and December 5, 2016), a voluntary filing of Form 8975 by the ultimate parent of a U.S. MNE will relieve its subsidiaries of any secondary CbC filing obligations in other jurisdictions. Taxpayers should nevertheless take care to monitor local reporting requirements and administrative deadlines in the jurisdictions they operate in, since the rules in this area are still developing.

### **Form 8975, Schedule A and the Instructions**

For tax years beginning on or after June 30, 2016, Form 8975 and Schedule A should be attached to the ultimate parent’s return and filed with the IRS by the due date of that return. A separate Schedule A must be filled out for each tax jurisdiction of the MNE, and one aggregate Schedule A must also be filled out to report “stateless” entities (i.e., entities that do not have a tax jurisdiction of residence) and their information. All currency amounts must be reported in U.S. dollars. The taxpayer must maintain records that support the information supplied on Form 8975, and failure to report information required on the form may result in

penalties under Section 6038. An amended Form 8975 may be filed by following the instructions for filing an amended return of the type the Form 8975 was attached to.

Form 8975 contains two parts. Part I is required and requests basic information that identifies the filing taxpayer, and Part II is optional and provides a space for any “additional information” related to the MNE. The taxpayer could, for instance, include a narrative description of its business in Part II. Schedule A contains three parts. The first part requests information about the particular tax jurisdiction the form relates to, including revenue from unrelated and related parties, profit or loss, income tax paid/accrued, stated capital, accumulated earnings, the number of employees and tangible assets. The instructions provide some modest guidance on how to determine these amounts. The second part requests information about the MNE entities resident in the tax jurisdiction. The third part requests any additional information related to the information provided in Parts I and II and is optional.

We know that taxing authorities will be exchanging these CbC reports under the authority of applicable tax treaties. Now that the draft Form 8975 and its instructions have been released, ultimate parents of U.S. MNEs should carefully evaluate whether and to what degree the completed form reveals any potential BEPS-related exposure, and consequently whether any adjustments to existing structures would be appropriate.

For more information, please contact [Henry Birnkrant](#) at 202.239.3319 or [Matthew Moseley](#) at 202.239.3828.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Sam K. Kaywood, Jr.  
Co-Chair  
404.881.7481  
sam.kaywood@alston.com

Jasper L. Cummings, Jr.  
919.862.2302  
jack.cummings@alston.com

Clay A. Littlefield  
704.444.1440  
clay.littlefield@alston.com

Edward Tanenbaum  
Co-Chair  
212.210.9425  
edward.tanenbaum@alston.com

Scott Harty  
404.881.7867  
scott.harty@alston.com

Ashley B. Menser  
919.862.2209  
ashley.menser@alston.com

George B. Abney  
404.881.7980  
george.abney@alston.com

Brian D. Harvel  
404.881.4491  
brian.harvel@alston.com

Matthew P. Moseley  
202.239.3828  
matthew.moseley@alston.com

John F. Baron  
704.444.1434  
john.baron@alston.com

L. Andrew Immerman  
404.881.7532  
andy.immerman@alston.com

Daniel M. Reach  
704.444.1272  
danny.reach@alston.com

Henry J. Birnkrant  
202.239.3319  
henry.birnkrant@alston.com

Stefanie Kavanagh  
202.239.3914  
stefanie.kavanagh@alston.com

Heather Ripley  
212.210.9549  
heather.ripley@alston.com

James E. Croker, Jr.  
202.239.3309  
jim.croker@alston.com

Brian E. Lebowitz  
202.239.3394  
brian.lebowitz@alston.com

Michael Senger  
404.881.4988  
michael.senger@alston.com

# ALSTON & BIRD

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500  
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260  
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, CA 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001  
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333