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## **SBA Submission: OECD Request for Public Comments on Scoping of the Future Revision of Chapter IV (Administrative Approaches) of the Transfer Pricing Guidelines**

Dear Sir or Madam,

The Swiss Bankers Association (“SBA”) would like to thank you for the opportunity to provide its comments on the new project of Working Party No. 6 (“WP6”) to revise the guidance in Chapter IV: Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD TPG”).

Our views are based on the extensive experience of our members with respect to transfer pricing audits, subsequent adjustments and related dispute resolutions of Multinational Enterprises (“MNE”) operating in the business fields of:

- asset management,
- investment banking,
- retail banking and
- wealth management.

Please find below our comments on the following specific issues:

1. Comments on additional guidance to be done to update Chapter IV in relation to:

a. Examination practices and guidance on risk assessment

The SBA believes that Base Erosion and Profit Shifting (“BEPS”) Action Point 13 – with its introduction of the new three-tiered transfer pricing documentation requirements – will substantially change the existing examination and risk assessment practice. In our view, the major driver of the upcoming changes will be the Country-by-Country Reporting (“CbCR”) that will provide tax authorities with information about substance and profit allocation within MNEs. So far, such data were not readily available to the tax administrations. The SBA would appreciate, if WP6 would establish a framework for the appropriate use of CbCR data in tax audits in the updated Chapter IV. The SBA would welcome, if the short instruction from Chapter V: Documentation, Art. 5.25 and the related reports<sup>1</sup> would be described in detail in the envisaged update of Chapter IV. The SBA would especially welcome, if there would be a framework introduced for the following CbCR applications:

- high-level risk assessment,
- assessment of other base erosion and profit shifting related risks, and
- economic and statistical analysis.

b. Mechanisms to prevent and resolve tax disputes

The OECD has been recently very active in dealing with tax disputes prevention and resolution, e.g. in:

- the 2017 update of Chapter IV of OECD TPG,
- OECD BEPS Action 13: Transfer Pricing Documentation and Country-by-Country Reporting,
- OECD BEPS Action 14: Making Dispute Resolutions Mechanisms More Effective, and
- OECD BEPS Action 15: Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS.

This work has an impact on transfer pricing related matters in MNEs represented by the SBA. The SBA would therefore welcome, if the envisaged update of Chapter IV would consider the guidance provided by the work of the OECD in this matter.

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<sup>1</sup> OECD (2017), BEPS Action 13 on Country-by-Country Reporting: Guidance on the appropriate use of information contained in Country-by-Country Reports, Art. 4.

The SBA recognizes that Art. 9 Para. 2 OECD Model Convention (“OECD MC”) results in much faster remedy from economic double taxation than the direct application of Art. 25 OECD MC (Mutual Agreement Procedure). It is therefore important that at least among OECD member countries, these provisions become part of their tax conventions.

The SBA would also welcome, if Chapter IV would define a compulsory order (or at least describe the interaction) between the available instruments for economic double taxation remedy.

The SBA would highly appreciate, if WP6 would provide more guidance on, when a primary adjustment should not be considered justified both in principle and in amount.<sup>2</sup>

2. Views on how the guidance in Chapter IV could be revised or supplemented to reflect the latest developments on administrative procedures aimed at minimizing transfer pricing disputes and to help resolve them, increasing tax certainty for taxpayers and preventing double taxation. The necessity of potential revision or supplement of current guidance on:

- a. Safe harbor rules

SBA would welcome, if safe harbor rules would be more common in the transfer pricing area. So far, there is only one internationally accepted application of safe harbor rules, i.e. 5% profit mark-up on costs for low value-adding intra-group services (“LVAIGS”)<sup>3</sup>. WP6 might for example consider Singapore practice as a benchmark for the wide application of safe harbor rules. Any entity with gross revenues from their trade or business with less than SGD 10 million does not have to prepare transfer pricing documentation.<sup>4</sup> In addition, related party transactions not exceeding certain volumes do not have to be documented.<sup>5</sup>

- b. Arbitration

Reference is made to our comments on 1 b) above.

As arbitration is the step that follows a MAP that did not lead to a consensus, the whole procedure might be considerably lengthened. We believe that the more frequent application of Art. 9 Para. 2 OECD MC (corresponding adjustment) would bring much faster solutions and would therefore be more efficient for both tax administrations and taxpayers. Nevertheless, we think that it is important that tax conventions contain arbitration clauses.

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<sup>2</sup> OECD TPG, Chapter IV, Art. 4.35.

<sup>3</sup> OECD TPG, Chapter VII, Art. 7.43 et seq.

<sup>4</sup> IRAS, eTax Guide, Transfer Pricing Guidelines, Fifth Edition, Art. 6.10.

<sup>5</sup> IRAS, eTax Guide, Transfer Pricing Guidelines, Fifth Edition, Art. 6.18.

3. What additional aspects or mechanisms to minimize the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)?

a. What have been the advantages and/or challenges of transfer pricing compliance practices (e.g. co-operative compliance and risk assessment tax examination practice)?

Reference is made to our comments on 1 a) above.

4. Relevant aspects of the minimum standards and best practices related to APAs contained in the Report on BEPS Action 14 related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimize the risk of double taxation?

a. Corresponding adjustments

Reference is made to our comments on 1 b) above.

The SBA would further appreciate, if there would be more guidance on when tax authorities could make an adjustment on the basis of the application of another transfer pricing method than the one retained. We believe that cherry-picking of methods in order to make an upward adjustment should not be allowed.

b. Secondary adjustments

We believe that no additional guidance is needed, as Art. 4.68 to 4.78 of OECD TPG are quite comprehensive.

5. Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG.

a. Considering this, is there any additional guidance needed that could be provided on advanced pricing arrangements?

The SBA believes that there could be additional guidance provided concerning transition risk that

is assumed by the taxpayers for the period before and immediately after the APA applies.

b. Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimizing transfer pricing disputes?

Reference is made to our comment on 5a) above.

c. What are the advantages of such initiatives and the implementation challenges?

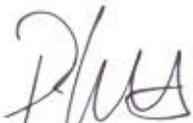
Reference is made to our comment on 5a) above.

6. Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?

Reference is made to our comments on 1) and 2) above.

We thank you for taking due consideration of our comments.

Yours sincerely,  
Swiss Bankers Association



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Head of Tax department



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