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VIA ELECTRONIC TRANSMISSION AND HAND-DELIVERY

CC:PA:LPD:PR (REG–109822–15)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC

Re: Comments on proposed country-by-country reporting regulations under § 1.6038-4 in REG–109822–15

Dear Sirs or Madams,

The Silicon Valley Tax Directors Group ("***SVTDG***") hereby submits these comments on the above-referenced proposed regulations issued in REG–109822–15, 80 Fed. Reg. 79795 (December 23, 2015) under § 6038 of the Internal Revenue Code of 1986, as amended. SVTDG members are listed in the Appendix of this letter.

Sincerely,

Robert F. Johnson

Robert F. Johnson
Co-Chair, Silicon Valley Tax Directors Group

I. INTRODUCTION AND SUMMARY

A. Background on the Silicon Valley Tax Directors Group

The SVTDG represents U.S. high technology companies with a significant presence in Silicon Valley, that are dependent on R&D and worldwide sales to remain competitive. The SVTDG promotes sound, long-term tax policies that allow the U.S. high tech technology industry to continue to be innovative and successful in the global marketplace.

B. Recommendations

The OECD BEPS Action 13: 2015 Final Report *Transfer Pricing Documentation and Country-by-Country Reporting* ("**Action 13 Final Report**") includes "*Model legislation related to Country-by-Country Reporting*" ("**Model Legislation**"). The *Model Legislation* generally requires any "Constituent Entity" (of an MNE Group) resident in a jurisdiction adopting the *Model Legislation* to file a CbC report with the tax administration of that jurisdiction. The obligation of a Constituent Entity to file a CbC report can be avoided two ways, both of which entail the foreign tax administration getting a CbC report on the relevant MNE group—either a CbC report filed by the "Ultimate Parent Entity" ("***UPE***") in its jurisdiction, or a CbC report filed by a "Surrogate Parent Entity" in its jurisdiction.

The obligation of a foreign Constituent Entity of a U.S. MNE Group to file a local-country CbC report with a foreign jurisdiction puts a significant burden on the U.S. MNE Group because each such jurisdiction will almost certainly impose reporting requirements different than those in final § 1.6038-4. Avoiding the burden of filing a CbC report with foreign jurisdictions, and having U.S. Treasury act as a gatekeeper with respect to U.S.-filed CbC reports, is much preferred. This can't be accomplished as it stands: some countries have implemented (or will implement) CbC reporting rules applicable for taxable years starting with calendar 2016, but § 1.6038-4 (if finalized as proposed) will apply only for taxable years beginning after finalization. U.S. MNE groups will thus be forced to file foreign CbC reports for taxable years before those for which U.S. CbC reports have to be filed with U.S. Treasury.

There are two ways to avoid complications from timing mismatches between U.S. and foreign CbC reporting requirements—either delay the effective/applicability date of foreign requirements, or advance such date for U.S. requirements. To accomplish the former, we recommend U.S. Treasury engage with the OECD CFA and urge it to formally recommend that any countries implementing rules embodying the functional equivalent of the secondary reporting requirement in Article 2, ¶ 2 of the *Model Legislation* delay application of such rules to taxable years beginning on or after January 1, 2017.

We also give three alternative recommendations that would either require or allow a UPE of a U.S. MNE Group to file a CbC report with U.S. Treasury for taxable years beginning on or after January 1, 2016, and thereby prevent foreign Constituent Entities from having to file a foreign CbC report.

Our first alternative recommendation is simply for U.S. Treasury to issue temporary or final regulations applicable for taxable years of UPEs of U.S. MNE groups beginning on or after January 1, 2016, notwithstanding the effective/applicability date in Prop. § 1.6038-4(j). In an October 5, 2015 letter to Congress (made public shortly thereafter), U.S. Treasury described its intention to promulgate regulations adopting CbC reporting consistent with the *Action 13 Final Report*. U.S. Treasury thereby met the § 6038(a)(3) requirement that it prescribe the furnishing of CbC information on or before January 1, 2016.

Our second alternative recommendation is to modify Prop. § 1.6038-4 so that—in addition to requiring filing of CbC reports for taxable years beginning on or after finalization of the regulations—it allows elective filing of U.S. CbC reports for taxable years beginning on or after January 1, 2016. U.S. Treasury should also try to get assurances—either from the OECD CFA or from countries with which it intends to execute "automatic exchange of information" agreements—that such electively-filed U.S. CbC reports will be accepted on an equal footing with mandatorily-filed CbC reports.

Our third alternative recommendation is that U.S. Treasury ask Congress to narrowly modify § 6038 to require filing of U.S. CbC reports for taxable years beginning on or after January 1, 2016.

The three alternative recommendations would only benefit U.S. MNEs if tax administrations of foreign jurisdictions have access to U.S. CbC reports containing information about foreign Constituent Entities resident in the jurisdiction. The benefit of the outlined recommendations hinges on there being a sufficient network of "Qualifying Competent Authority Agreements" in place by the time foreign CbC reports need to be filed. We accordingly urge U.S. Treasury to proceed with all due speed in concluding such bilateral agreements with foreign jurisdictions.

In this letter we also recommend Prop. § 1.6038-4 be amended to allow UPEs electively to include in U.S. CbC reports information about foreign entities not treated as "constituent entities" under Prop. § 1.6038-4 (but perhaps treated as "Constituent Entities" under the *Model Legislation*). The recommendation would allow U.S. MNE groups to decide whether they want (electively) to include in a U.S. CbC report information about a Constituent Entity that isn't a constituent entity, or instead to file a foreign CbC report in the jurisdiction in which the Constituent Entity is resident.

Finally, we recommend Prop. § 1.6038-4(d)(2) be amended to clarify that each of the nine items of information specified in Prop. §§ 1.6038-4(d)(2)(i)–(ix) should in general be reported in the aggregate, and only for constituent entities in the jurisdiction. This amendment would reflect language in the Preamble to the proposed regulations.

II. SPECIFIC CONCERNS WITH PROPOSED COUNTRY-BY-COUNTRY REPORTING REGS IN § 1.6038-4 IN REG–139483–13

A. U.S. MNE groups would prefer their foreign Constituent Entities not be obliged to file CbC reports, and would prefer U.S. Treasury to act as gatekeeper of CbC reports

The *Model Legislation* in the OECD BEPS *Action 13 Final Report* is similar to Prop. § 1.6038-4 in that it imposes on a UPE resident for tax purposes in a jurisdiction adopting rules in the *Model Legislation* the obligation to file a CbC report with the tax administration of that jurisdiction.[1]

The *Model Legislation* differs from Prop. § 1.6038-4 in that it also requires (in Article 2, ¶ 2) any non-UPE Constituent Entity resident for tax purposes in a jurisdiction adopting the *Model Legislation* ("Jurisdiction 1") to file with the tax administration of Jurisdiction 1 a CbC Report for a particular "Reporting Fiscal Year" if either—

(i) the UPE of the "MNE Group" isn't obligated to file a CbC report in its jurisdiction of tax residence ("Jurisdiction 2");

(ii) Jurisdiction 2 has a current "International Agreement" to which Jurisdiction 1 is a party, but doesn't have a Qualifying Competent Authority Agreement ("***QCAA***") in effect to which Jurisdiction 1 is a party by the time the CbC Report must be filed for the Reporting Fiscal Year with Jurisdiction 1; or

(iii) there has been a "Systemic Failure" of Jurisdiction 2 that has been notified by the tax administration of Jurisdiction 1 to the Constituent Entity.

Any jurisdiction adopting CbC reporting rules incorporating something substantially like Article 2, ¶ 2 can thus require any Constituent Entity of an MNE Group with a U.S. UPE to file a CbC report with that jurisdiction for a Reporting Fiscal Year if, for example, **(i)** the U.S. UPE isn't obligated to file a CbC report in the U.S. for that Reporting Fiscal Year; or **(ii)** there's no QCAA in effect between the U.S. and that jurisdiction by the time the CbC Report has to be filed for the Reporting Fiscal Year with that jurisdiction. Put differently, in these circumstances a foreign Constituent Entity of a U.S. MNE Group would have to file a CbC Report with that jurisdiction if either **(a)** final § 1.6038-4 applies only to taxable years after the Reporting Fiscal

[1] *Model Legislation*, Article 2, ¶ 1. The *Model Legislation* and Prop. § 1.6038-4 use similar terms (e.g., "Constituent Entity" in the *Model Legislation*, and "constituent entity" in Prop. § 1.6038-4) whose definitions don't necessarily overlap.

Year; or, **(b)** whether or not final § 1.6038-4 applies to the Reporting Fiscal Year (so a U.S. CbC report may be filed for that year), there's no QCAA in place with the U.S. by the time the CbC Report has to be filed with that jurisdiction; or **(c)** the entity treated as a Constituent Entity in that jurisdiction isn't treated as a constituent entity of a U.S. MNE group under final § 1.6038-4.[2]

The obligation of a foreign Constituent Entity of a U.S. MNE group to file a local-country CbC report with a foreign jurisdiction puts a significant burden on the group because each such jurisdiction will almost certainly impose reporting requirements different than those in final § 1.6038-4.[3] There's no obligation on a foreign Constituent Entity of a U.S. MNE Group to file a CbC report with a particular foreign jurisdiction for a Reporting Fiscal Year if none of (a), (b), or (c) are met—i.e., if final § 1.6038-4 applies to the Reporting Fiscal Year; if the U.S. has in place with that jurisdiction a QCAA by the time the CbC Report has to be filed with that jurisdiction; and if the Constituent Entity in the foreign jurisdiction is also treated as a constituent entity under final § 1.6038-4 (and so is covered by a U.S. CbC report). The obligation (and associated burden) vanishes because the tax administration of the foreign jurisdiction can get from U.S. Treasury the CbC report filed by the UPE of the U.S. MNE group with U.S. Treasury under § 1.6038-4. In this event U.S. Treasury acts as a gatekeeper of the U.S.-filed CbC report, and can suspend exchange of such reports if triggering events arise in the foreign jurisdiction. Avoiding the burden of filing a CbC report with a foreign jurisdiction, and having U.S. Treasury act as a gatekeeper with respect to U.S.-filed CbC reports, is obviously much preferred.

The *Model Legislation* has in Article 2, ¶ 3 an override of the obligation in ¶ 2 to file a CbC report in a particular foreign jurisdiction (say, Jurisdiction 1). The thrust of the override is that the CbC report-filing obligation in Jurisdiction 1 is suspended if another Constituent Entity (a "***Surrogate Parent Entity***") of the U.S. MNE Group files a CbC report with the tax administration of a different foreign jurisdiction (say, Jurisdiction 3) for the Reporting Fiscal Year, if Jurisdiction 1 and Jurisdiction 3 have in effect a QCAA by the time of filing of the CbC report in Jurisdiction 1 for the Reporting Fiscal Year, and if certain other requirements are met.[4] If these conditions are met, the tax administration of Jurisdiction 1 can get from the tax administration of Jurisdiction 3 the CbC report filed by the Surrogate Parent Entity. This is beneficial inasmuch as the obligation to file CbC reports in many foreign jurisdictions is replaced with the obligation to (only) file CbC reports in foreign jurisdictions of a smaller number of Surrogate Parent Entities. Jurisdictions with a good network of QCAAs would be desirable for

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[2] In this situation the U.S. CbC report wouldn't necessarily include information about the Constituent Entity,

[3] As examples, amounts reported in CbC reports filed in foreign jurisdictions would be in the local currency, and such reports would reflect nuances of accounting principles under local financial reporting rules.

[4] The requirements are described in *Model Legislation* Article 2, ¶¶ 3a), and 3c)–3e).

this purpose. But this situation is much less preferable for U.S. MNE groups—for reasons outlined above—to that in which only a U.S. CbC report needs to be filed, and U.S. Treasury acts as gatekeeper.

B. Changes needed to minimize the burden on U.S. MNE groups to file foreign CbC reports

As discussed in section A, U.S. MNE Groups wouldn't, for a particular Reporting Fiscal Year, have to file CbC reports in a foreign jurisdiction if three requirements are met: (1) final § 1.6038-4 applies to the Reporting Fiscal Year; (2) any Constituent Entity in the foreign jurisdiction is also treated as a constituent entity under final § 1.6038-4; and (3) the U.S. has in place with that jurisdiction a QCAA by the time the CbC Report has to be filed with that jurisdiction. We address these in turn.

1. Ensuring a U.S. CbC report is filed with U.S. Treasury for the earliest possible Reporting Fiscal Year

The *Action 13 Final Report* explains that the CbC reporting requirements "are to be implemented for fiscal years beginning on or after 1 January 2016."[5] Some countries have already implemented CbC rules for such fiscal years.[6] By contrast, the rules of final § 1.6038-4 are proposed to apply—

> to taxable years of [UPEs] of U.S. MNE groups that begin on or after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register and that include annual accounting periods determined under [§ 6038(e)(4)] of all foreign constituent entities and taxable years of all domestic constituent entities beginning on or after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register.[7]

Under Prop. § 1.6038-4, the final regulations thus cannot apply, for example, to a taxable year coinciding with calendar year 2016. But Constituent Entities of U.S. MNE groups with a calendar 2016 Reporting Fiscal Year are subject to CbC reporting requirements in some foreign jurisdictions.[8] This mismatch in applicable years can give rise to an obligation of a foreign

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[5] Action 13 Final Report, p. 10. See also, ¶ 50 ("It is recommended that the first Country-by-Country Reports be required to be filed for MNE fiscal years beginning on or after 1 January 2016.") and *Model Legislation* Article 8 ("This [title of the law] is effective for Reporting Fiscal Years of MNE Groups beginning on or after [1 January 2016].").

[6] Examples of such countries are Australia, Ireland, the Netherlands, France, Italy, and Japan. See, however, the discussion in § II.B.1.a, below, about an EU Directive that, if enacted, would require EU Member States to conform their CbC reporting rules to a common standard that would potentially delay some of the reporting requirements for locally-resident Constituent Entities.

[7] Prop. § 1.6038-4(j) (emphasis added).

[8] Australia and Japan are examples; other countries may implement similar CbC rules during 2016.

Constituent Entity of a U.S. MNE group to file a CbC report in foreign jurisdictions whose CbC reporting rules require such filing.

The effective/applicability provision in Prop. § 1.6038-4(j) was presumably drafted in light of the specific limitation in § 6038(a)(3), which provides:

> (3) **LIMITATION.—**No information shall be required to be furnished under [§ 6038(a)] with respect to any foreign business entity for any annual accounting period unless the Secretary has prescribed the furnishing of such information on or before the first day of such annual accounting period. [Emphasis added]

The limitation in § 6038(a)(3) prevents required filing of CbC report by U.S. UPEs for taxable years beginning before U.S. Treasury has adequately prescribed the furnishing of such information.

a. First recommendation—urge the OECD CFA to recommend "secondary reporting" by foreign Constituent Entities be delayed by one year

We understand European Union Member States on March 8 reached agreement on a modified version of a January 28 "*Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation*" (the "**Proposed Amendment**").[9] A secondary reporting requirement was modified to be effective for Reporting Fiscal Years beginning on or after January 1, 2017.[10] The original *Proposed Amendment* had provisions relating to the automatic exchange of information among EU Member States. It also proposed to require each EU Member State to take necessary measures to require the UPE of an MNE Group resident for tax purposes in its territory, or any other tax resident "Reporting Entity" (essentially, "Constituent Entity"), to file a CbC report with respect to its Reporting Fiscal Year. The *Proposed Amendment* specified CbC reporting requirements in an "Annex" substantially the same as the *Model Legislation*. In particular, the Annex imposed secondary reporting requirements on Constituent Entities of MNE Groups whose UPE was tax resident outside the EU. The *Proposed Amendment* required first CbC reports to be filed for the fiscal year of the MNE Group beginning on or after January 1, 2016.[11] The EU Member States' agreement to delay secondary reporting was a simple, sensible way of dealing with the nontrivial burden put on MNE groups by timing mismatches in different jurisdictions' CbC reporting rules. It suggests a tack to take with the OECD CFA in connection with the *Model Legislation* in the *Action 13 Final Report*.

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9 2016/0010 (CNS).

10 Final adoption of the *Proposed Amendment* by the Council of the European Commission is expected in May, 2016.

11 *Proposed Amendment*, p. 13 (amending *Article 8aa* of *Directive 2011/16/EU*).

We accordingly recommend U.S. Treasury engage with the OECD CFA and urge it to formally recommend that any countries implementing rules embodying the functional equivalent of the secondary reporting requirement in Article 2, ¶ 2 of the *Model Legislation* delay application of such rules to taxable years beginning on or after January 1, 2017. To the extent countries have already implemented CbC reporting rules in their local laws, the U.S. and the OECD CFA should urge such countries to timely amend such laws to make any secondary reporting obligations first effective for taxable years beginning on or after January 1, 2017.

b. Second, alternative recommendation—promulgate temporary or final regulations applicable to taxable years beginning on or after January 1, 2016

Paragraph 6038(a)(3) governs timing of CbC report filing. It was amended in 1998 to clarify that guidance relating to the furnishing of required information has to be provided by U.S. Treasury, and the legislative history signaled U.S. Treasury doesn't have to provide such guidance specifically through regulations.[12] On October 5, 2015, U.S. Treasury Assistant Secretary for Legislative Affairs Anne Wall wrote Senate Finance Committee Chairman Orrin Hatch and House Ways & Means Committee Chairman Paul Ryan, apprising them of OECD BEPS *Action 13 Final Report* CbC reporting requirements (recommended to require filing for MNE group fiscal years beginning on or after January 1, 2016[13]), and stating U.S. Treasury's intention "to issue regulations to require [CbC] reporting by certain U.S.-based companies . . . ." This letter was made public on or around November 16, 2015.

With this letter U.S. Treasury prescribed—before January 1, 2016—the furnishing of CbC reporting information for fiscal years beginning on or after such date. The requirements of § 6038(a)(3) have been met, notwithstanding the effective/applicability date in Prop. § 1.6038-4(j). We accordingly recommend that if our first recommendation is unsuccessful—either because U.S. Treasury chooses not to engage with the OECD CFA or because the CFA chooses not to formally recommend a one-year delay in implementing the secondary reporting requirement in the *Model Legislation*—U.S. Treasury and the IRS should, in recognition of the unusual and exigent circumstances surrounding timing of CbC reporting, issue temporary or final regulations applicable to taxable years of UPEs of U.S. MNE groups beginning on or after January 1, 2016. If other countries' CbC reporting can't be delayed to apply first to taxable years beginning in 2017, U.S. Treasury and the IRS should require reporting for taxable years beginning in 2016.

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[12] H.R. Rept. No. 105-599 (Conference Report), 105th Cong. 2d Sess., 341 (1998) ("The conference agreement clarifies that guidance relating to the furnishing of required information is to be provided by the . . . Treasury (not specifically through regulations) . . . .")

[13] OECD BEPS *Action 13 Final Report*, ¶ 50.

c. Third, alternative recommendation—modify Prop. § 1.6038-4 to allow earlier elective filing of CbC reports by the UPE of a U.S. MNE group

If our first alternative recommendation is unsuccessful, we recommend U.S. Treasury and the IRS modify Prop. § 1.6038-4 to allow U.S. MNE groups to elect to file a CbC report for a taxable year or years earlier than they're required to. Electively-filed CbC reports would have to meet the same criteria as mandatorily-filed reports. Prop. § 1.6038-4 would remain as it is (subject to the changes recommended below) with respect to mandatorily-filed U.S. CbC reports—i.e., to those filed for taxable years beginning on or after publication of final regulations. If this recommendation were accepted, Constituent Entities of U.S. MNE groups electing to file a U.S. CbC report would be spared having to file foreign CbC reports if tax administrations of foreign jurisdictions accept electively-filed U.S. CbC reports.

This approach might not work. Suppose the UPE of a U.S. MNE isn't required to, but elects to file a U.S. CbC report for its taxable year beginning January 1, 2016. Any foreign jurisdiction adopting CbC reporting rules that embody Article 2, ¶ 2 of the *Model Legislation* could still require any local Constituent Entity of the U.S. MNE group to file a CbC report on the grounds the U.S. UPE wasn't required to file a U.S. CbC report, even though it elected to do so. The tax administration of such a jurisdiction could in effect ignore any U.S. CbC report it got on the grounds the report didn't have to be filed.

We accordingly also recommend U.S. Treasury quickly work to get appropriate assurances that electively-filed U.S. CbC reports will be accepted on an equal footing with reports required to be filed. Assurances could come either from the OECD CFA—in the form of a supplement to the *Action 13 Final Report*—or individually from the countries with whom the U.S. intends to execute QCAAs.

d. Fourth, alternative recommendation—modify § 6038(a)(3) to require earlier filing of CbC reports by U.S. MNE groups

If our first two recommendations are unsuccessful, and if U.S. Treasury can't relatively quickly get sufficient assurances that electively-filed U.S. CbC reports will be accepted by tax administrations of foreign jurisdictions as fully equivalent to mandatorily-filed U.S. CbC reports, an alternative recommendation should be adopted.

U.S. Treasury could require CbC reporting by U.S. UPEs for taxable years beginning on or after January 1, 2016 if Congress modified § 6038(a)(3) to allow U.S. Treasury to "prescribe the furnishing of [CbC report] information" after the first day of such taxable year(s). If § 6038(a)(3) were so modified, Prop. § 1.6038-4 could in 2016 (or very early in 2017) be modified and finalized to require CbC reporting by U.S. UPEs for taxable years beginning on or after January 1, 2016. Foreign Constituent Entities of U.S. MNE groups would generally be

spared having to file CbC report with their foreign jurisdictions.[14] We accordingly recommend that if the first three recommendations are unsuccessful, U.S. Treasury ask Congress to make a narrow modification to § 6038(a)(3) as described.

2. Ensuring all foreign Constituent Entities are included as constituent entities in a CbC report filed by the UPE of a U.S. MNE group

The alternative approaches outlined in section B.1, above, would, if implemented, increase the likelihood no Constituent Entity of a U.S. MNE group would be obliged to file a CbC report in the foreign jurisdiction in which it's tax resident.[15] The obligation could be avoided because the foreign jurisdiction would get from U.S. Treasury a copy of the U.S. CbC report.

Obviously this approach would only work in any particular foreign jurisdiction if information about the foreign Constituent Entity is included in the U.S. CbC report. This would be the case if the "Constituent Entity" for foreign CbC purposes is treated as a "constituent entity" under Prop. § 1.6038-4. If a foreign entity of a U.S. MNE group is a "Constituent Entity" as defined in CbC reporting rules of a foreign jurisdiction, but isn't a "constituent entity" under Prop. § 1.6038-4, a CbC report filed by the UPE won't—under Prop. § 1.6038-4—include information about the entity, and the foreign jurisdiction would still want the Constituent Entity to file a foreign CbC report.

The situation just outlined could be avoided if the definition of "constituent entity" of a U.S. MNE group (currently in Prop. § 1.6038-4(b)(5)[16]) was broad enough to cover any conceivable definition of "Constituent Entity" in CbC reporting rules adopted in any foreign jurisdiction. This would be challenging. Mismatches can arise because of differences in the definition of "U.S. MNE group" in Prop. § 1.6038-4(b)(4) and the definition of "Constituent Entity" under Article 1 of the *Model Legislation* (or any equivalent CbC rules adopted by a foreign jurisdiction). The definition of "U.S. MNE group" turns on consolidation for U.S.

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[14] This of course assumes relevant QCAAs are in place in time—see section B.3, below.

[15] As discussed in section B.1, other requirements would also have to be met—in addition to taking one of the outlined approaches—before such a foreign Constituent Entity's obligation didn't materialize. For example, the U.S. would have to have a QCAA with the relevant foreign jurisdiction by the time such jurisdiction required the foreign CbC report.

[16] A constituent entity is "any separate business entity of such U.S. MNE group, except that the term constituent entity does not include a foreign corporation or foreign partnership for which the ultimate parent entity is not required to furnish information under [§ 6038(a)] (determined without regard to § 1.6038-2(j) and § 1.6038-3(c)) or any permanent establishment of such foreign corporation or foreign partnership."

GAAP,[17] but the definition of "Constituent Entity" turns on consolidation for foreign local financial reporting purposes.[18]

There'll be mismatches. For example, U.S. GAAP requires consolidation of "variable interest entities" ("***VIEs***"), even if such entities aren't at least 50 percent controlled by vote.[19] A VIE wouldn't be a "constituent entity" under Prop. § 1.6038-4(b)(5) if the UPE isn't required to furnish information under § 6038(a) (determined without regard to §§ 1.6038-2(j) & 1.6038-3(c))—e.g., a foreign corporation VIE wouldn't be a constituent entity if the U.S. UPE doesn't meet the more-than-50-percent-by-vote-or-value stock ownership "control" threshold in § 6038(e)(2). It's unclear whether VIEs would be treated as "Constituent Entities" in any jurisdictions. Another cause of mismatch might be the 2015 OECD BEPS Action 7 guidance concerning what constitutes a permanent establishment ("***PE***") for purposes of the OECD *Model Tax Convention on Income and Capital* (the OECD "***MTC***"). The *Model Legislation* definition of "Constituent Entity" tracks the updated definition of PE,[20] whereas the definition of Prop. § 1.6038-4 uses a prior version of the OECD MTC.[21]

An alternative to modifying the definition of "constituent entity" to cover any variation of "Constituent Entity" would be to amend Prop. § 1.6038-4 to allow UPEs electively to include in U.S. CbC reports information about foreign entities not treated as "constituent entities" (but perhaps treated as "Constituent Entities"). This would allow U.S. MNE groups to decide

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[17] Under Prop. § 1.6038-4(b)(4), a "U.S. MNE group" comprises the UPE "and all of the business entities required to consolidate their accounts with the ultimate parent entity's accounts under U.S. generally accepted accounting principles, or that would be so required if equity interests in the ultimate parent entity were publicly traded on a U.S. securities exchange, regardless of whether any such business entities could be excluded from consolidation solely on size or materiality grounds."

[18] Under Article 1, ¶ 4 of the *Model Legislation*, a "Constituent Entity" includes "any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange."

[19] VIEs were defined originally in FIN 46(R) (an interpretation of U.S. GAAP issued by the U.S. FASB), which was replaced by accounting standard FASB Statement 167 in 2009.

[20] A "Constituent Entity" is defined in Article 1, ¶ 4 of the *Model Legislation* as two types of business units and " any [PE] of any [of the two types of business units] provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes."

[21] Prop. § 1.6038-4(b)(5) defines a "constituent entity" as certain types of separate "business entities, and under Prop. § 1.6038-4(b)(2) a "business entity" entity includes a business establishment "treated as a [PE] under an income tax convention to which that jurisdiction is a party or that would be treated as a permanent establishment under the [OECD MTC] 2014 and that prepares financial statements separate from those of its owner for financial reporting, regulatory, tax reporting, or internal management control purposes."

whether they want (electively) to include in a U.S. CbC report information about a Constituent Entity that isn't a constituent entity, or instead to file a foreign CbC report.

Note that—unlike the risk of a foreign jurisdiction rejecting an electively filed (early) U.S. CbC report—the elective inclusion in a U.S. CbC report of information about a foreign entity doesn't appear to carry with it a risk of rejection by a tax administration of a foreign jurisdiction, at least if the CbC reporting rules of the jurisdiction are similar to the *Model Legislation*. If such tax administration considers a foreign entity as a Constituent Entity of an "MNE Group," the tax administration should be bound to accept the U.S. CbC report[22] and not require the Constituent Entity to file locally a CbC report: in this case none of the requirements of Article 2, ¶ 2(ii) of the *Model Legislation* would be met, so under Article 2 the Constituent Entity shouldn't be required to file a CbC report. That is, the tax administration of a foreign jurisdiction adopting CbC reporting rules materially the same as those in the *Model Legislation* should accept a U.S. CbC report despite potential discrepancies in the precise details of information provided in the U.S. CbC report as compared with information required under local CbC reporting rules. U.S. MNE groups would in any case presumably be allowed to augment U.S. CbC report information about any Constituent Entities—i.e., include information beyond that required in Prop. § 1.6038-4—to allay concerns of possible rejection of the report by the tax administration of a foreign jurisdiction. U.S. Treasury should consider signaling this in final regulations.

3. U.S. Treasury should act to ensure QCAAs are executed by the time of filing of CbC reports for taxable years beginning January 1, 2016

The OECD reported on January 27, 2016 that 31 countries signed the *Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports*.[23] This agreement is a QCAA under the *Model Legislation*, requiring automatic exchange of CbC reports between the party jurisdictions. The U.S. isn't a signatory. The preamble to the Proposed Regs states "[i]t is expected that the U.S. competent authority will enter into competent authority arrangements for the automatic exchange of CbC reports under the authority of information exchange agreements to which the United States is a party."[24] We understand U.S. Treasury intends to enter into bilateral "competent authority arrangements" (which are QCAAs) .

The alternative approaches outlined in section B.1, above, would, if implemented, increase the likelihood no Constituent Entity of a U.S. MNE group would be obliged to file a

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[22] Assuming, that is, a U.S. CbC report exists for the Reporting Fiscal Year at issue, the U.S. has a QCAA in effect with the relevant foreign jurisdiction by the time a foreign CbC report needs to be filed, and there's no "Systemic Failure" by U.S. Treasury.

[23] http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm

[24] REG–109822–15, 80 Fed. Reg. at 79796.

CbC report in the foreign jurisdiction in which it's tax resident. But, as discussed above, this benefit can only be achieved in a foreign jurisdiction if the U.S. has executed a QCAA with the foreign jurisdiction by the time such jurisdiction requires a foreign CbC report be filed. If such a QCAA has been executed, the obligation of a foreign Constituent Entity to file a CbC report can be avoided because the foreign jurisdiction would get from U.S. Treasury a copy of the U.S. CbC report.

The three alternative approaches outlined in section B.1, above, would, if any were implemented, result in UPEs of some (or all) U.S. MNE groups filing with U.S. Treasury CbC reports for taxable years beginning on or after January 1, 2016, and U.S. Treasury exchanging those reports with tax administrations of foreign jurisdictions. Because the benefit of the outlined approaches hinges on there being a sufficient network of QCAAs in place by the time foreign CbC reports would need to be filed, we urge U.S. Treasury to proceed with all due speed in concluding bilateral QCAAs with foreign jurisdictions.

C. Clarification recommended for Prop. § 1.6038-4(d)(2)

Prop. § 1.6038-4(d)(2) requires the CbC report must contain information specified in subparagraphs (i)–(ix) "with respect to each tax jurisdiction in which one or more constituent entities of a U.S. MNE group is resident . . . ." The paragraph doesn't, however, specify that each of the nine items of information in subparagraphs (i)–(ix) should be reported as an aggregate amount for any such jurisdiction.

Prop. § 1.6038-4(d)(2) also doesn't specify that each of the nine items of information should be reported only for a U.S. MNE group's constituent entities in the jurisdiction (e.g., it's unclear on the face of the paragraph whether information from non-constituent entity MNE group members should be part of the aggregation). Only Prop. § 1.6038-4(d)(2)(vi) references the information (stated capital) is required (with an exception) for "all the constituent entities."

Uniform aggregation across all in-jurisdiction constituent entities is made clear in the Preamble, which provides that "[t]he information for each tax jurisdiction must be presented . . . as an aggregate of the requested information from all of the constituent entities that are resident in the tax jurisdiction."[25] We accordingly recommend the language of Prop. § 1.6038-4(d)(2) be changed to clarify that—unless otherwise specified in the subparagraphs—each of the nine items of information specified in Prop. §§ 1.6038-4(d)(2)(i)–(ix) should in general be reported in the aggregate, and only for constituent entities in the jurisdiction.

[25] REG–109822–15, 80 Fed. Reg. at 79798,

Appendix—SVTDG Membership

Accenture
Acxiom Corporation
Adobe Systems, Inc.
Advanced Micro Devices, Inc.
Agilent Technologies, Inc.
Amazon.com
Apple Inc.
Applied Materials, Inc.
Autodesk
BMC Software, Inc.
Broadcom Limited
Brocade Communications Systems, Inc.
Cadence Design Systems, Inc.
Chegg, Inc.
Cisco Systems, Inc.
Dolby Laboratories, Inc.
Dropbox Inc.
eBay, Inc.
Electronic Arts
EMC Corporation
Expedia, Inc.
Facebook, Inc.
FireEye, Inc.
Fitbit, Inc.
Flex
Fortinet
Genentech, Inc.
Genesys
Genomic Health, Inc.
Gilead Sciences, Inc.
GitHub
GLOBALFOUNDRIES
GlobalLogic, Inc.
Google, Inc.
GoPro, Inc.
Groupon
Harmonic Inc.
Hewlett-Packard Enterprise
Ingram Micro, Inc.
Integrated Device Technology, Inc.
Intel Corporation
Intuit, Inc.
Intuitive Surgical
KLA-Tencor Corporation
Lam Research Corporation
LinkedIn Corporation
Marvell Semiconductor, Inc.
Maxim Integrated
Mentor Graphics
Microsemi Corporation
Microsoft Corporation
NetApp, Inc.
Netflix, Inc.
Oracle Corporation
Palo Alto Networks, Inc.
Pandora Media, Inc.
PayPal Holdings, Inc.
Pivotal Software, Inc.
Plantronics, Inc.
Qualcomm, Inc.
Rovi Corporation
salesforce.com
SanDisk Corporation
Sanmina Corporation
SAP
Seagate Technology
ServiceNow, Inc.
Symantec Corporation
Synopsys, Inc.
Tesla Motors, Inc.
The Cooper Companies
The Walt Disney Company
Theravance Biopharma
Trimble
Twitter, Inc.
Uber Technologies
Visa
VMware Corporation
Yahoo!
Yelp, Inc.