

# OECD releases United States Stage 2 peer review report on implementation of Action 14 minimum standard

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### Executive summary

On 13 August 2019, the Organisation for Economic Co-operation and Development (OECD) released the Stage 2 peer review report of the United States (US) relating to the outcome of the peer monitoring of the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms. The US was among the six assessed jurisdictions included in the first batch for which the OECD has released Stage 2 peer review reports.<sup>1</sup> Stage 2 focuses on monitoring the follow-up of any recommendations resulting from US's Stage 1 peer review report.<sup>2</sup> The US requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an [accompanying document](#) addressing the implementation of best practices.

Overall the report concludes that the US addressed most of the shortcomings identified in its Stage 1 peer review report.

## Detailed discussion

### Background

In October 2016, the OECD released the [peer review documents](#) (i.e., the Terms of Reference and Assessment Methodology) on Action 14 which form the basis of the Mutual Agreement Procedure (MAP) peer review and monitoring process under BEPS Action 14.<sup>3</sup>

The Terms of Reference translate the minimum standard approved into a basis for peer review, consisting of 21 elements complemented by 12 best practices. The Terms of Reference assess a Member's legal and administrative framework, including the practical implementation of this framework to determine how its MAP regime performs relative to the 21 elements in four key areas: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements.

The Assessment Methodology establishes detailed procedures and guidelines for a two-stage approach to the peer review and monitoring process. Stage 1 involves the review of a Member's implementation of the minimum standard based on its legal framework for MAP and the application of this framework in practice. Stage 2 involves the review of the measures taken by the Member to address any shortcomings identified in its Stage 1 peer review. In light of the above, the OECD has also released a [schedule](#) for Stage 1 of the peer review and a questionnaire for taxpayers.<sup>4</sup> The schedule catalogues the assessed jurisdictions into 10 batches for review.

Both stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.<sup>5</sup> In summary, Stage 1 consisted of three steps or phases:

- (i) Obtaining inputs for the Stage 1 peer review
- (ii) Drafting and approval of a Stage 1 peer review report
- (iii) Publication of Stage 1 peer review reports

Input is provided through questionnaires completed by the assessed jurisdiction, peers (i.e., other members of the FTA MAP Forum) and taxpayers. Once the input has been gathered, the Secretariat prepares a draft Stage 1 peer review report of the assessed jurisdiction and sends it to the assessed jurisdiction for its written comments on the draft report. When a peer review report is finalized, it is sent for approval of the FTA MAP Forum and later to the OECD Committee on Fiscal Affairs (CFA) to adopt the report for publication.

For Stage 2, there are two steps or phases:

- (i) Approval of the Stage 2 peer monitoring report of an assessed jurisdiction
- (ii) Publication of the Stage 2 peer review reports

More specifically, an assessed jurisdiction should within one year of the adoption of its Stage 1 peer review report by the CFA submit a detailed written report (Update Report) to the FTA MAP Forum. The Update Report should contain: (i) the steps that the assessed jurisdiction has taken or is taking to address any shortcomings identified in its peer review report; and (ii) any plans or changes to its legislative or procedural framework relating to the implementation of the minimum standard. Members of the FTA MAP Forum should also provide their comments on the Update Report provided by the assessed jurisdiction. Based on the Update Report submitted by the assessed jurisdiction and the input from the peers, the Secretariat will revise the Stage 1 peer review report of the assessed jurisdiction with a view to incorporate these updates in the Stage 2 peer monitoring report of the assessed jurisdiction. After adoption from the CFA, the Stage 2 peer monitoring report will be published.

### Minimum standard peer review reports

The report is divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each part addresses a different component of the minimum standard.

### Stage 2 peer report on the United States

Overall, the Stage 2 peer report indicates that the US addressed most of the shortcomings identified in its Stage 1 peer review report.

#### Preventing disputes

According to the peer review report, not all of the US treaties are consistent with the requirements of the Action 14 Final Report (OECD 2015). Approximately 33% of the treaties with the US contain neither (1) a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law nor (2) an alternative provision to set a time limit for making transfer pricing adjustments.

Approximately 25% of its treaties do not contain unilateral relief prior to the referral of the case to the bilateral phase of the MAP. Approximately 25% of US treaties do not contain an article equivalent to the OECD Model Tax Convention stating that the competent authorities may consult together for the elimination of double taxation for cases not provided in the tax treaty.

To fully comply with the dispute resolution mechanism under Action 14, the US would need to amend and update a certain number of its tax treaties. In response to this request, the US reported that the US intends to implement the required elements in all of its tax treaties and that it would conduct any ongoing or future negotiations with the current or prospective treaty partners with a view towards compliance with Action 14. Nonetheless, as of now, the US has not put in place a plan to that effect.

Furthermore, the US has in place a bilateral advance pricing agreement (APA) program. This APA program also enables taxpayers to request roll-back of bilateral APAs and such roll-backs are granted in practice.

### Availability and access to MAP

The US meets the requirements of the availability and access to MAP under the Action 14 minimum standard. It provides access to MAP in all eligible cases. The US has in place a documented notification and consultation process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified. The US also has in place an internal statutory or administrative dispute settlement/resolution process that is independent from the audit and examination function that can only be accessed through a request by the taxpayer. Where cases are resolved under that process, access to MAP may be limited. The US has extensive, clear, and comprehensive guidance on the availability of MAP and on how it applies this procedure in practice. This guidance also specifies the effects of the internal statutory or administrative dispute settlement/resolution process on MAP.

### Resolution of MAP cases

The number of cases the US closed in 2016 and 2017 is approximately 79% of the cases started in those years. Its MAP inventory slightly increased as of 31 December 2017 as compared to its inventory as of 1 January 2016. During these years, MAP cases were not closed on an average time frame of 24 months. In the Stage 1 peer review report, the

US was recommended to ensure that the available resources for the MAP function are adequately used to resolve cases in a timely, effective, and efficient manner. Although the US has taken steps to efficiently close cases and the time needed to close these cases has decreased, the average is still above the pursued average of 24 months. The US should continue improving internal working procedures to make more adequate use of its resources to resolve MAP cases in a timely, efficient, and effective manner.

Furthermore, the US competent authority operates independently from the audit function of the Internal Revenue Service and adopts a logical approach to resolve MAP cases effectively and efficiently. The performance indicators are appropriate to perform the MAP function.

### Implementation of MAP agreements

According to the peer review report, the US meets the Action 14 minimum standard as regards the implementation of MAP agreements. The US monitors implementation and no issues have arisen in the peer review process.

### Best practice peer review reports

The US provided information and requested feedback from peers on how it has adopted the 12 best practices on dispute resolution and therefore, in addition to the peer review report, the OECD has released an accompanying document addressing the implementation of best practices by the US. However, for most of the best practices, the peers provided only limited input. On the best practice of implementing bilateral APAs, peers reported that they do negotiate and agree to bilateral APAs with the US and expressed a general good working relationship with the US with respect to APAs.

### Implications

In a post-BEPS world, where multinational enterprises (MNEs) face increased scrutiny from tax authorities and the number of MAP cases continues to increase, the release of the peer review reports represents the continued recognition of the importance to MNEs of certainty with respect to the tax treatment of cross-border transactions. While increased scrutiny and greater subjectivity increases the risk of double taxation, the continued focus by the OECD and participating jurisdictions on the implementation of effective dispute resolution mechanisms can be seen as a positive step in helping to improve access to an effective and timely MAP process.

## Endnotes

1. See EY Global Tax Alert, [\*OECD releases first batch of Stage 2 peer review reports on dispute resolution\*](#), dated 14 August 2019.
2. See EY Global Tax Alert, [\*OECD releases the United States peer review report on implementation of BEPS Action 14 minimum standards\*](#), dated 2 October 2017.
3. See EY Global Tax Alert, [\*OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review\*](#), dated 31 October 2016.
4. See EY Global Tax alert, [\*OECD releases schedule of Action 14 peer reviews\*](#), dated 1 November 2016.
5. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.

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