OECD:
Discussion drafts on intangibles, safe harbors and timing issues released

On 6 June 2012, the OECD released three discussion drafts on transfer pricing matters and has solicited comments from business on the following:

- **The transfer pricing of intangibles** – A proposed revised version of Chapter VI of the OECD’s Transfer Pricing Guidelines. This is the next step in the significant project on intangibles that began in 2010 under the remit of the OECD’s Working Party 6; [URL](http://www.oecd.org/document/41/0,3746,en_2649_33753_50509929_1_1_1_1,00.html)

- **Safe harbors** – Proposed amendments to the OECD’s guidance on the use of transfer pricing safe harbors in Chapter IV of the Transfer Pricing Guidelines; and [URL](http://www.oecd.org/document/16/0,3746,en_2649_33753_50509904_1_1_1_1,00.html)

- **Timing issues** in relation to transfer pricing. [URL](http://www.oecd.org/document/0,3746,en_2649_33753_50519552_1_1_1_1,00.html)

Comments must be submitted by 14 September 2012, and a public consultation is expected in November in relation to intangibles.

**Special considerations for intangibles**

The OECD’s Working Party 6 has issued an interim draft of its work for further detailed public comment, in response to suggestions from the business community following the business consultation in November 2011. The revised draft proposes a new Chapter VI, “Special Considerations for Intangibles” of the Transfer Pricing Guidelines, covering:

- Identifying intangibles, including categorization;
- Identifying parties entitled to intangible related returns, including consideration of legal arrangements and functions, risks and costs;
- Transactions involving the use or transfer of intangibles, including the transfer of rights in intangibles and in combination with other business transactions;
- Determining arm’s length conditions in cases involving intangibles, including comparability factors and selecting the most appropriate transfer pricing method; and
- A revised Annex, setting out 22 intangibles examples.

**Safe harbors**

The OECD has published a discussion draft proposing revisions to the current Transfer Pricing Guidelines’ comments on safe harbors (in Chapter IV). The OECD comments that the current drafting “has a somewhat negative tone” that does not reflect the practice of OECD member countries (particularly in respect of smaller taxpayers and less complex transactions), and does not cover adequately bilateral agreements establishing a safe harbor, even though some countries have favorable experiences with such bilateral agreements. The changes proposed look to address these issues given the potential advantages of safe harbors in terms of simplicity and ease of administration, and the discussion draft includes draft sample memoranda of understanding for competent authorities to use in establishing bilateral safe harbors.

**Transfer pricing timing differences**

The third discussion draft arises from the work by the Working Party 6 on intangibles and considers various timing issues that may arise. The OECD notes that some countries follow an arm’s length price setting approach based on information reasonably available at the time the transaction is undertaken, while other countries follow an arm’s length outcome approach using information available at the end of the relevant year or at the time the tax return is filed.

The issues raised include the timing of information available on comparable transactions; tax authorities’ acceptance of taxpayer-initiated transfer pricing adjustments (such as year-end adjustments); the use of post-transaction date information to assess reasonableness (e.g. of financial projections); and specific issues in respect of any valuation of an intangible that is highly uncertain at the transaction date.