U.S. TAX PROPOSALS AFFECTING MULTINATIONAL BUSINESSES

International tax proposals released by the Obama Administration last week represent a significant step forward in the tax reform debate, although there continue to be significant policy differences between the Administration and Congress. This memorandum focuses on the implications of these proposals for U.S. and foreign-based multinationals.

The Administration's proposals reflect a stronger policy-level commitment to tax reform than has been evident in recent years.[1] As an indication of its willingness to engage, the Administration has proposed a conceptual framework that is similar to recent Congressional tax reform proposals.[2] The ability to make apples-to-apples comparisons facilitates identifying areas where policymakers are in agreement, and may be helpful in addressing the remaining areas of disagreement.[3] Most notably, there appears to be a consensus that:

- Income from active foreign businesses should be exempt from U.S. tax, or subject to taxation at a significantly reduced rate;
- Measures to combat base erosion (siphoning income from high-tax countries to low-tax countries) are needed to protect the U.S. tax base; and
- Those anti-abuse measures will include a thin capitalization rule that will make it more difficult for non-U.S. multinationals to reduce worldwide tax burdens by leveraging their U.S. operations.

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1 The proposals are included in the Treasury's Green Book, an annual publication describing the Administration's revenue proposals. Critics had characterized the international section of last year's Green Book as an undifferentiated grab bag of ideas with no clear unifying theme. In comparison, the international section of this year's Green Book is more unified and focused.

2 Recent statements by Treasury Secretary Jacob Lew indicate that at least some similarities are intentional. Secretary Lew said at a Senate Finance Committee hearing that one aspect of the Administration's proposal was "structured similarly" to the Camp bill and that it "draws on principles that are shared on both sides." *See* McPherson, Lindsey, "Revenue Neutrality a Reason for 19 Percent Minimum Tax, Lew Says," 2015 TNT 25-1 (February 6, 2015).

3 The appendix provides a side-by-side comparison with the most significant tax reform proposal in the last Congress, Option C of then-chairman Camp's bill.

The use of a similar set of building blocks makes it easier to anticipate the shape that tax reform eventually will take. The configuration of those building blocks, of course, will be critically important in assessing the implications of tax reform for particular companies and industry groups.

Some of the details of the Administration's proposals are less important at this stage, for two reasons: (i) the proposals are described in extremely superficial terms, and are not susceptible to rigorous exegesis; and (ii) the headline items—a 19% minimum tax on foreign income above a specified hurdle rate, and a 14% tax on retained foreign earnings—are the features that are most likely to change. These rates (and the comparable rates included in recent Congressional proposals) can be viewed as opening bids and not as lines in the sand.[4]

The Administration's international proposals also provide useful insights into the U.S. negotiating position in the OECD's BEPS project, in which the United States and its most significant trading partners are working to develop a coordinated approach to combat base erosion.[5]

PROSPECTS FOR TAX REFORM

The U.S. tax rules governing multinational businesses are in need of a comprehensive overhaul. There is a risk of being left behind (and of competitive disadvantages for U.S. businesses) if other countries reform their rules and the United States doesn't.[6] But even in the presence of a broad consensus that change is necessary, the process of getting from here to there will likely be tortuous. International tax reform has been under discussion for several years now; definitive legislation may still be several years away. Why should businesses care about it now?

Although the timing remains uncertain, some version of the ideas that are currently under consideration is likely to become law. It therefore is strongly desirable to identify features that could give rise to collateral damage, and to explore alternative means of achieving the underlying policy objectives. Major tax reform legislation generally develops in an iterative process. The issues are framed by exchanges between the members and staff of the House and Senate taxwriting committees, between the two houses of Congress, and between Congress and the Administration; in each case with input from taxpayers and their advisers. Trial balloons can

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4 Secretary Lew basically said as much at the Senate Finance Committee hearing, when he said that "[w]e don't think that the numbers that we've picked have absolute truth to them," adding that "[w]e could've gone a little bit higher, we could've gone a little bit lower" and "[t]his is the kind of thing we ought to be able to work out." McPherson, 2015 TNT 25-1.

5 "BEPS" stands for **b**ase **e**rosion and **p**rofit **s**hifting.

6 The BEPS Action Plan is targeted at arrangements that create stateless income (income derived from economic activity conducted in a high-tax country by a multinational group based in another such country that somehow is subject to tax in neither place). If other countries adopt coordinated rules for dealing with stateless income, and the United States doesn't modernize its rules, there will be a risk both of duplicative taxation and of revenue losses to the U.S. tax system.

affect the outcome: a bad idea that isn't effectively rebutted when it first appears can become part of the conversation, and may eventually find its way into law.

The timetable of international tax reform will depend on a variety of factors:

- Will Congressional leaders and the Administration assign priority to tax reform? Will other demands prevent them from dedicating the time required to get it done?
- Will it be possible to approach tax reform in stages, or will it be politically necessary to enact a single all-encompassing package?
    - The need for reform is strongest, and the path to a deal seems clearest, in the context of the U.S. tax rules governing international businesses.
    - The route will be longer and more tangled if tax reform is comprehensive and addresses the treatment of individuals, domestic businesses and pass-through entities.[7]
    - The only scenario in which tax reform is realistically possible within the next 12 to 18 months is one in which businesses are dealt with separately from individuals, and business tax reform comes first.

ACTIVE FOREIGN INCOME WILL BE TAXED AT A REDUCED RATE; ANY TAXES DUE WILL BE PAYABLE CURRENTLY

The Administration's proposals should be viewed in light of the global trend towards territorial tax systems. Most countries have adopted rules under which income from active businesses conducted outside their borders is not subject to full taxation. The United States has become an outlier in continuing to apply a deferral system.

Under the current U.S. rules, a foreign subsidiary's active income generally is not subject to current tax, but only so long as the related earnings are retained outside the United States. This has given rise to serious problems for the tax authorities, multinationals, and the broader economy:

- The availability of opportunities to reduce tax burdens by shifting earnings outside the United States erodes the U.S. tax base, and creates capricious distinctions between companies that are in a position to take advantage of those opportunities and companies that aren't;
- The lockout effect resulting from a more than trillion-dollar pool of earnings that cannot be brought back to the United States creates structural inefficiencies; and

[7] The Administration seems inclined to pursue domestic and international business tax reform as a single package. *See* McPherson, 2015 TNT 25-1 (quoting Secretary Lew to say that policymakers "theoretically . . . could separate out the international piece" but that "it wouldn't solve the whole problem" and "the best way to do it would be to do it through broad business tax reform").

- The frustrations associated with the U.S. system, and the cost savings available by moving businesses offshore, have encouraged a wave of high-profile inversion transactions.

The Administration's proposals would replace deferral with a hybrid exemption system. Under that system, active foreign earnings would be taxed at a reduced rate that would not require that earnings be retained outside the United States. The Camp bill takes a similar approach. Either measure, when coupled with the transition rules discussed below, should eliminate the lockout effect.

Both the Administration proposals and the Camp bill effectively divide active foreign business income into two classes:

- Income, determined by application of a formula, that is completely exempt from U.S. tax (the Administration's proposal would use a risk-free return on equity); and

- Other active income, which would be exempt if it has been subject to foreign tax at a specified minimum rate, and otherwise would be taxed at a reduced rate.

Neither proposal would change the treatment of foreign source passive income, which will continue to be subject to current taxation at regular corporate income tax rates.

AREAS OF POSSIBLE AGREEMENT

The Administration's proposals should not be viewed in a vacuum. The real insights come not from parsing the details of the proposals, or from reading them in isolation, but from comparing them to recent Congressional tax reform proposals. A side-by-side comparison reveals the points on which policymakers appear to be in agreement, and offers a glimpse into the future. The Appendix contains a side-by-side tabular comparison of the Administration's proposal with the corresponding provisions of the Camp bill.

Nearly all of the Administration's proposals fall into one policy goal bucket: to reduce the tax rate on active foreign business income, while preventing the erosion of the U.S. tax base. Many of the specific proposals overlap with the proposals in Camp's draft. The areas of overlap provide a signpost to the likely contours of tax reform.

THIN CAPITALIZATION RULES

Tax reform is likely to include a thin cap rule. Such a rule, which would be targeted at U.S. subsidiaries of foreign multinationals as well as at U.S. multinationals, would be intended to make it more difficult to reduce a multinational group's worldwide effective rate by overleveraging U.S. businesses relative to non-U.S. businesses. The Administration's proposals and the Camp bill include essentially similar thin cap rules, although the Administration's proposal would be triggered at a lower threshold. Both would apply to a U.S. borrower's net interest expense (*i.e.*, the amount by which interest expense exceeds interest income). The Administration's thin cap proposal would not apply to financial services companies.

EXPENSES ALLOCABLE TO FOREIGN INCOME

Policymakers continue to disagree on the appropriate treatment of domestic expenses that are not directly associated with foreign income, but might be deemed to have been incurred in order to fund foreign activities. This is a significant area of difference between the Administration's proposal and the Camp bill. The Camp bill would have followed the approach used by many foreign countries by taxing 5% of dividends paid out of exempt foreign income as a proxy for the allocation of expenses to such income.

The Administration's proposal instead would require taxpayers to allocate and apportion interest expense between domestic and foreign sources, and between different categories of foreign source income. Deductions would be disallowed to the extent interest is allocated to exempt foreign income, and would be allowed at a reduced rate to the extent expenses are allocable to foreign income that is taxable at a reduced rate. The Administration's proposal corresponds closely with one of the policy options described in the discussion draft concerning BEPS Action 4, and suggests that the Administration supports this option in the BEPS negotiations.

INCOME FROM INTANGIBLES

Tax reform will likely broaden the definition of intangibles. The Administration's proposal and the Camp bill (as well as BEPS Action 8) seek to identify and deal separately with income from intangibles, and rely on a very broad definition of intangibles for this purpose.

ANTI-HYBRID RULES

The Administration's draft would disallow deductions for intragroup payments of interest and royalties if the recipient is not required to include the payments in income. This again corresponds to a rule that is under consideration in the BEPS process.

ANTI-INVERSION RULE

Tax reform will likely incorporate stricter anti-inversion rules. The Camp bill predated the most recent wave of inversion transactions and does not address those transactions. The Administration's proposal would sharply curtail the ability to move a U.S. corporation offshore, possibly at the expense of creating significant barriers to ordinary-course M&A transactions that are not motivated by taxes.

OTHER MEASURES

The Administration's proposal includes a number of other measures that may represent the vestiges of the grab bag approach reflected in prior Green Books. Those measures include:

- "Onshoring" incentives for bringing jobs back to the United States.

- A rule disallowing deductions for the cost of moving jobs offshore;

- Measures targeted at marginal tax planning strategies, including the elimination of a rule applicable to interests in foreign subsidiaries held for less than 30 days in a taxable year, and to address arrangements that conceivably could enable U.S. acquirors of foreign companies to circumvent recently-enacted rules that disallow foreign tax credits that are attributable to differences in the treatment of an acquisition for U.S. and foreign tax purposes.

If you have any questions, please feel free to contact Jim Duncan, Alison Coutifaris, Daniel Hanna or any of your regular contacts at the firm. You may also contact our partners and counsel listed under "Tax" located in the "Practices" section of our website at http://www.cgsh.com.

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APPENDIX

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: FOREIGN SUBSIDIARIES OF U.S. COMPANIES			
	Camp Option C	**Administration FY 2016**	**Comments**
Overview	A split-rate system would apply to a U.S. parent's share of a foreign subsidiary's active business income: a portion of the income would be exempt from tax, and the balance would be subject to tax at a reduced rate. No change in the treatment of passive income.	Same, except as described under "Branches" below.	
Scope of exemption	Exemption applies to active income minus amount attributed to intangibles under a formula that would treat bricks-and-mortar businesses more favorably than financial services businesses.	Exemption is capped by reference to a risk-free return on equity invested in active assets (the allowance for corporate equity, or "ACE"). Assets held in the conduct of an active financial services business would constitute active assets for this purpose.	The mechanics of determining exempt income differ slightly (10% of tangible assets under Camp, a risk-free return on equity under the Administration proposal), but the theory is about the same. The difference in outcome will depend on the interest rate environment, and on whether a risk-free return is defined by reference to long or short-term rates, and how risk-free returns are determined in different countries and markets.
Mechanics of reduced rate/ minimum tax system	Intangibles income (in general, all active income that doesn't qualify for an exemption) would be taxed at a reduced rate (typically 50% or 60% of the generally applicable U.S. corporate income tax rate—12.5% to 15% if the generally applicable rate is 25%), subject to reduction by creditable foreign taxes.	Active income not qualifying for an exemption (*i.e.*, in excess of the ACE) would be taxed at a reduced rate equal to the difference between 19% and 85% of the foreign effective tax rate, determined on a rolling 5-year basis. The foreign effective rate would be determined by dividing creditable foreign tax payments by the earnings attributed to a country for U.S. purposes.	The Administration's proposal would treat shareholders of companies based in high-tax jurisdictions more harshly than shareholders of companies based in tax havens. Active income derived from a zero-tax country would be subject to an overall tax rate of 19% (19% U.S. tax+ zero foreign tax); the same income derived from a country with a tax rate between 19% and 22.35% would be subject to residual U.S. tax as well as foreign tax; income subject to foreign tax at a rate of 22.35% (85% of 22.35% = 19%) or more

		Home-office expenses would be taken into account in determining net earnings; the Administration's proposal does not specifically indicate whether the ACE would be deductible for this purpose, or whether gains and losses would be netted between subsidiaries and branches in the same country.	would not be subject to U.S. tax.
Definition of active income	No changes to existing law, except for the split-rate system described above, and the extension and modification of the active financing exemption described under "Financial services companies", below.	Same.	
Intragroup payments	The look-thru rules would be made permanent, but income that had qualified for a complete exemption instead generally would be taxable at a reduced rate.	Same, subject to anti-hybrid rules.	
Sale of shares in a foreign subsidiary	Gains attributable to exempt earnings generally would not be subject to taxation; losses would not be allowed to the extent of exempt dividends received by the seller.	The Administration's proposal is more elaborate, but generally also seeks to create parity of treatment between the dividends that a shareholder would have received and gain on the sale of shares.	

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: EXPENSES			
	Camp Option C	**Administration FY 2016**	**Comments**
U.S. expenses that do not relate directly to foreign income	Expenses that are not directly associated with active foreign income would not be required to be allocated between domestic and foreign sources. As a proxy for expense allocation, a 5% disallowance rule (or, more precisely, a dividend exemption limited to 95%) would apply. At a 25% corporate tax rate, this would represent a 1.25% residual tax on active foreign income.	If interest expense incurred by a U.S. member of a multinational group represents a disproportionate share of the group's worldwide borrowing costs, then a portion of that expense would be treated as a cost of earning foreign income. Deductions would not be allowed for interest allocable to exempt foreign income. Deductions would be allowed at a 19% for interest allocable to foreign income taxable at that rate.	The Administration's interest allocation proposal is very similar to one of the policy options described in the BEPS Action 4 discussion draft.
Thin capitalization	Deductions would not be allowed for net interest expense (*i.e.*, interest expense in excess of interest income) attributable to excess domestic indebtedness. A borrower would be considered to have such excess indebtedness if its net interest expense exceeds 40% of EBITDA, **and** it has more debt than it would have had if each member of the worldwide group had the same debt/equity ratio.	Similar rules would apply, based on the allocation of net interest expense for financial statement purposes, although the standalone exception based on a percentage of EBITDA would be set at a much lower level (10% instead of 40%). The rules would not apply to financial services companies.	

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: INTANGIBLES			
	Camp Option C	**Administration FY 2016**	**Comments**
Foreign subsidiaries	Active income in excess of a 10% return on tangible assets generally would be characterized as intangibles income. Such income generally would not qualify for a full exemption, and instead would be taxable at a reduced rate.	The split-rate system in the Administration's proposal achieves essentially the same result, but does not denominate amounts that are taxable at a reduced rate as intangibles income.	
U.S. companies and their foreign branches	Deductions would be allowed in respect of foreign intangibles income earned by U.S. companies directly or through foreign branches. The intent would be to create parity of treatment between, and taxation at the same reduced rate for, intangibles income earned by U.S. and non-U.S. members of a multinational group.	The amount of foreign branch income eligible for an exemption or reduced rate would be reduced by deemed payments by the branch to its home office for the use of intangibles. The Administration's proposal broadly defines intangibles to include "workforce in place, goodwill, going concern value, and any other item owned or controlled by a taxpayer that is not a tangible or financial asset and that has substantial value independent of the services of any individual."	The Administration's definition of intangibles closely resembles the definition of intangibles in BEPS Action 8.

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: FOREIGN TAX CREDITS			
	Camp Option C	**Administration FY 2016**	**Comments**
Exempt income	Not allowed.	Not allowed.	
Income taxed at a reduced rate	Allowed, subject to basket changes described below.	85% of relevant foreign tax payments allowed as credits, on a country-by-country basis.	
Income not qualifying for exemption or reduced rate	Allowed, subject to basket changes described below.	Allowed on a country-by-country basis.	
Baskets	As under current law, foreign tax credits would be determined separately for two baskets of income. The passive basket would be expanded and renamed. The new basket "mobile category income" would include intangibles income and certain income from intragroup sales.	Not addressed.	The Camp bill's expanded mobile category basket would result in income and taxes from closely related activities falling unpredictably on different sides of the line.
Pre-enactment taxes	See "Transition issues", below.	See "Transition issues", below.	

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: TRANSITION ISSUES			
	Camp Option C	**Administration FY 2016**	**Comments**
Pre-enactment earnings	Retained foreign earnings would be subject to a one-time tax at an: • 8.75% effective rate (*i.e.*, a 75% exclusion) if the earnings are represented by financial assets • 3.5% effective rate (*i.e.*, a 90% exclusion) if the earnings have been reinvested in hard assets (a "bricks-and-mortar" exception).	Retained foreign earnings would be subject to a onetime tax (payable over 5 years) at a 14% rate.	.
Foreign tax credits	Allowed on a proportional basis (*i.e.*, 10% of foreign taxes paid in respect of earnings taxed at 3.5%, and 25% in respect of earnings taxed at 8.75%).	Allowed on a proportional (and country-by-country) basis (*i.e.*, 14/35 of foreign taxes).	
Computation of retained foreign earnings	The tax on retained foreign earnings would be determined by netting the earnings and deficits of a U.S. group's foreign subsidiaries.	The Administration proposal is silent on this point.	
Preservation of tax attributes attributable to timing mismatches	The Camp bill does not specifically address the treatment of a U.S. parent company's pre-enactment foreign tax credit carryover or overall domestic losses, but policymakers appeared to be have been persuaded that those attributes should be preserved.	No direct guidance.	This issue is particularly important to U.S. multinationals that have not been able to make effective use of foreign tax credits in recent years because domestic losses have offset foreign profits (for example, as a result of the financial crisis).

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: INVERSIONS AND HYBRIDS			
	Camp Option C	**Administration FY 2016**	**Comments**
Inversions	The Camp bill predates the most recent wave of inversions and does not address inversion transactions. Under current law, a U.S. company can combine with a smaller foreign company, so long as shareholders of the U.S. company don't own more than 80% of the combined enterprise. Inversions thus have been practical if and to the extent that the foreign minnow is at least one-quarter the size of the U.S. whale.	The Administration's proposal would reduce the current-law U.S. shareholder test from 80% to 50%. Further, anti-abuse rules would target attempts to adjust the relative size of the U.S. parties, and combinations where the management and activities of the new foreign parent company are mostly located in the United States.	The challenge in developing anti-inversion rules is to design a test that effectively discourages inversion transactions without inhibiting bona fide business combinations that are not motivated by taxes. The existing rules haven't been effective in discouraging inversions. The Administration's proposal would tilt the balance in the other direction: it would deter tax-motivated transactions, but perhaps at the expense of sharply restricting mergers of equals and similar plain-vanilla transactions. The more stringent thin cap standard proposed by the Administration could also be effective in reducing the benefits of inversion transactions that have already been completed.
Hybrids	Not addressed.	Deductions for interest and royalty payments made to related parties would be disallowed if the recipient is not required to include the payment in income or the inconsistent treatment of the asset would permit double dipping.	The Administration's proposal closely resembles the treatment of hybrid mismatches under BEPS Action 2.

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: FOREIGN BRANCHES OF U.S. COMPANIES			
	Camp Option C	**Administration FY 2016**	**Comments**
Overview	Income earned by foreign branches of U.S. companies would continue to be subject to tax at domestic rates. Rules designed to discourage the transfer of assets from branches to be subsidiaries would be strengthened.	Income earned by a foreign branch would qualify for exemption or taxation at a reduced rate under the same rules applicable to subsidiaries.	The proposal to extend the hybrid exemption system to active foreign branches would give rise to complex and difficult issues that the drafters may not have fully appreciated. For example, • There currently are no rules for determining the portion of a U.S. bank's capital that should be attributed to a particular foreign branch. Local law rules applied by foreign bank regulators and tax authorities vary widely from country to country. Disparities in the amount of capital attributed to a branch would be particularly troublesome in the context of a minimum tax rule that is proposed to apply on a country-by-country basis. • The existing U.S. tax rules for identifying active income were developed in the context of foreign subsidiaries (for example, some rules envision the conduct of all business functions from a single headquarters in a particular foreign country, which is characteristic of subsidiaries but uncommon for branches). The rules would need to be adapted for use by branches.

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: FINANCIAL SERVICES COMPANIES			
	Camp Option C	**Administration FY 2016**	**Comments**
Active financing income	The active financing exemption ("AFE") would be extended for five years. However, as a result of the proposed creation of a new intangibles income category, it appears that income that would have qualified for a complete exemption under the current-law AFE instead would be classified as intangibles income taxable at a reduced rate.	The AFE would be made permanent. Active financing income would be exempt to the same extent, and subject to the same ACE cap, as income from other active businesses.	
Thin capitalization	Based on net interest expense.	Based on net interest expense; financial services companies excluded.	Recent proposals to strengthen thin cap rules (including not only the U.S. proposals compared in this Appendix but also the BEPS Action 4 discussion draft) appropriately recognize that such rules should be based on net interest expense. The Administration's proposal further recognizes the special considerations applicable to financial services companies and provides an exception for such companies.
U.S. expenses that do not relate directly to foreign income	No allocation; 95% exemption of foreign dividends as a proxy for expense allocation.	Allocation based on worldwide interest expense: • The proposal does not specifically indicate whether interest expense would be determined on a gross or net basis and whether an exception would apply for financial services companies.	The considerations that led to the adoption of a net interest test for thin cap purposes, and to the Administration's proposed thin cap exception for financial services companies, apply with even greater force if an interest allocation rule is adopted. The application of an allocation rule based on gross interest to regulated financial service companies, and the disallowance of deductions for U.S. borrowing costs deemed to be attributed to exempt foreign income, would be unworkable and unfair.
Bank tax	Excise tax of 3.5 bps on total consolidated assets in excess of $500 billion.	Financial fee of 7 bps on assets less equity. Applicable to firms with assets ≥ $50 billion, and covers banks, insurances companies, asset	

		managers, broker-dealers and financial captives. There is no threshold. The fee is deductible in computing corporate income tax.	

COMPARISON OF INTERNATIONAL TAX REFORM PROPOSALS: NON-U.S. MULTINATIONALS

	Camp Option C	Administration FY 2016	Comments
Thin capitalization	Thin cap rules (described under "Expenses", above) would restrict the ability to reduce worldwide tax burdens by situating leverage disproportionately in the United States.	Same.	
Hybrids		Anti-hybrid rules (described above) would restrict the ability to reduce worldwide tax burdens by exploiting mismatches between the treatment of a financing transaction within and outside the United States.	
Inversion		Anti-inversion rules (described above), if enacted in the form described in the Administration's proposal, would make it more difficult to structure a business combination between foreign and U.S. companies of roughly equal size.	
Expense allocation		Expense allocation rules (described above) could affect the tax efficiency of business combinations between multinationals with disparate amounts of leverage, and in some cases could create incentives to acquire or dispose of businesses to realize allocation benefits.	

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099