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Public advice and guidance compendium – PCG 2018/D5

This is a compendium of responses to the issues raised by external parties to draft Practical Compliance Guideline PCG 2018/D5 *Enterprise Tax Plan: small business company tax rate change: compliance and administrative approaches for the 2015–16, 2016–17 and 2017–18 income years*.

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response / action taken
1	Will the final Guideline be modified in light of the Treasury Law Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017 (the Bill) passing Parliament?	No, other than minor changes to reflect the enactment of the Bill, no changes were necessary.
2	Footnote 1 of the draft Guideline mentions a law companion ruling to be published once the Bill has passed. When exactly can that be expected?	Draft Law Companion Ruling LCR 2018/D7 <i>Base rate entities and base rate entity passive income</i> was published on 24 August 2018. The footnote in the final Guideline has been updated to reflect this.
3	Neither the compliance approach (paragraphs 10 to 12 of the draft Guideline) nor administrative approach (paragraphs 13 to 21 of the draft Guideline) explicitly discuss the ATO's compliance approach at the shareholder level. In Example 1 at paragraph 24 of the draft Guideline, it is stated that 'No penalty is imposed by the ATO'. However, it is not clear whether this 'no penalty' comment is referring to the administrative approach's penalty concession granted to ABC Co or whether it is also intended to signal that no penalties will be applied for incorrect tax returns lodged by the members. It is recommended the final Guideline: • explain the ATO's compliance and administrative	The following was added to paragraph 11 of the final Guideline: 'Under this approach, the Commissioner will not allocate resources to review the affairs of members in so far as it relates to the franking of distributions in these circumstances.' Additionally, paragraph 29 of the final Guideline was amended to say 'No penalty is imposed by the ATO for either the entity or its member'.

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	approaches at both the corporate tax entity and the shareholder level. Example 1 be modified to clarify what is the penalty and interest position of the shareholder if additional primary tax is payable in 2017.	
4	Paragraph 9 of the draft Guideline notes that the guidance applies for three income years (2016–2018) depending on an entity's circumstances. Ultimately, however, the compliance approach only applies for the 2016 and 2017 years and the administrative approach only applies for the 2017 and 2018 years. It is recommended: - explicit reference is made to the 2017 and 2018 years at paragraph 8 of the draft Guideline. - paragraph 9 of the draft Guideline be modified so the date of effect of each compliance concession is clearly stated upfront. - other ATO website guidance (eg <i>Reducing the corporate tax rate</i>) be modified so it is consistent with the final Guideline.	Paragraph 8(a) of the final Guideline has been updated to state: 'A facilitative compliance approach will apply to the 'carrying on a business' test in relation to eligibility for the lower rate in the 2015–16 and 2016–17 income years'. No change has been made to paragraph 9 of the final Guideline outlining the years to which the compliance and administrative approaches apply given that it is set out in paragraphs 11 and 17 of the final Guideline, respectively. Reducing the corporate tax rate page on ato.gov has been updated to reflect the compliance and administrative approaches being taken.
5	The paragraph 11 caveats of the draft Guideline do not currently appear on other ATO website guidance on this topic (refer ATO webpage <i>Reducing the corporate tax rate</i>) and thus the Guideline's compliance approach appears more restrictive than the pre-existing ATO public guidance. However, paragraph 12 of the draft Guideline states the compliance approach does not apply where ATO compliance activity, unrelated to whether or not the correct tax rate has been applied, has been initiated.	A link to the final Guideline is available under the 'More information' section on Reducing the corporate tax rate.

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	If paragraph 12 is intended to merely confirm that the ATO is not constrained in conducting 'non-corporate tax rate' compliance activity, then there is no issue with that proviso to the compliance approach. The current wording of paragraph 12 suggests any 'non-corporate tax rate' compliance activity means the compliance approach does not apply at all, even though the taxpayer has not breached the paragraph 11 caveats. If the taxpayer has not breached the proviso in paragraph 11, the compliance approach should still apply. It is recommended: - the wording of the proviso outlined in paragraph 12 of the draft Guideline be revisited. - other related ATO website guidance on this topic should be updated for consistency in its messaging.	
6	It would be prudent for the Guideline to highlight what is the ATO's current guidance for the 2018 filings (or at least where such information can be located). The current ATO website guidance is suggesting that 2018 tax returns should be lodged 'based on the existing law' and look to amend if the law changes. It will not always be feasible for corporates to readily conclude whether the impacts of the new passive income rule result in a change in the company tax rate compared to the current law. Thus the ATO's current guidance for 2018 filings might benefit from an immediate update. For example, the ATO might still be prepared to accept tax returns being filed under the (then) old law, provided any necessary amendments are	This information is available on ato.gov.au in the company tax return instructions ,which have been updated. Instructions now have a link to LCR 2018/D7 in addition to an update for the new passive income test.

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	actioned within a reasonable period of time. It is recommended: - the final Guideline's commentary on the compliance approach also highlight what is the ATO's guidance for 2018 filings (or where it can be located). - the ATO guidance for 2018 filings is now promptly updated.	
7	At paragraph 15b of the draft Guideline, it is noted that, inter alia, incorrect franked distributions that have arisen due to the passage of the amending Acts subsequent to the distributions being made, and the release of Draft Taxation Ruling TR 2017/D7 <i>Income tax: when does a company carry on a business within the meaning of section 23AA of the Income Tax Rates Act 1986?</i>, are also entitled to the administrative approach concession. The impact of the highlighted wording is not clear from the administrative approach commentary. For example, the amending Acts are the <i>Tax Laws Amendment (Small Business Measures No. 1) Act 2015</i> and the <i>Treasury Laws Amendment (Enterprise Tax Plan) Act 2017</i> (the latter becoming law in May 2017). Then, as noted in the draft Guideline, TR 2017/D7 was only released in October 2017. Accordingly, the question arises whether the administrative approach concession is referable to all 2017 and 2018 year dividends, or only pre-October 2017 dividends, or as possibly suggested by Example 1, pre-May 2017 dividends when the Enterprise Tax Plan became law? Note that under section 202-75(3) of the <i>Income Tax</i>	The administrative approach in relation to franking is clearly expressed to apply to all 2016-17 and 2017-18 income year dividends at paragraphs 15 and 17 of the final Guideline.

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	<i>Assessment Act 1997</i> the company in Example 1 of the draft Guideline may have actually provided the (incorrect) distribution statement on 31 October 2017 (ie after the release of TR 2017/D7), but this does not appear to jeopardise the outcomes in Example 1. It is recommended that given the nature of the concession being offered, and given all the confusion associated with all these changes, the administrative approach concession should not be narrowly construed and preferably all incorrect 2017 and 2018 franked dividends should benefit from the concession. In the heading of the administrative approach, reference is made to 'incorrect franking' and it begs the question whether the administrative approach concession covers situations involving both over franking (clearly this is the case as articulated in paragraph 13 and Example 1 of the draft Guideline), but does it also extend to under-franking (ie in hindsight, the company could have franked at 30% but only franked at 27.5%, and if so, is it dependent on the company paying the correct company tax rate)? Further, we are now in the 2019 income year and thus presumably some companies might be paying franked dividends. Whilst the entity acknowledges that private companies may have the opportunity to defer giving distribution statements until four months after the end of an income year (see section 202-75(3)), the final Guideline would benefit in having some comment, whether by footnote or otherwise, on the ATO's current guidance if corporate taxpayers are considering paying franked dividends now.	

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	It is recommended that: • Some clarification of the impact of paragraph 15b of the draft Guideline occurs – suggest the administrative approach concession not be narrowly defined in this case. • The final Guideline makes clear whether the administrative approach concession covers both over and under-franking or not, as well as some guidance on what to do if taxpayers are thinking about paying dividends in the 2019 year.	