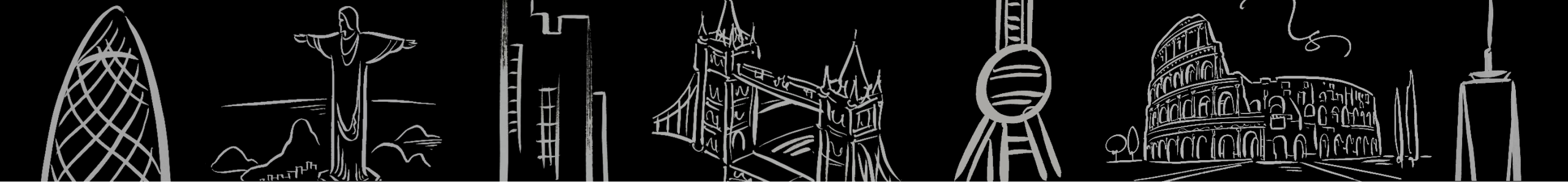




# FINANCIAL SERVICES: HOW TO FACE RECENT CHANGES AND WHAT IS NEXT!



# PANEL SPEAKERS



**Erik Stroeve**  
The Netherlands

Partner – Head of  
Financial Services Tax



**Tom Barber**  
USA

Partner – Head of US  
Insurance Tax



**Renata Ardous**  
UK

Director – International  
Tax and Transfer Pricing

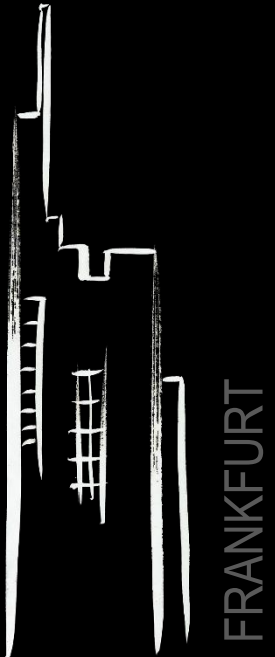
Focus on three main topics in the FS Industry:

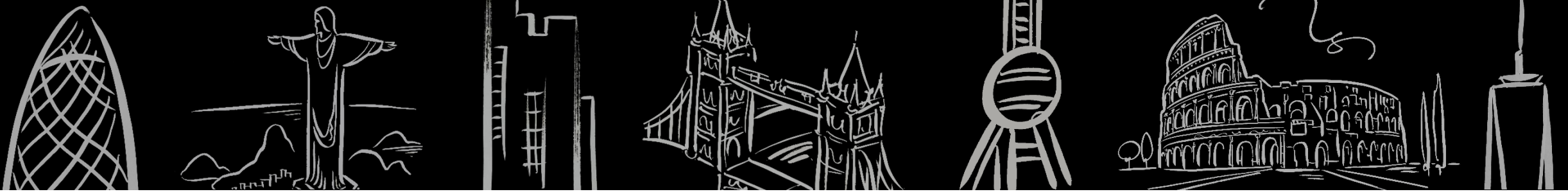
- Transparency
- Managing Risks
- Digitalization

# CONTENTS

# TRANSPARENCY TRENDS

- General Opening
- Influence of NGO's
- Tax Policy Publications
- CRS / FATCA update
- US update





## INTO THE LIGHT AFTER CBCR

- Since 2015 (after CRD IV), only 1 sector needs to publish relevant information on country by country basis: EU financial institutions (turnover, FTE, profit, tax paid etc)
- Oxfam Novib Report 2017:
  - 25% of profits are accounted for in tax havens;
  - Individual banks book profits in TH & losses in home country
  - 1 address in Delaware contained 285.000 companies
  - Etc etc.



# UK TAX STRATEGY

- What is Tax Strategy?

- Since 2017, certain businesses must publish their tax strategy, as required by the Finance Act 2016.

- Who needs to publish?

- The criteria are based on the size of the group in the previous financial year. If one of the following criteria is met, then a business will be within the rules and must publish its tax strategy:

1. UK Group turnover in excess of £200 million; or
2. UK Group balance sheet above £2 billion; or
3. Worldwide Group turnover of more than €750 million

- What information must be published?

- The document should explain the business's tax arrangements, without the inclusion of anything commercially sensitive or even the need to publish the amounts of taxes paid.
- For multi-national groups with a worldwide tax strategy, only parts relevant to UK tax need be published. The document should be available, free of charge, on the internet as either a separate document or a self-contained part of a wider document.

- When is the deadline?

- If the criteria are met for the previous financial year, then publication should be by the end of this current financial year.

# HOW YOU MANAGE UK TAX RISKS

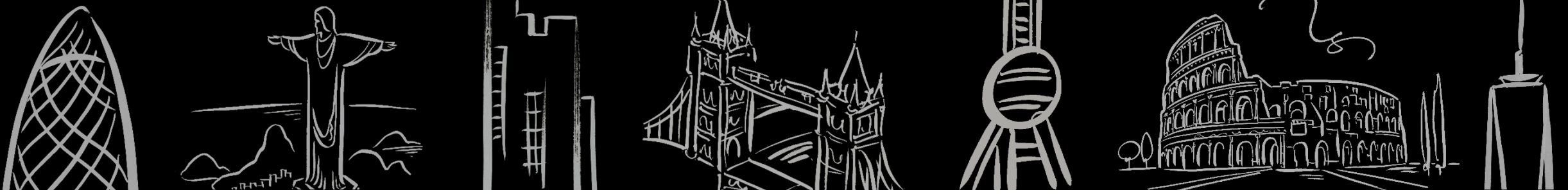
## What to include

- It is necessary to consider what tax risks your business has from:
  - The size of the business
  - The complexity of the business
  - How any changes to the business could impact its tax risks
- HMRC's guidance says that the following should also be included:
  - Details on how your business's tax risk is managed
  - High level description of the key management roles and their responsibilities
  - Information on the systems and controls in place to manage tax risk
  - Details on the levels of oversight of your business's board as well as its involvement

# TAX POLICY PUBLICATIONS REVIEWED

- Not all Institutions are clear about whether they ask from their clients to put certain management systems in place to avoid tax evasion and fraud;
- Not all Institutions are clear whether or not they refuse services when client does not disclose certain tax incentives;
- There is not always a (anti) Tax Haven policy in place, neither for Institution itself nor for the clients they serve;
- Insufficient control policies regarding legal structures, tax bribery and UBO;
- Insufficient report mechanism regarding clients that have Tax Litigation pending;
- **Principles are also applied to Asset Management activities of – for example – a bank or insurance company;**
- Example from AXA: “...internal guidelines around investments funds which provides for a set of rules that any fund within AXA must comply with (rationale of the state of domiciliation, prohibition of domiciliation within non-cooperative jurisdictions, commercial purpose). In addition, for any fund located within a low tax jurisdiction, one of the key principles is that the asset management fee must be taxed in the country where the management team is located and therefore where the service is provided.”

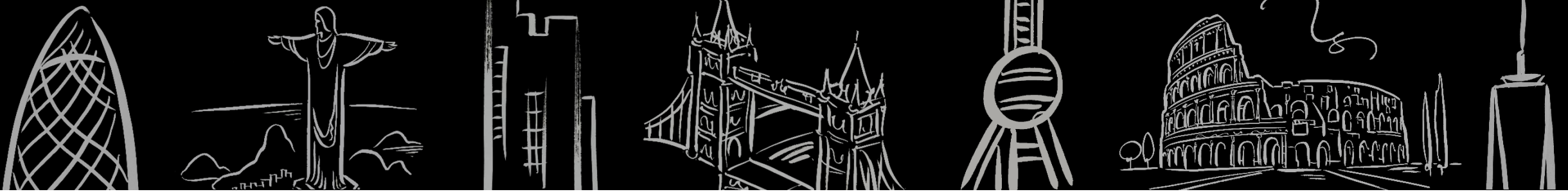




# CRS/FATCA UPDATE

## ■ CRS (Common Reporting Standard)

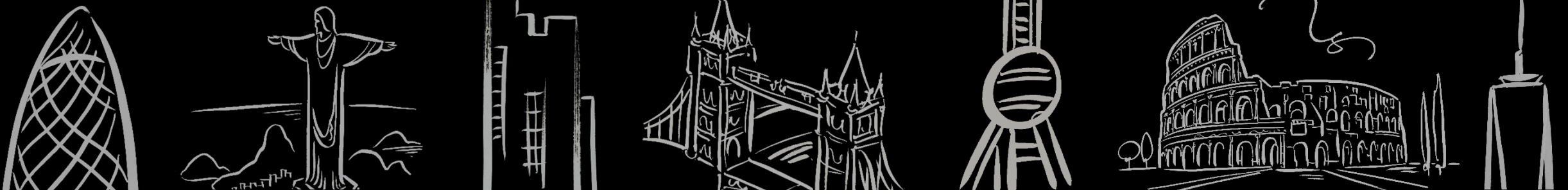
- FATCA passed in 2010 and went live in 2014 before CRS was developed
  - Signing for CRS in the US would increase regulatory burdens on US financial institutions without any benefit to the US
  - Talk of joining CRS stopped at least two (2) years ago
  - Over 100 countries have signed up to implement the CRS framework
- In December 2017 the OECD released additional FAQs covering the following topics:
    - Reporting obligations of a financial institution in the process of liquidation
    - Timing of collecting self-certifications
    - Determining controlling persons
    - Excluded Accounts
    - Indirect distributions by a trust



# CRS/FATCA UPDATE

## ■ FATCA

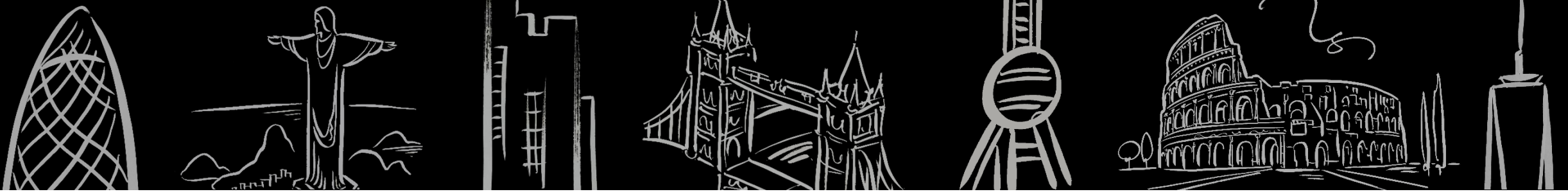
- On July 5, 2018 the Treasury Inspector General for Tax Administration (TIGTA) released a report evaluating efforts by the Internal Revenue Service to enforce FATCA
  - \$380M spent to implement FATCA with limited to no action on planned activities outlined in FATCA Compliance Roadmap
  - Many Foreign Financial Institutions are filing for accounts with invalid taxpayer identification numbers hampering the IRS' ability to match taxpayer data
- Similar weaknesses were found in taxpayer identification numbers reported on Forms 1042-S
- Establish follow-up procedures and initiate action to address error notices related to e-file submissions that are rejected
- Matching of Form 8966 account reporting with corresponding Taxpayer's Form 8938 to identify non-filers and underreporting
- Increase efforts to inform taxpayers of how to obtain a global intermediary identification number
- Strengthen overall compliance efforts directed toward improving accuracy of Form 1042-S filers
- The IRS announced upgrades to the *Foreign Account Tax Compliance Act (FATCA) Registration System* on 31 July 2018 and subsequently issued an updated FATCA Online Registration user guide.
- The IRS also published frequently asked questions (FAQs) regarding FATCA status, certifications of pre-existing accounts (COPA), and periodic certifications. These FAQs announced an extended due date of 15 December 2018, for the COPA and the periodic certifications,



# CRS/FATCA UPDATE

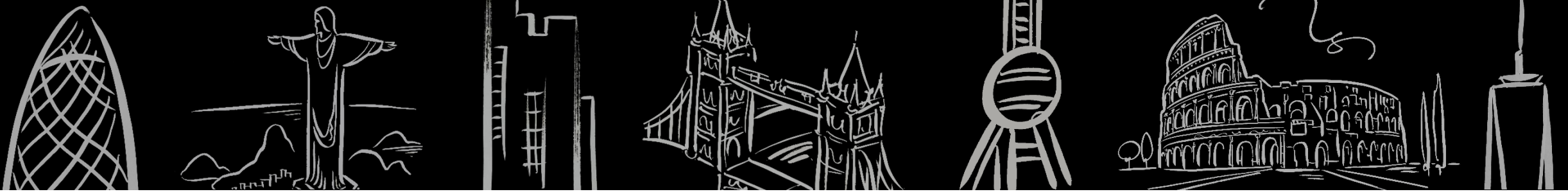
## ■ AUTOMATIC EXCHANGE OF INFORMATION (AEOI) COMPLIANCE

- Given sporadic enforcement of FATCA/CRS its easy to grow complacent with regards to the due diligence, withholding and reporting obligations required by AEOI initiatives
- As the enforcement process is further automated and linked to other taxpayer filings, *enforcement is expected to substantially increase*
- Clients with concerns over AEOI requirements should analyze policies and procedures to ensure that the correct information is being captured and utilized
- Periodic “*health checks*” are recommended to review policies and procedures and how effectively they are being implemented in the areas of solicitation and validation of documentation (Forms W-8series and Self-Certifications) and the reporting that stems from such documentation



# US UPDATE - TRANSPARENCY

- IRS AUDIT ROADMAPS
  - Schedule UTP
  - FIN 48
  - Form 5472 (transactions with foreign related parties)
  - IRS exam experiences – take aways
    - Selection of taxpayers to examine
    - Focus of exams

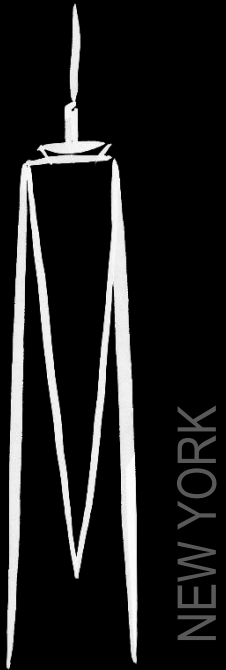


# US UPDATE - TRANSPARENCY

- BEAT (Starting 2018)
  - Draft Form 8991 released September 5, 2018
  - Taxpayer must prove they do not meet the \$500 million gross receipts (3 year average of preceding 3 tax years)
  - Taxpayer must prove whether the 2% or 3% base erosion percentage is appropriate
  - Services excepted and **NOT** excepted must be disclosed

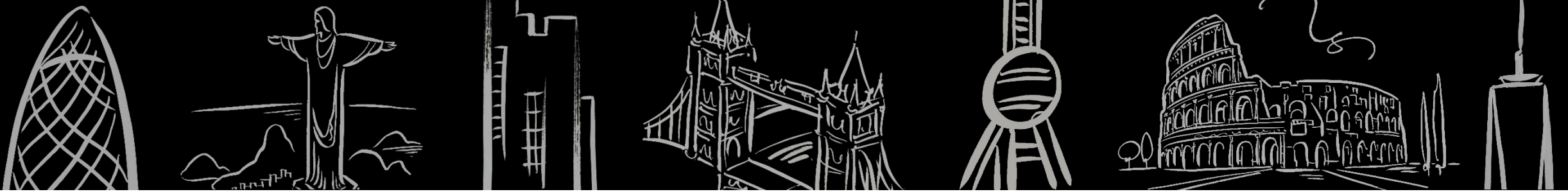
# MANAGING RISKS

- Recent case law: SPV's / Holdings
- Anti Tax Avoidance Directive / Multilateral Instrument and treaty abuse
- New PE concepts after MLI
- US Tax Reform



# RECENT EU CASE LAW ON SPV'S / HOLDINGS

- **ECJ 20.12.2017 (C-504/16, C-613/16) “Deister Holding”**
  - German anti abuse provision that precludes full withholding tax relief (Y 07-11) violates Parent-Subsidiary-Directive and freedom of establishment
  - providing evidence **demonstrating the existence of economic reasons** must be possible
  - For CJEU, neither the tax treatment of the EU parent company’s shareholders nor the type or composition of economic activities of the EU parent company is relevant for assessing the existence of abuse
- **ECJ 14.06.2018 (C-440/17) “GS”**
  - Even after changes by German Ministry of Finance in the law, still violations of EU law in the version starting from 2012
- **ECJ 07.09.2017 (C-6/16) “Egiom & Enka”**
  - The automatic application of a general tax measure excluding certain categories of taxpayers from the tax advantage without the tax authorities being obliged to provide prima facie evidence of tax evasion goes further than is necessary for preventing fraud and abuse.



## KEY TAKE AWAYS AFTER 2 GERMAN CASES: ECONOMIC OR OTHER IMPORTANT REASONS FOR ESTABLISHING THE COMPANY

### Acknowledged economical reasons:

- Being the head of a group (also regional subgroup, division)
- Conducting of management holding functions
- Group financing (of at least 2 subsidiaries)

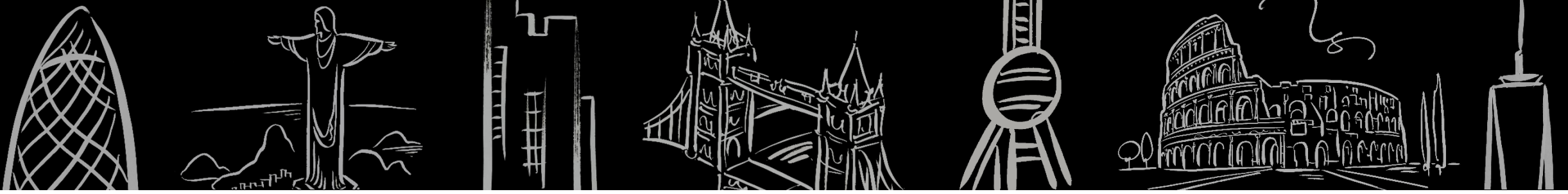
### Possible economical reasons:

- More liberal foreign-exchange transactions
- Favorable location factors
- Eased conditions for setting up a company
- More liberal commercial law



# ALTA ENERGY LUXEMBOURG V. HER MAJESTY THE QUEEN (22 AUGUST 2018)

- [77] A tax treaty is a multi-purpose legal instrument. The preamble of the Treaty states that the two governments desired “to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.” While indicative of the general purpose of the Treaty, this statement remains vague regarding the application of specific articles of the Treaty. **Under the GAAR analysis, the Court must identify the rationale underlying Article 1, 4 and 13, not a vague policy supporting a general approach to the interpretation of the Treaty as a whole.**
- [91] There is nothing in the Treaty that suggests that a single purpose holding corporation, resident in Luxembourg, cannot avail itself of the benefits of the Treaty. **There is also nothing in the Treaty that suggests that a holding corporation, resident in Luxembourg, should be denied the benefit of the Treaty because its shareholders are not themselves residents of Luxembourg.**
- **Key take away: say clearly and precisely when and how an anti abuse provision should apply**



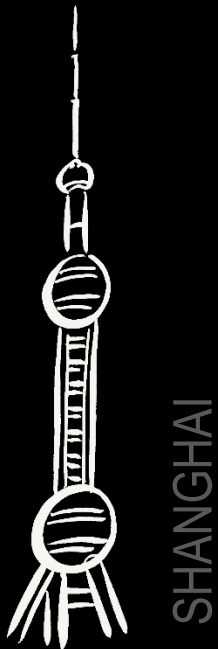
# ATAD & MULTILATERAL INSTRUMENT – WHAT’S PROPOSED?

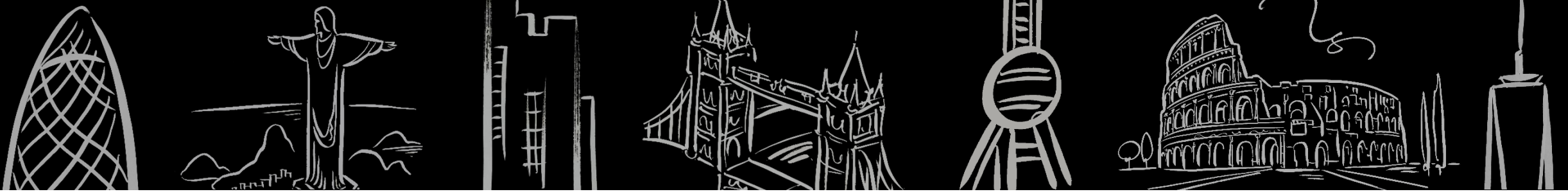
- **ATAD:** Under the General Anti Avoidance Rule (GAAR = back stop introduced to take over where the specific ATAD anti-abuse rules do not work); non-genuine arrangements or series thereof, should be ignored for tax purposes if:
  - The main purpose of the arrangement is to obtain a tax advantage;
  - Which defeats the object or purpose of the applicable tax law.
- **MLI Art. 6:** add preamble to Treaty
  - “ .....including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions.”
- **MLI Art. 7(Prevention of Treaty Abuse)**
  - “Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital *if it is reasonable to conclude*, having regard to all relevant facts and circumstances, *that obtaining that benefit was one of the principal purposes of any arrangement or transaction* that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be *in accordance with the object and purpose of the relevant provisions* of the Covered Tax Agreement.”

# WHAT DOES MLI COVER?

Measures included

- hybrid mismatch arrangements (Action 2)
- treaty abuse (Action 6),
- strengthened definition of permanent establishment (Action 7), and
- measures to make mutual agreement procedures (MAP) more effective (Action 14), including provisions on MAP arbitration.





## MLI- PE

3 articles:

- Article 12 - Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies
- Article 13 - Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions
- Article 14 - Splitting up of Contracts

# MLI: UK APPROACH IN GENERAL

- Adopt all minimum standard provisions
- Adopt those provisions which are a proportionate and effective defence against the abuse of tax treaties (including those that are already a part of UK treaty policy)
- Reserve against provisions which have a disproportionate effect on commercial transactions
- Reserve against provisions that are unnecessary in the light of other measures taken to address misuse of the international tax framework (e.g. revisions to TP guidelines)

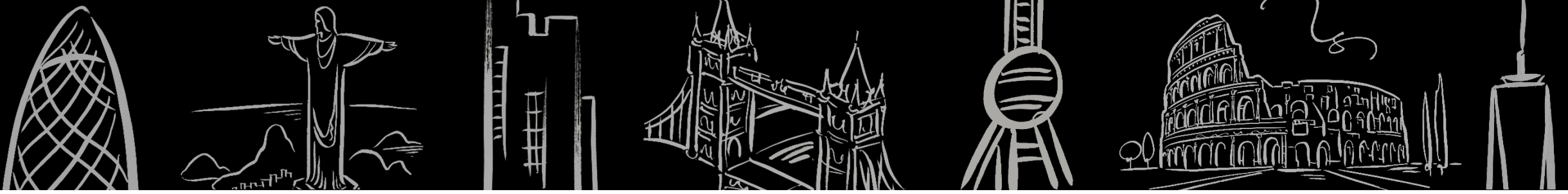
## **UK - Avoidance of Permanent Establishment Status**

- Do not adopt the changes to the dependent agent PE provision (Art. 12)
- Do not choose either option to amend the specific activity exemptions in the PE definition, but do adopt the anti-fragmentation rule (Art. 13)
- Do not adopt the provision on the splitting-up of contracts (Art. 14)

# 1 OCTOBER 2018 – MLI-UK

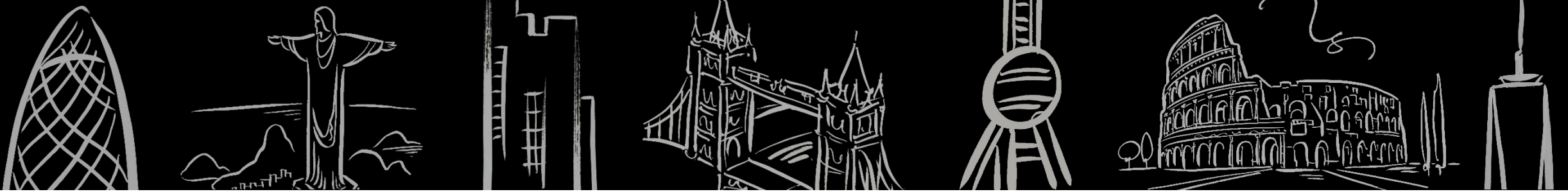
- On 1 October 2018, the Multilateral Convention (2016) (MLI) entered into force in respect of the United Kingdom. T
- The UK signed the convention on **7 June 2017** and deposited its final MLI position on **29 June 2018**, including the **121** tax treaties that it wishes to be covered by the MLI.
- For a treaty to be covered by the MLI, both signatories need to have
  - a) joined the convention,
  - b) included each other in their list of covered tax agreements, and
  - c) deposited their instruments of ratification. In the case of the United Kingdom, this means that the following treaties will now be affected by the MLI:
    - New Zealand - United Kingdom Income Tax Treaty (1983) (as amended through 2007);
    - Poland - United Kingdom Income Tax Treaty (2006);
    - former Yugoslavia - United Kingdom Income Tax Treaty (1981), in relations between Serbia and the United Kingdom;
    - Slovenia - United Kingdom Income and Capital Tax Treaty (2007); and
    - Sweden - United Kingdom Income Tax Treaty (2015).

Source IBFD



# US TAX REFORM – TAX CUTS AND JOBS ACT – MAIN CORPORATE CHANGES

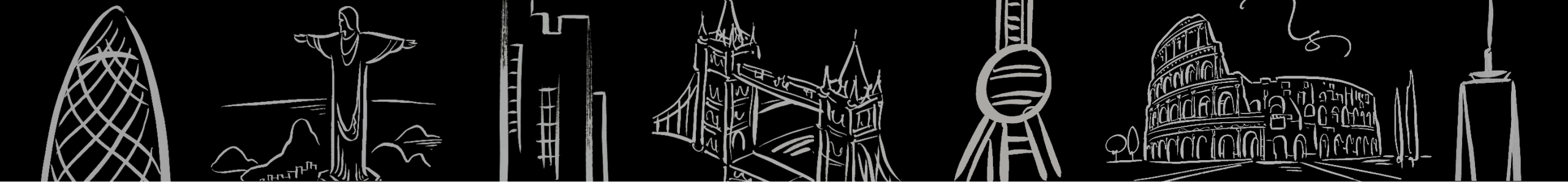
- US Corporate Tax Rate now 21% effective starting January 1, 2018
  - US now more at level playing field with OECD countries
- Corporate AMT Repealed
  - AMT credits available to offset regular tax
  - Excess refundable thru 2021
- 100% Bonus depreciation
- New Sec 163(j) limitations (no longer just foreign related party interest)
- Sec 162(m) Compensation \$1M limit (expands covered employee definition, includes CFOs)
- NOLs
  - Unlimited carryforward (post 2017 NOLs)
  - No more NOL carryback ability (post 2017 NOLs)
  - NOL carryforward use limited to 80% of taxable income
    - Legacy pre-2017 NOLs allowed to 100% taxable income offset
- Capital Loss Rules unchanged
  - Carryback 3 years
  - Carryforward 5 years



# US TAX REFORM – TAX CUTS AND JOBS ACT – MAIN CORPORATE CHANGES (INTERNATIONAL)

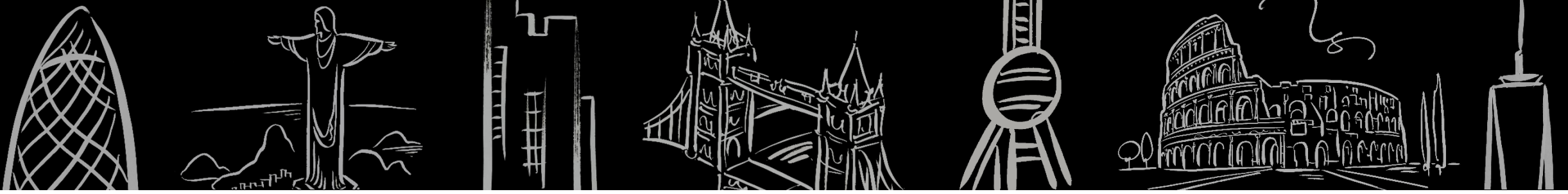
- **Section 965 Deemed Repatriation (2017 Tax Year)**
  - Transition tax on post-1986 untaxed foreign earnings of 10% owned foreign corporations –tax on US shareholder
  - Earnings equal to cash/cash equivalents taxed at 15.5%, remainder at 8%
  - Proportional foreign tax credit allowed
  - May elect to pay liability over 8 years
  - Current year losses and NOL carryforwards can offset
  - Future repatriation not subject to incremental US tax





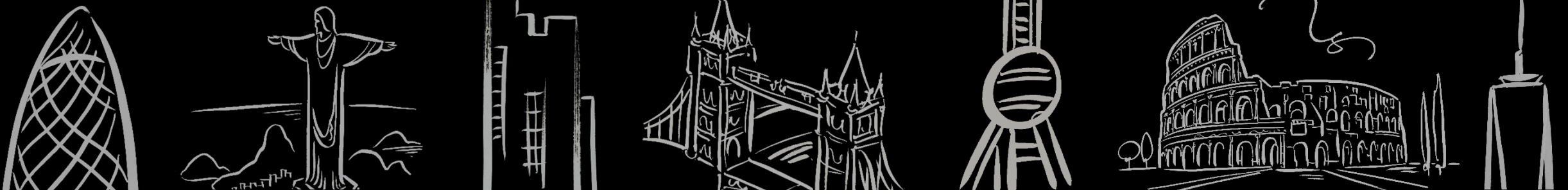
# US TAX REFORM – BEAT

- New parallel tax regime
- Applies to Taxpayers with average gross receipts of \$500M (average prior three years) and
  - Base erosion payments to foreign related parties of 3% or higher
  - 2% or higher for certain banks and securities dealers
- 5% (10% starting in 2019) Tax on Modified Taxable Income
  - Plus 1% for certain banks and securities dealers
- Modified Taxable Income = Regular Taxable Income plus Base Erosion payment add backs
- Base Erosion Payment Add backs (example)
  - Rents
  - Royalties/trademarks
  - Interest
  - Purchase of tangible goods
- Services not excepted
- Insurance Companies:
  - Ceded Reinsurance premiums
  - Will losses paid on Assumed Reinsurance be deemed base erosion payments?
    - Many comment letters to IRS/Treasury have been submitted
- Banks and Security Dealers:
  - Related party derivative payments/accruals on most derivatives are excluded



# US TAX REFORM – BEAT (PLANNING)

- Evaluate if Taxpayer exceed \$500M gross receipts test
  - Foreign related parties with effectively connected income, get sucked into this test.
- Analyze service costs to determine excepted costs
  - Service cost method under Section 482 (TP rules)
  - *Specified Covered Services* per RP 2007-13
- Review reinsurance deals
  - Change from Quota Share to XL covers
  - Terminate related party reinsurance deals
- Check the Box on Foreign Subs
  - Treats them as US domestics, thus BEAT does not apply.
- Model projections on with and without basis
  - Breakeven analyses
- Can income/deductions be shifted?
  - Elect out of bonus depreciation
  - Postpone or accelerate significant transactions
- Re-evaluate Transfer Pricing agreements
- Keep an eye out for pending guidance



# US TAX REFORM – TAX CUTS AND JOBS ACT – MAIN CORPORATE CHANGES (INTERNATIONAL)

## ■ Global intangible low-taxed income (GILTI)

- GILTI as a new anti-deferral tax on certain earnings of a CFC, effective starting with the first tax year of the CFC beginning after Dec. 31, 2017
- Similar to Subpart F income, **a 10% U.S. shareholder of one or more CFCs** will be required to include its GILTI currently as taxable income (in addition to any Subpart F income), regardless of whether any amount is distributed to the U.S. shareholder.
- GILTI taxes U.S. shareholders currently on its allocable share of CFC earnings for a tax year to the extent such earnings exceed a 10% return on the shareholder's allocable share of tangible assets held by CFCs
  - “Intangible” a misnomer
- Corporations may claim a deduction of 50% of GILTI (37.5% for tax years starting after 2025) and certain indirect foreign tax credits.
- Application deemed paid taxes and dividend gross-up concept has been extended to GILTI.

## ■ Foreign Derived-Intangible Income (FDII)

- A FDII deduction (37.5%) in for U.S. C corporations that sell goods and/or provide services to foreign customers.
- This deduction reduces the effective tax rate on qualifying income to 13.125%.
- FDII is intended to operate in tandem with GILTI
- FDII is derived from a sale of property to a foreign person for foreign use or services provided to a person or with respect to property not located in the U.S. For these purposes a "sale" is defined very broadly and includes any lease, license, exchange, or other disposition

# DIGITALIZATION

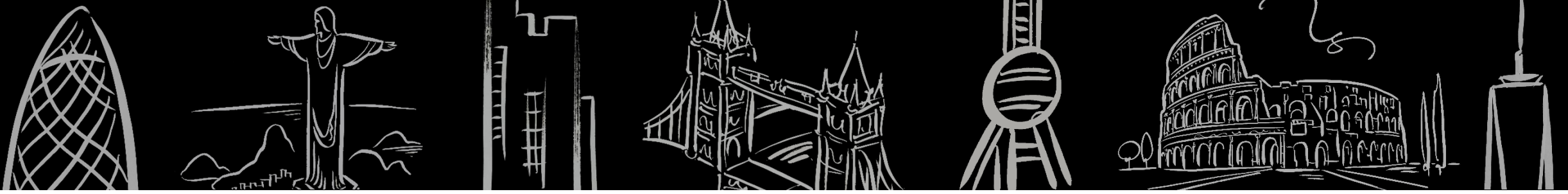
- Crypto



SHANGHAI

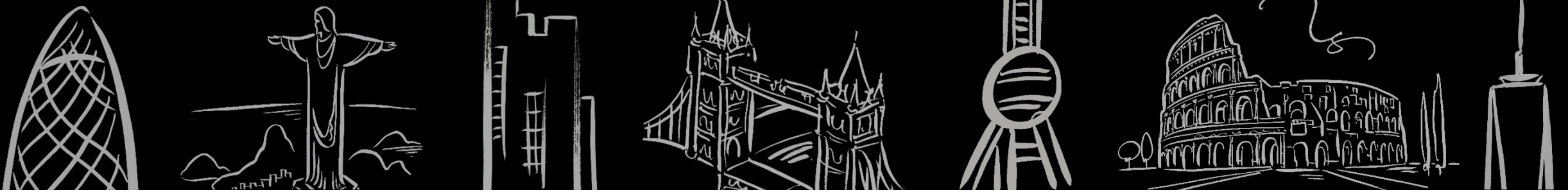
# DIGITALIZATION

- Raising capital with new technology – ICO
- Costs vs traditional IPO low
- Supervising Authorities are considering more detailed rules
- Traditional corporate law (on information rights, voting rights, control rights) not applicable – very flexible
- For Tax – VAT implications (exchange is VAT exempt; traditional ways of obtaining financing is either exempt or outside scope VAT so why ICO's not?)



# CRYPTO CURRENCY – US TAX

- Notice 2014-21, form of a Q&A
  - Describe how general tax principles applies to virtual currency
- Numerous new types of transactions and issuances have evolved since the notice came out:
- ABA and AICPA, amongst others seek Updated guidance
- House Ways and Means Chairman Brady urges IRS for additional guidance (September 19<sup>th</sup>)



# CRYPTO CURRENCY – US TAX

- Guidance needed on:
  - Tax reorg provisions and their application to ICOs (Initial Coin Offering)
  - Treatment of utility tokens vs. tokens similar to equity
  - Capital vs Ordinary Income property
    - Important as capital losses can only offset capita gains
    - Limited capital loss carryback /carryforward ability
  - Treatment of items such as forks (similar to stock splits or taxable)?
    - What is a Fork?
  - Change in the software of the digital currency that creates two separate versions of the blockchain with a shared history.
  - What is tax basis?
  - Exchanges of one currency for another with the development of so many new currencies– taxable event

# CONTACT

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