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Organisation for Economic Cooperation and Development
Centre for Tax Policy and Administration
Tax Treaties, Transfer Pricing and Financial Transactions Division
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Re: Comment Letter on the Public Consultation Document: Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the Public Consultation Document: Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing, published February 4, 2022 (the "Consultation Document").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the OECD and the Inclusive Framework in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations. A list of the companies comprising the NFTC's Board of Directors is attached as an Appendix.

This letter opens with general comments regarding the consultation process for draft Model Rules on the functioning of Amount A of Pillar One. The letter then provides general comments on the draft rules in the Consultation Document, and specific comments on the detailed revenue sourcing rules.

Consultation Process

While the NFTC appreciates the opportunity to comment on the draft rules outlined in the Consultation Document, we are concerned that the design of the consultation process will frustrate efforts to obtain meaningful input from stakeholders on the work of the Inclusive Framework, undermining the development of workable, consensus-based rules for Amount A, for two reasons:

- First, the consultation period – two weeks – is too short to permit our organization and its member companies to digest the Consultation Document, consider the application of the draft rules in various business models, and develop specific input.

- Second, the draft rules outlined in the Consultation Document are interrelated with the other draft rules being developed, including the scope of exclusions for Financial Services and Extractives, the marketing and distribution safe harbor, the elimination of

double taxation, and the process for providing tax certainty to taxing jurisdictions and Covered Groups. It is difficult to provide meaningful comments on one set of proposed rules without understanding the operation of those rules within the system as a whole.

Accordingly, the comments in this letter should be considered conditional pending the publication and review of all draft rules related to Amount A. The draft rules in the Consultation Document, together with all other draft rules, will need to be reviewed once all Pillar One rules have been developed and published to ensure overall coherence. We support additional opportunities to provide input into the draft rules in the Consultation Document as other rules are published and as changes to the draft rules are considered in light of comments from stakeholders. Given the enormous implications of this work, the NFTC believes that it is critically important to continue to offer a broad range of stakeholders opportunities for input into the process.

General Comments

The reasonableness of the draft nexus test will depend on the workability of the revenue sourcing rules. To the extent complex revenue sourcing rules requiring transaction-by-transaction analyses are maintained, the revenue threshold in the nexus test is far too low; a threshold of at least EUR 10 million would be more appropriate. This item should be revisited to the extent simplifying conventions are adopted consistent with the design principles for revenue sourcing rules outlined below.

Regarding the draft revenue sourcing rules, it would be difficult or impossible for Covered Groups to comply with these rules in many commercial contexts. Because these rules are a fundamental building block of Amount A, they must be workable and administrable for the Covered Group and for tax administrators. Based on the Background section of the Consultation Document, the drafters recognize that revenue sourcing rules must balance the need for accuracy with the need to limit compliance costs. The drafters explain that the revenue sourcing rules provide a methodology for a Covered Group to use "available information" to reliably identify the market jurisdiction based on "a range of possible indicators" or, where no reliable indicator is available, "an allocation key that is expected to provide a reasonable approximation of the market jurisdiction." The draft rules, however, miss the mark, proposing detailed rules for more than 20 categories of transactions that in many cases rely on information that either is unavailable to Covered Groups or cannot be processed in a manner that would lead to consistent, reliable results across business lines. As currently drafted, the rules present the very real possibility that Covered Groups will have no choice but to revert to the allocation keys in the draft rules as the default revenue sourcing method, leaving them open to second guessing and audit by taxing administrations seeking to compel the use of indicators on a transaction-by-transaction basis. Since revenue sourcing will be foundational to the success of the Amount A reallocation, it will be important to provide an early certainty process in advance of the year relating to the reallocation, transition relief for the initial 100+ companies in scope of Amount A before the scope is expanded to possibly thousands of additional companies, and a clear understanding of the amount of revenue sourced and removed from each jurisdiction. If more revenue is sourced under these proposed Amount A rules to certain jurisdictions, then revenue will need to be removed from other jurisdictions.

The NFTC proposes two general principles for the design of revenue sourcing rules:

- Rely on Information Collected in the Ordinary Course of Business. The revenue sourcing rules should be based on information Covered Groups already collect and maintain for commercial, legal (e.g., indirect tax obligations), or other regulatory purposes. Covered Groups should not be required to request or collect information from customers, counterparties or other third parties. This is particularly important in situations where the third party is outside the scope of Pillar One, including businesses categorically out of scope, such as those in the Financial Services industry. In this regard, the draft rules should be clarified to provide that "reasonable steps" do not include requesting information from counterparties or other third parties.

- Reconsider Transaction-by-Transaction Approach. Covered Groups within the scope of Amount A can engage in millions or even billions of transactions (as defined by the draft rules) per year, with thousands or millions of customers. Revenue sourcing rules based on transaction-by-transaction information are neither workable nor practical. Covered Groups should not be required to collect or process information on a transaction-by-transaction basis in a manner that is not already done for purposes of preparing financial statements, meeting regulatory obligations (including indirect tax obligations), or for other commercial purposes. To require otherwise would risk forcing Covered Groups to implement costly new systems solely for the purpose of complying with the Pillar One rules. To the extent new systems are required for collecting or processing information, such systems should be developed over a transition period in consultation with the Covered Group and its home-country tax administrator, with allocation keys or other simplifying conventions applying in the interim. Moreover, for transaction categories that generate immaterial revenues in the context of the revenues of a Covered Group (e.g., less than 10 percent of group revenues), consideration should be given to sourcing such revenues in the same proportion to other revenues.

In following these two principles, the drafters could provide even greater tax certainty and administrative efficiency for Covered Groups and tax administrations alike by creating a formulaic "safe harbor" approach to revenue sourcing. This approach would permit Covered Groups to elect to follow a formulaic model more akin to the Allocation Keys at the outset, not just as a backstop to the reliable indicator approach, focusing on information that is publicly available or is readily accessible and collected in the ordinary course of business.

Specific Comments on Detailed Revenue Sourcing Rules

Part 2 – Reliable Method

To the extent the "reliable indicator" approach is maintained, the guidance should provide that a Covered Group's selection of reliable indicator is presumptively correct. Accordingly, a Covered Group may use any reliable indicator without any obligation to explain why other reliable indicators were not used, or to use a corroborating indicator. Any proposed change to the reliable indicator used by a Covered Group should be developed in consultation with the Covered Group

and should be applied on a prospectively basis only. Moreover, Covered Groups should be permitted to apply a reliable indicator to a sample of transactions, or use other statistical methods, to determine how to source the aggregate revenues derived from specific transaction types.

Regarding the use of allocation keys, we note above that the reliable indicator rules as currently drafted are unduly burdensome and in many cases, are simply unworkable. Accordingly, we urge the drafters to consider permitting a Covered Group to use an allocation key based on publicly available information on an elective or safe harbor basis to limit compliance and tax administration costs in all cases, and not only as a backstop to the reliable indicator approach. For example, rules could be provided to allow a Covered Group to use allocation keys to source (1) all revenues, (2) revenues from particular categories of transactions (or business lines), or (3) revenues from jurisdictions other than its largest markets (e.g., jurisdictions other than the Covered Group's largest five markets, or other than the largest markets making up more than 50 percent of revenue).

Part 3.B – Finished Goods Sold Through Independent Distributors

The sourcing of revenues for sales of finished goods through independent distributors to the location of delivery of finished goods to the final customer creates significant complexity. This approach forces the revenue sourcing determination to be contingent on access to information from third parties – information which the Covered Group has no legal, financial or contractual right to obtain. The definition of independent distributors appears to include traditional distributors as well as independent retailers and therefore could number in the thousands or tens of thousands. Information from these third parties could be viewed a breach of antitrust legislation or could lead to disclosures of confidential business information which will be anti-competitive. In any event, the revenue sourcing rules should not require Covered Groups to request information from third parties which is not already collected or maintained for commercial or other regulatory purposes. Accordingly, consideration should be given to loosening (or eliminating) the caveats on the use of the location of the independent distributor as a reliable indicator, permitting the use of location of delivery by Covered Group (e.g., delivery address of the independent distributor), or permitting the use of allocation keys based on publicly available information on a safe harbor or elective basis.

Part 4 – Components

The sourcing of revenues from the sale of components to the location of delivery of finished goods incorporating the components to the final customer creates the same challenges and complexities as those posed by the sourcing rules governing the sales of finished goods to independent distributors. The drafters should consider revisiting the substantive sourcing rule to source such revenues to the location of further manufacturing or assembly. Alternatively, consideration should be given to workable reliability indicators that rely on information the Covered Group is likely to collect and maintain, and that do not rely on third party information. Consideration should also be given to permitting the use of allocation keys based on publicly available information on a safe harbor or elective basis.

More generally, the definitions of component and finished goods will be difficult to apply at the margin. Depending on the context, many types of goods can be sold to final consumers for their use and sold to businesses customers for incorporation into other goods. Sourcing rules that do not distinguish between components and finished goods, but instead rely on information a Covered Group is likely to collect with respect to its goods in the ordinary course of business (e.g., place of delivery to an independent distributor or manufacturer) would reduce the need to categorize goods.

Part 5.B – Online Advertising Services

The proposed reliable indicators for the sourcing of revenues from online advertising services would appear to require an extraordinary amount of data given that clicks and impressions can number in the billions. Consideration should be given to permitting the use of sampling or simplifying conventions, the use of methodologies that establish click or impression location for commercial or other regulatory purposes, or the use of allocation keys.

Parts 5.G and 5.H – Business to Consumer and Business to Business Services

The proposed revenue sourcing rules for business-to-consumer ("B2C") and business-to-business ("B2B") services, which operate as the default rules for the sourcing of revenues from the provision of services and digital goods not subject to more specific rules, are unduly complex and should be reconsidered. As an overarching comment, we recommend that drafters consider explicitly incorporating into the rules for sourcing revenue Value Added Tax (VAT) indicators. This would improve the administrability of the rules, and reduce the possibility of disputes, by tapping into existing, well-functioning systems familiar to taxpayers and tax administrations alike. If this recommendation is not adopted, the issues outlined below should be addressed.

First, depending on industry or service line, it may be difficult for Covered Groups to distinguish among Consumers, non-Large Business Customers, and Large Business Customers. Covered Groups may have thousands or millions of customers. It may not be possible or practicable to discern whether a customer acquires a good or service for a personal purpose rather than for commercial or professional purposes. In some instances, the same customer may acquire goods and services for personal and commercial or professional purposes. It also may be difficult to determine the extent to which a customer is part of a large corporate group, particularly in situations in which the Covered Group contracts with customers on a local or regional basis and the contracting affiliate operates under a name unrelated to that of its parent. Consideration should be given to drafting a common set of rules for services, irrespective of whether the beneficiary is a consumer or a business customer. If the Model Rules will retain the distinction based on the size of a Business Customer, a range of EUR [1-3] million is too low for MNEs within the scope of Amount A to feasibly manage. We recommend a threshold of at least EUR 10 million based on the total invoiced services for the relevant period.

Second, the reliable indicators should not be contingent on information from third parties to which the Covered Group has no legal, financial or contractual right to obtain. The use of customer headcount allocation key is particularly inappropriate as it relies on third party information that is not relevant to the Covered Group for commercial or other regulatory

purposes and does not seem like a reliable proxy for the place of use of services in virtually any context.

Third, while geolocation data is sometimes available for B2C transactions, it is not a suitable indicator in most cases and therefore should not be used except at the election of a Covered Group. Many companies do not collect this data from their customers and do not have any commercial reason to collect such data. Moreover, in some jurisdictions, collection of this type of data is strictly regulated or outright prohibited. Of course, customers can also refuse to allow location data to be collected, making it unreliable, and the requirement to use or retain personal data needs to be consistent with privacy rules.

Finally, the revenue sourcing rules for B2B services, as well as several of the reliable indicators, reference a "place of use" standard. To the extent place of use relates to the place (or places) where the benefit of the service is intended, consideration should be given to simplifying conventions based on information maintained by the Covered Group for commercial or other regulatory purposes.

Conclusion

The NFTC appreciates the opportunity to comment on the draft rules outlined in the Consultation Document and looks forward to participating in an ongoing dialogue to develop technical details that are practical and workable for both tax administrations and taxpayers.

Sincerely,

Jake Colvin
President

List of NFTC's Board of Director Companies

ABB Incorporated
Amazon
American International Group
Amgen
Anheuser-Busch
Applied Materials
BP America Inc.
Caterpillar Incorporated
Chevron
Cisco Systems, Inc.
Corning Incorporated
Dentons US LLP
DHL Express (USA) Inc.
eBay Inc.
Ernst & Young LLP
ExxonMobil Corporation
Facebook
FedEx Express
Fluor Corporation
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