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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 Tax Base Determinations

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 Tax Base Determinations, published February 18, 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.

Before commenting on specific aspects of the Consultation Document, the NFTC reiterates its prior general comments regarding the limited consultation process for draft Model Rules on the functioning of Amount A of Pillar One. In particular, 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 multi-year averaging rules for determining whether groups are in scope, the marketing and distribution safe harbor, the elimination of double taxation, and the process for providing tax certainty to taxing jurisdictions and Covered Groups.

The piecemeal release of proposed rules, many of which remain under discussion by the Task Force on the Digital Economy, limits meaningful input from stakeholders. Accordingly, the comments in this letter should be considered conditional pending the publication and review of all draft rules related to Amount A. 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.

Uniform Application

The Background section of the Consultation Document notes that jurisdictions will be free to adapt the model rules for domestic legislation to implement Amount A, while ensuring consistent implementation "in substance." We recommend more clarity regarding the uniform determination of tax base to avoid double counting of income, double taxation, and needless disputes. One approach would be for the tax base of a Covered Group to be determined under the rules of the Multilateral Convention as implemented by the jurisdiction of the Ultimate Parent Entity, taking into account the Covered Group's Financial Accounting Profit or Loss under Qualified Financial Accounting Standards (using the currency of the Consolidated Financial Statements) without adjustment except as explicitly specified.

Book-to-Tax Adjustments – Consistency with Pillar Two

The OECD Inclusive Framework is currently undertaking two workstreams that require the determination of adjusted profit before tax based on Consolidated Financial Statements of large multinational enterprises, with adjustments to account for common features of corporate tax bases. The book-to-tax adjustments outlined in the Consultation Document are more limited than those in the Pillar Two Model Rules. No justification is provided for proposing different standards.

We recommend that these standards be aligned. Aligning the standards would enable Covered Groups and tax administrations to comply with, and administer, one common set of book-to-tax adjustments, reducing the potential for double counting of income, double taxation, or other incoherence as between the two Pillars. Accordingly, the categories of book-to-tax adjustments should be consistent as between Pillar One and Pillar Two, as well as the definition of each category of book-to-tax adjustment.

As an example, while fn. 4 of the Consultation Document provides that commentaries will elaborate on the practical application of the exclusion of Policy Disallowed Expenses, the Pillar Two Model Rules already have guidance related to the definition of this standard, defining Policy Disallowed Expenses narrowly to mean illegal payments (such as bribes) and material fines and penalties. We recommend that Policy Disallowed Expenses be defined narrowly and uniformly to mean (1) illegal payments, and (2) material fines and penalties paid to governments. We also recommend clarification that any reversal of a Policy Disallowed Expense in a later period (for example, following a successful challenge to an asserted fine) be excluded.

Restatements

We recommend that any restatement be accounted for in the period in which the restatement is identified and recognized, without any cap or carryover mechanism. This is the most straightforward manner of dealing with restatements. Excessive single year impacts can be mitigated to some extent by the provision of effective mechanisms to address losses and profit shortfalls, as discussed below.

Losses and Profit Shortfalls

The purpose of Pillar One is to reallocate a portion of excess economic profits (*i.e.*, profits in excess of 10 percent of revenues) to market jurisdictions. Pillar One should not apply to cyclical businesses that exceed the profitability threshold in some years, but not in others and (critically) not on average. Accordingly, a comprehensive and effective mechanism to address losses and profit shortfalls is critical to achieving the core objectives of Pillar One.

We recommend that unrelieved losses incurred in a prior period should be carried forward and offset against any subsequent profit on an earn-out basis as described in fn 5. We further recommend that there be no time limitation on the use of losses incurred once Amount A is implemented; losses should be carried forward until fully utilized. There is no policy justification for time limitations on loss carryforwards in the context of Amount A, which is intended to capture excess economic profits. This treatment should apply regardless of whether losses are attributable to the Covered Group, a Predecessor Group, or a Transferred Entity/Group.

With respect to losses from a Predecessor Group or Transferred Entity/Group, we recommend liberal definitions regarding the identification and use of such losses so as to prevent any unrelieved losses from disappearing for the purposes of Amount A as a result of a business combination or division. In particular, we recommend that the Business Continuity Conditions be eliminated, as they do not appear to further the objectives of Pillar One and could result in Amount A determinations that are contingent on a subjective evaluation of events occurring after the tested period.

We recommend that losses incurred prior to the implementation of Amount A should be recognized, consistent with the purpose of Pillar One. In addition, given the purpose of Pillar One, we recommend that pre-implementation losses be considered on the same basis as other losses, with no time limitations. To the extent time limitations with respect to pre-implementation losses are considered for purposes of administrative simplicity, the time limitation should be no shorter than 10 years before the Amount A implementation date, with losses incurred in that period carried forward until utilized. To the extent of any time limitations, the first-in-first-out approach outlined in fn 16 is reasonable.

In addition, we recommend the reintroduction of a mechanism to account for profit shortfalls, *i.e.*, years in which the profit of a Controlled Group are below the Amount A excess profit threshold. A mechanism to account for profit shortfalls is necessary to avoid inappropriate results for businesses that are cyclical or that otherwise experience distortions in their results that are reverse over time. Absent such a mechanism, Pillar One would capture and reallocate profits that represent routine returns, rather than residual or excess returns, which would be inconsistent with the core policy underpinnings of Pillar One. This would result in wildly different tax obligations for businesses that experience similar levels of profitability over time, violating basic principles of horizontal equity.

Profit shortfalls can be addressed in several ways. The simplest way, which we recommend, is to define a "loss" to include the amount of any profit shortfall for purposes of applying the loss carryforward mechanism. This would achieve the purpose of Pillar One in a simple and elegant manner. Another approach would be to permit Covered Groups, on an elective basis, to average their results over a period of years for purposes of determining Amount A.

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 uniform rules for tax base determinations that consider economic profit over time and do not result in double counting or double taxation of the same income.

Sincerely,

Jake Colvin
President