November 10, 2022

Organisation for Economic Co-operation 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: Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One published October 6, 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.

General Comments

Tax Administration Framework and Relationship to Whole of Work

The Tax Administration Framework provides a high-level overview of the proposed filing and compliance requirements for Amount A. The October 2021 Statement provides the guiding objective of this framework: "tax compliance will be streamlined (including filing obligations)." A streamlined tax administration framework is beneficial to both Covered Groups and to tax administrations, preserving resources for more productive use. As explained in more detail in the comments below, in many respects the approach in the Consultation Document falls short of the mark, imposing undue filing and administrative obligations on in-scope Covered Groups. As contemplated, the Tax Administration Framework introduces an entirely new cycle of tax returns, which require further development and more cohesive guidance on the timing of any Amount A tax liability and relief from double taxation, and on the integration of these items with other tax liabilities with respect to each country. Moreover, the lack of consensus on many critical items in the Consultation Document makes it difficult for businesses to provide comprehensive comments or anticipate potential concerns. Furthermore, some key substantive issues such as the treatment of withholding taxes, the marketing and distribution safe harbor, Amount B, Relevant Similar Measures, and interaction with Pillar Two are not addressed, making it difficult to evaluate the efficacy of the tax administration framework in isolation. We strongly urge another public consultation on the significant number of issues that remain unagreed, so that the business community

will have opportunities to provide input and comments as any changes are proposed for open issues or items not contemplated in the Consultation Document.

Importance of Tax Certainty Framework

The tax certainty framework for Amount A and related issues is a critical component of the work. The October 2021 Statement emphasizes this point, providing that:

> In-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g., transfer pricing and business profits disputes), in a mandatory and binding manner.

As we previously noted in response to a prior consultation document, absent a practical tax certainty framework, Amount A will generate needless and duplicative audits and disputes that would overwhelm existing dispute resolution processes, leading to burdensome tax administration and compliance costs as well as unrelieved double taxation. We are pleased that the updated language in the Consultation Document reflects incremental improvements based on comments from stakeholders. However, additional changes are warranted to further improve the process for Covered Groups and tax administrations, as addressed below.

Specific Comments

Part I – Administration

Taxation of Amount A

The Consultation Document states that "like any other income taxing right afforded to jurisdictions under the current international income tax regime, jurisdictions will be free to tax Amount A income in any manner they deem appropriate." Part 1, 2.1.2. This is an invitation for chaos and unintended consequences. While certain standardizing principles are provided, other key issues are left open. Importantly, the corporate income tax rate applied to Amount A income should be consistent with the generally applicable corporate income tax rate applied to other income in that jurisdiction. Given that a stated purpose behind Pillar One is to eliminate discriminatory tax measures, the rules should not allow discriminatory tax rates to be applied.

Registration

Registration in every jurisdiction in which there is not a permanent establishment and return filing in every jurisdiction with a permanent establishment is unnecessarily burdensome in light of the "streamlined" tax compliance process envisioned by the October 2021 Statement. This is particularly the case if a multiple taxpayer approach were applicable (see below). The Consultation Document provides that certain simplifications would be "considered," such as requirements for resident representatives and bank accounts, but given the clear stated policy goals of streamlined compliance, such burdensome requirements should not be permitted under any circumstances. Assignment of a taxpayer ID (if that is the key consideration behind the registration requirement) could be accomplished through a more simplified and uniform process.

Single Taxpayer and Multiple Taxpayer Approaches

We appreciate the efforts reflected in the Consultation Document in the direction of a streamlined compliance process managed through a single entity (including centralized filing). Part 1, 2.8, and 2.9. As currently drafted, however, the Consultation Document allows for exceptions to this approach which may

undermine the streamlined process. Additionally, guardrails are needed in order to ensure additional local filings are not required by individual countries, further undermining the goal of streamlined compliance.

We need more information before supporting a single taxpayer or multiple taxpayer approach, and do not believe that availability of cash is a limiting issue since proper capitalization can be managed. If a single taxpayer approach is applied, we recommend that the MNE has the option of selecting the most appropriate single taxpayer and that no secondary liability for local entities is permitted. We believe that the concerns regarding non-payment expressed in the Consultation Document are overblown, given the size and profitability of the in-scope Covered Groups. As recognized in the Consultation Document, a mandatory multiple taxpayer approach could raise significant and burdensome logistical issues, for example, in cases where the subject entities change from year to year. Further, such an approach could raise many issues around identifying specific liable entities within a jurisdiction and how relief is allocated (e.g., waterfall, pro rata, etc.) to Amount A jurisdictions. These challenges could be mitigated by eliminating the local registration requirement and by permitting the Covered Group to elect which of its legal entities will serve as the paying agent and liable entity within a given relief jurisdiction.

Under either approach, intergroup payments made between entities to fund Amount A tax liabilities should not be subject to any withholding tax or other indirect taxes. We recommend that the multilateral instrument provide that withholding taxes and indirect taxes cannot apply to such payments and that interest cannot be applied.

Elimination of Double Taxation

NFTC continues to recommend that eliminations be solved through an exemption method. In light of the complexity of the Amount A system reflected in numerous consultation documents, it has become increasingly apparent that an exemption method is the only mechanism that can relieve double taxation of Amount A, consistent with the objectives of the work. The Consultation Document reflects the possibility that Relieving Jurisdictions may apply a credit method. We strongly recommend that an exemption system be the required mechanism for double taxation relief, as unintended consequences and other challenges are likely to result from credit-based relief. An exemption system eliminates many complexities that exist with a credit system; while these complexities may be important in achieving domestic tax policy objectives, they will frustrate the objectives of Pillar One by imposing undue compliance costs and permitting double taxation.

If Relieving Jurisdictions are permitted to select a credit system, we request a consultation with universally applicable rules for credit systems in the context of Amount A so that stakeholders can ensure that these systems will meet the stated goals of double tax relief under Pillar One eliminations. In the context of Pillar One, any credit system must provide strong guardrails to ensure that double taxation relief is actually realized upon the imposition of tax liability on Amount A. Bolting elimination mechanisms onto existing credit systems, which were designed to achieve domestic tax objectives not relevant to Pillar One, will invariably lead to double taxation, thus frustrating the objectives of Pillar One. Any credit system that does not provide contemporaneous relief would, at a minimum lead, to cash flow issues and could ultimately result in double taxation. If a credit mechanism is considered, we suggest a rule that requires an automatic refund of tax if the credit mechanism fails to relieve double taxation contemporaneous with the imposition of tax on Amount A. We note that in certain jurisdictions securing refunds can be exceedingly slow, burdensome, or ineffective. In particular, where tax administrations are understaffed and administrative action refunds are very slow (or is otherwise not as a priority), the delay in relief may be significant, leading to double taxation and cash flow issues.

To avoid these significant issues, the rules should align the timing of tax obligations on Amount A imposed by Market Jurisdictions and the provision of relief by Relieving Jurisdictions. Amount A tax payments should be due following the conclusion of the certainty process. If Affected Parties are permitted to require Amount A payment before the certainty process is completed, then Relief

Jurisdictions should be required to provide relief at the same time. Liability for payment and obligation of double taxation relief should be simultaneous to avoid the considerable cash flow issues (and risk of double taxation) highlighted in the Consultation Document. The rules should also avoid delays that could result from unneeded administrative steps separating these processes. If double taxation is not relieved within a certain timeframe (a risk that increases with the greater flexibility given to Relieving Jurisdictions on process), there should be a corresponding right for taxpayers to decrease future Amount A payments until the Relieving Jurisdictions have met their obligations related to double tax relief given the cash flow consequences. Such processes are necessary to avoid double taxation consistent with the objectives of Pillar One and put appropriate pressure on Affected Parties to mutually agree required allocations.

In terms of allocating relief among entities in a Relieving Jurisdiction, including a "push-down of elimination" mechanism to individual entities in a jurisdiction is unnecessary. Instead, we would suggest including an optional election similar to Pillar Two, where the consolidated parent in a jurisdiction could claim relief. The pro-rata approach for allocating relief is also problematic when a large number of entities are in the jurisdiction (e.g., in a conglomerate scenario).

Streamlined Compliance

NFTC appreciates the efforts reflected in the Consultation Document to provide for streamlined compliance, which is critical to ensuring that the additional burden of complying with these new rules is minimized. Part 1, 3.3. Streamlined compliance also limits the burden on tax administrations. In order to best achieve this, we strongly recommend that a single, comprehensive Amount A tax return be filed with the Lead Tax Administration. The return should include the initial amount A residual profits for each jurisdiction; the net amount A for the jurisdiction after the application of the marketing and distribution safe harbor, withholding taxes, and other adjustments; the applicable corporate income tax rate; and the net amount A tax (or amount to be relieved) for each jurisdiction. Any and all Amount A calculations should be included in the comprehensive Amount A return rather than through individual tax returns filed with each jurisdiction. The Lead Tax Administration should retain the return and should only provide information that is relevant and material to Market Jurisdictions via a separate schedule.

The Consultation Document provides that streamlined compliance is not available in "very limited circumstances." We suggested that comprehensive guardrails are provided to ensure streamlined compliance is provided when at all possible. Limiting the streamlined approach to circumstances where the Amount A obligations "have no practical interaction with other domestic income tax items" opens the door to unduly burdensome procedures in contravention of the objectives of Pillar One. Further, it seems inconsistent with the statement that streamlined compliance is available except in "very limited circumstances." Companies should not be forced into new compliance requirements on a jurisdiction-by-jurisdiction basis at the whim of tax administrations. Permitting a de facto option for jurisdiction undermines the objective of streamlined reporting. We recommend providing more explicit guidelines to ensure separate filing requirements for Amount A are rare or nonexistent.

We appreciate that separate filing requirements may be required for Relieving Jurisdictions to ensure relief of double taxation (although we remain opposed to using tax credits rather than exemption of income as discussed above). These requirements, however, should be limited to information required to ensure double taxation relief, not requirements for new information related to the determination of Amount A tax liabilities that is not generally provided as part of the Common Documentation Package.

The rule that relief entities must commence the domestic procedures of the Relieving Jurisdiction by the due date of the Amount A return is not reasonable. Instead, we suggest that a relief entity would first complete and file the return that details the actual liabilities and relief sought before starting the local country procedures. We recommend providing a more reasonable timeline for starting these procedures.

Local resident entities in Market Jurisdictions should not be secondarily liable for Amount A tax liabilities. It is important that there is consistency and certainty across application of the rules, and that will be more difficult to sustain if market countries unilaterally enforce liabilities against local entities that are not relieving entities. Given the size and profitability of in-scope Covered Groups, concerns regarding non-payment of tax obligations are overblown.

Audits

We strongly agree that jurisdictions should not implement unilateral, additional information requirements related to Amount A as discussed above. However, clarity is needed on the statement that this would not affect a jurisdiction's right or ability to request information as part of a review or audit. Part 1, 2.2.9 and 3.2.1.

Allowing jurisdictions to audit freely outside of the certainty process could result in significant inefficient and costly controversy for taxpayers and tax administrations, undermining the tax certainty process at the core of the Pillar One work. We recommend that such requests must be conducted as part of the collective certainty process, not as separate audits conducted unilaterally by tax administrations. Otherwise, such requests will significantly undermine the administrability and certainty goals of the framework. The suspension of unilateral audit activity during the comprehensive certainty review is not sufficient to prevent needless inquiries that do not further the objectives of Pillar One. We also recommend that safeguards are put into place to prevent inaccurate no-basis assertions against taxpayers. Furthermore, any reopening of prior tax years should be limited to providing relief and should not be permitted to reopen or extend the statute of limitations or other items.

Additional Provisions Suggested

The Consultation Document lacked sufficient detail or was silent on a number of critical issues. Accordingly, we suggested that the OECD include these items in the Tax Administration Framework and provide a public consultation prior to finalizing the work on Amount A:

- **Taxpayer Confidentiality Is Paramount –** We request additional clarity and strong guardrails regarding taxpayer confidentiality. Confidentiality is promoted by limiting the information received by each jurisdiction to information relevant to its particular jurisdiction. Protocols for use and disclosure of taxpayer information should be developed and strictly adhered to by each jurisdiction.
- **Guidance on Short Years and Non-Conforming Year Ends for Fiscal Year Companies** – Due to a number of reasons an MNE may have a short taxable year or use a non-conforming year-end. We suggest providing additional details on how these alternative year ends would affect Amount A and how they should be reported.
- **Payment in Local Currency** – Requiring Groups to pay their Amount A tax liabilities on or about the same day, together with a requirement to translate those liabilities into local currencies, could impact currency markets. To alleviate this concern, we suggest allowing for payments using the entities reporting currency or payment in U.S. dollars. Requiring Covered Groups to adopt complicated currency management practices in order to comply with Pillar One (particularly in jurisdictions where they may not maintain operations) will only provide further confusion and administrative burdens on Covered Groups and Market Jurisdictions.

Part II – Tax Certainty Framework for Amount A

We fully support the Consultation Documents statement that "Restoring the stability of the international tax system is one of the key objectives of the Pillar One agreement" and believe that this objective should be a guiding principle in designing the rules. We appreciate the significant efforts reflected in Part II of the Consultation Document to further clarify the compliance requirements

and appreciate the additional details and timeline for the transition period (3 years of flexibility to use allocation keys and 6 years for flexibility for information reporting). We further appreciate the recognition that IT and compliance systems changes are costly and time consuming, so reasonable rules that will take that into account are helpful. In order to achieve the desired stability, we recommend additional measures on confidentiality, increasing the de minimis thresholds and including the MDSH.

Confidentiality

While we appreciate the greater emphasis on confidentiality, more clarity is necessary on confidentiality obligations and consequences to tax administrations for breaches. Further, consistent with NFTC comments on prior consultations, the full package of documentation, covering sensitive worldwide data, should not be sent to every participating country. To mitigate confidentiality concerns, only the data required by the jurisdiction should be sent to a particular jurisdiction. Only countries that need the information (e.g., those on review panels) should receive the full underlying data and documentation.

Advance Certainty

We recommend that the rules clarify that Advance Certainty for a Covered Group's Revenue Sourcing approach also includes the type of documentation that will be required to support that approach, since that is one of the most important considerations in systems setups.

Consequences for "Non-Transparent" or "Uncooperative" Covered Groups

The consequences for acting in a "non-transparent" or "uncooperative" manner (including incomplete information) are severe – losing protections of the Review Panel process. Accordingly, the alleged failures in cooperation should be obvious and material to the outcome. Also, to that end, we propose that all panel members must agree that has occurred (not just 2⁄3 of the panel). If a Covered Group's behavior is so unacceptable to warrant the removal of certainty protections, it seems that would be clear to all panel members.

Administrability of the Process

The most important objective of the Tax Certainty Framework is to achieve certainty in an administrable manner. Any compromises to allow for greater involvement cannot undermine this overall objective. The participation of all interested IF members in the panel process (as referenced in footnote 69), seems challenging in this regard and we look forward to reviewing potential solutions.

Expert Advisory Group

The Consultation Document continues to envision a significant and expanding role for government experts that will focus on assessing the adequacy of a taxpayer's internal control framework for Amount A (the Expert Advisory Group, or "EAG"). We struggle to understand the rationale or need for setting up the EAG as part of the Tax Certainty Process. To this end, we are concerned that few tax administrations have staff with the necessary experience or expertise to evaluate taxpayers' Amount A tax control frameworks. Understanding and evaluating tax control frameworks is not a core competency of most tax administrations. Even for those administrations that have the relevant experience, the number of qualified staff is likely to be fewer than needed to staff the reviews. The proposal that the EAG would analyze a taxpayer's "*business and financial management systems and its enterprise resource planning software*" as part of evaluating a taxpayer's Amount A tax control framework adds to our concern. Although a taxpayer's overall financial control framework is critical to the reliability of the taxpayer's Amount A tax control framework, the adoption of such language implies that the scope of the Expert Advisory Group's review would be all encompassing across the entirety of the taxpayer's financial control framework.

Such a review would be intrusive and would duplicate reviews that are already carried out for non-tax regulatory purposes. Given the ongoing and extensive reviews of taxpayers' financial control frameworks, we believe that, for purposes of determining compliance with Amount A, only the tax control framework for the application of Amount A should be subject to review. Note, however, that even with this defined scope, we believe that few tax administrations will have the resources needed to evaluate taxpayers' Amount A tax control frameworks.

As an alternative to the above structure, we propose enhancing compliance by requiring in-scope Covered Groups to provide the Lead Tax Administration a Letter of Attestation by an independent auditing firm that evaluates the reliability and effectiveness of the taxpayer's Amount A tax control framework. We believe that an attestation engagement over compliance is the preferable means to provide the necessary comfort to tax administrators regarding the reliability of the Amount A tax control framework for in-scope taxpayers. Such an engagement will take the form of either an examination or agreed-upon procedure that will assess i) the taxpayer's compliance with specified laws, rules, or Advance Certainty agreements (e.g., the issues, process and revenue sourcing indicators agreed in the Advance Certainty Review) and ii) the taxpayer's internal control over compliance with such specified requirements.

De Minimis

We have previously provided comments on the de minimis thresholds of 1% and 5% that were set for any Review Panel requests to change amounts in a Covered Group's documentation. Since those recommendations were not accepted, we reiterate that these thresholds are too low and recommend that those be increased to at least 5% and 10% respectively. Higher thresholds will ensure that changes are proposed only where they have a material effect on allocations, thereby discouraging needless inquiries or disputes regarding minor items. We appreciate the clarification that a Review Panel will not propose a different revenue sourcing methodology for a prior year without confirming first that proposed methodology data is actually available.

Treatment of Amended Returns

Given the overall length of time for resolution, the Covered Group may have entities that are required under local laws to file amended returns for a year under review. Accordingly, it would be helpful to have guidance on how that should be managed (e.g., notification of changes to Lead Tax Administration), to ensure full transparency and to avoid any negative consequences to the process of reaching certainty determinations.

Part III – Tax Certainty for Issues Related to Amount A

We are encouraged by the addition of Article [Y] and delighted that the drafters responded so constructively to comments highlighting gaps for cases not currently covered by bilateral tax treaties. It is critical for the proper functioning of the certainty framework to maintain and reinforce this necessary article. We also recommend that domestic anti-avoidance rules are covered under these rules to ensure that they are not used to allocate profit to a jurisdiction while bypassing the certainty process or undermining other aspects of Pillar One, thereby minimizing double taxation.

Dispute Resolution

While recognizing that any disputes may take significant time to resolve, we recommend that the Competent Authorities should not be permitted to extend the MAP timeline for resolution beyond two years without the acquiescence of the Covered Group. The Covered Group is in a good position to assess whether a proposed extension of time is likely to lead to a negotiated resolution. It is appreciated that the Consultation Document provides that any extension of time should be short. Since the objective is timely

resolution, it would also be helpful to include rules or more explicit timing guidelines to reinforce that objective.

We suggest that a Covered Group should not be required to demonstrate the specific quantitative impact of resolution of a Related Issue. The quantitative impact would not be certain in any case before completion of other certainty processes, and moreover this amount is not necessary to the objective of resolving disputes. It should be sufficient to explain why it is the type of issue that could have an impact on the application of Amount A rules.

As the dispute resolution process uses a last-best offer approach to dispute resolution, we find the ninety-day period to decide to agree to a separate proposal unnecessary. This additional period deters from the overall objective of accelerating resolution and certainty. Because the proposals under consideration would be from the Competent Authorities, the Competent Authorities should be incentivized to provide reasonable proposals as early in the negotiations as possible. Employing another round of negotiations to consider one last set of proposals simply prolongs resolution and introduces a sort of gaming of the dispute resolution mechanism to bargain in negotiations.

Competent Authorities are permitted to extend timelines when they agree the Covered Group failed to provide additional material information requested by either Competent Authority. While we appreciate that the rules note that the failure must relate to "material" information, it is important that this exception is not overused by making repeated, unusually burdensome, or late requests that unfairly prolong timelines.

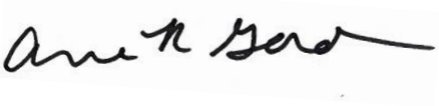
Elective binding dispute resolution mechanism

The ability for developing economies that have no or low levels of MAP disputes to opt out of a binding dispute resolution is problematic. We suggest that all nations that sign on to the MLC include binding dispute resolution procedures. Developing nations or others with a "low-capacity" should be phased in on a reasonable timeline that allows them to build capacity or receive technical assistance. Otherwise, the certainty provisions will have less utility to Covered Groups as jurisdictions may be permitted to opt out of the binding mechanism.

Conclusion

The NFTC appreciates the opportunity to comment on the proposals outlined in the Consultation Document. We look forward to continuing opportunities for constructive engagement as the feedback from the business community is incorporated into the Inclusive Framework.

Sincerely,



Anne Gordon
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National Foreign Trade Council

Appendix to NFTC Comments on Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One

NFTC Board Member Companies

ABB Incorporated
Accenture
Amazon
American International Group
Amgen
Anheuser-Busch
Applied Materials
BP America Inc.
Caterpillar Inc.
Chevron Corporation
Cisco Systems, Inc.
Coca Cola Company (The)
Corning Incorporated
Dentons US LLP
DHL Express (USA) Inc.
eBay Inc.
Ernst & Young LLP
ExxonMobil Corporation
FedEx Express
Fluor Corporation
Ford Motor Company
General Electric Company
Gilead Sciences, Inc.
Google Inc.
Halliburton Company
Hanesbrands Inc.
Hewlett Packard Enterprise Company
HP Inc.
IBM Corporation
Johnson Controls
KPMG LLP
Mars Incorporated
Mayer Brown LLP
McCormick & Company, Inc.
Meta Platforms
Microsoft Corporation
Mondelēz International, Inc.
National Foreign Trade Council
Oracle Corporation
Pernod Ricard USA
Pfizer International Incorporated
Philips North America LLC
Pitney Bowes
PricewaterhouseCoopers LLP
Procter & Gamble Company
Qualcomm Incorporated
Raytheon Technologies
Samsung Electronics
Schneider Electric
Siemens Corporation
Siemens Energy, Inc.
Stellantis NV
TE Connectivity
Texas Instruments
TotalEnergies
Toyota Motor North America
UPS
Visa Inc.
Walmart