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Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
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Re: Comment Letter on the Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)

The National Foreign Trade Council (the "NFTC") is providing written comments on the Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two) published on February 3, 2023 (the "Administrative Guidance").

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 ("IF") in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations.

General Comments

NFTC welcomes the Administrative Guidance aimed at addressing numerous issues for which stakeholders, including the business community, requested clarification. As the Administrative Guidance will be used in creating a revised Commentary, NFTC intends for these comments to provide insight into areas where additional guidance is needed and where the rules would benefit from simplification. In particular, we want to highlight that integration with existing tax systems, the utilization of credits, and certainty are all paramount to creating a sustainable tax ecosystem.

Specific Comments

Acquiring Constituent Entities

We understand that the OECD is diligently working on providing additional guidance for Pillar Two. In particular, the Administrative Guidance contains references to multiple open technical items where "further work" will be undertaken, e.g., the treatment of the acquiring Constituent Entity in inter-company transactions (2.1.2). These open items are particularly concerning given the fast-approaching implementation and the significant ongoing preparatory activities carried out by and associated costs borne by MNEs. Most M&A transactions take months, if not years, to plan and structure; therefore, guidance in this area is urgently needed. In providing guidance on acquisitions, agile and simple mechanisms to clarify the remaining technical issues must be provided in the next few months, if not sooner.

Simplification and Consistency of the GloBE Rules

The compatibility of the GloBE rules with existing international tax rules remains unclear. While the guidance does contain a consensus statement that the rules are designed to be compatible with UN and OECD model treaties, there are still ongoing debates as to whether this is the case, particularly with respect to the UTPR. The architecture of the GloBE rules is becoming increasingly complex. At this point in time, these rules are contained in the model rules (Dec. 2021), the Commentary (March 2022), Safe Harbors (Dec. 2022) and Administrative Guidance (Feb. 2023). We expect further provisions and documents will be added as the currently open technical items are clarified and suggest that at some point (and the sooner, the better), the OECD IF should consider consolidating the rules and simplifying their presentation.

Separately, some provisions are temporary in nature and therefore provide no medium/long-term certainty; e.g., the simplified methodology of GILTI allocation (4.3.2) is in place temporarily until 2027 and subject to re-assessment by the IF at that stage. The CbCR safe harbor, which is critically important to ensure that the resources of MNEs and tax administrations are focused on jurisdictions where material minimum tax may be due, is also temporary and subject to re-assessment. Alignment with current rules as well as rules which provide long-term certainty are needed to ensure the sustainability of the GloBE.

The Administrative Guidance gives significant design flexibility to IF members planning to introduce QDMTT, referring to functional similarity and not-dissimilar outcomes. At the same time, the qualification mechanism for these regimes is still unclear. Our concern is that this design flexibility, combined with the absence of the qualification mechanism, will result in a set of disparate domestic regimes resulting in double taxation and complex compliance. If rules do not align and implementing countries each have their own interpretation, the compliance and subsequent audit process will be expensive, burdensome, and unmanageable. One mechanism for addressing this issue directly is through a QDMTT safe harbor, discussed below.

Rule order

The Administrative Guidance confirms that GILTI will be treated as a CFC tax and that CFC taxes will be offset after the application of the QDMTT. This is at odds with previous indications that CFC taxes would be offset in priority to the QDMTT and GloBE rules. GILTI is a minimum tax, and in many cases, to offset after the QDMTT will lead to double taxation because of complexities related to the U.S. foreign tax credit rules, in particular because of the manner in which domestic expenses are apportioned. In light of this, NFTC requests that the ordering rule is reconsidered so that CFC taxes are offset in priority to the QDMTT. If the ordering rule is not changed, then NFTC requests that IF members, including the United States, honor their commitments by exercising regulatory authority or by pursuing changes in domestic law to ensure that their CFC taxes do not result in the double taxation of income subject to top-up tax under a QDMTT; either by exempting such income from CFC tax or by providing a full foreign tax credit that reaches equivalent results.

Tax Credits

The treatment of credits in the GloBE rules is punitive for MNEs headquartered or operating in the United States. The disallowance of credits for research & development, housing, and energy - especially green energy credits under the 2022 *Inflation Reduction Act* - in some cases can propel MNEs into the minimum tax with respect to income earned and subject to tax in the United States. Transferable credits should be on an equal footing with refundable credits. Moreover, the treatment of nonrefundable credits that cannot be monetized through the use of tax equity structures should be reconsidered.

Nonrefundable credits can have a strong policy basis in that they help ensure that a business is still operating and investing in workers and communities in order to receive the benefits. In some instances, the use of tax equity structures is not possible where, as is the case for research & development credits, the credit is based on expenses that are part of the core business of the MNE. In other instances, such structures are untested and potentially unavailable, especially in the case of recently enacted provisions not yet subject to review.

Finally, even the treatment of refundable tax credits should be reconsidered. Refundable tax credits that qualify as QRTC's can result in a minimum tax liability. Refundable credits generate untaxed book income for the claimant, which in some cases can reduce the MNE's effective rate below 15%. NFTC understands that the treatment of credits has been subject to much discussion and debate. The current outcomes, however, are unstable in that they may lead to the application of minimum tax on the U.S. income of U.S. MNEs in a manner that does not seem consistent with the stated objectives of Pillar 2. These income tax credits, used to promote important national objectives, are not considered harmful tax practices under the OECD Harmful Tax Practices guidelines, nor are they considered illegal state aid under EU law.

Imposition of minimum tax, or requiring project sponsors to incur the expense and legal constraints of tax equity in transactions where it is not otherwise needed, is inconsistent with sound environmental and tax policy. Accordingly, we urge the OECD to consider additional remedies that are applicable to refundable, transferable, and nonrefundable credits beyond the use of the equity method, which is unhelpful for many MNEs.

Furthermore, the OECD should encourage IF members to draft their QDMTT implementing legislation to permit tax credits for these payments under national laws. Without such a credit, additional tax might be due and market distortions may also occur if countries adopt inconsistent credit rules in this regard.

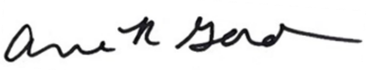
QDMTT Safe Harbor

The three-tiered system created by the IF is designed to ensure all MNEs are subject to the minimum tax so long as they operate in at least one IF jurisdiction. However, the system also needs to ensure that income is only subject to the minimum tax once. One mechanism that would help prevent double taxation as well as reduce the compliance burden is to provide a safe harbor for income subject to QDMTT. Such a safe harbor would prevent the application of the IIR and UTPR to income from countries that have implemented a QDMTT.

Conclusion

NFTC appreciates the continued engagement with the business community on the IF. We are happy to answer any questions or provide clarification on any of the comments raised.

Sincerely,



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