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OF THE
UNITED STATES OF AMERICA

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Organisation for Economic Co-operation and Development (OECD)
Tax Policy and Statistics Division
Centre for Tax Policy and Administration
2, rue André Pascal
75775 Paris Cedex 16
France

RE: Comments on Global Anti-Base Erosion Proposal ("GloBE") under Pillar Two

Dear Sir or Madam:

The U.S. Chamber of Commerce appreciates the opportunity to present the following comments to the Organisation for Economic Co-operation and Development (OECD) on Pillar Two (also referred to as the "Global Anti-Base Erosion" or "GloBE" proposal).

I. In General

As noted in our submission on Pillar One, the Chamber believes it is important to maintain the coherence of the international tax system and, as such, we encourage continuing broad engagement to meaningfully address digital tax issues. We want any solution to this issue to be sustainable and are extremely concerned that the failure of this process or the non-universal adoption of a new solution would yield significant tax and trade disruptions. Further, any agreement needs to be long-term, rather than treated as a "first step" in raising more tax revenue or moving toward formulary apportionment.

The Chamber believes that any proposal should require:

- Withdrawal of unilateral measures (DSTs, DPTs, ORT, MAALs, equalization levies, etc.), with a commitment not to impose in the future.
- An economic impact assessment of Pillars 1 and 2 (jointly) be completed and made public before any agreement is made on an approach.
- That some form of mandatory binding dispute resolution mechanism be implemented before any final consensus agreement on Pillars 1 and 2 is reached.
- Alignment and harmonization, and coordinated implementation of, Pillars 1 and 2 to eliminate risks of double or multiple taxation.

- That, subject to preservation of pre-effective date tax attributes (e.g. losses and other carryforwards), any provisions need to be prospective, without any inference intended with respect to prior years.

II. Global Intangible Low Tax Income (GILTI) as a "GloBE" Compliant Regime

While GILTI should not be viewed as a model income inclusion rule, because some of its design flaws result in double taxation,[1] the Chamber believes nevertheless that the U.S. GILTI regime[2] should be grandfathered as a qualified income inclusion rule pursuant to Pillar Two[3] and the OECD should ensure that the income inclusion rule is designed in a manner that prevents double taxation. Moreover, the FDII regime should be explicitly identified as 'not harmful' under the OECD Forum for Harmful Tax Practices."

Further, the income inclusion rule should (i) apply only with respect to controlled foreign affiliates (defined as direct or indirect ownership greater than 50 percent) and (ii) be administered and audited at *only* the ultimate parent jurisdiction as applied to all of a multinational enterprise's (MNE's) domestic affiliates and controlled foreign affiliates. If the ultimate parent jurisdiction of an MNE has a qualified income inclusion rule, no other jurisdiction's income inclusion rule or switch-over rule should apply to the MNE's subsidiaries. Applying the income inclusion rule at the level of each holding company would raise the likelihood of double or multiple taxation and be unduly burdensome and complex.

In addition, an ordering rule should provide that the income inclusion rule is the primary rule and the undertaxed payment and subject to tax rules are secondary and only apply to the extent a company's income is not subject to a qualifying income inclusion rule. A payment is considered to be "undertaxed" or not "subject to tax" if it is not subject to a minimum level of taxation. Therefore, payments subject to the income inclusion rule are, by definition, not "undertaxed" and are "subject to tax". Moreover, the undertaxed payment and subject to tax rule should not apply to payments to unrelated parties.

The following responses to specific questions in the Public Consultation Document are all subject to the proviso that the U.S. GILTI regime be treated as a qualified income inclusion rule, notwithstanding any differences between the responses and the GILTI regime.

III. Use of Financial Accounts as a Starting Point for Determining the Tax Base Under the "GloBE" Proposal as well as Adjustments for Permanent and Temporary Differences

[1] The Chamber and its members continue to urge the United States to ultimately address these design flaws.
[2] 26 U.S.C. §951A.
[3] Indeed, the Chair's Summary of the G7 Finance Ministers and Central Bank Governors Meeting in Chantilly on July 17 and 18, available at http://www.g7.utoronto.ca/finance/190718-summary.html, cited to GILTI as the example for a Pillar Two regime to provide for a "minimum level of effective taxation' that 'would contribute to ensuring that companies pay their fair share of tax."

The Chamber supports the use of financial statements prepared under globally accepted standards (e.g., U.S. GAAP or IFRS) as a starting point for purposes of determining the tax base. Consolidated financial statements based on the generally accepted accounting principles of the MNE ultimate parent jurisdiction should be used, rather than local financial statements, to minimize complexity. For example, if local financial statements were used, complex rules would be required to account for movements in foreign exchange. By relying on consolidated financial statements prepared based on accounting principles in the ultimate parent jurisdiction, the OECD can leverage the accounting rules for converting foreign currency into the currency of the ultimate parent jurisdiction. This would also align with our recommendation below to use a worldwide blending approach.

The Chamber agrees that it is important to avoid "situations where technical and structural differences between the calculation of the tax base in the parent and subsidiary jurisdiction result in an otherwise highly-taxed subsidiary being treated as having a low effective rate of tax for reasons unrelated to the policy underlying the GloBE proposal."[4] To minimize such situations, the Chamber believes adjustments should be made to consolidated financial statements to take into account permanent and temporary differences between financial accounting and tax principles.

Taking both permanent and temporary differences into account ensures that the GloBE effectively functions to ensure income is taxed at a minimum tax rate. Otherwise, the GloBE would function as an alternative minimum tax with policy objectives that may conflict with the policy objectives of the parent company's jurisdiction. As such, foreign tax credits, research and development credits, and other credits allowable under the parent company's jurisdiction must be allowed in full to eliminate double taxation and support research and other incentives provided by the parent company's jurisdiction.

Permanent Differences

Common permanent differences include, but are not limited to, dividends subject to the participation exemption, interest on certain government debt, fines and penalties, bribes, disallowance related to entertainment, book adjustments related to purchase accounting when acquiring a business, stock-based compensation, and others. Permanent differences can be material and should be taken into account when calculating the GloBE tax base. Some permanent differences, such as dividends from controlled entities, would be addressed by taking a worldwide blending approach, which the Chamber recommends below, although dividends from non-controlled entities would still need to be addressed.

Temporary Differences

Common temporary differences include, but are not limited to, book / tax differences in depreciation and amortization (often the result of government policy to encourage investment in fixed assets through accelerated cost recovery of assets for tax purposes), capitalized interest,

[4] See Pillar Two Consultation Document, paragraph 14.

differences in pension and other post-retirement benefits, net operating and capital losses, and capitalization versus expensing of research and development costs. Temporary differences can be material and should be taken into account when calculating the GloBE tax base.

Consistent with a worldwide blending approach, any approach that is adopted to cure timing differences should apply to *global* excess taxes and tax attributes, rather than to excess taxes or tax attributes at a country or entity level, given the complexity in accounting for these attributes for potentially hundreds of affiliates. Although Chamber members do not have a uniform comprehensive view of the most appropriate mechanism to address temporary differences, the following observations are offered for consideration:

- As noted in the public consultation document, timing differences between financial statements and tax can be so significant that the differences become permanent based on time value of money. Examples include cost recovery deductions for long-lived assets over a shorter life and accelerated method for tax purposes and foreign exchange gains and losses and intangible basis that is only triggered on eventual sale of the intangible.
- **Carryforward and averaging approaches**. A carryforward or multiyear averaging approach should encompass a sufficient number of years to acknowledge significant timing differences between financial accounting and tax and changes in market conditions (for example, U.S. tax principles allow a carryforward of excess foreign taxes related to certain types of foreign income for 10 years). An averaging approach should use at least 10 years and allow loss carryforwards.
- **Deferred tax accounting approach**. In general, a U.S. MNE computes its consolidated earnings before tax for each of its legal entities under U.S. GAAP, and temporary differences between U.S. GAAP and local GAAP are accounted for through deferred tax expense. A deferred tax accounting approach would therefore align the tax included in the numerator to the financial accounts income base in the denominator and effectively neutralize the impact of temporary differences each year, thereby achieving an appropriate effective tax rate. Should deferred tax accounting be used, to provide greater accuracy, the mechanism must be adjusted to remove the cumulative effects of discrete deferred tax events (e.g. changes in the tax law or changes in valuation allowance) in order to remove distortive deferred tax items.

IV. Extent to which an MNE Can Combine Income from Different Sources Taking into Account the Relevant Taxes on Such Income in Determining the Effective (Blended) Tax Rate on Such Income

The Chamber believes that OECD Pillar Two income inclusion rule should be implemented on a *global* basis (i.e., using a worldwide blending approach). Given the Pillar Two Consultation Document's stated purpose of "improv[ing] compliance and administrability and neutraliz[ing] the impact of structural differences in the calculation of the tax base,"[5] a global calculation is the only calculation that satisfies this goal for many reasons, including, but not limited to:

[5] Pillar Two Consultation Document, paragraph 15.

- It is the simplest and least compliance burdensome as taxpayers already have this information at the worldwide level without having to convert information between accounting standards, such as U.S. GAAP and IFRS.
- It would remove distortions caused in investment decisions if applied at the worldwide level, as the impact of investment decisions are smoothed out across jurisdictions.
- It would lessen volatility in the effective tax rate as multi-year swings are smoothed out.
- It would eliminate substantial complexity versus the jurisdictional and entity approach when allocating income between branches and their head office. There would remain complexity between domestic and foreign branches but it would eliminate complexity between foreign affiliates.
- It would eliminate substantial complexity versus the jurisdictional and entity approach when allocating income between transparent entities, such as partnerships, across jurisdictions. There would remain complexity between domestic and foreign partnerships and partners, but it would eliminate complexity between foreign and foreign.
- It would resolve many issues in income / tax crediting matching situations relative to the other approaches where there are branch / head office or partner / partnership withholding or other taxes.
- It would resolve foreign to foreign distribution issues relative to the other approaches.

Conversely, jurisdictional or entity blending would be highly problematic and complex, giving rise to double taxation as well as lengthy dispute resolution processes, and presenting significant administrative challenges and increased controversy to both MNEs and tax authorities.

V. Stakeholders' Experience with, and Views on, Carve-outs and Thresholds that may be Considered as Part of the "GloBE" Proposal

The Chamber believes that Pillar Two should only apply to large MNEs with the same revenue threshold of Pillar One, that is, companies in a global group that generate €750 million (or more) of global revenue annually.

Additionally, income subject to full parent jurisdiction taxation under its CFC rules (e.g., subpart F) should be carved out of the income inclusion rule, subject to tax rule, and the undertaxed payment rule.

Further, there is a sense that GloBE is aimed at halting a "race to the bottom" on worldwide global corporate taxes. The Chamber reiterates that countries are sovereign with differing economies and respective needs for tax revenues. Countries commonly act to use their tax laws to incentivize or disincentivize some activities and behaviors. It is generally accepted that well-designed tax incentives can increase investment in ways that contribute to overall

growth and job creation. The Chamber therefore urges that any global minimum tax that is adopted include exceptions for acceptable incentives, such as those to promote innovation. Otherwise, without these exceptions, it will considerably hamper countries' rights to use incentives because the incentives will not flow to investments in innovation, but to countries imposing the minimum tax.

The Chamber appreciates the opportunity to offer these comments and is ready to provide additional input as appropriate.

Sincerely,

Caroline L. Harris