U.S. Chamber of Commerce

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The Honorable Lily L. Batchelder
Assistant Secretary (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue N.W.
Washington, D.C. 20220

Re: Draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One

Dear Assistant Secretary Batchelder:

The U.S. Chamber of Commerce ("Chamber") welcomes the opportunity to comment on the draft text of the OECD/G20 Inclusive Framework's Multilateral Convention to Implement Amount A of Pillar One ("Pillar One MLC") and accompanying documents.[1] While certain pieces of the Pillar One MLC were previously the subjects of OECD public consultations, this is the first time that complete drafts of all three Pillar One documents have been made available to the public. We therefore appreciate the Department of the Treasury's ("Treasury") decision to open an official public consultation on these documents, which contemplate a radical change to the global international tax system.

Spanning nearly 900 pages, the draft Pillar One MLC documents would implement a critical component of the OECD/G20 Inclusive Framework's ambitious "two-pillar solution" to address the tax challenges arising from the digitalization of the economy. That component, Amount A of Pillar One, is intended to reallocate the international taxing rights over a portion of the profits of roughly 100 of the world's largest and most profitable multinational enterprises ("MNEs") to market jurisdictions while requiring the removal and standstill of digital services taxes ("DSTs") and other relevant similar measures. According to the OECD, the Pillar One MLC is designed to enhance stability and certainty in the international tax system by coordinating this reallocation of taxing rights with a corresponding obligation to relieve double

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[1] On October 11, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting released the draft Pillar One MLC accompanied by an Explanatory Statement and the Understanding on the Application of Certainty of Amount A (collectively, the draft "Pillar One MLC documents"), available at https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.htm.

taxation.[2] As set forth below, however, the draft Pillar One MLC would fail to achieve these policy objectives in several material respects and, therefore, warrants further attention by Treasury. The following comments discuss several such aspects of the draft Pillar One MLC and provide pragmatic, consensus-based recommendations for addressing them, consistent with Pillar One's underlying policy aims.

Marketing and Distribution Profits Safe Harbour Adjustment

Under the so-called marketing and distribution profits safe harbour ("MDSH") adjustment, profit reallocated under Amount A of Pillar One would be adjusted downwards to prevent double taxation (or "double counting") in cases where a market jurisdiction could otherwise tax an MNE's excess profit twice—once under its domestic corporate tax/transfer pricing rules and again under Amount A. In laying the policy foundation for the MDSH adjustment in 2020, the OECD explained that:

> [i]t would not be a traditional safe harbour, but would instead "cap" the allocation of Amount A to market jurisdictions that already have taxing rights over a group's profits under existing tax rules. Conceptually, it would consider the income taxes payable in the market jurisdiction under existing taxing rights and Amount A together, and adjust the quantum of Amount A taxable in a market jurisdiction, on the basis of limiting it where the residual profit of the MNE group is already taxed in that jurisdiction as a result of the application of the existing profit allocation rules.[3]

By capping the profit reallocated to market jurisdictions under Amount A, as contemplated above, it is clear to see how such an adjustment would further the stated policy objective of avoiding double counting in cases where a market jurisdiction could otherwise tax an MNE's excess profit twice. As described in Article 5 of the draft Pillar One MLC, however, the proposed MDSH adjustment would generally fail to achieve this fundamental objective due to several material design flaws, the most incongruous of which are discussed below.

De Minimis Threshold

The proposed MDSH adjustment contains a de minimis threshold that would prevent its application with respect to jurisdictions in which a MNE group has taxable

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[2] OECD, *The Multilateral Convention to Implement Amount A of Pillar One – Overview* 3 (2023), https://www.oecd.org/tax/beps/multilateral-convention-amount-A-pillar-one-overview.pdf.

[3] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* para. 501, at 124 (2020), https://read.oecd.org/10.1787/beba0634-en?format=pdf.

profit of less than €50 million, which would significantly limit the number of instances in which the MDSH adjustment would apply. For example, an ordinary distributor earning a 3% return on sales would need to earn $1.7 billion in local sales revenue for the MDSH adjustment to apply. At the same time, however, the draft Pillar One MLC would set a disproportionately low €1 million nexus threshold for Amount A to apply, which would drop to only €250,000 for jurisdictions with a gross domestic product of less than €40 billion.

An obvious consequence of retaining these two wildly disparate thresholds would be a world where many market jurisdictions are entitled to receive reallocations of profit under Amount A to which the MDSH adjustment would not apply. As a result, in-scope MNE groups could suffer double taxation of the same residual profits in many market jurisdictions, which would contravene the policy intention of Pillar One. Treasury should therefore seek to align the MDSH de minimis and Amount A nexus thresholds in any final Pillar One MLC. Alternatively, Treasury should seek to substantially lower the former to reduce its disproportionality relative to the latter.

Jurisdictional Offset Percentage

The proposed MDSH adjustment would also include a jurisdictional offset percentage that varies—between 90% and 25%—based on a market jurisdiction's level of depreciation and payroll or whether such jurisdiction is defined as a Lower Income Jurisdiction. Here again, this proposed design feature would frustrate the policy objectives of Pillar One by adding undue complexity and subjecting in-scope MNE groups to varying degrees of double taxation of the same residual profits in market jurisdictions. Because any jurisdictional offset percentage would have the effect of reducing the potential amount of the MDSH adjustment for a market jurisdiction, Treasury should seek to remove this offset from the final Pillar One MLC.

Treatment of Withholding Taxes

The risk of double counting the same residual profit of an MNE group in a market jurisdiction is particularly acute with respect to withholding taxes (i.e., that a market jurisdiction would tax twice the same item of profit if the jurisdiction were allocated Amount A on top of existing withholding tax liabilities). In view of this risk, the draft Pillar One MLC would take into consideration withholding taxes that are similar to other corporate taxes on business profits. Specifically, the proposed MDSH adjustment would take into account only withholding taxes levied by market jurisdictions on cross-border deductible payments made to other in-scope MNEs; withholding taxes on dividends, capital gains, and payments made to out-of-scope MNEs would not count. At the same time, however, the proposed mechanism for taking relevant withholding taxes into account (the "Withholding Tax Upward

Adjustment") would be subject to three separate limitations: a reduction factor varying between 15% and 70%; an exclusion for normal or routine profit; and the aforementioned jurisdictional offset percentage. In all instances, therefore, there would only ever be a partial offset against Amount A for any withholding taxes levied by the market jurisdiction, ensuring at least some degree of double taxation of the same residual profit.

While the proposed MDSH adjustment reflects an important acknowledgment by the OECD of the specter of double taxation, it regrettably stops well short of what Pillar One's policy objectives require. Instead, Treasury should seek to ensure that any withholding tax paid by an in-scope MNE on payments deductible in a market jurisdiction would decrease the Amount A profit reallocation to that taxing jurisdiction by the amount necessary to avoid double taxation of the MNE's residual profit.

In summary, the proposed MDSH adjustment would not operate to "cap" the profit reallocated to market jurisdictions under Amount A as originally intended. Instead, it would merely "haircut" the gross Amount A calculation through the application of a complex series of formulae and apply only to profitable jurisdictions in large, developed economies. Structurally excluding such a large number of market jurisdictions from the MDSH adjustment would fundamentally undermine the stated policy intention of Pillar One to enhance stability and certainty in the international tax system by coordinating the reallocation of taxing rights while preventing double taxation. Accordingly, Treasury should seek to perfect the MDSH adjustment in the final Pillar One MLC to ensure a dollar-for-dollar offset against any profit reallocated to a market jurisdiction under Amount A.

Removal and Standstill of DSTs and Relevant Similar Measures

As set forth above, Amount A of Pillar One is intended to reallocate the international taxing rights over a portion of the profits of the world's largest and most profitable MNEs to market jurisdictions while requiring the removal and standstill of DSTs and other relevant similar measures. Consistent therewith, the draft Pillar One MLC would provide for the removal of DSTs and relevant similar measures, and it would outline criteria to prevent the introduction of such measures in the future. Critically, these provisions would apply with respect to all companies, not merely to those considered in scope for Amount A purposes, and any breach thereof would lead to the denial of Amount A. But the proposed definition of a DST or relevant similar measure and the proposed procedures for classifying and policing new such measures raise several material concerns.

Definition of DST and Relevant Similar Measure

Article 39(2) of the draft Pillar One MLC would generally define a DST or relevant similar measure as a tax imposed by a jurisdiction, however described, that meets three cumulative conditions and is not described in a list of exceptions. The three cumulative criteria would require the tax to be (1) applied by reference to market-based criteria (e.g., location of customers and users); (2) ring-fenced to nonresidents or foreign-owned businesses; and (3) outside the scope of tax treaties.

The Chamber is deeply concerned that these cumulative conditions are too restrictive and would not provide the Conference of the Parties sufficient discretion to properly evaluate new unilateral measures, resulting in a proliferation of discriminatory taxes that should be treated as DSTs or relevant similar measures. Treasury, therefore, should seek to make these conditions *disjunctive* in any final Pillar One MLC. Alternatively, at the very least, Treasury should strive to liberalize the second criterion requiring a tax to be "ring-fenced" to nonresidents or foreign-owned businesses on a de jure or de facto basis. This could be accomplished by, for example, revising Article 39(2)(b)(ii) to require only that the tax applies revenue thresholds, exemptions for taxpayers subject to domestic corporate income tax in that jurisdiction, or other scope restrictions that cause the measure to apply in practice *principally* to nonresident or foreign-owned businesses.

Elimination of Amount A Allocations for Parties Imposing DSTs and Relevant Similar Measures

Another concerning aspect of the draft Pillar One MLC is how it may be interpreted by less scrupulous jurisdictions contemplating the adoption (or retention) of a unilateral DST or relevant similar measure instead of capitalizing on Amount A. As currently drafted, nothing in the Pillar One MLC would appear to restrict a market jurisdiction from making this choice, meaning jurisdictions with the most aggressive unilateral measures would have the least incentives to implement Amount A. Tacitly allowing market jurisdictions the prerogative to impose or retain DSTs or relevant similar measures would contravene Pillar One's underlying policy objectives to enhance stability and certainty in the international tax system through coordinating the reallocation of taxing rights. We therefore urge Treasury to seek more impactful consequences for jurisdictions that opt to impose DSTs or relevant similar measures instead of Amount A (e.g., preclude such jurisdictions from participating in the Conference of the Parties, suspend information sharing with such jurisdictions).

Removal of a DST or Relevant Similar Measure

Where a jurisdiction's existing unilateral measure is found to be a DST or relevant similar measure by the Conference of the Parties, the draft Pillar One MLC provides that Amount A will be denied only for the period starting on or after the date of the Conference's decision—not retroactively. Allowing a DST or relevant similar measure to remain in effect pending its adjudication by the Conference of the Parties would perversely incentivize market jurisdictions to enact such measures in the first place since any negative consequences would be substantially deferred. Ideally, the final Pillar One MLC should require repayment of any amounts collected under such a DST or relevant similar measure. At a minimum, however, amounts collected under such a DST or relevant similar measure should remain creditable against any Amount A owed to that jurisdiction until there is an offset.

Elimination of Double Taxation – Relief for Amount A Taxation

As previously mentioned, the Pillar One MLC is designed to enhance stability and certainty in the international tax system by coordinating the reallocation of taxing rights under Amount A with a corresponding obligation to relieve double taxation. As currently drafted, however, Part IV of the Pillar One MLC would conspicuously fail to ensure the elimination of double taxation in certain circumstances. For instance, Article 12 of the draft Pillar One MLC describes four different methods that a relieving jurisdiction could use to provide relief from double taxation under Amount A: (1) by direct payment; (2) refundable tax credit; (3) nonrefundable tax credit; (4) or deduction. This degree of flexibility alone raises obvious concerns about inconsistent treatment among jurisdictions leading to double taxation. And for jurisdictions opting to provide relief via nonrefundable tax credit or deduction, such jurisdictions would be required to allow the carry-forward of any unutilized amounts for only three fiscal years.

The Chamber respectfully submits that Part IV of any final Pillar One MLC must more effectively ensure the elimination of double taxation—an essential element of any plan to enhance stability and certainty in the international tax system. Given that U.S. MNEs are expected to make up roughly half of all those subject to Pillar One, it is incumbent on Treasury to champion the adoption of a simpler, more effective mechanism for the relief of double taxation of amounts reallocated under Amount A.

Enhancing Stability and Certainty in the International Tax System

The Chamber appreciates the years-long effort by the OECD/G20 Inclusive Framework toward a consensus-based solution to address the tax challenges arising from the digitalization of the economy. The public release of the draft Pillar One MLC

represents an important milestone in this monumental effort and is intended to enhance stability and certainty in the international tax system by coordinating the reallocation of taxing rights with a corresponding obligation to relieve double taxation. And yet, even if Treasury were ultimately successful in meaningfully addressing all the major concerns raised herein, recent developments at the United Nations and elsewhere threaten to undermine whatever stability or certainty Pillar One might otherwise achieve.

On November 22, the United Nations voted 125–48 to approve a resolution to establish a framework convention for international tax cooperation, which would shift negotiations from the OECD to the United Nations.[4] As characterized by former Deputy Assistant Secretary for Multilateral Tax, Itai Grinberg, the U.N. vote effectively indicates that 125 countries do not support Pillar One as a medium-term solution to stabilize the international tax system.[5] And this development occurred in the context of other countries' recent moves toward imposing new unilateral, discriminatory DSTs or relevant similar measures (e.g., Canada, Colombia).

Until such time as the OECD's deliberations and economic impact assessments become more transparent, with detailed, jurisdiction-specific estimates of in-scope profits, in-scope MNEs, and the impacts on tax bases and tax revenues made available to member countries and taxpayers alike, it is hard to envisage why any of those 125 countries would choose to adopt Pillar One over an alternative measure. Congress, moreover, has repeatedly sought such transparency from Treasury. For the Pillar One process to remain viable and reach a conclusion in 2024, therefore, the Chamber calls on Treasury to adopt a more transparent approach and engage more proactively with lawmakers and taxpayers during the pivotal months ahead. The Chamber believes that taking such an approach may help to quell some of the increasing interest in alternative tax cooperation fora like the United Nations.

Finally, given the need to address—and potentially renegotiate—the many significant issues raised herein, we respectfully urge Treasury to seek an appropriate extension for the moratorium on imposing newly enacted DSTs or relevant similar measures on any company, which is currently set to expire on December 31. For obvious reasons, securing such an extension will be critical to reaching a workable, durable conclusion to the Pillar One process.

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[4] *See* Sarah Paez, *U.N. Tax Cooperation Resolution Passes in Committee Vote*, 112 Tax Notes Int'l 1444 (Dec. 4, 2023).

[5] *See* Chris Cioffi, *OECD Global Tax Pact Lobbying Ramps Up Among Corporate Giants*, Bloomberg Law (Nov. 7, 2023).

The preceding comments are by no means exhaustive but represent some of the most acute, widespread concerns among a group of in-scope U.S. MNEs from across the industry spectrum. Given the fundamental nature of these concerns, the Chamber would counsel the Biden administration against signing any final Pillar One MLC that fails to materially address them. Instead, we respectfully urge Treasury to engage constructively with the business community—and Congress—to address these and other issues critical to enhancing stability and certainty in the international tax system. To that end, we would welcome the opportunity to discuss our comments with you or your colleagues in further detail and provide whatever additional information you may require. Thank you for your time and attention.

Sincerely,

Watson M. McLeish
Senior Vice President, Tax Policy
U.S. Chamber of Commerce

cc: The Honorable Ronald L. Wyden, Chairman, Committee on Finance, United States Senate
The Honorable Michael D. Crapo, Ranking Member, Committee on Finance, United States Senate
The Honorable Benjamin L. Cardin, Chairman, Committee on Foreign Relations, United States Senate
The Honorable James E. Risch, Ranking Member, Committee on Foreign Relations, United States Senate
The Honorable Jason T. Smith, Chairman, Committee on Ways and Means, United States House of Representatives
The Honorable Richard E. Neal, Ranking Member, Committee on Ways and Means, United States House of Representatives
Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, United States Congress