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United States Department of the Treasury
Office of Tax Policy
1500 Pennsylvania Avenue, NW
Washington, DC 20005

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Sent via email: OTP_Pillar1MLC@treasury.gov

Subject: Comments on draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One

Ladies and Gentlemen:

We appreciate the opportunity to submit these comments in response to the request for public input on the draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One (Pillar One MLC) and accompanying documents. We welcome the opportunity to engage with US Treasury on this important topic.

We welcome this consultation by the Treasury Department, which we see as reflecting the importance of feedback from stakeholders on the business and practical implications of the significant international tax changes that are contemplated with Pillar One. The Pillar One MLC contains some substantial refinements from the earlier documents that were released as consultation drafts as part of the Inclusive Framework process, including the addition of new rules in key areas that have been the focus of extensive stakeholder comment in those consultations.

In this submission, we build on the comments we have submitted throughout the Pillar One project, with a focus in particular on administrability and the need to balance the aims for technical precision and avoidance of complexity. We address key aspects of the revisions reflected in the Pillar One MLC. We also reiterate elements of our prior comments in areas where we continue to see a significant need for further effort to get to clear, workable rules that provide for the certainty and predictability that are essential for a stable global tax environment.

As work on the Pillar One project, and the Pillar One MLC in particular, continues, we encourage ongoing engagement with stakeholders.

Sourcing and Nexus

We appreciate the work that has been put into development of the rules related to sourcing and nexus that are reflected in the Pillar One MLC. However, we have concerns that the rules do not achieve a broadly workable balance.

There is a heavy burden on companies to track data to a level of granularity that their systems currently may not produce. Given the size of companies subject to Amount A, in many cases the detail required would not be

material for management reporting purposes. We urge that requirements with respect to the level of detailed information and the expected rigor of such systems be balanced with the materiality of the different categories of revenues that a company may have (for example, a company should be able to utilize different standards of rigor for a system covering 80% of its revenue versus one covering 20%).

We would also note that the ultimate resort to an Allocation Key means that the sourcing outcomes in many instances would be based on a proxy and not on a precise measure. Given this, the detailed sourcing rules seem to create an appearance of precision that may only serve to create unintended and protracted controversy of a type that historically has been difficult to resolve and has damaged relationships between taxpayers and tax administrations. We strongly encourage that consideration be given to providing more flexibility to taxpayers with respect to revenue sourcing than is currently reflected in the Pillar One MLC.

Further to this theme, with respect to nexus, we believe that the nexus threshold also does not reflect an appropriate balance. Given the size of the companies that fall within scope of Amount A, threshold amounts such as €250,000 and €1 million are very low. In many instances, the use of thresholds at this level would necessitate the use of transaction-level data, which we think is important to avoid. In addition, it should be made clear that revenues assigned under an Allocation Key would not be considered in applying the nexus threshold.

Even with the refinements on reliable methods that have been made, the Pillar One MLC still requires data from a company's clients and customers that in most cases would involve information that a company would not obtain in the normal course of business and that can involve data that is commercially sensitive information. We ask that consideration be given to further refinements that reduce reliance on third-party data and recognize regulatory restrictions on data.

We appreciate the inclusion of the three-year transition period before the more detailed sourcing rules take effect. However, the Pillar One MLC states that the Initial Transition Phase would begin after the Pillar One MLC enters into force. Given the extensive data considerations, we suggest that an Initial Transition Phase should be available for any company upon its qualification for Amount A, so that a company that is not within scope of Amount A at the outset but falls in scope later would be able to utilize this transition.

Allocation and Taxation of Profits and Elimination of Double Taxation

Amount A allocation

We welcome both the substantive outcome and the administration simplification arising from the Pillar One MLC provision that makes a pro-rata reduction in the Amount A profit that would otherwise be allocated to a taxing jurisdiction to the extent that the jurisdiction that should eliminate double taxation (i.e., the relieving jurisdiction) is not a Party to the MLC. However, we note with some concern that beginning after the first two years the Pillar One MLC is in force, this reduction in the Amount A allocation would only be available if there is a tax treaty in effect between such jurisdictions that includes a business profits provision corresponding to Article 7 of the OECD or UN model tax conventions. This limitation on the reduction in the Amount A allocation

would cause unrelieved double taxation. We see no policy justification for such double taxation and we urge that this limitation be eliminated.

We also appreciate the inclusion in the Pillar One MLC of the autonomous domestic business exemption in recognition that reallocation of profits under Amount A is not appropriate in the case of a business that operates on a non-integrated basis domestically in one or more jurisdictions. We believe this exemption is a practical approach to addressing such situations where they arise and will contribute to making Amount A more administrable by both taxpayers and tax authorities.

Marketing and Distribution Safe Harbor

We continue to believe that an effective marketing and distribution safe harbor (MDSH) is essential to Amount A. Although we acknowledge that there has been progress on the MDSH, we are concerned that the MDSH formula set forth in the Pillar One MLC does not fully reduce the Amount A allocation to a market jurisdiction by the amount of residual profits already allocated to such jurisdiction, and thus the MDSH does not really serve its intended purpose. We understand that the MDSH, like other aspects of the Amount A framework, has been the subject of intense negotiation and reflects compromise. However, we think that dilution of what should be a robust and straightforward MDSH undermines the policy underlying the Amount A framework.

As an initial matter, we very much welcome the incorporation of withholding taxes into the MDSH. This properly recognizes that, because Amount A is intended to address a concern that market jurisdictions do not have "enough" taxing rights under existing international tax rules, such a determination must take into account all income taxes the jurisdiction imposes, whether it chooses to exercise its taxing rights through a gross basis withholding tax on deductible payments or through a tax on net income. Moreover, implementation of an MDSH without incorporating withholding taxes would be inherently unstable, as jurisdictions could impose withholding taxes at will without affecting their Amount A allocation. While we appreciate that the Pillar One MLC includes an MDSH that takes into account withholding taxes, we have concerns about the limitations and restrictions on how withholding taxes are reflected in the MDSH computation.

In our comments on earlier drafts, we suggested that the MDSH formula could account for withholding taxes quite simply, through a straightforward addition to the MDSH formula:

M = Min ((EP + (D) * (Wr/t)) – PEP) [x Y%], Q), where

Wr = Withholding tax rate;

D = deductible payment subject to withholding tax; and

t = income tax rate.

While this basic framework has been reflected in the Pillar One MLC, the adjustments and limitations on what should be a fairly straightforward concept result in a very hollow withholding tax adjustment indeed. After working through the various formulae and haircuts, one discovers that there is *no* withholding tax adjustment

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whatsoever for the first two years, and only 25% of such adjustment through the seventh year of the Pillar One MLC's entry into force. In addition, the withholding tax adjustment *itself* incorporates its own routine return adjustment, which effectively results in a routine return adjustment within the broader routine return adjustment. The overall treatment of withholding tax in the MDSH strikes us as unwarranted hedging on what should be a firm principle. We believe that any restriction on the withholding tax adjustment should be narrowly targeted as relief for low-income jurisdictions only.

Beyond the substance of the withholding adjustment, we think that the inherent complexity of the withholding tax adjustment calculation is worrisome, especially when one considers that the withholding tax downward adjustment, like the rest of the MDSH, must be determined on a jurisdiction-by-jurisdiction basis. The new nomenclature of the MDSH itself reflects its overall complexity, with the need for a bevy of defined terms such as Jurisdictional Offsetting Profits, Jurisdictional Offset Percentage, Adjusted Jurisdictional Excess Profits, Low Depreciation and Payroll Jurisdiction, Adjusted Elimination Profits, Withholding Tax Upward Adjustment, Withholding Tax Upward Adjustment for the Current Period, Withholding Tax Upward Amount, and Withholding Tax Upward Adjustment Reduction Factor.

The jurisdictional Offset Percentage included in the MDSH calculation in the Pillar One MDSH seems to be the parameter "Y" from the earlier draft. As we stated in prior comments, we believe that this parameter should be 1.0. The broadly applicable 35% limitation serves no discernable purpose that we can see other than to dilute the MDSH benefit. We see no theoretical connection between the measure of overlapping income and the Amount A reallocation percentage. Conceptually they should be distinct measures. Accordingly, we urge that the successor to "Y" be eliminated (which would be equivalent to setting it to 1.0) to ensure a full MDSH. In our view, any reduction in the MDSH should be narrowly targeted as relief for low-income jurisdictions only.

Overall balance

We continue to believe that the allocation methodology is highly sensitive to asset related changes in the business model of companies. We are concerned that the allocations of Amount A and the corresponding relief obligations likely would trigger unintended variability for companies with repercussions in the deal market.

We also believe it is critical to take a step back and review whether the final re-distribution of taxable income requires allocation approaches of this complexity. We are concerned that the compromises that have resulted in the web of adjustments reflected in the allocation approach in the Pillar One MLC would lead to unintended distortions.

In our view, a more robust and expanded Amount B combined with a more straightforward approach for the Amount A allocations would provide more predictability and therefore greater stability for both companies and governments.

Finally, we would note that the complex re-allocations reflected in the Pillar One MLC would not directly advance broader fiscal and business objectives of dispersing supply of products around the globe and in fact could operate to encourage consolidation of supply chain footprints.

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Administration

The policy intent and design of Pillar One is a coordinated global reallocation of taxing rights, with a globally consistent tax base and calculation methodology and a global approach to dispute prevention and resolution. However, much of the approach in the Pillar One MLC with respect to the administration of Amount A focuses on the use of domestic procedures and processes, including, in particular, domestic procedures for obtaining relief from double taxation. Such double taxation procedures are inherently jurisdiction specific (i.e., they are local, not global), are already under significant pressure and involve significant costs to companies (in obtaining double tax relief ultimately or due to the double taxation that results from not being able to obtain such relief as a practical matter).

The tax certainty provisions in the Pillar One MLC present a framework that aspires to be global, innovative and highly centralized. The administration provisions in contrast are firmly grounded in the wide range of domestic procedures that exist today. We are concerned about this fundamental ideological disconnect in the approach to processes that are inherently intertwined. We believe that introduction of a new global tax concept like Amount A would deserve an equally global approach for administration and elimination of double taxation. Indeed, we believe that introduction of an appropriately innovative global process for administration would streamline the application of Amount A and reduce resource costs for both companies and tax administrations. In this regard, we would note that the resource costs associated with the administration approach reflected in the Pillar One MLC would fall disproportionately on US-headquartered companies given that that the companies in scope of Amount A are predominantly US companies.

Under the administration approach in the Pillar One MLC, companies could be required to pay the tax on the Amount A allocation to each market jurisdiction before receiving relief under the domestic mechanism for relief of double taxation in each jurisdiction that has an obligation to eliminate double taxation with respect to Amount A. This means that achieving the outcome intended by Amount A would be entirely dependent on how, when and whether the jurisdictions that are obligated to eliminate double taxation satisfy that new global obligation through their domestic rules and processes. We do not believe that this approach would deliver the results that are intended by Amount A.

We believe that the design principles underlying the administration approach for Amount A must be fundamentally re-thought. In our view, the administration approach should reflect key design principles that include the following:

- Amount A is effectively a new global group-wide tax that should be administered on a global basis.
- An appropriately coordinated global administration approach should be implemented directly through the Pillar One MLC with limited reliance on varied domestic procedures of jurisdictions.
- The elimination of double taxation that is a fundamental element of Amount A requires a system to *prevent* double taxation rather than only allowing *subsequent relief* from double taxation.

- A double taxation prevention mechanism should be provided through the Pillar One MLC that redistributes tax payments among jurisdictions' tax administrations consistent with the allocation of Amount A and the obligations to eliminate double taxation.

- Additional tax paid by companies because of Amount A should be limited to the excess of the tax on Amount A in the market jurisdictions over the tax relief that is obligated to be provided by the relieving jurisdictions under Amount A.

The collection by market jurisdictions of the tax on the Amount A allocated to them could be structured through direct payments from relieving jurisdictions' tax administrations or through the use of one tax administration as a central clearing house. The company's obligation to make payments to market jurisdictions with respect to Amount A would be limited to the difference between the amount of tax owed in the market jurisdictions and the amount of tax required to be relieved by the relieving jurisdictions, and such payments could be made through the central clearing house if that structure is used. If there are insurmountable barriers to an approach that would involve payments among tax jurisdictions, a fallback approach could have the company make initial payments to market jurisdictions with respect to Amount A equal to any excess of the amount of tax owed in the market jurisdictions over the amount of tax required to be relieved by the relieving jurisdictions followed by supplemental payments to the market jurisdictions to get to the full Amount A tax liability when the company receives the relief required to be provided by the relieving jurisdictions.

Certainty

We very much appreciate the overall vision regarding certainty that is reflected in the Pillar One MLC. However, as reflected in the comments we submitted on the earlier drafts, we believe that the certainty approach could be strengthened, including by:

- Reducing the layers of review and interaction.

- Increasing the role of the Lead Tax Administration.

- Increasing the role of the company.

Our suggested streamlined approach covers both the Advance Certainty Review and the Comprehensive Certainty Review and includes four steps:

- Step 1: The company elects to participate and submits the Amount A Common Documentation Package to the Lead Tax Administration.

- Step 2: The Lead Tax Administration makes all determinations relating to Advance Certainty and Comprehensive Certainty issues.

- Step 3: Any disagreements that arise from any affected tax administrations are submitted to the Determination Panel, which is itself vested with authority to resolve all issues with a determination that binds all affected jurisdictions.

- Step 4: The company accepts the determination or rejects it with the option of pursuing alternative approaches for certainty.

This streamlined approach and the enhanced role for the Lead Tax Administration would allow for more efficient deployment of tax administration resources. As part of this streamlined approach, the company (typically, the Ultimate Parent Entity in the jurisdiction of the Lead Tax Administration) should be given the opportunity to make representations in all phases of the process, which also would help facilitate the collection and evaluation of any relevant factual information.

Even though this process is streamlined, we are confident that it would ensure an appropriate outcome because the process itself ensures discipline. The ultimate authority of the Determination Panel to accept the Lead Tax Administration's determination or reject it in favor of an alternative approach would provide a compelling incentive for a reasonable initial determination by the Lead Tax Administration.

The streamlined process also would provide at least two additional benefits. First, the additional capacity that would be available would allow all aspects of Amount A to be covered under the Advance Certainty process. Second, the streamlined approach (even with expanded scope) would significantly reduce the timeframe under which the objectives of the process – including timely relief of double taxation – could be achieved.

Further, we continue to think that it is important for tax administrations to undertake a review of a Group's Amount A Common Documentation Package on a coordinated basis in situations in which the company has not applied for certainty in advance or rejects the outcome of the process. The company should not be penalized for not having applied for certainty in advance. Accordingly, we believe that the company should have the right to apply for the review process even where it did not apply for certainty in advance, and tax administrations should be required to participate and be bound by the ultimate outcome.

As reflected in our comments on earlier drafts, we believe the definition of Related Issue must go beyond Articles 5, 7 and 9 of the OECD and UN Model Tax Conventions to include issues such as limitations on deductions that are formally or de facto applied only to payments to related parties. In our view, certainty on issues related to Amount A is integral to full certainty on Amount A. Therefore, we encourage continuing focus on ensuring that the certainty provisions in the Pillar One MLC operate in a way that reflects this interconnection between issues related to Amount A and Amount A itself.

The fact that the companies in scope of Amount A are predominantly US companies means that the IRS likely would be the Lead Tax Administration in a disproportionate number of cases. Thus, any improvements that can make the certainty process more efficient and effective for taxpayers and tax administrations will have particular US relevance.

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Treatment of Digital Services Taxes and relevant similar measures

We want to reiterate the point we have made consistently in our submissions in connection with the earlier drafts that Pillar One is aimed at preventing the spread of uncoordinated unilateral measures such as Digital Services Taxes (DSTs) that unchecked would give rise to significant risk of overlapping taxation creating a barrier to cross-border economic activity. The ongoing proliferation of this type of uncoordinated measure, both with respect to digital services and more broadly, is creating double or multiple taxation, inordinately high compliance burdens, and significant uncertainty for businesses.

In considering the Pillar One MLC, it is important to recognize that eliminating DSTs and similar measures is itself a core objective of Pillar One, independent of the objectives of Amount A related to profit allocations with respect to in-scope companies. We believe that the October 2021 agreement both to remove existing DSTs and relevant similar measures with respect to all companies and to not newly enact any such measures is a central element of governments' commitments to Pillar One.

The obligation to remove existing measures and not to enact new measures must be clear, definitive and comprehensive. We welcome the language in the Pillar One MLC and the Explanatory Statement that makes clear that the obligation not to apply such measures extends to all persons, regardless of their nature or status, regardless of whether they are part of a Covered Group that is in scope of Amount A and regardless of whether they are a resident of a Party to the Pillar One MLC. We further welcome the inclusion of language specifying that the elimination of Amount A allocations for any jurisdiction that violates this obligation covers its Amount A allocations in full and making clear that such a jurisdiction is not freed from its relief of double taxation obligations under the Pillar One MLC.

As an overall matter, however, we would note that the sanction of elimination of Amount A allocations for jurisdictions that violate their obligation with respect to removal or non-enactment of DSTs and similar measures necessarily is restricted in its impact due to the scope limitations for Amount A. We urge that continuing work on Pillar One include development of mechanisms for jurisdictions to bring action against any measure in a jurisdiction that is in violation of this removal or non-enactment obligation.

With respect to the removal and non-enactment commitment, it is essential that the definition of DST and relevant similar measures be clear, comprehensive and consistently applied. There should be an opportunity for stakeholders to provide input to the Conference of the Parties on measures that should be reviewed and information on the operation of such measures in practice that will help inform the review process.

In order to ensure transparency and accountability of the review process to be conducted by the Conference of the Parties, reports should be published on the review of all measures that potentially are covered by the obligation to remove or not to enact. Similar to the approach used under BEPS Action 5 on harmful tax practices, such reports should identify each measure reviewed and the determination made in the review (i.e., whether the measure is found to be covered or not) and should include an explanation of the rationale for such determination. An initial report should cover the review process with respect to existing measures that were considered for inclusion on Annex A as measures that are required to be removed. Future reports should cover the Conference of the Parties' reviews of existing and newly enacted measures that *potentially* meet the

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definition of DSTs and other relevant similar measures and the determinations made as to such measures. These reports also should include updates on the status of previously reported measures to confirm that they were not enacted or were removed.

While the elimination of DSTs and similar measures is a core objective of Pillar One, we believe that the need to prevent the spread of such measures is an objective that extends beyond, and is independent of, the Amount A allocation rules. Therefore, in our view it is essential that work to address DSTs and similar measures continue even if the Pillar One MLC were not ultimately to enter into force.

Interaction with Pillar Two

It is essential that the interaction between Pillar One and Pillar Two be clear. The Commentary to the OECD Model GloBE Rules (paragraph 29, page 93) briefly addresses this interaction and indicates that the treatment of Pillar One taxation will be further addressed in Administrative Guidance that will be developed. We recommend that guidance confirm that Amount A allocations under Pillar One would not lead to allocation of GloBE Income or Loss of a relief entity to another jurisdiction (i.e., that an Amount A allocation would not be treated as creating a deemed permanent establishment for Pillar Two purposes). We further recommend confirmation that both the Amount A tax and the relief provided under Article 12 of the Pillar One MLC would be allocated to the relieving jurisdiction, while the GloBE Income or Loss of the relieving jurisdiction would not be impacted by Pillar One.

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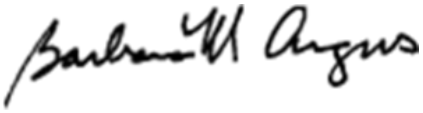
The EY team that prepared this submission welcomes the opportunity to discuss these comments in greater detail and to continue to participate in the dialogue as work on this important matter advances.

If there are questions regarding this submission or if further information would be useful, please contact Tracee Fultz (tracee.fultz@ey.com), Mike McDonald (michael.mcdonald4@ey.com) or me (barbara.angus@ey.com).

Yours sincerely



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