



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

12/8/2021

Mr. Austin Evers
C/O Mehreen Rasheed
American Oversight
Washington, DC 20005

Email: Mehreen Rasheed: foia@americanoversight.org

RE: Your FOIA Request to Treasury, Case Number 2020-03-069

Dear Mr. Evers:

This is the final response of the Department of the Treasury (Treasury) to your Freedom of Information Act (FOIA) request dated 3/11/2020. You have requested access to the following records:

“All email communications (including email messages, email attachments, complete email chains, calendar invitations, and attachments thereto) between (a) any of the Treasury officials listed in Column A and (b) any person or entity listed in Column B, below, containing any of the following terms: tax, TCJA, BEAT, “base erosion and anti-abuse tax,” GILTI, global intangible low-taxed income,” “Cut Cut Cut Act,” AMT, “alternative minimum,” repatriate, repatriation, foreign, evasion.

Column A Treasury Officials: Secretary Steven Mnuchin, Anyone serving as chief of staff to the Secretary, Anyone serving in the capacity of White House Liaison or White House Advisor, Anyone serving as advisor or counselor to the Secretary, Assistant Secretary for Tax Policy David Kautter, Deputy Secretary Justin Muzinich, Anyone serving as chief of staff to the Deputy Secretary, Deputy Assistant Secretary L.G. “Chip” Harter, General Counsel Brian anyone serving as his Deputy or Chief of Staff.

Column B External Entities: Amazon, including any an email address ending @amazon.com, American International including anyone with address ending in @ai, Anheuser-Busch, including anyone with an email a ending in @av-inbev, Bank of America, including anyone with an email a ending in @bankofame, Credit Suisse, including with an email address @credit-suisse.com, General Electric, including anyone with an email a ending in @ge.com, International Business Machines Corporation (IBM), including anyone with an email address ending in @us.ibm.com or @ibm.com, Kimberly-Clark, including anyone n email address ending in @kcc.com, Union (UBS), email address ending in @ubs.com, United Technologies, including anyone with an email address ending in @utc.com, Covington & Burling LLP, including anyone with an email address ending in @cov.com, Akin Gump Strauss Hauer & Feld LLP, including anyone with an email address ending in @akingump.com, Capitol Tax Partners, LLP, including anyone with an email ending in @capitoltax.com.

Please provide all responsive records from December 1, 2017, through December 31, 2019.”

Your request has been processed under the provisions of the FOIA, 5 U.S.C. § 552. A reasonable search was conducted for records responsive to your request. In response to the search, 215 pages were located within the Departmental Offices of Treasury. After carefully considering these records, I am releasing 138 pages in full and 77 pages in part. The withheld information is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552 (b)(5) and (b)(6).

FOIA Exemption 5 exempts from disclosure “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” This includes communications forming part of the deliberative process, attorney-client privilege, or attorney work product.

FOIA Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

There are no fees assessed at this time since allowable charges fell below \$25.

You have the right to appeal this decision within 90 days from the date of this letter. By filing an appeal, you preserve your rights under FOIA and give the agency a chance to review and reconsider your request and the agency’s decision. Your appeal must be in writing, signed by you or your representative, and should contain the rationale for your appeal. Please also cite the FOIA reference number noted above. Your appeal should be addressed to:

FOIA Appeal
FOIA and Transparency
Office of Privacy, Transparency, and Records
Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

If you submit your appeal by mail, clearly mark the letter and the envelope with the words “Freedom of Information Act Appeal.” Your appeal must be postmarked or electronically transmitted within 90 days from the date of this letter.

If you would like to discuss this response before filing an appeal to attempt to resolve your dispute without going through the appeals process, you may contact our FOIA Public Liaison for assistance via email at FOIAPL@treasury.gov, or via phone at (202) 622-8098. A FOIA Public Liaison is a supervisory official to whom FOIA requesters can raise questions or concerns about the agency’s FOIA process. FOIA Public Liaisons can explain agency records, suggest agency offices that may have responsive records, provide an estimated date of completion, and discuss how to reformulate and/or reduce the scope of requests in order to minimize fees and expedite processing time.

If the FOIA Public Liaison is unable to satisfactorily resolve your question or concern, the Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. If you wish to contact OGIS, you may contact the agency directly by email at OGIS@nara.gov, by phone at (877) 684-6448, by fax at (202) 741-5769 or by mail at the address below:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001

Please note that contacting any agency official (including the FOIA analyst, FOIA Requester Service Center, FOIA Public Liaison) and/or OGIS is not an alternative to filing an administrative appeal and does not stop the 90-day appeal clock

If any questions arise, please contact Alexis Colon at alexis.colon@treasury.gov. Please reference FOIA case number 2020-03-069 when contacting our office about this request.

Sincerely,



Mark Bittner
Director, FOIA & Transparency
Office of Privacy, Transparency, and Records

Enclosure

Responsive document set (215 pages)

From: Hiltz, Peter
Sent: Tue, 3 Dec 2019 14:16:25 +0000
To: Harter, Chip
Subject: Amazon's Comments on Pillar Two
Attachments: OECD Pillar 2 Consultation response - Amazon.pdf

Hi Chip,

Attached is a copy of Amazon's comment letter on the OECD Pillar Two Consultation filed yesterday.

Peter Hiltz
Director, International Tax Policy and Planning
Amazon.com
hilpeter@amazon.com
+(b)(6)



December 2, 2019

VIA ELECTRONIC TRANSMISSION

International Cooperation and Tax Administration Division
Organisation for Economic Cooperation and Development
2, rue André Pascal
75016 Paris
France
taxpublicconsultation@oecd.org

Comments on the Global Anti-Base Erosion Proposal – Pillar Two

Dear Sirs or Madams,

Amazon welcomes the Organisation for Economic Cooperation and Development's ("OECD") publication of the proposed "Global Anti-Base Erosion Proposal" ("GloBE") under Pillar Two, which is an important step forward towards an agreement among the member countries of the OECD in reaching a consensus solution for reform of the international tax framework, and we are pleased to provide our comments on the consultation.

Amazon is a U.S.-listed global company that employs 750,000 employees worldwide. We seek to be Earth's most customer-centric company. We have organized our operations into three segments: North America, International and Amazon Web Services. These segments reflect the way the company evaluates its business performance and manages its operations. In each of our segments, we serve our primary customer sets, consisting of consumers, sellers, developers, enterprises, and content creators. In addition, we provide services, such as advertising.

Amazon has been a strong and consistent supporter of the OECD's work to achieve a consensus-based solution with respect to taxation of the evolving international economy and hope our comments and suggestions provide constructive input towards that goal. Failure to reach a consensus will most likely have wide-ranging negative impacts for consumers and businesses, both large and small, and in developed and developing countries alike. Reaching broad international agreement on changes to fundamental international tax principles is critical to limit the risk of double taxation and to avoid distortive unilateral measures. A clear condition in any multilateral agreement governing these reforms should be a commitment by countries to not pursue or to cancel competing unilateral measures that undermine the intended objective of a single common approach to taxation across the modern economy. Achieving success at the OECD will help provide certainty and stability for the global economy, foster growth in international trade, and minimize the risk of global tax and trade disputes, all of which are vital for the millions of customers and sellers that we are fortunate enough to serve around the world.

We believe that any long-term reform solution should be consistent with the following guiding principles:

- **Principle 1 – Be levied on profits/losses, not revenue** – VAT/GST is the tax that applies to revenue.
- **Principle 2 – Apply in an economically principled way to both loss-making and profit making businesses.**
- **Principle 3 – Be proportionate, neutral, equitable, and enforceable** so that, on an overall basis, it is **applicable to all types of businesses** such that the new tax rules **do not ring-fence the digital economy, do not result in different tax rates for foreign and domestic taxpayers**, and do not create market distortions.

- **Principle 4 – Be a direct taxation measure only.** If there is a new concept of enhanced nexus that does not require a taxpayer to have a physical permanent establishment in a country that should be limited to direct taxes and **should explicitly have no impact or influence on jurisdictional nexus for indirect taxes or any non-tax legal matters.**
- **Principle 5 – Achieve consensus and maximize consistency** in its application. It is critical that consensus is achieved with sufficient detail to foster consistent application and **avoid multi-layer taxation** – inconsistent variations of the achieved consensus must not be adopted by countries unilaterally.
- **Principle 6 – Include mandatory mechanisms for effective dispute resolution.** The new framework **must not undermine the existing tax treaty network** and should provide pathways for effective dispute resolution. The treaty network is important in supporting global trade. Disturbing the existing tax treaty network would create unwanted knock-on consequences including multi-layer taxation and disputes.
- **Principle 7 – Create clear and simple rules to comply with and provide collaboration on transition relief.** Anticipating the fact that the timing of adoption by jurisdictions will vary because of differences in legislative procedures and acknowledging that systems changes are likely inevitable, agreement should be reached to allow sufficient time for the adoption and administration of the new system in a manner that does not increase disputes or result in double taxation.

Clear solutions, that can work for all countries, and that can be practically implemented and followed by taxpayers and tax authorities alike, are critical to success. Pillar 2 has the potential for unmanageable complexity, but we also think there is a road to a relatively simple and workable solution that will meet the broad policy aims. Our responses to this consultation has that objective in mind.

We would be happy to respond to any questions you may have about the attached comments.

Yours sincerely,



Kurt Lamp

VP Global Tax, Amazon

Detailed Discussion on GloBE proposal

We agree with the OECD that the “GloBE proposal should be designed to achieve [the policy] objectives consistent with the principles of design simplicity that will minimise compliance and administration costs and the risk of double taxation.”

As the consultation document details, the GloBE proposal has the potential to be incredibly complicated and introduces many highly complex areas associated with the interaction between tax rules and tax accounting. As a fundamental point of principle, tax policy should encourage compliance and the way that Pillar 2 is designed should follow this principle. Importantly, it must be proportionate, equitable and enforceable, underpinned by a robust dispute resolution framework and designed in such a way that it does not create multi-layer taxation.

Overall Scope

The goal of the GloBE approach is to ensure that an MNE’s income is subject to a minimum level of tax. The first area to be addressed is the overall scope of the approach, and what activities are subject to these rules.

Consideration should first be given to how the work conducted on BEPS Action 3 can be leveraged to scope out MNE’s who are already subject to a comprehensive and effective CFC regime. Although Action 3 was not a minimum standard, it set out certain features and hallmarks of an acceptable CFC regime, and that work could be used here as a form of initial gateway test. Since many countries already have such a CFC regime to which the GloBE provisions would be additive and to some extent duplicative, those groups already subject to such a CFC regime should not be required to apply the GloBE provisions. A white list of effective CFC regimes or minimum tax regimes could be considered for purposes of applying this provision, and there could be an element of peer review in creating and maintaining that white list. This should help to reduce the compliance burden for both taxpayers and tax authorities.

For those groups not already subject to an effective CFC or minimum tax regime, it will be necessary to design an effective and practical approach for the minimum taxation provisions. For simplicity, we would suggest the minimum taxation provisions should have the same thresholds as the Country-by-Country (“CbC”) Reporting Rules. This simplifies the administration of minimum tax rules for smaller groups, and aligns with financial reporting standards for consolidation. As noted above, for those MNE groups above these thresholds but who are already subject to a white listed CFC or minimum tax regime, there should not be a requirement to apply duplicative GloBE provisions.

Income Inclusion Provision

The first component of the GloBE approach is the income inclusion provision. The goal of the income inclusion provision is to ensure that the income of all subsidiaries of an MNE group is subject to a minimum level of tax. This is achieved by recognizing low-taxed profits of subsidiaries at the shareholder level, and subjecting those profits to incremental “top up tax” to a minimum level.

A practical approach will ensure that entities are subject to only one income inclusion provision to avoid competing claims by different taxing authorities. The income inclusion provision (as well as the assessment of whether the group is subject to an effective CFC regime noted above) should therefore be applied at the level of the MNE Group’s Ultimate Parent Entity (“UPE”), again in line with the CbC rules. So long as the UPE is subject to an income inclusion provision in its home jurisdiction that provision would necessarily ensure that the MNE Group was subject to a minimum level of taxation. As such, any income inclusion subject to additional “top up tax” should be calculated at the level of the UPE only, and not at the level of any intermediate holding company (provided that the UPE jurisdiction has an income inclusion provision).

Deduction Denial Provision

The GloBE approach contemplates supplementing the minimum tax income inclusion provision with a deduction denial provision that applies such that certain payments are not deductible (or eligible for treaty benefits) unless subject to a minimum level of tax in the hands of the payee. The aim of this rule would be to eliminate the advantages of shifting profits

to low-tax jurisdictions and guard against a “race to the bottom” in which jurisdictions compete for MNE profits by cutting tax rates and resisting the adoption of consensus-based minimum tax proposals.

In order to promote simplicity and to reduce the administrative burden on both taxpayers and tax authorities, the application of the denial deduction provision should be limited in scope such that it applies only to deductible related party payments that are not already subject to the income inclusions provisions.

As such, the deduction denial provision should only apply in a specific set of circumstances, i.e., for MNE Groups with a UPE in a jurisdiction that does not have an income inclusion rule and where base eroding payments are made to an entity in a jurisdiction that is not already subject to a minimum level of tax as the result of another entity’s income inclusion provision.

Calculation and Measurement

With our recommendation that both the income inclusion and deduction denial provisions should only apply to MNE groups who are not subject to an effective white-listed CFC or minimum tax regime at the UPE level, any approach must then address three fundamental elements: (1) defining the operations subject to the provisions and the level (i.e., entity, jurisdiction, etc.) at which they are applied; (2) determining how to measure tax burden; and (3) determining how and when to apply the “top up tax”. For the sake of simplicity and to encourage a broad adoption of these rules across the world, both the income inclusion and deduction denial provisions should apply the same calculation methodology and approach, since they are both seeking to test an applicable level of taxation.

Granularity level: The GloBE provisions could be applied at various levels of granularity: entity-by-entity, country-by-country, or on a worldwide consolidated basis. As detailed below, we consider that the worldwide consolidated basis is the only pragmatic approach that could be broadly adopted.

Any alternate approaches which require bespoke country or legal entity level calculations would in practice be incredibly burdensome, if not impossible, both for taxpayers and tax authorities, and is highly likely to lead to disputes between tax authorities. Many of the complexities with this level of granularity in approach are identified by the OECD in the consultation document.

Therefore, as a threshold matter, MNE Groups should be allowed to apply the rules in the context of their overall worldwide group. As a form of gateway test, we would suggest that the MNE Group first test whether their consolidated operations are subject to tax at a sufficiently high effective rate based on their consolidated financials. Such a worldwide “safe harbor” would ensure that GloBE provisions were effectively targeted at MNE Groups who may be engaging in profit shifting and other problematic tax practices, which result in an overall low effective tax rate.

One of the main advantages of a simpler worldwide approach is that it is likely the only approach that could be workable for both developed and developing countries. A worldwide approach would greatly reduce compliance burdens by using the MNE Group’s consolidated financial results that are already available and audited. Measuring an MNE Group’s tax burden on a worldwide basis may also provide more equitable results, as it may remove jurisdiction-by-jurisdiction distortions that arise for genuine commercial reasons.

Measurement: For those groups that are not already subject to an effective CFC or minimum tax regime, and do not meet the suggested “safe harbor” noted above, consensus guidelines should establish a common starting point for measuring taxable income and any permitted adjustments. This is important with regards to both the income inclusion rule (in order to assess whether the level of tax is high enough for any given MNE group) and the deduction denial rule (in order to assess if the recipient of the payment is subject to a sufficient level of tax).

A pragmatic starting point is to compute net income based on the accounting rules applicable to the jurisdiction of the UPE. This is likely to be the most straightforward and easily administrable approach. MNEs will generally have this information for financial reporting purposes, and tax authorities in the ultimate parent jurisdiction will generally be familiar with their home country accounting rules. Starting with financial reporting data would also promote uniformity among jurisdictions applying

an income inclusion provision, and there is generally greater conformity among the global accounting rules (i.e., IFRS vs. US GAAP) than among the tax rules of various jurisdictions.

Applying different accounting rules on a jurisdiction-by-jurisdiction basis, by contrast, could lead to widely divergent results and would greatly increase compliance burdens on taxpayers and audit burdens on tax authorities.

Applying domestic tax laws as the basis of an income inclusion provision would also be difficult, if not impossible, to implement because domestic tax laws vary significantly from jurisdiction to jurisdiction and, if used for the basis of the income inclusion rule, would effectively require taxpayers to maintain multiple sets of financial records for a single entity. This appears to be a disproportionately high compliance burden, and practically would be almost impossible for a tax authority to audit, even those with highly developed tax administrations. Thus, using domestic tax rules could lead to a diminished comparability and create additional administrative burden that many countries or companies will not have the capacity or capability to handle.

Given this, applying the GAAP of the UPE would appear to be the most proportionate and practical approach in this area.

Once consolidated pre-tax income has been computed in accordance with the accounting rules applicable to the jurisdiction of the UPE, adjustments may be made to reflect consensus determinations as to necessary book-tax adjustments. This will create an adjusted income result.

Fundamentally, any adjustments made to arrive at adjusted net income should be kept to a short and simple list to ensure that administration is not overly burdensome. Using consolidated accounting profit will aid simplicity and reduce the number of adjustments required. For example, using consolidated accounts will mean that intercompany dividends do not need to be adjusted for given they would be eliminated upon consolidation. Adjustments should not include any timing differences, but be reserved to certain limited permanent items.

Timing differences, such as those from the depreciation of assets used in a trade or business, should not result in any adjustments in arriving at adjusted net income (as described above) under the GloBE provisions, given they do not impact the amount of taxes, only the timing when paid. Using consolidated accounting would simplify the treatment of timing differences. Accounting rules generally look to ensure the appropriate matching of income and expenses. For tax, this is achieved through deferred tax accounting, and therefore using the consolidated accounting profit and the tax accrued per the accounts, including movements in deferred tax balances, will alleviate concerns that timing differences could lead to unjust outcomes under the GloBE provisions. In circumstances where movements in deferred tax balances are not recorded for financial purposes (for example due to valuation allowances) these amounts should be adjusted and included in the tax amount.

After adjusted net income has been computed, the amount of tax properly attributable to that income will likewise need to be determined. As noted above, the corporation tax charge in the accounts, which will include both current and deferred taxes, as well as withholding taxes can be the effective starting point for this. It is also important that Pillar 2 calculations should be made subsequent to and reflect any additional pillar 1 allocations.

Consequences. If subject to less than the established minimum tax, then additional tax should be paid such that the aggregate tax burden in the MNE Group is at least equal to (not exceeding) the target rate applied at a consolidated level. The target rate should be determined based on a consensus among participating countries.

From: Smith, Maureen N.
Sent: Mon, 9 Dec 2019 20:18:47 +0000
To: Kautter, David; Harter, Chip; (b)(6); Paul, William M.; Hubbard, Helen M.; Erwin, Mark E.; Blanchard, William E.; Imholtz, Diana A.; Hanemann, Spence; Holzem, Caitlin I.
Cc: David Bowman; Farr, Lucy W.; Matlock, Tracy L.; Sanders, M. Jared; Long, Yixuan; Ann Battle; Madhany, Fatima
Subject: ARRC Tax Letter re: ISDA Protocol
Attachments: ARRC Tax Letter re ISDA Protocol.PDF

Ladies and Gentlemen,

Please find attached a letter, approved by the Alternative Reference Rates Committee (the "ARRC"), requesting IRS and Treasury guidance regarding the anticipated International Swaps and Derivatives Association Protocol relating to Interbank Offered Rate ("IBOR") fallback provisions.

The ARRC greatly appreciates the Guidance on the Transition from IBORs to Other Reference Rates, published in the Federal Register on October 9, 2019 (the "Proposed Regulations"), and anticipates providing additional comments on the Proposed Regulations separately. We look forward to further conversations with you and your staff on these important issues.

Sincerely,

Maureen Smith
Chair, Tax Subgroup of the ARRC

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Please access the attached hyperlink for an important electronic communications disclaimer:
https://hyperlink.services.treasury.gov/agency.do?origin=http://www.credit-suisse.com/legal/en/disclaimer_email_ib.html

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Washington, DC 20224

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Ms. Caitlin I. Holzem
U.S. Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

December 9, 2019

Re: Guidance Relating to the ISDA Protocol Regarding the Incorporation of Robust Fallback Provisions to IBOR Reference Rates

Ladies and Gentlemen:

The Alternative Reference Rates Committee (the "ARRC"), a committee convened by the Board of Governors of the Federal Reserve and by the Federal Reserve Bank of New York with the support of a number of agencies including the U.S. Department of the Treasury ("Treasury"), is writing to request standalone guidance relating to one or more Interbank Offered Rate ("IBOR") fallback-related protocols to be published by the International Swaps and Derivatives Association ("ISDA") early next year (the "Protocol").

The ARRC greatly appreciates the Guidance on the Transition from Interbank Offered Rates ("IBORs") to Other Reference Rates, published in the Federal Register on October 9, 2019 (the "Proposed Regulations"), and the work done by Treasury and the Internal Revenue Service (the "IRS") to address tax issues arising from the IBOR transition, including issues raised by the ARRC in its prior

comments dated April 8, 2019¹ and June 6, 2019.² However, as discussed in further detail below, it is not clear whether adherence to the Protocol or adoption of comparable fallback provisions by parties to a contract will qualify for the relief provided in the Proposed Regulations. Due to the time-sensitive nature of this issue, the ARRC is providing its initial comments with respect to the Protocol in this letter and will separately provide additional comments regarding the Proposed Regulations.

Currently, derivative contracts that are based on ISDA documentation contain fallback provisions that are widely considered by both private-sector participants and the official sector to be highly likely to lead to widespread disruptions in the event of a permanent discontinuation of the relevant IBORs. The Protocol is intended to address this issue by providing a mechanism for parties to remediate their existing contracts, which are massive in number,³ without the need for individual negotiations. Broad market adherence to the Protocol will help to ensure that market participants are protected from the disruption that could occur under the current fallbacks included in ISDA documentation. On the other hand, uncertainty about the tax consequences of adhering to the Protocol could cause market participants to delay adhering to the Protocol or making contractual modifications to implement comparable fallback provisions. Accordingly, the ARRC requests in this letter that Treasury and the IRS issue interim guidance specifically addressing the Protocol.

This letter provides background regarding the mechanics of over-the-counter (“OTC”) derivative contracts based on the standardized documentation published by ISDA, the Protocol and the need for additional guidance. In addition, it provides a description of the guidance that the ARRC recommends to address the concerns raised by the Protocol, including proposed language for such guidance.

I. Background Regarding the Protocol

a. General Background on ISDA Master Agreements and Protocols

ISDA publishes documents, including “Master Agreements” and “Definitions,” which are used to provide standardized terms that form the basic framework of most OTC derivative contracts. Individual trades under an ISDA Master Agreement are generally documented by way of a “confirmation,” which details the terms of the specific transaction and incorporates relevant ISDA Definitions, including the 2006 ISDA Definitions (the “Definitions”) for interest rate derivative contracts. This general framework enables market participants to streamline their negotiations by relying on industry-standard terms, and ensures greater consistency across the derivatives market. This consistency, in turn, reduces risk for market participants.

A protocol is a mechanism to effect a multilateral amendment to existing ISDA-based contracts. Protocols provide an efficient way of implementing standard contractual changes among a large group of parties; in doing so, they enable parties to avoid time-consuming and costly bilateral negotiations. A

¹ See the ARRC’s whitepaper on U.S. federal income tax issues relating to the transition from IBORs to RFRs, available at <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC-Tax-Whitepaper-April2019.pdf>.

² See the ARRC’s proposed language for guidance relating to certain tax issues submitted to Treasury relating to the Transition from IBORs to RFRs, available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC_Proposed_Transition_Guidance.pdf.

³ As of the end of 2016, there was approximately \$145 trillion notional amount of outstanding over-the-counter derivatives. See the second report by the ARRC, available at <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Second-report>.

market participant who wishes to “adhere” to a protocol submits an “adherence letter” to ISDA, which publishes the names of the adhering parties on its website.⁴ If two parties to an ISDA-based contract adhere to a protocol, all of the contracts that they have outstanding with each other will be legally modified in accordance with the terms provided by the relevant protocol as of the date that the last of the parties adhered to the protocol (or as of a later date set out in the protocol). The adherence typically applies to all outstanding ISDA Master Agreements, and associated confirmations, to which the relevant market participant is a party, provided that the other party has also adhered.

b. The Protocol – Process

The current version of “Rate Options” for IBORs in the Definitions does not incorporate robust “fallback” provisions that would provide clarity, certainty and consistency regarding the appropriate replacement rate once an IBOR has been permanently discontinued. At the request of the Financial Stability Board’s (the “FSB’s”) Official Sector Steering Group,⁵ ISDA has been leading an industry effort to implement robust fallback language for derivatives contracts since 2016.⁶

ISDA has announced that it will amend the Definitions to provide for fallback reference rates in the Rate Options for LIBOR and certain other IBORs to address the circumstances under which those IBORs cease to exist, or possibly cease to be representative, at some point in the future (such provisions, the “ISDA fallback provisions,” and such amended Definitions, the “Amended Definitions”).⁷ The ISDA fallback provisions will contain terms to establish the base replacement risk-free rate (“RFR”) for each IBOR (any such base replacement rate, a “new fallback rate”) as well as a spread adjustment that will apply (the “spread adjustment”).

Simultaneously with the publication of the Amended Definitions, ISDA will publish the Protocol to facilitate multilateral amendments to incorporate the Amended Definitions into outstanding OTC derivative contracts (so-called “legacy derivative contracts”). By adhering to the Protocol, market participants will agree that any legacy derivative contracts with a counterparty who also adheres will be modified to reference the Amended Definitions, including the ISDA fallback provisions. As an alternative to adhering to the Protocol, a party can seek to enter into a bilateral agreement with a derivative counterparty to amend its legacy derivative contracts with that counterparty to include the Amended Definitions, as discussed below.

To determine the methodologies to be included in the ISDA fallback provisions, and at the request of international regulators, ISDA has conducted global, market-wide consultations on various technical issues.⁸ In an October 2019 letter to the Antitrust Division of the U.S. Department of Justice,

⁴ The Protocol webpage contains information on the various open and closed protocols, including lists of the adhering parties. See <https://www.isda.org/protocols/>.

⁵ Letter from FSB Co-Chairs to ISDA, July 7, 2016, attached as Appendix C to FSB Progress Report on Implementation of July 2014 FSB Recommendations, October 10, 2017, available at <https://www.fsb.org/wp-content/uploads/P101017.pdf>. The FSB Progress Report identifies the issues that may arise in a transition to reformed or new proposed interest rate benchmarks and makes recommendations to regulators and market participants (e.g., market associations such as ISDA) for addressing them.

⁶ See ISDA Consultation from July 2018, p.3, available at <http://assets.isda.org/media/f253b540-193/42c13663-pdf/>.

⁷ See the ISDA consultation on final parameters for fallback adjustments, available at <https://www.isda.org/a/Ua0TE/Consultation-on-Parameters-for-Fallback-Adjustments.pdf>.

⁸ The consultations are available at the following web addresses:

ISDA affirmed that it made substantial efforts to ensure that the consultations were fair, transparent and objective.⁹ For example, questions were designed to elicit narrative feedback and to avoid limiting or steering responses. To provide procedural safeguards, ISDA engaged antitrust counsel and third-party consultants to assess responses and ensure that information was shared appropriately. The consultations garnered a large number of responses from market participants representing several business sectors and countries. The consultants engaged by ISDA have released reports discussing the responses received and their conclusions based on those responses.¹⁰

ISDA expects to publish the Amended Definitions and Protocol by February 2020 for all IBORs. This publication will mark the beginning of a three-month period during which market participants will have the opportunity to adhere to the Protocol prior to a specific date on which the amendments to the Definitions will take effect (the “Initial Adherence Period”). After the end of the Initial Adherence Period, all new Definitions-based derivative transactions will reference the Amended Definitions, as will all legacy derivative contracts modified pursuant to the Protocol or through bilateral amendments incorporating the Amended Definitions. The occurrence of these changes on the same date should increase market consistency and predictability. LCH and CME have also announced that they will implement rule changes implementing revised fallback language in all derivative contracts they clear, including outstanding derivative contracts, on the date the Amended Definitions take effect.¹¹

Broad adherence to the Protocol during the Initial Adherence Period is of critical importance to the wider goal of ensuring that market participants are protected from widespread disruptions in the event of a permanent discontinuation of the relevant IBORs. John C. Williams, president and Chief Executive Officer of the Federal Reserve Bank of New York, recently stated:¹²

Derivatives contracts account for 95 percent of the exposure to U.S. dollar LIBOR, so universal changes to these contracts would be a significant leap forward. If the market

<http://assets.isda.org/media/f253b540-193/42c13663-pdf/>,
<https://www.isda.org/a/md6ME/FINAL-Pre-cessation-issues-Consultation.pdf>,
<https://www.isda.org/a/n6tME/Supplemental-Consultation-on-USD-LIBOR-CDOR-HIBOR-and-SOR.pdf>,
and
<https://www.isda.org/a/Ua0TE/Consultation-on-Parameters-for-Fallback-Adjustments.pdf>.

⁹ See the supplemental letter submitted by ISDA on October 23, 2019 to the Antitrust Division of the U.S. Department of Justice, attached hereto as Appendix C. The original letter submitted by ISDA on June 4, 2019 is attached hereto as Appendix D.

¹⁰ The reports are available at the following web addresses:

<http://assets.isda.org/media/04d213b6/db0b0fd7-pdf/>,
<http://assets.isda.org/media/e0b1bac2/04397355-pdf/>,
<https://www.isda.org/a/OLPTE/2019.09.18-Anonymized-ISDA-Supplemental-Consultation-Report.pdf>, and
<http://assets.isda.org/media/3e16cdd2/d1b3283f-pdf/>.

¹¹ The stated intentions of CME and LCH are available publicly at <https://www.cmegroup.com/education/articles-and-reports/cme-group-supports-isda-s-libor-fallback-provisions.html> and <https://www.lch.com/membership/ltd-membership/ltd-member-updates/lchs-position-respect-isdas-recommended-benchmark>. The ARRC believes that such revisions will not result in “modifications” of the relevant cleared derivative contracts for purposes of Section 1001 of the Internal Revenue Code (the “Code”) because, pursuant to the terms of the rules governing the cleared derivative contracts to be revised, LCH and CME have the authority to make such changes unilaterally.

¹² John C. Williams, Remarks at the 2019 U.S. Treasury Market Conference, Federal Reserve Bank of New York, New York City, September 23, 2019, available at <https://www.newyorkfed.org/newsevents/speeches/2019/wil190923>.

signs up to the Protocol when it's published, it will be a considerable milestone and will go a long way toward reducing risks to firms, markets, and the financial system. . . .

In a similar vein, Randal K. Quarles, vice chair for supervision of the Federal Reserve Board of Governors, recently stated that "it will be crucial in ensuring global financial stability that everyone participate in the International Swaps and Derivatives Association's (ISDA) consultations on better fallback language for LIBOR derivatives and then sign the Protocol so that these fallback provisions apply to the legacy book of derivatives."¹³

Broad participation during the Initial Adherence Period would signal strong market support for the Protocol and thereby encourage other market participants to adhere to the Protocol as well. Wide uptake of the Protocol will reduce market risk in that parties will be less exposed to varying and unpredictable outcomes that could arise if some of a party's legacy derivative contracts contain the new and more robust ISDA fallback provisions while others do not. This was acknowledged in a letter to ISDA dated March 12, 2019, by the Co-Chairs of the FSB, where they stated that:

The measures that ISDA is taking will play a very important role in the transition from LIBOR and will serve to strengthen contract language in derivatives referencing other IBORs. The adoption of appropriately revised fallbacks by market participants will help to mitigate a key source of risk to the financial system.

On November 7, 2019, the Federal Reserve Board, the FDIC, the OCC, and other agencies released a proposal on adjusting margin requirements for covered swap entities that, among other things, is meant to remove unintended hurdles to adhering to the Protocol and moving away from LIBOR.¹⁴ Additionally, the Financial Accounting Standards Board (the "FASB") has issued an exposure draft with proposals that would ease the transition from legacy IBORs to RFRs from an accounting perspective¹⁵ and recently affirmed its proposals, with the goal of finalizing the guidance in early 2020.¹⁶

While not all terms of the ISDA fallback provisions are finalized, most material terms have been determined, based on the final consultation results published by ISDA on November 15, 2019.¹⁷ The specific terms of the anticipated ISDA fallback provisions are discussed below.

c. Methodology in the ISDA Fallback Provisions

In the Amended Definitions, ISDA intends to amend the Rate Options to provide that an announcement or publication regarding the permanent discontinuation of an IBOR triggers the ISDA

¹³ Randal K. Quarles, Speech at the Alternative Reference Rates Committee Roundtable, June 3, 2019, *available at* <https://www.federalreserve.gov/newsevents/speech/quarles20190603a.htm>.

¹⁴ The proposal is available at <https://www.fdic.gov/news/board/2019/2019-09-17-notice-dis-b-fr.pdf>.

¹⁵ The FASB guidance is available at https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176173289025&acceptedDisclaimer=true.

¹⁶ See the FASB News Release, November 13, 2019, *available at* https://www.fasb.org/cs/Satellite?c=FASBContent_C&cid=1176173736549&pagename=FASB%2FFASBContent_C%2FNewsPage.

¹⁷ The full report on ISDA's consultation on final parameters for fallback adjustments is available at <https://www.isda.org/a/UaOTE/Consultation-on-Parameters-for-Fallback-Adjustments.pdf>.

fallback provisions (a “trigger event”).¹⁸ ISDA has not yet determined if the amendment will also provide for a trigger event resulting from an announcement by a regulator that an IBOR is no longer representative (a “pre-cessation trigger”).

Due to the differences between RFRs and IBORs, it will be necessary to adjust the spread above the applicable IBOR in a derivative contract with a higher spread above the applicable RFR. Accordingly, upon a trigger event a spread adjustment will be calculated to take effect when the discontinued IBOR is replaced with the new fallback rate, which in the case of U.S. dollar LIBOR will be the Secured Overnight Financing Rate (“SOFR”). The new fallback rate, together with the spread adjustment, will replace the IBOR as the reference rate under the terms of the contract once the IBOR is actually discontinued (such date, the “replacement date”). ISDA has announced that Bloomberg Index Services Limited (“Bloomberg”) will produce and publish the new fallback rates and the spread adjustments, as well as an “all-in” rate including both, for each IBOR tenor upon the occurrence of the relevant trigger event.¹⁹ Bloomberg will also publish indicative spread adjustments and resulting fallback rates prior to a trigger event.

To determine the spread adjustment accompanying the transition to the new fallback rate, ISDA anticipates the use of a five-year historical median approach whereby the median spread between the relevant IBOR and the relevant new fallback rate compounded over a period that corresponds to the applicable IBOR tenor (e.g., three months) are calculated over a five-year look-back period. In order to avoid distortions due to market disruption during the period between the trigger event and the replacement date, the relevant spread adjustment will be calculated based on the five-year look-back period ending on the business day prior to the trigger event. Attached as Appendix B is an illustration of a hypothetical timeline for the replacement of a relevant IBOR with a new fallback rate in an ISDA-based contract pursuant to the Amended Definitions (which could be incorporated into legacy derivative contracts through adherence to the Protocol or bilateral amendment) and subsequent operation of the ISDA fallback provisions.

There are several adjustments necessary to account for the fact that RFRs are overnight rates and IBORs are forward looking term rates. Under the ISDA fallback provisions, the rate for a payment period will be based on a “backward-looking” compounded setting in arrears rate whereby the relevant new fallback rate is observed over a period of time that is generally equivalent to the relevant IBOR tenor and compounded daily during that period. To deal with the operational difficulty of making a payment on a derivative contract based on a rate that is only known at the end of the period as opposed to the forward looking IBOR rates historically used, it is anticipated that the observation period for determining payments under a derivative contract referencing the new fallback rate will be shifted back by two days. This would mean that the last observation of the new fallback rate for any calculation period would generally be two banking days before the relevant payment date.²⁰

¹⁸ For further information on the fallback triggers for a permanent cessation of an IBOR, see pages 5 – 6 of the July 2018 ISDA Consultation on Certain Aspects of Fallbacks for Derivatives Referencing GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW, available at <http://assets.isda.org/media/f253b540-193/42c13663-pdf/>.

¹⁹ The ISDA announcement is available at <https://www.isda.org/2019/07/31/bloomberg-selected-as-fallback-adjustment-vendor/>.

²⁰ Laying out the material terms of the anticipated ISDA fallback provisions, the report on ISDA’s latest consultation stated the following conclusions:

- Using the feedback collected from respondents, ISDA expects to implement a historical median spread adjustment over a five-year lookback period without including a transitional period, without excluding

As noted above, a few minor details of the ISDA fallback provisions remain unresolved. Most unresolved terms relate to minor calculation mechanics—for example, incorporating holiday calendars for compounding. ISDA also continues to consider the inclusion of pre-cessation trigger events in the Protocol.²¹ Additionally, ISDA has yet to consult on the methodologies for adjustments to the Definitions in respect of EURIBOR and EUR LIBOR, but expects to do so by mid-December.²² It is possible that the Amended Definitions used by the Protocol will include ISDA fallback provisions for such rates.

d. Bilateral Amendments

It is expected that some market participants will incorporate the ISDA fallback provisions for IBORs through bilateral agreements rather than adherence to the Protocol. Parties may choose to enter into bilateral agreements for a variety of reasons, including to amend contracts with a non-adhering counterparty, to amend contracts that are not based on an ISDA Master Agreement, based on general practice to effect amendments that could be made by protocols through bilateral agreements, due to governance difficulties in approving a protocol adherence or because of timing issues related to adherence.²³

In many cases involving bilateral amendments, the expectation is that the parties will adopt fallback provisions identical to the ISDA fallback provisions included in the Amended Definitions (including the new fallback rates and spread adjustments that will be published by Bloomberg). However,

outliers and without excluding negative spreads. The spread adjustment will be applied to a compounded in arrears rate with the applicable calendar to be determined and announced by Bloomberg prior to implementation. Respondents supported a two-Banking Day backward shift adjustment period, which is anticipated to apply absent fundamental conflict with the suitability and implementation of the adjusted fallback rates. ISDA also plans to continue its review of and discussing with market participants regarding the feedback it received regarding products that may not work using these approaches.

- Bloomberg and ISDA will publish the final and full mathematical formulas for the spread adjustment and compounded in arrears rate (with adjustment period) prior to publication by Bloomberg of the adjusted fallback rates and implementation of the fallbacks in the 2006 ISDA Definitions.

See page 34 of the report, available at <http://assets.isda.org/media/3e16cdd2/d1b3283f-pdf/>.

²¹ If a pre-cessation trigger event were included in the Protocol, the ISDA fallback provisions would operate in a manner similar to what is currently contemplated, except that the trigger event might occur earlier than is currently contemplated. In an ISDA consultation focused on certain pre-cessation issues, a majority of respondents indicated they would be supportive of the inclusion of a pre-cessation trigger event. However, there remains disagreement regarding the implementation of such a trigger event. See pages 35 – 36 of the ISDA Consultation on Certain Pre-Cessation Issues, available at <https://www.isda.org/a/md6ME/FINAL-Pre-cessation-issues-Consultation.pdf>. The FSB has recently issued a letter to ISDA requesting that such trigger events be included in the Protocol. See Letter from FSB Co-Chairs to ISDA, November 15, 2019, available at <https://www.fsb.org/wp-content/uploads/P191119.pdf>. The ARRC believes the discussion herein is not impacted by the potential inclusion of a pre-cessation trigger event.

²² Fallback provisions for EUR LIBOR and EURIBOR have followed a different timetable because the fallback rate, €STR, was only published on October 2, 2019.

²³ It is also possible that market participants who amend legacy derivative contracts will desire to amend concurrently the fallback provisions applicable to debt instruments hedged by such derivative contracts. The ability of market participants to rely on the guidance requested for these debt instruments, as well as other non-derivative contracts that use contractual language comparable to the ISDA fallback provisions, would remove uncertainty regarding the tax treatment of such amendments, which the ARRC expects would increase the number of market participants who adhere to the Protocol or adopt comparable contractual provisions.

there may be certain terms that the parties wish to include or amend. Some examples of terms which parties may wish to modify include the following:

- If the Amended Definitions do not include a pre-cessation trigger event, it is possible that parties will want to include one through bilateral amendment.
- Parties may wish to make revisions to the ISDA fallback provisions necessary to address certain administrative and technical issues applicable to the particular terms of their agreement, such as changes related to determination dates, calculation agents and payment dates.²⁴

Because of the continually developing array of issues relating to the IBOR transition and the difficulty in capturing all possible reasons that parties may choose to amend their contracts bilaterally rather than enter into the Protocol, the ARRC urges Treasury and the IRS to provide flexible relief with respect to such bilateral incorporation of contractual language comparable to the ISDA fallback provisions.

II. Application of Proposed Regulations to Protocol and Amended Definitions and Request for Targeted Guidance

This section discusses the reasons why the Proposed Regulations do not clearly apply to the Protocol and Amended Definitions, and describes the ARRC's requested relief.

a. The Proposed Regulations, the Protocol and the Amended Definitions

The application of the Proposed Regulations to certain modifications of contracts to adopt or modify a fallback provision, including by adherence to the Protocol or bilateral adoption of the Amended Definitions, may be unclear in certain respects. In particular, the Proposed Regulations provide that no exchange occurs for purposes of Section 1001 of the Code as a result of an amendment to a debt instrument or modification of a non-debt contract to (1) include a qualified rate as a fallback to a rate referencing an IBOR or (2) to replace an IBOR fallback rate with a qualified rate and, in either case, any associated alterations or modifications.²⁵ A rate is a qualified rate if it satisfies three requirements: (1) the rate is one of a series of enumerated rates, which includes SOFR, (2) the fair market value of the debt instrument or non-debt contract after the alteration or modification is substantially equivalent to the fair market value of the debt instrument or non-debt contract before the alteration or modification or one of the associated safe harbors is met (the "fair market value requirement"), and (3) the replacement rate is based on transactions in the same currency as the IBOR.²⁶

The ARRC expects that the amendments to be made pursuant to the Protocol, or comparable bilateral amendments, will satisfy most of the requirements set forth in the Proposed Regulations as a predicate to relief thereunder. For example, the ARRC expects that the new fallback rates will generally fall into the enumerated list of qualified rates included in the Proposed Regulations²⁷ and that the

²⁴ Administrative and technical changes are expected to be necessary for many amended OTC derivative contracts that use non-ISDA-based documentation and non-derivative contracts that incorporate the Definitions or use language comparable to the Definitions.

²⁵ Prop. Reg. § 1.1001-6(a)(3).

²⁶ Prop. Reg. § 1.1001-6(b).

²⁷ See Prop. Reg. § 1.1001-6(b)(1).

administrative changes made by the ISDA fallback provisions will qualify as “associated alterations or modifications.”²⁸ However, it is not clear whether an amendment made through adherence to the Protocol will satisfy the fair market value requirement.

The preamble to the Proposed Regulations states that the purpose of the fair market value requirement is to ensure that the modifications are limited to those necessary to replace the IBOR with a new reference rate. However, the preamble acknowledges that fair market value may be difficult to determine precisely and therefore the Proposed Regulations provide two safe harbors in order to ease compliance. Under these safe harbors, the fair market value requirement is deemed satisfied if either (1) the historic average of the IBOR and replacement rate are within 25 basis points of each other, taking the spread adjustment into account or (2) the parties are unrelated and determine, based on arm’s-length negotiations, that the fair market value of the debt instrument or non-debt contract is substantially equal before and after the alteration or modification.²⁹

The existing safe harbors in the Proposed Regulations may not be available to taxpayers who adhere to the Protocol or adopt the Amended Definitions through bilateral agreement. The historic average rates safe harbor requires that, as of the date of the alteration or modification, there be no more than a 25 basis point difference between the historic average of the IBOR and historic average of the replacement rate, taking into account any spread adjustment, as of the date of the modification of the contract.³⁰ The historic average may be determined using an industry-wide standard, including one recommend by ISDA or the ARRC for purposes of computing the spread adjustment. Alternatively, the historic averages may be determined using any reasonable method that takes into account every instance of the relevant rate published during a continuous period that begins no earlier than 10 years before and ends no earlier than three months before the modification. However, the ISDA fallback provisions included in the Amended Definitions will establish the spread adjustment using a historical period ending on the day before the trigger event date, not the modification date, and therefore the ISDA fallback provisions do not clearly fit within the confines of the safe harbor. Importantly, as described above, the trigger event date will occur sometime (generally unknown) after the date a contract is modified.

Taxpayers adhering to the Protocol also cannot clearly satisfy the second safe harbor, which requires arm’s-length negotiations, because the Protocol is designed so that the parties do not negotiate directly. Instead, when both parties to a derivative adhere to the Protocol, the terms of the contract are automatically amended to include the Amended Definitions incorporated into the Protocol. However, while amendments to a derivative contract made through adherence to the Protocol do not involve negotiation between the parties to the contract, the underlying policy goals of this safe harbor—agreement among unrelated market participants—would seem to be met. Specifically, the terms of the Amended Definitions have been determined through a market-wide negotiation of sorts that has

²⁸ An example of a modification of this type that will be incorporated in the ISDA fallback provisions is the shifting of the observation period for calculating the amount of interest due on a payment date. *See* Prop. Reg. § 1.1001-6(a)(5).

²⁹ Prop. Reg. § 1.1001-6(b)(2)(ii)(A) & (B).

³⁰ Prop. Reg. § 1.1001-6(b)(2)(ii).

included regulators, trade organizations and market participants from numerous sectors and countries.³¹

It is possible that the fair market value requirement may be satisfied without the use of a safe harbor (i.e., under the “general test”). However, satisfaction of the general test would require a valuation for each contract modified (either through the Protocol or bilaterally) to include the Amended Definitions. It is important to provide certainty to market participants that adherence to the Protocol or bilateral agreement to include contractual provisions comparable to the Amended Definitions does not cause a taxable exchange to occur for purposes of Section 1001 of the Code, without the need for such valuations.

For the reasons described above, taxpayers adhering to the Protocol or adopting the Amended Definitions through bilateral agreement cannot be certain they will meet the fair market value requirement or come within one of the safe harbors and therefore avoid a taxable exchange. This uncertainty may deter parties from adhering to the Protocol or adopting the Amended Definitions, in particular during the Initial Adherence Period.

b. Requested Guidance

The ARRC requests that Treasury and the IRS issue standalone guidance stating that adherence to the Protocol, as well as bilateral modifications that implement comparable fallback provisions, will not give rise to a taxable event under Section 1001 of the Code. As noted above, the ARRC intends to provide additional comments regarding the Proposed Regulations, including comments addressing the impact of the fair market value requirement in other contexts, but is prioritizing these comments because it understands that the publication of the Protocol is likely to precede the finalization of the Proposed Regulations. Such standalone guidance could be in any form, provided that taxpayers can rely on it.

While the ARRC believes that broad adherence to the Protocol is a critical goal and that such adherence will best facilitate the adoption of more robust fallback provisions into an inordinately large number of legacy derivative contracts, it understands that there are legitimate and commonplace reasons why significant numbers of market participants may choose to enter into comparable contractual modifications on a bilateral basis. Accordingly, the ARRC recommends that the standalone guidance also apply to modifications of contracts that are comparable to the modifications effected by adherence to the Protocol.

The ARRC believes that the nature of the Amended Definitions and the Protocol should allay those concerns of Treasury and the IRS that motivated certain of the predicates for relief under the Proposed Regulations, including the fair market value requirement, and therefore such concerns should not impede the issuance of prompt and broad relief.

The Amended Definitions are intended to be adopted widely by the global market, and are expected to be the industry standard fallback provisions for both bilateral and cleared derivatives, and potentially other types of contracts. They have been developed by ISDA, at the request of international regulators, based on extensive consultations with global market participants and reflect the views of a

³¹ See notes 8 to 10 above and accompanying text.

variety of participants. In addition, both the applicable rate and the spread adjustment will be calculated and published by Bloomberg based on predetermined formulas.

Because the methodology for calculating the spread adjustment will utilize data as of the trigger event date, which is an unknown date in the future, parties adhering to the Protocol (or entering into comparable bilateral amendments) during the Initial Adherence Period will not be able to predict whether the spread adjustment resulting from the ISDA fallback provisions will operate to their economic benefit or detriment. In addition, because adhering to the Protocol results in a modification of all of the adhering party's ISDA Master Agreements with other adhering parties and modification of an ISDA Master Agreement will generally amend multiple individual derivative transactions, an adhering or amending party will likely modify both "long" and "short" contracts, with the result that the economic consequences of these modifications will not be known at the time of adherence.

The Amended Definitions and the Protocol do not take into account the individual circumstances of any specific contract and therefore cannot include any changes that are unrelated to the incorporation of the more robust ISDA fallback provisions. Accordingly, where a modification is solely to adopt the Amended Definitions or comparable contractual provisions, whether through adherence to the Protocol or by bilateral amendment, the concern that the parties will agree to other changes, unrelated to the replacement of an IBOR, simply does not apply. As a result, the fair market value requirement represents an undue barrier to these types of modifications.

While the technical discussion herein focuses principally on the fair market value requirement because it presents a clear impediment to relief under the Proposed Regulations in this context, the ARRC believes that standalone guidance regarding the Protocol and the Amended Definitions should apply broadly and not address the fair market value requirement alone. Such broad guidance would eliminate any uncertainty market participants may otherwise have that adherence or amendment may trigger taxable events, uncertainty that could unnecessarily hinder adherence.

Accordingly, the ARRC requests interim guidance that would state that the modification of a contract, either through adherence to the Protocol or the entry into comparable bilateral modifications, is not a taxable event under Section 1001 of the Code. In order to reduce impediments to timely adherence to the Protocol or adoption of the Amended Definitions, the ARRC urges Treasury and the IRS to provide such guidance as soon as possible and in any case by February 2020.

c. Proposed Language

Attached to this letter as Appendix A is draft language that could serve as the basis for the guidance requested herein.

Appendix A

Proposed Guidance with Respect to Adherence to the ISDA Protocol

Section 1

If a contract³² is modified as described in Section 2 of this [revenue procedure]/[notice], the modification will not be treated as an exchange of property for other property differing materially in kind or extent for purposes of Treasury Regulations section 1.1001-1(a).

Section 2

A contract is modified as described in this Section 2 if

- (a) both parties to such contract adhere to a protocol published by the International Swaps and Derivatives Association regarding certain definitions providing new benchmark fallback reference rates for Inter-Bank Offered Rates (the “Protocol”), and as a result of such adherence the provisions of the Protocol are incorporated into the terms of the contract; or
- (b) the terms of the contract are otherwise amended to incorporate provisions that are comparable to the provisions that would be incorporated into the contract if the parties to the contract were to adhere to the Protocol.

³² As described in note 23, parties may wish to simultaneously adhere to the Protocol to amend their legacy derivative contracts and amend debt instruments hedged by such derivative contracts in a manner that is comparable to the Protocol. If the guidance requested herein covers such debt instruments, there would be no uncertainty regarding the tax consequences of amendments of such debt instruments and more market participants would be expected to adhere to the Protocol.

Appendix B

Hypothetical timeline for the replacement of a relevant IBOR with a new fallback rate in an ISDA-based contract³³

- 2019: Party A and Party B enter into an ISDA contract referencing USD three-month LIBOR and incorporating the existing Definitions
- February 1, 2020: ISDA releases Amended Definitions and Protocol, marking the beginning of the Initial Adherence Period
- February 5, 2020: Party A submits its adherence letter to ISDA
- March 1, 2020: Party B submits its adherence letter to ISDA
- May 1, 2020: Initial Adherence Period concludes
- May 1, 2020: ISDA contract between Party A and Party B is modified by operation of the Protocol to include Amended Definitions
- January 1, 2022: The U.K. Financial Conduct Authority or Intercontinental Exchange announces that LIBOR will cease to be published for any dates following March 31, 2022 (“trigger event”)
 - Bloomberg calculates relevant spread adjustment between USD three-month LIBOR and USD three-month compounded SOFR based on SOFR data for the five-year period from January 1, 2017 to December 31, 2021 (the “spread adjustment”)
- April 1, 2022: Reference rate of ISDA contract between Party A and Party B is automatically amended to reference USD three-month compounded SOFR for any go-forward payments based on rates published on or after April 1, 2022 (“replacement date”), plus the spread adjustment published by Bloomberg

³³ Note that this example is included for illustrative purposes only and **is not an indication of the actual dates** on which the anticipated events will occur.

December 9, 2019

Appendix C

ISDA Supplemental Letter to the Antitrust Division of the Department of Justice

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October 23, 2019

Re: *Supplement to International Swaps & Derivatives
Association, Inc.'s Request for Business Review Letter*

Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
Main Justice Building
Room 3109
950 Pennsylvania Avenue NW
Washington, DC 20001

Dear Mr. Delrahim:

The International Swaps and Derivatives Association, Inc. ("ISDA")¹ provides the below supplemental information in support of its June 4, 2019 business review letter request concerning ISDA's plan to amend its standardized documentation to account for the potential discontinuation of LIBOR and other interbank offered rates (collectively referred to as "IBORs").

Executive Summary

On June 4, 2019, ISDA submitted a business review letter request asking that the Department's Antitrust Division issue a statement indicating that it is not presently inclined to bring an enforcement action against ISDA for the adoption of certain methodologies to account for any differences between the IBORs and the relevant risk-free interest rate benchmarks ("RFRs") that would apply if an IBOR is permanently discontinued and fallbacks to the adjusted RFRs apply in contracts that reference the discontinued RFR. The June 4 letter

¹ For purposes of this letter, ISDA is defined to include the Association, its Board, any Board committee and any Board or Board committee member acting in that capacity.

provided background on IBORs and the role that they play in the derivatives markets, the way IBORs are incorporated into ISDA's standard documentation, and how ISDA's proposed fallback methodology would involve changes to ISDA's standard documentation. In support of ISDA's request, the letter detailed the steps that ISDA took to evaluate and analyze potential options for addressing the discontinuation of IBORs, the public consultation that ISDA issued in 2018 ("2018 Consultation") to gather market feedback, and the general consensus reflected in the 2018 Consultation regarding how to address the potential discontinuation of IBORs. Finally, the letter explained the changes that ISDA intends to make to its standard documentation to account for the potential discontinuation of IBORs, and other steps that ISDA intends to take to effectuate changes to the fallback methodology.

In response to the 2018 Consultation, an overwhelming majority of respondents identified the "compounded setting in arrears rate" and "historical mean/median" approaches as the preferred methods for addressing the technical issues associated with fallbacks for the IBORs specified in that consultation.² ISDA engaged The Brattle Group ("Brattle") to provide an independent overview, summary, and analysis of market participants' responses to the 2018 Consultation. A review of the respondents' comments as summarized in the Brattle Report revealed no significant problems or concerns with the consensus view, confirming that it would be a workable solution that mitigates certain risks involving potential market manipulation, value transfers, and other concerns. Accordingly, ISDA made plans to move forward with the consensus view for the specified IBORs.

In May 2019, ISDA launched a supplemental consultation (the "Supplemental Fallback Consultation") in order to determine whether the consensus view from the 2018 Consultation would also work for fallbacks for USD LIBOR, Canadian IBOR ("CDOR"), and Hong Kong IBOR ("HIBOR").³

Also in May 2019, ISDA issued a second consultation – the "Pre-Cessation Consultation" – which sought input from market participants regarding whether ISDA should

² GBP LIBOR, CHR LIBOR, JPY LIBOR, TIBOR Euroyen, TIBOR and BBSW.

³ ISDA waited to consult on these other fallbacks because the secured overnight financing rate ("SOFR"), which is the fallback RFR for USD LIBOR, was not produced until April 2018 (only three months before the 2018 Consultation) and because the relevant private-public sector working groups were still consulting on reforms to the RFRs for CDOR and HIBOR in 2018, ISDA waited to consult on USD LIBOR, CDOR, and HIBOR so that market participants would have more information about the RFRs.

As part of the 2018 Consultation, ISDA previewed that it would be launching a supplemental consultation seeking the additional input needed from market participants regarding a potential fallback methodology for other benchmarks including USD LIBOR.

address possible “pre-cessation” events based on a public statement from a regulator that an IBOR is no longer representative of the market even though it has not yet been permanently discontinued. The Financial Stability Board Official Sector Steering Group (“FSB OSSG”) specifically requested that ISDA undertake the Pre-Cessation Consultation, and ISDA has informed the FSB OSSG of the scope, timing, and substance of the responses.

Both the Supplemental Fallback Consultation and Pre-Cessation Consultation closed on July 12, 2019.

As detailed below, the vast majority (approximately 92%) of respondents to the Supplemental Fallback Consultation expressed a preference—consistent with the market consensus responses to the 2018 Consultation—to use the compounded setting in arrears rate with the historical mean/median approach for the relevant fallback benchmarks (*i.e.*, USD LIBOR, CDOR, and HIBOR). ISDA therefore intends to proceed with developing fallbacks based on the compounded setting in arrears rate and the historical mean/median approach for USD LIBOR, CDOR, and HIBOR fallbacks, for inclusion in the 2006 ISDA Definitions.

The Pre-cessation Consultation however, did not yield a consensus among market participants on how best to address a “pre-cessation” event based on a public announcement by a regulator that an IBOR was no longer representative of the market. While a majority of respondents stated that they would not be content to continue referencing unrepresentative IBORs in new contracts (71.9%) or legacy contracts (64.0%) following a public statement by a regulator that the IBOR was unrepresentative, there was a wide diversity of opinions on how to respond to such an event. A healthy majority of respondents (64.07%) were in favor of utilizing a pre-cessation trigger to address this issue, but even within this group there were different views of how a pre-cessation trigger should be drafted, implemented, and executed—in particular, there was disagreement on whether there should be flexibility to apply to trigger to some but not all transactions. Because the consultation did not generate a consensus regarding how a pre-cessation trigger should be drafted, ISDA continues to discuss next steps with the FSB OSSG.

As with the 2018 Consultation, ISDA made substantial efforts, described below, to ensure that the two consultations issued in May 2019 were fair, transparent, and objective, and that neither the processes nor the results were the product of anticompetitive conduct. Thus, ISDA respectfully submits that, as with the 2018 Consultation, its collaboration with market participants via the two 2019 consultations and its work incorporating the results of those consultations into its standard documentation should not be subject to enforcement by the Department’s Antitrust Division.

I. The Supplemental Fallback Consultation

A. Purpose and Format of the Consultation

The Supplemental Fallback Consultation built on the 2018 Consultation and asked whether market participants viewed the most-preferred approach in the 2018 Consultation—compounded setting in arrears rate with the historical mean/median approach—as suitable for USD LIBOR, CDOR, and HIBOR. The Supplemental Fallback Consultation allowed those

market participants who participated in the 2018 Consultation to affirm, expand on, or modify their prior answers. The Supplemental Fallback Consultation also presented new questions related to SOFR, including (i) whether it would be appropriate to rely on indicative SOFR values and the historical Overnight Treasury GC Repo Primary Dealer Survey Rate (which serves as a proxy for the SOFR) and (ii) whether the SOFR should be used as an input to calculate a fallback for the SOR in the event that SOR is discontinued because USD LIBOR is discontinued.

On May 16, 2019, the Supplemental Fallback Consultation was publicly released as a market survey on ISDA's website, and was available to all market participants.⁴ The consultation provided background information about the FBS OSSG's request for ISDA to participate in work regarding the selection of fallbacks for key benchmarks. To educate respondents, the consultation explained that the current fallbacks to USD LIBOR, CDOR, and HIBOR were not designed to account for permanent discontinuations of those IBORs, outlined how a permanent cessation would be defined and how fallbacks could be triggered. The Supplemental Fallback Consultation detailed the fallback adjustment options for USD LIBOR, CDOR, and HIBOR and referred the market participants to the 2018 Consultation for additional information about the potential advantages and disadvantages of these options.

The Supplemental Fallback Consultation further detailed ISDA's intentions to amend the 2006 ISDA Definitions to include fallbacks to account for the potential discontinuation of relevant IBORs, and to utilize a third-party vendor⁵ to calculate and publish the adjusted RFR and spread adjustment so that users can access that information in the same way that they access the relevant IBOR or RFR. It was also explained that if the results of the Supplemental Fallback Consultation were consistent with the 2018 Consultation, then the selected vendor will also build out and finalize the approaches for USD LIBOR, CDOR, and HIBOR.

The Supplemental Fallback Consultation provided a form template for use by the respondents, but also accepted responses in alternative formats such as narrative letters. The consultation was opened on May 16, 2019 and closed on July 12, 2019. As with the 2018 Consultation, Brattle was retained to provide an independent review, analysis, and a summary of the responses to the consultation. On September 18, 2019, Brattle published a report ("Supplemental Fallback Consultation Report"), attached hereto, summarizing the responses to the consultation and reporting the representativeness of the consultation responses.

B. Results of the Consultation

As fully detailed in the Supplemental Fallback Consultation Report, an overwhelming majority (approximately 90%) of respondents expressed a preference to use the compounded

⁴ The Supplemental Fallback Consultation can be viewed at <https://www.isda.org/a/n6tME/Supplemental-Consultation-on-USD-LIBOR-CDOR-HIBOR-and-SOR.pdf>

⁵ As discussed below, ISDA has subsequently announced the selection of Bloomberg to fulfill this role. A press release with this information can be viewed at <https://www.isda.org/2019/07/31/bloomberg-selected-as-fallback-adjustment-vendor/>

setting in arrears rate with the historical mean/median approach for USD LIBOR, CDOR, and HIBOR fallbacks. Many of these respondents cited the need for a consistent fallback adjustment methodology across the different benchmarks as an important reason for their preference. Respondents also reiterated the advantages of the compounded setting in arrears rate with historical mean/median approach, consistent with the 2018 Consultation responses. A few respondents did express concerns and potential operational challenges associated with the compounded setting in arrears rate in particular, which were similar to those raised by respondents in the 2018 Consultation. Nevertheless, Brattle's analysis shows that the large majority of respondents did not share those same concerns

Recognizing that the historical mean/median approach requires the use of historical data related to SOFR to calculate the spread adjustment for USD LIBOR fallbacks, and that the Federal Reserve Bank of New York only began publishing SOFR in April 2018, the consultation asked if it would be acceptable to use indicative SOFR and the historical Overnight Treasury GC Repo Primary Dealer Survey Rate (which serves as a proxy for the SOFR) to calculate the spread adjustment for lookback periods starting prior to April 2018. The majority of respondents (approximately 60%) agreed with this approach. Some of these respondents noted that the use of proxy and indicative data is acceptable because there is no other obvious alternative, while others viewed the indicative and proxy data as representative of what the SOFR would have been and/or as the best data available. Some respondents indicated that they agree with using the indicative and proxy data because they preferred a longer lookback period (*i.e.*, 10 years or more). A few respondents agreed in principle with using both the indicative and proxy data, but wanted further analysis to be conducted to determine whether the proxy data is "relevant" to the SOFR. Other respondents were comfortable with the use of the indicative data, but not necessarily the proxy data. Those that preferred a shorter lookback period tended not to think the proxy data would be needed, and therefore considered the point moot. Others specifically highlighted the differences in characteristics between the SOFR and the proxy data that render the proxy data unacceptable. Only a few respondents objected to the use of both the indicative data and the proxy data.

C. ISDA's Implementation Plan

Based on the responses to the Supplemental Fallback Consultation, ISDA intends to proceed with developing fallbacks based on the compounded setting in arrears rate and the historical mean/median approach for USD LIBOR, CDOR, and HIBOR fallbacks to be included in the 2006 ISDA Definitions. ISDA intends to continue soliciting feedback from market participants and working with its independent advisors to determine the appropriate parameters for the historical mean/median approach and precise equations that will be used to calculate the adjustment. ISDA released a public consultation on these issues on September 18, 2019.⁶

⁶ The consultation can be viewed at <https://www.isda.org/2019/09/18/september-2019-consultation-on-final-parameters/>.

In July 2019, ISDA announced its selection of Bloomberg to calculate and publish adjustments to the IBOR fallbacks at issue in the 2018 Consultation. Bloomberg was selected through a public invitation to tender published in February 2019.⁷ The selection process was run by ISDA with input from a selection committee with members representing both buy- and sell-side market participants.

ISDA has provided the relevant feedback from the Supplemental Fallback Consultation regarding SOR to the Monetary Authority of Singapore (“MAS”), the Singapore Foreign Exchange Market Committee (“SFEMC”) and ABS Benchmark Administration Co Pte Ltd (“ABS Co”) for their consideration as they determine how to address the implication of the permanent cessation of USD LIBOR on SOR. If the SFEMC and ABS Co determine that a fallback to a rate such as “Adjusted SOR” is appropriate and that rate is produced and published (or will be produced and published), ISDA expects to update SGD-SOR-VWAP Rate Option in Section 7.1 of the 2006 ISDA Definitions to include a contractual fallback to that rate.

II. The Pre-Cessation Consultation

A. Purpose and Format of the Consultation

In early 2019, statements by the UK Financial Conduct Authority (FCA) indicated that if the FCA determined that one or more LIBOR panels shrunk so significantly that the relevant rate was no longer capable of being representative, then the FCA would make a statement that such a benchmark is no longer representative.⁸ In light of this, the FSB OSSG suggested that, in addition to incorporating fallback triggers based on permanent cessation, market participants may wish to consider including in their LIBOR contracts “pre-cessation” fallback triggers based on an announcement by the FCA that LIBOR is no longer representative. If pre-cessation triggers are included, contracts referencing LIBOR would move to the adjusted RFR fallback rates upon the pre-cessation event, even if LIBOR continues to be published. In a March 2019 letter to ISDA, the FSB OSSG co-chairs specifically asked that ISDA consult on a potential trigger for fallbacks that would take effect in the event that the FCA found LIBOR to be non-representative and made a statement to that effect, noting that “the EU Benchmarks Regulation envisages some circumstances in which a critical benchmark that does not meet requirements of the Regulation (such as representativeness) continues to be published but EU supervised entities would no longer be able to enter into new derivative or securities transactions referencing LIBOR in such circumstances.”⁹

⁷ The press release regarding the invitation to tender can be viewed at <https://www.isda.org/a/F9gME/IBOR-Fallback-Admin-RFP-Press-Release.pdf>.

⁸ <https://www.fca.org.uk/news/speeches/libor-transition-and-contractual-fallbacks>.

⁹ <http://www.fsb.org/wp-content/uploads/P150319.pdf>.

The Pre-Cessation Consultation sought input from market participants on the preferred approach for addressing pre-cessation issues in derivatives that reference LIBOR and other key IBORs, including in the context of a regulator's statement that the relevant IBOR is no longer representative. Specifically, the consultation sought feedback from market participants regarding possible approaches to inclusion of a pre-cessation trigger in the 2006 ISDA Definitions and/or the protocol that ISDA intends to publish to address fallbacks for legacy transactions.¹⁰ To educate respondents, the Pre-Cessation Consultation provided background information regarding these potential approaches and potential challenges to implementation of a pre-cessation trigger related to representativeness.

First, the consultation addressed the potential implications of a pre-cessation trigger on cash products and derivatives used to hedge cash products, and the risk of mismatches between a product and its derivative. The Pre-Cessation Consultation noted that because derivatives often are used to hedge cash products, market participants may want to apply the same triggers and fallbacks across cleared and non-cleared derivatives and in the relevant cash products and related derivative to avoid a mismatch (*e.g.*, the cash product moving to a new benchmark but the derivative does not, or vice versa). If new cash products include pre-cessation triggers, market participants may want to consider including pre-cessation triggers and corresponding fallbacks in new derivatives that hedge those cash products. Similarly, if new or existing cash products do not include pre-cessation triggers and fallbacks, market participants may prefer not to include pre-cessation triggers and fallbacks in derivatives that hedge those cash products.

Certain public-private sector RFR working groups, such as the Alternative Reference Rates Committee (ARRC) in the United States, have consulted on and published template fallback language for new cash products which includes non-representative "pre-cessation" triggers for USD LIBOR. However, not all public-private sector RFR working groups have explicitly considered or taken a view on fallbacks for cash products and whether a pre-cessation trigger relating to representativeness should be included in such fallbacks. It is also unclear whether market participants would be able to include a pre-cessation trigger in existing cash products, as many legacy cash products are difficult or impossible to amend.

CME and LCH have each communicated to ISDA and regulators that, subject to the detail and feedback of the Pre-cessation Consultation, they believe that market efficiencies could be achieved by aligning how cleared derivatives operate with a pre-cessation trigger for fallbacks in non-cleared contracts if the 2006 ISDA Definitions were to include such a trigger. However, at the same time, CME and LCH have each also communicated to ISDA and regulators that they may elect to consider pre-cessation triggers for fallbacks if LIBOR is

¹⁰ As previously discussed, ISDA intends to amend its standard documentation to implement fallback reference rates for certain key IBORs, including LIBOR, to protect against the risk that those IBORs could cease at some point in the future. ISDA intends to amend and restate the "rate options" in the 2006 ISDA Definitions in order to ensure that if certain IBORs cease, the fallbacks will apply in derivatives transactions executed on or after the effective date of the amendments and incorporate the 2006 ISDA Definitions. To address pre-existing (legacy) derivatives transactions, ISDA intends to publish a protocol to facilitate the inclusion of fallbacks that incorporate the 2006 ISDA Definitions. Adherence to such a protocol will be strictly voluntary.

found to be non-representative, even if the 2006 ISDA Definitions do not include them. Thus, ISDA also noted in the Pre-Cessation Consultation that mismatches could occur in a variety of situations in which the relevant triggers and fallbacks do not completely align and solicited input from market participants regarding this potential issue.

Second, the Pre-Cessation Consultation noted that if a relevant regulator states that a benchmark is no longer representative, then that would not, in and of itself, result in the prohibition on the use of a benchmark under the EU Benchmarks Regulation, market participants using that benchmark in derivatives may nevertheless wish to cease using that benchmark following such a statement. Market participants in the jurisdiction of the regulator making the statement particularly might prefer to cease using the benchmark (or may be required to do so), and any market participants that choose to stop using the benchmark in new transactions also may want to amend certain existing transactions that reference the benchmark, as appropriate. The consultation noted that under such circumstances, counterparties who converted to the fallback rate would be able to determine whether they are receiving/paying more or less on the basis of the fallback rate compared to the unrepresentative IBOR, and solicited views from market participants regarding this potential situation.

Third, the Pre-Cessation Consultation raised the possibility that the addition of a pre-cessation trigger could introduce a disparity between spread adjustments in derivative contracts. If a regulator made a statement that an IBOR is no longer representative and, as a result, derivative contracts are amended to reference the fallback rate at the time the relevant regulator makes such a statement, and the relevant IBOR is subsequently permanently discontinued following an index cessation event, the spread that would apply for the permanent cessation fallbacks would differ from the spread that applied for the pre-cessation fallbacks. The consultation also solicited feedback from market participants regarding this potential issue.

The Pre-cessation Consultation was released on May 16, 2019 and closed on July 12, 2019. ISDA provided a form template for use by the respondents, but also accepted responses in alternative formats such as narrative letters. The consultation featured twenty questions designed to elicit robust narrative feedback from market participants, including potential advantages and disadvantages of including or excluding a pre-cessation trigger from the 2006 ISDA Definitions and/or an amendment protocol to introduce IBOR fallbacks.

B. Results of the Consultation

A significant majority of respondents (71.9%) stated that they would not be content to continue using an IBOR in new derivatives contracts following a statement regarding unrepresentativeness. A smaller majority of respondents (64.0%) stated that they would not be content to continue to have legacy contracts (i.e., contracts that could contain contractual fallbacks) that reference an IBOR following a statement regarding unrepresentativeness, but nearly half of those respondents (45.6%) indicated that they may nonetheless continue referencing an unrepresentative IBOR under certain circumstances.

The responses to the Pre-cessation Consultation indicated that market participants broadly desire a uniform transition to fallback rates across products and currencies. However, the respondents expressed a wide variety of views regarding whether and how to implement a pre-cessation trigger related to non-representativeness for derivatives:

- 14.6% of respondents generally supported adding a pre-cessation trigger to the permanent cessation triggers in a “hard wired” amendment to the 2006 ISDA Definitions and related protocol but did not specifically address a preference regarding optionality or flexibility.
- 26.97% of respondents supported the inclusion of a pre-cessation trigger in the 2006 ISDA Definitions and opposed the publication of a protocol with optionality or flexibility.
- 22.5% of respondents supported the inclusion of a pre-cessation trigger in the 2006 ISDA Definitions and supported implemented with optionality and flexibility.
- 28.1% of respondents opposed the use of a pre-cessation trigger.
- 7.9% of respondents gave non-committal or unresponsive answers to whether a pre-cessation trigger should be implemented.

C. ISDA’s Implementation Plan

Because the Pre-cessation Consultation did not yield a consensus regarding how a pre-cessation trigger should be utilized, ISDA will not at this time incorporate a pre-cessation trigger into the 2006 ISDA Definitions. ISDA continues to discuss issues related to pre-cessation with the FSB OSSG.

III. The Supplemental Fallback Consultation and Pre-cessation Consultation Will Improve Market Stability and Efficiency

ISDA is confident that the output for the Supplemental Fallback Consultation will be useful and important tools for market participants and will promote a safer and more stable market. ISDA also believes that its consultation processes for both the Supplemental Fallback Consultation and Pre-cessation Consultation were fair and procompetitive, and therefore should not be subject to enforcement by the Department’s Antitrust Division. As described in further detail below, the consultations were conducted at the behest of international regulators and featured open, robust, and transparent processes designed to engage a wide array of global market participants. Throughout the consultation processes, ISDA took steps to educate and engage market participants while using safeguards such as the involvement of antitrust counsel and third party consultants to ensure that information was shared appropriately.

First, ISDA conducted the consultations at the request of international regulators, who recognized the importance of assessing market opinions regarding fallback methodologies and procedures. The Supplemental Fallback Consultation was conducted in response to requests

from the FSB OSSG that ISDA take a leading role in increasing derivative contract robustness by developing fallbacks in its Definitions for key IBORs. The Pre-Cessation Consultation was initiated at the request of the FSB OSSG, which requested that ISDA seek market opinions regarding a pre-cessation trigger based on representativeness.¹¹ ISDA remained engaged with the regulators regarding the progress of the consultations and its intended next steps.

Second, each consultation featured an open and transparent process. Both consultations were designed to elicit narrative feedback from market participants and to avoid limiting or steering the responses in any way. The Supplemental Fallback Consultation built upon the 2018 Consultation, which was the result of an iterative process described in the June 4, 2019 business review letter request. The Pre-Cessation Consultation featured open-ended questions that permitted respondents to provide their responses as free-form text. It also identified potential advantages to and drawbacks of various approaches to the implementation of a pre-cessation trigger, and solicited feedback as to these various approaches and issues. ISDA published a webinar to introduce each consultation and accepted questions from respondents throughout both supplemental consultations.

Third, each consultation featured procedural safeguards. ISDA engaged an independent third party, Brattle, as well as outside counsel to assess the responses to both supplemental consultations. As part of their analysis, Brattle and ISDA's outside counsel anonymized and aggregated the responses in order to ensure that information was shared appropriately.

Fourth, each consultation was robust. Both consultations garnered a high number of responses from a broad range of market participants and reflected input from a mixture of entity types and perspectives. For the Supplemental Fallback Consultation, Brattle reviewed responses from a total of 89 entities, collectively from 16 countries across Europe, Asia-Pacific, and the Americas. The responding entities operate in a number of sectors and included banks, asset managers, pension funds, corporate entities, central counterparties, global financial service firms, and government entities. Similarly, the Pre-cessation Consultation elicited a variety of perspectives from a broad group of market participants. ISDA's outside counsel and Brattle reviewed a total of 86 responses,¹² from 89 respondents, including banks, asset managers, pension funds, corporate entities, central counterparties, global financial service firms, and government entities from 16 countries across Europe, Asia-Pacific, Africa, and the Americas.

Fifth, ISDA's methodology will not be binding on market participants with legacy derivatives contracts referencing the relevant IBORs. There will always remain optionality

¹¹ See Letter from Andrew Bailey (U.K. Financial Conduct Authority) and John Williams (Federal Reserve Bank of New York) to ISDA, dated March 12, 2019, available at <https://www.fsb.org/wp-content/uploads/P150319.pdf>

¹² Six responses from trade/industry associations were reviewed but excluded from the total because they did not identify the members whose opinions were represented in the response. One respondent submitted a response on behalf of four banks, and therefore was considered four responses.

October 23, 2019

with respect to how individual counter-parties choose to amend their contracts, and ISDA cannot and will not be in a position to ensure that all market participants use the fallbacks in the ISDA Definitions as a starting point for those discussions. ISDA is merely offering a fallback methodology – not a fixed price. Nevertheless, ISDA's expectation is that there will be significant adoption of the fallback methodology.

IV. Conclusion

We would be pleased to answer any questions or provide any additional information that may assist in your assessment of this request.

We also attach for your review and consideration the *Summary of Responses to the ISDA Supplemental Consultation on Spread and Term Adjustments* report by Brattle, dated September 18, 2019 and the *Anonymized Narrative Summary of Responses to the ISDA Pre-Cessation Consultation* report by Brattle, dated October 21, 2019.

Thank you for your consideration.

Respectfully submitted,



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December 9, 2019

Appendix D

ISDA Letter to the Antitrust Division of the Department of Justice

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June 4, 2019

Re: *International Swaps & Derivatives Association, Inc.'s
Request for Business Review Letter, File No. 60-523999-
0010*

Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
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Room 3109
950 Pennsylvania Avenue NW
Washington, DC 20001

Dear Mr. Delrahim:

The International Swaps and Derivatives Association, Inc. ("ISDA") requests a business review letter pursuant to C.F.R. § 50.6 concerning ISDA's plan to amend its standardized documentation to account for the potential discontinuation of LIBOR and other interbank offered rates (collectively referred to as "IBORs").

Executive Summary

ISDA is a trade association whose members include a broad range of derivatives market participants, such as international, regional and specialized banks, corporations, investment managers, government and supranational entities, insurance companies, and other firms. ISDA's work focuses on reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure. One significant component of ISDA's work has been to develop standard contractual documentation that may be voluntarily used by market participants. ISDA's standard documentation provides the standard contractual terms in the global market for interest rate and other derivatives. A significant portion of those interest rate and other derivatives incorporate IBORs into their standard terms and conditions.

In the wake of allegations of potentially fraudulent or improper behavior with respect to the LIBOR-submission process, regulators in and outside of the U.S. urged the market to identify and adopt risk-free or nearly risk-free interest rate benchmarks (“RFRs”) as alternatives to LIBOR and other key IBORs to account for the possibility that IBORs may be discontinued. A failure to account for the potential discontinuation of IBORs poses a serious risk of frustrating existing contracts that reference IBORs, and could have rippling, negative effects on the U.S. and global economies. In order to mitigate these risks, and at the request of regulators, ISDA has worked closely with a broad range of industry participants to develop a fallback methodology (i.e., a methodology that prepares for the discontinuation of IBORs) that will cause the least amount of disruption, is the least susceptible to manipulation, and ensures the most commercially reasonable outcome. ISDA’s proposed fallback methodology has, to date, garnered incredible consensus among industry participants, reflecting that the proposed fallback methodology will be well and timely received by industry participants.

Because ISDA’s members are competitors in certain markets, the Association’s work to develop a proposed fallback methodology could be viewed as coordination among competitors. In particular, ISDA has worked with industry participants to develop a methodology that attempts to account for the inherent differences between the IBORs and the relevant RFRs. In short, that methodology attempts to approximate the differences between the IBORs and the relevant RFRs. As described more fully below, the methodology applies a “term adjustment” and “spread adjustment” (representing the “risk premium” in the IBORs) to the relevant RFRs, and ISDA has worked with industry participants to develop the preferred term adjustment and spread adjustment calculations.

For the reasons outlined in this letter, ISDA respectfully submits that this coordination by ISDA and market participants should not be subject to enforcement by the Antitrust Division. ISDA has taken substantial efforts, described in detail below, to ensure that its process was fair, transparent, and objective, and that neither the process nor its resulting methodology was the product of anticompetitive conduct. ISDA believes that its process represents procompetitive efforts to ensure a safer and more efficient marketplace, and therefore believes that no violation of the antitrust laws has occurred by or through ISDA’s processes.

Introduction

ISDA respectfully requests that the Antitrust Division issue a statement indicating that it is not presently inclined to bring an enforcement action against ISDA’s adoption of certain methodologies to account for differences between the IBORs and the relevant RFR that would apply if an IBOR is permanently discontinued and the impact that these differences would have on contracts referencing that IBOR.¹ In support of this request, this letter provides background on IBORs, the role they play in the derivatives markets, the way IBORs are incorporated into ISDA’s standard documentation, and how ISDA’s proposed

¹ For purposes of this letter, ISDA is defined to include the Association, its Board, any Board committee, and any Board or Board committee member acting in that capacity.

fallback methodology will center around proposed changes to ISDA's standard documentation. Part I starts by describing the role ISDA plays in the industry, the history and role of IBORs in derivatives, and the nature and use of ISDA's standard documentation in derivatives transactions. Part II then outlines the risks presented by the potential discontinuation of IBORs and the significant negative consequences that the discontinuation of IBORs could have on derivatives transactions. Part III describes the steps ISDA took to evaluate and analyze the possible methods for addressing the discontinuation of IBORs, and the general consensus around how to address that problem. Finally, Part IV outlines the proposed fallback methodology, with a focus on the changes to ISDA's standard documentation and the steps that ISDA will take to effectuate those changes. Because this letter contains commercially sensitive operational details and strategy, the disclosure of which would have a detrimental effect on ISDA and its members, ISDA requests confidential treatment to the fullest extent provided for by 28 C.F.R. § 50.6(10)(c).

I. Factual Background

a. ISDA

ISDA is a trade association that was created in 1985 to make global derivatives markets safer and more efficient. ISDA has over 900 member institutions from 71 countries. Membership is comprised of a broad range of derivatives market participants: international, regional and specialized banks, corporations, investment managers, government and supranational entities, insurance companies, and other firms. Members also include key components of the derivatives market infrastructure, including financial technology firms, trading platforms, exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. ISDA's work focuses on reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure for all market participants.

ISDA has pioneered industry-standardized documentation for derivatives transactions, promoted sound risk management practices and processes, and engaged with policymakers and industry participants to assess and implement regulatory reform. ISDA's first major standardization work was the ISDA Master Agreement, which remains a standard document for derivatives transactions today. Utilization of ISDA's standardized documentation by market participants is entirely voluntary, but ISDA's documentation is widely used as a starting point for bilateral negotiations because it increases efficiency and reduces costs. As a practical matter, even though ISDA's documents remain voluntary, ISDA has typically seen wide-spread adoption of most of ISDA's standardized terms and conditions and, in some cases, these terms and conditions are hardwired in derivatives market infrastructure.

b. Interbank Offered Rates ("IBORs")

Although the IBORs are not all defined the same, they are generally intended to represent the average rate at which certain identified banks (called "panel banks") could borrow money in various currencies in the interbank market on an unsecured basis for a

given period of time, known as a “tenor.” Tenors can vary from overnight to months. Different administrators produce and publish the different IBORs. For example, LIBOR, also known today as ICE LIBOR, is the most widely used reference rate, and is intended to reflect London interbank lending rates for Eurodollars. Today, LIBOR is administrated by the ICE Benchmark Administration, a subsidiary of the Intercontinental Exchange. LIBOR is currently produced across five currencies and numerous tenors spanning from overnight to twelve months. IBORs are used for many purposes in the global financial system, including as reference rates in financial transactions. In these cases, the IBORs are used to determine the amounts owed to or by the parties to those financial transactions.

The process by which each IBOR is set differs by currency, but generally speaking, each panel bank submits, for each tenor on each day, the rate at which it could expect to borrow funds in that currency in the interbank market. An administrator collects all of the rates submitted by the panel banks, and (after making certain adjustments to cull down the set of submissions) averages all of the rates submitted to produce a single rate for each tenor. Because banks typically fund themselves differently today than they did 30+ years ago, there are far fewer transactions in the interbank markets that LIBOR and other IBORs are intended to represent. Therefore, LIBOR and other IBORs are produced largely based on the rates at which panel banks believe they could borrow in these markets, which in turn is based on a variety of data points and their judgment.

II. ISDA’s Standard Documentation and References to IBORs

ISDA’s documentation includes several forms of a Master Agreement and various definitional booklets.

- The Master Agreement is a standard contract that can be used to govern over-the-counter (“OTC”) derivatives transactions entered into between parties. ISDA publishes the template, which is made available to parties who can choose to bilaterally enter into the Master Agreement to govern their transactions and set out provisions governing their relationship. Transactions across different asset classes and products are often documented using the same Master Agreement.
- The Definitions provide the basic framework for the documentation of the privately-negotiated derivatives transactions. They are intended for use in confirmations of individual transactions governed by ISDA Master Agreements. The 2006 ISDA Definitions specifically address interest rate and currency derivative transactions. The 2006 ISDA Definitions have a mechanism whereby ISDA can publish supplements to update, add or adjust provisions as markets develop.

The 2006 ISDA Definitions contain the “rate options” for the IBORs that serve as the legal definitions of these reference rates in most interest rate derivatives. If LIBOR or another IBOR were to be permanently discontinued, and thus no longer available, then all transactions using the terms in the 2006 ISDA Definitions (and earlier versions of the ISDA Definitions for interest rate and currency derivative transactions) would transition to a

fallback mechanism for the calculation of the relevant rate. The current fallback mechanism in ISDA's Definitions is not practical and could lead to widespread market disruption. Specifically, the relevant rate options in ISDA's Definitions currently establish that in the event an IBOR is discontinued, the counterparty that is the "calculation agent" for the transaction must obtain price quotes from major dealers in the relevant market. However, it is unlikely that dealers would be willing and/or able to give such quotes, particularly if the relevant IBOR has been permanently discontinued. Even if quotes were available in the near-term after the discontinuation of the IBOR, it is unlikely that quotes would be available for each future reset date over the remaining tenors of long-dated contracts. (Some derivatives transactions have multi-year terms, and interest rate swaps can last 5, 10, 30 or even more years). And even if dealers provided such quotes, the quotes likely would vary materially across the market and it would be difficult, if not impossible, to obtain such quotes for all of the hundreds of millions notional of derivatives that currently reference IBORs.

If the benchmark rates that are incorporated into these derivatives transactions are unavailable, then potentially catastrophic consequences could ensue. Indeed, these derivatives transactions are often used for hedging purposes, allowing purchasers of interest rate swaps to mitigate against extreme fluctuations in interest rates. If those derivatives transactions become frustrated, then large portions of the economy would be more exposed to market volatility. In all events, the frustration of those contracts could lead to extreme and unintended value transfers between the parties and/or require the bilateral renegotiations of hundreds of trillions of dollars in notional transactions.

In order to mitigate these potentially catastrophic consequences, ISDA has undertaken efforts to make the markets safer and more efficient by seeking a general consensus on how the definitions for various key IBORs should be revised to include specific fallback rates.

III. Uncertain Future for LIBOR

The long history of LIBOR and its reform illustrate that ISDA's work is essential to protecting efficient financial markets. In 2009, the G20 formed the Financial Stability Board ("FSB"), an international body that monitors and makes recommendations about the global financial system. Around that time, allegations emerged that certain panel banks may have engaged in fraudulent or improper behavior with respect to the process of making submissions to the LIBOR administrator, which prompted the FSB and regulators across the globe to investigate the durability and robustness of LIBOR.

In light of this review and given the importance of LIBOR in the global economy,² regulators urged the market to identify and adopt risk-free or nearly risk-free interest rate

² Jerome H. Powell, Federal Reserve Board of Governors, *Reforming U.S. Dollar LIBOR: The Path Forward*, Speech at the Money Marketmakers of New York University (Sept. 4, 2014); <https://www.federalreserve.gov/newsevents/speech/powell20140904a.htm> ("This problem is not just Wall Street's concern; every household with a LIBOR-linked mortgage and every corporation with a LIBOR-linked loan has an interest in more robust U.S. dollar reference rates.").

benchmarks (“RFRs”) as alternatives to LIBOR and other key IBORs.³ In 2013, the FSB established the Official Sector Steering Group (“OSSG”), comprised of senior officials from central banks and regulatory bodies, to focus specifically on interest rate benchmarks and possible alternative rates. In July 2014, the FSB and OSSG recommended that the alternative rates, to the maximum extent possible, be anchored in actual transactions to avoid the need for submissions from market participants based on judgment and to protect against the potential for manipulation.⁴ Public-private sector working groups were established in relevant jurisdictions (e.g., the Alternative Reference Rates Committee, or the “ARRC” in the United States) to carry out this work.

Alongside this work, UK’s Financial Conduct Authority (“FCA”) and other members of the FSB OSSG, including the US Federal Reserve, have been encouraging market participants to transition away from LIBOR.⁵ In July 2017, Andrew Bailey (Chief Executive of the FCA) explained that “it is not only potentially unsustainable, but also undesirable, for market participants to rely indefinitely on reference rates [e.g., LIBOR] that do not have active underlying markets to support them.”⁶ Mr. Bailey announced that panel banks have agreed to sustain LIBOR until the end of 2021 to enable a transition away from the rates that can be planned and executed smoothly.⁷

There are hundreds of trillions of dollars notional in derivatives and other financial products tied to LIBOR through the use of ISDA’s Definitions. Therefore, it was logical that the OSSG asked ISDA on July 6, 2016 to lead an initiative to increase derivative contract robustness by developing fallbacks in its Definitions for key IBORs.⁸ ISDA understood its implicit assignment: to (1) establish and implement fallback procedures that are sufficiently robust to prevent serious market disruption in the event that an IBOR is permanently discontinued, and (2) ensure that market participants understand these fallback arrangements. On September 7, 2016, ISDA agreed to take on this work, and as illustrated below, ISDA has carried out a process that satisfied the OSSG’s objectives.

IV. ISDA’s IBOR Reform

a. Risk Free Rates Require Adjustments to Replace IBORs

A threshold matter for ISDA’s work was identifying the relevant fallback rates. After discussions with a broad range of industry participants, regulators, and the OSSG,

³ *Id.* (“[R]egulators need to work with market participants to encourage them to develop and adopt alternative reference rates that better reflect the current structure of U.S. financial markets. . . . Going forward, these alternative rates could replace LIBOR as the reference rate for new interest rate derivatives and some other contracts denominated in U.S. dollars.”)

⁴ Financial Stability Board, Reforming Major Interest Rate Benchmarks (July 22, 2014) http://www.fsb.org/wp-content/uploads/r_140722.pdf.

⁵ Andrew Bailey, Chief Executive of the FCA, *The Future of LIBOR*, Speech at Bloomberg London, UK (July 27, 2017) <https://www.fca.org.uk/news/speeches/the-future-of-libor>

⁶ *Id.*

⁷ *Id.* See also Andrew Bailey, Chief Executive of the FCA, *FCA statement on LIBOR panels*, Speech (Nov. 24, 2017) <https://www.fca.org.uk/news/statements/fca-statement-libor-panels>

⁸ The FSB OSSG also sent letters to ISDA regarding this work on April 18, 2018 and March 12, 2019.

ISDA determined that the RFRs that were identified by relevant public-private sector working groups would be the fallback rates incorporated into ISDA's Definitions for the relevant IBORs. Those RFRs have been selected for most major jurisdictions, and at present include:

Table 1: Public-Private Sector RFR Selections

Jurisdiction	IBOR(s)	Public-Private Sector Working Group	Selected RFR
USA	USD LIBOR	Alternative Reference Rate Committee	SOFR (broad treasuries repo financing rate to be published by NY Fed)
UK	GBP LIBOR	Bank of England Working Group on Sterling Risk-Free Reference Rates	SONIA
Japan	JPY LIBOR TIBOR Euroyen TIBOR	Cross-Industry Committee on Japanese Yen Interest Rate Benchmarks	TONA
Switzerland	CHF LIBOR	National Working Group on Swiss Franc Reference Rates	SARON
Eurozone	EUR LIBOR EURIBOR	Working Group on Euro Risk-Free Rates	€STR
Australia	BBSW	N/A	RBA Cash Rate (AONIA)
Canada	CDOR	Canadian Alternative Reference Rate Working Group	CORRA
Hong Kong	HIBOR	TMA Working Group on Alternative Reference Rates	HONIA

Multiple market participants pointed out, and others agreed, that RFRs technically cannot be substituted directly for IBORs without adjustments. First, IBORs are currently available in multiple tenors, such as one, three, six and twelve months. By contrast, the RFRs are overnight rates. Second, IBORs incorporate a bank credit risk premium and a variety of other factors that RFRs do not capture. Because direct substitution is not possible, ISDA sought to determine how to adjust the RFRs to make them suitable IBOR replacements. To ensure that ISDA understood the potential risks and industry participants' views on how best to account for these two issues—for the differences in “terms” between IBORs and RFRs and the existence of a “risk premium” in IBORs but not in RFRs—ISDA conducted a multi-step, public consultation during the second half of 2018. The results of that consultation form the basis for ISDA's proposed fallback procedures.

b. ISDA's Consultation Generated Market Consensus

To prepare for the consultation, ISDA took steps to ensure that the market survey would be informative and would elicit meaningful feedback from the respondents. When it first undertook the work requested by the FSB OSSG described above, ISDA established four open-membership working groups, organized by currency, to address risks associated

with an IBOR discontinuation and draft fallback arrangements. The working groups reported to the ISDA Board Benchmark Committee formed by the ISDA Board of Directors, and included representatives of interest rate swap dealers, interest rate swap end-users, central counterparties, and IBOR benchmark administrators. ISDA also established a separate working group to analyze technical issues that may be necessary when transitioning from an IBOR to an RFR fallback rate. This group included technical experts from the working groups, and was primarily tasked with identifying a range of potential term adjustments and spread adjustment methodologies. The technical group shared their recommendations with the working groups for further consideration, and these recommendations informed the questions and options presented in the consultation. ISDA also engaged and consulted with The Brattle Group on analysis of the implementation items, and tasked The Brattle Group with conducting an independent overview, summary, and analysis of the market responses to the Consultation.

On July 12, 2018, ISDA launched the consultation as a public survey designed to educate the public about the proposed amendments to ISDA's standard documentation and solicit informed recommendations on the term structure and RFR adjustment methodologies. The consultation provided information on alternative options for calculating the term adjusted RFRs (i.e., the RFRs with adjustments for the tenor of the relevant IBOR) and spread adjustments, and asked market participants to rank nine combinations of these options in order of preference and to specify whether their preferences applied universally across the covered IBORs. The consultation also asked market participants about the potential impact of any of the possible combinations on their ability to complete transactions, and prompted them to disclose any concerns if fallbacks were based on different calculations across the covered IBORs. Market participants were asked to comment on the general appropriateness and effectiveness, and potential operational challenges or other barriers to implementation, of the options in the consultation.

ISDA received responses to the consultation from a diverse range of market participants from five continents and 19 countries, reflecting the preferences of 164 entities or respondents.⁹ The respondents represent a variety of industry sectors, including banks, asset managers, pension funds, corporate entities, exchanges and clearinghouses, global financial services firms, industry and trade associations and government entities, and thus reflect several different perspectives and businesses.

The results of the consultation confirmed a general market consensus. In almost 90 percent of respondent rankings, the "compounded setting in arrears rate" was selected as the

⁹ ISDA received 151 responses from market participants. However, two of these responses consisted of separate sets of answers for different related entities or on behalf of different clienteles, and two responses were exact duplicates of each other, resulting in 152 actual responses by market participants. In addition, two of these responses were from trade associations that explicitly listed the member entities that contributed to the responses. One of these trade associations represented ten member entities and the other represented four member entities. Therefore, collectively, the 152 actual responses came from 164 entities. Of these 164 entities, only responses from 147 were considered when determining fallback option preferences because the other responses were not from named market participants, were incomplete or did not address the IBORs covered by the consultation.

top preference for the term adjusted RFR. The compounded setting in arrears rate consists of the relevant RFR observed over the relevant IBOR tenor and compounded daily during that period. Proponents of this approach highlighted as advantages its compatibility with the overnight index swap (“OIS”) market and its ability to reflect the daily interest rate movements during the relevant period. The remaining respondents (but for one) that did not select the compounded setting in arrears rate were not opposed to this approach.

The “historical mean/median approach” to the spread adjustment was selected as the top preference in almost 70 percent of the respondent rankings. The historical mean/median approach is based on the mean or median spread between the relevant IBOR and RFR calculated over a significant, static lookback period (e.g., 5 or 10 years). Proponents of this approach highlighted several advantages, including that: (i) it is robust and simple; (ii) it would reduce the potential for manipulation; and (iii) it is resistant to market distortions. Some respondents expressed concerns with the historical mean/median approach to the spread adjustment, including the potential for a value transfer if the fallbacks are triggered. The concern over value transfer appeared to be the key reason persuading the remaining respondents to select the forward approach to the spread adjustment as their first preference. However, even among the proponents of the forward approach to the spread adjustment, several acknowledged that, relative to the historical mean/median approach to the spread adjustment, there is: (i) more manipulation risk associated with the forward approach; and (ii) concern over uncertainty as to whether there will be sufficient market liquidity in relevant transactions to support the forward approach. In more than half of the respondent rankings in which the forward approach was ranked first, the historical mean/median approach was the next preferred option. As a result, more than 80 percent of respondent rankings included the historical mean/median approach in their top two preferred options.

The consultation that ISDA conducted in 2018 specifically covered GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW. It also asked for preliminary feedback regarding USD LIBOR, EUR LIBOR and EURIBOR and asked respondents to indicate whether their preferences applied to the covered IBORs specifically or to IBORs generally. Approximately 78 percent of respondents found it appropriate to apply the same adjustments to all IBORs.

In order to confirm these results for USD LIBOR, CDOR and HIBOR specifically, ISDA is conducting a supplemental consultation that will close on July 12, 2019.¹⁰ ISDA waited to consult on these IBORs so that market participants would have more information about the RFRs when responding. In the case of USD LIBOR, the fallback RFR, SOFR, was not produced until April 2018, only three months before the 2018 consultation. In the case of CDOR and HIBOR, the relevant public-private sector working groups were still consulting on reforms to the fallback RFRs, CDOR and HIBOR, respectively, in 2018.

¹⁰ At the urging of certain regulators, ISDA also recently launched a consultation seeking input on whether market participants would also like to incorporate a fallback mechanism for the IBORs in the event that the IBORs have been deemed unrepresentative of the market, even though the IBORs continue to be published (i.e., even though the IBORs have not been permanently discontinued). That consultation is also expected to close in July 2019.

ISDA will update the Antitrust Division if the results of the current consultation differ from the results of the 2018 consultation.

The fallback RFR for EUR LIBOR and EURIBOR, which is €STR, will not be produced until October 2019. ISDA expects to confirm the results of the 2018 consultation for EUR LIBOR and EURIBOR sometime at the end of 2019 or in early 2020, after €STR begins trading. As a result, ISDA will implement fallbacks for EUR LIBOR and EURIBOR on a delayed timetable.

c. ISDA's Implementation Plan

As it has done for prior amendments, ISDA intends to publish a "Supplement" in order to amend and restate the relevant rate options in the 2006 ISDA Definitions to include the new fallback rates and adjustment methodology. Specifically, the Amendments will apply to the rate options in Section 7.1 of the Definitions. Upon the effective date of the Supplement, all transactions moving forward that reference the relevant IBORs and incorporate the 2006 ISDA Definitions will include the amended rate option (i.e., the rate option with the fallback). Transactions entered into prior to the effective date of the Supplement (so called "legacy derivatives contracts") will not be covered by the Supplement and will therefore not contain the fallbacks.

ISDA also intends to publish a protocol to assist parties who voluntarily adhere to the amended and restated rate options (i.e., the rate options with the fallbacks) in legacy contracts referencing the relevant IBORs. If market participants choose to adhere to the protocol, then they would agree that their legacy derivatives contracts referencing the relevant IBORs with other adherents will include the amended and restated rate option even though they were entered into prior to the effective date of the Supplement. Such legacy derivatives contracts will therefore include the fallback provisions. Adherence to the protocol will be completely voluntary and will only amend contracts between two adhering parties (i.e., it will not amend contracts between an adhering party and a non-adhering party or between two non-adhering parties). The fallbacks included in legacy derivatives contracts by adherence to the protocol will be exactly the same as the fallbacks included in new transactions that incorporate the 2006 ISDA Definitions after the effective date of the Supplement. ISDA expects that the protocol will open for adherence when the Supplement is finalized, but about three months before the Supplement takes effect. At the end of the three-month period, the amendments made by the protocol will take effect as of the same date that the Supplement takes effect for contracts between two parties that have adhered to the protocol as of that date. If one or more counterparties to a contracts adheres to the protocol after that date, the amendments will take effect as of the date that the last counterparty adheres.

V. ISDA's Proposed Fallback Methodology Will Improve Market Stability and Efficiency

ISDA fallback rates and adjustment methodology are the result of an open, robust, and transparent consultation of market participants undertaken at the behest of international

regulators in a process akin to the activities of standard setting organizations. ISDA undertook the effort to publish fallback rates at the express request of regulatory bodies and international government organizations. To develop the consultation, ISDA then utilized open-member working groups to consider the merits and drawbacks of various approaches to the fallback rates in order to ensure that all perspectives were represented. ISDA did not steer the iterative process, but instead helped working groups to collect independent comments from industry members. Through the consultation process, ISDA maintained a list of FAQs, hosted educational webinars to facilitate a transparent process and ultimately shared the detailed results of the consultation publicly on its website. As detailed further below, the proposed methodology is the product of a years-long, diligent process.

a. The Proposed Fallback Methodology Was Developed at the Behest of International Regulators

As an initial matter, ISDA engaged in work to implement more robust fallbacks for key IBORs at the behest of international regulatory bodies in order to have a procompetitive impact on derivative markets. Regulatory bodies and international governmental organizations explicitly requested that ISDA undertake this work in an attempt to stabilize the swaps and derivatives markets.¹¹ These regulatory bodies and international governmental organizations uniformly recognize the important competitive benefits of ISDA's reform efforts.¹²

b. The Proposed Fallback Methodology Was Developed Through a Robust, Objective, and Transparent Process

First, ISDA's Consultation process was robust. ISDA's proposed term and spread adjustments represent an approach cultivated by the diligent deliberations of market participants, regulators, and other advisors. Under ISDA's leadership, these diverse entities engaged in an open dialogue, weighing the merits of different approaches over several years.

As previously described, ISDA formed four open-membership working groups to consider fallback rates, draft amendments to the ISDA definitions, and devise a plan to amend legacy contracts that reference applicable IBORs. The working groups consisted of dealers, end users, central counterparties, and IBOR benchmark administrators. Each of the four groups focused on separate IBOR rates, although the working groups routinely conducted joint calls with each other. ISDA also created a technical group to address adoption of fallback rates by analyzing different adjustment methodologies. The working groups engaged in a comprehensive process in which participant ideas and concerns were broadly discussed and commonly agreed-upon goals were integrated into the evaluation of a

¹¹ Andrew Bailey, Chief Executive of the FCA, *The Future of LIBOR*, Speech at Bloomberg London, UK (July 27, 2017) <https://www.fca.org.uk/news/speeches/the-future-of-libor> ("Fall back language to support contract continuity or enable conversion of contracts if LIBOR ceases is an essential safety net – a 'seat belt' in case of a crash when LIBOR reaches the end of the road.")

¹² *See Id.* ("For the reasons set out in the FSB's statement, [ISDA's] consultation rightly points to the overnight RFRs identified by the various Working Groups as the foundation for a fall back rate in these contracts. . . . The FSB statement reflects the collective determination of authorities across the globe.").

variety of potential approaches. In total, there were roughly 80 working group meetings attended by 93 unique participants from a broad range of institutions stretching over a ~15 month period. In the process of engaging with the FSB OSSG, ISDA circulated several “draft notes” to the various Working Groups containing the items under consideration for each meeting. These draft notes were made available to all market participants who were ISDA members, including end-users, before they were submitted to the FSB OSSG.

ISDA also engaged directly with various trade associations, including the Loan Market Association, the Association for Financial Markets in Europe, the International Capital Market Association, and the Loan Syndications and Trading Association, to obtain their perspectives as to the items under consideration. This ensured that the process included and addressed the perspectives of additional market participants. ISDA also routinely consulted with outside, independent advisors about its process, including legal counsel, The Brattle Group (economic consults), and Martin Baxter, an expert in algorithms, models and data.

Second, ISDA’s process was objective. ISDA broadly engaged market participants in an extensive, iterative process to evaluate the hierarchy of fallback options. The iterative process made progressive use of inputs and comments from the meeting participants, the FSB OSSG, various regulators, trade associations, and end users, with ISDA representatives serving as a conduit amongst the Working Groups and facilitating information flows and information collection between group/subgroup meetings. ISDA did not drive the results in any particular direction, nor did it appear to ISDA that any members were trying to steer the process in any one direction. Rather, ISDA and the working groups suggested criteria to assist individual market participants in responding to the consultation based on their own independent judgment. ISDA’s independent advisors have consistently reviewed, validated and tested ISDA’s process through regular updates, frequent review of materials, and occasional participation in working group meetings.

Third, ISDA’s process was transparent. After launching the consultation, ISDA published a consultation overview, maintained a list of FAQs on its website, and hosted two educational webinars. After publishing preliminary results on November 27, 2018,¹³ ISDA shared the detailed results of the consultation publicly on December 20, 2018,¹⁴ and plans to publish the developed approach for review and comment prior to implementation. ISDA is undertaking the same steps with respect to the current supplemental consultation for USD LIBOR, CDOR and HIBOR (and certain aspects of fallbacks for derivatives referencing SOR). ISDA has also been transparent with key regulators and government agencies. ISDA has discussed the fallbacks it will implement with numerous regulatory agencies since 2016 and has consistently provided substantive updates and materials to the FSB OSSG. During this process, ISDA has consistently updated government agencies (including the DOJ and

¹³ *ISDA Publishes Preliminary Results of Benchmark Consultation*, (Nov. 27, 2018),

<https://www.isda.org/2018/11/27/isda-publishes-preliminary-results-of-benchmark-consultation/>

¹⁴ *Anonymized Narrative Summary of Responses to the ISDA Consultation on Term Fixings and Spread Adjustment Methodologies*, (Dec. 20, 2018), <https://www.isda.org/2018/12/20/isda-publishes-final-results-of-benchmark-fallback-consultation/>

European Commission) of key milestones, and has attempted to preempt any potential concerns.

c. The Proposed Fallback Methodology is Implemented Contractually

ISDA's methodology will not be binding on market participants with legacy derivatives contracts referencing the relevant IBORs. There will always remain optionality with respect to how individual counter-parties choose to amend their contracts, and ISDA cannot and will not be in a position to ensure that all market participants use the fallbacks in the ISDA Definitions as a starting point for those discussions. ISDA is merely offering a fallback methodology – not a fixed price. Nevertheless, ISDA's expectation is that there will be significant adoption of the fallback methodology.

VI. Conclusion

For the foregoing reasons, ISDA respectfully requests that the Antitrust Division issue a statement that it does not presently intend to bring any enforcement action against ISDA's proposed business activities with respect to implementation of fallbacks for IBORs. We would be pleased to answer any questions or provide any additional information that may assist in your assessment of this request. Given the uncertainty regarding the timing of when IBORs may be permanently discontinued, ISDA respectfully requests that the Division provide as expeditious a response to this request for a business review letter as possible. ISDA and the FSB OSSG have discussed a strong desire to finalize the fallbacks by the end of 2019.

We also attach for your review and consideration the *Anonymized Narrative Summary of Responses to the ISDA Consultation on Term Fixings and Spread Adjustment Methodologies* report by The Brattle Group, dated December 20, 2018.

Thank you for your consideration.

Respectfully submitted,



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From: Hiltz, Peter
Sent: Tue, 3 Dec 2019 15:33:16 +0000
To: Harter, Chip
Subject: Association Submissions on Pillar Two
Attachments: USCIB_Final_Comments_Pillar_Two_12_2_19.pdf, Business Roundtable Comments - OECD Pillar Two Public Consultation.pdf, BIAC@OECD Comment Letter Pillar 2 - 2 Dec 2019 final submission.pdf, U.S. Chamber letter on OECD Consultation Comments on Global Anti-Base Erosion Proposal_GloBE_under Pillar Two_12.2.pdf, 2019-12-01 SVTDG comments on OECD Pillar Two discussion draft.pdf, 2019 NFTC Comments on Pillar 2 proposal v. 4 CLEAN.docx, Digital_Economy_Group_Submission_on_Pillar_2_Consultation_Document.pdf

Just so you have some more reading material.

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UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

December 2, 2019

VIA EMAIL

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Re: USCIB Comments on the OECD Public Consultation Document on Global Anti-Base Erosion Proposal ("GloBE") Pillar Two

USCIB¹ is pleased to provide comments on the Public Consultation Document ("consultation document") on Global Anti-Base Erosion Proposal ("GloBE") Pillar Two.

General Comments

Timing

USCIB understands that there is enormous political pressure to achieve progress in an extremely tight time frame. The consultation document raises a number of very difficult issues and allows only 25 days to develop responses. This is insufficient. It is important that there be careful vetting of these issues and the compressed time frame does not allow for that. It is essential, therefore, that this consultation be followed up with additional opportunities for input as the proposals are developed further.

GILTI Must be Considered an Acceptable Income Inclusion Regime

USCIB members have worked diligently over the last few years to comply with the new GILTI regime. While U.S. multinationals² have significant concerns over the operation of the GILTI rules,³ it would be onerous and inconsistent with the emphasis on tax certainty, to require US tax resident parented

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

² For purposes of this letter, U.S. multinationals includes U.S. headquartered companies and U.S. tax resident parented companies.

³ Advocating for GILTI to be white-listed should not be interpreted as advocating for the 13.25% to be the rate for determining whether income is low-taxed.

companies to adapt to yet another set of rules having essentially the same goal. Therefore, we strongly recommend that the GILTI regime be considered an acceptable and appropriate income inclusion regime. Companies subject to the GILTI regime should be excluded from further application of Pillar Two. Given that the GILTI regime applies to a U.S. based multinational's domestic and foreign controlled subsidiaries, the right to "tax back" should be solely vested with the U.S, and the U.S. should be vested with the sole right to audit and administer the income inclusion rule as applied to U.S. based multinationals.⁴ USCIB responses to specific questions reflect this view; most importantly the headquarter jurisdiction should have the sole right to tax and administer the income inclusion rule and global "blending" needs to be permitted consistent with the US GILTI regime and sound tax policy.

Interaction of Income Inclusion and Undertaxed Payments Rule⁵

USCIB acknowledges that this topic is not covered by the consultation document, other than to say that coordination is needed to ensure that income is not double taxed. We nevertheless address it briefly here because we consider coordination between the income inclusion rule and undertaxed payment rule must be understood to properly evaluate the proposal.

It is USCIB's view that the income inclusion rule must be the primary and exclusive rule to the extent the headquarter jurisdiction adopts an income inclusion rule into law. The income inclusion rule and the undertaxed payments rule of course should not both apply to the same income. Thus, the income inclusion proposal should take precedence over the undertaxed payments rule. Any potentially undertaxed payments made by any company to a company subject to a qualifying income inclusion regime such as the US GILTI regime should not be considered an undertaxed payment and, therefore should be eligible for local country deduction and any otherwise available treaty benefits and not subject to the switchover rule. This priority rule is based on sound tax policy principles. The country imposing the income inclusion rule is in the best position to ensure that the minimum tax is applied to net income and not gross income, that losses are accounted for appropriately, etc. The undertaxed payments rule, on the other hand, raises the practical specter of excessive taxation, such as taxation of gross payments. It is inappropriate where an income inclusion regime applies.

The undertaxed payments rule essentially looks at the tax imposed on a transaction-by-transaction basis. This would be un-administrable, could result in excessive taxation that does not account for allocable deductions or losses, and incompatible with any form of a top-up tax.

We also believe that an intermediate country's income inclusion rules should not apply if a higher tier parent jurisdiction has income inclusion rules which apply. Anything other than income inclusion at the ultimate parent level would require calculations on a partially consolidated basis, further complicated by the fact that many subsidiaries may have more than one related shareholder. Again, the complexity for both taxpayers and tax administrations would make this extremely difficult.

⁴⁴ The US inclusion regimes are actually much more comprehensive than GILTI covering subpart F income, which is generally passive or easily movable. Thus, the US system provides a comprehensive anti-deferral regime.

⁵ References to the undertaxed payments rule should be considered to include references to the switch-over and subject to tax rules.

Finally, the undertaxed payments rule should only apply to interest and royalty payments (not including software transactions treated as product sales) and should not apply to payments between unrelated parties.

Coordination with Pillar One

The calculations under Pillar Two should be made after reallocations of income under Pillar One. These interactions would be made easier if global blending is permitted. If global blending is not permitted, then it would need to be clear which jurisdiction and entity is the taxpayer under Pillar One and which state is the surrender state.

Elimination of Unilateral Measures

It is essential for the coherence of the international tax system that non-compliant unilateral measures be eliminated by Inclusive Framework members adopting Pillar Two. The final agreement must not only contain an agreement to eliminate unilateral measures but also list unilateral measures that need to be eliminated. If unilateral measures are not listed, then some countries may assert that their measures are not unilateral measures covered by the agreement and may continue to impose additional tax on multinational enterprises. In the same way that BEPS Action 5 agreed to review all preferential regimes to determine if they were harmful, and to then continually update those reviews for new regimes, so too should the OECD/IF review all unilateral measures and then continually update those reviews for new unilateral measures, with sanctions for countries that fail to repeal or introduce new unilateral measures.

Global Race to the Bottom

The entire GloBE proposal is premised on the need to stop a harmful race to the bottom on corporate taxes. USCIB recognizes that countries are sovereign and if they decide to pursue this policy, they are within their rights to do so. We believe, however, that this conclusion is not self-evident. Indeed, Pascal Saint-Amans has stated: “While these corporate tax cuts have created some concerns of a ‘race to the bottom,’ most of these countries appear to be engaged in a ‘race to the average,’ with their recent corporate tax rate cuts now placing them in the middle of the pack.”⁶ We raise some countervailing considerations.

- Countries have very different economies, populations and needs for revenue. It is a core function of national sovereignty to balance these considerations and decide on the mix of taxes to raise revenue⁷ and how those revenues are to be spent. To require the imposition of a global minimum corporate tax undercuts that sovereignty.
- All countries exercise their sovereign right to use their tax codes to incentivize some activities and disincentivize others. Well-targeted tax incentives can increase investment in desirable activities in a way that minimizes bureaucracy and delivers results quickly. A global minimum

⁶ (<http://www.oecd.org/tax/tax-reforms-accelerating-with-push-to-lower-corporate-tax-rates.htm>)

⁷ The OECD has concluded that corporate taxes are the most inefficient taxes, so countries could reasonably conclude that they prefer other more efficient taxes to raise necessary revenues.

tax, without exceptions for acceptable incentives, will impose significant constraints on a country's right to use incentives because the incentive would go not to the investor, but rather the country imposing the minimum tax.

- The BEPS project was intended to align taxing rights with value creation. The OECD should recognize the progress that has been achieved, and progress will be more evident as business adapts to new laws and non-compliant regimes are phased out, as a result of the BEPS changes and their implementation. Aggressive tax planning has been reduced. If value is properly attributed to where value is created, then that country where the value is created should have the taxing right; including the right to tax at a low-rate if that is consistent with that country's fiscal policy.⁸
- A jurisdiction-by-jurisdiction approach exacerbates these problems because the tax incentive is isolated and there is no possibility of blending to offset low-taxed income with high-taxed income.

Dispute Resolution

Dispute resolution will be critical to successful implementation of both Pillar One and Pillar Two. The OECD should require any country that wishes to be part of the new consensus to adopt mandatory binding arbitration, with peer review, as a minimum standard to resolve any disputes arising as a result of the new rules. We also believe that the OECD should be seeking more efficient and effective ways to permit taxpayers to achieve advanced certainty for cross-border transactions.

It is important to note, however, that including a meaningful dispute resolution process will not be enough to make such comprehensive changes effective, if broad consensus is lacking and if the new system does not have simple, administrable rules to prevent conflicting claims to tax the same income.

Incomplete Impact Assessment

USCIB members believe a completed impact assessment is critically important to enable progress on Pillar One and Pillar Two. Consensus at any level will be difficult to achieve if IF members do not have a reasonably clear understanding of the impact of any proposals on their tax receipts, business investment, and broader economies. Because the Pillar One and Pillar Two propose numerous significant taxation methods that go well beyond the current ALP, countries cannot use their prior or current experiences to determine if the proposals adequately address the challenges of digitalization and accomplish the desired re-allocation of taxing rights. Countries are unlikely to agree on new double tax avoidance rules (especially with respect to surrender

⁸ USCIB continues to believe that it would be more appropriate to consider data post-BEPS and determine whether there is a significant concern with low or no taxed income. USCIB believes that the BEPS changes combined with US tax reform, have eliminated the ability (at least for US-based multinationals) to earn income subject to little or no tax. Once the examination of the post-BEPS/post US tax reform is complete, as mandated by Action 11, it would then be possible to determine whether additional measures addressing low-taxed income are necessary.

states) if they are uncertain about the potential changes to their tax base. Resolving these political questions will depend on complete impact assessments that countries may rely on.

Global Groups Headed by Fiscally Transparent Entities Should Be Considered

Some U.S.-headquartered multinationals are headed by a fiscally transparent entity, such as a US S corporation or a partnership. The consultation document highlights some issues related to fiscally transparent entities within a multinational group. These questions are less relevant if a global blending approach is adopted, per our recommendation. However, even if a global blending approach is adopted, issues related to multinational groups headed by fiscally transparent entities would need to be addressed, to not ignore taxes imposed on the business profits of the fiscally transparent entity (or group) on a current basis paid by tax resident owners rather than paid by the entity.

Responses to OECD Questions

Use of Financial Accounts to Determine Income

As stated above, USCIB believes it is necessary that GILTI be considered a good minimum tax regime for purposes of Pillar Two. GILTI is not based on financial accounting income and, therefore, USCIB would not support requiring that financial accounts be the starting point in all cases. For those jurisdictions that have adopted a compliant minimum tax regime, USCIB believes that companies tax resident in those jurisdictions should be permitted to follow their existing rules as applied to both domestic and foreign controlled subsidiaries.

For those jurisdictions that have not yet adopted a minimum tax regime, USCIB believes that using parent entity's consolidated financial accounts may be an appropriate starting point. For companies using consolidated financials as their starting point, the OECD should accept any standard that is regularly used by securities regulators. Therefore, IFRS, US GAAP and Japanese GAAP should all be acceptable standards. USCIB is not concerned about the use of different standards because the application of an accounting standard is not driven by tax concerns and the complexity of applying a single standard to corporate group that is not otherwise using that standard outweighs any tax advantage or disadvantage. The goal should not be a single global definition of the tax base, but a method that is consistently applied within a global group. The consolidated group should consistently use the same sources of data from year to year.

USCIB also believes, that the consolidated group should be able to use information from its separate entity statutory financial statements. These separate entity accounts may, in some cases, provide the most appropriate information for determining whether an appropriate level of tax has been paid.

Consolidated or separate entity financial statements may exclude taxes paid by owners on business profits of an MNE headed by a fiscally transparent entity, and such taxes should be considered as taxes imposed on the business profits of such entities in appropriate cases.

USCIB believes that global harmonized tax base is either possible nor desirable. Therefore, the focus should be on defining an acceptable minimum standard. GILTI should be an acceptable minimum

standard, but other countries could use different approaches that could also be considered acceptable.

Permanent Differences

The questions posed for both permanent and temporary differences are difficult; and the answers vary by company.⁹ One reason this is difficult is that the book tax differences will differ depending on both the book¹⁰ and the tax system. That is, some tax systems will be closer to a corporation's books than others, so there is no one answer to what adjustments should be made.

USCIB believes that if the starting point for a particular group is financial accounts, then it may be appropriate to consider adjustments for, for example, the following permanent differences, keeping in mind that it will be necessary to determine whether book and tax vary in a particular case:

- Purchase accounting
- Impairments
- Discontinued Operations
- Valuation Allowance Releases
- Intercompany Asset Transfers
- Valuation Allowances
- Tax Reserve Movements
- Tax credits (e.g., R&E tax credit- should that be added back for this purpose)
- Foreign exchange gain or loss

Timing Differences

Initially, USCIB would like to point out that in some cases, even though timing differences should reverse over time, the amount of the differences and the period of time necessary for those amounts to reverse (decades in some cases), could mean that the differences should be effectively considered as permanent.

USCIB supports Pillar Two providing options to MNEs to neutralize the impact of timing differences. USCIB would also like to reiterate that we favor those methods that apply at the ultimate parent level. Thus, the ability to carryover taxes at the subsidiary level, particularly because this is not an attribute of the GILTI regime, is not favored. Carryforwards that apply at the parent level will be much simpler to apply.

The OECD should also consider optionality with respect to these minimum tax determinations and methods to neutralize timing differences. That is, companies should have flexibility to use the method of adjustment that best conforms with their accounting methods. For example, not all companies use deferred tax accounting and therefore should not be required to adjust for temporary differences using these numbers. Also, deferred tax accounting may be done at the parent level (not

⁹ USCIB members would be willing to meet with the OECD to discuss these issues in more detail.

¹⁰ This will depend on whether IFRS, US GAAP or Japanese GAAP or other approved accounting method is used.

entity-by-entity or jurisdiction-by-jurisdiction) so that for those companies using deferred tax accounting to make temporary adjustments, that may need to be done at the parent level. Given the significant timing differences between financial account and tax recovery, there is a strong case for adopting multiple methods to neutralize timing differences. For instance, allowing MNE's to use deferred tax accounting principles as a basis to establish taxes paid and allowing an appropriate carryforward of tax attributes. Said another way, the potential cures for timing differences outlined in the consultation document should not be treated as mutually exclusive.

USCIB understands that deferred taxes may be a significant component of any differences between cash taxes paid and tax expense accrued for financial statements -- but not the only component. OECD agreed guidance should clarify the treatment of these differences in a manner consistent with the objectives of Pillar Two, while recognizing that GILTI properly addresses these differences.

The consultation document briefly raises issues concerning change of ownership.¹¹ The complexity of these rules would be minimized by a global approach. That is a change of ownership would not occur if there were an in-house reorganization, while an entity-by-entity approach would maximize the complexity because it would maximize the number of ownership changes.

Blending

The consultation document proposes three options for blending: global, jurisdictional, or entity-by-entity. USCIB strongly supports global blending. First, as pointed out above, a global blending would have to be acceptable for GILTI to be an acceptable minimum tax regime. Second, USCIB simply believes that a global blending approach is the most appropriate and administrable approach and, therefore, is the right answer. The global blending approach assures that an MNE is paying at least a minimum tax rate on earnings outside its home country. That in combination with all the other anti-avoidance rules in existence globally and the DEMPE and other enhancements to the transfer pricing rules should be seen as sufficiently addressing the BEPS concerns.

In addition, the complexity involved in determining both income and taxes on a jurisdictional basis would make the jurisdictional approach more complex and would undo much of the value of starting with parent consolidated financials. A MNE's consolidated financials will not be broken down by jurisdiction and the taxes associated with income in a particular jurisdiction would also need to be determined. This might be especially difficult for withholding taxes or "tiering" taxes. A withholding tax should be attributed to the country imposing the withholding tax. If, however, the recipient country also imposes tax on that income would the two taxes be blended? If not, how, would the income and taxes be divided? Similarly, if a lower-tier subsidiary pays taxes to its country of residence, but those earnings are also taxed by a higher-tier (but not the ultimate parent) how are those taxes "sourced" and can the two levels of taxes be blended? These problems do not exist if global blending is permitted.

The entity-by-entity approach seems both misguided and exceedingly complex. The objection to the global approach is that it permits blending of high and low-taxed income. The entity approach would

¹¹ The United States has extremely complex rules on separate return limitation years.

permit blending as long as the income is earned in the same entity (and would probably encourage such planning). The entity-by-entity approach also would be even more difficult to apply than the jurisdictional approach because the necessary allocations would be more granular.

Aside from reducing complexity, the global blending approach may represent an opportunity for political compromise between those countries that support substance based carve-outs based on Action 5 and those countries that oppose those carve-outs.

Including a substance based carve-out protects 100% of the benefit provided by any regime that is considered not harmful.

An approach that does not include a substance based carve-out but includes blending on a jurisdictional basis, eliminates any benefit from the nonharmful regime, because the tax will instead be paid to the jurisdiction imposing the minimum tax.¹²

Not including a substance based carve-out and applying blending on a global basis, preserves some benefit for the regime – which by definition is nonharmful. That benefit, of course, depends on the existence of high-taxed income elsewhere in the group, but many companies have excess foreign tax credits.

Global blending also reduces the possibility of double taxation. If there is not precise agreement on the allocation of income and therefore on the allocation of taxing rights, then global blending takes some of the pressure off this lack of precision. Taxpayers can effectively eliminate double taxation by allowing some of the high-taxes to offset tax on other low-taxed income. While it might be better to have a precise allocation of income, it is likely that there will continue to be disagreements between taxpayers and fiscal authorities, and taxpayers should not be required to go through time intensive and costly dispute resolution to resolve every case of double taxation.¹³ Global blending would relieve some of that tension in the system.

Carve-outs

As discussed above, USCIB strongly recommends that the GILTI regime be considered an acceptable and appropriate income inclusion regime. USCIB also believes that the Inclusive Framework should allow sufficient time for the results of the BEPS project to become apparent before considering new anti-base erosion provisions. To the extent, that carve-outs reflect confidence in the BEPS conclusions, USCIB believes that they should be accepted by the Inclusive Framework, at least at this stage. The BEPS guidance has changed the behavior of both companies and countries. In order to take advantage of nonharmful tax regimes, companies had to put real activities in those jurisdictions.

¹² There might be some blending depending on the tax rate of the jurisdiction providing the benefit and any other income that is earned in that jurisdiction, but the overall benefit would be minimized.

¹³ The United States does not permit a credit for foreign taxes that exceed the amount of the liability under foreign law. Taxpayers are required to exhaust all effective and practical remedies to ensure that only the correct amount of tax is paid. A remedy is effective and practical only if the cost is reasonable in light of the amount in issue and the likelihood of success. (Treas. Reg. §.901-2(e)(5)(i)). Thus, the US would allow some double tax relief for the imprecision in properly allocating income to foreign countries, regardless of whether the taxpayer pursues every available avenue of relief.

Undercutting both the tax policy decisions of sovereign countries and the investment decisions of the companies is inappropriate.

USCIB supports a carve-out for a fixed return on assets. This would be consistent with the GILTI rules and is also a good tax policy. As we point out above, there are strong arguments to be made for rejecting the global race to the bottom argument. These contrary arguments may be strongest, when there is measurable investment in tangible assets in a jurisdiction. That is the benefits of foreign direct investment may be most obvious when a foreign corporation commits resources to the physical development of the jurisdiction of the investment. Carving out a routine return on fixed assets is an acknowledgment that an investment in fixed assets is not the type of investment where profits are susceptible to shifting to tax havens. These investments may generate significant employment during the construction phase and significant collateral benefits as assets are placed in service.

USCIB also supports a carve-out for an MNE group with an effective tax rate (as reflected on consolidated financial statements) in excess of the income inclusion rule's "minimum tax rate". The policy objective of Pillar Two should be to "tax-back" MNE's that are *systematically* paying income tax below a "minimum tax rate" by shifting income tax base to low-tax jurisdictions. An MNE with an effective tax rate reflected on consolidated financial statements in excess of the identified "minimum tax rate" is not running afoul of this policy objective. In addition to accomplishing the policy goals of the income inclusion rule, this carve-out is administratively simple for all parties and reliable, given the data used to qualify for the carve-out is generally audited by an independent accounting firm. Given the policy goal of "taxing-back" profits of MNE's that systematically pay tax below a designated minimum rate, an MNE should be permitted to carryforward any "excess tax rate" to a future testing period. A carryforward acknowledges that an MNE's effective tax rate may vary from year-to-year based solely on timing differences between financial accounting and tax or market conditions, and not based on shifting profits to low-tax jurisdictions.

USCIB believes that de minimis thresholds are not likely to be helpful if they are applied on a global basis (other than perhaps a limitation with respect to the overall size of the group). Because we strongly support global application of these rules. We do not specifically recommend de minimis thresholds. If, however, a jurisdiction or entity blending approach is adopted. USCIB believes that appropriate de minimis thresholds should be provided.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

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TREAS-20-0544-A-000056



December 2, 2019

International Co-operation and Tax Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development

By email: taxpublicconsultation@oecd.org

Re: Business Roundtable comments on OECD public consultation document, "Global Anti-Base Erosion Proposal ("GloBE")—Pillar Two"

Dear Sir/Madam,

Business Roundtable welcomes the OECD's continued commitment to working multilaterally and with the business community to promote sound tax policies and straightforward tax administration, which are both essential to protecting cross-border investment and economic growth.

On behalf of nearly 200 chief executive officers of America's leading companies, Business Roundtable is pleased to submit comments in response to the OECD public consultation document, "Global Anti-Base Erosion Proposal ("GloBE")—Pillar Two," dated November 8, 2019. Derek Theurer, Business Roundtable Vice President for Tax and Fiscal Policy, will attend the public consultation meeting on December 9, and we request the opportunity to speak at that meeting.

Business Roundtable emphasizes the need for a clear policy rationale to underpin the GloBE proposal, such as evidence of unaddressed risks of base erosion or profit shifting. Already agreed-upon BEPS measures require changes in tax law, treaty amendments, and regulatory implementation, and in the view of the Business Roundtable, it is still too early to assess the effectiveness of such measures. We recognize the consultation document is an interim step, and the comments below reflect concerns about the GloBE proposal's potential adverse effect on investment, growth, and opportunity.

Overview

Business Roundtable reaffirms certain principles of international income taxation as vital to a strong and growing global economy:

- Principles of the 1998 Ottawa Taxation Framework: neutrality, efficiency, certainty, simplicity, effectiveness, fairness, and flexibility (see Appendix).
- Avoidance of double taxation.
- Taxation of net business profits, not gross revenue.
- Allocation of profits among a controlled group based on the arm's length standard.
- Consistency of fundamental income tax rules among nations globally.
- Effective dispute resolution mechanisms.
- Proportionality of compliance burden to revenue collection.

Business Roundtable is concerned the GloBE proposal could deviate from these principles and create barriers to cross-border investment, constraining the ability of multinational businesses to expand operations, increase employment and contribute to global economic growth and opportunity.

Specific Recommendations

1. The income inclusion rule must have priority over the undertaxed payments rule.

To avoid multiple layers of taxation, the GloBE proposal must include an ordering rule that gives priority to the income inclusion rule. If the home jurisdiction of a multinational enterprise (MNE) parent company has a GloBE-compliant income inclusion rule, the undertaxed payments rule must not apply to payments made to the parent company or to affiliates covered by the income inclusion rule of the parent company's home jurisdiction.

2. The U.S. GILTI regime must be considered a GloBE-compliant income inclusion rule.

The U.S. global intangible low-taxed income (GILTI) regime requires inclusion of the foreign earnings of a controlled foreign corporation (CFC) in the U.S. parent company's income. Under GILTI, foreign earnings are subject to a global effective tax rate of at least 13.125%. The structure of GILTI departs in material respects from other proposed minimum taxes, which can result in double taxation and a minimum tax rate exceeding 13.125%. While final implementing regulations are pending, GILTI operates as a rigorous minimum tax.

Business Roundtable maintains that GILTI must be treated as fully consistent with the income inclusion rule contemplated in the GloBE proposal. As described above, GILTI, as a compliant income inclusion rule, must have priority over the undertaxed payments rule.

The GILTI regime includes worldwide blending of CFC income, and Business Roundtable recommends worldwide blending as the standard for the income inclusion rule under the GloBE proposal. GILTI and other minimum tax designs are exceedingly complicated in practice and this complexity would be further compounded if the income inclusion rule applied on a basis other than worldwide blending. At a minimum, GILTI must coexist with other GloBE minimum taxes that may be based on per-jurisdiction or per-entity blending.

3. The GloBE minimum tax rate should be calibrated to avoid undermining global growth.

Business Roundtable notes with concern a paragraph in the OECD Secretary-General's Report to the G20 Finance Ministers in October 2019 that suggested the GloBE proposal would raise a significant amount of revenue for governments. We are concerned about the macroeconomic effect of raising corporate income taxes globally. Several OECD reports¹ conclude corporate income taxes are particularly harmful for economic growth, and we thus recommend the GloBE minimum tax rate be kept as low as possible.

¹ OECD, *Tax Policy Reform and Economic Growth*, 2010.

Åsa Johansson, Christopher Heady, Jens Arnold, Bert Brys and Laura Vartia, *Tax and Economic Growth*, OECD Economics Department Working Paper No. 620, July 11, 2008.

4. An agreement on Pillar Two must include a commitment to repeal existing unilateral measures and refrain from imposing any new unilateral measures aimed at more burdensome taxation of MNE profits.

The consultation document does not discuss the necessity for the GloBE proposal, together with the Pillar One proposal, to supersede unilateral tax measures that target the same issues. Concurrent with agreement on Pillar One and Pillar Two, members of the Inclusive Framework must make a clear commitment to repeal existing unilateral measures and refrain from imposing any new unilateral measures.

5. The GloBE proposal should clarify the use of financial statements as the income base and provide for appropriate adjustments.

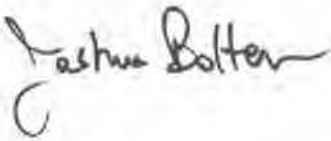
The OECD should clarify the rationale for using financial accounting statements as the income base for the income inclusion rule. Measured tax rates fluctuate with accelerations and deferrals of deductions and income, which are intrinsic to tax system design, natural business cycles, and company-specific growth dynamics. Regardless of the income base selected, numerous adjustments will be required to account for transitory fluctuations. Companies should not be subject to additional burdens merely because the timing of deductions and income was not more evenly distributed. Further, in the case of fiscally transparent entities, payment of taxes by the entities' owners must be considered.

* * *

In the view of the Business Roundtable, a careful examination of the issues raised in the Pillar Two consultation document, followed by work to agree on technical details and implementation, may require exceeding the year-end 2020 timeline for a final report. We urge policymakers to set as priorities sound tax policy and long-term economic stability, rather than nominal deadlines.

Business Roundtable appreciates your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Yours sincerely,



Joshua Bolten
President & Chief Executive Officer

Appendix

Ottawa Taxation Framework Conditions – Principles

Neutrality

i) Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.

Efficiency

ii) Compliance costs for taxpayers and administrative costs for the tax authorities should be minimised as far as possible.

Certainty and simplicity

iii) The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.

Effectiveness and fairness

iv) Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimised while keeping counter-acting measures proportionate to the risks involved.

Flexibility

v) The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments.

(OECD, *Implementation of the Ottawa Taxation Framework Conditions: The 2003 Report*, p. 13)



William Morris

Chair, *Business at OECD* Tax Committee
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France

Centre for Tax Policy Administration
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75775 Paris Cedex 16
France

Submitted by email: taxpublicconsultation@oecd.org

December 2, 2019

Ref: Secretariat Global Anti-Base Erosion Proposal (“GloBE”) – Pillar Two

Dear Secretariat Team,

Thank you for the opportunity to comment on the Secretariat proposal (the “proposal”) on Pillar Two of the project *Addressing The Tax Challenges Of The Digitalization Of The Economy* (the “Project”). As we said in relation to our comments on Pillar One, this Project will fundamentally reshape the international tax rules, and we are glad that stakeholder engagement has been encouraged. Given the scope of the Project, we are also encouraged that you have indicated that this engagement will continue, and look forward to further opportunities to contribute.

We appreciate the efforts (implicit in the questions asked) to make an income inclusion rule as simple as possible – although, realistically, a globally coordinated income inclusion rule will likely never meet the dictionary definition of “simple”. Furthermore, we acknowledge that the U.S. enactment of the Global Intangible Low-Taxed Income rules (or “GILTI”) put the question of a worldwide income inclusion/minimum tax rule, squarely on the international agenda. That said, we would make a number of preliminary comments in order to frame our comments in the attached letter:

- First, as a general matter, this proposal cannot be fully evaluated in isolation. The interaction of Pillars One and Two, as well as between the components of Pillar Two, need to be seen together before the effects and implications can be fully understood. Furthermore, the interaction of the income inclusion rule with the undertaxed payments rule **together with** the BEPS Action Items recently, or in the process of being implemented currently, need to be understood to avoid overlap and rule conflict. The Project (as a whole) will need to pause from time to time in order to fully evaluate the interactions of all of these complex component parts.
- The consultation document does not discuss the interaction of the income inclusion rule with the “undertaxed payment” rule (or the “subject to tax” and “switchover” rules). Understanding which of these rules has priority over the other (or, indeed, whether they are meant operate alongside each other) is crucial in guiding more detailed comments on the operations of these rules. We understand more details will be forthcoming, but we wish at this point to make very

clear that many of our members remain unconvinced in the coherency of the policy objectives of the proposals. However, if such rules are introduced, it is agreed that the income inclusion rule should be the primary rule, to be applied at the parent entity level only. To allow countries to operate the undertaxed payments rule as a primary rule will dramatically increase complexity, as well as disputes and double taxation, and significantly decrease tax certainty. *Business at OECD* could not support such a rule ordering.

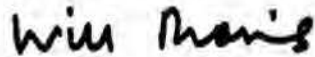
- We do believe (as with Pillar One) that in order to evaluate and then helpfully shape a workable and equitable income inclusion rule, it is necessary to articulate the principles underlying that rule, as well as the need for it.
 - On the first of those questions, is it about all businesses having to pay a minimum level of tax around the world? Is it about ensuring the “right” tax is paid in the right countries? Is it about ensuring that tax is paid where value is created (which, perhaps conflicts with profit reallocation under Pillar One)? Clarity – and broad agreement – will be necessary on those points in order to be able to move forward on important design features.
 - On the second, we do wonder whether BEPS 1.0 has really yet been given a chance to succeed? *Business at OECD* participated fully in that entire project and believes that measures across the range of Action Items have already begun to have significant effects, with even more significant ones to come as the MLI and ATAD are implemented. In order to build business support for Pillar Two at this stage, therefore, it will be necessary for the IF to very clearly articulate why another set of anti-avoidance rules which will, almost of necessity, be quite complex, are necessary.
- Many of our members believe that where an existing national regime already provides sufficient protection against very low overall effective tax rates, that regime should be considered an acceptable regime (and potentially included on a whitelist), and its replacement with a new set of Pillar Two rules should not be required. For instance, all of our U.S. members believe that the GILTI regime should be listed (or be described) as such an acceptable income inclusion rule. That said, having been criticized for its complexity, GILTI is not the only model for an income inclusion rule.
- As an addition to the last point, if a country has an acceptable pre-existing income inclusion regime, or has enacted the final Pillar Two proposal on income inclusion, then any payment to a business headquartered in that country, or to any subsidiaries of that business in other countries (regardless of whether the country in which a particular subsidiary is located has itself adopted an income inclusion rule) should not only be deemed to satisfy the income inclusion rule, but should also in no event be subject to the undertaxed payment rule or to pre-existing income inclusion rules at lower levels in the group in different countries. Issues like these should be covered in the framework needed for Pillar Two, which should be a pre-requisite for political consensus.
- Equally important to our broad membership is the application of a global blending approach and a carve-out for regimes that have been approved under BEPS action 5.
- Finally, while we greatly welcome your attention to accounting questions, we also believe that you need to consider systems issues (e.g. ERPs) as we did successfully in relation to BEPS Action Item 13 and country-by-country reporting.

We have attempted wherever possible to answer your specific questions, and, particularly in relation to the complex (and vital) accounting issues, we would be delighted to provide you with more information and/or the opportunity to discuss with accounting experts and systems experts.

We want once more to reiterate our genuine commitment to engage constructively in this process. However, as we did in our Pillar One comments, we would also note that this commitment to engage is not an unconditional commitment to support any result that is reached. *Business at OECD* remains committed to its *Business Principles for Addressing the Tax Challenges of the Digitalizing Economy* and would be unlikely to support the project in the event of substantial divergence from those principles.

Again, we thank you for the opportunity to comment on this important proposal, and look forward to further engagement at the public consultation meeting and beyond.

Sincerely,

A handwritten signature in black ink that reads "Will Morris". The signature is written in a cursive, slightly informal style.

Will Morris
Chair, Taxation and Fiscal Policy Committee,
Business at OECD (BIAC)

Executive Summary

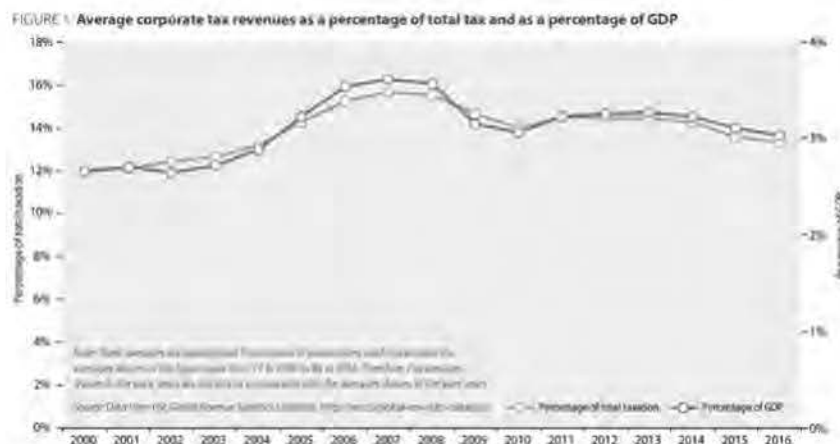
1. *Business at OECD* welcomes the opportunity to provide feedback on the Secretariat's Pillar Two Consultation Document. As the voice of business at the OECD, we aim for our comments to be constructive, both in supporting and challenging elements of the proposal where our members express strong unanimity, as well as in highlighting differences of opinion on the challenges where views diverge. We are committed to proactive engagement throughout this process, even if we do not necessarily agree with any resulting outcomes.
2. The Secretariat's Pillar Two document, which focuses on a narrow set of issues within the larger framework to address global anti-base erosion and profit shifting, makes useful contributions to the ongoing discussion regarding a proposed minimum tax. However, other critical elements remain to be addressed – crucially the priority within Pillar Two between the income inclusion rule and the undertaxed payment rule, as well as the interaction between Pillars One and Two. We anticipate and look forward to a further chance to comment on Pillar Two when additional work results in another consultation document.
3. We strongly believe that the long-term success of this endeavour can create a stable and certain environment for both taxpayers and tax authorities, but in order to do so, the entire framework must be rooted in widely accepted principles. Without this, the benefits of the agreement will be short-lived; any number of political pressures can arise in individual countries or regions, with the ensuing urge to diverge from the international consensus. In order to ensure coherency, anchoring points – rooted in clear principles – are required. Therefore, we encourage the Inclusive Framework to more clearly link the elements contained in Pillar Two (and those regarding Pillar One) to recognized economic and tax policy principles and to establish a framework how all components of Pillar Two interact with Pillar One and any other previously implemented BEPS elements.
4. On 21 January 2019, *Business at OECD* published *Business Principles for Addressing the Tax Challenges of the Digitalizing Economy* ("Business Principles")¹. This list of 11 policy recommendations should, we urge, continue to be considered in developing modifications to the underlying international taxation norms for the modern digitalizing economy. The core principles outlined in the Ottawa Taxation Framework (which are referenced in our Business Principles) should also continue to be adhered to in this process.
5. There will be significant interaction between Pillars One and Two for countries adopting both proposals, with a high likelihood of double taxation risks without proper coordination. Therefore, it is crucial that further work is undertaken to understand the linkages between these two pillars – in particular that the Pillar Two calculations need to be done taking full account of the reallocations of income and resulting tax that will result from the application of Pillar One

¹ See *Business at OECD, Business Principles for Addressing the Tax Challenges of the Digitalizing Economy* (Jan 2019), <http://biac.org/wp-content/uploads/2019/01/FINAL-2019-01-21-Business-at-OECD-Digital-Principles-Position-Paper.pdf>.

Amounts A, B, and C.

6. In addition to rule ordering among the four core elements of the Pillar Two GloBE framework, it is also necessary to contemplate coordination with other existing rules, such as CFC rules, or their replacement with a more holistic solution. It could be appropriate to reduce complexity in the system by recommending the removal of some BEPS measures where any GloBE agreement deals with the same concerns and makes them unnecessary.
7. It is equally important that the design and mandatory implementation of effective binding dispute prevention and resolution mechanisms become a key part of Pillar Two, ensuring that taxpayer rights are respected, and tax certainty is ensured. Related to this, countries should be required to withdraw any unilateral actions (affecting non-resident taxpayers) which would be considered redundant due to Pillar Two implementation.
8. To the extent that countries have already unilaterally introduced rules similar to GloBE (such as the U.S. GILTI regime), Pillar Two should ensure consistent and homogenous enforcement, and take into account those national regimes that achieve broadly the same outcomes as GloBE even if designed differently. Said in another way, duplication between the new GloBE and existing rules should be avoided.
9. The outcome of Pillar Two (in combination with Pillar One) must be workable for both taxpayers and tax administrations, taking into consideration differing administrative capacities (especially regarding the effect of multilateral disputes).
10. We believe it is important that more clarity and early consensus is achieved at a political level as to the outcome of this process, since the consequences of departing from well-established principles of international tax law towards a more complex and burdensome system can lead to undesirable results.
11. Given the enormous changes that GloBE (along with Pillar One) represents to the international tax system, adequate time must be given to arrive at workable solutions that will withstand the scrutiny and the test of time. Arbitrary timelines will only allow for paper consensus that will likely quickly break down in practice if crucial details are not thoroughly discussed and decided.
12. Global blending is the only practical way to assess a potential under-taxation of a company without introducing a global harmonized tax base (which we consider out of scope of this project). Similarly, it would be somewhat counter-intuitive to declare certain tax regimes BEPS compliant (in particular those fostering R&D and innovation), only to de facto make them ineffective now via the GloBE approach.
13. As the minimum effective tax rate is not yet decided (or even yet proposed at a specific rate), it is difficult to know what impacts it will have on tax base, investment, innovation, etc. However, the higher the rate is compared to currently prevailing average rates, the higher will be the risk of double taxation impacts.

14. Related to the above point, a thorough impact assessment should be conducted by the OECD, ideally showing the additional impact compared to the already implemented BEPS actions. We believe that with the elimination of harmful tax regimes and the alignment of substance and profit, a major part of the previously assessed BEPS activity is already eliminated (to be verified in the upcoming BEPS Action 11 report). The IF should therefore have robust data at hand when deciding about the cost-benefit impact of the implementation of any potentially complex Pillar Two framework.
15. The above point is especially important, as already the driving hypothesis of the “race to the bottom” for corporate tax rates (implicitly alluding to lower tax revenues) should be complemented by the analysis the OECD has performed with regard to corporate tax revenues in relation to GDP and overall tax revenues. Both percentages have actually *increased* over the past 15 years and remained relatively stable over the past 5-7 years, despite the reduction in corporate income tax rates ²:



16. We are pleased to provide input below on the issues requested for public comment in the Consultation Document.

Introduction: Benchmarking the “Pillar Two - GloBE” against our Business Principles

17. *Business at OECD* considers it imperative to respect our aforementioned Business Principles, published in January 2019, in addressing the tax challenges of the digitalization of the economy. We previously provided an initial benchmarking of the Pillar One “Unified Approach” against these Business Principles to demonstrate the areas of greatest alignment and challenge, and now do the same for Pillar Two.

² See OECD Corporate Tax Statistics: <https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-database-first-edition.pdf>

Principle	Score	Comment
Be based on long-standing and well-founded underlying principles of international taxation		The proposal introduces a new feature to the international tax system by way of a multilateral minimum tax but has not yet clearly defined the principles underlying Pillar Two or described the interaction with Pillar One. Furthermore, the Pillar Two proposals may conflict with the EU treaties.
Not ring-fence the digital economy		The proposal does not appear to ring-fence any portion of the digital economy.
Respect the Ottawa Taxation Framework principles		Neutrality
		No explicit discrimination of digital or remote sales.
		Efficiency
		Unclear at this stage, but efficiencies should be pursued.
		Certainty
		Not at this time.
		Simplicity
		Not at this time.
		Effectiveness
		Unclear at this stage.
		Fairness
		Opportunities for avoidance appear to be limited
		Flexibility
		The proposals should keep pace with changing business models.
Be grounded in the concept of value creation		N/A at this time (although in certain situations, e.g. fully local value chains, there could be an inconsistency with the concept of value creation).
Reduce instances of double taxation		We believe the OECD is committed to preventing double taxation, but the lack of reference to dispute prevention/resolution mechanisms is concerning. Also, there is a lack of discussion of the interaction between the two elements of Pillar Two, as well as between Pillars One and Two, both of which raise numerous issues regarding potential double taxation.
Be introduced as a comprehensive package		The proposal commits to implementation as a comprehensive package (alongside an evolving Pillar One proposal) and also notes that coordination in entry into force is required. However, no framework is available or proposed to clarify the interaction of the various components or existing legislation. Dispute prevention/resolution must also still be included.
Be reflected in model treaties and commentary		The proposal recognizes that effective multilateral implementation requires robust mechanisms (such as treaty changes or other instruments). However, certain aspects seem in conflict with the EU treaties.
Provide tax certainty for taxpayers and tax administrations, including strong dispute resolution mechanisms		The proposal is still too broad (and lacking in detail) to give taxpayers certainty. However, we feel certain, given the OECD demonstrated commitment to increasing tax certainty that this will be improved upon.
Have global agreement		N/A at this time.
Minimize the administrative burden on taxpayers and tax administrations		The proposal recognizes some of the administrative challenges that it will cause, however, much more detail (and creative thinking) will be required to address these. If a per-jurisdiction or per-entity blending approach is adopted, this traffic light will turn red.
Be developed through inclusive consultation with all businesses and other stakeholders		We welcome the opportunity to comment on the proposal, but regret that no economic impact assignment is available for a complete analysis.

18. As a preliminary matter, it is hard to state what should be used as a starting point until the entire scope of Pillar Two is known, including the interactions between the “income inclusion”

and “tax on base eroding payments” rules, as well as the policy objectives. It seems that the policy concerns behind each rule relate to potential erosion of tax bases (either of a shareholder jurisdiction or of a jurisdiction remitting payments overseas). A third policy concern appears to be scenarios where low levels of tax are paid (either in relation to local activities or more broadly across a group). Financial statements may be an appropriate place to start to meet some of these objectives – although the interaction (or lack thereof) between local accounts and group accounts, as well as between accounting profits and taxable profits, will pose significant challenges even there.

19. Similarly, the blending approach and carve-outs selected would have differing implications that may or may not meet different policy objectives. Their interaction with the information sources selected (e.g. group financial statements) may also result in different approaches being appropriate. As all of these elements will need to work together, and potentially alongside other measures not yet detailed (as well as Pillar One outcomes), it is imperative that the policy objectives are clearly articulated.

Section 1. Financial accounts

20. The questions related to whether global financial accounts can serve as a base for a global tax base used to assess Pillar Two are the same as for Pillar One. We therefore invite the Secretariat to consider the remarks we have made in this respect in our comment letter to Pillar One, in particular with regard to segmentation and consolidation of accounts below the group level. We fear in particular that many tax authorities would consider the financial accounts as not granular enough or lack the understanding of certain tax accounting rules, and therefore demand numerous reconciliations.
21. Joint ventures and minority shareholdings could raise specific issues in that respect, because taxes paid might be accounted for differently than the respective profits.
22. Our members do not have a single view on the use of financial accounts as a starting point for determining tax base for the income inclusion rule. Many members think that consolidated financial statements (based on either U.S. GAAP or IFRS, or a whitelist of acceptable similar GAAP standards) could be a starting point that would ensure consistency and simplify compliance costs. Others, however, have noted that the local accounts are more likely to be aligned with the local tax bases from which tax computations are based, and noted that significant adjustments may be required to the group accounts in order for them to be meaningfully compared to cash taxes paid. None of our members considered that it would be an easy exercise to utilise financial accounts, and noted considerable compliance burden with any approach. The cost and effort of using financial accounts as a basis would be even bigger if entity-per-entity and even country-per-country blending would be considered, especially if data consolidated on parent level needs to be broken down to entity level (cost and effort include, for instance, system costs to prepare local accounts in parent GAAP and related audit fees).
23. A range of other options exist (e.g. the use of consolidated financial statements, with adjustments as set up by the corporate income tax regulations applicable in the parent company jurisdiction), each of which has its own trade-offs and may not meet the policy objectives while keeping compliance costs and complexity low.

24. Noting some challenges with using financial statements, a broader approach to determining ETR could be considered, as a company's total direct tax contributions to a government consist of more than simply corporate income taxes paid, but also other taxes designed to tax corporate profits, such as sector specific levies, withholding taxes, and government royalties. This may be a more complete and accurate measure of a company's direct contribution to tax revenues, particularly where specific measures have been introduced domestically to ensure that higher levels of tax are paid already. An alternative might be agreement to roll back sector specific levies and taxes that are not based on profitability (although this would result in the right to tax being migrated to other countries).
25. Clarification of the scope of adjustment and simplification are necessary. If certain adjustment is needed, only numbers that can be easily picked up from the figures in the consolidated financial statements should be used. A method of excluding permanent differences from earnings before tax is appropriate.
26. From the viewpoint of reducing the administrative burden, it is important to minimize the adjustment items as much as possible. An important permanent difference common to many countries is exclusion of dividends received. The amount of dividends received should be excluded in order to eliminate double taxation. Capital gains and losses need to be considered carefully, as there are large differences in whether they become subject to taxation or not. Other significant permanent differences such as certain revaluation gains, impairment losses, investment allowances, or R&D super deductions would need to be analysed.
27. Similar to permanent items, temporary timing differences would need a hypothetical or standard system of taxation to determine those. This however would then be equal to making deferred adjustments. That standard system would need to then either match closely to major subsidiary taxation or there would be elections to match.
28. One way Pillar Two might deal with timing issues is to have averaging (at least 5 years) and loss carry forwards in order to take into account timing differences between parent country and foreign country to get a real minimum tax. However, this will not consider all timing differences which sometimes span over a longer horizon and would therefore discriminate against businesses with longer investment cycles.
29. Deferred tax accounting would be a relatively simple and realistic approach for certain companies from the viewpoint of using financial accounting as a start point and simplification, but more complex for other companies. Careful consideration is required with regard to the valuation allowance for deferred tax assets and equity in earnings of affiliated companies. It should also be noted that numerous companies do not use deferred tax accounting currently, which would make significant investments necessary for them to upgrade their accounting systems – and for tax authorities to understand these new rules. Adjustments for deferred taxes may need to be optional depending on a company's circumstances.
30. The Consultation Document seems to indicate a bottom-up approach to applying the income inclusion rules. This would require a large number of complex calculations to coordinate and adopt such an approach, which is likely difficult and costly to perform. Rather, income inclusion applied at the ultimate parent level (using consolidated GAAP and worldwide blending) would

offer a practical and proportionate measure. It requires consideration of many of the same intra-group issues already considered in the Action 13 CbCR guidance.

31. This of course will have behavioral impacts on how jurisdictions approach other issues, such as CFC rules. The same incentive principle applies at every tier – i.e. if somebody is going to tax the profits, then jurisdictions will prefer that they collect that revenue. This may lead to a need for some constraints on what options are/are not acceptable for jurisdictions to adopt in that context.

Section 2. Blending

32. The use of blending rules is necessary to make this proposal workable and manageable. The wider the scope of the blending, the easier the application of the GloBE rules will be. In particular, the entity blending approach should be ruled out on general principles because of its complexity, but also because many jurisdictions do not tax on an entity by entity basis (e.g. group relief, fiscal unity). The potential argument for entity blending, i.e. to eliminate accumulation of low tax income in one entity by blending it with high income tax income in other entities in a country, should also be discarded as it could be spun further into segment blending (i.e. blending of low tax and high tax income in the same entity). We urge the IF to draw a line between complexity and result.
33. Many members are concerned that a per-country blending would result in tremendous complexity in determining the respective tax rates to be compared with the threshold rate, and would therefore be administratively burdensome for MNEs and taxing authorities alike.
34. The worldwide blending approach will be the most likely way to make this proposal work as a compromise between associated cost and return. This approach would simplify discussions concerning the use of consolidated financial statements, since they could be the right source for working out the MNE effective tax rate. Another favourable element of global blending supported by members is that company operations vary in each country due to regulatory, legal, and business constraints. A global approach also is more suited for highly integrated businesses. If countries are concerned that global blending is not granular enough, specific anti-avoidance rules could be used to alleviate such concerns.
35. Since the allowable range for temporary differences, permanent differences, and exemptions varies depending on the way of blending, conclusions should be drawn on blending first. Using a jurisdictional blending seems to be problematic because the figures for all individual companies, such as the income and tax amounts, need to be differentiated by jurisdictions. If financial accounting is used as a starting point, a worldwide blending has the lowest compliance cost and would reduce the volatility arising from the various differences and the necessity of carve-outs. However, if the system design requires a procedure for summarizing all foreign subsidiaries' income and corporate tax amounts, such as GILTI in the United States, the compliance cost is considered to be the most excessive. We believe it is essential to have a system that determines whether the tax rate is below or above the minimum tax rate based on consolidated financial statements. As for an entity blending, some countries can avoid an increase in compliance costs if it is acceptable to use an effective tax rate calculated for the purpose of CFC tax system as it is.

Section 3. Carve Outs

36. As mentioned above, when considering exclusions to this proposal, consideration should be given to those MNEs which are already subject to high tax rates (that usually coincide with non-mobile activities); in these cases, the existing regulations ensure that no profit shifting is carried out to low-tax jurisdictions and therefore, no additional rules would be needed. Hence, when the ETR of an MNE on a consolidated basis is above a certain threshold, the measures of this proposal should not be applied, since the objective of ensuring an appropriate level of taxation would be already met.
37. Commonly accepted incentives such as tax credits (or other incentives) for R&D and capital investments, and tax reduction by applying a reduced tax rate or income deduction for the purpose of attracting certain investment, should be exempted as long as business entities are engaged in active activities. Items subject to rules that are determined not to be harmful tax regimes based on Action 5 should equally be excluded, given the effort that countries and companies have made to comply with them. However, exemptions based on facts and circumstances would lead to an increase in administrative burden and thus must be optional. When adopting worldwide blending calculated from the consolidated financial statements, it may be more appropriate to adopt the method where a certain percentage of tangible assets is deducted as a deemed active income.
38. In terms of a further carve-out, by not burdening smaller businesses with significantly complex rules, we would advocate for a fixed threshold under which the GloBE proposal would not apply.
39. Some members suggest to exclude companies where the majority of the value chain is located locally in countries, as it would suggest that a potential low taxation is due to the specifics in country taxation and not due to international tax planning.

Section 4. Other Issues

40. Any Pillar Two agreement should provide criteria for exempting already existing equivalent income inclusion regimes (and/or maintain a list of specific regimes). For example, if financial accounting measures were required, GILTI rules wouldn't seem to work and a switch from one base to another would make it difficult to avoid double taxation. As such, taxpayers subject to GILTI should be exempted from the application of Pillar Two. Similarly, rules for coordination/expansion of seemingly redundant measures (e.g. CFC regimes) should be defined.
41. If financial accounting is adopted, permanent items (such as dividends, step-ups, business combinations, discontinued operations, extraordinary items, or impairments not recognised in a territory) would need to be adjusted to financial accounting. However, to define permanent differences there needs to be a tax system, such as a hypothetical or standard system, to compare it to.
42. Other possible sources of double taxation risk arise from basic mismatches (e.g. timing differences associated with GAAP differences, or differences between the parent country tax

legislation and local tax legislation) or mismatches in measuring foreign profits for purposes of income inclusion versus foreign tax credit relief.

43. With regard to other elements contained in the GloBE approach, the subject-to-tax test should be based on the nominal rate, and not on the effective tax rate. The guidance should clarify that this rule only applies to related party payments.
44. Some of our members have raised detailed design issues about the undertaxed payments rule and we hope to have the opportunity to comment on those issues soon – and certainly before any binding decisions are taken
45. The Inclusive Framework should consider what effect Pillar Two might have on bilateral treaties to the extent that a tax on base eroding payments infringes the non-discrimination clause of Article 24(4) of the OECD Model Convention.
46. A top-down approach could avoid double taxation by removing from the scope of any base eroding payment rules any subsidiaries of an MNE which is subject to the income inclusion rule in its ultimate parent jurisdiction. There is a need for this type of rule ordering because of the complexity arising from per-country determination of consolidated entities and related shareholders.
47. The original programme of work, which is appended to the consultation document, contemplates the extension of the subject to tax rule to unrelated parties (para 29, Annex B). This should be explicitly removed from consideration. An extension to unrelated party payments would massively increase the scope of Pillar Two by bringing legitimate business transactions into a base erosion project. It is hard to see the justification for this increase in scope; in terms of proportionality, the resources required to bring it into scope would be huge compared to any potential base erosion.
48. Finally, many of our members have expressed concerns that the proposal (both as an income inclusion rule and/or a tax on base eroding payments) would not be permissible under EU law. We consider it vitally important that potential issues around domestic/transnational law compatibility (in relation to all participating countries) are assessed before agreement is reached. The alternative is decreased certainty over prolonged periods of time as laws are tested, and ultimately differences between how rules are implemented.

CHAMBER OF COMMERCE
OF THE
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December 2, 2019

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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 regime² should be grandfathered as a qualified income inclusion rule pursuant to Pillar Two³ 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,



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December 1, 2019

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Re: Comments on the Public Consultation Document on the Global Anti-Base Erosion Proposal ("GloBE") (Pillar Two)

Dear Mr. Pross,

The Silicon Valley Tax Directors Group ("**SVTDG**") appreciates the opportunity to provide comments on the Public Consultation Document on the Global Anti-Base Erosion Proposal ("GloBE") (Pillar Two), which was published on November 8, 2019. SVTDG members are listed in the Appendix to this letter. We would be happy to respond to any questions you may have about the attached comments. We would appreciate the opportunity to be represented at the public consultation in Paris scheduled for December 9, 2019.

Sincerely,

/s/ Robert F. Johnson

Robert F. Johnson
Co-Chair, Silicon Valley Tax Directors Group

1. INTRODUCTION AND SUMMARY

1.1. Background on the Silicon Valley Tax Directors Group

The SVTDG represents U.S. high technology companies with a significant presence in Silicon Valley that are dependent on R&D and worldwide sales to remain competitive. The SVTDG promotes sound, long-term tax policies that allow the U.S. high tech technology industry to continue to be innovative and successful in the global marketplace, where digitalization is spreading through all businesses.

1.2. Summary of comments

Our comments below stress the following points:

- The need to ensure that the income inclusion rule has priority over the undertaxed payments rule.
- The need to ensure that the ultimate parent entity’s income inclusion rule has priority over that of other countries.
- The need to exclude from the GloBE regime MNE groups that are subject to GloBE-equivalent regimes, including in particular the U.S. GILTI regime.
- The need to exclude from the GloBE’s undertaxed payments rule payments to members of a group whose global ETR, as reflected on consolidated public financial statements, is at least equal to the GloBE-approved minimum tax rate.
- The need to ensure that Pillar One’s tax impact will be taken into account before Pillar Two’s provisions are applied.
- The need to ensure that countries adopting either Pillar One or Pillar Two eliminate any DST or DST-type taxes they may have enacted and refrain from introducing any such taxes in the future.
- The need to ensure that countries adopting the GloBE regime do so in a harmonized form, with one globally agreed minimum tax rate.
- The need to give further thought to the question of whether financial accounts provide a preferable starting point for the tax base used in computing ETR under the GloBE proposal, as well as the need to minimize adjustments to financial statement information if that is the recommended tax base.
- The advisability of using blending at the worldwide level to avoid vastly increased complexity that would result from more granular blending approaches.

- The need to consider accommodating innovation-incentivizing tax reliefs such as R&D credits in making ETR calculations.

2. PRELIMINARY COMMENTS

The GloBE proposal consultation document acknowledges that a number of key design issues of the proposal are under active consideration by Inclusive Framework members and that the document does not address those. The SVTDG believes, however, that certain issues are critical to the proper operation of any global minimum tax proposal and that decisions regarding those issues will have a significant impact on the design choices for the specific technical points covered in the consultation document. Accordingly, we direct our preliminary comments to those broader issues, some of which we also addressed in comments submitted earlier this year.

2.1. Rule coordination -- priority of income inclusion rule

At its core, the GloBE proposal has two primary legs, the income inclusion rule and the undertaxed payments rule. The proposal’s “subject to tax rule” appears to be a version of the undertaxed payments rule that would apply to payments between unrelated parties. Because unacceptable complexity would arise from any rule that would effectively require a payor to determine the effective tax rate of an unrelated payee, we believe the “subject to tax rule” should be eliminated from the proposal and we do not discuss it further here. The proposal’s “switch-over rule” appears to be a treaty mechanism to coordinate with a domestic law income inclusion rule, and we do not discuss it separately in this letter.

Systematic double taxation would arise if the proposal authorized countries to apply the income inclusion rule and undertaxed payments rule without any agreement on how to coordinate them. As we have previously suggested to the OECD / IF, the SVTDG strongly urges the adoption of an approach that would break this tie in favor of the income inclusion rule, provided that rule adheres to whatever minimum tax rate standard is globally agreed for purposes of the undertaxed payments rule. In other words, if the parent country of an MNE group invokes an income inclusion rule that applies a minimum tax rate test that is at least as high as the minimum tax rate standard that is globally agreed for purposes of the undertaxed payments rule, and if the parent country accordingly taxes at the parent level the low-taxed income in the intermediary country, then no other country should be able to invoke the undertaxed payments rule with respect to payments made to members of that MNE group.

This approach would have several advantages. First, it would allow for a relatively clear determination as to whether the undertaxed payment rule should apply at all in many cases -- if the payment is made to a member of a group headed by a parent in a country that has adopted the income inclusion rule, the undertaxed payments rule would be called off. Equally importantly, it would ensure that the regime did not cause widespread overkill or over-taxation, which could

itself be an undesirable burden on international trade. This would be true because the parent country’s income inclusion rule would be better positioned to take into account only net amounts of low-taxed profit in the intermediary country, whereas the source country’s undertaxed payments rule would more likely operate on a gross payment basis. The parent country would also be better placed to give double taxation relief for whatever amount of tax may have been imposed by intermediary (or source) country. Accordingly, the income inclusion rule should take precedence.

2.2. Rule coordination -- priority of ultimate parent country income inclusion rule

Complications inherent in the income inclusion rule would increase exponentially if the rule could be invoked at multiple tiers. Accordingly, it would be our recommendation that if the country of residence of a group’s ultimate parent entity had enacted the income inclusion rule, no other country where intermediary holding companies of the group might be resident should be able to invoke an income inclusion rule against the income of a low-taxed, lower tier subsidiary. Of course, if the ultimate parent country had not introduced such a rule, an intermediary holding company country should not necessarily be precluded from enforcing such a rule. Giving precedence to the ultimate parent country would protect groups from having to deal with multiple sets of rules affecting the calculation of the effective tax rate, the amount of the income inclusion, the treatment of previously taxed income and basis adjustments, the determination of double tax relief, etc.

2.3. Identification of exempt entities

Exemption for GloBE-equivalent regimes, such as GILTI. Consistent with our recommendation above concerning the priority of the income inclusion rule, we recommend that the OECD / IF identify countries’ existing regimes in the nature of income inclusion rules that are sufficiently consistent with the objectives of the OECD / IF’s GloBE proposal that companies subject to those regimes should be exempt from the GloBE proposal (i.e., either the income inclusion rule or the undertaxed payments rule). For example, we believe the U.S. GILTI regime is sufficiently consistent with the proposal’s objective that members of MNE groups that include a parent company resident in the United States should be exempt from the GloBE proposal. This should be the case regardless of whether the version of the GloBE proposal ultimately agreed by the OECD / IF bases the effective tax rate (ETR) calculation under its income inclusion rule on financial accounts or tax books, or whether it adopts blending at the worldwide, jurisdictional, or entity level. In other words, countries that have already legislated a comprehensive global minimum tax regime should not have to amend that legislation in order to be considered compliant with the GloBE proposal if, as in the case of GILTI, the existing regime sufficiently achieves the GloBE objectives. Moreover, future legislative modifications to such a regime

should not disqualify it as being a GloBE-equivalent income inclusion rule if they do not cause the regime to deviate substantially from the GloBE objectives.

Exemption from undertaxed payments rule for MNE groups above a threshold global ETR, as shown on consolidated financial statements. Regardless of whether an MNE group’s parent is resident in a jurisdiction that has in place a GloBE-equivalent income inclusion rule, members of the MNE group should be exempt from application of the undertaxed payments rule by any country if their global ETR as shown on their audited public financial statements exceeds a minimum threshold.¹ The minimum threshold for this purpose should be equal to the GloBE-approved minimum ETR. Also, the group’s global ETR could be measured by reference to the ratio which their total taxes paid or accrued over the preceding three years bears to their total worldwide profits over the same years, as shown on their audited consolidated financial statements prepared in accordance with a widely recognized set of accounting standards (e.g., IFRS or U.S. GAAP).

Using prior period ETR numbers will facilitate the ability to make real-time determinations of whether the undertaxed payments rule applies to particular payments, which will be especially important if application of that rule leads to the imposition of withholding taxes. Using a multi-year average of taxes paid or accrued and profits will also help to smooth over the effects of any tax rate volatility. We also note that this worldwide ETR calculation done for purposes of determining the applicability of the undertaxed payments rule would not require the MNE group to separate its domestic from foreign profits and taxes paid, a further simplification.

Given that the purpose of the GloBE proposal is to ensure that “the profits of internationally operating businesses are subject to a minimum rate of tax”,² there is no need to subject to the GloBE regime’s undertaxed payments rule the members of an MNE group whose global ETR is at or above the GloBE-approved minimum ETR. Substantial simplification could be achieved by giving both taxpayers and tax administrations this fairly easy way of confirming that application of the undertaxed payments rule is unnecessary for such a group.

2.4. Coordination of Pillars One and Two

The SVTDG recommends that the ETR calculations relevant to the application of the Pillar Two GloBE regime by any country should occur after the application of any provisions enacted in implementation of Pillar One recommendations. In this way, the tax rate effects of the income shifting required by Pillar One will be properly reflected in the Pillar Two ETR calculations. The SVTDG notes that the need to reflect the Pillar One tax rate effects in the

¹ Such a group’s parent company jurisdiction may still wish to implement a GloBE-approved income inclusion rule, in order to discourage shifting of profits from that jurisdiction to lower-taxed countries.

² Pillar Two Consultation Document, paragraph 7.

Pillar Two ETR calculations heightens the need to be able to determine the Pillar One effects as soon as possible after the end of the relevant year (if not earlier). This will only heighten the need for clear, administrable rules and prompt, effective, and binding dispute resolution under Pillar One.

2.5. Elimination of unilateral measures

The SVTDG strongly recommends that it be a condition for a country’s adoption of either the Pillar One or Pillar Two recommendations that the country eliminate any DST or DST-type measures it may have introduced and that it refrain from introducing any such measures in the future.

2.6. Adoption of a harmonized GloBE regime

The SVTDG stresses the need for there to be a harmonized approach to adoption of any aspect of the GloBE regime. Thus, for example, there should be one globally agreed minimum tax rate, and groups should be able to use one consistent approach to making ETR calculations for purposes of determining their potential liability under the GloBE regime in all adopting countries. Inconsistent approaches to adoption of the GloBE regime would lead to serious risks of double taxation and intolerable compliance burdens.

3. ISSUES RAISED IN THE CONSULTATION DOCUMENT

3.1. Determination of tax base

The SVTDG notes the consultation document’s recommendation that the tax base to be used to calculate ETR for purposes of the GloBE proposal’s income inclusion rule should be based on book income shown on a financial statement rather than taxable income (computed by reference to the rules prevailing in the ultimate parent country). SVTDG members resident in the United States are already using U.S. taxable income principles to determine the ETR of their foreign subsidiaries in the aggregate under the GILTI regime. Implicit in our recommendation above that the U.S. GILTI regime be recognized as a GloBE-compliant or GloBE-equivalent regime is the view that the GloBE proposal should accommodate ETR determinations by reference to the parent country’s taxable income principles. We acknowledge, however, that financial statements may be a useful starting point for ETR calculations for groups that are not headquartered in a country that already has a GloBE-compliant or GloBE-equivalent regime. The consultation document raises a number of complicated questions about the use of financial accounts which would require more time to analyze than the consultation period provides if the SVTDG were to comment in detail. That being said, the SVTDG strongly recommends that any GloBE tax base derived from financial accounts be subjected to as few adjustments as possible, so that complexity can be avoided.

3.2. Blending

The SVTDG strongly supports the selection of worldwide blending as the appropriate choice for GloBE. Trying to drill down below a worldwide level would to determine tax base on a jurisdictional or entity level would vastly increase the potential difficulty of applying the GloBE regime. The use of worldwide blending would also go a long way towards minimizing the impact of many of the issues relating to book-tax differences described in the GloBE consultation document.

3.3. Carve-outs and thresholds

As indicated in our preliminary comments, the SVTDG supports a carve-out from the GloBE regime for companies subject to an existing global minimum tax regime such as GILTI, and we also support a carve-out from the GloBE regime’s undertaxed payments rule for members of a group whose global ETR, as shown on their consolidated financial statements, exceeds the GloBE-approved minimum tax threshold (or an alternative threshold set somewhat higher than the GloBE-approved minimum tax rate). Beyond those suggestions, the SVTDG believes it may be appropriate for the GloBE regime to make accommodation for innovation-incentivizing tax reliefs such as R&D credits, despite the potential added complexity in doing so. If financial accounts are used as the basis for computing ETRs, we note the need to ensure that the relative impact of various forms of incentives is not distorted by whether they are shown as above the line or below the line items.

Appendix—SVTDG Membership

10x Genomics, Inc.	Ingram Micro, Inc.
Accenture	Intel
Activision Blizzard	Intuit Inc.
Adobe	Intuitive Surgical
Agilent	Jazz Pharmaceuticals
Airbnb	Keysight Technologies
Amazon	KLA
AMD	Lam Research
Analog Devices	Lime
Ancestry.com	LiveRamp
Apple	Marvell
Applied Materials	Maxim Integrated
Aptiv	MaxLinear
Arista	Mentor Graphics
Atlassian	Microsoft
Autodesk	NetApp
Bio-Rad Laboratories	Netflix
BMC Software	NVIDIA
Broadcom Limited	Oracle Corporation
Cadence	Palo Alto Networks
CDK Global	PayPal
Chegg, Inc.	Pivotal Software, Inc.
Cirrus Logic	Pure Storage
Cisco Systems Inc.	Qualcomm
Confluent	Ripple Labs, Inc.
CrowdStrike, Inc.	Robinhood
Cypress Semiconductor	salesforce.com
Dell	Sanmina Corporation
Dolby Laboratories, Inc.	Seagate Technology
Dropbox Inc.	Snap Inc.
eBay	Snowflake
Electronic Arts	Stripe
Expedia, Inc.	SurveyMonkey
Facebook	Symantec Corporation
FireEye	Synopsys, Inc.
Fitbit, Inc.	The Cooper Companies
Flex	The Walt Disney Company
Fortinet	TiVo Corporation
Genentech	Trimble, Inc.
Genesys	Uber Technologies
Genomic Health	Velodyne LiDAR
Getaround	Verifone
Gigamon, Inc.	Veritas
Gilead Sciences, Inc.	Verizon Media
GLOBALFOUNDRIES	Visa
GlobalLogic	VMware
Google Inc.	Western Digital
GoPro	Workday, Inc.
Grail, Inc.	Xilinx, Inc.
Hewlett-Packard Enterprise	Yelp
HP Inc.	
Indeed.com	
Informatica	



December 2, 2019

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Re: Comment Letter on the Public Consultation Document: “Global Anti-Base Erosion Proposal GLoBE)- Pillar Two

The National Foreign Trade Council (the “NFTC”) is pleased to provide written comments on the Public Consultation Document: “Global Anti-Base Erosion Proposal (“GLoBE”)—Pillar Two” published November 8, 2019 (the “Consultation Document”).

The NFTC, organized in 1914, is an association of some 200 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.

The NFTC appreciates the opportunity to comment on the proposals for further work set out by the Consultation Document and being discussed by the Inclusive Framework. Given the enormity of the challenge undertaken by the Inclusive Framework – providing a consensus-based long-term solution to the tax challenges arising from the digitalization of the economy by 2020 – the NFTC believes that it is critically important to offer a broad range of stakeholders’ opportunities for input into the process.

This letter provides more specific comments and responds to the specific issues raised by the Consultation Document. The NFTC has structured our comments in the spirit of the Secretariat’s request for concise comments focused on providing feedback on the GLoBE as presented in the Consultation Document.

1. GLoBE Proposal

The GLoBE proposal sets out to address the perceived BEPS challenges through the development of two inter-related rules that would be implemented by a change to domestic law:

- a. An income inclusion rule that would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate below a minimum rate; and
- b. A tax on base eroding payments that would operate by way of a denial of a deduction or imposition of source-based taxation (including withholding tax), together with any necessary changes to double tax treaties, for certain payments unless that payment was subject to tax at or above a minimum tax rate.

In December 2017 the United States adopted the so-called Tax Cut and Jobs Act (Pub. L. No. 115-97) ("tax reform"). As part of the tax reform package, the U.S. lowered its corporate tax rate from 35% to 21%, but in doing so, realized that there are other jurisdictions around the world with lower corporate tax rates. Consequently, as part of that tax reform proposal, the U.S. adopted a Global Intangible Low-Tax Income (GILTI) provision designed to be a minimum tax on U.S. companies to prevent companies from moving operations out of the U.S. to lower-tax jurisdictions. The GILTI provision was originally designed by Congress to only tax income that fell below a certain tax rate of 13.125 percent to be sure to provide a minimum tax on companies operating in countries with a corporate tax rate lower than that. However, because of the interaction of the GILTI calculation with other changes put in place under U.S. tax reform, the actual amount that U.S. based MNEs could expect to pay as a minimum tax far exceeds the original 13.125 percent.

The tax reform legislation generally retained the existing subpart F regime that applies to passive income and related-party sales and services, and created a new type of inclusion for GILTI, which is based on a broad class of controlled foreign corporation ("CFC") income. Similar to a subpart F inclusion, "U.S. shareholders" of CFCs include GILTI in income on an annual basis. Unlike a subpart F inclusion, a U.S. shareholder calculates a single GILTI inclusion, based on all of its CFCs. In general, GILTI is the excess of a U.S. shareholder's "net tested income" (that is, the excess of the aggregate of its CFCs' tested income over its CFCs' tested losses), over its "net deemed tangible income return" which is a deemed return on the CFCs' tangible assets (10% of qualified business asset investment or "QBAI") reduced by the CFCs' "specified interest expense").

After finalizing the proposed GILTI regulations, the U.S. Treasury Department proposed a new set of regulations providing for a "high-tax exception" from the GILTI regime. Building on the statute's exception for income excluded from subpart F income by reason of section 954(b)(4), the proposed rules provide an election to exclude all items of a CFC's gross income that are subject to an effective rate of foreign income tax greater than 18.9% (i.e., 90% of the U.S. corporate tax rate, currently 21%), without

regard to whether the income would otherwise be foreign base company income or insurance income ("GILTI high-tax exception").

Because of the interaction with other tax reform provisions, particularly the Base-Erosion Anti-Tax Avoidance (BEAT) and the limited expense allocations permitted under the proposed foreign tax credit regulations, U.S. MNEs will pay a GILTI tax between the Congressionally mandated 13.125 percent and the high-tax exemption rate of 18.9 percent. These minimum tax rates far exceed the corporate tax rates of many countries included in the Inclusive Framework.

The GLoBe income inclusion rule is designed to operate as a minimum tax that ensures that the income of an MNE group is subject to tax at a minimum rate thereby reducing the incentive to allocate profits for tax reasons to low-taxed jurisdictions. This is the same reasoning the U.S. Congress used when it adopted the GILTI regime.

Our recent experience with U.S. tax reform, particularly with the enactment of the GILTI and BEAT rules, has highlighted the difficulty of crafting global base erosion rules of the type proposed in the Consultation Document. In general, we believe such rules should be narrowly tailored to meet the stated policy objective of deterring profit shifting to no or low-tax jurisdictions where value creation is not taking place. As an initial step, the OECD and the Inclusive Framework should evaluate the efficacy of the BEPS changes that have already been put into place and provide data to support the need for any additional proposals. If such proposals are needed, then consideration should be given to an income inclusion rule that ensures that the profits of a multinational enterprise are subject to tax at a minimum rate in only the enterprise's home jurisdiction. The income inclusion rule would apply only if the foreign profits of the multinational enterprise are subject to tax at rates below a minimum threshold on an aggregate basis (i.e. worldwide blending) rather than on an entity-by-entity or country by country basis, and only to the extent necessary to ensure that profits are taxed at this minimum rate. It would not be practical or administrable to implement blending on anything other than on a world-wide basis at the level of the jurisdiction of the parent company. Further, foreign tax credits and other provisions should be enacted and permitted so as to avoid double taxation. The income inclusion rule should apply at the level of the ultimate parent jurisdiction only, and not on a country by country basis which would add enormous systems and administrative complexity and result in increased tax controversies. Given the ultimate parent jurisdiction is vested with the right to "tax back" the multinational's global profits, it should also be the only jurisdiction vested with the right to audit the income inclusion rule.

A tax on base eroding payments should be considered only as a secondary rule to the extent such payments are made to related parties that are not within the scope of an income inclusion rule (e.g., because the jurisdiction of the ultimate parent has not yet adopted an income inclusion rule). This priority rule reflects the relatively stronger claim of the home jurisdiction to tax otherwise untaxed profits of the multinational enterprise, as opposed to the jurisdiction from which deductible payments are made. The income inclusion rule is also better suited to the proposed design of the Pillar Two rules as a top up tax (rather than a base-eroding payments rule), and it is therefore better suited to be the priority rule.

The NFTC believes the U.S. GILTI regime meets all the criteria set out in the Consultation Document as a minimum tax and should be permanently grandfathered as such under the income inclusion rule. U.S. based MNEs should be excepted from the global minimum taxes implemented by jurisdictions outside the U.S., because subjecting U.S. based MNEs to income inclusion rules in multiple jurisdictions will result in double taxation as the result of multiple jurisdictions attempting to “tax back” the same income. If the domestic government of an MNEs parent company imposes a robust minimum tax regime, that regime should be accepted as meeting the requirements of Pillar Two, and only the parent company jurisdiction should have the right to impose tax pursuant to the new taxing rights provided by Pillar Two. The income inclusion rule should take priority over an undertaxed payment rule or subject to tax rule, which would only apply to the extent such payments are made to related parties that are not within the scope of an income inclusion rule (e.g. because the jurisdiction of the ultimate parent has not yet adopted an income inclusion rule).

The NFTC also believes that any non-compliant unilateral measures should be withdrawn as a condition of reaching consensus on Pillar Two. This would include any unilateral measures developed after the release of the Pillar Two Consultation Document. In the same way that BEPS Action 5 agreed to review all preferential regimes to determine if they were harmful, and to then continually update those reviews for new regimes, so too should the OECD review all unilateral measures and then continually update those reviews for new unilateral measures, with sanctions for countries that fail to repeal or introduce new unilateral measures.

In addition, some U.S.-headquartered MNEs are headed by a fiscally transparent entity, such as a U.S. S corporation or a partnership. The Consultation Document highlights some issues related to fiscally transparent entities within an MNE. We recommend that taxes paid by non-corporate owners of such entities be considered to be imposed on the business profits of the entity in certain cases. The failure to do so would result in the mischaracterization of MNEs headed by fiscally transparent entities as categorically low taxed or exempt from an income inclusion regime in their headquarters country, even though in fact the business income may be subject to high rates of tax in the headquarters country. In some sense passthrough taxation of an MNE headed by a fiscally transparent entity that operates through foreign branches or fiscally transparent subsidiaries represents a pure or comprehensive income inclusion regime; to the extent the owners of the parent entity are resident of the home country, all of the income of the parent entity would be subject to tax in that country. Such a regime would meet all the criteria set out in the Consultation Document as a minimum tax and should be accepted as such under the income inclusion rule.

We recommend the inclusion of a principles-based rule along the following lines to ensure that taxes paid by non-corporate owners of an MNE headed by a fiscally transparent entity are appropriately accounted for:

Any tax paid by owners of a fiscally transparent entity on the business profits of the entity (and its branches or fiscally transparent subsidiaries) on a current

basis shall be considered to be imposed on the business profits of the entity where:

- (1) the owners are required under local law to be, or in fact are, tax resident in the same jurisdiction as the fiscally transparent entity; and
- (2) the business profits of the fiscally transparent entity retain their fiscal nature for purposes of the imposition of tax on the owners by the jurisdiction of residence of the fiscally transparent entity.

This principles based rule would be consistent with the treatment of fiscally transparent entities under the OECD Model Tax Convention for tax treaty purposes, which in general treats income earned by a fiscally transparent entity as earned by a resident of a country to the extent it is treated as derived by a resident of that country, including an owner of the fiscally transparent entity, under the tax law of that country.

2. Carve-outs

The Consultation Document calls for the exploration of possible carve-outs as well as exclusions to restrict application of the GLoBE proposal. The first carve-out to be explored includes regimes compliant with the standards of BEPS Action 5 on harmful tax practices, and other substance-based carve-outs. The BEPS Action 5 report set out a minimum standard to assess whether a company has substantial activity in a preferential regime. The principle applied to preferential regimes is that such regimes should require substantial activities where benefits are granted to a taxpayer to the extent that the taxpayer undertook core income-generating activities required to produce the type of income covered by the preferential regime. The GILTI provisions apply to virtually every US taxpayer group who maintains their foreign operations in corporate form, and would apply to companies' research and development operations not based in the U.S. This rule generally subjects a U.S. shareholder to tax on the combined net income of its CFCs that (1) is not otherwise taxed in the U.S. on a current basis (e.g., not ECI, not subpart F) or specifically excluded (e.g., related dividends) and (2) exceeds a fixed routine return on the CFC's tangible depreciable assets. The GILTI regime does not carve out special tax regimes and is therefore stricter than any proposed minimum tax regime. We believe that any Action 5 compliant regimes should be carved out of the GLoBE proposal. We also believe the GLoBE provisions should only apply to those MNEs above the Country-by-Country reporting threshold. The NFTC recommends that there should be a carve out for MNEs whose global effective tax rate is in excess of the GLoBE minimum tax.

A second carve-out to be explored is gain recognized on the disposition or restructuring of a business. The GLoBE tax should be based upon transactions incurred in the normal course of business. If a taxpayer recognizes a gain from a disposition of a business or business line (either through the form of a sale of stock, partnership interests, or assets) or from the restructuring of its global business, such gain is not generated from the ordinary course of business and should be carved out of the GLoBE proposal.

Likewise, dividends paid as part of a restructuring should also be considered outside the normal course of business and excluded from the GLoBE tax.

3. Dispute Resolution

The Consultation Document explains that the OECD Programme of Work directs the Inclusive Framework to consider issues around rule coordination as well as the interaction of the GLoBE proposal with other international and domestic tax rules in order to ensure that the proposal avoids the risk of double taxation, minimizes compliance and administration costs, and that the rules are targeted and proportional. The NFTC supports the work of the OECD to ensure that there is a robust dispute mechanism in place to resolve issues of double or multiple taxation. We are concerned that the adoption of minimum taxes by members of the Inclusive Framework, without the recognition that MNEs are already subject to large minimum tax payments, could lead to more disputes. We urge the OECD to coordinate the dispute resolution between Pillars One and Two to ensure that the same revenue is not subject to multiple levels of tax. A strong binding arbitration with peer review should be included in the Pillar Two proposal to avoid double taxation and to ensure that any disputes are resolved on a timely basis.

4. Implementation

The consultation document raises a number of complicated questions about the use of financial accounts which would require more time to analyze than the consultation period provides if the NFTC were to comment in detail. That being said, we offer the following implementation comments.

The minimum tax computation should be done on a world-wide consolidated level based on Consolidated Financial Statements. The Consolidated Financial Statements should be prepared under the GAAP of the parent entity. Companies should not be required to prepare an additional set of books under different accounting standards to that in which they maintain their records, i.e., there should not be a special accounting standard introduced solely to comply with the GLoBE proposal. The calculation should only be performed on an annual basis and after the taxpayer's year end such that it does not impact on quarterly reporting or installment payments.

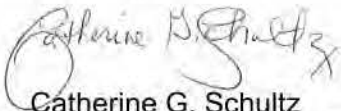
The GLoBE proposal should be implemented at the same time by all members of the Inclusive Framework, for the same period, be prospective only and be consistently applied. How the Pillar One and Pillar Two proposals interact must be carefully considered and those interactions clarified. For example, will the reallocation under Pillar One occur before the application of Pillar Two? Clear rules on the interaction and the ordering of the two pillars should be addressed.

The NFTC believes that the Pillar One and Pillar Two proposals need to be continually evaluated by the OECD to assess the total impact of these proposals on both taxpayers and tax administrators.

Conclusion

The proposals in the Consultation Document (Global Anti-Base Erosion Proposal) appear to reflect the concern that, notwithstanding the BEPS changes and U.S. tax reform, opportunities remain, at least for non-U.S. multinationals, to shift profits to low or no-tax jurisdictions or to convert profits to stateless income. The BEPS changes have resulted in considerable changes in behavior among multinational enterprises and governments. New tax legislation, including the EU's Anti-Tax Avoidance Directive (ATAD) and the U.S. Tax Cuts and Jobs Act (TCJA) have gone beyond the BEPS minimum standards. We therefore recommend that if the GLoBE proposals are considered, such consideration comes only after a review of the efficacy of the BEPS changes that have already been put into place, as required by Action 11, and careful consideration of the policy rationale for a universally agreed global minimum taxation regime, to determine whether further measures are needed.

Sincerely,



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**Appendix to NFTC Comments on
The Secretariat Proposal for A Global Anti-Base Erosion Proposal---Pillar Two**

NFTC Board Member Companies:

ABB Incorporated	Hanesbrands Inc.
Albright Stonebridge Group	Hewlett Packard Enterprise Company
Amazon	HP Inc.
American International Group	IBM Corporation
Amgen	Johnson Controls
Anheuser-Busch	KPMG LLP
Applied Materials	Mars Incorporated
BP America Inc.	Mastercard International
British American Tobacco Company	Mayer Brown
Caterpillar Inc.	McCormick & Company, Inc.
Chevron Corporation	Microsoft Corporation
Cisco Systems, Inc.	MillaporeSigma
Coca Cola Company (The)	Mondelēz International, Inc.
ConocoPhillips, Inc.	National Foreign Trade Council
Corning Incorporated	Oracle Corporation
Deloitte & Touche	Pernod Ricard USA
Dentons US LLP	Pfizer International Incorporated
DHL Express (USA) Inc.	Pitney Bowes
DLA Piper LLP (US)	PricewaterhouseCoopers LLP
eBay Inc.	Procter & Gamble Company
Ernst & Young LLP	Qualcomm Incorporated
ExxonMobil Corporation	Samsung Electronics
Facebook	Siemens Corporation
FCA US LLC	TE Connectivity
FedEx Express	Total
Fluor Corporation	Toyota Motor North America
Ford Motor Company	United Technologies Corporation
General Electric Company	UPS
Google Inc.	Visa Inc.
Halliburton Company	Walmart

DIGITAL ECONOMY GROUP

30 November 2019

VIA E-MAIL

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Re: Public Consultation Document on Global Anti-Base Erosion (“GloBE”) proposal under Pillar Two

Dear Mr. Pross:

The Digital Economy Group (the “DEG”) is an informal coalition of leading U.S. and non-U.S. companies engaged in commerce through digital and non-digital means.¹ We appreciate the opportunity to respond to the Public Consultation Document issued on 8 November 2019 with a Secretariat proposed “Global Anti-Base Erosion” or “GloBE” proposal under Pillar Two.² We request an opportunity to supplement these points and to respond to any comments and questions at the Consultation to be held in Boulogne-Billancourt, France on 9 December 2019.

I. Policy goals

The Pillar Two / GloBE proposal has four stated policy objectives:

1. comprehensively address remaining BEPS challenges by ensuring that the profits of internationally operating businesses are subject to a minimum rate of tax;
2. stop a harmful race to the bottom on corporate taxes;
3. shield developing countries from pressure to offer inefficient tax incentives; and
4. achieve these objectives consistent with principles of design simplicity that will minimize compliance and administration costs and the risk of double taxation.³

¹ The Digital Economy Group’s current membership comprises the following companies: Airbnb, Inc., Amazon.com, Inc.; Expedia, Inc.; Facebook, Inc.; Google, Inc.; Microsoft Corporation; Netflix, Inc.; RELX PLC.; Salesforce.com Inc.; Spotify AB, and Stripe, Inc.

² OECD (2019), *Public Consultation Document, Global Anti-Base Erosion (“GloBE”) proposal under Pillar Two*, 8 November 2019 - 2 December 2019, OECD / G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (hereinafter “**Consultation Document**”).

³ Consultation Document, para. 7.

We provide our comments through the framework of assessing whether the Secretariat's proposal achieves those goals.

II. Elements of Pillar Two

A. Worldwide consolidated financial statements using the accounting standard of the parent entity should be used to determine tax base

To enhance reliability, simplicity and administrability, the general rule should be that tax base determinations will be based upon worldwide consolidated financial statements using the accounting standards of the parent entity.

We do not see any material benefit to determining the tax base by reference to the domestic tax accounting rules as opposed to financial accounting rules. Audited financial statements are subject to high standards of uniform presentation, and require certification by the group's responsible officers. Since audited financial statements are prepared for many non-tax purposes, they should be considered especially reliable for purposes such as GloBE determinations. As a practical point, for a public company (which most in-scope groups would be) the main priority is generally to achieve and present as strong a set of results as possible and not to under-state profits. Accordingly, using published (consolidated) financial statements should provide an element of "self-policing" to ensure that the policy goals of the GloBE proposals are met.

Greater uniformity exists between the major financial accounting standards than among domestic tax accounting standards, which may deviate from the relevant financial accounting in material ways. As the Consultation Document notes in paragraph 14, attempting to use domestic tax accounting standards to compute tax base could result in significantly different results among jurisdictions when applying a single fixed percentage minimum tax rate.

A large percentage of the global economy's multi-national enterprises ("MNEs") prepare their consolidated financial statements under the International Financial Reporting Standards ("IFRS") or US generally accepted accounting principles ("GAAP"). In general, those standards are converging.⁴ At least those two reporting standards should be considered appropriate standards for determining the tax base under the GloBE proposal. The OECD may wish to consider whether other standards used by many major groups, such as Chinese, Indian, and/or Japanese GAAP, also are sufficiently similar so as to designate those standards as acceptable for Pillar Two purposes.

As MNE groups already compute the income of their subsidiaries using the financial accounting standard applicable to the ultimate parent entity of the group, basing the calculation of the GloBE proposal's tax base on that standard would reduce compliance burdens and avoid unnecessary complexity. Companies already reporting under one of the accepted standards should not be required to prepare an additional set of books under a special accounting standard introduced solely to comply with the GloBE proposal.

Concerns about volatility issues arising from temporary differences between book and tax accounting can be best addressed by using global blending and prioritizing the income inclusion rule as described further below.

Appropriate adjustments also should be available for companies recouping losses who might show an artificially low effective tax rate due to timing differences.

B. Blending on a worldwide basis at the level of the parent jurisdiction should be preferred

Worldwide blending at the level of the parent jurisdiction should be the preferred approach.

We believe that worldwide blending will satisfactorily address concerns that groups may continue to maintain low-taxed residual income entities or hybrid arrangements within their structures. First, we note that the changes

⁴ For more information, see https://www.ifrs.com/convergence_landing.html.

implemented under the BEPS Project were focused on such structures, particularly BEPS Actions 2, 5 and 8-10. We expect that a thorough Impact Assessment will demonstrate that many groups have revised or unwound such structures in response, in large part, to the BEPS Project measures.

Second, we also note that, as the Consultation Document itself identifies, the Pillar One proposal will assign additional tax liabilities directly to residual income entities, which will increase the effective tax rates of precisely those entities, including those operating in a low tax jurisdiction.⁵ Thus, the effect of Pillar One will be to increase the total tax paid by those group entities receiving residual nonroutine income. Increasing the taxes paid by such entities will address the goal of counteracting any race to the bottom in corporate tax rates. Further, the increased tax liability of those entities also should ameliorate concerns that worldwide blending would not be sufficient to address the tax rates of residual income entities.

Further, we note that the 2018 introduction of worldwide blending with a minimum tax rate of 10.5% under the Global Intangible Low Taxed Income (“**GILTI**”) provision of US tax reform, along with the ongoing implementation of BEPS Project measures as noted above, has been effective to achieve the policy goals of the GloBE proposal. The implementation of the EU Anti-tax Avoidance Directive (“**ATAD**”) also has encouraged MNEs to adopt structures in line with Pillar Two goals. In response to these recent changes, many US groups have moved to unwind targeted structures containing low-tax entities, showing a clear correlation between worldwide blending and the intended results of the BEPS Project (and the Pillar Two goals). This experience in only a few years of one worldwide blending system indicates that it provides the appropriate incentives.

The GloBE proposal rate should be set at a reasonable rate. We have heard the view expressed that the rate for global blending would need to be substantially higher than the rate for a structure with jurisdiction or entity blending. We doubt that a significant rate difference would be necessary to encourage group behavior to align with Pillar Two policy goals. As noted, the US GILTI rate has been effective to encourage US groups to modify their structures. The purpose of a minimum tax rate should be to discourage tax optimization through structures lacking business purpose and economic substance, not to reverse legislative decisions on how to raise revenue from the local economy. The Pillar Two rules should be designed to capture outliers, not enterprises from jurisdictions which have set their tax policy within the broad spectrum of commercially developed jurisdictions.

We agree with the Consultation Document’s observation at paragraph 60-61 that a major attribute of worldwide blending is that this approach would allow smoothing of some of the volatility in effective tax rates resulting from temporary differences. A design feature that has the effect of creating a minimum tax liability in a year due solely to the effect of a temporary difference will create inequities between taxpayers, as certain taxpayers could become subject to greater taxation under the minimum tax rules not due to any long term economic difference in its business.

Blending at either the jurisdictional or entity level would be needlessly complex given that worldwide blending will meet the policy goal of ensuring that at least a minimum amount of tax is paid on the foreign earnings of MNEs. The policy goal of design simplicity thus weighs strongly in favor of worldwide blending as the preferred approach.

An alternative approach to meeting the goal of ensuring that the profits of internationally operating businesses are subject to a minimum rate of tax would be to assess the effective tax rate of an MNE group at the group parent level, including both domestic and foreign income. Under this approach, if the parent level consolidated effective tax rate is in excess of the minimum tax rate, then that MNE group would be determined to be GloBE compliant without being required to prove the negative that no additional liability is due under the foreign income inclusion rule, or of the transactional rules. Perhaps in such an approach, the home country entity tax authority could certify that there are no problematic entities within the structure.

⁵ See the Programme of Work reproduced in the Consultation Document at paragraph 5.

C. Any income inclusion rule should take priority over the undertaxed payment and subject to tax rules

The income inclusion rule should take priority over the undertaxed payment and subject to tax rules, because compliance with the income inclusion rule would satisfy the main policy objective of imposing a minimum level of tax on the foreign earnings of MNE groups. Once an MNE group has met the requirements of the income inclusion rule, the other transaction based rules become redundant, as a determination has been made that the entire group's operations are sufficiently GloBE compliant. Once an MNE group is deemed GloBE compliant by meeting the income inclusion rule, the transaction based undertaxed payment and subject to tax rules should be switched off.

Prioritizing the income inclusion rule over the undertaxed payment and subject to tax rules would reduce much of the complexity identified in paragraph 14 of the Consultation Document. From a conceptual standpoint, it makes sense for the global tax base to be "owned" by the parent, rather than apportioned into parts owned by intermediate entities.

This same priority rule should apply even if blending were required on an entity or jurisdiction basis. Once a group parent pays any additional "top up" tax based on the agreed full inclusion rule, the group should be regarded as having satisfied the policy goal that a minimum level of tax has been paid on all foreign earnings. Thus, there is no further need for the transaction based rules to apply.

We believe that both a global blending rule and the priority for compliant full inclusion regimes sufficiently addresses the policy goal of stopping a harmful race to the bottom on corporate taxes. The reforms of the BEPS Project have reduced the incentive effect of lower corporate tax rates in certain jurisdictions for groups which do not maintain appropriate substance in such jurisdictions. Experience has shown that even a minimum tax rate of 10.5% has been effective in causing groups to reorganize out of the lowest tax structures.

D. The GILTI regime and ATAD-compliant EU CFC rules should be considered GloBE compliant income inclusion rules

We recommend that the OECD / IF determine a list of full inclusion regimes which would be deemed to be GloBE compliant, and would not be subject to the undertaxed payment and subject to tax rules. Even though we have recommended that as a general rule the financial statements should be used to determine the effective tax rate of the group, we believe that is not inconsistent with that general rule to identify certain legal regimes based on tax accounting principles as GloBE compliant, based on their comprehensive coverage to tax foreign earnings. Taxpayers subject to GloBE compliant inclusion regimes should be exempted from the further application of Pillar Two.

For example, the US GILTI regime should be considered a GloBE compliant CFC regime because it meets the key policy objectives of the OECD under the Pillar Two work by effectively imposing minimum tax on the worldwide earnings of all US MNEs.

In the EU/EEA context, ATAD-compliant CFC regimes should be considered GloBE compliant CFC regimes for similar reasons. If some income inclusion regime beyond an ATAD-compliant CFC regime is desired, we note that some questions exist whether such a regime without a substance carve-out could be imposed under Pillar Two which is compliant with the European Court of Justice decision in the *Cadbury Schweppes* case. The OECD should review the possible constraints imposed by this decision before proposing a Pillar Two full inclusion rule different from accepting that ATAD-compliant full inclusion rules are acceptable.

If there is a political imperative to pursue jurisdictional or entity by entity blending, the OECD should create a model of an acceptable domestic income inclusion mechanism through CFC rules to allow the income to be reported on the parent tax return.

E. Allowances for non-harmful and efficient incentives

We appreciate the goal of shielding developing countries from offering inefficient incentives. The design of Pillar Two should distinguish between those incentives which are considered inefficient and those which are not. The stated Pillar Two goal is clearly only to reduce incentives to adopt inefficient tax regimes, and not to discourage regimes which national governments have found to be productive tools to encourage industrial or commercial development in the country.

We recommend that the mechanics of the GloBE proposal not reverse or reduce the effect of those measures which pass scrutiny at the Forum on Harmful Tax Practices (“**FHTP**”) and which are not harmful under the BEPS Action 5 final report. This could be achieved, for example, through a carve-out for income that is reported under an appropriate incentive regime.

Many national legislatures consider research and development (“**R&D**”) credits or similar allowances as important incentives to support innovation and economic growth in their economies. We expect that the GloBE regime would take R&D credits and other tax incentives for innovation and development into account in some way so that their effect is not neutralized by the Pillar Two proposal. For example, the amount of claimed R&D credits could be added back to the numerator of the effective tax rate calculation in applying the minimum tax rule.

III. Further technical input

In the spirit of brevity, our other technical input in response to the issues raised by the Consultation Document are included below in bullet point format.

A. Generally

- The scope of the undertaxed payment rule and the subject to tax rule should be limited to payments related to “mobile” income (e.g., interest and royalties). Other payments (e.g., by distributors to acquire inventory which they on-sell, or payments for services rendered) should be out of scope.
- To avoid disputes and provide certainty, strong dispute resolution mechanisms are essential. Effective and binding dispute resolution with peer review should be included within the GloBE proposal.

B. Adjustments for temporary differences

- By their nature, temporary differences relate solely to the timing of taxation rather than whether the item will be subject to tax. For simplicity, no adjustment to the tax base should be made in respect of them and calculations of effective tax rate should be based on tax accrued rather than cash tax paid.
- With respect to deferred accounting, we recommend using financial statement results as reported in company public financial statements. In other words, financial statements should not be adjusted to remove the impact of deferred accounting as such adjustments smooth out timing differences.
- There are differences of opinion among DEG Members regarding the use of a multi-year averaging approach to measure the effective tax rate. On one hand, it would provide more stability (for example “smoothing out” the effect of one-off items), however on the other, its adoption would add additional complexity.
- On some occasions, groups may actually report a negative effective tax rate. That should not be considered results below the minimum tax.
- Applying the minimum tax computations at the world wide consolidated level and prioritizing the income inclusion rule will reduce the impact of these issues.

C. Allocating income between branch office and head office

- Paragraph 63 of the Consultation Document suggests using information provided in the CBCR report to allocate income between branch and head office. The purpose of the CBCR report is solely as a high level risk assessment tool and the information included is prepared on this basis. Were the CBCR data to be used to comply with the GloBE proposal it is likely that a number of adjustments would be required to the data before it would be meaningful. Accordingly, CBCR data should not be used.

D. Carve-outs and thresholds

- A substance-based carve out should apply reflecting the principles stated in the BEPS Action 5 final report.
- We agree that the Pillar Two proposal represents a substantial change to the international tax architecture, and therefore it is appropriate that the Pillar Two proposal should apply to all sectors of the economy. We would not support changes to the proposal that result in the ring-fencing of highly digitalized businesses.
- The GloBE provisions should only apply to those companies above the CBCR threshold.
- Appropriate adjustments would be necessary for dispositions and other extraordinary events which can create one-time anomalies in the effective tax rate calculations.

IV. Coordination with Pillar One and withdrawal of unilateral actions

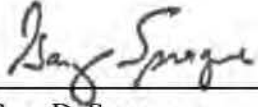
We continue to strongly support the work of the OECD / IF to achieve a global consensus through this project. We believe that a critical outcome of the ongoing work on Pillar One and Pillar Two will be to restore the stability and certainty of the international tax system through an appropriate global solution, agreed upon by as many countries as possible. As we noted in our submission on Pillar One, a necessary component of that solution is a commitment to withdraw all implemented and proposed digital service taxes and other unilateral actions that are intended to operate outside international obligations.⁶ We request that the OECD / IF express this commitment as an element of both the political agreement to be achieved in early 2020, and in the more technically complete agreement to be achieved in mid-2020.

⁶ For a list of such measures, please see Appendix A of the DEG's comments on Pillar One.

* * *

Thank you again for the opportunity to provide these comments. We look forward to participating in the 9 December Consultation.

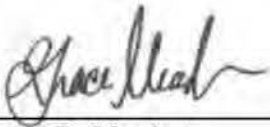
Yours sincerely,



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From: Kranbuhl, Kipp
Sent: Mon, 17 Sep 2018 12:42:07 -0400
To: (b)(6); Dreyer, Steven; Seitz, Steven; Harter, Chip
Cc: Washington, Anita; Williams, Terry; Lopez, Jasmine
Subject: BEAT Discussion
Attachments: Coalition Submission to Treasury 9-13-18.pdf

Attendees:

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September 13, 2018

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Re: Section 59A Regulatory Guidance

Dear Sirs:

On behalf of the members of our coalition,¹ we want to thank you for the time you and your colleagues have spent meeting with us and other taxpayers considering the application of the Base Erosion Anti-Abuse Tax (BEAT), particularly with respect to the use of "foreign affiliate reinsurance." As we have discussed, the members of our coalition believe the BEAT is working largely as intended to address the foreign affiliate reinsurance loophole, and has not adversely affected capacity or pricing in the insurance market as the availability of capital remains strong.²

Prior to passage of the BEAT, foreign-owned insurance companies were using affiliate reinsurance to strip much of their U.S. profits to low tax/no tax countries like Bermuda and Switzerland to avoid U.S. taxes that U.S.-based companies were required to pay. This tax break provided foreign-owned companies with an unfair competitive advantage over American companies in doing business here at home and resulted in foreign companies gaining domestic market share at the expense of American-owned companies. Several companies inverted overseas to take advantage of this loophole.

Fortunately, policymakers recognized the need to address this unintended loophole as part of H.R. 1 by

¹ The Coalition for American Insurance consists of ten major U.S.-based insurance groups that employ hundreds of thousands of people within the United States. For more information about the coalition, please see <http://www.coalitionforamericaninsurance.com/>.

² See, e.g., Dowling & Partners, 8 IBNR Weekly 23 (February 22, 2018) ("High levels of reinsurance capacity, both traditional and lower cost alternative capital, were the reason the overall rate improvement at January 1 was less than originally expected in the wake of the 2017 catastrophes.")

adopting the BEAT. According to the legislative history, the BEAT was created to function as a minimum tax in order to preclude companies from eroding the tax base through use of certain related-party payments. For this purpose, Congress singled out reinsurance payments to foreign affiliates as a type of base erosion payment subject to the BEAT.

The adoption of BEAT has helped to level the competitive playing field. As Dowling & Partners, a leading insurance industry expert, has said, “U.S. based primary insurers will no longer operate with the significant economic/mathematical/structural disadvantages relative to foreign based entities. All else equal, and they never are, the lower U.S. corporate tax rate, when combined with the effective elimination of the ability to undertake tax advantaged quota-share agreements with “affiliated” entities, brings U.S. primary insurers to at least parity with foreign owned insurers.”³

We are already seeing positive economic impacts in the insurance industry. The pressure to invert and the capital flight to offshore domiciles have diminished significantly as a result of the BEAT and other changes that were made. For example, Assurant reversed its plans to invert into The Warranty Group and instead acquired the Bermuda-based company and remained in the U.S. Several foreign companies also have announced they are unwinding their large intercompany quota share arrangements, keeping their insurance business and reserves (and the associated U.S. taxes) in the United States. Finally, in announcing U.S.-based AIG’s plans to acquire Bermuda-based reinsurer Validus, the Financial Times commented that “Along with a lower US headline corporate rate, the BEAT diminishes whatever advantages Bermuda-based reinsurers had in writing business. It is no surprise that groups, which tried to engage in Bermuda tax arbitrage, are now seeking rescues by the likes of AIG. Bermuda’s airport may be welcoming many more US CEOs in the months ahead.”⁴

Application of BEAT

The BEAT has a broader base (but lower rate) than the regular tax and only applies if it exceeds the taxpayer’s regular tax liability after reduction for tax credits (other than certain specified credits in years prior to 2026). The tax base for the BEAT is the taxpayer’s regular taxable income, plus (1) any “base erosion tax benefits” arising from specified base erosion payments and (2) the “base erosion percentage” amount of any net operating loss (NOL) deduction allowable for the tax year. For the purpose of the BEAT, a base erosion payment specifically includes any premium or other consideration for reinsurance paid or accrued to a foreign related party. The BEAT rate is five percent for tax years beginning in calendar year 2018, 10 percent for tax years beginning in 2019 through 2025, and 12.5 percent for tax years beginning after December 31, 2025.

Thus, assuming a 10% BEAT rate and not taking into account any applicable credits or exceptions,⁵ the BEAT generally will apply only if any affiliate reinsurance (and other base erosion) payments are close to or exceed 100% of the U.S. taxpayer’s regular taxable income. Thus, the BEAT still permits a significant amount of foreign affiliate reinsurance and only applies to “excessive” payments.

³ Dowling & Partners, 1 IBNR Weekly 5 (January 4, 2018).

⁴ See “AIG: The Beat Goes On,” Financial Times (January 23, 2018).

⁵ There are several exceptions to application of the BEAT. First, the BEAT does not apply to corporations whose average annual gross receipts for the 3-taxable-year period ending with the preceding taxable year are less than \$500 million. Second, the BEAT does not apply to individuals, S corporations, regulated investment companies or real estate investment trusts. Finally, a *de minimis* exception is provided for companies whose foreign related party payments are less than 3 percent of overall deductions (2 percent for certain banks and securities dealers).

Keep the Reinsurance Loophole Closed

We are concerned that a few comment letters to Treasury regarding the BEAT seek indirectly to reopen the loophole and threaten to eviscerate the progress that has been made to date.

For example, in a letter regarding Modco cessions,⁶ the commenters suggest that the base erosion tax benefit would be better measured by the reinsurance settlement payment made to the related foreign reinsurer rather than the reinsurance premium paid, and investment income ceded, to the foreign affiliate. We believe, however, that such treatment (i.e., effective netting) is clearly inappropriate under the language of the BEAT and would result in substantively equivalent transactions being treated very differently.

Modco is economically identical to coinsurance, and the income statement effects are the same. According to the Society of Actuaries, the emphasis should be on "coinsurance" and not on "modified," because "all of the specifics of Coinsurance apply to Modco."⁷ The only difference is who holds the reserves (and the investment assets with respect to the reserves) and the attendant accounting to reflect reserve credits/adjustments. In Modco arrangements, the ceding company retains the reserves and the investment assets.

Ceded premium paid under coinsurance is a reduction in premium income and is clearly treated as a base erosion payment if paid to a related foreign reinsurer. Similarly, for both tax and regulatory accounting purposes, Modco premium ceded is treated as a reduction in premium income. The amount returned to the ceding company as a prepayment of future obligations under the reinsurance contract is recorded for regulatory purposes as "reserve adjustments on reinsurance ceded," an item separate from premium income (not return premium). Interest income on the invested assets is credited to the reinsurer in this same "reserve adjustments on reinsurance ceded" account. Thus, any premiums paid or accrued to a related foreign insurer in a Modco arrangement should be treated as base erosion payments, rather than only the net reinsurance settlement payment as suggested by the commenters. Allowance of effective netting as suggested by the commenters would treat economically similar transactions differently, create an incentive to prefer Modco to standard coinsurance, and effectively reopen the affiliate reinsurance loophole which was addressed by the BEAT.

Thus, we respectfully request that Treasury clarify that the BEAT applies to the reduction in premium income for ceded premium under Modco contracts with no netting of Modco reserve adjustments or other returns. Section 803(a)(1)(B) includes reductions in premium income for modified coinsurance premium ceded (regardless of subsequent return Modco reserve adjustments). Moreover, any subsequent Modco adjustment should be broken into its components rather than netted. The gross amount payable to the foreign related reinsurer as premium or investment income should be subject to the BEAT. This is the appropriate treatment under the statute and is necessary to maintain parity between Modco and coinsurance transactions.

For similar reasons, we are concerned about a recent submission sent to Treasury from Chubb.⁸ In the e-mail, they suggest that "losses incurred" on reinsurance assumed into the U.S. from a foreign affiliate should not be base erosion payments. While we agree with the general premise that losses incurred should not be treated as base erosion payments, their proposed regulatory fix – to carve out from BEAT any reductions from gross income in section 803 or 832(b)(1) (other than reinsurance premium

⁶ See memorandum to Brett York, Attorney-Advisor, Office of Tax Legislative Counsel from Brownstein Hyatt Farber Schreck, LLP and McGuire Woods LLP (February 20, 2018).

⁷ Society of Actuaries, Introduction to Reinsurance Boot Camp, (May 6, 2015).

⁸ See letter to Chip Harter, Deputy Assistant Secretary, from Timothy Boyle, Head of Global Tax, Chubb (forwarded by e-mail from Jodi Bond, August 17, 2018).

payments) -- is far broader in application. First, their proposed solution may be interpreted to allow Modco reserve adjustments to be netted against reinsurance premium and investment income payments to foreign related parties in applying the BEAT. For the reasons described above with respect to the first comment letter, we believe this is inappropriate under the terms of the statute, would treat similar transactions very differently, and would reopen the reinsurance loophole through use of Modco arrangements.

Second, in the case of property & casualty insurance, their proposed solution carving out amounts covered by section 832(b)(1) has the potential to exclude from BEAT several forms of base erosion payments made to affiliates such as interest, rents and service payments. This would allow them effectively to skirt the BEAT, and reopen the loophole by restructuring their offshore arrangements to include greater services and interest rather than reinsurance premiums, or to include other payments made by non-insurance companies in the reinsurance contract. It is important to note that each of these items is treated as a deduction both for annual statement purposes and under section 832(c). Also, they are clearly the types of base erosion payments that Congress intended to subject to the BEAT.

Thus, because the adoption of BEAT was clearly intended to discourage base erosion, we respectfully request that Treasury and the IRS ensure that any regulatory interpretations regarding application of the BEAT with respect to the insurance industry do not allow or promote base erosion. In fact, we encourage Treasury to use its authority to prevent avoidance of BEAT by identifying transactions or arrangements that are designed, in whole or in part, to characterize payments otherwise subject to BEAT as payments not subject to BEAT (Section 59A(i)(1)(B)(i)).⁹

By contrast, as suggested in a recent comment letter from AIG,¹⁰ we believe that Treasury and the IRS should clarify that losses incurred and claims or benefit payments under a reinsurance contract between a U.S. reinsurer and a foreign related party are not treated as base erosion payments. The payment of claims is an integral part of reinsurance transactions that help to grow the U.S. tax base by bringing premiums, investment income and profits to the U.S., and thus help enlarge (rather than erode) the U.S. tax base. Also, these payments are not effectively related party payments as they ultimately go to third party customers, and the group as a whole does not control the timing or amount of such payments. Therefore, we believe it would be consistent with the legislative intent of the BEAT to clarify that any such loss, claims, or benefit payments on reinsurance provided to a foreign related party are not subject to the BEAT.¹¹

However, the appropriate treatment of ceding commissions paid to foreign related parties is less clear. While such payments are also with respect to transactions that grow the U.S. tax base, ceding commissions themselves are comprised of many types of expenses and often include a profit or contingent profit. While the AIG example is simple, ceding commissions are often ill-defined or identified as a percentage of premium. This leads to variability across contracts and allows for flexibility, particularly in

⁹ For example, Treasury should clarify that retroactive reinsurance with a foreign affiliate is subject to the BEAT, because it allows for similar base erosion as prospective foreign affiliate reinsurance.

¹⁰ Letter to Kipp Kranbuhl, Tyler Williams, Douglas Poms and Steven Seitz, Department of Treasury, from Darren Trigonoplos, Vice President, AIG (August 24, 2018).

¹¹ We support clarifying language that has been developed and suggested by a group of American based life and property and casualty insurance companies regarding the definition of base erosion payment. Their suggested language is as follows:

() *Base erosion payment.*—

() *Claim, benefit and losses incurred amounts on certain reinsurance not included.*— In the case of an insurance company, the term base erosion payment does not include an amount paid or accrued to a foreign person which is a related party for claims, benefits, or losses incurred [amounts deductible by life insurance companies under section 805(a)(1) and amounts taken into account by nonlife insurance companies under section 832(b)(5)] with respect to reinsurance. This paragraph shall not apply to (a) payments with respect to insurance of related parties to the taxpayer as provided in [cross-reference to regulations provision implementing the related-party definition in section 59A(g)], or (b) payments within the scope of [cross-reference to provision implementing the expatriated entity rules of section 59A(d)(4)].

the related party context. To avoid incentives for base erosion in the insurance industry, any guidance with respect to ceding commissions should be consistent with the treatment provided to similar services or other costs in other similar arrangements and industries.

Once again, we greatly appreciate the opportunity to provide our comments and suggestions for your consideration in connection with the proposed guidance regarding the BEAT. Please let us know if you have any questions or comments. We would be glad to meet with you to discuss these issues further.

Sincerely yours,



Jo-Marie St. Martin
On behalf of the Coalition for American Insurance
Vice President, Federal Government Relations
W. R. Berkley Corporation

cc:

Douglas Poms
Brian Jenn
Brett York
Kevin Nichols
David Brazell
Marjorie Rollinson
Daniel McCall

From: Jackel, Monte
Sent: Mon, 17 Sep 2018 13:04:37 +0000
To: NY TAX;WA TAX;HO TAX
Subject: DAILY TAX REALTIME®

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Private Equity Firms Face Compliance Woes Under 'GILTI' Tax Rules

Posted: Sep 17, 2018 07:01:17

By Lydia O'Neal and Allyson Versprille

Small shareholders of U.S. partnerships with overseas interests could get smacked with the 2017 tax overhaul's levy on global intangible low-tax income, a development creating a slew of unexpected complexities, particularly for private equity funds.

The Internal Revenue Service's proposed regulations for the GILTI tax ([REG-104390-18](#)) outlining the minority shareholders' liability could also factor into some funds' decisions as they weigh whether or not to incorporate, tax professionals told Bloomberg Tax.

"It's going to be a compliance nightmare for software providers" that manage partnerships' financial filings "and a compliance nightmare for partnerships that are going to have to deal with this," said Glenn Dance, a former IRS official and current managing director at Grant Thornton LLP in Washington. "When they do their modeling work, they take into account the law at the time."

The 2017 tax law ([Pub. L. No. 115-97](#)) subjects U.S. shareholders who own more than 10 percent of a controlled foreign corporation to a tax on GILTI, which is the income of the CFC that exceeds 10 percent of the value of its tangible, depreciable assets.

If a U.S. partnership owns at least 10 percent of a CFC, that ownership interest is split among the partners. It doesn't matter whether the partners themselves, by extension, individually own 10 percent of the CFC, practitioners said, because their income from that indirect ownership of the CFC is still subject to the GILTI tax.

More Conversions, Less Certainty

"I think some of these entities will definitely convert to corporations and/or they'll convert portions of their tax structures into corporations," Andrew Silverman, a Bloomberg Intelligence tax policy analyst, said in an email.

Private equity and asset management giants KKR & Co. LP and Ares Management LP have already done so, he said, prompting speculation that others, such as Blackstone Group LP, Carlyle Group LP, and Apollo Global Management LLC, may soon follow. “The impact of GILTI on partnerships,” Silverman said, “could be the deciding factor that pushes them to convert.”

And affected companies are going to make their thoughts loud and clear, practitioners said, as the IRS irons out the final version of those proposed rules—a potential for change that will only heighten uncertainty for businesses.

“This is a first stab at the rules—they’re going to go through a lot of revisions,” said Carl Merino, counsel at Day Pitney LLP in New York. Companies’ financial disclosures, he added “are necessarily going to remain in flux.”

Striking a Balance

In writing the proposed regulations, the IRS sought to reconcile the tax law’s GILTI provision with existing rules governing the income of a CFC, known as Subpart F income, Merino said.

“Since the GILTI rules are generally supposed to track Subpart F, they were trying to be consistent, I think,” said Merino. While the IRS considered two different approaches to the problem of U.S. partnerships with 10 percent or greater interests in CFCs, he said, “any approach produces some distortion.”

Kim Blanchard, a partner at Weil Gotshal & Manges LLP in New York who focuses on private equity partnerships and international tax planning, said the approach the agency chose should hardly be a surprise at all, as the IRS has been tacitly applying it under the Subpart F rules all along. The IRS chose this approach, she said, because otherwise it would have to admit that it was retroactively wrong. “We’ve done a number of deals with private equity,” she said, in which “we have put domestic corporations on top of foreign targets just for this reason, because it’s a nightmare.”

Monte A. Jackel

AKIN GUMP STRAUSS HAUER & FELD LLP

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From: Jackel, Monte
Sent: Mon, 17 Sep 2018 16:50:20 +0000
To: Merrick, John J.
Cc: Harter, Chip
Subject: Fwd: Contact
Attachments: 55ti0627.pdf, ATT00001.htm

Last point. Notice 2005-14 on section 199 said:

“(2) *Gain or loss from the disposition of an interest in a pass-thru entity* . Because the sale of an interest in a pass-thru entity does not reflect the realization of QPAI by that entity, QPAI generally does not include gain or loss recognized on the sale, exchange or other disposition of an interest in the entity. However, if § 751(a) or (b) applies, gain or loss allocated to assets of the partnership the sale, exchange, or other disposition of which would give rise to an item of QPAI is taken into account in computing the partner’s § 199 deduction.”

I am not sure it is correct on 199 but that point is moot because section 751(c) incorporates 1248. But it is an open question on GILTI. Section 199 avoided the issue.

I think that (1) the last day should be determined at the domestic partnership level; (2) that immediately before the sale of a partnership interest by a US shareholder there should be a deemed distribution to that partner, sale of the assets and deemed recontribution by buyer. (3) If seller is US but not a US shareholder it is an issue of first impression under the law. I favor last day at domestic partnership level. There is a tricky interaction with 743 and 1248 we can discuss.

Here is my prior article.

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VIEWPOINTS

CFC Stock Held by Foreign Partnerships: Confusion Galore

by Monte A. Jackel and Robert J. Crnkovich

Monte A. Jackel is a managing director at PricewaterhouseCoopers LLP and Robert J. Crnkovich is an adjunct professor at Georgetown University Law Center and a principal at PricewaterhouseCoopers LLP. The authors wish to acknowledge the assistance of Chip Harter and Marty Collins, also of PricewaterhouseCoopers LLP, for their review and assistance in the preparation of this article. This article represents the personal views of the authors and does not necessarily represent the views of PricewaterhouseCoopers LLP.

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Sections 951 through 961 contain the principal rules addressing the inclusion in gross income by a U.S. shareholder¹ of subpart F income. Subpart F income, as defined in section 952, generally consists of passive income, such as dividends and interest, earned by a controlled foreign corporation.

Section 951 provides that subpart F income is included in the gross income of U.S. shareholders as if it were distributed by the CFC on a current basis, without regard to any actual transfers by the foreign corporation. Section 961(a) then provides for a positive basis adjustment to the CFC stock held by a U.S. shareholder, or to the U.S. shareholder's partnership interest in a foreign partnership (or other foreign entity) that holds that stock.

The basis adjustment to the partnership interest is necessary because section 958(a)(1)(B) and (a)(2) treat stock held indirectly through foreign entities as if it were owned directly by the U.S. shareholder. To avoid double taxation when the earnings that have been previously taxed as subpart F income are later distributed

to the U.S. shareholders, section 959 provides for exclusion of this previously taxed income (PTI).

Current Statute and Regulations

Unaddressed in the statute and regulations is the impact of the subpart F inclusion and the later PTI distribution on the foreign partnership's basis in the CFC stock; that is, the statute does not specifically provide for a basis increase in the CFC stock held by a foreign partnership for the subpart F inclusion by its U.S. partners, or for a basis decrease in the CFC stock on the distribution of the PTI to the partnership. Also left unaddressed are the basis consequences to the U.S. partners when the PTI is first distributed to the foreign partnership and then later when the PTI is distributed by the foreign partnership to its partners. The failure to account for an increase in stock basis in the CFC stock in the hands of the foreign partnership for a subpart F inclusion, and the failure to treat the distribution of PTI from the CFC to the foreign partnership as tax-exempt income under section 705(a)(1)(B) for the U.S. partners in the partnership, will result in inside-outside basis differences that are inappropriate and that could lead to adverse results to both taxpayers and the government.

On August 29, 2006, proposed regulations were issued under sections 959 and 961.² These proposed regulations do not address the application of the code sections in cases when the stock of a CFC is owned by

¹A U.S. shareholder is defined in section 951(b) as a U.S. person who owns or is considered as owning 10 percent or more of the total combined voting power of all classes of stock entitled to vote of the foreign corporation. This definition ties into section 951(a), which requires the inclusion in gross income of subpart F income of U.S. shareholders, and also ties into the definition of CFC in section 957(a), which requires the ownership by U.S. shareholders of more than 50 percent of either the total voting power of all classes of stock entitled to vote or the total value of the stock of the corporation.

²REG-121509-00, *Doc 2006-16316, 2006 TNT 167-6*.

a partnership, specifically by a foreign partnership.³ This omission is particularly surprising because of the common use of foreign partnerships to hold CFC stock. With the potential for future reforms in the international tax area by the Obama administration, the use of foreign partnerships is likely to increase. Hence, a clear resolution of the issues presented in this article will assume critical importance.

The problems associated with the failure of the proposed regulations under sections 959 and 961 to address basis adjustments in the context of U.S.-owned foreign partnerships holding CFC stock will also become more prevalent because of the final regulations under section 1248 issued in 2007.⁴ These regulations deal with sales of CFC stock by foreign partnerships.⁵ The 2007 section 1248 final regulations provide that, for purposes of section 1248, "if a foreign partnership sells or exchanges stock of a corporation, the partners in such foreign partnership shall be treated as selling or exchanging their proportionate share of the stock of such corporation." Therefore, under these regulations, the sale by a foreign partnership of CFC stock will be treated as a section 1248(a) dividend to those U.S. partners of the partnership who are treated as owning the requisite amount of stock of the CFC held by the foreign partnership.⁶

Need for Guidance

There is a need for guidance in the application of sections 959 and 961 to stock of a CFC held by a foreign partnership whose partners consist of U.S. persons. Specifically, as stated earlier, section 958(a)(1)(B) and (a)(2) treat stock owned by a foreign partnership as being owned proportionately by its partners.⁷ This

means that, under section 951(a)(1)(A), the U.S. partners of a foreign partnership who meet the U.S. shareholder ownership test of section 951(b) are required to include the subpart F income of the CFC owned by the foreign partnership in gross income as if the U.S. partners owned that stock directly.

Section 951(b), in defining a U.S. shareholder, refers to ownership under section 958(a), which includes ownership through a foreign partnership. In those cases, section 961(a) refers to "the basis of property of a United States shareholder by reason of which he is considered under section 958(a)(2) as owning the stock of a controlled foreign corporation" in providing for an increase in basis by the amount included in gross income under section 951(a). Reg. section 1.961-1(a)(1)(i) and (ii) and 1.961-1(b)(1)(ii) provides for such a basis increase to the stock of a CFC or the interest in the foreign partnership that owns the stock under local law. Similarly, section 961(b)(1) and reg. section 1.961-2(a)(1)(i) and (ii) provide for a basis decrease to the CFC stock or to the basis in the foreign partnership that owns the stock in the case of an amount excluded from gross income as PTI under section 959(a).

Although section 961 provides for both increases and decreases to the basis of the stock of a CFC, or the basis of an interest in a foreign partnership owning that stock, it is not clear that a U.S. shareholder (or U.S. person) would receive an increase in basis in the CFC stock and its partnership interest on the same subpart F inclusion. In the case of a foreign partnership that owns stock in a CFC, if the U.S. partners of that partnership have a subpart F inclusion and a corresponding basis increase in their partnership interests, does the foreign partnership also obtain a basis increase in the stock of the CFC that it owns under local law, given that it is the partners of that partnership who include the amounts of subpart F income in gross income?

This deficiency in the statute and regulations creates uncertainties in numerous situations. Consider the following:

- Is there a doubling up of income if the foreign partnership sells the CFC stock before the PTI is distributed to the partnership?
- For a tax-indifferent U.S. shareholder (for example, one with built-in losses), would the (often artificial) gain from a sale of the CFC stock by the foreign partnership (if there is no basis increase to that stock in the hands of the partnership) create additional outside basis that might be shifted to other property on a liquidation of the

³Domestic partnerships that own CFCs present their own separate issues, which will not be discussed in this article. Domestic partnerships are considered as an entity in testing for the CFC status of the stock of a foreign corporation owned by that partnership. See reg. section 1.701-2(f), Example 3. See also Notice 2009-7, 2009-3 IRB 312, *Doc 2008-27221*, 2008 TNT 250-3 (domestic partnership used as so-called blocker of subpart F income listed as a transaction of interest).

⁴T.D. 9345 (July 30, 2007), *Doc 2007-17592*, 2007 TNT 146-8.

⁵Reg. section 1.1248-1(a)(4) and -1(a)(5), Example 4.

⁶For a detailed discussion of many of the issues that arise with partnerships in the international context as it relates to the holding of CFC stock by such partnerships, see F. Scott Farmer, Gary R. Huffman, Monte A. Jackel, and Brooke E. Hintmann, "Partnership Dispositions of Stock in Controlled Foreign Corporations," *Tax Notes*, Mar. 20, 2006, p. 1319, *Doc 2006-4022*, or 2006 TNT 54-25.

⁷See also reg. section 1.958-1(a)(2), (b), and (d), Example 2. The issues discussed in this article are separate but parallel to the issues dealing with the application of the successor-in-interest rule of reg. section 1.959-1(d) to both domestic and foreign partnerships. This rule provides that before the contribution of the CFC stock to the partnership, the U.S. contributing partner has

(Footnote continued in next column.)

had a subpart F inclusion. For a good discussion of these issues, see Chris Bowers and Natan J. Leyva, "The Application of Sections 959 and 961 to Indirectly Owned CFCs," 34 *Tax Mgmt. Intl. J.* 307 (June 2005).

partnership? Will a failure to increase the basis of the CFC stock held by the foreign partnership create an inside-outside basis mismatch, thereby creating the potential for basis shifts?⁸

- Is there a section 959(a) PTI exclusion available to the foreign partnership if, after the subpart F inclusion, the earnings and profits of the CFC are distributed to the foreign partnership?
- If so, how does this PTI exclusion affect the partners' basis in their partnership interests?
- If the foreign partnership then distributes the PTI to its partners, is the basis of the partners in the partnership decreased by a distribution of that PTI under section 705?⁹ If so, do the partners recognize gain under section 731(a) when the amounts representing PTI are distributed to them by the foreign partnership?
- If the partners sell their partnership interests before the PTI is distributed to them, will they have further gain on the sale?

Analysis

As stated earlier, section 958(a)(1)(B) and (a)(2) treat stock of a CFC owned by a foreign partnership as held directly by the U.S. partners for purposes of subpart F. Section 959 treats the payment of undistributed subpart F income as PTI. Section 961(a) and (b) are intended to adjust stock basis when there is a subpart F inclusion and a later distribution of PTI (otherwise, a sub-

sequent taxable disposition of a CFC with a PTI account would yield a second tax on the same earnings).

To prevent overtaxation of the U.S. partners of the partnership, the foreign partnership should get a basis increase in the CFC stock for the subpart F inclusion of the U.S. partners and the foreign partnership should also be entitled to the PTI exclusion on a later distribution of the PTI from the CFC to the foreign partnership. The U.S. partners should also be entitled to correlative positive and negative adjustments for the PTI exclusion of the foreign partnership (as if it was tax-exempt income under section 705(a)(1)(B)) and the distribution of the PTI from the CFC to the foreign partnership, and then from the foreign partnership to its partners (under section 705(a)(2)), so as to achieve the correct economic results: the taxation of the subpart F income only one time regardless of where in the chain of ownership the PTI resides.

It must be pointed out, however, that some practitioners have found it difficult to get comfortable with the idea that there is a section 961(a) or (b) basis adjustment to the shares of the CFC held by a foreign partnership under the current statute and its implementing regulations for two reasons. First, reg. section 1.961-1(a)(1)(i) and (ii) and 1.961-1(b)(1)(ii) provide for an adjustment to the U.S. shareholder's basis in either stock in the CFC or the U.S. shareholder's basis in the property (for example, a foreign partnership interest) through which ownership of the CFC shares is attributed to the U.S. shareholder. The regulations do not explicitly provide for an increase in *both* the U.S. shareholder's basis in its foreign partnership interest *and* the foreign partnership's basis in the CFC shares. Second, an analogous problem existed before 1997 for stock of lower-tier CFCs. Section 961 did not provide for an adjustment to the basis of the stock of a lower-tier CFC in the hands of a first-tier CFC when there was a subpart F inclusion from the lower-tier CFC. Congress added section 961(c) to address this problem, but section 959(c) by its terms applies only to stock of a lower-tier CFC held by an upper-tier CFC. The analogous issue regarding shares of a CFC held by a foreign partnership was not addressed in this 1997 legislative amendment to the statute.

Recommendation

We believe that the appropriate basis adjustments could be provided by regulation and would not require a statutory change. Guidance is necessary to provide for the correct economic results and to provide for a rational result to the statutory regime first enacted by Congress in 1962.¹⁰

⁸Assuming the partnership owns other appreciated property, a transfer by the U.S. shareholder of its interest in a foreign partnership having a section 754 election in effect may result in an increase in the basis of both the CFC stock and the partnership's other assets. This is because under reg. section 1.743-1(d) the inside basis of the partnership in the hands of the transferee would reflect a share of gain on a later sale of the CFC stock that should not exist after the subpart F inclusion has occurred. In other words, the failure to increase the basis of the CFC stock may in some instances cause the subpart F inclusion to create basis in assets other than the CFC stock — the asset for which it was destined!

⁹Subpart F was enacted in 1962 as part of P.L. 87-834. In 1997 section 961(c) was added as part of P.L. 105-34 to provide that if a U.S. shareholder is treated under section 958(a)(2) as owning any stock in a CFC that is actually owned by another CFC, adjustments similar to those under section 961(a) and (b) shall be made to the stock of the CFC that is owned by the upper-tier CFC under local law. The inference from this amendment is that the actual local law owner of the CFC stock, such as a foreign partnership, would not otherwise be subject to the basis adjustments under section 961(a) and (b). Informal discussions with those involved in the drafting of the 1997 amendment concluded that absent that amendment, section 961(a) and (b) would not have applied. Even though a subsequent Congress may have interpreted a code provision, namely section 961(a) and (b), in a certain way does not mean that such interpretation controls the intent of the Congress in 1962 when it enacted section 961(a) and (b).

¹⁰As noted, some practitioners might argue that a statutory change would be required to achieve these results based principally, if not entirely, on the literal wording of section 961(a) and (b). (Footnote continued on next page.)

Under one approach, this treatment of basis increases and decreases as follows:

1. The subpart F inclusion by the U.S. partners causes an increase in the basis of the CFC stock in the hands of the foreign partnership with respect to the U.S. partners of that partnership.
2. A distribution of the PTI to the foreign partnership is treated as tax-exempt income¹¹ in the hands of the foreign partnership with respect to the U.S. partners of that partnership.

Alternatively, for purposes of determining basis increases in the CFC stock,¹² the CFC stock would be treated, immediately before the subpart F inclusion by the U.S. partners, as if it had been distributed by the foreign partnership to the partners and then recontributed to the partnership immediately after the subpart F inclusion. Similarly, in determining basis decreases, the CFC stock would be treated as if it had been distributed to the U.S. partners immediately before the distribution of PTI to the partners and then as if the stock was recontributed to the partnership immediately after that PTI distribution.

Example

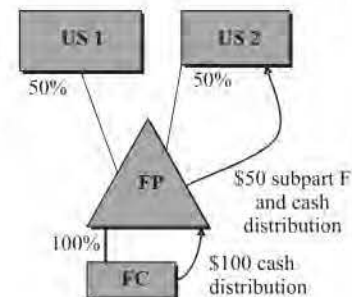
Assume a foreign partnership, FP, is owned equally by two U.S. shareholders. Each contributes \$500 to FP, which uses the \$1,000 to form CFC. CFC invests the \$1,000 in an asset that produces \$100 of subpart F income. Each partner has a \$50 subpart F inclusion. The CFC then distributes the \$100 of PTI to FP, which then distributes \$50 to each of its partners. (See figure.)

Suggested Approach Not Adopted

Any other treatment of this transaction will result in overtaxation of the U.S. partners. For example, if FP does not obtain a CFC stock basis increase of \$100 for the subpart F inclusion, a later sale of the CFC stock by FP while the CFC still holds the PTI would result in FP realizing \$100 of gain, which would pass

FP Interest Basis:

- Each partner's initial tax basis in FP = \$500
- Increase for \$50 share of subpart F income at partner level under section 961(a)
- Increase for \$50 share of exempt income (PTI) at FP level under section 705(a)(1)(B)
- Decrease for \$50 of PTI exclusion at partner level under section 961(b)
- Decrease for \$50 cash distribution under section 705(a)(2)
- Ending basis in FP = \$500



through to the U.S. shareholders as a dividend based on reg. section 1.1248-1(a)(4) (assuming the CFC has other nonpreviously taxed earnings and profits). This income would pass through and be taxed to the U.S. partners who, under sections 951(a)(1)(A), 951(b), and 958(a)(2), have already included the \$100 of earnings in gross income as subpart F income. Similarly, if the distribution of the subpart F income from the CFC to FP is not exempt from tax as PTI under section 959(a), the U.S. partners will be taxed on \$200 attributable to only \$100 of subpart F income. And if the distribution to FP by CFC does not change the basis of the U.S. partners in FP before either the distribution of that amount to them or the sale of their interests in FP, the subsequent distribution or sale could result in income under section 731 or gain under section 741 when no net income or gain has been realized by the partner and the partner has already been subjected to tax on that income or gain under subpart F.

Conclusion

Regulations should be proposed under sections 705, 959, and 961 that provide for the treatment of subpart F inclusions, PTI distributions, and basis increases and decreases that take into account the hodgepodge created by section 958(a)(2) that treats the U.S. partners of that partnership as the tax owners of the CFC stock as if they held that stock directly. The rules of subchapter N require that the U.S. partners of the partnership treat the stock as owned by them directly, but those rules do not override the rules of subchapter K in determining the basis and tax consequences to the partners of transactions regarding the foreign partnership and its partners. Although the issues are complex, we believe providing guidance in this area would lead to an improved administration of the tax law. ♦

(b) and its implementing regulations, as noted above, as well as the addition of section 961(c) in 1997 implicitly providing for a congressional imprimatur on the lack of those authorized basis adjustments under the current statutes.

¹¹ See Rev. Rul. 96-10, 1996-1 C.B. 138, *Doc 96-954*, 96 *TNT* 4-9, and Rev. Rul. 96-11, 1996-1 C.B. 140, *Doc 96-955*, 96 *TNT* 4-10, for the proposition that tax-exempt income means a receipt that results in a permanent increase to basis in the hands of the partnership. It is necessary to have a positive adjustment under section 705(a)(1) for the PTI to offset the negative adjustment under section 705(a)(2) for the distribution under section 731 to avoid the taxation of otherwise tax-exempt PTI.

¹² This deemed distribution/recontribution approach would be solely for purposes of the basis calculation described above, and other code provisions, such as sections 707(a)(2)(B), 737, and 704(c)(1)(B), would disregard this deemed transfer.

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Begin forwarded message:

From: "Jackel, Monte" <mjackel@akingump.com>
Date: September 17, 2018 at 11:54:03 AM EDT
To: Merrick John J <John.J.Merrick@irsounsel.treas.gov>
Subject: Re: Contact

John. Sure.

Evaluation Only. Created with Aspose.HTML. Copyright 2013-2020 Aspose Pty Ltd.e. The other stuff requires a lot more thought. I note that the DPGR rules in 199-5 and other 199 guidance never dealt with a similar issue there. There is no clear answer to this stuff. I have a prior article or two on the subpart F issues on this. I understand the hesitancy on the notice 2010-41 issue but unless I am misreading it, it says only new partnerships can be subject to a law change.

Copying Chip.

Monte A. Jackel
Senior Counsel
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mjackel@akingump.com
202-887-4178: office
(b)(6): cell

On Sep 17, 2018, at 11:38 AM, Merrick John J <John.J.Merrick@irsounsel.treas.gov> wrote:

Got it, thanks for this – and earlier email. Always appreciate your helpful input. Will likely follow-up w/questions comments when time permits.

John

From: Jackel, Monte [<mailto:mjackel@akingump.com>]
Sent: Monday, September 17, 2018 11:33 AM

To: Merrick John J
Subject: FW: Contact

John. The main reason why I think you need to know the answer to item 2 below is that if the seller of the partnership interest is a US shareholder in its own right, the seller should be treated as selling assets and not a partnership interest or, at least, the ownership of the CFC at the end of the tax year should not matter as the seller in that case should have an inclusion on your theory. And to a US partner who is not a US shareholder, you need to know who has the inclusion or whether it is apportioned between seller and buyer and you need to know the answer to item 2 to know the answer to this. And the answer to item 2 is unclear under present law.

From: Jackel, Monte
Sent: Monday, September 17, 2018 10:45 AM
To: Merrick John J <John.J.Merrick@irs.counsel.treas.gov>
Subject: RE: Contact

John. As agreed. Here is the text of the email I sent to the tax group at Akin Gump.

Some general points about the rules in the proposed GILTI regulations relating to domestic partnerships as shareholders of CFCs.

(b)(5)

(b)(5)

(b)(5)

(b)(5)

These are just some initial thoughts. The regulations are quite complex frankly.

From: Merrick John J [<mailto:John.J.Merrick@irscounsel.treas.gov>]
Sent: Monday, September 17, 2018 10:40 AM
To: Jackel, Monte <mjackel@akingump.com>
Subject: Contact

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From: (b)(6) on behalf of Muzinich, Justin
Sent: Mon, 23 Sep 2019 12:17:17 -0400
To: Morgenstern, Brian (b)(6); (b)(6); (b)(6); Harter, Chip; Kautter, David
Subject: IBM Meeting

Treasury

Deputy Secretary Muzinich

David Kautter

Chip Harter (Dial-In: 202-927-2255/Access Code: (b)(6))

Brian Morgenstern

(b)(6)

IBM

Nelly Korsun, Vice President for Valuation and Transfer Pricing

Linda Evans, Director Global Tax Policy and Government Affairs

Dial In Number: 202-927-2255

Participant Access Code: (b)(6)

Leader Code: (b)(6)

From: Seidel, Joseph L.
Sent: Mon, 9 Jul 2018 17:51:02 +0000
To: Harter, Chip
Subject: RE: BEAT/NOLs Follow-up -- Meeting Request?

Hi Chip.

Hope you had a good Fourth. We wanted to see if you might have some time over the next 2 weeks to meet with Humberto Reboredo & possibly others from the CS tax group on NOLs & the BEAT tax. Before such a meeting, we would again have some written suggestions crafted by outside counsel for you to consider.

Let me know what you think and basically any day between now and July 20th should work for us. Thx again for your assistance and look forward to hopefully seeing you soon.

Joe.

Joseph L Seidel
Managing Director & Senior Counsel
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(c) (b)(6)

=====

Please access the attached hyperlink for an important electronic communications disclaimer:
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=====

From: Jeff R Levey
Sent: Mon, 19 Aug 2019 14:28:37 +0000
To: (b)(6) Harter, Chip
Cc: (b)(6) (b)(6)
Subject: RE: Can we do an Aug. 27 meeting on the proposed GILTI HTE with a group of tax directors?

Hi (b)(6),

Here is the list of attendees and the summary and agenda. Please let me know if you have any questions.

Regards

Jeff

Jeffrey Levey	Jeff.levey@ey.com
Rebecca Burch	(b)(6)@ey.com
Lisa Wolski	(b)(6)@ge.com
Harris Horowitz	(b)(6)@blackrock.com
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Temikia Montford	(b)(6)@assurant.com
Edwin Coleman	(b)(6)@exxonmobil.com
Summary	

The Working Group on Competitive International Taxation would like to discuss the proposed regulations creating a high tax election out of the GILTI regime, including some of the design and technical issues relating to the proposed regulations.

Agenda:

- I. Key design issues
 - a. The five-year election
 - b. The ETR threshold
 - c. Electing the HTE on a QBU basis
- II. Other issues

Jeff Levey | Executive Director | National Tax Department

Washington Council Ernst & Young

Direct: (b)(6) jeff.levey@wc.ey.com

From: (b)(6)@treasury.gov [mailto:(b)(6)@treasury.gov]

Sent: Wednesday, August 07, 2019 11:07 AM

To: Jeff R Levey <jeff.levey@ey.com>; LafayetteChip.Harter@treasury.gov

Cc: (b)(6)@treasury.gov; (b)(6)@treasury.gov

Subject: RE: Can we do an Aug. 27 meeting on the proposed GILTI HTE with a group of tax directors?

Hi Jeff,

Wonderful! We normally hold 30 minutes with these particular meetings, but am willing to go for 45mins given how many participants in your group.

To ensure the best use of your time, please provide us with information in writing at least three business days prior to the meeting.

1. Please provide full first/last names and email addresses, no nicknames (i.e. Mike for Michael) and must match the ID. A US Treasury Access link will be sent to each person to fill in his or her own personal information for building clearance.
2. A concise summary of the meeting request and purpose.
3. A proposed agenda.

Information submitted to the Office of Tax Policy is subject to our correspondence release agreement with Tax Analysts. All meetings, lists of attendees and written materials will be released to the tax press under the terms of the agreement.

Best,

(b)(6)

From: Jeff R Levey <jeff.levey@ey.com>

Sent: Wednesday, August 7, 2019 10:37 AM

To: (b)(6)@treasury.gov; Harter, Chip

<LafayetteChip.Harter@treasury.gov>

Cc: (b)(6)@treasury.gov; (b)(6)@treasury.gov

Subject: RE: Can we do an Aug. 27 meeting on the proposed GILTI HTE with a group of tax directors?

Hi (b)(6)

That's perfect. We've now got 10 companies coming in. I suspect we may end up with one or two more. Everyone is looking forward to meeting with you all. As we may plan a few meetings on the Hill as well, can you give me a sense of how much time we'll have? I was hoping for an hour as people are flying in from all over the place and there is a lot to talk about, but I know there's a lot of demands on your time.

Regards

Jeff

Jeff Levey | Executive Director | National Tax Department

Washington Council Ernst & Young
Direct: (b)(6) | jeff.levey@wc.ey.com

From: (b)(6)@treasury.gov [mailto:(b)(6)@treasury.gov]

Sent: Wednesday, August 07, 2019 8:08 AM

To: Jeff R Levey <jeff.levey@ey.com>; LafayetteChip.Harter@treasury.gov

Cc: (b)(6)@treasury.gov; (b)(6)@treasury.gov

Subject: RE: Can we do an Aug. 27 meeting on the proposed GILTI HTE with a group of tax directors?

Good morning Jeff,

We can do Aug 27 at 10:45AM.

Best,

(b)(6)
Office of Tax Policy
Department of the Treasury
Washington, D.C.
(Tel: (b)(6))

From: Jeff R Levey <jeff.levey@ey.com>

Sent: Tuesday, August 6, 2019 5:34 PM

To: Harter, Chip <LafayetteChip.Harter@treasury.gov>

Cc: (b)(6)@treasury.gov; (b)(6)@treasury.gov;

(b)(6)@treasury.gov

Subject: Can we do an Aug. 27 meeting on the proposed GILTI HTE with a group of tax directors?

Hi Chip,

Last week, I mentioned that I'd like to bring back that group of tax directors you met with in early February to discuss the proposed HTE, and you suggested early the week of the 26th. Could you do the 27th, late morning? That February meeting was actually the one you guys all came over to EY for as the government had just reopened. This working group has been around for over a year, filed comments on the proposed GILTI regs from last year, and has been working hard to analyze the proposed HTE, design issues, etc. Generally, there's support by the group for the HTE.

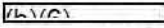
Please let me know if the 27th still works and a good time for you all. I suspect I'll have around 8 – 10 companies.

Regards

Jeff



Jeff Levey | Executive Director | National Tax Department

Washington Council Ernst & Young
1101 New York Ave, 4th Flr
Washington, DC 20005, United States of America
Direct:  | Office: +1 202 293 7474 | jeff.levey@wc.ey.com
Fax: +1 866 214 9763 | EY/Comm: 8955383
Andrea T Beale | Phone: 1-202-467-8506 | andrea.beale@wc.ey.com

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From: Seidel, Joseph L.
Sent: Mon, 22 Oct 2018 16:51:14 +0000
To: Harter, Chip
Subject: RE: Follow-up

Yes. That would be great & many thanks.

Should I call you?

Let me know. Thx. Joe.

Joseph L Seidel
Managing Director & Senior Counsel
CREDIT SUISSE | Head, U.S. Public Policy
(o) +1 202 626 3302
(c) (b)(6)

From: LafayetteChip.Harter@treasury.gov [mailto:LafayetteChip.Harter@treasury.gov]
Sent: Monday, October 22, 2018 12:50 PM
To: Seidel, Joseph L. (YPG)
Subject: RE: Follow-up

Joe,

Would 4pm today work for you for a call?

Chip

From: Seidel, Joseph L. <joseph.seidel@credit-suisse.com>
Sent: Monday, October 22, 2018 12:16 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: RE: Follow-up

Hi Chip. Wanted to see if you have any time this week to catch up. Right now we have our US CEO seeing Malpass on Thursday and though it would be good to exchange thoughts on current events in the international tax space before then.

Let me know what you think or what time might work for you.

Thx. Joe.

Joseph L Seidel

Managing Director & Senior Counsel
CREDIT SUISSE | Head, U.S. Public Policy
(o) +1 202 626 3302
(c) (b)(6)

From: Seidel, Joseph L. (YPG)
Sent: Wednesday, October 17, 2018 2:56 PM
To: LafayetteChip.Harter@treasury.gov
Subject: Follow-up

Hi Chip. Best window for me tomorrow is before 9AM or in the afternoon and could probably make any time work after 2pm.

Let me know and look forward to catching up on a couple of things.

Thx. Joe.

Joseph L Seidel
Managing Director & Senior Counsel
CREDIT SUISSE | Head, U.S. Public Policy
(o) +1 202 626 3302
(c) (b)(6)

=====

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Please access the attached hyperlink for an important electronic communications disclaimer:
https://hyperlink.services.treasury.gov/agency.do?origin=http://www.credit-suisse.com/legal/en/disclaimer_email_ib.html

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From: (b)(6)
Sent: Mon, 22 Oct 2018 13:40:04 -0400
To: Harter, Chip
Subject: RE: IFA USA New York Region/NYU Joint Panel and Reception | November 7, 2018

(b)(6)

From: Harter, Chip
Sent: Monday, October 22, 2018 12:56 PM
To: (b)(6)@treasury.gov
Subject: RE: IFA USA New York Region/NYU Joint Panel and Reception | November 7, 2018

(b)(6)

From: (b)(6)
Sent: Monday, October 22, 2018 12:06 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: RE: IFA USA New York Region/NYU Joint Panel and Reception | November 7, 2018

Hey Chip,

(b)(6)

From: (b)(6)
Sent: Monday, October 22, 2018 10:29 AM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: RE: IFA USA New York Region/NYU Joint Panel and Reception | November 7, 2018

(b)(6)

From: Harter, Chip
Sent: Wednesday, October 17, 2018 2:31 PM
To: (b)(6)@treasury.gov
Subject: FW: IFA USA New York Region/NYU Joint Panel and Reception | November 7, 2018

Could we book a 1pm train up to NYC and a 9pm train home?

Thanks!

From: Taylor, Willard B. <taylorw@sullcrom.com>
Sent: Thursday, October 11, 2018 11:27 AM

To: Oosterhuis, Paul W <Paul.Oosterhuis@skadden.com>; Brown, Patrick J (GE Power & Water) <patrick.brown1@ge.com>; Harter, Chip <LafayetteChip.Harter@treasury.gov>; Karen G Sowell <karen.sowell@ey.com>; Michael J. Caballero (mjcaballero@cov.com) <mjcaballero@cov.com>
Cc: Peter J. Connors (pconnors@orrick.com) <pconnors@orrick.com>
Subject: FW: IFA USA New York Region/NYU Joint Panel and Reception | November 7, 2018

Could each of you in due course send me a short bio, solely for introduction purposes. Thanks. Willard Taylor



**USA Branch of the
International Fiscal Association**

[\[ifausa.org\]](http://ifausa.org)

[.com\]](http://ifausa.org) [i](#)

IFA USA NEW YORK REGION/NYU JOINT PANEL AND RECEPTION

Wednesday, November 7, 2018
Program: 5:00 p.m. – 8:00 p.m.

LOCATION:

New York University School of Law
John Sexton Lounge, Furman Hall
245 Sullivan Street, 2nd floor
New York NY, 10012
Directions: [click here \[law.nyu.edu\]](http://law.nyu.edu)

PROGRAM

5:00 – 6:45 p.m.

International Provisions of the TCJA – How did we get here and where we going?

Speakers: **L.G. "Chip" Harter**, Deputy Assistant Secretary, International Tax Affairs,
Department of the Treasury
Patrick Brown, General Electric
Michael Caballero, Covington & Burling
Paul Oosterhuis, Skadden Arps

6:45 – 7:00 p.m. **NYSBA Tax Section's Role in Developing Guidance**

Speakers: **Karen Gilbreth Sowell**, Chair, NYSBA Tax Section
L.G. "Chip" Harter, Deputy Assistant Secretary, International Tax Affairs,
Department of the Treasury

7:00 – 8:00 p.m. **Cocktail Reception**

Moderator: **Willard B. Taylor**, New York University School of Law

[Click here to RSVP \[ifausa.org\]](#)

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immediately.

From: Nichols, Kevin
Sent: Mon, 2 Dec 2019 08:48:11 -0500
To: Van Hove, Jeffrey; Black, Tanner (b)(6) Vallabhaneni, Krishna
Cc: (b)(6); Eilts, Andrew; Harter, Chip (b)(6)
Subject: RE: Meeting with Larry Culp, GE's CEO/Chairman

(b)(5)

Kevin C. Nichols
Office of International Tax Counsel
U.S. Department of the Treasury
202-622-9461

From: Van Hove, Jeffrey <Jeffrey.VanHove2@treasury.gov>
Sent: Monday, December 2, 2019 8:39 AM
To: Black, Tanner <Tanner.Black@Treasury.gov>; (b)(6)@treasury.gov;
Vallabhaneni, Krishna <Krishna.Vallabhaneni@treasury.gov>
Cc: (b)(6)@treasury.gov; Eilts, Andrew <Andrew.Eilts@treasury.gov>;
Harter, Chip <LafayetteChip.Harter@treasury.gov>; (b)(6)@treasury.gov;
Nichols, Kevin <Kevin.Nichols@treasury.gov>
Subject: RE: Meeting with Larry Culp, GE's CEO/Chairman

Thanks Tanner. Adding Krishna (b)(5)

(b)(5)

From: Black, Tanner <Tanner.Black@Treasury.gov>
Sent: Monday, December 2, 2019 8:31 AM
To: (b)(6)@treasury.gov; Van Hove, Jeffrey
<Jeffrey.VanHove2@treasury.gov>
Cc: (b)(6)@treasury.gov; Eilts, Andrew <Andrew.Eilts@treasury.gov>;
Harter, Chip <LafayetteChip.Harter@treasury.gov>; (b)(6)@treasury.gov;
Nichols, Kevin <Kevin.Nichols@treasury.gov>
Subject: RE: Meeting with Larry Culp, GE's CEO/Chairman

Thanks, (b)(6)

Hope everyone had a good Thanksgiving. We just received more info from (b)(6) Please see below:

Meeting is on Thursday, Dec. 12th at 1:45pm in the small conference room.

- Larry Culp, CEO/Chairman
- Michael Schlessinger, VP of Tax (Bio to be provided)
- Mo Cowan, President of Global Government Affairs, Policy and Developed Markets (Bio to be provided)
- Lisa Wolski, Executive Counsel, Global Tax Policy and Global Public Policy

Topics for discussion: general business climate, China trade, and tax policy (OECD and medical device excise tax).

Thank you,
Tanner

From: (b)(6)@treasury.gov
Sent: Tuesday, November 26, 2019 6:00 PM
To: Black, Tanner <Tanner.Black@Treasury.gov>; Van Hove, Jeffrey <Jeffrey.VanHove2@treasury.gov>
Cc: (b)(6)@treasury.gov; Eilts, Andrew <Andrew.Eilts@treasury.gov>; Harter, Chip <LafayetteChip.Harter@treasury.gov>; (b)(6)@treasury.gov; Nichols, Kevin <Kevin.Nichols@treasury.gov>
Subject: RE: Meeting with Larry Culp, GE's CEO/Chairman

Adding Chip, Doug, and Kevin for ITC.

(b)(6)
Office of Tax Policy (detail)
U.S. Department of the Treasury
(b)(6)@treasury.gov

From: Black, Tanner <Tanner.Black@Treasury.gov>
Sent: Tuesday, November 26, 2019 4:28 PM
To: (b)(6)@treasury.gov; Van Hove, Jeffrey <Jeffrey.VanHove2@treasury.gov>
Cc: (b)(6)@treasury.gov; Eilts, Andrew <Andrew.Eilts@treasury.gov>
Subject: RE: Meeting with Larry Culp, GE's CEO/Chairman

All circling back on this, please see the CT link below:

STM Meeting with Larry Culp, GE CEO, 2019-SE-3071

Thank you,
TB

From: Black, Tanner
Sent: Friday, November 15, 2019 3:33 PM
To: (b)(6)@treasury.gov; Van Hove, Jeffrey <Jeffrey.VanHove2@treasury.gov>
Cc: (b)(6)@treasury.gov; Eilts, Andrew <Andrew.Eilts@treasury.gov>
Subject: RE: Meeting with Larry Culp, GE's CEO/Chairman

Good afternoon OTP,

The secretary will be meeting with the CEO of GE on Thursday December 12. IA will lead the memo, but OTP please provide input on tax policy. More specifics below. When a CT case is created we will share with you all.

GE CEO info below:

Attendees: Larry Culp, CEO and Chairman, General Electric Company. Likely accompanied by Mo Cowan, President, Global Government Affairs, GE and Lisa Wolski, Executive Counsel, Global Tax Policy and Global Public Policy. Michael Schlessinger, VP of tax for GE, may attend as well.

Topics: Trade policy (especially China), tax policy (including OECD), general review of global business, as Larry will just have concluded a meeting with all of the GE business CEOs and senior leadership.

Thank you,
Tanner

-----Original Appointment-----

From: Secretary Mnuchin [REDACTED]@treasury.gov>

Sent: Friday, November 15, 2019 3:27 PM

To: (b)(6) [REDACTED]

Cc: es_specials; (b)(6) [REDACTED]; (b)(6) [REDACTED]; (b)(6) [REDACTED]; Smith, Joseph

Subject: Meeting with Larry Culp, GE's CEO/Chairman

When: Thursday, December 12, 2019 1:45 PM-2:15 PM (UTC-05:00) Eastern Time (US & Canada).

Where: Secretary's Small Conference Room

Treasury:

Secretary Mnuchin

(b)(6) [REDACTED]

Others TBD

GE:

Larry Culp, CEO/Chairman

Others TBD

POC: Lisa Wolski

Email: (b)(6) [REDACTED]@ge.com

From: Sutton, William
Sent: Mon, 12 Aug 2019 09:49:46 -0400
To: 'McMillen, Jeffrey'; Harter, Chip; (b)(6)
Cc: Michael J. Caballero (mjcaballero@cov.com); (b)(6); (b)(6); (b)(6)
(b)(6)
Subject: RE: Mtg request

Thank you, Jeff,

I've copied (b)(6) to help coordinate schedules and Jason, who will attend. It looks as if we are all free after 10 am on the 28th, but I'll let Aisha confirm.

From: McMillen, Jeffrey <jmcmillen@AKINGUMP.com>
Sent: Monday, August 12, 2019 9:42 AM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>; (b)(6)@treasury.gov;
Sutton, William <William.Sutton@treasury.gov>
Cc: Michael J. Caballero (mjcaballero@cov.com) <mjcaballero@cov.com>; (b)(6)
<(b)(6)@treasury.gov>
Subject: Mtg request

Gentlemen,

Michael and I would like to request a meeting on behalf of several clients who have met with you over the last year regarding a GILTI High Tax Exception. We can get the best attendance by the companies on Wednesday, August 28th if your team has some time that day.

We are pleased that the proposed regulations were released, and we have some thoughts on possible changes that could be made when the regulations are finalized.

Please let us know if you can meet on the 28th. If so, we will let you know who will be able to attend as quickly as we can.

Thank you for considering.

Jeff and Michael

Jeffrey D. McMillen

AKIN GUMP STRAUSS HAUER & FELD LLP

2001 K Street N.W. | Washington, DC 20006 | USA | Direct: (b)(6) | Internal: 24270
Fax: +1 202.887.4288 | jmcmillen@akingump.com | akingump.com | Bio

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From: Harter, Chip
Sent: Mon, 16 Jul 2018 09:06:11 -0400
To: Harter, Chip
Subject: RE: Quick Question(s)?

I don't know what Secretary Mnunchen's calendar looks like, but probably worth a try. I think Justin would be your second choice.

Chip

From: Harter, Chip
Sent: Friday, July 13, 2018 4:55 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: FW: Quick Question(s)?

From: Seidel, Joseph L. <joseph.seidel@credit-suisse.com>
Sent: Friday, July 13, 2018 2:46 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: Quick Question(s)?

Given that you/Treasury are/is moving closer to making some decisions on International tax issues, would it make sense for us to request a Mnuchin meeting at the end of the month when our US CEO (Eric Varvel) in town for an unrelated Fed meeting (July 26)? Obviously not our Global CEO (Tidjane Thiam who Mnuchin has gotten to know) so not sure if that will work or not for the Secretary but seems like it may be a good time to re-enforce substantive points & answer any questions.

If it doesn't work with Mnuchin should we ask for anyone else? Craig I think knows the issue pretty well, but we have heard that Justin Muzinich plays some role in advising on the tax issues & I wanted to see if you thought he could be a good back-up if Mnuchin can't do it?

Let me know what you think or we can also discuss at the end of Monday's meeting.

Thx & have a good weekend.

Joe.

Joseph L Seidel
Managing Director & Senior Counsel
CREDIT SUISSE | Head, U.S. Public Policy
(o) +1 202 626 3302
(c) (b)(6)

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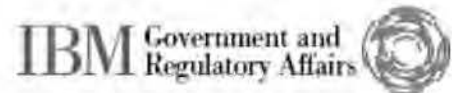
=====

From: Linda Evans
Sent: Thu, 2 Aug 2018 20:58:25 -0400
To: Harter, Chip
Subject: RE: Tax Council request to speak on October 4

Oh that's right ...I forgot -- I assume your OECD team will be there as well. What do you think about having someone else from you team not in Paris - we could change the format to a panel perhaps with hill folks.

Thoughts?

Linda C. Evans, Esq.
Director, Government Affairs and Global Tax Policy



Phone: 1-202-551-9381 | Mobile: (h/v/s)
E-mail: levans@us.ibm.com
IBM Policy: <https://hyperlink.services.treasury.gov/agency.do?origin=www.ibm.com/blogs/policy/>

600 14th St, NW Suite 300
Washington, DC 20005
United States

From: <LafayetteChip.Harter@treasury.gov>
To: <levans@us.ibm.com>
Date: 08/02/2018 06:42 PM
Subject: RE: Tax Council request to speak on October 4

Linda,

It was good seeing you as well. As to October 4th for the Tax Council Lunch, I will be in Paris at OECD meeting that week, and I don't believe that I will make it back to Washington by Thursday. Happy to be interviewed some other time.

Best regards,

Chip

From: Linda Evans <levans@us.ibm.com>
Sent: Wednesday, August 1, 2018 4:25 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>

Subject: Tax Council request to speak on October 4

Chip

Good to see you again today -- at BRT. I know you had to run but I wanted to invite you on behalf of the Tax Council Board of Directors and Program committee, to see if you would be available to join us for a mini conference on October 4 a 11 am, before our regular Tax Council luncheon that day. We are looking at the Phoenix Park hotel for locale.

If you are available, we'd like to hear your thoughts on whatever you'd like to discuss-- but you can imagine we'd like an update on regs process, what you may know about Tax reform 2.0 or 3.0 , and of course OECD and other global developments on digital tax. We are thinking of having an interview like format with you as the interviewee!

Are you free that day and able to join us?

Thanks

Linda C. Evans, Esq.
Director, Government Affairs and Global Tax Policy



Phone: 1-202-551-9381 | Mobile: (b)(6)
E-mail: levans@us.ibm.com
IBM Policy: <https://hyperlink.services.treasury.gov/agency.do?origin=www.ibm.com/blogs/policy/>

600 14th St, NW Suite 300
Washington, DC 20005
United States

From: Seidel, Joseph L.
Sent: Thu, 2 Aug 2018 15:04:00 +0000
To: Harter, Chip
Subject: RE: Tax treaty

Just left message for you and (b)(6) and we should talk before your meeting on what they focused on. Joe.

From: Seidel, Joseph L. (YPG)
Sent: Thursday, August 02, 2018 9:46 AM
To: Chip Harter
Subject: Tax treaty

Got your message. Sorry I couldn't pick up. Been on calls all AM and will try you when I get in to the office around 1015. Joe.

Sent with BlackBerry Work
(<https://hyperlink.services.treasury.gov/agency.do?origin=www.blackberry.com>)

=====

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https://hyperlink.services.treasury.gov/agency.do?origin=http://www.credit-suisse.com/legal/en/disclaimer_email_ib.html

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From: Kearney, Ross UTCHQ
Sent: Mon, 9 Sep 2019 13:08:06 +0000
To: Baldwin, Robert
Cc: Harter, Chip; Graves, Rebecca L UTCHQ; Kearney, Ross UTCHQ
Subject: RE: Treasury Meeting on OECD Tax Negotiations

Robert,

I will attend the roundtable on the 16th –

The POC for the CEO mtg is Becky Graves – I have copied her on this email –

Let us know if you have any questions –

Regards,

Ross Kearney | Corporate Vice President, Tax | United Technologies

8 Farm Springs Road | Farmington, CT 06032 | (b)(6) | ross.kearney@utc.com

From: Robert.Baldwin@treasury.gov [mailto:Robert.Baldwin@treasury.gov]
Sent: Monday, August 26, 2019 8:50 PM
Cc: LafayetteChip.Harter@treasury.gov
Subject: [External] Treasury Meeting on OECD Tax Negotiations

Hello,

Treasury Deputy Secretary Justin Muzinich invites you to participate in a roundtable discussion on U.S. positioning in OECD Tax Negotiations at the Treasury Department on Monday, September 16th at 1PM. The discussion will be led by the Deputy Secretary and Deputy Assistant Secretary for International Tax, Chip Harter. The following day, Secretary Mnuchin will host a subsequent discussion with the CEOs of your respective companies at 2PM on Tuesday, September 17th.

Please respond to me with your availability to attend this roundtable on Monday, September 16th, and provide a POC in your CEO's office to coordinate their attendance for the meeting on Tuesday, September 17th.

I will follow up with additional logistical information as the roundtable approaches. Let me know if you have any questions.

Best regards,

Robert

Robert Baldwin
U.S. Department of the Treasury
Special Assistant to the Deputy Secretary
Business: 202-622-2345
Cell: (b)(6)

From: (b)(6)@ubs.com
Sent: Tue, 28 Aug 2018 15:40:19 +0000
To: Harter, Chip
Subject: RE: UBS - BEAT follow-up

Chip, I set-up a conference dial-in, see below. Brian Forschino (Head of Tax - UBS Americas) and Todd Tuckner (Chief Accounting Officer - UBS) plan on dialing in and they will be in different location than me. Both Todd and Brian joined me when we met with you in early January.

Dial-in: (b)(6) // Passcode: (b)(6)

Thanks!

-----Original Message-----

From: LafayetteChip.Harter@treasury.gov [mailto:LafayetteChip.Harter@treasury.gov]
Sent: Monday, August 27, 2018 10:37 AM
To: Lieberman, Shane
Subject: RE: UBS - BEAT follow-up

That works, or you can just call me in my office. 202-622-1317.

Chip

-----Original Message-----

From: (b)(6)@ubs.com <(b)(6)@ubs.com>
Sent: Monday, August 27, 2018 10:01 AM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: RE: UBS - BEAT follow-up

Perfect. Thanks. Would you like me to set up a conference call line?

From: LafayetteChip.Harter@treasury.gov
<LafayetteChip.Harter@treasury.gov<mailto:LafayetteChip.Harter@treasury.gov>>
Date: Monday, Aug 27, 2018, 9:29 AM
To: Lieberman, Shane <(b)(6)@ubs.com<mailto:(b)(6)@ubs.com>>
Subject: RE: UBS - BEAT follow-up

How about Thursday at 2pm?

Chip

-----Original Message-----

From: (b)(6)@ubs.com <(b)(6)@ubs.com>
Sent: Monday, August 27, 2018 9:17 AM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: RE: UBS - BEAT follow-up

A call at your convenience.

From: LafayetteChip.Harter@treasury.gov
<LafayetteChip.Harter@treasury.gov<mailto:LafayetteChip.Harter@treasury.gov>>
Date: Monday, Aug 27, 2018, 9:13 AM
To: Lieberman, Shane <[b)(6)]@ubs.com<mailto:[b)(6)]@ubs.com>>
Subject: RE: UBS - BEAT follow-up

Shane,

Are you thinking of a call or a meeting?

Chip

-----Original Message-----

From: [b)(6)]@ubs.com <[b)(6)]@ubs.com>
Sent: Friday, August 24, 2018 1:27 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Cc: [b)(6)]@ubs.com
Subject: UBS - BEAT follow-up

Chip, we wanted to see if you have time next week to follow-up on the August 14 IIB meeting.

We hope to take a few minutes to give you some more input that we hope you will find constructive.

Please let me know if you have availability on Wednesday, Thursday, or Friday.

We appreciate your time and thoughtful consideration on the BEAT. Thanks and have a great weekend.

Visit our website at <https://hyperlink.services.treasury.gov/agency.do?origin=http://www.ubs.com>

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UBS reserves the right to retain all messages. Messages are protected and accessed only in legally justified cases.

From: Daniel Bunn
Sent: Wed, 13 Nov 2019 22:44:48 +0000
To: Harter, Chip
Cc: (b)(6)@utc.com; cschultz@nftc.org
Subject: RE: Update: Tax Prom in Paris

Great – glad you can join us!

Daniel

From: LafayetteChip.Harter@treasury.gov <LafayetteChip.Harter@treasury.gov>
Sent: Wednesday, November 13, 2019 4:55 PM
To: Daniel Bunn <dbunn@taxfoundation.org>
Cc: (b)(6)@utc.com; cschultz@nftc.org
Subject: RE: Update: Tax Prom in Paris

Daniel,

Thank you for the invitation. I plan attend.

Best regards,

Chip

From: Daniel Bunn <dbunn@taxfoundation.org>
Sent: Tuesday, November 12, 2019 1:57 PM
To: Daniel Bunn <dbunn@taxfoundation.org>
Cc: Coffin, Elizabeth B UTCHQ <(b)(6)@utc.com>; Catherine Schultz <cschultz@nftc.org>
Subject: Update: Tax Prom in Paris

Greetings everyone,

We're a bit more than a week away from the first Tax Prom in Paris, and we are close to capacity for the dinner with about 30 folks planning to attend. If you have not yet confirmed your plans to attend, please do so by the end of the week.

In order to avoid ethics clearance issues for the government officials attending the dinner, we are planning to have everyone pay individually. Additionally, we are planning to take some pictures to share with the folks who will be celebrating Tax Prom in D.C.

Since we'll have just spent all day at the Pillar One consultation, this will not be black tie event, and business attire or business casual will be fine. (Although, Libby has promised to bring tiaras.)

As a reminder, the dinner will be at **Bistrot des Vignes, 1 rue Jean Bologne, Paris 75016, at 7:30 pm on November 21st.**

Please let myself, Cathy, or Libby know if you have any questions about the dinner or if you have suggestions for someone who should attend.

We're looking forward to spending the evening with you.

Best,
Daniel Bunn
Cathy Schultz
Libby Coffin

Daniel Bunn
Director of Global Projects
Tax Foundation
202-464-5107 (office)
(b)(6) (mobile)
dbunn@taxfoundation.org

From: Kautter, David
Sent: Wed, 13 Mar 2019 18:53:00 +0000
To: Kautter, David; Harter, Chip; (b)(6); Nichols, Kevin; Huynh, Quyen
Cc: (b)(6); Poms, Douglas; (b)(6)
Subject: Coalition for American Insurance RE: BEAT

Coalition manifest (cleared 3/29):

Jonathan Talisman
Jomarie Green
Deborah Oates
Vijaya Rangaswami
Saathvik Alety
Vito Peraino
Howard Baird
Jordan Russo
Daniel Quinn
Robert Lehman
Jeffrey Williams

From: Jon Talisman <talisman@capitoltax.com>
Sent: Wednesday, March 13, 2019 10:27 AM
To: (b)(6) < [\(b\)\(6\)@treasury.gov](mailto:(b)(6)@treasury.gov)>
Subject: Meeting request

(b)(6)

I would like to request a meeting on behalf of the Coalition for American Insurance with Dave, Chip and the rest of the team to follow-up on the comment letter we filed with respect to the BEAT. A number of representatives from our member companies would attend. The best dates for us would be March 21 or March 27. If those dates don't work well, please send me some dates in late March or early April that do.

Thanks very much,

Jon

From: Kautter, David
Sent: Mon, 1 Apr 2019 11:28:32 +0000
To: Kautter, David; (b)(6); Nichols, Kevin; (b)(6); Poms, Douglas; (b)(6)
Cc: Huynh, Quyen
Subject: Credit Suisse Securities RE: BEAT

Suisse manifest (cleared 4/1):
Todd Orlich
Anthony Porcaro
Ashlyn Teel
Maureen Smith
Michael Caballero
Jessica Mandel

(b)(6) passed to OTP

From: Mandel, Jessica A. <jessica.mandel@credit-suisse.com>
Sent: Monday, March 18, 2019 2:23 PM
To: (b)(6)@treasury.gov>
Subject: Credit Suisse Meeting--4/2/19

(b)(6) I hope this email finds you well. We have our tax executives in DC on Tuesday, April 2nd and we were hoping to come in and speak to Deputy Secretary Muzinich regarding some of our issues surrounding BEAT. I have attached our comment letter on Section 59A Proposed Regulations (Internal Revenue Service REG-104259-18) – Proposals Regarding TLAC Securities, Securities Lending Transactions, and Internal Dealings for your reference. Please let me know if Mr. Muzinich is available on April 2nd for a meeting. Thank you so much for your help and I look forward to hearing back from you!

Jessica A Mandel
CREDIT SUISSE SECURITIES (USA) LLC
CS Sec USA LLC | Head Legislative Affairs, YPGA
1201 F Street, Nw | Washington DC 20004 | Americas
Phone (b)(6)
jessica.mandel@credit-suisse.com | <https://hyperlink.services.treasury.gov/agency.do?origin=www.credit-suisse.com>

From: Kautter, David
Sent: Tue, 21 May 2019 14:33:50 +0000
To: Kautter, David; (b)(6); Hawkins, Hannah; Poms, Douglas
Subject: GE Head of Tax re BEAT, GILTI, etc.

Cleared for this meeting:

Michael Schlessinger
Lisa Wolski

From: Wolski, Lisa (GE Corporate) <lisa.wolski@ge.com>
Sent: Monday, May 20, 2019 4:42 PM
To: (b)(6) <(b)(6)@treasury.gov>
Subject: Scheduling a GE meeting w/Dave Kautter

Hi (b)(6): I have a relatively new head of tax – he's not new to GE, he has been our head of tax for M&A for many years, but he has just recently taken over the VP of Tax role for the whole company. His name is Mike Schlessinger. (Somewhat confusingly, our prior head of tax was also a Mike.) As an M&A guy, he hasn't been involved in tax policy over the years, except as an interested observer. I've persuaded him to come to DC in June to do some key meetings, and one I'd really like to do if possible is bring him in to meet with Dave Kautter. We obviously have a couple of BEAT issues that you all are still thinking about and we have views on GILTI, and we would like to talk about all of that. But I also want Mike to get a bigger picture view of the TCJA implementation process. So while we have a few issues to discuss, I wouldn't envision it as diving deep into the weeds and hashing out why it should be one way vs another, but more a philosophical discussion.

I'd be looking to schedule it on June 19 between noon-5pm. What do you think?

Lisa Wolski
Executive Counsel
Government Affairs & Policy
General Electric Company

T (b)(6)
N

lisa.wolski@ge.com

1299 Pennsylvania Ave., NW
Washington, DC 20004

GE imagination at work

From: Kautter, David
Sent: Fri, 23 Mar 2018 13:24:29 +0000
To: Kautter, David; Poms, Douglas; (b)(6); (b)(6); Nichols, Kevin; (b)(6)
(b)(6)
Subject: IBM RE: BEAT

Attendees cleared:
James Kavanaugh
Simon Beaumont
Christopher Padilla
Linda Evans
Tejaswini Rajwade

Gary Gasper
Nick Giordano

Dave,

We have been asked by IBM to respectfully request a meeting with you for Jim Kavanaugh (CFO and Senior VP), and Simon Beaumont (Treasurer and VP) for the morning of Monday, April 30 (anytime in the morning after 9:00 a.m.). They are interested in discussing guidance on the “Base Erosion Anti-Avoidance Tax” (“BEAT”).

I know it is over a month out, but are you available to meet with these senior IBM executives on the **morning of Monday, April 30** (anytime in the morning after 9:00 a.m.)?

Many thanks in advance for your consideration of this request!

Gary

Gary Gasper | Partner

Washington Council Ernst & Young
1101 New York Avenue, N.W., 4th Flr, Washington, DC 20005, United States of America
Direct: (b)(6) | Office: (202) 293-7474 |
gary.gasper@ey.com

From: Kautter, David
Sent: Thu, 30 May 2019 17:27:28 +0000
To: Kautter, David
Subject: TCJA regulations meeting
Attachments: Agenda_CFO Council Fortune 250_June 2019.pdf, Attendee List, CFO Council Fortune 250, June 2019.pdf

CFO Council: Fortune 250 Spring Meeting

Session Date and Time

Friday, June 7, 2019
8:45 AM- 9:30 AM

Meeting Location

Hay Adams Hotel
800 16th Street NW
Washington DC
202 638 6600

Room Location

Concord Room (off the main lobby of the hotel)
I will meet the Assistant Secretary in the lobby and escort him to the meeting room.

Session Topic and Description

The Future of US Tax Policy

As the campaigns for the 2020 election are beginning to heat up (especially on the Democratic side), there is much uncertainty about the future of tax policy. In this session we focus on the Administration's position on various tax policy issues, including any changes or updates to the 2017 Tax Cuts and Jobs Act (TCJA), the US position of the taxation of the digital economy as well as progress on tax treaties, and any other priorities in tax policy.

Number of Attendees

There will be 14 attendees (attendee list is attached)

Room Set-up

The session will take place around a large conference table

Press

Press will **not** be present

Chatham House Rule

This meeting operates under the Chatham House Rule:
"When a meeting or part thereof, is held under the Chatham House Rule, participants are free to use the information received,
but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed".



CFO Council: Fortune 250



Location:
Washington, DC



Date:
June 6-7, 2019

Preparing for 2021: Policy, Politics and Economy

Our June meeting, as always in the nation's Capital, will focus on what to expect for 2021, following the general elections of 2020. What dynamics do we see on the political front, how will possible outcomes determine policies on trade, taxes and spending, regulation, etc. How may the economy fare by that time, and how will those responsible for fiscal policy as well as monetary authorities respond?

We will benefit from our proximity to the key players in town to have various in-depth discussions, helping the Council members to prepare for 2021.

Meeting Venue

The Hay Adams Hotel
800 16th Street NW
Washington, DC 20006
202 638 6600

Council Dinner and Meeting

The Hay Adams Hotel
Concord Room (off hotel lobby)

Council Benefits

- **Access Timely Information** — Implement trusted insights from both The Conference Board and outside experts—within your own organizations.
- **Solve Problems Effectively** — Benchmark and problem solve in a truly collaborative manner.
- **Connect with Colleagues** — Develop enduring relationships with peers from leading global organizations.

THURSDAY, JUNE 6, 2019

6:30 – 9:00 PM

Council Welcome Dinner

Hay Adams Hotel, Concord Room (off hotel lobby)

Recent Shifts in Monetary Policy – Where are We Heading Next?

GDP growth is solid, and the labor market is historically strong, but inflation continues to run below the Federal Reserve's two percent target. This, combined with considerable uncertainty both at home and abroad, prompted the Fed's shift to a "patient" stance on monetary policy in early 2019.

We are honored to spend our time this evening with Tom Barkin, president and chief executive officer of the Federal Reserve Bank of Richmond. In this role, he is responsible for the Bank's monetary policy, bank supervision and regulation, and payment services as well as oversight of the Federal Reserve System's information technology organization. President Barkin will share his views on the outlook for the U.S. economy and discuss potential policies to support business confidence and promote economic growth

Tom Barkin, President and Chief Executive Officer, **Federal Reserve Bank of Richmond**

FRIDAY, JUNE 7, 2019

7:30 – 8:00 AM

Breakfast & Networking

Hay Adams Hotel, Concord Room (off hotel lobby)

8:00 – 8:45 AM

Preparing for the Economy in 2021

While economists keep looking in their crystal balls whether a recession or not may arrive by 2020 (which could have major implications for shaping the campaign and outcome of the elections), an equally – if not more – important issue is that the medium-term growth projections for the US and globally do not look promising. The major challenges regarding labor and talent shortages, the weak productivity gains from new technology, dire government finances and a possible retreat from globalization, put growth prospects at serious risk. What should be the proper policy responses, and how should business anticipate on what may happen and where can it make a difference in changing the course of events?

Bart van Ark, EVP and Chief Economist, **The Conference Board**

8:45 – 9:30 AM

The Future of US Tax Policy

As the campaigns for the 2020 election are beginning to heat up (especially on the Democratic side), there is much uncertainty about the future of tax policy. In this session we focus on the Administration's position on various tax policy issues, including any changes or updates to the 2017 Tax Cuts and Jobs Act (TCJA), the US position of the taxation of the digital economy as well as progress on tax treaties, and any other priorities in tax policy.

David Kautter, Assistant Secretary for Tax Policy, **United States Treasury**

9:30 – 9:45 AM

Refreshment Break

9:45 – 10:45 AM

Preparing for a New Global Trade Regime

With the US-China trade negotiations dragging on and the USMCA still waiting to be ratified, what does this all lead to? Can a technological "cold war" with China be avoided? How temporary will tariffs really be? How will global chains value be affected and is relocation to the "home" country a reasonable alternative? Is there still a role for international organizations such as the WTO? In the end, can we expect a greater level playing field for global business to emerge? Or will the world of global trade look a lot hillier or even mountainous?

Amy Celico, Principal and Head of China Group, **Albright Stonebridge Group**

Antonio Ortiz-Mena, Senior Vice President, **Albright Stonebridge Group**

10:45 – 12 Noon

Business Roundtable

In this final session of the meeting, members will share their business challenges and "hot topics", especially those for which they would like peer input. This Roundtable is the hallmark of all Conference Board Council meetings. All sharing is done informally, and all discussions are confidential.

12:00 Noon

Meeting adjourns

Future Meeting Dates

- **November 7-8, 2019**
Boston, MA

Contact Us

Acting Program Director

Bart van Ark, bart.vanark@conference-board.org

Manager, Executive Programs

Jo-An Butcher, jo-an.butcher@conference-board.org cell: 631 235 5387

Contact Bart or Jo-An for any questions, missing information or clarification on this meeting.

About The Conference Board

Founded in 1916, The Conference Board is a global, independent membership and research organization working in the public interest. Our mission is unique: to provide the world leading organizations with the practical knowledge they need to improve their performance and better serve society.

CFO Council: Fortune 250 CPE Credits

Earn up to 4.5 CPE Credits in Finance

Delivery Method: Group-Live; Program Level: Intermediate; Advanced Preparation: None; Prerequisites: Must be Chief Financial Officer of a Fortune 200 company. Requirements: Must attend in-person to receive credit.

Learning Objectives: This meeting is relevant to executives who are responsible for overseeing the investment of funds and manage associated risks, supervise cash management activities, executive capital-raising strategies to support the organization's expansion, and deal with mergers and acquisitions.



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Attendee List | CFO Council: Fortune 250

June 6-7, 2019 | Hay Adams Hotel | Washington DC

Members

Claus Aagaard	Mars
Laura Bishop	USAA
Jeff Campbell	American Express
Denise Dettingmeijer	Randstad, North America
Mark Eckhardt	S.C. Johnson & Son
Jeremy Fox-Geen *	McKinsey & Co, North America
Maria Henry	Kimberly-Clark
Rafael Lizardi	Texas Instruments
Don Mulligan	General Mills

Guest

John Stephens	AT&T
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Guest Speaker

Tom Barkin	President and CEO Federal Reserve Bank of Richmond
Amy Celico	Principal and Head of China Group Albright Stonebridge Group
David Kautter	Assistant Secretary for Tax Policy United States Treasury
Antonio Ortiz-Mena	Senior Vice President Albright Stonebridge Group

From The Conference Board/ CED

Bernard Bailey	President Committee for Economic Development of The Conference Board
Joseph Minarik	Senior VP and Director of Research Committee for Economic Development of The Conference Board
Jo-An Butcher	Manager, Executive Programs

*Indicates new member

**Indicates remote participation

AMERICAN
OVERSIGHT

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TREAS-20-0544-A-000158

From: (b)(6) on behalf of Harter, Chip
Sent: Mon, 29 Apr 2019 07:00:45 -0500
To: Kautter, David
Subject: Accepted: Kurt Lamp, Tax Director w/Amazon RE: Meet/Greet

From: (b)(6) on behalf of Poms, Douglas
Sent: Wed, 20 Jun 2018 11:37:50 -0400
To: (b)(6) Nichols, Kevin (b)(6) (b)(6) (b)(6) (b)(6)
(b)(6)
Cc: Mogenson, Harvey;Kautter, David
Subject: CONFIRMED - Nick Giordano (GE) re GILTI and BEAT

WAVES APPOINTMENT STATUS

U#: U29550
Appointment #: 83709
Appointment Date/Time: 6/20/2018 1:00 PM
Security Specialist: (b)(6)
Person Visited: Douglas Poms
Event Name:
Room Number: 5116
Appointment Status: COMPLETE
Number of Visitors: 3
Number of Cleared Visitors: 3

First Name	Last Name	Status
PATRICK	BROWN	CLEARED
NICHOLAS	GIORDANO	CLEARED
LISA	WOLSKI	CLEARED

From: Nick Giordano <Nick.Giordano@ey.com>
Sent: Wednesday, May 16, 2018 2:30 PM
To: Kautter, David <David.Kautter@treasury.gov>
Cc: (b)(6) @treasury.gov>
Subject: Possible Meeting with General Electric Executives

Dave:

I hope things are well with you. I know you are keeping extremely busy. Senior tax executives from GE are interested in meeting with you on June 20 at whatever time might be available on your schedule. We can limit the discussion to 30 minutes or less.

The issues for discussion are focused on the international provisions at the center of the Tax Cuts and Jobs Act. Specifically, they will want to talk about an issue with the transition tax and the category of previously taxed income (PTI) as well as some brief mention of issues relating to the GILTI provisions and the Section 59A BEAT rules.

Thanks for your consideration of this request. Please let me know at your convenience if something is possible on June 20. Best regards.

Nick

From: (b)(6) on behalf of Poms, Douglas
Sent: Fri, 19 Oct 2018 16:54:47 -0400
To: Harter, Chip; Nichols, Kevin; (b)(6) (b)(6) (b)(6) (b)(6)
(b)(6); (b)(6)
Subject: (Confirmed) FDII and BEAT w/UPS - Zachary Rudisill

Updated to include visitors' clearance.

WAVES APPOINTMENT STATUS

U#: U34900

Appointment #: 91495

Appointment Date/Time: 10/24/2018 10:00 AM

Security Specialist: (b)(6)

Person Visited: Douglas Poms, ITC

Event Name: FDII and BEAT w/UPS

Room Number: Main Treasury - Griswold / 5116

Appointment Status: COMPLETE

Number of Visitors: 2

Number of Cleared Visitors: 2

First Name	Last Name	Status
ANNIE	POLICASTRO	CLEARED
ZACHARY	RUDISILL	CLEARED

WAVES APPOINTMENT STATUS

U#: U34945

Appointment #: 91558

Appointment Date/Time: 10/24/2018 10:00 AM

Security Specialist: (b)(6)

Person Visited: Douglas Poms, ITC

Event Name: FDII and BEAT w/UPS

Room Number: Main Treasury - Griswold / 5116

Appointment Status: COMPLETE

Number of Visitors: 1

Number of Cleared Visitors: 1

First Name	Last Name	Status
DONALD	LANCASTER	CLEARED

Meeting confirmed

From: Rudisill, Zachary

Sent: Thursday, September 27, 2018 12:38 PM

To: 'Lafayette "Chip" Harter (lafayette.harter@treasury.gov)' <lafayette.harter@treasury.gov>;
'doug.poms@treasury.gov' <doug.poms@treasury.gov>

Cc: 'bradley.bailey@treasury.gov' <bradley.bailey@treasury.gov>

Subject: UPS Meeting

Chip & Doug:

Hope you guys are doing well. UPS's tax director, Don Lancaster, will be in town in October and was wondering if you guys might have a few minutes to meet to chat FDI and BEAT. He's in town both the week of the 8th and the 22nd, so if there's a good day in there just let us know. Appreciate your consideration; talk soon,

Zach

Zachary M. Rudisill

AKIN GUMP STRAUSS HAUER & FELD LLP

1333 New Hampshire Avenue, N.W. | Washington, DC 20036-1564 | USA | Direct: (h)(6) | Internal: 24225
Fax: +1 202.887.4288 | zrudisill@akingump.com | akingump.com | [Bio](#)

Licensed to practice in Virginia only and under the supervision of the partners of Akin Gump Strauss Hauer & Feld LLP. Application for admission to the District of Columbia Bar pending.

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From: (b)(6) on behalf of Poms, Douglas
Sent: Thu, 14 Feb 2019 11:09:50 -0500
To: Harter, Chip (b)(6); Nichols, Kevin; Huynh, Quyen; (b)(6)
Subject: (Confirmed) Meeting with AIG on BEAT and insurance

Included visitors

WAVES APPOINTMENT STATUS

U#: U39066
Appointment #: 101652
Appointment Date/Time: 2/14/2019 4:00 PM
Security Specialist: (b)(6)
Person Visited: Douglas Poms, ITC
Event Name: BEAT Discussion
Room Number: Griswold, Room 5116
Appointment Status: COMPLETE
Number of Visitors: 3
Number of Cleared Visitors: 3

First Name	Last Name	Status
ANGELA	BEKKER	CLEARED
CAROLYN	CODA	CLEARED
ERIC	MILLER	CLEARED

WAVES APPOINTMENT STATUS

U#: U39118
Appointment #: 101738
Appointment Date/Time: 2/14/2019 4:15 PM
Security Specialist: (b)(6)
Person Visited: Douglas Poms, ITC
Event Name: BEAT
Room Number: Griswold, Room 5116
Appointment Status: COMPLETE
Number of Visitors: 1
Number of Cleared Visitors: 1

First Name	Last Name	Status
SHAWN	GALLAGHER	CLEARED

WAVES APPOINTMENT STATUS

U#: U39117
Appointment #: 101730
Appointment Date/Time: 2/14/2019 4:15 PM
Security Specialist: (b)(6)
Person Visited: Douglas Poms, ITC
Event Name: BEAT
Room Number: Griswold, Room 5116
Appointment Status: COMPLETE
Number of Visitors: 1
Number of Cleared Visitors: 1

First Name	Last Name	Status
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DARREN TRIGONOPLOS CLEARED

From: (b)(6) on behalf of Poms, Douglas
Sent: Wed, 18 Jul 2018 08:16:03 -0400
To: Nichols, Kevin (b)(6) Kitzinger, Lindsay (b)(6) Harter, Chip (b)(6)
Subject: (Confirmed) Meeting w/Lazard on BEAT and FTC (branch basket and transition rules) issues

WAVES APPOINTMENT STATUS

U#: U30927

Appointment #: 85753

Appointment Date/Time: 7/23/2018 4:30 PM

Security Specialist (b)(6)

Person Visited: Douglas Poms

Event Name: BEAT / FTC

Room Number: 5116

Appointment Status: IN PROGRESS

Number of Visitors: 6

Number of Cleared Visitors: 5

First Name	Last Name	Status
ELI	FINK	CLEARED
RANDOLPH	HERNDON	CLEARED
CHRISTOPHER	JAVENS	CLEARED
ALEXANDER	JONES	PROCESSING
ROBERT	LEHMAN	CLEARED
LAWRENCE	WILLCOX	CLEARED

Hi (b)(6) - We have a client, Lazard, who would like to come in and meet with you and the appropriate members of the team on some BEAT issues and FTC issues related to the branch basket and pre-reform attributes (e.g., OFLs). We are working on a written document to provide in advance of the meeting.

Do you have any availability July 18, 19, 20, 23, 24, 26, or 27?

Have a nice weekend.

Many thanks,
Chris

Chris Javens
Capitol Tax Partners, LLP
101 Constitution Ave., NW Suite 675E
Washington, DC 20001
Phone: 202-289-8700
Direct: (b)(6)

Mobile: (b)(6)

From: (b)(6)
Sent: Mon, 23 Apr 2018 08:46:15 -0400
To: Harter, Chip
Subject: Accepted: (Confirmed) BEAT Issue - FedEx - w/Jon Talisman et al

From: Poms, Douglas
Sent: Wed, 18 Apr 2018 08:06:34 -0500
To: Harter, Chip
Subject: Accepted: (Confirmed) BEAT Issue - FedEx - w/Jon Talisman et al

From: Nichols, Kevin
Sent: Wed, 27 Feb 2019 16:47:58 -0500
To: Harter, Chip
Subject: Accepted: (Confirmed) BEAT w/Ashlyn Teel

From: Nichols, Kevin
Sent: Wed, 30 Jan 2019 14:55:42 -0500
To: Harter, Chip
Subject: Accepted: (Confirmed) BEAT w/Sean Hailey

From: Poms, Douglas
Sent: Fri, 30 Mar 2018 08:39:23 -0400
To: Harter, Chip
Subject: Accepted: BEAT Issue - FedEx - w/Jon Talisman, Bobby Brown and Lance Mangum

From: (b)(6)
Sent: Fri, 8 Jun 2018 17:44:28 -0400
To: Harter, Chip
Subject: Accepted: FW: John Talisman - GILti AND MINING

From: Poms, Douglas
Sent: Mon, 14 May 2018 13:37:27 -0400
To: Harter, Chip
Subject: Accepted: Jon Talisman - GILTI and Treatment of Mining Operations

From: (b)(6)
Sent: Mon, 21 May 2018 10:00:19 -0400
To: Harter, Chip
Subject: Accepted: Jon Talisman - GILTI and Treatment of Mining Operations

From: Kranbuhl, Kipp
Sent: Mon, 17 Sep 2018 12:42:07 -0400
To: (b)(6); Dreyer, Steven; Seitz, Steven; Harter, Chip
Cc: (b)(6); (b)(6); (b)(6)
Subject: BEAT Discussion
Attachments: (b)(6)

Attendees:

Jo-Marie St. Martin, Vice President, W. R. Berkley Corporation
Deb Oates, General Tax Counsel, Strategic Tax Planning, Liberty Mutual Insurance
Viji Rangaswami, Vice President, Liberty Mutual Insurance
Vito Peraino, Senior Vice President and General Counsel, American Financial Group, Inc.
Kim Baird, Vice President Taxation, American Financial Group, Inc.
Kathleen Mellody, Vice President, The Hartford
Jon Talisman, Founding Partner, Capitol Tax Partners



September 13, 2018

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable David Kautter
Acting Commissioner of the IRS and
Assistant Secretary of the Treasury
1111 Constitution Avenue, NW
Washington, D.C. 20224

Mr. Lafayette G. "Chip" Harter III
Deputy Assistant Secretary of the Treasury
International Tax Affairs
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Mr. William Paul
Acting Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: Section 59A Regulatory Guidance

Dear Sirs:

On behalf of the members of our coalition,¹ we want to thank you for the time you and your colleagues have spent meeting with us and other taxpayers considering the application of the Base Erosion Anti-Abuse Tax (BEAT), particularly with respect to the use of "foreign affiliate reinsurance." As we have discussed, the members of our coalition believe the BEAT is working largely as intended to address the foreign affiliate reinsurance loophole, and has not adversely affected capacity or pricing in the insurance market as the availability of capital remains strong.²

Prior to passage of the BEAT, foreign-owned insurance companies were using affiliate reinsurance to strip much of their U.S. profits to low tax/no tax countries like Bermuda and Switzerland to avoid U.S. taxes that U.S.-based companies were required to pay. This tax break provided foreign-owned companies with an unfair competitive advantage over American companies in doing business here at home and resulted in foreign companies gaining domestic market share at the expense of American-owned companies. Several companies inverted overseas to take advantage of this loophole.

Fortunately, policymakers recognized the need to address this unintended loophole as part of H.R. 1 by

¹ The Coalition for American Insurance consists of ten major U.S.-based insurance groups that employ hundreds of thousands of people within the United States. For more information about the coalition, please see <http://www.coalitionforamericaninsurance.com/>.

² See, e.g., Dowling & Partners, 8 IBNR Weekly 23 (February 22, 2018) ("High levels of reinsurance capacity, both traditional and lower cost alternative capital, were the reason the overall rate improvement at January 1 was less than originally expected in the wake of the 2017 catastrophes.")

adopting the BEAT. According to the legislative history, the BEAT was created to function as a minimum tax in order to preclude companies from eroding the tax base through use of certain related-party payments. For this purpose, Congress singled out reinsurance payments to foreign affiliates as a type of base erosion payment subject to the BEAT.

The adoption of BEAT has helped to level the competitive playing field. As Dowling & Partners, a leading insurance industry expert, has said, “U.S. based primary insurers will no longer operate with the significant economic/mathematical/structural disadvantages relative to foreign based entities. All else equal, and they never are, the lower U.S. corporate tax rate, when combined with the effective elimination of the ability to undertake tax advantaged quota-share agreements with “affiliated” entities, brings U.S. primary insurers to at least parity with foreign owned insurers.”³

We are already seeing positive economic impacts in the insurance industry. The pressure to invert and the capital flight to offshore domiciles have diminished significantly as a result of the BEAT and other changes that were made. For example, Assurant reversed its plans to invert into The Warranty Group and instead acquired the Bermuda-based company and remained in the U.S. Several foreign companies also have announced they are unwinding their large intercompany quota share arrangements, keeping their insurance business and reserves (and the associated U.S. taxes) in the United States. Finally, in announcing U.S.-based AIG’s plans to acquire Bermuda-based reinsurer Validus, the Financial Times commented that “Along with a lower US headline corporate rate, the BEAT diminishes whatever advantages Bermuda-based reinsurers had in writing business. It is no surprise that groups, which tried to engage in Bermuda tax arbitrage, are now seeking rescues by the likes of AIG. Bermuda’s airport may be welcoming many more US CEOs in the months ahead.”⁴

Application of BEAT

The BEAT has a broader base (but lower rate) than the regular tax and only applies if it exceeds the taxpayer’s regular tax liability after reduction for tax credits (other than certain specified credits in years prior to 2026). The tax base for the BEAT is the taxpayer’s regular taxable income, plus (1) any “base erosion tax benefits” arising from specified base erosion payments and (2) the “base erosion percentage” amount of any net operating loss (NOL) deduction allowable for the tax year. For the purpose of the BEAT, a base erosion payment specifically includes any premium or other consideration for reinsurance paid or accrued to a foreign related party. The BEAT rate is five percent for tax years beginning in calendar year 2018, 10 percent for tax years beginning in 2019 through 2025, and 12.5 percent for tax years beginning after December 31, 2025.

Thus, assuming a 10% BEAT rate and not taking into account any applicable credits or exceptions,⁵ the BEAT generally will apply only if any affiliate reinsurance (and other base erosion) payments are close to or exceed 100% of the U.S. taxpayer’s regular taxable income. Thus, the BEAT still permits a significant amount of foreign affiliate reinsurance and only applies to “excessive” payments.

³ Dowling & Partners, 1 IBNR Weekly 5 (January 4, 2018).

⁴ See “AIG: The Beat Goes On,” Financial Times (January 23, 2018).

⁵ There are several exceptions to application of the BEAT. First, the BEAT does not apply to corporations whose average annual gross receipts for the 3-taxable-year period ending with the preceding taxable year are less than \$500 million. Second, the BEAT does not apply to individuals, S corporations, regulated investment companies or real estate investment trusts. Finally, a *de minimis* exception is provided for companies whose foreign related party payments are less than 3 percent of overall deductions (2 percent for certain banks and securities dealers).

Keep the Reinsurance Loophole Closed

We are concerned that a few comment letters to Treasury regarding the BEAT seek indirectly to reopen the loophole and threaten to eviscerate the progress that has been made to date.

For example, in a letter regarding Modco cessions,⁶ the commenters suggest that the base erosion tax benefit would be better measured by the reinsurance settlement payment made to the related foreign reinsurer rather than the reinsurance premium paid, and investment income ceded, to the foreign affiliate. We believe, however, that such treatment (i.e., effective netting) is clearly inappropriate under the language of the BEAT and would result in substantively equivalent transactions being treated very differently.

Modco is economically identical to coinsurance, and the income statement effects are the same. According to the Society of Actuaries, the emphasis should be on "coinsurance" and not on "modified," because "all of the specifics of Coinsurance apply to Modco."⁷ The only difference is who holds the reserves (and the investment assets with respect to the reserves) and the attendant accounting to reflect reserve credits/adjustments. In Modco arrangements, the ceding company retains the reserves and the investment assets.

Ceded premium paid under coinsurance is a reduction in premium income and is clearly treated as a base erosion payment if paid to a related foreign reinsurer. Similarly, for both tax and regulatory accounting purposes, Modco premium ceded is treated as a reduction in premium income. The amount returned to the ceding company as a prepayment of future obligations under the reinsurance contract is recorded for regulatory purposes as "reserve adjustments on reinsurance ceded," an item separate from premium income (not return premium). Interest income on the invested assets is credited to the reinsurer in this same "reserve adjustments on reinsurance ceded" account. Thus, any premiums paid or accrued to a related foreign insurer in a Modco arrangement should be treated as base erosion payments, rather than only the net reinsurance settlement payment as suggested by the commenters. Allowance of effective netting as suggested by the commenters would treat economically similar transactions differently, create an incentive to prefer Modco to standard coinsurance, and effectively reopen the affiliate reinsurance loophole which was addressed by the BEAT.

Thus, we respectfully request that Treasury clarify that the BEAT applies to the reduction in premium income for ceded premium under Modco contracts with no netting of Modco reserve adjustments or other returns. Section 803(a)(1)(B) includes reductions in premium income for modified coinsurance premium ceded (regardless of subsequent return Modco reserve adjustments). Moreover, any subsequent Modco adjustment should be broken into its components rather than netted. The gross amount payable to the foreign related reinsurer as premium or investment income should be subject to the BEAT. This is the appropriate treatment under the statute and is necessary to maintain parity between Modco and coinsurance transactions.

For similar reasons, we are concerned about a recent submission sent to Treasury from Chubb.⁸ In the e-mail, they suggest that "losses incurred" on reinsurance assumed into the U.S. from a foreign affiliate should not be base erosion payments. While we agree with the general premise that losses incurred should not be treated as base erosion payments, their proposed regulatory fix – to carve out from BEAT any reductions from gross income in section 803 or 832(b)(1) (other than reinsurance premium

⁶ See memorandum to Brett York, Attorney-Advisor, Office of Tax Legislative Counsel from Brownstein Hyatt Farber Schreck, LLP and McGuireWoods LLP (February 20, 2018).

⁷ Society of Actuaries, Introduction to Reinsurance Boot Camp, (May 6, 2015).

⁸ See letter to Chip Harter, Deputy Assistant Secretary, from Timothy Boyle, Head of Global Tax, Chubb (forwarded by e-mail from Jodi Bond, August 17, 2018).

payments) -- is far broader in application. First, their proposed solution may be interpreted to allow Modco reserve adjustments to be netted against reinsurance premium and investment income payments to foreign related parties in applying the BEAT. For the reasons described above with respect to the first comment letter, we believe this is inappropriate under the terms of the statute, would treat similar transactions very differently, and would reopen the reinsurance loophole through use of Modco arrangements.

Second, in the case of property & casualty insurance, their proposed solution carving out amounts covered by section 832(b)(1) has the potential to exclude from BEAT several forms of base erosion payments made to affiliates such as interest, rents and service payments. This would allow them effectively to skirt the BEAT, and reopen the loophole by restructuring their offshore arrangements to include greater services and interest rather than reinsurance premiums, or to include other payments made by non-insurance companies in the reinsurance contract. It is important to note that each of these items is treated as a deduction both for annual statement purposes and under section 832(c). Also, they are clearly the types of base erosion payments that Congress intended to subject to the BEAT.

Thus, because the adoption of BEAT was clearly intended to discourage base erosion, we respectfully request that Treasury and the IRS ensure that any regulatory interpretations regarding application of the BEAT with respect to the insurance industry do not allow or promote base erosion. In fact, we encourage Treasury to use its authority to prevent avoidance of BEAT by identifying transactions or arrangements that are designed, in whole or in part, to characterize payments otherwise subject to BEAT as payments not subject to BEAT (Section 59A(i)(1)(B)(i)).⁹

By contrast, as suggested in a recent comment letter from AIG,¹⁰ we believe that Treasury and the IRS should clarify that losses incurred and claims or benefit payments under a reinsurance contract between a U.S. reinsurer and a foreign related party are not treated as base erosion payments. The payment of claims is an integral part of reinsurance transactions that help to grow the U.S. tax base by bringing premiums, investment income and profits to the U.S., and thus help enlarge (rather than erode) the U.S. tax base. Also, these payments are not effectively related party payments as they ultimately go to third party customers, and the group as a whole does not control the timing or amount of such payments. Therefore, we believe it would be consistent with the legislative intent of the BEAT to clarify that any such loss, claims, or benefit payments on reinsurance provided to a foreign related party are not subject to the BEAT.¹¹

However, the appropriate treatment of ceding commissions paid to foreign related parties is less clear. While such payments are also with respect to transactions that grow the U.S. tax base, ceding commissions themselves are comprised of many types of expenses and often include a profit or contingent profit. While the AIG example is simple, ceding commissions are often ill-defined or identified as a percentage of premium. This leads to variability across contracts and allows for flexibility, particularly in

⁹ For example, Treasury should clarify that retroactive reinsurance with a foreign affiliate is subject to the BEAT, because it allows for similar base erosion as prospective foreign affiliate reinsurance.

¹⁰ Letter to Kipp Kranbuhl, Tyler Williams, Douglas Poms and Steven Seitz, Department of Treasury, from Darren Trigonoplos, Vice President, AIG (August 24, 2018).

¹¹ We support clarifying language that has been developed and suggested by a group of American based life and property and casualty insurance companies regarding the definition of base erosion payment. Their suggested language is as follows:

() *Base erosion payment.*—

() *Claim, benefit and losses incurred amounts on certain reinsurance not included.*— In the case of an insurance company, the term base erosion payment does not include an amount paid or accrued to a foreign person which is a related party for claims, benefits, or losses incurred [amounts deductible by life insurance companies under section 805(a)(1) and amounts taken into account by nonlife insurance companies under section 832(b)(5)] with respect to reinsurance. This paragraph shall not apply to (a) payments with respect to insurance of related parties to the taxpayer as provided in [cross-reference to regulations provision implementing the related-party definition in section 59A(g)], or (b) payments within the scope of [cross-reference to provision implementing the expatriated entity rules of section 59A(d)(4)].

the related party context. To avoid incentives for base erosion in the insurance industry, any guidance with respect to ceding commissions should be consistent with the treatment provided to similar services or other costs in other similar arrangements and industries.

Once again, we greatly appreciate the opportunity to provide our comments and suggestions for your consideration in connection with the proposed guidance regarding the BEAT. Please let us know if you have any questions or comments. We would be glad to meet with you to discuss these issues further.

Sincerely yours,



Jo-Marie St. Martin
On behalf of the Coalition for American Insurance
Vice President, Federal Government Relations
W. R. Berkley Corporation

cc:

Douglas Poms

(b)(6)

Kevin Nichols

(b)(6)

Marjorie Rollinson

Daniel McCall

From: (b)(6) on behalf of Poms, Douglas
Sent: Tue, 18 Sep 2018 16:09:08 -0400
To: (b)(6); (b)(6); Harter, Chip; (b)(6); (b)(6); (b)(6)
(b)(6)
Cc: (b)(6)
Subject: Canceled: (Canceled) Meeting w/Peter Hiltz - Amazon re: GILTI/904
Importance: High

Update – Meeting canceled - Jason Weinstein and team are traveling abroad next week and will need to reschedule at a later date.

From: Hiltz, Peter <hilpeter@amazon.com>
Date: August 31, 2018 at 4:34:32 PM EDT
To: (b)(6) <[\(b\)\(6\)@treasury.gov](mailto:(b)(6)@treasury.gov)>
Cc: Weinstein, Jason <jwein@amazon.com>, White-Smith, Morgan <whimorg@amazon.com>
Subject: Would like to get on your calendar (or appropriate person's calendar)

Hi (b)(6)

as I mentioned on the phone, we (Amazon) would like to get on your calendar (or the appropriate person's calendar) to talk about some of the complexities with OFIs and SLLs in the context of potential GILTI/904 regs.

Would appreciate any guidance on the appropriate audience at Treasury and IRS so we can get on the appropriate calendar. We would be coming in from Seattle so nailing down the calendar will be as important to us as it is to you.

Thanks for any assistance you can provide,

Peter Hiltz
Director, International Tax Policy and Planning
Amazon.com
hilpeter@amazon.com
(b)(6) (Cell)

From: Poms, Douglas
Sent: Wed, 6 Jun 2018 16:56:16 -0400
To: Harter, Chip
Subject: Declined: BEAT

I will have to miss this one. I have (b)(6) at that time. Thanks.

From: MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@do.treas.gov on behalf of Nichols, Kevin
Sent: Thu, 7 Mar 2019 07:45:56 -0600
To: Harter, Chip
Subject: Meeting Forward Notification: (Confirmed) BEAT w/Ashlyn Teel

Your meeting was forwarded

Nichols, Kevin has forwarded your meeting request to additional recipients.

Meeting

(Confirmed) BEAT w/Ashlyn Teel

Meeting Time

Monday, 25 March 2019 15:00-15:30.

Recipients

(b)(6)

All times listed are in the following time zone: (UTC-05:00) Eastern Time (US & Canada)

Sent by Microsoft Exchange Server 2013

From: (b)(6) on behalf of (b)(6)
Sent: Fri, 21 Sep 2018 15:48:35 -0400
To: Harter, Chip; Poms, Douglas; (b)(6); (b)(6); (b)(6); (b)(6)
(b)(6)
Cc: (b)(6); (b)(6); (b)(6)
Subject: Meeting with Bank of America regarding previously taxed earnings

Updated to include ACCI's clearance

WAVES APPOINTMENT STATUS

U#: U33693

Appointment #: 89751

Appointment Date/Time: 9/27/2018 11:30 AM

Security Specialist: (b)(6)

Person Visited: (b)(6)

Event Name: BOA/ITC/INTL

Room Number: MT 5116 / Griswold

Appointment Status: COMPLETE

Number of Visitors: 4

Number of Cleared Visitors: 4

First Name	Last Name	Status
MELINDA	HARVEY	CLEARED
ROSE	JENKINS	CLEARED
JEFFERY	MITCHELL	CLEARED
MARGARET	OCONNOR	CLEARED

WAVES APPOINTMENT STATUS

U#: U33446

Appointment #: 89378

Appointment Date/Time: 9/27/2018 11:30 AM

Security Specialist:

Person Visited: (b)(6) and Team

Event Name: BOA

Room Number: 5116 - Griswold

Appointment Status: COMPLETE

Number of Visitors: 3

Number of Cleared Visitors: 3

First Name	Last Name	Status
LARRY	BAILEY	CLEARED
JAMES	CARLISLE	CLEARED
WILLIAM	MCNAIRY	CLEARED

Update: Included meeting location

From: (b)(6) on behalf of "Margolis, Alisa" <amargoli@amazon.com>
Sent: Wed, 27 Feb 2019 17:59:55 +0000
To: paul.oosterhuis@scadden.com; jeffriedman@eversheds-sutherland.com; jjoy@ic.bloombergtax.com; edicker@tei.org; Harter, Chip
Subject: Tax Executives Institute - Midyear Conference Prep

You have been invited to an online meeting, powered by Amazon Chime.

1. Click to join the meeting:

<https://hyperlink.services.treasury.gov/agency.do?origin=https://chime.aws/3683564553>

Meeting ID: (b)(6)

2. You can use your computer's microphone and speakers, however, a headset is recommended. Or, call in using your phone:

United States Toll-Free: (b)(6)

Meeting PIN: (b)(6)

One-click Mobile Dial-in (United States (1)): (b)(6)

United States (1): (b)(6)

International:

<https://hyperlink.services.treasury.gov/agency.do?origin=https://chime.aws/dialinnumbers/>

3. To connect from an in-room video system, use one of the following Amazon Chime bridges:

SIP video system: (b)(6) or meet.chime.in

or

H.323 system: (b)(6)

If prompted enter the Meeting PIN: (b)(6)

From: (b)(6) on behalf of Poms, Douglas
Sent: Fri, 7 Sep 2018 13:37:41 -0500
To: (b)(6); (b)(6); Harter, Chip; (b)(6); (b)(6); (b)(6)
(b)(6); (b)(6)
Subject: (Confirmed) Meeting w/Peter Hiltz - Amazon re: GILTI/904

Update: Meeting has been confirmed

From: Hiltz, Peter <hilpeter@amazon.com>
Date: August 31, 2018 at 4:34:32 PM EDT
To: (b)(6) <[\(b\)\(6\)@treasury.gov](mailto:(b)(6)@treasury.gov)>
Cc: Weinstein, Jason <jwein@amazon.com>, White-Smith, Morgan <whimorg@amazon.com>
Subject: Would like to get on your calendar (or appropriate person's calendar)

Hi Jason,

as I mentioned on the phone, we (Amazon) would like to get on your calendar (or the appropriate person's calendar) to talk about some of the complexities with OFLs and SLLs in the context of potential GILTI/904 regs.

Would appreciate any guidance on the appropriate audience at Treasury and IRS so we can get on the appropriate calendar. We would be coming in from Seattle so nailing down the calendar will be as important to us as it is to you.

Thanks for any assistance you can provide,

Peter Hiltz
Director, International Tax Policy and Planning
Amazon.com
hilpeter@amazon.com
(b)(6) (Cell)

From: (b)(6) on behalf of Poms, Douglas
Sent: Mon, 25 Mar 2019 16:12:34 -0400
To: Harter, Chip;Huynh, Quyen;ITC Calendar
Subject: (HOLD) BEAT Discussion w/AIG et al

Kevin will be in Paris. Please forward to anyone I may have missed.

From: Carolyn Coda
Sent: Thursday, March 21, 2019 11:48 AM
To: 'Chip.Harter@treasury.gov' <Chip.Harter@treasury.gov>; 'Douglas.Poms@treasury.gov' <Douglas.Poms@treasury.gov>
Cc: (b)(6)@treasury.gov <(b)(6)@treasury.gov>; (b)(6)@treasury.gov <(b)(6)@treasury.gov>
Subject: Meeting Request - AIG

Chip and Doug –

I hope this note finds you doing well since we met last month.

As you will have already seen, AIG joined Prudential, RGA, Chubb, Liberty Mutual and PacLife in submitting comments regarding the application of BEAT to outbound reinsurance. As a follow-up, I would like to see if you and your teams have time on April 2nd or 3rd to meet with the companies to discuss the submission and provide any additional feedback that may be warranted.

We appreciate your consideration of this request in advance and please let me know if you have any questions.

Best,
Carolyn

Invariant
O: 202-628-8950
C: (b)(6)

From: (b)(6)
Sent: Tue, 21 May 2019 09:25:42 -0400
To: Harter, Chip
Subject: Amazon digital tax call

From: (b)(6) on behalf of Kautter, David
Sent: Thu, 14 Mar 2019 12:25:13 -0400
To: Harter, Chip; (b)(6) Nichols, Kevin; Huynh, Quyen
Cc: (b)(6)
Subject: Coalition for American Insurance RE: BEAT

From: Jon Talisman <talisman@capitoltax.com>
Sent: Wednesday, March 13, 2019 10:27 AM
To: (b)(6) <[@treasury.gov](mailto:(b)(6)@treasury.gov)>
Subject: Meeting request

(b)(6)

I would like to request a meeting on behalf of the Coalition for American Insurance with Dave, Chip and the rest of the team to follow-up on the comment letter we filed with respect to the BEAT. A number of representatives from our member companies would attend. The best dates for us would be March 21 or March 27. If those dates don't work well, please send me some dates in late March or early April that do.

Thanks very much,

Jon

From: (b)(6) on behalf of Poms, Douglas
Sent: Thu, 14 Feb 2019 11:09:25 -0500
To: Harter, Chip; (b)(6) Nichols, Kevin; Huynh, Quyen; (b)(6)
Subject: Hold for meeting with AIG on BEAT and insurance

Included visitors

WAVES APPOINTMENT STATUS

U#: U39066

Appointment #: 101652

Appointment Date/Time: 2/14/2019 4:00 PM

Security Specialist: (b)(6)

Person Visited: Douglas Poms, ITC

Event Name: BEAT Discussion

Room Number: Griswold, Room 5116

Appointment Status: COMPLETE

Number of Visitors: 3

Number of Cleared Visitors: 3

First Name	Last Name	Status
ANGELA	BEKKER	CLEARED
CAROLYN	CODA	CLEARED
ERIC	MILLER	CLEARED

WAVES APPOINTMENT STATUS

U#: U39118

Appointment #: 101738

Appointment Date/Time: 2/14/2019 4:15 PM

Security Specialist: (b)(6)

Person Visited: Douglas Poms, ITC

Event Name: BEAT

Room Number: Griswold, Room 5116

Appointment Status: COMPLETE

Number of Visitors: 1

Number of Cleared Visitors: 1

First Name	Last Name	Status
SHAWN	GALLAGHER	CLEARED

WAVES APPOINTMENT STATUS

U#: U39117

Appointment #: 101730

Appointment Date/Time: 2/14/2019 4:15 PM

Security Specialist: (b)(6)

Person Visited: Douglas Poms, ITC

Event Name: BEAT

Room Number: Griswold, Room 5116

Appointment Status: COMPLETE

Number of Visitors: 1

Number of Cleared Visitors: 1

First Name	Last Name	Status
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DARREN TRIGONOPLOS CLEARED

From: (b)(6) on behalf of Kautter, David
Sent: Thu, 9 May 2019 14:09:22 -0400
To: Harter, Chip (b)(6)
Subject: Kurt Lamp, Tax Director w/Amazon RE: Meet/Greet
Attachments: KURT LAMP.pdf

Contact: Jon Talisman
talisman@capitoltax.com
(b)(6)

KURT LAMP

Kurt Lamp joined Amazon in June 2010. His career with Amazon includes his roles as Amazon's Vice President of State Tax and Tax Operations and Amazon's Vice President of North America Tax. Prior to Amazon Kurt held various management roles with Microsoft, 1997 to 2010, where his final management role was Director of Tax Controversies. Prior to his tenure with Microsoft, Kurt's career includes tenure with one of *The Big Four* firms. Kurt holds BA in Economics, a JD from the University of North Dakota, and a Master of Laws (LLM) in Taxation from New York University. Kurt is past President and current Board member of the Seattle Chapter of TEI. Kurt has served on several national TEI committees and is currently a member of the Board of Directors of the Council on State Taxation.

From: (b)(6) on behalf of (b)(6)
Sent: Tue, 18 Sep 2018 08:28:23 -0400
To: Harter, Chip; Poms, Douglas; (b)(6) Wang, James; (b)(6) (b)(6)
(b)(6)
Cc: Jenkins, Rose E.; O'Connor, Margaret
Subject: Meeting with Bank of America regarding previously taxed earnings

Updated to include visitors' building clearance.

WAVES APPOINTMENT STATUS

U#: U33446

Appointment #: 89378

Appointment Date/Time: 9/27/2018 11:30 AM

Security Specialist:

Person Visited: (b)(6) and Team

Event Name: BOA

Room Number: 5116 - Griswold

Appointment Status: COMPLETE

Number of Visitors: 3

Number of Cleared Visitors: 3

First Name	Last Name	Status
LARRY	BAILEY	CLEARED
JAMES	CARLISLE	CLEARED
WILLIAM	MCAIRY	CLEARED

Update: Included meeting location

From: (b)(6) on behalf of (b)(6)
Sent: Tue, 11 Sep 2018 11:32:14 -0400
To: Harter, Chip; Poms, Douglas; (b)(6); (b)(6); (b)(6); (b)(6)
(b)(6)
Cc: (b)(6); (b)(6)
Subject: Meeting with Bank of America regarding previously taxed earnings

Update: Included meeting location

From: Harter, Chip
Sent: Wed, 30 Jan 2019 19:20:09 +0000
To: Harter, Chip;Huynh, Quyen;Poms, Douglas;(b)(6)
Subject: (Confirmed) BEAT

Updated to include visitors' clearances.

WAVES APPOINTMENT STATUS

U#: U38494

Appointment #: 100827

Appointment Date/Time: 2/8/2019 3:00 PM

Security Specialist: (b)(6)

Person Visited: Chip Harter

Event Name: BEAT Discussion

Room Number: Griswold, Room 5116

Appointment Status: COMPLETE

Number of Visitors: 7

Number of Cleared Visitors: 7

First Name	Last Name	Status
VOLKER	BAETZ	CLEARED
MICHAEL	CABALLERO	CLEARED
MARGARET	GAGE	CLEARED
TODD	ORLICH	CLEARED
ANTHONY	PORCARO	CLEARED
MAUREEN	SMITH	CLEARED
ASHLYN	TEEL	CLEARED

WAVES APPOINTMENT STATUS

U#: U38768

Appointment #: 101196

Appointment Date/Time: 2/8/2019 3:00 PM

Security Specialist: (b)(6)

Person Visited: Chip Harter

Event Name: BEAT Discussion

Room Number: Griswold, Room 5116

Appointment Status: COMPLETE

Number of Visitors: 1

Number of Cleared Visitors: 1

First Name	Last Name	Status
KATE	DEAL	CLEARED

**Note: Kevin and Dan will be out of the office. Please let me know if anyone else should be included.
Thanks!**

From: Teel, Ashlyn S. <ashlyn.teel@credit-suisse.com>
Sent: Friday, January 25, 2019 4:08 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: Meeting Request-February 8

Hi Chip,

Thank you for taking the time to speak with us last week on the BEAT proposed regulations. With the government re-opening, would you and your team have any availability to meet with us on Friday, February 8?

It would be myself, Maggie Gage, a couple members of our tax team including our interim head of US tax, and our CS expert on resolution planning.

Thank you!
Ashlyn

Ashlyn S Teel

CREDIT SUISSE SECURITIES (USA) LLC

CS Sec USA LLC | US Leg & Reg Coverage, YPGE
1201 F Street, Nw | Washington DC 20004 | Americas

Phone (b)(6)

ashlyn.teel@credit-suisse.com | <https://hyperlink.services.treasury.gov/agency.do?origin=www.credit-suisse.com>

=====

Please access the attached hyperlink for an important electronic communications disclaimer:
https://hyperlink.services.treasury.gov/agency.do?origin=http://www.credit-suisse.com/legal/en/disclaimer_email_ib.html

=====

From: Harter, Chip
Sent: Tue, 18 Dec 2018 17:08:20 +0000
To: Harter, Chip; Poms, Douglas; (b)(6); (b)(6); (b)(6)
Cc: Sutton, William; (b)(6)
Subject: (Confirmed) Citadel w/John Talisman re: GILTI

Updated to include visitors' clearance

WAVES APPOINTMENT STATUS
U#: U38492
Appointment #: 100823
Appointment Date/Time: 2/8/2019 2:00 PM
Security Specialist: (b)(6)
Person Visited: Chip Harter
Event Name: GILTI Discussion
Room Number: Griswold - 5116
Appointment Status: COMPLETE
Number of Visitors: 6
Number of Cleared Visitors: 6

First Name	Last Name	Status
ERIC	ATKERSON	CLEARED
CASON	CARTER	CLEARED
WILLIAM	DAVIS	CLEARED
RANDOLPH	HERNDON	CLEARED
ROBERT	RUSSO	CLEARED
JONATHAN	TALISMAN	CLEARED

Please forward to someone I may have missed. Thank you!

From: Harter, Chip
Sent: Mon, 29 Oct 2018 16:29:53 +0000
To: Harter, Chip; Poms, Douglas (b)(6); (b)(6); (b)(6)
Cc: (b)(6); (b)(6); (b)(6); (b)(6); (b)(6) Huynh, Quyen; (b)(6); (b)(6)
Subject: (Confirmed) Michael Caballero re: GILTI
Attachments: Summary of Meeting and Proposed Agenda -- GILTI and High-Taxed Income.docx

Adding updated clearance list and summary of meeting and proposed agenda (KB 11/2/2018)

WAVES APPOINTMENT STATUS

U#: U35538

Appointment #: 93372

Appointment Date/Time: 11/5/2018 2:30 PM

Security Specialist: (b)(6)

Person Visited: Chip Harter

Event Name:

Room Number: 5116

Appointment Status: COMPLETE

Number of Visitors: 11

Number of Cleared Visitors: 11

First Name	Last Name	Status
MICHAEL	CABALLERO	CLEARED
ELIZABETH	COFFIN	CLEARED
COURTNEY	CONNELL	CLEARED
RONALD	CREAMER	CLEARED
SQUAD	GHOSNSAAB	CLEARED
NOAH	JACOBSON	CLEARED
JEFFREY	McMILLEN	CLEARED
DEBORAH	OATES	CLEARED
ZACHARY	RUDISILL	CLEARED
MOSHE	SPINOWITZ	CLEARED
GARY	TAPPANA	CLEARED

From: Caballero, Michael <mjcaballero@cov.com>
Sent: Friday, October 26, 2018 10:28 AM
To: (b)(6)@treasury.gov>
Subject: Scheduling a Meeting with Chip on GILTI

(b)(6)

I was discussing with Chip my coming in with a group of taxpayers for a meeting on High-taxed GILTI Income and he proposed the afternoon of Monday, November 5th. He asked me to check back with the group to confirm that time and then contact you to add it to his schedule. As for times, we can do any time during his afternoon window (he mentioned 2-5pm, though I guess we have a slight preference for 2pm). Please let me know if that afternoon is still open and what time would work best for Chip and others.

Thanks,
Michael

Michael J. Caballero

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T (b)(6) mjcaballero@cov.com
<https://hyperlink.services.treasury.gov/agency.do?origin=www.cov.com>

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

Summary of the Meeting Request and Purpose

To discuss issuing regulatory guidance that would permit taxpayers to treat high-taxed foreign income as subpart F income.

Proposed Agenda

- I. Introduction
- II. Structural concerns under the TCJA's rules for Global Intangible Low-Taxed Income (GILTI) regarding the treatment of high-taxed income
 - A. Operation of the newly enacted GILTI rules on income of foreign affiliates that is subject to high levels of foreign income tax
 - B. Unnecessary costs and impact on business operations of multinational companies absent regulatory relief
 - C. Reduction of administrative burden and cost savings to the government and tax administration
 - D. Consistency of issuing guidance with tax policy surrounding subpart F
- III. Regulatory solutions
 - A. Possible approaches for regulatory relief
 - B. Statutory authority for issuing regulations

From: Harter, Chip
Sent: Mon, 21 May 2018 14:15:44 +0000
To: Harter, Chip; (b)(6); Poms, Douglas
Cc: (b)(6); (b)(6); (b)(6)
Subject: Application of the BEAT to insurance

From: Sharon Bradley <bradley@capitoltax.com>
Sent: Thursday, May 17, 2018 5:32 PM
To: (b)(6)@treasury.gov>
Subject: Meeting Request - Jon Talisman and Chip Harter - Mon 06/05/18

Hi (b)(6) -

Per our discussion, Jon Talisman would like to request a meeting with Chip Harter and his team to discuss application of the BEAT to insurance.

Meeting Request Date: Mon, June 5

Jon Talisman/Chip Harter and team

Subject: BEAT

(b)(6) thanks very much!
We look forward to hearing from you.

Sharon
Sharon Bradley
Capitol Tax Partners
101 Constitution Avenue, NW, Suite 675 East
Washington, DC 20001
(b)(6)
202/289-6600 - Fax
(b)(6)@capitoltax.com

From: Kranbuhl, Kipp
Sent: Tue, 11 Sep 2018 21:48:39 +0000
To: Kranbuhl, Kipp; (b)(6) Dreyer, Steven; Seitz, Steven; Harter, Chip
Cc: (b)(6); (b)(6); (b)(6)
Subject: BEAT Discussion
Attachments: Coalition Submission to Treasury 9-13-18.pdf

Attendees:

Jo-Marie St. Martin, Vice President, W. R. Berkley Corporation
Deb Oates, General Tax Counsel, Strategic Tax Planning, Liberty Mutual Insurance
Viji Rangaswami, Vice President, Liberty Mutual Insurance
Vito Peraino, Senior Vice President and General Counsel, American Financial Group, Inc.
Kim Baird, Vice President Taxation, American Financial Group, Inc.
Kathleen Mellody, Vice President, The Hartford
Jon Talisman, Founding Partner, Capitol Tax Partners

From: Harter, Chip
Sent: Wed, 24 Jan 2018 21:29:07 +0000
To: Harter, Chip (b)(6) Poms, Douglas; (b)(6) (b)(6)
Subject: CONFIRMED - Carlisle - Bank of America re GILTI related issues

Cleared for this meeting:

First Name	Last Name	Status
LARRY	BAILEY	CLEARED
JAMES	CARLISLE	CLEARED
WILLIAM	MCNAIRY	CLEARED

From: Carlisle, James
Sent: Tuesday, January 23, 2018 9:40 AM
To: 'chip.harter@treasury.gov' <chip.harter@treasury.gov>
Subject: Meeting request: GILTI

Chip – Hope all is well. My Bank of America team would like to meet with you and your team on a couple of GILTI-related issues if you had time in the next week or so. Thanks, Jim

Jim Carlisle

Federal Government Relations

Bank of America

(O) (202) 661-7127

(C) (b)(6)

james.carlisle@bankofamerica.com

From: Harter, Chip
Sent: Tue, 19 Dec 2017 18:33:04 +0000
To: Harter, Chip; Poms, Douglas; (b)(6); (b)(6); (b)(6); Trier,
Dana; (b)(6); (b)(6)
Cc: Nichols, Kevin
Subject: Confirmed Tax reform international BEAT proposal as applied to foreign banks

Cleared for this meeting:

First Name	Last Name	Status
BRIAN	FORSCHINO	CLEARED
DAVID	KELLY	CLEARED
SHANE	LIEBERMAN	CLEARED
TODD	TUCKNER	CLEARED

From: Bradley.Bailey@treasury.gov [mailto:Bradley.Bailey@treasury.gov]
Sent: Tuesday, December 19, 2017 10:36 AM
To: Lieberman, Shane
Cc: (b)(6)@treasury.gov
Subject: Meeting with Chip Harter on Jan 8

Shane,

Following up on your call, Chip Harter is happy to meet with UBS's Deputy CFO on Jan 8th.
(b)(6) handles his scheduling and is cc'd on here.

Brad

Brad Bailey
Deputy Assistant Secretary for Tax and Budget
Office of Legislative Affairs
U.S. Department of the Treasury
Bradley.bailey@treasury.gov
C: (b)(6)
O: (202) 622-2878

From: Harter, Chip
Sent: Thu, 28 Dec 2017 16:22:58 +0000
To: Harter, Chip (b)(6); Nichols, Kevin
Cc: (b)(6)
Subject: Credit Suisse

Cleared for this meeting:

First Name	Last Name	Status
HUMBERTO	REBOREDO	CLEARED
JOSEPH	SEIDEL	CLEARED
ASHLYN	TEEL	CLEARED

From: Seidel, Joseph L. [mailto:joseph.seidel@credit-suisse.com]
Sent: Thursday, December 28, 2017 11:19 AM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: RE: Senate BEAT tax -- Interest Expense & Implementation?

Hi Chip.

Hope you had good holidays. Wanted to see if you might have time next week on January 5th to get together with me and Humberto Reboredo, our U.S. tax director. We wanted to discuss BEAT implementation issues as well as the legislative landscape this year for any possible BEAT adjustments.

Let me know what you think and any time that day works good for us right now other than 11 to 12.

Thx for your assistance and look forward to hopefully seeing you on the 5th.

Joe.

Sent with BlackBerry Work
(www.blackberry.com)

From: LafayetteChip.Harter@treasury.gov <LafayetteChip.Harter@treasury.gov>
Date: Friday, Dec 15, 2017, 3:22 PM
To: Seidel, Joseph L. (YPG) <joseph.seidel@credit-suisse.com>
Subject: RE: Senate BEAT tax -- Interest Expense & Implementation?

Based on what I've seen so far of the statutory language and legislative history, I doubt we could create by reg a TLAC exception from the BEAT, unfortunately.

Chip

From: Seidel, Joseph L. [<mailto:joseph.seidel@credit-suisse.com>]
Sent: Friday, December 15, 2017 1:53 PM
To: Harter, Chip <LafayetteChip.Harter@treasury.gov>
Subject: Senate BEAT tax -- Interest Expense & Implementation?

Hi Chip.

Many thx for your help on BEAT and sounds like we will get one year of transition relief. Live to fight another day has some appeal at this point.

One last probably dumb question, but do you think Treasury will have reg writing authority for BEAT implementation? If so, any parameters on it or could Treasury in theory create special rules for payments under a debt structure mandated by bank regulators, similar, in effect, to how the 385 regs dealt with TLAC and other banking mandates?

Curious as to your opinion & many thx again for all your help over last several weeks.

Joe

Joseph L Seidel
Managing Director & Senior Counsel
CREDIT SUISSE | Head, U.S. Public Policy
(o) +1 202 626 3302
(c) (b)(6)

From: Seidel, Joseph L. (YPG)
Sent: Thursday, December 14, 2017 1:00 PM
To: LafayetteChip.Harter@treasury.gov
Subject: Sen Scott: Senate Base Erosion Provisions -- Interest Expense & SFC staff

Not sure where things at, but Sen. Tim Scott told our US CEO on a call a little while ago that he's going down to SFC to press staff on a bank BEAT fix. He also talked to the DB global CEO today. Said it's not settled yet and wants to push the language below that you guys/Treasury has signed off on.

Obviously hard to verify but maybe some help if still in play. Shay's his staff guy and his email address below. (Very smart guy in wheelchair if somehow that's helpful or there's a room everyone in)

Joe.

From: Seidel, Joseph L. (YPG)
Sent: Thursday, December 14, 2017 12:04 PM
To: 'Shay_hawkins@scott.senate.gov'
Cc: Teel, Ashlyn S. (YPGE); Mandel, Jessica A. (YPGA); Reboredo, Humberto M. (TTU)
Subject: FW: Senate Base Erosion Provisions -- Interest Expense & SFC staff

FYI – see below. Updated language below we worked on with Treasury to tighten a narrow BEAT exemption for IHCs. They support it and have raised it with the SFC/JCT staff.

We limited the language to only focus on the 12 foreign banks required to hold related party debt by regulators (data attached) and who are Intermediate holding companies (IHCs) under the Fed (Includes CS & DB). (Many other foreign banks have either shrunk or shut down US operations to avoid IHC registration). The BEAT most directly impacts these IHC banks who all get hit by the regulatory requirements. Hopefully narrowing to this small category can help with the scorekeepers. (basically a \$5B hit over ten years based on very conservative assumptions using Fed data)

All we need now is someone to say “yes” on the Senate side to nail this down that would be great & as you can see below, Treasury supports it. (Chip Harter the Treasury contact) Let us know what you think. Thx. Joe.

Base Erosion payments do not include interest paid by an entity that :

(1) is subject to regulation under any of the following:

- (i) Section 165(d) of the Dodd-Frank Act;**
- (ii) Title II of the Dodd-Frank Act; or**
- (iii) Federal Reserve Board rules governing Total Loss Absorbing Capacity (TLAC) securities; and**

(2) is –

- (i) required by the Federal Reserve Board to be registered as an Intermediate Holding Company pursuant to Federal Reserve Regulation YY (12 CFR 252);**
or
- (ii) a bank as described in Section 582(c)(2)(A)(i) affiliated with an Intermediate Holding Company.**

From: Douglas.Poms@treasury.gov [<mailto:Douglas.Poms@treasury.gov>]
Sent: Monday, December 11, 2017 7:04 PM
To: Seidel, Joseph L. (YPG)
Cc: LafayetteChip.Harter@treasury.gov; Reboredo, Humberto M. (TTU)
Subject: RE: Senate Base Erosion Provisions -- Interest Expense & SFC staff

Hi Joe, yes, that makes sense and what we thought you might have meant. That's great. As Chip said, we support this fix and will pass on that view.

Thanks,
Doug

From: Seidel, Joseph L. [<mailto:joseph.seidel@credit-suisse.com>]
Sent: Monday, December 11, 2017 6:58 PM
To: Poms, Douglas
Cc: Harter, Chip; Reboredo, Humberto M.
Subject: RE: Senate Base Erosion Provisions -- Interest Expense & SFC staff

Sorry, I think we got our "ANDs" and "ORs" out of line Saturday AM. Below we think tightens it up to narrowly deal with the IHC category where we have relatively strong Fed data showing the size of a relatively small exemption. Again, something broader (with all ORs) would make for a better policy outcome, but that does not seem to be where they are at right now.

Let us know what you think. Thx. Joe.

Base Erosion payments do not include interest paid by an entity that :

(1) is subject to regulation under any of the following:

- (i) Section 165(d) of the Dodd-Frank Act;
- (ii) Title II of the Dodd-Frank Act; or
- (iii) Federal Reserve Board rules governing Total Loss Absorbing Capacity (TLAC) securities; and

(2) is –

- (i) required by the Federal Reserve Board to be registered as an Intermediate Holding Company pursuant to Federal Reserve Regulation YY (12 CFR 252); or
- (ii) a bank as described in Section 582(c)(2)(A)(i) affiliated with an Intermediate Holding Company.

From: Douglas.Poms@treasury.gov [mailto:Douglas.Poms@treasury.gov]
Sent: Monday, December 11, 2017 5:54 PM
To: Seidel, Joseph L. (YPG)
Cc: LafayetteChip.Harter@treasury.gov
Subject: FW: Senate Base Erosion Provisions -- Interest Expense & SFC staff

Hi Joe,

We had a quick question on your proposed statutory language below. Did you mean the "and" between (2) and (3) (highlighted below) to be an "or"? The use of the word "and" would make the exception available only to a qualifying Intermediate Holding Company.

Thanks,
Doug

Base Erosion payments do not include interest paid by an entity that :

(1) is subject to regulation under any of the following:

- (i) Section 165(d) of the Dodd-Frank Act;
- (ii) Title II of the Dodd-Frank Act; or
- (iii) Federal Reserve Board rules governing Total Loss Absorbing Capacity (TLAC) securities;

(2) is a bank as described in Section 582(c)(2)(A)(i); and

(3) is required by the Federal Reserve Board to be registered as an Intermediate Holding Company pursuant to Federal Reserve Regulation YY (12 CFR 252).

From: Harter, Chip
Sent: Fri, 18 May 2018 13:31:51 +0000
To: Harter, Chip; Poms, Douglas; (b)(6); (b)(6); (b)(6)
Cc: (b)(6); (b)(6); (b)(6); (b)(6)
Subject: John Talisman - GILTI AND MINING

From: Sharon Bradley <bradley@capitoltax.com>
Sent: Friday, May 18, 2018 9:11 AM
To: (b)(6)@treasury.gov
Subject: Fwd: Meeting Request - Jon Talisman and Chip Harter and/or Doug Poms - THU 6/14/18

Good Morning (b)(6) -

Just a note to please re-confirm our 6/14 meeting, previously confirmed with (b)(6)
I will get security clearance information to you soon.

Thanks much,
Sharon

Begin forwarded message:

From: Sharon Bradley <bradley@capitoltax.com>
Subject: Fwd: Meeting Request - Jon Talisman and Chip Harter and/or Doug Poms - THU 6/14/18
Date: May 16, 2018 at 4:04:21 PM EDT
To: (b)(6)@treasury.gov

Hi (b)(6) -

This is the additional meeting for which I will be sending clearance information to you.
Can you please confirm that it is on the calendars of Chip Harter and Doug Poms?

Thu 6/14/18 - 2:00 PM

Jon Talisman with Peabody

Subject: GILTI AND TREATMENT OF MINING OPERATIONS

Thanks for your assistance.

Sharon

Begin forwarded message:

From: <(b)(6)@treasury.gov>
Subject: RE: Meeting Request - Jon Talisman and Chip Harter and/or Doug Poms

Date: May 14, 2018 at 11:13:43 AM EDT

To: <bradley@capitoltax.com>

Cc: <(b)(6)@treasury.gov>, <(b)(6)@treasury.gov>

Thanks Sharon,

I'll be out of the office on extended leave beginning 5/16. If submitted beyond 5/15, please email the waves form to either (b)(6) and/or (b)(6), whom I've copied and will be assisting during my absence.

Regards, (b)(6)

From: Sharon Bradley <bradley@capitoltax.com>

Sent: Monday, May 14, 2018 11:02 AM

To: (b)(6)@treasury.gov

Subject: Re: Meeting Request - Jon Talisman and Chip Harter and/or Doug Poms

(b)(6) -

Thank you for your email.

Thursday 6/14 - 2PM works better.

Please confirm, and I will work on getting the WAVES form to you.

Thanks,
Sharon

On May 11, 2018, at 4:44 PM, (b)(6)@treasury.gov wrote:

Hi Sharon,

If you can get 6/13 at 10AM to work, then it's a go; otherwise Thursday, 6/14 at 2PM works perfectly!

Best, (b)(6)

From: Sharon Bradley <bradley@capitoltax.com>

Sent: Friday, May 11, 2018 12:16 PM

To: LeGrande, Aeisha <Aeisha.LeGrande@treasury.gov>

Subject: Meeting Request - Jon Talisman and Chip Harter and/or Doug Poms

Hello (b)(6)

Jon Talisman would like to request a meeting with Chip Harter and/or Doug Poms.

We greatly appreciate your assistance with scheduling. Please let us know if the times below will work.

Wed 6/13-11:00-12:00*

Jon Talisman with Peabody

Subject: GILTI AND TREATMENT OF MINING OPERATIONS

*Alternative dates/times

Thur 6/14-11:00-12:00

Wed 6/13- 2:00-3:00

Thu 6/14 - 2:00-3:00

(b)(6) thanks very much!

We look forward to hearing from you.

Sharon

From: (b)(6)
Sent: Mon, 10 Sep 2018 23:38:33 +0000
To: (b)(6); Harter, Chip; (b)(6); (b)(6); (b)(6); (b)(6)
(b)(6); Mitchell, Jeffery G.
Cc: Jenkins, Rose E.; O'Connor, Margaret; (b)(6)
Subject: Meeting with Bank of America regarding previously taxed earnings

Updated to include ACCI's clearance

WAVES APPOINTMENT STATUS

U#: U33693

Appointment #: 89751

Appointment Date/Time: 9/27/2018 11:30 AM

Security Specialist: (b)(6)

Person Visited: (b)(6)

Event Name: BOA/ITC/INTL

Room Number: MT 5116 / Griswold

Appointment Status: COMPLETE

Number of Visitors: 4

Number of Cleared Visitors: 4

First Name	Last Name	Status
MELINDA	HARVEY	CLEARED
ROSE	JENKINS	CLEARED
JEFFERY	MITCHELL	CLEARED
MARGARET	OCONNOR	CLEARED

WAVES APPOINTMENT STATUS

U#: U33446

Appointment #: 89378

Appointment Date/Time: 9/27/2018 11:30 AM

Security Specialist:

Person Visited: (b)(6) and Team

Event Name: BOA

Room Number: 5116 - Griswold

Appointment Status: COMPLETE

Number of Visitors: 3

Number of Cleared Visitors: 3

First Name	Last Name	Status
LARRY	BAILEY	CLEARED
JAMES	CARLISLE	CLEARED
WILLIAM	MCNAIRY	CLEARED

Update: Included meeting location