UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

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Re: USCIB Comments on the OECD Public Consultation Document on Addressing the Tax Challenges of the Digitalisation of the Economy

USCIB[1] is pleased to provide comments on the Public Consultation Document ("consultation document") Addressing the Tax Challenges of the Digitalisation of the Economy. USCIB supports the comments of Business at the OECD. We write separately to emphasize certain points.

General Comments

The OECD and the Inclusive Framework are undertaking an enormous challenge – rebalancing the taxing rights of countries to reflect the digitalization of the economy, while at the same time encouraging global growth and trade and investment. The current fundamental tax principles have been in place for approximately a century and have facilitated cross-border trade and investment and foreign direct investment, which has enabled growth. The arm's length standard is flexible – this is one of its strengths. USCIB believes that the OECD should seek to modify – not abandon – the arm's length standard. USCIB also believes that the OECD should proceed cautiously and based on articulated general principles.[2]

USCIB strongly agrees with the statement:

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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] USCIB supports the BIAC Business Principles for Addressing the Tax Challenges of the Digitalizing Economy http://biac.org/wp-content/uploads/2019/02/FINAL-2019-01-31-Business-at-OECD-Digital-Principles-Position-Paper2.pdf

> Members of the Inclusive Framework also agreed that any new rules to be developed should not result in taxation when there is no economic profit nor should they result in double taxation.[3]

These principles should be foundational in developing any new rules.

The OECD should also recognize the progress that has been achieved as a result of the BEPS changes and their implementation. Aggressive tax planning has been reduced. USCIB believes that further changes in the jurisdiction to tax will require countries with current taxing rights to be willing to forego some of their taxing rights if new taxing rights are to be granted to other countries. It should not be assumed that new taxing rights are shifting income from a no or low tax jurisdiction to a higher tax jurisdiction. If income is to be shifted from a jurisdiction that imposes significant tax, then it is critical that there is consensus with respect to this shift or the result will be double or multiple taxation of the same income, which will obviously harm global growth.

The OECD should not abandon the BEPS DEMPE principles. The DEMPE principles represent a careful, reasoned response to attributing profit from intangibles to functions of taxpayers. These rules have only just been adopted and the effects of these rules are yet to be fully determined. Abandoning these principles before they been reviewed for effectiveness is ill-advised.

USCIB believes that greater certainty for both countries and companies should be a primary principle of a new regime, reducing the costs and delays of a dispute-driven tax culture. This also means that there needs to be a single regime, not a menu of options and alternatives. Dispute resolution will be critical to successful implementation. 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.

The OECD should also be seeking more efficient and effective ways to provide advanced certainty for cross-border transactions. The current APA process takes too long and is too resource intensive.

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

There should be empirical support for any new rules. This principle should apply in the context of both revised profit allocation and nexus rules and the minimum tax.

USCIB believes that two of the revised profit allocation and nexus rule options -- the user participation option[4] and the significant economic presence option -- cannot form the basis of a

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[3] http://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf, page 3.

[4] USCIB has provided extensive comments on the EU's Digital Services Tax and the UK's Digital Services Tax. Many of those comments are relevant to the issue of user participation as a standard for allocating taxing rights.

new consensus. The proposals based on user-created value are unsupported by economic analysis and do not appropriately reflect the contributions to value of research and development (R&D) and investment in capital assets. Companies spend billions of dollars annually to create the infrastructure, technology, and data analytics necessary to create the systems that enable user participation. USCIB believes that the proposal with respect to significant economic presence lacks specificity and is not administrable. The significant economic presence test would result in an outcome similar to global formulary apportionment. USCIB believes that global formulary apportionment would require a level of integration among countries that is simply not achievable at this time. Global formulary apportionment factors, with their historical preference towards customer revenue, discriminate against technology development and production, creating a significant disincentive for countries to support innovation and production. The revenue factor also discriminates against small market countries including developing countries in favor of large developed markets. To make the significant economic presence proposal work, there would need to be agreement among countries on the details of a global corporate income tax base and on an allocation key or keys. Under such an approach, the allocation or apportionment of losses presents significant challenges that need to be addressed. USCIB understands that the Common Consolidated Corporate Tax Base[5], although considered for over a decade, has not been adopted because countries are unwilling to accept the significant shift in taxing rights that the CCCTB represents, including permitting losses incurred in other countries to offset income earned in the local jurisdiction. These difficulties would only be more extreme if the OECD attempted to move in this direction on a global scale.

The OECD should therefore focus its efforts with respect to the profit allocation and nexus proposal primarily on the so-called "marketing intangible" proposal. USCIB believes that a cautious, flexible approach that includes **<u>modest</u>** increases in marketing returns to the market jurisdiction while not abandoning the arm's length standard may be able to address concerns of market jurisdictions without undue disruption to other jurisdictions and well-established tax and transfer pricing principles.

Although the profit allocation and nexus and minimum tax proposals are presented as part of a single consultation document, there does not seem to be any relationship between the two proposals. Therefore, there does not seem to be any need to address these issues together and we recommend removing the minimum tax proposal. The minimum tax proposal is addressing potential remaining BEPS challenges, not challenges associated with the digitalizing economy. 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

[5] USCIB also understands that the CCCTB would permit income to be determined based on parent company financials, which would significantly simplify the necessary calculations. Nevertheless, agreement has not been reached.

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. If it is concluded that further measures are necessary, then whether income is low-taxed should be determined on an aggregate basis – not a per-country basis – and foreign taxes paid to other jurisdictions should be fully respected.

Revised Profit Allocation and Nexus Rules

USCIB agrees with the concerns raised by BIAC on the user participation proposal and will focus, therefore, on the so-called marketing intangible proposal.[6]

USCIB agrees that nexus and profit allocation are closely related and should be addressed together.[7] The consultation document notes that allocating residual income between marketing intangibles and other income could be done through "normal transactional transfer pricing principles" or it could be achieved through a residual profit split that is a more mechanical and rough-justice formula. An important concern with any mechanical/rough-justice formula is that it would be over-inclusive, in that it would capture income that is not attributable to true marketing intangibles. Regardless of what one thinks about the merits of a proposal to allocate taxing rights on marketing intangibles to the market jurisdiction, endorsing a formula that is over-inclusive and captures additional income is not appropriate.

Further to the mechanical calculation itself, USCIB believes it is important that losses must be considered in any formula to calculate non-routine returns. The consultation document states that "one possible approach would be to apply the proposals similarly to non-routine losses, in which case the portion of these negative amounts attributable to marketing intangibles or user contribution should also be re-allocated"[8]. USCIB would like to stress that this should not be an option but would have to be a key ingredient for any profit-split based or mechanical allocation mechanism. Also, pre-existing losses need to be dealt in a way that allows businesses to use these in any changed framework of rules.

The consultation document seems to be focused on under allocation of profits to the market jurisdiction in the case of remote sales and limited risk distributors ("LRDs"). If companies are operating through higher risk distributors (or, for service companies, through similarly robust taxable structures), USCIB believes that those incremental local activities and obligations should be taken into account to determine if any additional profits should be attributable to the market jurisdiction. Traditional post-BEPS Transfer Pricing Guidelines will reach the proper allocation in many cases. The residual profit split method should not be the default method; the best method rule should continue to apply.

To the extent that companies have located BEPS DEMPE functions relating to marketing in the market jurisdiction the case for allocating additional profit to that jurisdiction is weak. If there is

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[6] We have also provided extensive comments on the UK Digital Service Tax that are relevant to these issues.
[7] Consultation Document, paragraph 2.1.13.
[8] See para. 76 of the consultation document.

a general concern about how the current returns earned by LRDs or higher-risk related party distributors are determined by multinationals, then it may be more appropriate to undertake specific work to provide more objective and specific guidance on how those returns should be determined within the current transfer pricing framework. Any additional marketing profit allocation should not be based on a company's worldwide profit margin. Only the portion of a company's worldwide profit margin attributable to marketing, after appropriate specific allocation to BEPS DEMPE functions performed in a jurisdiction, should be subject to a limited reallocation to market jurisdictions.

The policy rationale for the marketing intangible proposal may be premised on the idea that an MNE group "reaches in" to market jurisdictions via LRDs or non-resident entities to build market and consumer awareness, etc. The consultation draft takes the position that use of LRDs under allocates profit to the market jurisdiction. This rationale ignores that businesses have many ways of performing their distribution functions. These include sales to a related party distributor, sales to unrelated distributors, direct remote sales, and indirect remote sales (sales to another MNE which then resells to that MNE's subsidiary in a third country). Some businesses may use all these models and the location and allocation of the marketing profit may depend on how the business is structured.

Marketing intangibles may be more or less important in different markets, for different products, different services, and different customers. Thus, applying uniform global profits to all business lines will result in distortions – marketing profits will be attributed to products or business lines where marketing is less important and diverted from products or business lines where it is more important. The marketing intangible proposal, if it is truly intended to apply to the entire digitalized economy in all 128 Inclusive Framework countries, should consider all these factors and be capable of supporting a conclusion that little or no additional marketing profit earned by a digitalized business should be allocable to a market jurisdiction. Traditional profit allocation methods may suffice in many cases.

Developing a principles-based approach that works to apply the marketing intangibles concept in a consistent way may be difficult due to the significantly different ways that multinationals go to market. In addition, as business models continue to evolve, a principles-based approach rooted in the arm's length standard provides the flexibility needed for further changes.

The following examples illustrate some of the ways companies market and distribute their products and services. These examples are not intended to be comprehensive, but to illustrate some of the difficulties with assuming that profits are generated uniformly across different business lines. The value and composition of marketing intangibles varies significantly by business segment product line and region/country, which has a significant impact on related marketing costs.

For many businesses, local sales may not depend on the use or presence of marketing intangibles. When transactions are with local distributors those local distributors may be fully entrepreneurial (and are often unrelated), with significant margins already subject to tax. The local distributors have themselves invested in marketing and market research to develop marketing intangibles, which drive their in-country returns. For example, for many classes of products (e.g., heavy construction equipment), purchase decisions may be significantly dependent on the quality and availability of dealer after-market service. In these cases, it is the activities of the unrelated dealer/distributor which drive the greatest impact on direct or indirect sales of a brand or product, and there may already be significant returns taxed in market jurisdictions via the involvement of these local dealers.

A branded consumer goods group may utilise a network of related or unrelated party entities (which may be categorised as LRDs based on their functional, asset and risk profile) to distribute branded products on behalf of the group. The IP/brands may be owned in one or more locations, which develop global marketing campaigns and control the relevant BEPS DEMPE functions.

The related (or unrelated) party distribution entities may sell the group's branded products direct to consumer or through third party customers (e.g. supermarkets, wholesalers, online marketplaces etc.) for onward sale/distribution to the ultimate consumer.

For example, for a consumer products business, marketing spend could be split between traditional advertising expense and discounts between gross and net sales offered to customers. Spending on traditional advertising versus discounts varies dramatically by region and product line (e.g., beauty products vs over-the-counter medicine or EMEA vs North America sales). Some of the brands may require significantly more advertising and promotion spend than others. Indeed, some brands may have no associated advertising and promotional spend in a market. The factors determining how a branded product is 'activated' in a market will depend on a significant number of factors including: the brand's place in the product life cycle, the target consumer type, the local competitive landscape, and the method of ultimate distribution/consumption.

By contrast, in a medical device business, many products are sold to hospitals for surgical procedures with no marketing to consumers (patients) and all the marketing is directed to business customers. For some medical devices, however, such as contact lenses, significant amounts are spent in marketing to consumers.

Another example is the pharmaceutical industry, where marketing spend is highly variable by disease state and country. For example, a pharmaceutical business might invest significantly to launch a diabetes drug in the US, little to launch a cancer drug in the US and almost nothing to launch either category of drug in another country. Marketing is regulated in this industry and rules impact the types of marketing that may be done on a country-by-country basis.

Consider the case of automobile tires. Major tire manufacturers sell both through original equipment manufacturers ("OEMs") as well as replacement tires. These replacement tires are themselves sold to end-users through different channels – tire retailers, mass merchants, car dealers, and online etc. – making it difficult to distinguish a B2B business from a B2C even in this market.[9] The precise mix of OEM vs. replacement sales will vary over time (and could vary by country); the selection of a specific brand of tires by OEMs presumably reflects a number of factors, including price and performance (largely the result of DEMPE functions and technology intangibles) but also including the perception by consumers of the brand's product attributes as desirable and consistent with those of the OEMs' own products (the result of marketing intangibles).

In the case of extractive industries, the general operating structure for extractive projects takes the form of production sharing agreements or other regimes subject to negotiation and approval by host governments. These long-term agreements are carefully negotiated between companies and governments to give stability with respect to the significant investments required to extract resources. Companies do not have the ability to change these agreements unilaterally. These agreements typically apply a very high level of production jurisdiction income tax, production tax and royalty. If the taxation of the downstream marketing income were to change, this would create a very high probability of double taxation in an environment where taxes may already be very high.

In all of these cases, marketing intangibles and residual returns may exist in more than one entity or country (in the case of a portfolio of businesses or even within a single business). In this case, an effective controversy resolution mechanism becomes both more complex and more vital, as there are potentially multiple jurisdictional counterparties. Given the complexity of the underlying determinations, these controversies could quickly become intractable, raising the risk of effective double or triple taxation of income during a prolonged period of dispute.

USCIB raises these examples because we believe, despite the complexity, that any attempt to implement a special allocation of marketing intangible returns will need to be based on many factors, including those discussed above. Global calculations will be distortive. In certain cases, little or no additional marketing intangible income will be allocable to a market and traditional profit allocations may suffice. However, the combination of the complexity of individual factual determinations, the distortion from oversimplified global approaches, and the desire of countries to reallocate profits, leads USCIB to conclude that the best way forward may be a series of safe harbors for clearly defined types of transactions. USCIB has long supported the expanded use of safe harbors and believes that the Memorandum of Understanding approach developed under BEPS Actions 8 through 10 should be considered in this context.

Summary of Potential Issues That Would Have to be Addressed under Profit Allocation and Nexus Proposals

These comments only address the marketing intangible proposal because we believe the other proposals cannot form the basis of a consensus approach.

[9] *See for example https://www.moderntiredealer.com/uploads/stats/facts-section-2018.pdf.*

1. The definition of what is considered a marketing intangible for purposes of these proposals;
2. How would marketing intangibles be segregated from trade (or technology) intangibles and how could such a determination be made consistently among all market jurisdictions;
3. How would the profits attributable to the marketing intangibles be identified and what is the mechanism for determining an appropriately modest allocation to the market jurisdiction;
4. How will income be sourced;
5. Will routine profits be carved out of the new rules;
6. If so, how will routine profits be determined – using traditional transfer pricing methods;
7. How will the proposals be applied to multi-layer, multi-jurisdictional supply chains;
8. Will these proposals require amendments to income tax treaties;
9. How will required treaty amendments be implemented; and
10. Will the OECD do an empirical analysis of the expected impact of the changes on revenues to countries, cross-border trade and investment.

Global Anti-Base Erosion Proposal

As previously stated, we suggest that this proposal be removed from discussion and re-introduced if deemed necessary at a later time. The global anti-base erosion proposal sets forth two proposals. The income inclusion rule would expand CFC legislation to cover foreign branches or subsidiaries which are subject to a low effective tax rate. The tax on base eroding payments would deny deductions or tax relief for payments which are subject to a low effective tax rate. Both proposals can be thought of as anti-avoidance measures rather than a broader proposal to amend rules for the allocation and taxation of profits between countries.

As mentioned above, USCIB continues to believe that it would be more appropriate to consider data post-BEPS and post-US tax reform, after those fundamental impacts on the international tax system have had a reasonable period to play out. Only then can a fully-informed determination be made whether a significant concern with low or no taxed income remains that could warrant adopting significant new rules that will add complexity and lead to uncertainty and possible double taxation. We, therefore, believe these proposals are premature. We, nevertheless, provide comments on issues that would have to be dealt with in designing proposals of this kind.

Minimum Tax Determination Considerations

A minimum tax proposal needs to have agreement among countries on:

- What payments would be subject to the tests
- How to determine taxable income
- How to determine taxes paid

- How to determine how these rules interact – would the CFC provisions operate first and the base eroding payments rule apply only defensively

- How to be simple and administrable for both taxpayers and tax administrators. It is not practical for either tax administrations or taxpayers to recalculate each payee entity's financial accounts into the tax accounting systems for every other relevant country.

Income and Taxes Taken into Account

It is critically important that countries agree on how to measure the income amount being used in the minimum tax calculation. Either the ultimate parent consolidated financial statements should be used or countries need to agree on a benchmark system to determine taxable income.[10] This means that losses should be taken into account and not excluded, depreciation schedules need to be consistent, allowable deductions should be consistent and there should be no optionality for countries to pick and choose how the relevant income should be calculated. Any alternative methods or optionality will result in tax controversy between countries and double taxation. It is unlikely at this point in time that countries would apply these measures consistently, especially if there were a real or perceived loss of tax sovereignty.

The CFC proposal as drafted suggests that taxable income and taxes paid should be determined on a country-by-country basis under the domestic law of the parent jurisdiction attempting to impose the tax. USCIB believes this would be extremely difficult to administer because, there are multiple factors in play. First, the immediate parent of an entity is not necessarily the ultimate parent. A U.S. ultimate parent company may have a German, French, or UK subsidiary which may in turn have other subsidiaries beneath each of them (or vice versa). Thus, the company would be required to determine the income and taxes of each subsidiary under multiple different rules. And different countries may decide the same income is low-taxed in some cases and not low-taxed in others.

The tax on base eroding payments seems to have been pulled from the BEPS hybrid proposals. The Action 2 hybrid rules are extremely complex. When business objected to this, the response was that business could choose to unwind their hybrid instruments and entities and avoid the complexity. This is not the case with the so-called base eroding payments covered by this proposal. Thus, the proposals for base eroding payments are not fit for purpose. Assume a typical medium size MNE with 100 subsidiaries and each subsidiary has transactions with 10 other subsidiaries. In order to compute the effective tax rate, you would have to keep at least 11 sets of books and records for each subsidiary as every country has different tax accounting rules and you would need to be able to restate the books under the tax accounting rules of every payor jurisdiction. This becomes even more problematic if the calculations are needed on a transaction by transaction basis (at which point you are looking at marginal or incremental tax rates, not average tax rates). This would be an excessively complex problem both for taxpayers and tax administrations.

Even if the calculations are made based on the global public accounting records of the ultimate parent company, the fact that financial accounting rules for the parent do not equal the tax accounting rules

[10] This seems unlikely given the complexity of this exercise and the time frame for completion. In USCIB's view, the only reasonable option is to rely on the companies' audited financial statements.

for the parent which do not equal to the tax accounting rules of the payor jurisdiction leaves double counting or under counting a substantial risk.

The taxes taken into account to determine if the income or payments are in-scope should include (1) all national, state, provincial, and city income taxes paid by the payor (or payor group) regardless of whether it is in a single country or paid in multiple countries or deemed paid in multiple countries (as in the income inclusion rules of a CFC regime) and, (2) withholding taxes. Ideally the ultimate parent country tax administration should be willing to certify to the tax rate of the payee. The tax administration of the ultimate parent country would have information concerning all of the taxes paid by the payee, as well as any taxes imposed under the minimum tax regime and whether the group had been subjected to the income inclusion at the ultimate parent level.

USCIB believes that a minimum tax does not need to be imposed on a per-country basis to be effective. Rather, an overall limitation can achieve the same impact depending on the rate that is considered to be the floor. For example, a minimum tax at a lower rate and with a per-country limitation might achieve similar results to a minimum tax imposed at higher rate and on an overall basis and while achieving the simplicity results of an overall limitation.[11]

The simplest approach may be to look at whether the ultimate parent country of the payee entity had a CFC regime that would tax the payment if the local country did not have an acceptable level of taxation. This allows tax administrations to quickly consult a white list of CFC regimes rather than embark on trying to recalculate the payee entity's income. As an example, any U.S.-headquartered group should be exempted from any outbound base erosion rules (either in the form of denial of deductions or denial of treaty benefits) in view of the current inclusion of intangibles-related profits under GILTI.

A second possible approach is to determine a benchmark taxable income accounting system that all countries would agree to use for purposes of the alternative minimum tax calculation. Such a benchmark system should allow the payee country's rules with respect to timing items and could have a white list and black list of permanent exemptions or deductions. For example, foreign tax credits would be treated as taxes paid (even if they are not paid to the payee country, they are taxes that have been paid on the payee's income). This is particularly important in relation to income earned under special tax regimes (e.g., patent box and other innovation boxes and incentives that are not "harmful" under BEPS Action 5) and deductions for items such as previously incurred losses, stock-based compensation, and amortization/deprecation.

It should be noted that the costs of compliance and enforcement for an ETR-based minimum tax would likely be substantial (and perhaps unduly burdensome as audits are likely to require extensive analysis of foreign accounting records, in languages and tax accounting systems that are not familiar to the payor country tax auditors).

<u>Ordering</u>

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[11] Fixing the System: An Analysis of Alternative Proposals for the Reform of International Tax, Grubert and Altschuler, National Tax Journal, September 2013, 66(3), 671-712, at 697.

We believe that the income inclusion CFC proposal and the tax on base eroding payments should not both apply. We believe that the income inclusion proposal should take precedence over the tax on base eroding payments. We further believe that a country's CFC rule should not apply if a higher tier parent jurisdiction has CFC rules which apply. In other words, assume an MNE has three levels of companies (A owns B and B owns C). Further assume that all three tax jurisdictions have appropriate CFC rules. There seem to be three possibilities:

1. A's CFC rules apply
2. B's CFC rules apply
3. A and B's CFC rules apply, with B's rules applying first and A giving a tax credit for the B CFC taxes.

We believe that Option 1 would be more administrable (only the CFC rules of the highest-level parent jurisdiction with appropriate CFC rules should apply). Any potentially base eroding payments made by anyone to the A chain would be eligible for deduction and treaty benefits.

Furthermore, it should be clear that the recently adopted GILTI rules would constitute qualifying CFC rules. While U.S.-headquartered multinationals have significant concerns over the operation of the GILTI rules, it would be inappropriate to have both GILTI and yet another regime apply to the same income.

Tax in the Inclusion Country

Assuming the minimum tax rules apply and the inclusion country is entitled to impose a tax, that tax should not exceed the minimum tax less the associated foreign tax credits. This should not trigger a cliff edge event, and the rules should factor in limiting the additional tax to a "top up" amount sufficient to meet the minimum tax requirements, such that the effect of the rules is targeted and proportionate.

Withholding taxes are blunt instruments as well as being taxes on revenue, not income. As such, USCIB does not support gross basis taxes including withholding taxes. If countries do impose withholding taxes, they should have workable procedures for refunds when taxpayers are entitled to get their money back.

GILTI Experience

There are quite a few issues which have been uncovered in the study of the US GILTI provisions that should not be replicated under an OECD proposal. In the interests of brevity, we only list two.

First, the US GILTI rules do not actually test for whether income is low taxed. They simply assign a routine return to tangible assets (ignoring service companies); everything else is subject to CFC inclusion in the U.S. Since this minimum tax proposal is trying to apply only to tax avoidance and prevent a race to the bottom, it should only apply to income that is genuinely low taxed after application of the minimum tax on an aggregated basis across all CFCs of a group.

Second, the US GILTI rules try to take care of double taxation by providing foreign tax credits, but foreign taxes are "haircut" and some additional US expenses are allocated to the GILTI income, further limiting the foreign tax credit. This approach is bad tax policy as it tends to drive the effective rate on the included foreign income to levels substantially in excess of the specified minimum tax rate.

Thickly capitalized entities

The consultation document raises the issue of thickly capitalized entities without really identifying what this means. USCIB believes it might be concerned with finance entities located in low-taxed jurisdictions. USCIB believes that Action 4 concerning the deductibility of interest expense ought to be the method for determining whether interest expense is deductible. If any changes are needed, these rules should be "tweaked" rather than creating a whole new system. Further, as was clear in the context of Action 4, financial institutions are special cases given the regulatory restrictions on the conduct of their businesses. Moreover, the Inclusive Framework is still working on transfer pricing guidance relating to financial transactions.

Summary of Potential Issues That Would Have to be Addressed under Minimum Tax Proposal

1. What the actual minimum rate of tax should be (and mechanisms/rules to ensure that countries are not circumventing this minimum rate by other means);
2. Narrowing the scope of the income that's subject to the minimum tax or payments subject to disallowance as a deduction, such that the rules only result in a fair level of taxation of income that's actually subject to a low foreign tax rate;
3. How to effectively integrate the new rules with each countries' existing CFC regimes, if still required in light of the new rules;
4. How should previous or current losses of CFCs be handled and whether/how those losses are relevant in applying the new rules;
5. How should the minimum tax provisions be implemented in countries where group consolidation rules exist;
6. How should expenses be allocated to the income potentially subject to the minimum tax;
7. How should foreign taxes already paid by a CFC be treated;
8. How to perform necessary calculations when the tax rules applicable in the CFC's and its shareholder's countries may be different;
9. How should the proposals apply when multiple countries are involved, including clear tie-breaker rules, or a clearly delineated split;
10. What is the impact on income received by entities benefiting from approved IP regimes and other common innovation incentives and tax allowances;
11. How does the proposal apply where the shareholders are not corporations (i.e., situations involving individuals and partnerships as shareholders);
12. Will there be guidance on permissible deductions and credits (including following the timing items provided by the payee country tax laws);
13. Will there be guidance on appropriate addbacks for tax exemptions and impermissible deductions;
14. Will there be guidance on tracing through multiple countries (USCIB strongly believes tracing should be avoided);

15. Will there be guidance on the application of safe harbor rules;
16. How will timing issues be addressed; and
17. How will tax base differences be addressed.

USCIB expects this consultation will be the first step in a process and is willing to provide additional input as part of the formal or informal process.

Sincerely,

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