



April 25, 2022

**VIA EMAIL**

Mr. Itai Grinberg  
Deputy Assistant Secretary (Multilateral Negotiations)  
U.S. Department of the Treasury, Office of Tax Policy  
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Dear Deputy Assistant Secretary Grinberg,

USCIB is following closely the work of the OECD/G20 Inclusive Framework, and appreciates the time, attention, and resources the US Treasury Department has invested in the process. USCIB wishes to be helpful to the process and provide support and input as you work through the many important issues.

We write today concerning certain aspects of the design of Amount B in the Pillar One proposal. The discussions concerning the design of Amount B are of great interest to the members of our Tax Committee. We consider Amount B to be one of the key benefits of the Pillar One proposal, and critical for the overall purpose of stabilizing the international tax system. We wanted to assist your work on Amount B design and implementation, in the first instance by offering some guidance on isolating functions as detailed in the attached document “Principles for Distinguishing Routine from Entrepreneurial Functions - Marketing and Distribution.”

Amount B must be anchored in the arm’s length principle. In this document we have sought to allocate specific functions that are common across international business models to one of two key categories relevant for Amount B design, namely Entrepreneurial Functions (activities that commonly generate residual returns) and Routine Marketing and Distribution Functions (activities that commonly relate to routine returns). These two categories cover a significant volume of the transfer pricing controversies of our members which we understand Pillar One is intended to largely eliminate. For in-scope groups, Amount A is the mechanism to allocate a portion of residual profit to market jurisdictions and is the only allocation of residual profit under Pillar One. Amount B is intended to determine an appropriate routine return of a Group in a market jurisdiction. Amount B will be available to all Groups, not just those in scope for Amount A.

We understand that the successful design of Amount B could include agreed lists of functions that are considered Amount B functions. The lists in the attached document were compiled by our members from company transfer pricing files; in other words, functions that are audit tested and generally represent clear distinctions between entrepreneurial and routine functions.

We would be happy to discuss our approach as described herein once you have had the chance to review the document. We could anticipate offering additional guidance on other aspects of Amount B design and how to implement its features. We believe Amount B is a straightforward enough concept so that a high level of tax certainty and stabilization of the international tax system would be achieved if designed and implemented properly.

We greatly appreciate Treasury's efforts with respect to these issues and your willingness to field suggestions. Please let us know if you would like to discuss the recommendations set forth in this letter.

Sincerely,

Timothy McDonald  
Chair, Taxation Committee

Rick Minor  
Vice President & International Tax Counsel

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## Principles for Distinguishing Routine from Entrepreneurial Functions Marketing and Distribution

To avoid overallocation (“double dipping”) of residual profit to market jurisdictions in excess of the Pillar 1 agreement, Pillar 1 should include mechanisms that would adjust downward the Amount A attribution to a jurisdiction, if the return under transfer pricing attributed to a jurisdiction for routine marketing and distribution functions exceeds a certain threshold. Amount A should be the only reallocation of residual profit,<sup>1</sup> so if countries require some residual profit for marketing and distribution functions or the marketing and distribution country is otherwise entitled to a share of some residual profits (due to risks, functions, and investments, common in some industries), then Amount A would be double counting the attribution to the jurisdiction of some residual profit, requiring adjustment.

We understand that one complex issue under negotiation is defining routine marketing and distribution functions under Amount B (*i.e.*, what functions are covered by these categories). It is essential that the rules are practical, take into consideration actual business practice, and do not force companies to make unnatural changes to business practices. In the practical application of such rules, the focus should be on the actual functions of, risks controlled by, and assets of the local marketing and distribution entity and not, for example, on how marketing expenses may be reported in the financial statements of that entity (*e.g.*, where there is direct or indirect reimbursement for certain expenses by the entrepreneur to the distributor this may be an indicator of actual control or assumption of the risks associated with those costs by the entrepreneur). Further, provisions on marketing and distribution functions under Pillar One should include distribution of both physical and tangible goods and services (digital and otherwise). We have provided the following guidelines for identifying functions based on substantial experience across many companies in a variety of industries.

*To be clear, since business operations will necessarily have some reasonable variation across different businesses, we would recommend using these lists as indicative factors rather than a checklist of requirements.*

### Entrepreneurial Functions

- Final decision making on large discounts and non-standard contracts
- Establishing product development and business initiative plans and strategies (*e.g.*, whether to invent new features)
- Setting product and business initiative prioritization and implementation plan (*e.g.*, deciding which products to launch first, setting products available for launch)
- Setting global or regional branding, marketing, pricing, and promotional strategy
- Setting global or regional go-to-market and sales channel (*e.g.*, large customer vs small/medium size customer) strategy
- Setting global or regional plans and budgets for hiring / new headcount
- Approving and/or setting budgets
- Employing final decision makers on global or regional strategies at highest levels of seniority in the global or regional organization

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<sup>1</sup> In this context, “residual profit” should be understood as profit above remuneration for routine returns in accordance with existing transfer pricing principles.

- Bearing material market, product, currency, and other risks associated with the business
- Owning rights to intangible properties (IP) (technology, process (manufacturing) and marketing)
  - For the avoidance of doubt, derivative marketing, advertising, and promotional works are routine in nature and do not indicate entrepreneurial functions.
  - Similarly, the translation, adaptation and/or dubbing of content or marketing materials for local distribution is routine in nature and does not constitute an entrepreneurial function.
- Risk bearing R&D activities
- Acquisition of IP through M&A, licensing, or collaboration agreements
- Funding of regulatory approvals, *e.g.*, via clinical trials
- Specialized education and training programs, *e.g.*, for surgeons or other health care practitioners
- Global or regional supply chain planning
- Developing global or regional manufacturing strategy, including setting related quality standards

*\*References to “regional” functions above, are those typical of hub entities with broad regional oversight (e.g., EMEA) where significant DEMPE functions would be employed.*

### Routine Marketing and Distribution Functions

- Bearing limited market and business risks as the profits of routine distributors are fixed
- Not decision makers for any entrepreneurial functions listed above (with a de minimis threshold)
- Does not own high value, “core” intangible property, although may perform limited-risk and routine functions under a licensing or distribution arrangement and may own certain routine IP that are derivatives of its marketing and distribution functions (*e.g.*, customer lists, local market approvals)
- Incurring advertising, marketing, and promotional costs in line with plans and budgets provided by the entrepreneurial principal with such costs being directly or indirectly met by the entrepreneurial principal
- Educating and marketing products and services to users and customers
- Providing competitive and market related information conveying data that the entrepreneur combines with own knowledge to help determine its business plans
- Gathering trends and forecasting demand from local market – may provide feedback to entrepreneurial principal that is used in development of business plans (products or initiatives) by entrepreneur
- Offering discounts/promotions and discussing pricing based on predetermined strategies/plans, rate cards or parameters (discounts/promotions outside such predetermined approaches would require sign off by management employed in another entity)<sup>2</sup>
- Supporting local customers to maximize the benefit of their spend by putting together joint business plans and reviewing/assessing results
- For reselling distributors, contracting with, and invoicing to local customers
- Providing after-sales and other customer support services
- Hiring local personnel within budgeted headcount
- Providing logistics and warehousing services and managing inventory locally

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<sup>2</sup> The pricing is established by a predetermined rate card and the distributors are not negotiating with or offering discounts to customers, except within standard boundaries described in the rate card.

- Providing offsite data center, infrastructure, or software delivery services
- Functions may be limited to one specific market, sub-region, or jurisdiction
- Price negotiations (in line with pre-set strategies) with local governments and obtaining local regulatory approvals for local sales
- Regulatory compliance with local laws and requirements for local sales
- The translation, adaptation and/or dubbing of content or marketing materials for local distribution

#### Functions Observed in Third Party Routine Distributors (in Comp Data)

*Our observation from substantial experience looking at data / comparables is that third party comparables for limited risk distributors would include the functions that we have listed above as routine marketing and distribution functions. At times, we even see a broader range of functions in the third-party limited-risk distribution comparables, including some of those listed in the Entrepreneurial Functions (e.g., limited risk distributors may provide input into global supply planning or engage in M&A activity).*