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Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
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Subject: Input for OECD Public Consultation on the *GloBE Implementation Framework under Pillar Two*

Ladies and Gentlemen:

We appreciate the opportunity to submit this input on behalf of EY for the OECD's public consultation on the *GloBE Implementation Framework under Pillar Two* and to engage with the OECD and Inclusive Framework on this important topic.

In this submission, we first provide some overall comments about the importance of a robust GloBE Implementation Framework and key matters to be considered in developing it. In the context of those overall comments, we then provide input in response to the specific questions laid out in the document announcing the public consultation.

Overall comments on GloBE Implementation Framework

The primary goal in developing the GloBE Implementation Framework should be reducing the very high degree of complexity that is reflected in the Model Rules and Commentary. Complexity is a major contributor to the compliance burden for businesses and the administrative burden for tax authorities. It creates substantial uncertainty. It also significantly exacerbates the risk of inconsistency across jurisdictions, which in turn increases the likelihood of disputes and double taxation.

While there is significant complexity throughout the Model Rules and Commentary, a particularly prominent source of complexity is the use of financial accounting concepts as the starting point for measuring GloBE Income or Loss and Adjusted Covered Taxes combined with the requirement of myriad adjustments to the underlying financial accounting amounts. These rules would require preparation of financial accounting data at the Constituent Entity level that in many cases is not being produced currently in the form that is specified. In addition, the many adjustments to be made would require new computations and maintenance of new data points which are not relevant for any other purpose. Simplifications, detailed guidance and relevant examples on an agreed basis all would be extremely valuable in these areas.

The GloBE Implementation Framework will be a critically important document with respect to:

- Interpreting the Model Rules and Commentary;
- Establishing uniform compliance requirements and administrative practices;
- Providing mechanisms for ensuring consistency across jurisdictions; and
- Preventing and resolving disputes.

Given the central roles that it will play, it must be made clear that the GloBE Implementation Framework, including the Agreed Administrative Guidance contained in it, is an integral part of the GloBE package like the Model Rules and Commentary that must be followed by jurisdictions that choose to implement Pillar Two. There must be a clear and effective process to ensure that jurisdictions take any action necessary under their legal systems to incorporate all aspects of the GloBE Implementation Framework in their domestic laws or otherwise fully adopt it, with well-defined and appropriate repercussions for any jurisdiction that does not do so. Moreover, it must be clear that these requirements apply with respect to domestic rules adopted by jurisdictions in respect of the GloBE, such as a Qualified Domestic Minimum Top-up Tax (QDMTT).

It is essential that the GloBE Implementation Framework include an ongoing process for identifying issues where guidance is needed, providing that guidance, and ensuring that jurisdictions follow such guidance. This process could build on the process that has been used with respect to country-by-country reporting (CbCR), under which guidance continues to be updated periodically. Such guidance would help support certainty and harmonized implementation. Where the guidance allows for a flexible approach to a particular matter, it should be complemented with a compilation of individual jurisdiction approaches. Given that the GloBE Rules determine tax liabilities, the ongoing process for guidance must be timely and efficient. Moreover, any guidance that represents a change rather than a mere clarification should be applied prospectively, with the potential for the taxpayer to elect retroactive application in appropriate cases.

It should be made clear whether the Model Rules and Commentary will be dynamic like the OECD Model Tax Convention and Commentaries. This would allow issues to be addressed as they are identified, but there would need to be a mechanism in place to ensure that jurisdictions take the action necessary under their legal system to timely incorporate any updates in their domestic laws. In addition, as noted above with respect to the ongoing development of guidance, any updates that represent changes rather than mere clarifications should apply prospectively, with the potential for the taxpayer to elect retroactive application in appropriate cases.

There should be GloBE specific processes to address the consistency of jurisdictions' domestic legislation with the Model Rules and Commentary. This should include determinations as to whether the various elements of the rules that jurisdictions implement rules are to be considered "qualified" under the Model Rules and Commentary, with regular publication of the results of these determinations. There also should be a robust peer review process, focused on review and determinations regarding any jurisdiction implementation practices that are viewed as potentially non-conforming. These processes must be timely and efficient, and the review of the consistency of each jurisdiction's domestic legislation should be conducted as soon as possible following its enactment.

In our view, it is essential for the OECD to provide further opportunities for public consultation as the GloBE Implementation Framework is developed, including a final opportunity for consultation on a complete draft, so that stakeholders can supplement their comments in this early consultation with feedback on the specific proposals that are developed for the Implementation Framework.

Finally, we believe that the development of the GloBE Implementation Framework is a time for the OECD and Inclusive Framework to step back and assess the Model Rules and Commentary as a whole. These documents reveal the enormity of the compliance and administrative burdens that would arise with the GloBE Rules. This is an opportunity to reconsider the design choices that are the biggest sources of these burdens and evaluate how modifications to these choices could significantly reduce these burdens, with the aim of achieving a balance between the full costs of implementation and effective administration and the underlying policy objectives.

Input in response to questions in the public consultation announcement

In the context of the overall comments above, the input below addresses the four questions set out in the public consultation announcement.

Need for further administrative guidance as part of the GloBE Implementation Framework

The Commentary provides valuable clarification and refinement of the Model Rules. We welcome the references in the Commentary to plans for further consideration and potential refinement of particular areas of the GloBE Model Rules and the potential for development of Agreed Administrative Guidance to be included in the GloBE Implementation Framework. We believe there are many other areas where further refinement and additional guidance also would be valuable as well.

Two broad elements of the Model Rules and Commentary where further administrative guidance is critically important are Computation of GloBE Income or Loss (Chapter 3) and Computation of Adjusted Covered Taxes (Chapter 4). These computations involve myriad adjustments to amounts computed under Acceptable Financial Accounting Standards, adjustments that are not made for any other purpose. These adjustments will be a principal source of complexity for businesses and tax authorities and will create significant uncertainty and substantial risk of inconsistency unless clear and detailed guidance is agreed that provides a bridge between the computation of the item under Acceptable Financial Accounting Standards and the required computation for GloBE purposes.

It is very important to be as clear as possible, and as consistent as possible with the underlying policy objectives, with respect to how the required adjustments to get to GloBE Income or Loss and Adjusted Covered Taxes are intended to operate relative to each Acceptable Financial Accounting Standard (including in areas where those standards differ).

As is recognized in the Commentary, Agreed Administrative Guidance is needed throughout the Model Rules in order to provide greater clarity, enhance certainty, and facilitate consistency across jurisdictions. We highlight below just few of the specific areas where additional guidance is important, as illustrative examples:

- Treatment of gains and losses arising from hedging activities on foreign investments – Article 3.2.1: It is important that the treatment for GloBE purposes of such gains and losses is aligned with the treatment of the underlying asset or transaction that is subject to the hedge.

- Intra-group Financing Arrangements – Article 3.2.7: The Commentary on Article 3.2.7 provides useful guidance on the intended interpretation and application of this rule. However, it would be helpful to have guidance clearly stating that the application of the rule is not intended to result in double or multiple taxation in the context of a financing arrangement that involves a chain of jurisdictions.

- International Shipping – Article 3.3: Article 3.3 is intended to exclude international shipping income from GloBE Income or Loss. More guidance on how these rules interact with the different international shipping tax regimes that jurisdictions have in place would be useful.

- Treatment of CFC tax attribution in a joint venture context – Article 4.3.1: Clarification as to how taxation under a CFC regime should be allocated in the context of a Joint Venture subject to Article 6.4.

- Computation of Adjusted Covered Taxes – Article 4.4: Article 4.4 is intended to provide a mechanism to address temporary differences, with Article 4.4.1(e) addresses "deferred tax expense with respect to the generation and use of tax credits." More work is needed to get to an appropriate balance on the treatment of tax credits.

- Recapture rules – Article 4.4: The 5-year and 3-year recapture rules in Article 4.4 create significant complexities. The compliance burden arising from the complexities could be reduced with guidance that provides a materiality threshold for the recapture requirements.

- Tax attributes on transition – Article 9.1: Article 9.1.1 provides for transition rules based on deferred tax accounting concepts, to prevent temporary differences leading to a top up tax. Rather than requiring an MNE Group to undertake complex calculations as if the Constituent Entity had been subject to the GloBE Rules in prior years, it uses a simplified approach that provides for taking into account the deferred tax accounting attributes of the group at the beginning of the Transition Year. The Commentary clarifies that this includes tax assets resulting from prior year losses. Guidance should confirm that this includes deferred tax assets related to tax credits as well.

- Tax attributes on transition – Article 9.1: Article 9.1.3 provides a limitation on intragroup asset transfers before applicability of the GloBE Rules. The Commentary explains the underlying rationale as being to limit the ability to step-up the basis in such assets without including the resulting gain in the computation of GloBE Income or Loss. However, neither Article 9.1.3 nor the Commentary confirm that Article 9.1.3. should not apply if the resulting gain has been taxed at an ETR of 15% or more. This is particularly urgent because the transition period starts after 30

November 2021 and continues until the Transition Year. Guidance should clarify that Article 9.1.3. would not apply in such situations.

- PE determination – Article 10.1: There are ambiguities with respect to the determination of whether a PE exists that should be addressed. For example, clarification is needed on the requirement that a jurisdiction "taxes" the income attributable to a place of business that is included in some elements of the definition of PE. As another example, clarification is needed on the interaction with other elements of tax treaties and what it means for a treaty to be applicable.

- Short-term Portfolio Shareholdings – Article 10.1: With respect to the determination of whether an Ownership Interest is treated as a Short-term Portfolio Shareholding, there is uncertainty as to the meaning of economic ownership, including the application of the facts and circumstances test. Clarification in this regard would be valuable.

Finally, to reiterate the points made in the opening section, it is essential that Agreed Administrative Guidance be adopted and followed consistently by jurisdictions. In addition, the production of agreed guidance must be an ongoing process so issues can be addressed as they arise. Any guidance that represents a change rather than a clarification should be applied prospectively, with the potential for the taxpayer to elect retroactive application in appropriate cases.

Comments relating to filing, information collection, and record keeping

As a general principle, our recommendation is that filing, information collection and record keeping obligations should be kept to the minimum possible, so that only strictly necessary information is required to be collected and shared.

Develoment of a GloBE Information Return form that is standardized both in information required and format is important for facilitating the automation of MNE Groups' reporting processes.

The GloBE Implementation Framework should establish a process by which only central filing of the GloBE Information Return and sharing through information exchange are required, with local filing only as a last resort. In this regard, some jurisdictions may need to modify their domestic legislation or regulations to ensure that a direct filing by a local entity in the MNE Group is not necessary under relevant domestic procedural requirements.

The information exchange process should leverage from the lessons learned with the CbCR exchange of information procedure, to avoid complexity and unnecessary compliance burden. For example, the process should allow simplified notification requirements so that MNE Groups will not need to notify every year unless there have been relevant changes to their tax profile.

Similar to the CbCR process, the review process with respect to GloBE Information Returns should be limited to the tax authority to which the filing is submitted. Other jurisdictions should be required to

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accept the filing as reviewed by that jurisdiction and should not be permitted to make any adjustments of their own.

There will be situations where the filing entity is a subsidiary and does not have access to the information of the parent and/or other associated entities of the group. It will be important for the GloBE Implementation Framework to provide alternative ways of reporting to address this. The approach provided for this situation in the CbCR process (which could involve filing of partial information) would not be appropriate for GloBE Information Returns.

The timing for filing the the Globe Information Return must take into account the financial and tax reporting processes of MNE Groups, so that preparation of the Globe Information Return can fully leverage the existing compliance processes to the greatest extent possible. The rules should also provide some flexibility for MNE Groups to report in a different time frame when justified.

Finally, to avoid multiple layers of compliance, we suggest that where an MNE Group is subject to a QDMTT or QIIR for a jurisdiction, it should be sufficient to note that fact (together with identifying the jurisdiction that imposed the QIIR) in the GloBE Information Return, without being required to file futher information for that jurisdiction. For this purpose, the OECD and Inclusive Framework should develop and publish a list of QDMTT and QIIR jurisdictions, which should be regularly updated, and this information should be pre-populated in the Globe Information Return form. This mechanism would eliminate the need to submit detailed information on an MNE Group's operations and tax profile in such a jurisdiction, thus avoiding the risk of disclosure of such information and its possible misuse when there is no potential for another jurisdiction to impose additional top up tax and therefore no need for jurisdictions to have detailed information.

Suggestions on measures to reduce compliance costs, including simplifications and safe harbors

As discussed above, simplification of the Model Rules and commentary would be valuable in reducing compliance costs as well as the risk of inconsistent application of the GloBE rules across jurisdictions. In the interest of reducing compliance costs, we encourage the OECD and the Inclusive Framework consider the extent to which compliance with the GloBE rules could be coordinated with CBCR obligations. In addition, as Pillar One is further developed, consideration should be given to potential synergies between the compliance requirements under Pillar One and the GloBE Rules.

We also believe that the development of effective safe harbors could be extremely valuable in reducing the burdens of compliance and administration of the GloBE Rules. These safe harbors should operate in such a manner as to eliminate or significantly reduce the need for performing the detailed computations required under Pillar Two, for the calculations under the IIR, UTPR and QDMTT and for the application of a domestic top-up tax. In many instances, the top-up tax due by MNE Groups will be minimal or even nil, whereas the compliance burden without appropriate and effective safe harbors would be massive. Moreover, as detailed below, we believe that any temporary relief from compliance obligations that is provided for MNE Groups that have not incurred top-up tax for a specified period would significantly reduce the burden on MNE Groups.

We continue to believe that MNE Groups that have a high ETR at the group level should be recognized as representing a low risk of BEPS for governments. We urge the Inclusive Framework to consider the development of a gateway test that would exclude MNE Groups from the Pillar Two rules based on a simplified ETR test linked to the Group’s global operations. We would note that this gateway test should not be confused with a global blending approach. In contrast to global blending, the global tax rate to be used in this gateway test would not be used for purposes of calculating a top-up to the minimum tax rate. Rather, it would be used to make an overall risk assessment of what category of companies should be subjected to application of the Pillar Two rules. This global gateway test should use a higher rate applied on the consolidated financial statement results without adjustments, as the global ETR threshold for the scope determination.

The OECD and Inclusive Framework should consider providing relief from the GloBE Rules for a specific number of years (e.g., 3 years) in cases in which the MNE Group has filed GloBE Information Returns for several consecutive years (e.g., 5 years), based on which no top-up tax has arisen. This safe harbor could be contingent on no significant legislative changes occurring in the relevant jurisdictions and no material changes in the MNE Group’s operations. Such a measure would reduce the compliance burden for MNE Groups with a history of ETRs at or above the agreed minimum rate and would allow tax administrations to focus on the review of the tax position of MNE Groups with lower ETRs. If an MNE Group meets these requirements for one or more (but not all) jurisdictions, this safe harbor should apply to those jurisdictions and eliminate any need to include detailed information with respect to those jurisdictions on its GloBE Information Returns for the relevant years.

Based on the GloBE rules, the policy intent is to top-up the tax to the minimum rate in case of permanent differences and the application of low rates and special regimes. The current peculiarities of the GloBE rules can lead to top-up tax in situations that are not covered by this policy intent (e.g., in the case of the combination of a permanent difference (that in itself would not bring the ETR below 15%) and a recast temporary difference). We recommend that the OECD and Inclusive Framework publish a whitelist of jurisdictions that are considered not to be below an ETR of 15% based on the design characteristics of their tax systems. This could be combined with a list of incentives/special regimes that potentially could lead to an ETR below 15%. If an MNE Group does not make use of the listed incentives/special regimes, it would meet the safe harbor criteria for a jurisdiction that is on the ETR whitelist. This would significantly reduce the compliance burden and would lead to a top-up tax only in situations covered by the policy intent.

In addition, a specific safe harbor measure should be developed under which MNE Groups that operate in a QDMTT jurisdiction and can demonstrate that, based on their projected activity and tax profile, they will not be subject to any top-up tax in that jurisdiction would not be subject to the QDMTT, or any other GloBE tax with respect to that jurisdiction, for a specified period of time (e.g., 3 years) absent a material change in circumstances. This safe harbor exclusion should provide an opportunity for renewal after the expiration of the specified period, or after a material change in circumstances within the period, based on a new demonstration by the MNE Group.

As a final note regarding safe harbors, it is important that safe harbors apply not just with respect to the IIR and UTPR, but equally with respect to a QDMTT that is put in place in a jurisdiction.

In addition to providing safe harbors that eliminate or significantly reduce the need to perform the required GloBE computations, consideration should be given to providing an advance ruling process. The process could be initiated at the option of an MNE Group and would involve confirmation that the Group's systems and processes are robust and can be relied upon by tax authorities. Once confirmed, an MNE Group then could obtain certainty that it does not need to undertake the GloBE calculations for a specified period of years (e.g., 5-7 years) absent a material change in circumstances. The process could be led by the MNE Group's parent jurisdiction Competent Authority with input from other jurisdictions that are significant to that MNE Group, similar to current multilateral APA processes.

Mechanisms on rule coordination, tax certainty and avoiding the risk of double taxation

The release of the GloBE Model Rules has highlighted the fact that these rules effectively create a parallel system of taxation and tax reporting. This system comes on top of jurisdictions' domestic corporate income tax systems. The aim of the creation of this parallel system is to ensure that businesses pay at least a minimum level of taxation on all their profits, regardless of where these activities take place. This parallel tax process comes with its own tax technical provisions, calculations and administrative processes. And because it is a new multilateral process, it raises questions on the division of taxing rights in relation to levying the top-up taxes, how the parallel system interacts with the "regular" corporate income tax rules in relevant jurisdictions and what types of dispute resolution will be available to resolve interpretation issues that could lead to double taxation.

When it comes to the division of taxing rights regarding minimum taxes and with that the avoidance of double taxation, the GloBE Rules are fully reliant on a voluntary form of coordinated introduction of rules that contain commonly agreed provisions, definitions and calculations. This includes ordering rules relating to the charging provisions. Because the agreement does not contemplate any treaty changes in connection with introduction of the GloBE Rules, except in the limited situations where the switch-over rule cannot be applied because a bilateral tax treaty applies the exemption method as the mechanism to prevent double taxation, the view of the OECD and Inclusive Framework seems to be that the GloBE Rules are stand-alone rules that are not governed or impacted by existing tax treaty provisions.

One question in this regard is whether it is prudent to rely fully on soft law coordination and rule ordering when the global system of minimum tax rules is introduced. Such a soft law "agreement" means that there are no guarantees that governments will indeed take a common approach, will in the future resolve any additional interpretation issues in a common way and will respect the rule ordering as agreed. We are concerned that such a soft law approach to the introduction of a new form of multilaterally coordinated taxation would not provide tax certainty or prevent unnecessary interpretation differences or risk of double taxation. These are rules with multilateral effects, and therefore a multilateral approach is necessary to secure common interpretation of the rules and access to a multilateral dispute resolution mechanism is critically important.

In our view, it would have been preferrable if the agreement reached had been supplemented by the conclusion of a multilateral instrument among the jurisdictions that are introducing Pillar Two minimum

tax rules. Such a multilateral instrument would provide the basis for the prevention of double taxation involving minimum taxes, like existing bilateral tax treaties are doing for the regular corporate income taxes of jurisdictions. In the absence of such a legal mechanism, we consider it extremely important to supplement the soft law agreement with processes that secure a common interpretation and multilateral coordination by the governments introducing these rules and provide access to effective and efficient dispute resolution for businesses, as discussed further below.

In addition to prevention of double taxation arising with the global minimum taxes, it is also important to have clarity on the interaction between such minimum taxes and the regular corporate income taxes of jurisdictions, including the tax treaties that apply to these taxes. It would for example be important to address matters such as:

- How does the definition of covered taxes under tax treaties relate to the definition of covered taxes under the GloBE Rules?
- When is a domestic minimum tax a covered tax for the GloBE rules, and when is it a QDMTT?
- Are QDMTTs creditable if the profits of a subsidiary are also taxable in the hands of a parent entity in another jurisdiction?

As discussed above, we believe that an advance ruling process with respect to the GloBE Rules would be valuable. We also believe that there should be access to a multilateral dispute resolution mechanism for interpretative issues and double taxation cases. Without a multilateral instrument that governs the division of taxing rights on minimum taxes including providing processes for addressing disputes, it is important that existing multilateral dispute resolution mechanisms are accessible for issues that relate to the GloBE Rules. One way to structure this would be for jurisdictions to conclude a Multilateral Competent Authority Agreement (MCAA) in which they agree that access to article 25, paragraph 3 of the OECD Model Tax Convention, or similar provisions in bilateral tax treaties, is provided for issues relating to the GloBE Rules. Inclusion of an Article 25, paragraph 3 provision in bilateral tax treaties and the joining of the MCAA should also be considered an element of the Action 14 minimum standard on Dispute Resolution. Moreover, it would be helpful if the members of the Inclusive Framework that are also Member States of the European Union could agree that a Pillar Two Directive would be a covered agreement for purposes of the EU Dispute Resolution Directive. That would provide access to mandatory and binding arbitration in relation to the GloBE Rules.

We believe that a mandatory and binding dispute resolution mechanism should be available for all GloBE-related disputes that come up. The agreement among Inclusive Framework members on the GloBE Rules creates a new multilateral system of minimum taxation, which works in parallel to the domestic tax systems of these jurisdictions. It is important for it to be clear from the outset that these rules are introduced as a set of globally agreed common rules, with agreed global interpretations and a global, mandatory and binding operating mechanism.

There also should be a robust peer review process with respect to Pillar Two, relating to how jurisdictions are applying their rules in practice, similar to the peer review processes under BEPS Actions 5, 6, 13 and 14. This would be a process where jurisdictions are required to complete a peer review questionnaire reporting on the status of implementation and operational practices. Because there is tax

liability at stake and potential for double taxation, it is essential that these reviews are timely and efficient, but also comprehensive enough to address any challenges.

The peer review process should include a formal opportunity for input from businesses. This input could be two-fold: businesses could contribute to the content of the questions used to perform the peer reviews and they could provide information on non-conforming practices they have experienced.

Taxpayers affected by a practice of a jurisdiction that is found to be non-compliant should be entitled to re-computation of any GloBE liability and a refund of any excess tax imposed (with appropriate interest). The Inclusive Framework also should consider establishing a mechanism for barring a jurisdiction that has been non-compliant from imposing any top-up tax for future years until it has fully refunded all top-up tax it should not have imposed.

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The global EY team that prepared this submission welcomes the opportunity to discuss these comments in greater detail and to continue to participate in the dialogue as the OECD and the member countries of the Inclusive Framework advance the work on this important project.

If there are questions regarding this submission or if further information would be useful, please contact Jano Bustos (joseantonio.bustos@ey.com), Ronald van den Brekel (ronald.van.den.brekel@nl.ey.com), Marlies de Ruiter (marlies.de.ruiter@nl.ey.com) or me (barbara.angus@ey.com).

Yours sincerely, on behalf of EY,

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