MEMO# 35511

November 21, 2023

OECD Pillar One (Tax) Multilateral Convention Includes ICI's Recommendations

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TO: ICI Global Members
Global Tax Committee
Management Company Tax Subcommittee
Tax Committee SUBJECTS: International/Global
Tax RE: OECD Pillar One (Tax) Multilateral Convention Includes ICI's Recommendations

The Multilateral Convention (MLC) for "Amount A" of "Pillar One"—announced recently by the Organisation for Economic Co-operation and Development (OECD)[1]— includes the ICI's recommendations[2] for ensuring that asset managers qualify for the regulated financial services exception. Pillar One is part of the "Two Pillar Solution" advanced by the OECD and the Inclusive Framework's Task Force on the Digital Economy "to address the tax challenges arising from the digitalisation of the economy."[3]

Pillar One is designed to provide market jurisdictions with a new right to tax a portion of the allocable "residual profits" (Amount A) of large multinational entities (MNEs); this right would apply regardless of whether the MNE is physically present in that jurisdiction. The regulated financial services exception was added earlier to Pillar One following strong advocacy by the ICI[4] and others. This exception prevents asset managers meeting certain requirements from having their profits potentially being subject to the Amount A taxing right.

We raised concerns, during OECD consultations, with how the Amount A exception for regulated financial services might be applied to asset managers—with particular concerns for US-based asset managers. Our concerns focused on "licensing" and "capital adequacy" requirements.

The Explanatory Statement (ES)[5] that accompanies the MLC clarifies that the "licensing requirement" for asset managers "should be interpreted broadly and understood to cover circumstances where an Entity is authorised or registered to carry on the relevant business."[6] Moreover, the ES provides that "[t]he specific details of the licence and the nature of that supervision are not required to be tested in detail; rather, this condition is a question of fact as to whether the Entity has the relevant licence, permission or authority."[7]

In addition, the MLC maintains that requirement that the regulatory regime for an asset manager is based upon the principles developed by the International Organization of Securities Commissions (IOSCO). We previously urged the OECD to adopt a test based on the IOSCO principles rather than, as originally proposed, "capital adequacy."[8]

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Notes

[1] https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf.

[2] See, e.g., ICI Memo Nos. 34264, dated August 19, 2022.

[3] See ICI Memo No. 34163, dated May 27, 2022

[4] See ICI Memo No. 32049, dated November 12, 2019.

[5] https://www.oecd.org/tax/beps/explanatory-statement-multilateral-convention-to-implement-amount-a-of-pillar-one.pdf (hereafter Explanatory Statement).

[6] Explanatory Statement, paragraph 1672.

[7] Explanatory Statement, paragraph 1673.

[8] Explanatory Statement, paragraph 1695.