

OECD releases three Pillar Two documents, including guidance on safe harbours

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On December 20, 2022, the OECD released a new set of Pillar Two documents. The first document provides guidance regarding safe harbours and penalty relief in respect of the model Global Anti-Base Erosion (GloBE) Rules. The other two documents are public consultation papers concerning GloBE information returns and how to increase tax certainty by avoiding interpretation or application differences between jurisdictions in respect of the GloBE rules. Stakeholders must submit their comments on the consultation papers by February 3, 2023.

Guidance on Pillar Two: Safe harbours and penalty relief

The [Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules \(Pillar Two\) \[PDF\]](#) (Safe Harbour and Penalty Relief Rules) provide guidance on certain temporary and permanent safe harbours and transitional penalty relief, but do not cover a Qualified Domestic Minimum Top-up Tax (QDMTT) safe harbour, which is expected to be addressed in future administrative guidance on the QDMTT.

Briefly, the model GloBE rules implement a global minimum tax under Pillar Two. They were released exactly one year earlier on December 20, 2021. For more information about the GloBE rules, please see the [Osler Update dated December 23, 2021](#).

In the December 2022 release, the OECD continued enhancing the Pillar Two framework that is part of the two-pillar solution approved by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework) on October 8, 2021. For more information about the Inclusive Framework and its two-pillar solution, please see the [Osler Update dated October 12, 2021](#).

In the 2022 Fall Economic Statement, the Canadian government reiterated its commitment to both Pillar One and Pillar Two, but did not provide an update on timing for implementation. The EU has recently announced its intention to implement the income inclusion rule in Pillar Two with effect for fiscal years starting on or after December 31, 2023, and the UTPR one year later. Canada previously announced its intention to implement those rules with effect from 2023 and 2024, respectively, and we anticipate that Canada will likely seek to align its timing with that of the EU. For more details, please see the [Osler Update dated November 3, 2022](#).

Transitional CbCR safe harbour

Chapter 1 of the Safe Harbour and Penalty Relief Rules includes an interim relief measure (Transitional CbCR Safe Harbour) aimed at effectively exempting multinational enterprise groups (MNE Groups) present in qualifying lower-risk jurisdictions from onerous GloBE rules during the Transitional Period. The Transitional Period is defined as all fiscal years that begin on or before December 31, 2026, and end on or before June 30, 2028.

Where the Transitional CbCR Safe Harbour applies, the Top-up Tax in the jurisdiction is deemed to be zero and the MNE Group may be exempt from preparing detailed GloBE calculations in respect of that jurisdiction.

In general terms, an MNE Group will qualify for the Transitional CbCR Safe Harbour in respect of a particular jurisdiction provided that it can demonstrate that it meets at least one of three tests:

1. The total revenues and pre-tax income of group entities located in the jurisdiction are less than €10 million and €1 million, respectively, based on the annual Qualified CbC Report (De Minimis Test).
2. A simplified effective tax rate (Simplified ETR) for the jurisdiction is at least 15% for fiscal years beginning in 2023 and 2024, 16% for fiscal years beginning in 2025, and 17% for fiscal years beginning in 2026 (ETR Test).
3. There are no excess profits after excluding routine profits (Routine Profits Test).

A full Substance-based Income Exclusion (SBIE) calculation must be prepared to determine whether or not the Routine Profits Test is met.

The Transitional CbCR Safe Harbour also includes special rules for certain entities (e.g., Joint Ventures, Tax Neutral Ultimate Parent Entities (UPEs), Investment Entities and their owners) and for Net Unrealised Fair Value Loss situations.

Permanent safe harbours and transitional penalty relief

Chapter 2 of the Safe Harbour and Penalty Relief Rules includes permanent safe harbours, namely a Simplified Calculations Safe Harbour and a Simplified Calculation for Non-Material Constituent Entities.

The Simplified Calculations Safe Harbour means that the Top-up Tax for a jurisdiction is deemed to be zero if one of the above tests (De Minimis Test, ETR Test or Routine Profits Test) is met. However, in determining whether or not one of the three relevant tests is met, different simplified calculations are used: namely, the Simplified Income Calculation, Simplified Revenue Calculation, and Simplified Tax.

In general terms, the simplified calculations are alternative calculations to the GloBE Income or Loss, GloBE Revenue and Adjusted Covered Taxes calculations prescribed under the GloBE Rules. The simplified calculations have yet to be released. They are expected to be included in the Agreed Administrative Guidance that will be released when the Inclusive Framework determines that the simplified calculations achieve substantially the same final outcomes as those provided under the GloBE Rules, or that they otherwise do not undermine the integrity of the GloBE Rules.

Another change is that the relevant effective tax rate for the ETR Test as it applies to the

Simplified Calculations Safe Harbour is 15%, while the relevant effective tax rate for the ETR Test as it applies to the Transitional CbCR Safe Harbour ranges from 15% to 17% depending on the fiscal year.

Chapter 2 of the Safe Harbour and Penalty Relief Rules also discusses some practical difficulties and approaches to applying the Simplified Calculations Safe Harbour to Non-Material Constituent Entities.

Both the Transitional CbCR Safe Harbour and the permanent Simplified Calculations Safe Harbour do not discharge the MNE Groups from their obligation to comply with group-wide GloBE requirements (e.g., filing a GloBE Information Return).

Finally, Chapter 3 of the Safe Harbour and Penalty Relief Rules includes the Transitional Penalty Relief rules that are aimed at relieving MNEs from penalties or sanctions where the MNEs have taken reasonable measures to ensure the correct application of the GloBE Rules in the initial years.

GloBE information returns

The first public consultation document concerns [GloBE information returns](#) [PDF]. It addresses the proposed approach to a standardised GloBE Information Return under the model GloBE rules that provides information on the GloBE tax calculations of an MNE group. The GloBE Information Returns will be used to help tax administrations around the globe to review the correctness of the GloBE tax liability computation and to perform the relevant risk assessment.

The Inclusive Framework has mainly focused on identifying a detailed set of the data points necessary for calculating an MNE's GloBE tax liability. The compiled data points and the related explanatory guidance are set out in Annexes A1 and A2, respectively, of the public consultation document.

The OECD invited all stakeholders to submit their comments on the GloBE Information Return consultation by February 3, 2023.

Tax certainty for the GloBE rules

The second public consultation document, "[Tax Certainty for the GloBE Rules](#)" [PDF], discusses various mechanisms for achieving tax certainty under the model GloBE rules, in respect of the potential for different jurisdictions to diverge in their interpretation and application of the rules. It proposes that the mechanisms discussed in the consultation paper can apply both in advance of any taxation action being taken by a jurisdiction (dispute prevention mechanisms) and after the relevant taxation action has been taken (dispute resolution mechanisms).

The OECD invited all stakeholders to submit their comments on the Tax Certainty for the GloBE Rules consultation by February 3, 2023.