Explanatory Notes to Legislative Proposals Relating to the Global Minimum Tax Act

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Preface

These explanatory notes describe proposed amendments to the *Global Minimum Tax Act.* These explanatory notes describe these proposed amendments, clause by clause, for the assistance of Members of Parliament, taxpayers and their professional advisors.

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These notes are intended for information purposes only and should not be construed as an official interpretation of the provisions they describe.

Explanatory Notes Relating to the *Global Minimum Tax Act* (the "Act" or "GMTA")

Clause 1

Definitions

Global Minimum Tax Act (GMTA)
2(1)

"private investment entity"

The definition "private investment entity" is added to subsection 2(1) to address (together with new subsection 9(2.1)) potentially negative compliance and tax outcomes under the Act in certain cases where a private entity (i.e., a "private investment entity") owns, directly or indirectly, a controlling interest in a publicly listed corporation.

A private investment entity, for a fiscal year, is a private entity located in Canada that:

- has filed a prescribed form with the Canada Revenue Agency in respect of the fiscal year, or any prior year, on or before the GIR due date for the year;
- does not have any of its ownership interests quoted on a securities market;
- is not controlled by a publicly listed entity;
- owns the controlling interest in a publicly listed corporation located in Canada;
- for purposes of the Act, consolidates its financial results with the publicly listed corporation(s) it controls because of paragraph (d) of the "consolidated financial statements" definition; and
- prepares (or is controlled by another private entity that prepares) its actual financial statements using the Accounting Standards for Private Enterprises ("ASPE") established by the Accounting Standards Board (Canada) and has exercised the option not to prepare consolidated financial statements under ASPE.

In other words, the ultimate controlling private entity of the group does not prepare actual consolidated financial statements because it has chosen not to under ASPE, but it is nevertheless deemed to have consolidated financial statements (that include the public corporation(s) it controls) for the purposes of the Act because of the rule in paragraph (d) of the "consolidated financial statements" definition.

For more information, see the commentary to subsection 9(2.1).

This amendment applies to fiscal years of a qualifying MNE group that begin on or after December 31, 2023.

Clause 2

Private investment entities – de-consolidation

GMTA
9(2.1)

New subsection 9(2.1) of the Act implements a de-consolidation rule in respect of certain qualifying MNE groups that include one or more private investment entities. In general terms, a private investment entity is an entity located in Canada that is not publicly listed, that controls a Canadian-located publicly listed corporation and that produces only unconsolidated financial statements under the Canadian Accounting Standards for Private Enterprises (or is a member of a group the ultimate controlling entity of which prepares only such unconsolidated financial statements). Private investment entity status is also contingent on the filing of the requisite form with the Canada Revenue Agency. For more information, see the note to the definition "private investment entity" in subsection 2(1).

Where it is determined that a private investment entity would be a constituent entity of a qualifying MNE group in the absence of subsection (2.1), the rules in paragraphs (a) to (d) of the subsection apply. Paragraph (a) is intended to effectively de-consolidate the private and public subgroups of the MNE group for the purposes of the Act. This is achieved by deeming any private investment entity not to have a controlling interest in any Canadian-located publicly listed corporation. By severing the control link between the private entities and the publicly listed corporation(s), the MNE group is split into multiple smaller groups. The one or more private investment entities in the group (together with any private entities they control) form a new group; and each publicly listed entity, together with any entities it controls, forms a separate group with the publicly listed entity as its ultimate parent entity.

Paragraph (b) provides that the de-consolidation rule in paragraph (a) does not apply for certain purposes, in recognition that its application in those cases would lead to inappropriate consequences. First, to prevent circularity, paragraph (a) does not apply for the purposes of the definition "private investment entity".

Second, when determining the GloBE income or loss of an entity that would have been a constituent entity of the "actual group", the rules relating to intragroup transactions and financing arrangements in subsections 18(13), (14) and (18) are to be applied as if the de-consolidation had not taken place. This is intended to prevent MNE groups from taking advantage of the de-consolidation to engage in arbitrage transactions between subgroups of the actual group. However, the disapplication of the de-consolidation rule does not extend to the determination of the effective tax rate in clause 18(14)(b)(ii)(B) or of whether an entity involved in an intragroup financing arrangement is a low-tax entity or high-tax counterparty for the purposes of subsection 18(18).

Third, in the context of applying the *de minimis* jurisdiction exclusion (in section 33), the determination of whether the conditions in paragraph 33(1)(b) (i.e., the jurisdictional GloBE revenue threshold) and (c) (i.e., the jurisdictional GloBE income or loss threshold) are met is undertaken on the basis of the combined revenue and income/loss from the constituent entities of the private and public subgroups located in the jurisdiction. In other words, those thresholds are applied to the actual group as if the de-consolidation had not taken place and if the relevant revenue and income/loss figures in respect of the actual group fall below those thresholds then the private and public subgroups may both benefit from the exclusion if the requisite election is made in respect of each subgroup.

Fourth, when determining the adjusted covered taxes of an entity that would otherwise be a constituent entity of the actual group, the anti-avoidance rules in subsections 48(4) to (9) (which pertain to pre-transition year asset carrying value step-ups and impact the amount of a constituent entity's total deferred tax adjustment amount) apply as if the de-consolidation had not taken place.

Finally, for the purposes of applying the transitional country-by-country reporting ("CbCR") safe harbour, the de-consolidation rule is disapplied in two discrete instances. In the case of the anti-hybrid arbitrage arrangements rule in subsection 47(14), the three types of hybrid arrangements that are counteracted by the rule are determined at the level of the actual group. This is intended to prevent MNE groups from taking advantage of the de-consolidation rule to undertake arbitrage transactions between the separate subgroups. In addition, the *de minimis* threshold test in the safe harbour (in subsection 47(3)) is applied at the level of the actual group to prevent the effective double counting of the threshold amount.

These exclusions from the de-consolidation rule are necessary to ensure the integrity of the transitional CbCR safe harbour because the safe harbour may be available to de-consolidated subgroups in some instances. This could be the case, for example, where a CbCR is not required to be filed in respect of a subgroup under the applicable CbCR rules and the jurisdictional election for the transitional CbCR safe harbour is made for the fiscal year and section 2.2.1.3(a) of the GloBE information return is completed using the data from qualified financial statements that would have been reported as "total revenues" and "profit (loss) before income tax" in a qualified CbCR (in accordance with subparagraph 47(2)(b)(ii)).

Paragraph (c) deems any new group (or standalone entity) that results from the de-consolidation under paragraph (a) to be a qualifying MNE group. This paragraph ensures that each of the new groups created by the de-consolidation are subject to the Act (and potentially liable to top-up tax) even where a new group, in and of itself, does not satisfy the revenue threshold test in subsection 9(1), the multi-jurisdictional requirement in subsection 10(1) or the group requirement in subsection 10(2). By deeming each new group (or single entity) to be a qualifying MNE group, paragraph (c) effectively deems it to be a group and an MNE group as well. Thus, as long as the "actual group" is a qualifying MNE group, all of the (de-consolidated) new groups will be as well.

Finally, paragraph (d) applies in instances where a single entity (without a permanent establishment) is separated from the rest of the "actual" MNE group as a consequence of the de-consolidation under paragraph (a). Paragraph (d) provides that the single entity is the ultimate parent entity of the deemed qualifying MNE group (consisting of that single entity) and that its financial statements (prepared in accordance with an authorized financial accounting standard) are to be used as the consolidated financial statements of the group.

In the absence of subsection (2.1), the "actual group" would be the qualifying MNE group for all purposes of the Act, with potentially significant compliance implications. In addition, all the constituent entities included in the actual group that are located in the same jurisdiction would be required to "blend" their income and taxes in determining the jurisdictional effective tax rate and top-up amounts for the actual group. Likewise, elections that are made on a jurisdictional basis under the Act would apply equally to all the public and private entities within the actual group. Subsection (2.1) is intended to address these potentially negative compliance and tax outcomes.

This amendment applies to fiscal years of a qualifying MNE group that begin on or after December 31, 2023.

De-consolidation – avoidance transactions

GMTA
9(2.2)

New subsection 9(2.2) of the Act is intended to counteract any attempts to plan into the de-consolidation rule in subsection (2.1), by denying the application of subsection (2.1) where a transaction or event is undertaken or occurs and one of the main purposes of that transaction or event is to make that subsection applicable to an "actual group" (within the meaning of subsection (2.1)).

For more information, see the note to subsection 9(2.1).

This amendment applies to fiscal years of a qualifying MNE group that begin on or after December 31, 2023.