BR Business Roundtable

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April 27, 2023

Australian Government
Director, International Tax Branch
Corporate and International Tax Division
The Treasury
Langton Cres
Parkes ACT 2600

By email to MNETaxTransparency@treasury.gov.au

Re: Business Roundtable comments on public country-by-country reporting

Dear Sir/Madam,

On behalf of more than 230 chief executive officers of America's leading companies, Business Roundtable is pleased to submit comments in response to the Treasury's exposure draft, dated April 6, 2023, of legislation requiring multinational enterprises (MNEs) to report various items of information on a country-by-country basis regarding their business activities and tax liabilities, for publication on a government website.

We have serious concerns about the proposed legislation. While Business Roundtable is on the record supporting efforts to enhance transparency through disclosure on a number of fronts, including corporate tax disclosure, we believe the proposed legislation would impose unreasonable and unworkable requirements that would far outweigh the benefits enumerated by proponents and eclipse any positive aspects of the proposal. If the proposal cannot be dropped or discarded altogether, it should be revised in a manner that would minimize its negative effects. Our concerns are explained below.

1. *Public disclosure would be in conflict with the global agreement to keep country-by-country reports confidential*

When country-by-country reporting by MNEs was agreed upon in 2015 by Australia and the other countries participating in the BEPS project, an important part of the agreement was that the information in the reports would not be disclosed to the public. The Final Report on Action Item 13 (Transfer Pricing Documentation) stated that "tax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information … and other commercially sensitive information contained in the documentation package. Tax administrations should also assure taxpayers that the information presented in transfer pricing

documentation will remain confidential." OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. Commentators had pointed out, in response to a discussion draft of the Action 13 report, that public disclosure of details of an MNE's business such as income and expenses, specific assets and their value, and tax payments and accruals in every country where the MNE operates, at a particular moment in time, could easily lead to misunderstanding and misinterpretation by journalists, and potential investors. Furthermore, it would be likely to reveal information that the MNE would consider commercially sensitive in nature and would have an impact on a business's competitive position. Australia and the other participating countries (now numbering more than 140 countries) sensibly took the view that only tax administrations should have access to the MNEs' information.

The explanatory materials accompanying the exposure draft of April 6, 2023, do not provide a satisfactory explanation of the rationale for requiring public disclosure, nor do they address the risks of public disclosure noted above. Moreover, no justification is provided for the fact that the proposed legislation would undermine the global policymaking process that concluded that country-by-country reports must be kept confidential by the tax authorities in every country. In our view, the case for public disclosure has not been made.

We note that there are significant national security concerns arising from the disclosure of some of this information which could negatively impact the security interests of Australia or its allies. Compliance with this law might violate legal obligations in other jurisdictions. Imagine, for example, the military intelligence value in knowing details regarding employees and assets in use at a facility used for the maintenance of military equipment near a location of actual or potential conflict. Significant information which would not be easily obtainable through open source or satellite intelligence would be made publicly available. The discretionary power of the Commissioner—a tax administrator having no national security experience--to provide exceptions from public disclosure would not suffice to protect the security interests of Australia and its allies.

It should be noted further that the proposed legislation would create a competitive disadvantage in markets outside Australia for a reporting MNE with competitors that have no Australian presence and therefore no obligation to reveal information regarding their business. This extraterritorial effect of the proposed legislation on MNE groups carrying on business in Australia does not seem to be an appropriate goal of Australian legislators. Further, the Australian market is typical of many markets globally that have a concentrated presence of some American businesses that would provide a competitive lens into the domestic businesses that are likely outside the scope of both this disclosure and of Pillar 2. At a minimum, if public disclosure is to be required, it should limit the country-specific information to Australia (and perhaps also certain uncooperative jurisdictions, as in the European Union's rules), with aggregated information being disclosed with respect to the MNE's operations outside Australia.

2. *The proposed legislation seems pointless in light of the worldwide rollout of the GloBE Rules, which will create a global effective tax rate of at least 15% for reporting MNEs*

The Inclusive Framework on BEPS has created, through its agreement on the GloBE Model Rules, a global tax system for MNEs that will result in a minimum tax of 15% on profits from each country in which an MNE operates. These rules are in the process of being adopted by many countries around the world, and their design is such that the incentive to adopt them increases as more countries participate. Thus, it is likely that the global minimum tax will be a reality in the near future for MNEs.

In these circumstances, it is very difficult to understand what benefit would result from public disclosure of MNEs' country-by-country information as would be required by the proposed legislation.

3. *There would be serious practical difficulties in reporting some of the information required by the proposed legislation.*

As noted in the explanatory materials that accompanied the exposure draft, the information required by the proposed legislation goes beyond what is currently required in the country-by-country reports that are kept confidential by tax administrations. For example, the proposed rules would require reporting of specifics regarding all tangible and intangible assets, including their value. This would be a colossal undertaking for an MNE. Valuation, in particular, would be difficult (if not impossible) with respect to intangible assets that are not normally bought and sold in any marketplace. At a minimum, if reporting of assets and their value were to be required, a materiality threshold should be provided so that only significant items need be reported.

In addition, the exposure draft does not provide sufficient information on certain items to be reported, such as effective tax rates, for MNEs to be able to comply with the reporting requirement. Details would need to be provided regarding how the effective tax rate would be computed for each country (e.g., in accordance with the GloBE Model Rules, or according to particular Australian rules). If the GloBE Model Rules were to be used, taxpayers would face different filing deadlines for returns using these calculations and would potentially have to deal with uncertainty regarding the application of rules such as safe harbor exclusions.

Similarly, the Australian tax administration should not mandate that the group specify its "approach to tax" and publicly disclose it when it is not otherwise a mandatory requirement for the group to make such a statement specifying its approach to tax. The Australian operations will often only represent a very small percentage of the total activities of a multinational group headquartered outside of Australia. As a minimum, the requirement should be limited to the approach to tax taken by Australian companies or branches.

Furthermore, it is unclear whether the reporting of items "at a group level" implies overall consolidated group numbers, or numbers broken out by entity/jurisdiction. It seems that the intent is that the disclosures be granular since most of this information (or very similar information) is already disclosed in consolidated financial statements at a group level, and new requirements in this regard would effectively impose a new disclosure standard for public financial statements outside the proper regulatory authority of Australia in cases where the group in question was neither headquartered nor listed in Australia.

Another problem is that the timeline for filing a report, combined with the requirement for amendment of country-by-country disclosures, would make it virtually certain that these reports would have to be revised repeatedly. The requirement to refile a public disclosure based on an amended tax return adds no value for public consumers, although it creates substantial additional burdens. In other contexts, tax authorities have appropriately allowed changes related to prior years to be reflected in current year disclosures rather than requiring amended filings, which could continue ad infinitum (i.e., it would be easily imaginable that a group might file a timely report, and then have to revise the report in every subsequent year to reflect immaterial audit settlements until the statute of limitations had closed in all jurisdictions where the group had a taxable presence). At a minimum, there should be a reasonably high materiality threshold in relation to any requirement for amended filings.

Regarding penalties, we would urge that any penalties for violations of these reporting requirements, other than intentional fraud, be applicable only to legal entities and not to natural persons.

Finally, we note that the explanatory materials make reference to GRI 207 as a source of authority and apparent justification for the idea that the proposed rules would not be too burdensome. It should be noted that GRI 207 is not a mandatory standard in any jurisdiction, to our knowledge, nor is it universally accepted as an appropriate standard. More broadly, the proposed legislation raises the possibility of similar reporting requirements being enacted in other countries, with variations that would create an excessive compliance burden for MNEs.

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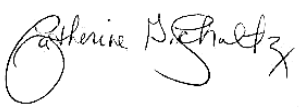
Business Roundtable urges the Treasury to take the above comments into account in its consideration of the proposed legislation. We appreciate your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



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