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By email: mnetaxtransparency@treasury.gov.au

Treasury Exposure Draft Legislation – Public Country-by-Country Reporting

Dear Sir/Madam

Ernst & Young (EY) welcomes the opportunity to respond to Treasury's exposure draft (ED) materials released on 6 April 2023, regarding proposals for public country-by-country (CBC) reporting (draft inserts for *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency – tax changes)*.

Our comments are as follows.

1. Start date

We believe that multinational enterprises (MNEs) will need more time to ready themselves for the disclosures required under these proposals, and as a minimum we recommend that the starting date should be deferred until no earlier than income years starting on or after 1 July 2024.

This proposal seeks information beyond that required under the current CBC reporting requirements or any other public tax disclosure regimes. As such, this is seeking information which is not prepared generally or for any reason by MNEs in the manner sought. MNEs will therefore need time to build systems to gather and collate the required information for disclosure. To expect those systems to be built and operational within effectively a few weeks' time is unreasonable.

Moreover, although we understand that the intention is that the measures are proposed to apply to income years starting on or after 1 July 2023 per draft EM paragraphs 1.37 and 1.38, there appears to be a discrepancy with the ED item 3 application reference to the 2023-24 income year and later income years. This ED item 3 reference could be read, for December year end companies, to mean a commencement date of 1 January 2023. The ED item 3 reference should be aligned with the EM to allay any concerns that the rules as proposed might apply to a December year end company from 1 January 2023.

2. Extent of information required is an overreach

As currently drafted, the proposals extend well beyond information necessary to protect Australia's income tax base. There is therefore a lack of reasonableness and proportionality being applied by these proposals. Public stakeholders do not need the level of detail and specifics required by these proposals, including the breadth of countries included, in order that Australia's income tax base be protected.

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Importantly, by comparison the EU directive proposals only require a detailed level of disclosure for the activities of the relevant multinational group within the EU.[1] Whereas for activities outside the EU, the relevant information requested can generally be aggregated in a single total, with certain specific exceptions relating to tax sensitive jurisdictions. The Australian proposals, on the other hand, require a detailed listing of every country in which the multinational group operates. We believe a better alternative would be to require disclosure of information in respect of only certain specified countries which may be considered to be tax havens in nature.

3. Disclosure requirements – Detailed comments

3.1 Commercially sensitive information

There appears to be no obvious recognition of, or exception for, information that may be commercially sensitive in nature. The disclosure of the information mandated by the proposals will in many cases give away commercially sensitive information to competitors, customers, other stakeholders and persons that may be intent on undermining the commercial interests of the MNE. Such disclosure would unfairly detrimentally impact upon the value of the entity or its group members.

We therefore recommend that where the MNE is of the view that the information required to be disclosed is of a commercially sensitive nature and has reasonable grounds to assert why this is so, an exemption should be made available. Consideration should be given to ensuring that such an exemption operates in practice in a manner that provides certainty in the ability of the MNE to claim it. At a minimum this should be included as a specific circumstance that the Australian Taxation Office (ATO) must consider in granting exemptions to taxpayers from making certain disclosures as is contemplated by proposed subsections 3D(14) and (15) of the *Taxation Administration Act 1953* (Cth) (TAA 1953)[2].

3.2 Disclosures additional to OECD, GRI and EU approaches

There are a number of disclosure requirements which go beyond either the EU public CBC reporting requirements, or those requirements of the Global Reporting Initiative (GRI) 207 standard.[3] These include the disclosure of:

- Expenses from transactions with related parties
- A listing of tangible assets
- A listing of intangible assets
- The book value of intangible assets
- Effective tax rates
- The difference between income tax accrued and prima facie income tax based on the statutory rate.

The requirement to disclose these detailed items on a country-by-country basis is unreasonable and disproportionate to the intended object of protecting Australia's tax revenue base, even by the use of

[1] EUR-Lex, Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L2101.
[2] All legislative references are to *Taxation Administration Act 1953* (Cth) unless otherwise specified.
[3] Global Reporting Initiative (GRI), GRI 207: Tax 2019, https://www.globalreporting.org/standards/media/2482/gri-207-tax-2019.pdf.

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public disclosure pressure. For a MNE to disclose this information on a detailed country-by-country basis to the world at large is an onerous exercise.

In addition, it is a disproportionate request in light of Australia's existing strong tax legislative protections of its tax revenue base, including a well-funded and well-respected ATO that already has much of this information available to it; and certainly has the ability to access this level of information upon request (either from the taxpayer group or via other Revenue Authorities).

We note that while proposed subsection 3D(7) is said to be included to reduce the compliance burden on entities, the provision does not alleviate the burden that would be involved in the making of these additional disclosures mentioned above.

There are also concerns whether the Australian application of these rules to foreign CBC reporting parents and their foreign groups would be inconsistent with and/or contravene foreign laws in their jurisdictions including secrecy and privacy laws. Australia's misalignment with OECD, GRI and EU approaches would also lead to inconsistencies in global transparency reporting.

3.3 Recommendation

For all the above reasons, we therefore recommend against enacting these extensive, far-reaching rules, and if contrary to our recommendations, they are proceeded with, we recommend that the additional information requirements outlined above be deleted from the required disclosures, and that the other recommendations herein be adopted.

4. Exclusions

Despite there being provisions in the proposed legislation that enable a class of entities to be excluded, or for the Commissioner to exempt certain entities, we believe that a threshold de minimis exemption is warranted where the Australian operations of the multinational group are so small that the requirements of forced disclosure of global information would be extremely onerous and disproportionate to any potential threat to the Australian tax revenue base.

For example, the provisions should not apply where the gross revenue in Australia is less than say x% of the MNE group's global revenue.

Similarly, under the proposals those entities that currently fall below the threshold in their home jurisdiction for CBC reporting compliance (e.g. €750 million in Europe) but meet the Australian threshold of A$1 billion (which is significantly below the thresholds in Australia's main trading partners in equivalent currency terms) would be required to provide public CBC reporting information.

For these companies, this is a whole new class of obligations as they are not required to lodge confidential CBC Reports currently as they do not meet the thresholds agreed in the OECD. This proposal will therefore create incremental costs for those MNEs who do not require such reports under their headquarter country rules because of the different thresholds. An alternative approach would be to adopt the OECD threshold of €750 million as the appropriate gateway threshold for the rules to apply.

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5. ATO disclosure - Additional voluntary disclosures

It is to be expected that companies will be concerned about the manner in which the ATO will publish the information. Of particular concern will be entities whose statistics may, on their own, raise concerns about the presence of business activities in certain jurisdictions, but with appropriate further explanation of their circumstances, these concerns can be readily allayed to the general reader. Accordingly, we think it is very important that provision be made for additional voluntary disclosure to be made by the MNE and to be published by the ATO to provide further transparency and thereby avoid any misconceptions in the published data.

6. Penalties

We note that the question of penalties for non-compliance has been specifically addressed through the amendment to section 8C of the TAA 1953. Given this appears to be the legislative intent (i.e. that section 8C sanctions are the appropriate approach), for the avoidance of doubt, we believe that the legislation should confirm that Part 4-25 of Schedule 1 to the TAA 1953 (dealing with administrative penalties) does not apply to the disclosures under this section.

Further, we consider that the provision should make it clear that the disclosure of a correction in accordance with subsection 3D(11), does not give rise to a risk of penalty under section 8K of the TAA 1953.

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Should you have any questions in relation to the above or wish to discuss these matters in further detail, please do not hesitate to contact Tony Merlo (03 8575 6412, tony.merlo@au.ey.com) or Alf Capito (02 8295 6473, alf.capito@au.ey.com) in our Tax Policy Centre.

Yours sincerely

Ernst & Young