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Friday, 19 May 2023

Ms Ronita Ram
A/g Assistant Secretary
Tax Treaties Branch, Corporate and International Tax Division
Treasury
Langton Crescent
Parkes ACT 2600
Via Email: MNETaxTransparency@TREASURY.GOV.AU

Dear Assistant Secretary,

The American Chamber of Commerce in Australia (AmCham) writes in response to the release of the Exposure Draft Legislation entitled *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency - Tax changes* (the 'proposed measure').

This submission is concerned with ensuring the proposed measure is appropriately targeted to achieve its originally stated objective in a cost-efficient manner by focusing on tax abusive planning by Multinational Enterprises (MNEs). As set out on page 4 of Treasury's Consultation Paper introducing these reforms in August 2022 entitled *Government election commitments: Multinational tax integrity and enhanced tax transparency*:

> *The Government, as part of its election commitment platform, announced a multinational tax integrity package to address the tax avoidance practices of multinational enterprises (MNEs) and improve transparency through better public reporting of MNEs' tax information. These changes form part of the Government's commitment to ensuring that MNEs pay their fair share of tax in Australia to help fund vital services, repair the Budget and level the playing field for Australian businesses.*

1. Proposed Measure

AmCham recognises that transparency is a key factor underpinning the integrity of the tax system.

Australia has enthusiastically adopted the recommendations of the OECD's BEPS Project, including the BEPS Action 13 Final Report in relation to Country-by-Country (CbC) reporting to revenue authorities. Confidential CbC reporting has provided the Australian Taxation Office (ATO) with access to large volumes of data in relation to MNEs. This has been complemented by real-time engagement between the ATO and large corporates through a variety of programs (e.g. Justified Trust).

As a result, the ATO has been able to state publicly that the tax gap for large corporates is a relatively small proportion of the total corporate income tax base, reflecting the ATO's strong administration of the tax system: see https://www.ato.gov.au/General/Tax-and-Corporate-Australia/In-detail/Macro-level-analysis-is-giving-us-confidence.

The effectiveness of this new proposal in improving the collection of a fair share of tax from MNEs is questionable. This is reflected in the fact that none of our points made below focus on the amount of tax collected by Treasury through this measure. In fact, the 2023/2024 Federal Budget largely ignores this measure when discussing increased revenue. We agree. This measure will not collect tax. From our perspective it is not clear why the provision of detailed information to the ATO under the current law - in a context where the ATO already has access to significant penalty enforcement powers - is not an effective mechanism to ensure compliance with Australian tax laws. There is an unnecessary increase in the compliance burden and public transparency on MNEs where the benefit - in terms of ensuring MNEs pay their fair share of tax - is not clear.

Nor are the consequences of these provisions fully recognised in the draft Explanatory Memorandum. MNE's complying with all relevant tax laws and dealing with relevant tax authorities on a transparent basis remain exposed to the risk that publicly disclosed information will be (possibly deliberately) mis-interpretated so as to suggest a taxpayer is not paying its fair share of tax where the MNE is in fact in complete compliance with our tax system.

Compliance Burdens

These measures would significantly increase the administrative burden as well as the compliance costs for the MNEs, both initially and on an ongoing capacity. This additional compliance cost comes at a time when MNEs are preparing for the implementation of the Pillar 2 Model Rules whilst also adjusting to a challenging economic environment. Gathering the data required for the Australian Public CbC reporting will likely be a burdensome task for many MNE groups, even though the intention is to "minimize the compliance and administrative burden imposed" (paragraph 1.21 of the draft Explanatory Material). The Australian Government seems to assume that all MNE groups are already subject to the Organisation for Economic Co-operation and Development (OECD) CbC reporting and Global Reporting Initiative 207 (GRI 207) and therefore only three additional disclosures are introduced (paragraph 1.19 of the explanatory material: effective tax rate, expenses from related party transactions, and details of intangible assets).

However, it should be acknowledged that GRI 207 is a voluntary reporting standard. This means that, as an example, explaining the "reasons for differences between CIT accrued and tax due if the statutory tax rate is applied" will also be a completely new task for many MNEs. Furthermore, it cannot be assumed that a MNE has the newly required data readily available - new processes and/or systems may need to be set up in this regard.

A further critical item is the requirement that the Effective Tax Rate (ETR) has to be calculated in line with the Pillar 2 logic. In the current version of the draft rules, the Australian Public CbC reporting would be implemented earlier than Pillar 2, i.e., many MNE groups will not yet be in a position to calculate their ETR in line with the Pillar 2 requirements.

Even though the Australian Government highlights the relevance of the OECD CbC reporting guidance in the application of the Australian Public CbC reporting rules (paragraph 1.22 of the explanatory material), there is a quite significant difference when it comes to the data source. While the OECD Transfer Pricing (TP) Guidelines (Annex III to Chapter V) offer flexibility in choosing the data source (e.g., consolidation reporting package, internal management accounts), the Australian draft rules prescribe the use of audited consolidated financial statements (s. 3D(8) of the draft rules). We suggest offering some flexibility in this regard in line with the OECD TP Guidelines.

Consistency with International Standards

As opposed to confidential CbC reporting obligations, the Australian Public CbC reporting rules are a separate reporting obligation without alignment to other similar proposed/enacted reporting obligations in other countries.

These rules, if pursued in their current form, place Australian multinationals and foreign companies with Australian operations, at a significant disadvantage. These entities will be required to disclose information, available to their competitors, that is not disclosed by companies that chose to limit their taxable presence in Australia.

The obligations exceed both EU, OECD and GRI-207 requirements. This includes the requirement to provide expenses arising from transactions with related parties, the requirement to provide a list of tangible and intangible assets and disclosure of the effective tax rate, calculated with reference to Pillar 2 rules. The policy rationale for this inconsistency is not clear and the inconsistency will materially increase the cost of compliance for MNEs.

The EU Directive is expected to apply to tax years starting after June 2024 and provides a better balance between the value of disclosure compared to the cost of administration. The disclosures under the proposed Australian measures go well beyond the EU Directive, without explaining the deficiencies of the EU based model. As an example, the EU does not require each country data to be published separately, rather it allows for information to be aggregated in three main ways: (1) Each EU Member State; (2) Each jurisdiction listed on the EU list of non-cooperative jurisdiction or "grey list" for two consecutive years (e.g. "tax havens"); and (3) the rest of the world.

We recommend the Australian Government consider modifying the requirements to be in line with the abovementioned international/EU standards so that there is a globally consistent approach. This would :

- reduce the administrative burden and compliance costs for taxpayers who will otherwise have to create two sets of data for the same country.
- avoid much of the uncertainty present in the proposed Australian rules (e.g. the proposed Australian measures require the calculation of an ETR for each jurisdiction which is based on Pillar 2 Model Rules that countries have not yet enacted. The ETR calculations will be impacted by decisions that individual countries (including Australia) are currently making in relation to how they implement the Pillar 2 Model Rules.
- Importantly, it reduces the risk that interested stakeholders will be confused by differences between two sets of data produced by the same country.

Alternatively, we encourage the Government to consider systematic exemptions (see subsection 3D(13) of the draft rules) for MNE groups publishing an EU public CbC reporting. Otherwise, MNE groups worldwide will likely be overwhelmed by country specific public CbC reporting obligations in the future.

Defence and National Security

Beyond commercially sensitive information, questions arise regarding information that relates to national security and defence and the disclosure of tangible and intangible assets used to support national security and defence programs and objectives. We would envisage that national security or defence would be a basis for an appropriate exemption limiting the obligation to disclose <u>all</u> tangible and intangible assets. (We welcome the opportunity to discuss this matter).

Future Investment in Australia

If the reporting requirements are too burdensome or invasive, the proposed measure may discourage MNEs with limited connections to Australia from investing here in a material way, potentially delaying projects that would otherwise generate jobs for Australians and revenue for the Australian economy. These disclosure rules could become a material reason not to invest in Australia.

We recommend the Government implement a materiality threshold (e.g., minimum number of entities in Australia, certain minimum amount of revenue, etc.) to reduce the compliance and administrative burden of MNE groups with only limited business activities in Australia.

Carve Outs

In light of the above, it is recommended that any proposed measure at least include the following carve-outs:

- Jurisdictions where the MNE has an insignificant presence - determined by (as possible examples) revenue earned, tax paid, employee location or asset value, as a set threshold or proportion of global group.
- A threshold before new investments in Australia are caught (e.g. the limitations contained in section 177J(1)(f) and (g)).
- Confidential or commercially sensitive information (including legally protected information), as this could impact legitimate commercial operations. BEPS Action 13 Final Report recognized that companies were being asked to provide confidential and commercially sensitive information to tax authorities under the confidential CbC reporting regime. Stringent confidentiality requirements were included as a result. Without modification, the proposed measures require MNEs to make significant amounts of information publicly available, increasing the risk that commercially sensitive information is disclosed.
- MNEs with APAs.
- BEPS Pillar 2 offers transitional relief (Safe Harbour) for MNEs when the Globe Rules take effect. For consistency, a public CbC reporting exception should apply for companies that meet the Safe Harbour.
- Information that relates to national security or defence. The US has implemented a similar national security exception relating to the reporting of some requirements (see IRS Notice 2018-31 *National Security Considerations with Respect to Country-by-Country Reporting,* relating to the US exception at **Annexure A**).
- We would recommend clarifying that legally protected information (including information protected by LPP) is not required to be disclosed.

Responsibilities of the Public Officer

Further information is sought on the responsibility of the Public Officer in Australia and how that responsibility differs from the CbC reporting parent.

Penalties and Enforcement

We recommend the Exposure Draft be amended, to make it clear on the application of penalties for non-compliance. Significant Global Entities (SGE) penalties would seem to be inappropriate, especially during the early years of application.

Nor is it clear how the Australian Government would enforce the collection of any penalties from parent entities located offshore with no direct assets located in Australia.

Timing

The measure significantly underestimates the time companies need to comply with new requirements. The timelines are incredibly tight and do not give sufficient time for MNEs to develop systems and processes to comply particularly in the context of the breadth of changes that are being considered as part of the OECD measures.

In addition, the effective tax rate for disclosure will be determined under Pillar 2 rules, which do not apply in Australia yet and are recommended to commence from 1 January 2024 (as per the Budget Announcement). There is insufficient detail for MNEs to make preparations to comply with the effective tax rate for disclosure when the Pillar 2 rules are yet to be set.

A greater transition period, for any version of these proposals, is a sensible request. The Exposure Drafts disclosure requirements - as they are over and above OECD, GRI-20, and EU Directive requirements including disclosure of the effective tax rate calculated with reference to Pillar 2 rules, should be delayed until their worldwide implementation. As per the recent Budget announcement, the Pillar 2 rules are recommended to commence from 1 January 2024. In light of the above, we recommend that the CbC reporting is delayed beyond the implementation of those rules to ascertain the impact of those rules, the benefit to revenue, and the impact to the tax gap first, before deciding whether it is worth proceeding with the measure.

(We also note that the draft Exposure Draft legislation and accompanying Explanatory Memorandum propose slightly different start dates - the start date should be clarified such that it applies to the first financial year that the CbC reporting parent uses for the purposes of preparing its audited financial statements that starts on or after [1 July 202[ ]].)

2. About AmCham

AmCham was founded in 1961 by Australian and American businesses to encourage the two-way flow of trade and investment between Australia and the United States, and to assist its members in furthering business contacts with other nations. AmCham is Australia's largest and most active international chamber of commerce, representing some of America's most significant companies operating in the Indo-Pacific region, as well as start-ups and SMEs. In pursuing its purpose, the Chamber has found itself not only representing the United States' business view, but also speaking increasingly for a broad range of members involved in the Australian business community.

3. US-Australia Alliance

The US-Australia alliance is underpinned by core common values including the rule of law, transparency, hard work and fair play.

The relationship has provided an immense benefit to Australia – including new jobs, higher wages, elevated productivity, market access, capabilities, intelligence, interoperability, research and development, trade and investment, cultural ideas, and exchanges of people.

The current two-way trade and investment relationship between our countries is valued at almost $2 trillion. US trade and investment in Australia accounts for approximately $131 billion or 7% of Australia's GDP.

Over a quarter of all foreign investment in Australia comes from the United States, making it the biggest investor in our country. There are 323,000 Australians working for 1,100 US majority owned companies in Australia on a median salary above $100,000. US companies also spend $1.2 billion a year here on research and development.

For these reasons, AmCham's members consider it pivotal that Australia's taxation settings continue to support foreign investment and the benefits accruing from that investment.

4. Conclusion

Thank you for your consideration, and for this opportunity to submit AmCham's views to this Consultation process. We welcome any queries you have regarding our submission and any opportunities to engage in further consultation.

Kind regards,

April Palmerlee
Chief Executive Officer

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Annexure A –

IRS Notice 2018-31 ***National Security Considerations with Respect to Country-by-Country Reporting***

National Security Considerations with Respect to Country-by-Country Reporting

Notice 2018-31

SECTION 1. OVERVIEW

This notice provides additional guidance concerning country-by-country (CbC) reporting requirements under section 6038 and §1.6038-4. In consideration of the national security interests of the United States, this notice addresses modifications to the reporting requirement under §1.6038-4 with respect to certain U.S. multinational enterprise (MNE) groups. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to amend §1.6038-4 to incorporate the guidance described in this notice. Prior to the issuance of these amendments, U.S. MNE groups may rely on the provisions of section 3 of this notice.

SECTION 2. BACKGROUND

On December 23, 2015, a notice of proposed rulemaking (REG-109822-15) relating to the furnishing of CbC reports by certain United States persons under section 6038 was published in the **Federal Register** (80 FR 79795). The preamble to the proposed regulations requested comments concerning the need for a national security exception to the CbC information reporting requirement. On June 30, 2016, the Treasury Department and the IRS published final regulations (TD 9773) requiring annual CbC reporting on Form 8975, *Country-by-Country Report* (CbC report), by certain United States persons that are ultimate parent entities of U.S. MNE groups that have annual revenue for the preceding reporting period of $850,000,000 or more. The

final regulations do not provide a general exception for information that may relate to national security, but the preamble to the final regulations stated that the Department of Defense would continue to consider the national security implications of CbC reports in particular fact patterns. Based on subsequent consultations with the Department of Defense, the Treasury Department and the IRS have determined that national security interests require modifications to the reporting requirements for U.S. MNE groups that are specified national security contractors as defined in section 3.01 of this notice and that have a reporting requirement under §1.6038-4.

SECTION 3. MODIFICATIONS TO CBC REPORTING FOR SPECIFIED NATIONAL SECURITY CONTRACTORS

.01 Specified National Security Contractor

For purposes of this notice, a U.S. MNE group is a "specified national security contractor" if more than 50 percent of the U.S. MNE group's annual revenue, as determined in accordance with U.S. generally accepted accounting principles, in the preceding reporting period is attributable to contracts with the Department of Defense or other U.S. government intelligence or security agencies.

.02 Modifications to Manner of Reporting on Form 8975

The Treasury Department and the IRS intend to amend §1.6038-4 to provide the definition of specified national security contractor and modifications to the manner of reporting on Form 8975 for such U.S. MNE groups. The amended regulations will provide that U.S. MNE groups that have a Form 8975 filing obligation under §1.6038-4 and are specified national security contractors may provide Form 8975 and Schedules

A (Form 8975) in the following manner:

- Complete Form 8975 with a statement at the beginning of Part II, Additional Information, that the U.S. MNE group is a specified national security contractor as defined in this notice;
- Complete one Schedule A (Form 8975) for the Tax Jurisdiction of the United States with aggregated financial and employee information for the entire U.S. MNE group in Part I, Tax Jurisdiction Information, and only the ultimate parent entity's information in Part II, Constituent Entity Information; and
- Complete one Schedule A (Form 8975) for the Tax Jurisdiction "Stateless" with zeroes in Part I, Tax Jurisdiction Information, and only the ultimate parent entity's information in Part II, Constituent Entity Information.

No other Schedule A (Form 8975) or additional information is required.

.03 Amended Form 8975 and Schedules A (Form 8975)

A specified national security contractor that has already filed Form 8975 and Schedules A (Form 8975) for prior reporting periods may file an amended Federal income tax return (following the instructions for filing of amended Federal income tax returns) and attach an amended Form 8975 and Schedules A (Form 8975) in the manner provided in section 3.02 with the amended report checkbox on Form 8975 marked. Specified national security contractors that do not electronically file their amended Federal income tax returns should, in addition to filing an amended Federal income tax return with an amended Form 8975 and Schedules A (Form 8975), mail a

copy of page 1 of their amended Form 8975 to Ogden as provided in the Instructions for Form 8975 and Schedule A (Form 8975) under the heading "Where to File." In order to ensure originally-filed CbC reports are not automatically exchanged, specified national security contractors that are filing amended Form 8975 and Schedules A (Form 8975) to supersede an already-filed Form 8975 and Schedules A (Form 8975) should do so by April 20, 2018, if filing an amended Federal income tax return on paper, or by May 25, 2018, if filing electronically.

SECTION 4. EFFECTIVE DATE

The amendments to the regulations described in this notice shall apply to CbC reports and amended CbC reports filed after March 30, 2018.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Melinda E. Harvey of the Office of Associate Chief Counsel (International). For further information regarding this notice contact Melinda E. Harvey (202) 317-6934 (not a toll-free call).