USCIB
UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

April 27, 2023

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

Via email: *MNETaxTransparency@treasury.gov.au*

Re: USCIB Submission to the "Public Country-by-Country Reporting" Consultation Request

Dear Sir or Madam,

The Tax Committee of the United States Council for International Business ("USCIB") submits this letter in response to the government of Australia's public consultation related to (i) the draft legislation for transparency measures for multinational entities to prepare for public release certain tax information on a country-by-country basis (referenced herein as "Australian PCbC") and (ii) its statement on the approach to taxation and accompanying explanatory material implementing this measure (collectively referred to as the "Consultation Document"). USCIB is a multi-industry sector U.S. trade association that promotes open markets, competitiveness and innovation, sustainable development, and corporate responsibility. Its members include leading U.S.-based global companies from every sector of the U.S. economy and professional advisory firms, both groups of which typically have operations in every region of the world. We appreciate the opportunity to provide this submission. The comments herein generally reflect the consensus position of USCIB members, unless otherwise provided.

We set forth our submission comments below but note that – given the significant differences of Australian PCbC from other forms of established country-by-country ("CbC") reporting – we would welcome additional time to fully evaluate the impact of this proposal and reserve the right to supplement this submission. The relatively short comment period makes it difficult for us and others to evaluate and appreciate the full ramifications of this proposal.

USCIB understands the importance of transparency in tax matters but believes the transparency framework must be designed in a proportionate, balanced and thoughtful manner.

Over the last several years, large multinational enterprises ("MNEs") have faced strong encouragement from governments, regional bodies, investors, non-governmental organizations and lobbyist organizations for greater transparency in reporting tax matters for non-audit purposes. USCIB recognizes the Australian government specifically has expressed its commitment to strengthening tax transparency reporting. We recognize public sentiment for greater transparency and accountability for corporate activity. Indeed, tax transparency – when introduced in a balanced and thoughtful manner – can be beneficial to

society as it enables potentially a greater dialogue on the design and implementation of tax policies and practices, promotes trust between government and the governed, and facilitates an understanding of the role of government in advancing social and economic goals.

Tax matters, however, are complicated and can be difficult to explain in a straightforward manner to the public who generally lack the familiarity with the underlying tax concepts. The effort is even more difficult when inconsistent, but seemingly similar, information is disseminated. Accordingly, as a threshold matter, USCIB wants to emphasize the importance of international harmonization for public CbC reporting. Having each and every country adopt the same terminology and definitions is critical to its success and sustainability. To the extent that interested public stakeholders are presented with data that conflicts due to inconsistent data fields and/or definitions, the wider global transparency harmonization efforts will be harmed.

USCIB strongly supports the work done by the Organisation for Economic Co-operation and Development ("OECD") to establish the international standards for CbC reporting.

Less than 10 years ago, as part of the OECD Base Erosion and Profit Shifting ("BEPS") initiative, over 100 countries – including Australia – formally agreed to require non-public CbC reporting (hereinafter "OECD CbC") to ensure accurate and timely tax administration globally.[1] The Action 13 Final Report that contains the OECD CbC model rules even places a particular emphasis on the need for consistency, concluding in part that, with respect to implementation of the rules, "It is essential that the guidance in this chapter, and in particular the [CbC] Report, be implemented effectively and consistently."

Significantly, the OECD agreed that OECD CbC would remain confidential, only to be used as a tool for risk assessment. Countries formally agreed to the confidentiality provisions under the multilateral agreement. Decisions taken at that time reflected careful consideration of the benefits to tax administrations and potential costs to MNEs of public CbC. Mandating the public disclosure of CbC would breach the OECD agreement, risk damaging trading relationships with important partners and deter countries from further engagement at multilateral organizations like the OECD. We are concerned that this version of the Australian PCbC with unique data items undermines the importance of multilateral efforts and may ultimately lead to decreased participation in such efforts.

While we appreciate the discussion has moved from OECD CbC to public CbC, USCIB believes consistency in the reporting framework across jurisdictions is, and should remain, a fundamental principle. Indeed, a lack of consistency in reporting between different countries means that MNEs would be subject to multiple reporting requirements which will potentially create investor and public confusion, thereby leading to more ambiguity and effectively less transparency. The draft legislation itself places emphasis on international reporting standards to allow MNEs certainty on their reporting obligations in a timely

[1] *See* 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, (referred to herein as "OECD CbC").

manner[2]. We thus recommend that Australian PCbC be more closely aligned with the OECD CbC models. For your convenience, we include here as an Appendix a comparison of the key data requirements in the Australian proposal to those in the OECD model and derivative legislation. In this regard, the European Union (EU) Directive on Public CbC Reporting ("EU PCbC")[3] is a framework that is closely aligned with the OECD model rules and could be considered as a reliable model of a consistent PCbC standard suitable for other jurisdictions.

The Australian proposal requires MNEs to disclose CbC tax data for all of its jurisdictions. This is far beyond the scope of the EU Directive and sets an expansive new precedent for the claimed ability to legislate and enforce extraterritorial issues. To ensure consistent global publication and to avoid confusion amongst stakeholders, Australia PCbC should be aligned with EU Directive requirements from both the data scope and jurisdiction aggregation perspectives. At the very least, there should be a materiality threshold that MNE's are only required to report information for jurisdictions representing 80% of total revenue or some reasonable limitation of materiality on a per country basis. We also note that in addition to going further than the OECD CbC initiative and the EU PCbC Directive, the Australian PCbC even goes further than the Global Reporting Initiative's Sustainability Reporting Standard 207 ("GRI 207") which, while far from a globally accepted standard, has buy-in from over 250 MNEs. For MNEs currently at the forefront of publishing their tax strategy and core tax data points, the Australian proposals ask for more information than any of these companies currently publish.

The Australian PCbC proposal requirements might also lead to competitive distortions between MNCs subject to Australian PCbC requirements and those who are not, with filers at a competitive disadvantage due to the disclosure of sensitive data about their costs and global footprint. We strongly believe that the tax system needs to be applied equally to all taxpayers.

USCIB proposes specific changes to the proposal to provide for a better balanced and consistent approach.

USCIB believes that the tax transparency goals of the Australian government would be better served by designing an approach that carefully weighs the potential costs and administrative burden for MNEs to comply with the public reporting requirements versus the benefits that providing such information would offer. Specifically, we believe further consideration should be given to the following points that we believe will help deliver transparency in a way that is consistent globally.[4]

[2] See paragraph 1.26
[3] Council Directive (EU) 2021/2101, amending the Accounting Directive 2013/34/EU (hereinafter "EU PCbC Directive").
[4] For purposes of this letter, we have assumed "at a group level" (1.18) implies these numbers to be broken out by entity/jurisdiction. USCIB welcomes clarification/confirmation on this point.

A. **Materiality threshold for Australian operations:** Australian PCbC should only apply to MNEs that have operations of a certain size in Australia. MNE groups with *de minimis* or dormant operations in Australia should not be subject to Australian PCbC. For example, Australia could align the materiality threshold with the EU PCbC Directive concept[5].

B. **Materiality threshold for disclosure of non-Australian operations.** There does not appear to be a materiality threshold in relation to any of the data required to be published. Not only is the absence of a materiality threshold troubling from a compliance burden perspective it is not helpful from a stakeholder perspective in interpreting and understanding the published data. Accordingly, as indicated above, we propose limiting disclosure to the largest jurisdictions covering in the aggregate, 80% of revenue and employees or some reasonable limitation of materiality on a per country basis.

C. **Align data items with current reporting standards:** Further, USCIB suggests the Consultation Draft be updated to align the data requirements to the OECD CbC model rules or the EU PCbC Directive.[6] Aligning to already established standards will limit data error issues in terms of both reporting and interpretation. Furthermore, the additional data requirements noted below are complex and detailed, and there is a strong risk that errors could be made in reporting. This would undermine the accuracy and reliability of the information provided to the public. Accordingly, we propose that the following data elements be removed from the draft legislation:

1. Expenses from transactions with related parties that are not tax residents of the jurisdiction. MNEs will likely not have this information readily available on a per country basis.

2. The Pillar Two effective tax rate (ETR) calculation. MNEs will often not have this information readily available on a per country basis during the OECD transitional safe harbour period. The Pillar Two ETR calculation is extremely complex with potentially hundreds of needed adjustments. Indeed, the transitional safe harbour in Pillar Two was established specifically to provide MNEs with a reprieve from having to perform these complex calculations on a global scale. Given the complexities, publishing this data will not achieve the government's stated goal to help investors and the public assess whether taxes align with economic presence. In contrast, comparing the Pillar Two rate to the implied ETR (taking the tax figures divided by the profits) will create widespread confusion. However, if the Australian government requires MNEs to

[5] *See* EU PCbC Directive, Article 48b, Para. 5. Generally, a foreign MNE group (i.e., a non-EU headquartered company) will be subject to EU public CBC reporting to the extent it has a "qualified presence" in at least one of the EU Member States where, on an entity-level, two of the following criteria apply: (a) Balance sheet total greater than €4 million, (b) net turnover greater than €8 million and (c) Greater than 50 employees during the year. A branch will be deemed to have a qualified presence where it has net turnover greater than €8 million for two consecutive years.

[6] A summary matrix comparing the various reporting initiatives can be found in Appendix I.

publish such data it:

a. Should not commence until the effective date of Pillar Two (in 2024) as it would advance a difficult compliance burden and a timeline that is generally aligned across the Inclusive Framework.

b. Align with the transitional CbC safe harbour. In many instances, MNEs will not be required to calculate the full Pillar Two ETR during the transition period. As indicated above, the OECD designed these safe harbours to effectively exclude from the scope of Pillar Two an MNE's operations in lower-risk jurisdictions in the initial years, thereby providing relief to MNEs in respect of their Pillar Two compliance obligations.

3. The list of tangible and intangible assets. MNE groups already are expected to report the book value of tangible assets in the OECD CbC framework. A list of tangible and intangible assets for any reasonably-sized MNE could be millions of lines long. Not only would this be burdensome for MNEs to produce, but given the massive amounts of data, it would also provide minimal benefit in terms of increased transparency. Further, an aggregated list (by categories) would likely be combined at an extremely high level which would require extensive manual work for MNEs to prepare without providing clear insights to the reader. This data could also be extremely burdensome for MNEs to obtain as fixed asset systems are typically maintained at an entity level rather than being easily accessible to central resources and may exist in dozens or more different enterprise resource planning ("ERP") systems.

4. The book value of the intangible assets at the end of the income year. MNEs generally do not maintain this information on a per country basis. We note that the OECD did not consider including these data items in their 2020 OECD CbCR review. Furthermore, much of this data may be competitively sensitive, especially areas like the functional role and location of every entity, and the specific details of all tangible and intangible assets held. This may affect both the ability and likelihood of MNEs to complete the Australia CbC disclosure requirements and at worse affect the attractiveness of Australia if such broad ranging disclosures are required. Furthermore, self-created intangibles are typically not recorded for financial statement purposes and have no readily available valuation. For many MNEs, these types of intangibles are the large majority of any intangible value, and the lack of available data would make them impractical to include in a public CbC. However, the fact that they would not be included would mean that the reported intangibles would not reflect the value of an MNE's intangibles leading to confusion and less transparency. It is our understanding that this consideration was part of the rationale for the OECD limiting the CbC data to only tangible assets.

5. "Reasons" for variances between current year corporate tax accrued and the statutory rate multiplied by profit before tax. These reasons will be numerous and

often routine (e.g., audit settlements, timing differences). If this is retained in the final proposal, we suggest:

a. A materiality standard be applied. For example, explanations may only be required where there is a greater than 20 percent difference between the two numbers; and
b. All small items (if they don't exceed 10% of the difference) be grouped together.

Much of the data items mentioned above are not items that many companies ordinarily prepare or retain today. For example, the requirement to prepare a tax rate reconciliation on a jurisdictional basis will require jurisdictional consolidations and tax rate reconciliations to be prepared. For a large MNE group, collecting this data and preparing these reconciliations for every jurisdiction in which they operate will impose significant and disproportionate, administrative and resource challenges.

D. **Source of reported data:** The exposure draft notes that the information published must be based on amounts as shown in the audited consolidated financial statements. USCIB suggests that that MNEs be allowed the same flexibility on data sourcing as those set forth in OECD CbC (which states that MNEs may choose to use data from a variety of sources including internal management accounts).[7]

E. **Alignment of terms and definitions:** In addition to aligning the data requirements with the OECD CbC model rules, we suggest that key terms and definitions be aligned as well. For example, for purposes of Australian PCbC, related party revenue excludes intra-country transactions, while there is no similar exclusion for purposes of OECD CbCR or even EU PCbC. Furthermore, we note that the EU PCbC generally permits data to be reported on the basis of the OECD CbCR rules.[8] We believe Australian PCbC would greatly benefit from a similar rule.

F. **Stability of final requirements:** We appreciate that the tax landscape will continue to evolve; however, in order to allow for MNE and public certainty on compliance obligations, USCIB suggests the data items required for Australian PCbC (as modified for points of global consistency noted herein) remain unchanged for the initial five years of the reporting requirement. With respect to years beyond the initial period, the data items can be re-evaluated, and the government can seek commentary regarding the appropriateness of any further amendments. We note that the EU PCbC contains a similar five-year review period, as did the original OECD CbC initiative.

G. **Clarity on which MNEs are excluded from the scope:** The current proposals provide the government of Australia with the discretion to decide which MNEs would participate (and which ones would be excluded). We suggest Australia introduce clear rules up front regarding which MNEs would be excluded from the scope.

[7] Annex 3, Section B, Source of Data
[8] *See* EU PCbC Directive, Article 48c, Para. 3.

H. **<u>It is important for commercially sensitive data to be protected:</u>** The BEPS Action 13 Final Report recognized that companies must provide confidential and commercially sensitive information to tax authorities under OECD CbC reporting regimes and therefore included stringent confidentiality requirements. Under the Australian proposal, companies are required to provide significant additional information publicly, increasing the risk that commercially sensitive information would be disclosed. For this reason, we recommend that Australia adopts a safe harbour that allows MNEs to defer publication of confidential and commercially sensitive data for five years, in line with the EU PCbC. There may be instances where reporting per country data could reveal sensitive business information, such as the location of valuable assets or the cost of production in different regions. This could place companies at a competitive disadvantage and raise privacy concerns. As a result of the requirement to publish jurisdiction by jurisdiction, this distortion could occur in any market in the world (not just Australia) in which one business is required to publish as a result of Australian legislation and a competitor is not. Further, as noted above, the listing itself of each and every tangible and intangible asset could lead to MNEs publishing sensitive information that may harm MNE's competitiveness. In some instances, the requested disclosures may even be contrary to securities laws, or there may be significant national security concerns for some MNEs to disclose the required data items. This could negatively impact the security interests of Australia or its allies or perhaps violate legal obligations in other jurisdictions.

I. **<u>Penalties:</u>** USCIB suggests there should be a transition period where a penalty would not apply. This approach would be similar to the Pillar Two transitional penalty relief regime, which recognizes that no penalties or sanctions should apply during a transitional period in connection with filing GloBE information returns where an MNE has taken reasonable measures to ensure the correct application of the Pillar Two rules. Furthermore, the EU PCbC provides for the possibility that the EU subsidiary of non-EU parented MNE may not possess all required information. In such case, the EU subsidiary reports all the information it possesses and includes a statement indicating that its parent did not make the necessary information available. We recommend that (a) since this is an Australian rule, the requirement to produce the information be the responsibility of the Australian subsidiary and (b) the Australian subsidiary not be penalized if it cannot obtain non-Australian data. We do not believe the local subsidiaries should be penalized if it makes every effort to comply with the legislation but are unable to do so because they cannot compel their foreign parent to produce information that has not otherwise been made available to them**.** It is also important that no natural persons could be subject to legal risk as a result of the filing of Australian PCbC. Local directors have no control over the provision of information by MNE parent companies, and it would be overreaching to assign legal risk to foreign directors.

J. **<u>Clarification on Proposed Timing</u>**: We understand the new rules would be applicable for income years commencing from July 1, 2023. The very brief gap in time between the date when these submissions are due, and the proposed effective date is disconcerting given the number of fundamental issues we are highlighting in this submission. In addition, USCIB would appreciate clarity on when the first year is applicable for

taxpayers; for a taxpayer whose fiscal year ends December 31, 2023, is the first Australian PCbC obligation for the year to December 31, 2023 year or for the year to December 31, 2024? This needs to be clarified.

K. **Overall Timing:** Regardless of the intended start date, given the complexity of the request – which includes items that go far beyond OECD CbCR -- USCIB requests these rules apply no earlier than 2024. This would more closely align with the implementation of both EU PCbC and Pillar Two. The delay of six months to one year would not harm the overall objective of helping investors and the public. Indeed, a delay of Australian PCbC may in fact be a benefit to investors, as it could lead to the collection and reporting of more complete and accurate information. Given that MNEs may not have access to the requested data and are also struggling with the complex implementation of Pillar Two, the additional time will allow for more accurate and consistent reporting across MNEs.

L. **Correction of errors:** Given the proposed timeline for submitting Australian PCbC, it is highly likely that these reports will need to be regularly revised. Regular revisions will be burdensome for MNEs and confusing for the public. We suggest that Australia consider including any required prior year changes in the current year disclosures rather than requiring submitting amended reports (similar to the Pillar Two treatment of prior year adjustments). At a minimum, there should be a relatively high materiality threshold to require resubmission of all prior year reports. A clear definition should also be provided regarding the definition of what constitutes an error; for example, would an audit adjustment that resulted in a change in profit for any jurisdiction arise to the level of an error or would only administrative errors need to be reported.

M. **Allow MNEs to publish their own data:** The current proposal provides that MNEs will provide their Australian PCbC to the government (the Commissioner) and the Commissioner will make the information available "as soon as practicable" on an Australian government website. Some MNEs may want to timely publish this report in conjunction with other ESG disclosures (e.g., their annual sustainability report) to provide context and transparency. Hence, we suggest MNEs be permitted to publish the CbC themselves with possible additional information provided for purposes of providing clarity.

We would like to thank the Director for the opportunity to provide these comments and reiterate our belief in the importance of tax transparency that is performed in a balanced and consistent manner. We would be happy to discuss with you the contents of this submission at your earliest convenience.

Best regards,

John Stowell
Chair, Tax Committee
U.S. Council for International Business

Rick Minor
VP & International Tax Counsel
U.S Council for International Business

Appendix I

Below we provide our understanding of the Consultation Draft required data items as compared with OECD CbC, EU PCbC and GRI 207.

Comparison of CbC	Australian CbC proposal[9]	OECD CbC	EU public CbC Directive	GRI 207
Statement on the approach to tax	✓	✗	✗	✓
Names of entities in the CbC reporting group	✓	✓	✓	✓
Description of main business activities	✓	✓	✓[10]	✓
Total revenue	✗	✓	✓[11]	✗
Revenue from third parties	✓	✓	✗	✓
Revenue from related parties	✓	✓	✗	✓
Expenses from transactions with related parties that are not tax residents of the jurisdiction	✓	✗	✗	✗
Profit/loss before tax	✓	✓	✓	✓
Income tax paid (cash basis)	✓	✓	✓	✓
Income tax accrued (current year)	✓	✓	✓	✓
Pillar 2 Effective tax rate ("ETR")	✓[12]	✗	✗	✗
Tangible assets other than cash and cash equivalents	✓	✓	✗	✓

[9] Amounts required per the Australian PCbC proposal must be based on amounts as shown in the audited consolidated financial statements of the entity for the period that corresponds to the income year.
[10] Brief description of business activities in each jurisdiction for which CbC data is required.
[11] Taxpayers must report total revenue, including related party revenue, but there is no clear requirement to separately state the two amounts.
[12] While not required as part of the OECD, EU, or GRI CbC initiatives, the current effective tax rate can be calculated using data that is required to be disclosed, i.e., Income tax accrued (current year) divided by Profit/loss before tax. Under the Australian PCbC proposal, however, affected taxpayers are expected to calculate and disclose ETR in accordance with the BEPS Pillar Two rules.

Comparison of CbC	Australian CbC proposal[9]	OECD CbC	EU public CbC Directive	GRI 207
Book value of tangible assets at the end of the income year	✓	✓	✗	✓
List of intangible assets at the end of the income year	✓	✗	✗	✗
Book value of intangible assets at the end of the income year	✓	✗	✗	✗
Number of Employees	✓	✓	✓	✓
Reasons for the difference between CIT accrued on profit/loss and tax due if the statutory rate is applied to profit/loss	✓	✗	✗[13]	✓
Total accumulated earnings	✗	✓	✓	✗
Stated capital	✗	✓	✗	✗

[13] Per the EU PCbC Directive, Member States may require taxpayers to explain material differences between Income tax paid (cash basis) and Income tax accrued (current year).