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Tuesday, 5 March 2024

Director
International Tax Unit
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600
Via Email: MNETaxTransparency@treasury.gov.au

Dear Director,

Public Country-by-Country Reporting Tax Transparency Measures

The American Chamber of Commerce in Australia (**AmCham**) writes in response to the release of the exposure drafts of the *Treasury Laws Amendment Bill 2024: Multinational tax transparency - country by country reporting* and the *Taxation Administration (Country by Country Reporting Jurisdictions) Determination 2024* and their supporting explanatory material (collectively, the **Revised Draft Legislation**).

In this letter, AmCham sets out its submissions on the Revised Draft Legislation on behalf of its members. Our intention is to limit the submission to key areas of concern and themes related to our joint intent.

We recommend the Australian Government consider modifying the Revised Draft Legislation to align with OECD norms and EU Directive so that there is a globally consistent approach. This would reduce the risk of:

- Uncertainty present in the proposed rules;
- Administrative burden and compliance costs for taxpayers who will otherwise have multiple sets of data for the same country and the confusion this brings;
- Australia becoming a global outlier compared to our peers;
- Companies limiting their tax presence in Australia;
- Australian multinationals and foreign companies with Australian operations at a significant competitive disadvantage; and
- Impacting foreign investment in Australia, potentially delaying projects that would otherwise generate jobs for Australians and revenue for the Australian economy.

Preliminary Comments

Whilst AmCham supports the disclosure of tax information to tax authorities reflected in Action 13 of the OECD's base erosion and profit shifting project and the subsequent adoption in Australia and across much of the world of country-by-country (**CBC**) reporting under aligned OECD standards, there remains no apparent compelling reason for requiring, by force of law and without global coordination, the *public* disclosure of such tax information by multinationals (particularly in relation to jurisdictions outside of Australia merely by result of having a connection with Australia) in the form of public CBC reporting. In this respect, in relation to the rationale given in connection with the Revised Draft Legislation, GRI 207 remains a voluntary standard and investors and capital providers are more than capable of encouraging disclosure on a multitude of matters (including tax) where this is desired.

This remains a matter on which, if there is 'shifting attitudes for enhanced corporate disclosures' it is more appropriately dealt with at an international level (for example, through the OECD). Further, it comes at a time where there are already considerable efforts targeted at multinational enterprises to improve taxation outcomes, including the adoption of the OECD Pillar 2 GloBE measures, and so the necessity and value of such public CBC reporting must be questioned. In this respect, our previous submission dated 19 May 2023 (a copy of which is set out as Annexure A) remains relevant in relation to these issues.

There remains a risk that, because of the divergence of the Revised Draft Legislation from other similar models (including the European Union's public CBC reporting measure set out in EU Directive 2021/2101 [**EU Public CBC Rules**]) and the extensive proposed worldwide public tax information reporting as a result of a relatively small connection with Australia, this measure will discourage investment by multinationals into Australia. In this respect, having an Australian investment may put them at a commercial disadvantage to their competitors who do not invest in Australia.

To the extent that, notwithstanding the above comments, the Australian Government still considers that public CBC reporting is necessary, there continues to be a need to align with the European Union's public CBC reporting measure set out in EU Directive 2021/2101 to ensure there is a de facto global standard, to mitigate the administrative and compliance burden, and to ensure that multinationals are not faced with competing public CBC reporting requirements. Whilst AmCham welcomes the number of positive changes to the previous draft proposed Australian public CBC legislation, AmCham has set out below in further detail improvements that should be adopted in this regard.

Ensuring Global Alignment

AmCham considers the most significant issue that remains is that the Revised Draft Legislation unfortunately does not fully acknowledge or align with other public CBC reporting concepts, particularly the EU Public CBC Rules, or with the existing private CBC rules governed by the OECD. Given this relates to global tax reporting, it is essential that multinational enterprises are not faced with multiple divergent reporting standards. In particular, Australian Public CBC reporting does not provide a substantial value-add to the public if a multinational entity is already preparing a similar report that is publicly available (and instead merely increases the compliance burden). Despite some convergence in the Revised Draft Legislation, preparing the Australian Public CBC report would still result in additional efforts for multinational entities due to the different data requirements, different format, and a separate filing obligation in Australia. It also encourages the adoption by other jurisdictions of their own independent varied public CBC reporting arrangements, leading to a variety of global reporting mechanisms. This scenario was successfully avoided when the OECD CBC reporting was introduced in a globally coordinated way. We hope that the same outcome can be achieved for the Public CBC reporting.

We have set out below key areas of divergence with other global requirements and our proposed solutions.

Fundamentally, AmCham considers that where a multinational enterprise is already subject to the EU Public CBC Rules, that submission would be deemed sufficient compliance with the Australian rules (perhaps only with the addition of information solely in relation to Australia to be publicly reported, with a link to the equivalent EU scheme). The Revised Draft Legislation in its current version should offer the flexibility to implement a measure such as an EU Public CBC reporting exemption (e.g., via regulations made under paragraph 3DB (4)), and it would be helpful if such approach could be confirmed in draft regulations presented alongside the Revised Draft Legislation.

The Revised Draft Legislation does not presently align with the EU Public CBC Rules and the OECD CBC reporting standards for private reporting. In particular:

- The Relevant Draft Legislation requires information to be prepared and submitted in accordance with not only the OECD Transfer Pricing Guidelines and the OECD Guidance on the Implementation of CBC reporting (which are consistent with both the EU Public CBC Rules and the OECD CBC rules), but also with disclosures 207-1 and 207-4 of GRI207: Tax. The introduction of an additional standard different from both existing regimes requires multinationals to revisit the existing data prepared and ensure it is prepared in compliance with a broader set of rules, potentially producing three different sets of data.

- This difference is magnified by the requirement to include the 'statement on the approach to tax' (group level) and the explanation of the 'difference between tax accrued and profit before tax multiplied by the country tax rate' (country level), as well as the reporting of revenue from related parties not resident in the tax jurisdiction. These are significant and material matters, and because they are not covered by existing reporting, require additional complex analysis (for example, even where disclosure is ultimately only required on an aggregate or country level, it is necessary to understand the underlying effects on the entity level in a first step, and for a large multinational entity. This could easily result in a reconciliation task for several hundred entities).

- AmCham submits that this is best addressed by excluding those additional pieces of information that derive from GRI207 and are not present in either the EU Public CBC Rules or the OECD CBC rules.

There is also significant divergence between the EU Public CBC Rules and the Revised Draft Legislation in terms of jurisdictions subject to the country-by-country (rather than aggregated) reporting. Whilst it remains unclear as to why Australia should report on non-Australian jurisdictions in any case, the list of countries in the CBC reporting well exceeds the European Union's 'blacklist' and 'grey list'. AmCham requests this list should be aligned and tied to the European Union lists. For example, Cayman Islands, Singapore, Bermuda, Switzerland etc should all be removed from the list. To the extent there is the maintenance of an Australian specific list (which is undesirable), this should be based on some objective process (like the EU list that at least provides information to the relevant jurisdictions on how to improve their tax administration and allows the prospect of removal from the list) rather than an opaque ministerial determination.

AUD 10 million Materiality Threshold

The Revised Draft Legislation proposes to introduce CBC reporting obligations to the ultimate parent of the group if AUD 10 million or more of the aggregated turnover for the income year is Australian-sourced income. This threshold is focussed on carving out smaller enterprises, which is positive, although we believe that the threshold is too low. However, as the threshold is based on Australian sourced income of the group, AmCham submits there could be circumstances where a group with a small Australian tax presence (i.e., an Australian subsidiary or permanent establishments (**PE**) that has less than AUD 10 million revenue) still has a reporting requirement because there is other Australian sourced income that is being booked elsewhere in the group. For example, income from a loan into Australia (that may be subject to withholding tax), or income derived by a non-resident where a PE is not triggered could create scenarios where a public reporting requirement is triggered if the quantum of that income is greater than AUD 10 million notwithstanding the actual Australian subsidiary or PE presence in Australia is small.

AmCham considers that the communication, enforcement, and monitoring of this requirement is perceptible to creating complexities and will likely create confusion.

Further, AmCham submits the threshold will unnecessarily impose a reporting obligation for a wide group whilst under the EU equivalent CBC reporting regime, a reporting obligation will arise for multinational groups with a consolidated net turnover of at least EUR750 million in each of the last two consecutive financial years, if the group's ultimate parent undertaking is either:

- based in the EU, or
- based in a third-country and operates in the EU through a qualifying EU presence.

A qualifying EU presence is defined by reference to definitions laid down under the EU Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (Council Directive 2013/34/EU) and includes:

- medium-sized or large subsidiaries that meet two of the following three conditions:
  - ✓ a balance sheet greater than EUR 4 million,
  - ✓ net turnover greater than EUR 8 million, or
  - ✓ an average number of employees exceeding 50.

Branches which exceed the turnover threshold above (i.e., EUR 8 million) for each of the last two consecutive financial years.

AmCham submits the Revised Draft Legislation should:

- generally follow the EU's approach and be expanded to avoid targeting just entities with income generated from Australia; and
- that limiting the threshold to only income of the Australian subsidiary or PE might be preferable and easier to apply in practice.

Commercially Sensitive Material

AmCham advocates that fair and full taxpaying is important. However, forcing private companies to disclose commercially sensitive information goes far beyond this objective.

To further align with the global reporting standard embodied in the EU Public CBC Rules, while still improving corporate tax transparency, we recommend providing an option to keep commercially sensitive information private, with disclosure limited to the ATO. This is consistent with the EU Public CBC Rules and will ensure the protection of confidential and commercially sensitive data, that is currently being requested to be disclosed. This is particularly important for private companies, for whom the confidentiality of financial information is a key competitive advantage.

The disclosure of sensitive information including global revenue, profitability, level of investment and other commercial data that is currently private, although already disclosed to tax authorities to ensure compliance with the tax law, may lead to a competitive disadvantage for private companies.

Forcing private companies to publicly release commercially sensitive information risks their departure from Australia and does nothing to improve taxpaying practises. Disincentivising private multinational operations in Australia risks eroding Australia's taxbase if private multinationals leave or decide against expanding to Australia due to this requirement.

Australia has enthusiastically adopted the recommendations of the OECD's BEPS Project, including the BEPS Action 13 Final Report in relation to 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).

In AmCham's view, aligning with the EU Public CBC Rules in delaying the publication of information by five years is the minimum position which should be adopted in Australia. This ensures corporate tax transparency but also protects the confidentiality of sensitive commercial information for private companies operating in Australia for a period. This was specifically addressed by the EU when adopting their Public CBC Rules. The five-year deferral option was introduced to ensure that striving to achieve corporate tax transparency did not disadvantage EU companies compared to non-EU companies. The same rationale should apply to Australia.

Exceptions

We understand that other jurisdictions with similar rules have acknowledged that the extraterritorial application of these information reporting requirements is onerous and have therefore provided exceptions to the obligation, for example the EU Public CBCR Directive (the Directive) provides for the possibility that EU subsidiaries of a non-EU multinational may not have all the information required to be reported. In such event, the Directive permits the EU subsidiary to:

> *"...draw up, publish, and make accessible a report on all the income tax information in its possession, obtained, or acquired, and a statement indicating that the ultimate parent entity or the standalone undertaking did not make the necessary information available."*

We are of the view that the Draft Legislation be updated to include a similar exception.

The exception for extraterritorial information unable to be obtained from the parent entity should be adopted in respect of the CBC reporting obligations themselves or that circumstance should be noted as an excuse from liability to prosecution in the amendments being made through the insertion of the new section 8C(1)(ab) of the TAA.

National Security

We urge the Treasury to obtain feedback from the ministries of defence of its allied nations (e.g., the U.S.) regarding the implications of requiring the disclosure of sensitive information by its defence contractor companies and consider providing an exemption for a class of entities that fall within the defence industry. While the Exposure Draft provides the Commissioner authority to specify a class of entities or an entity exempt from the stated disclosure requirements, there is no clarity to-date on the criteria for, the process to seek, or the duration of said exemption.

We would like to see further guidance provided in this regard, as the failure to provide such an accommodation would effectively sanction the release of significant information with potentially high intelligence value to geopolitical competitor states and harm Australia's interests and its relations with allies.

Aggregation

The 'specified country' list is based on the list of entities set out in the International Dealings Schedule, which is outdated. The 41 countries were drawn from the international dealings schedule (IDS) which was created in the pre-BEPS era.

We consider that there is a misconception to the public that the countries listed are considered to be 'non-cooperative' and strongly recommend that the list be aligned to the EU list. By leveraging the IDS list, the Exposure Draft does not seem to take into consideration that entities on the 'specified list' will have already taken steps to implement Pillar 2 domestic minimum taxes of 15 percent, and so should not be considered as 'jurisdictions typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities.' We consider that the EU non-cooperative list and Grey list is an updated list. Many of these countries have implemented recommendations from the various BEPS actions, including the adoption of Pillar 2 and therefore should no longer be 'specified countries' with regards to the Australian requirements.

Whilst AmCham welcomes the reduced disclosure by allowing aggregation of non-specified jurisdictions, this still creates issues for US-based entities that derive the clear majority of revenue from US activities, as reporting will effectively show those US-based entities' US tax position.

The concern is that this may be contrary to US corporate law, which allows for private information sharing only with relevant regulators for private businesses.

Penalties

The proposed penalties are significant notwithstanding that there is no loss of revenue for failure to comply, or for late lodgements. Whilst it is understood that there is a desire to promote compliance, we feel that imposing draconian penalties in circumstances where the same entities are also subject to penalties in relation to CBC reporting to the Australian Taxation Office is not appropriate.

Further, the Revised Draft Legislation also purports to subject non-complying CBC Reporting Parents to penalties under section 8E of the *Taxation Administration Act 1953* (Cth). By virtue of section 8Y of the *Taxation Administration Act 1953* (Cth), this may also result in criminal offences being applicable to directors and officers.

The inclusion of criminal penalties for non-compliance is also highly unacceptable given this is fundamentally a reporting regime.

It is also currently unclear whether the Australian Federal Government intends to apply these penalties to CBC Reporting Parents that are not resident in Australia for tax purposes. Specifically, the potential application of criminal penalties on natural persons if convicted of three or more 'relevant offences' for non-residents invites questions. As a matter of international law, foreign penal laws will generally not be enforced, nor will courts enforce the laws of foreign governments in a home jurisdiction to collect taxes levied in a foreign country, and this is broadly the case for Australia. The potential application of criminal penalties to foreign CBC Reporting Parents would be contrary to usual practice and we would seek further clarity on this issue and the application of any relevant treaties.

Further Clarification Required

AmCham submits there is need for further clarification as to the following matters:

- The scope of discretion. For example, can discretion be used to request extensions, and/or certain exemptions based on confidentiality? What considerations are necessary when discretion is exercised?
- The mechanism for lodgement of exemption requests should be clarified. For example, would the exemption be requested by the Australian entity or the ultimate parent company?
- The proposal is not clear as to who would be responsible and held accountable for the penalties. For example, will it be the global directors, public officer, or local directors? This is an important point for clarification because the foreign parent entity would not have a public officer as it would (in most cases) have no direct tax presence in Australia.
- Further information is required in relation to the publication and content of the approved form documents and further guidance from the ATO.
- It is generally appreciated that the new documents differentiate between material errors and non-material errors stating that a correction of the Australian Public CBC would only be required in case of material errors. While an example of a non-material error is provided, no example is provided of a material error. It is necessary that there be further clarification as to the idea of a 'material' error. For example, will material errors be regarding significantly incorrect calculations or does a wrong entity name represent a material error?
- There is discussion of a requirement to provide a link to the EU report. The Explanatory Memorandum mentions this, but it is not referred to the new law.
- Clarifications that, to the extent additional reporting requirements are added under the regulation-making power, such additional requirements are in line with global standards, to again prevent the proliferation of multiple standards.

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 policy settings continue to support foreign investment and the benefits accruing from that investment.

Conclusion

Thank you for your consideration and for the opportunity to submit AmCham's views. We welcome any queries you may have regarding our submission.

Kind regards,

April Palmerlee
Chief Executive Officer

AP: ao

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.

Annexure ‘A’

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Friday, 19 May 2023

Ms Ronita Ram
A/g Assistant Secretary
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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.

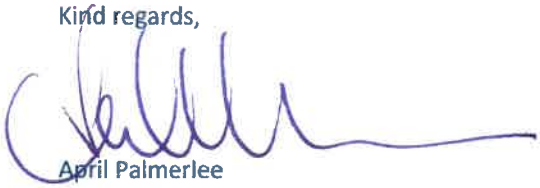
Over a quarter of all foreign investment in Australia comes from the United States, making it the biggest investor in our country. There are 323,000 Australians working for 1,100 US majority owned companies in Australia on a median salary above $100,000. US companies also spend $1.2 billion a year here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

AP: ao

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).