March 5, 2024

Director
International Tax Unit
Corporate and International Tax Division
Treasury
Langton Crescent
Parkes ACT 2600
MNETaxTransparency@treasury.gov.au

Re: Comment Letter on Treasury Laws Amendment Bill 2024: Multinational tax transparency—country by country reporting

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the Australian Government's *Treasury Laws Amendment Bill 2024: Multinational tax transparency—country by country reporting* ("CbCR"), published on February 12, 2024 (the "Draft Bill").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the OECD and the Inclusive Framework in establishing and maintaining international tax norms that provide certainty to enterprises conducting cross-border operations.

We understand Australia's stated goals of providing for the disclosure of information about a corporation's subsidiaries in the annual financial reports through a new 'consolidated entity disclosure statement.' We appreciate the modifications made from the prior draft legislation on CbCR, *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023*, published in June 2023 ("2023 Exposure Draft"). The NFTC welcomes the Australian Taxation Office's ("ATO") consultation and the opportunity to provide additional written comments on the Draft Bill.

General Comments

NFTC has previously expressed concerns with proposals for publicly available CbCR. We appreciate the additional ATO consultation on these rules and responsiveness to some of our prior comments. However, in reviewing the Draft Bill for public CbCR, we still have an array of concerns about the scope, safeguards for data, and compliance burden.

Specific Comments

Scope

The proposed scope of information requested is still overly broad and is beyond what is included in OECD Confidential CbCR. The scope of CbCR was agreed at the OECD as 'appropriate' to enable tax authorities to make a confidential risk assessment of an MNE's tax affairs. While we understand the need for this data to conduct risk assessments, there seems to be no objective policy goal for publishing that information.

Similarly, the information requested goes beyond that required under the public CbCR EU Directive 2021/2101 ("EU Public Directive"). The statement on approach to tax included on CbCR filing, the disclosure of Tangible Assets, nor the reconciliation prepared by jurisdiction between income tax accrued and taxes due and paid are requirements in the EU Public Directive.

The obligations to report global data coupled with the imposition of criminal penalties tied solely to information reporting substantially diverges from international norms. NFTC recommends the removal of the criminal penalties. We further recommend providing an exception from reporting for information that an entity does not possess or have reason to possess. The exception should also include relief from reporting where the provision of the information would violate the law in any relevant jurisdiction (e.g., due to confidentiality or privacy). This protection would be consistent with the approach taken in the EU Public Directive, where local entities must request data from a foreign parent and report whether the foreign parent provided the necessary data. However, local entities and employees are otherwise not subject to penalty for a related entity's refusal to provide data.

With regard to jurisdictions in-scope, the EU Public Directive identifies the Black and Grey list jurisdictions and requires separate reporting only for countries in these lists. We recommend alignment with the EU on the Black and Grey lists instead of having a separate list of 41 identified jurisdictions. This will remove additional reporting burden and focus the information on "high risk" countries deemed to not meet tax transparency requirements, making such disclosure more meaningful to the interested parties. Furthermore, we encourage Australia to develop and communicate a formal set of standards by which a foreign country will be included or excluded from this list. Prior to adding a country to the list of jurisdictions in-scope, a mandatory notice period should be provided, which will allow MNEs to better forecast the potential costs of locating investments in various jurisdictions around the world while maintaining a presence in Australia. Australia should also review if it is necessary to have these countries on the list given that many of these markets have Pillar Two minimum tax in place from January 2024 onwards. Furthermore, after the introduction of the UTPR for taxable years beginning after January 1, 2025, no income in any of these jurisdictions will be subject to tax at a rate of less than 15 percent. We note that taxes paid under the UTPR are not included in the CbCR data as taxes paid in the jurisdiction that resulted in the payment of the UTPR, which would lead to distortions of the data with respect to that jurisdiction and the jurisdiction to which the UTPR was remitted.

Type of Entity

The proposed tax transparency requirements only apply to certain types of entities that are country-by-country reporting entities in Australia - section 3D(1)(a) excludes partnerships in which any of the partners is not a constitutional corporation or trusts of which any of the trustees is not a constitutional corporation.

Consistent with these exclusions, the Draft Bill should also exclude a foreign constitutional corporation that is treated as fiscally transparent in its country of organization such that the entity's income is subject

National Foreign Trade Council
1225 New York Avenue NW, Suite 650B, Washington, DC 20005 202-887-0278
Serving America's Global Businesses Since 1914.
www.nftc.org

to tax directly in the hands of its members or trustees on a current basis and those members or trustees are individuals.

Revenue

The disclosure of Revenue is required by the EU Public Directive for Total Revenue, whereas the Draft Bill requires splitting revenue into revenue from unrelated parties and revenue from related parties. The Draft Bill defines related party revenue differently, whereby intra-country transactions are to be excluded in the Australian report, versus the existing Global non-public CbCR and EU Public Directive, which do not have the exclusion. This would potentially create five different definitions of Revenue within CbCR documents, which will create confusion, leading to less transparency and ultimately undermining any intended benefit from such disclosures. In addition, the split of related party intra-country vs inter-country is a very time-consuming exercise and may not be possible for some MNEs. This requirement will add a significant incremental compliance workload to MNEs. Again, the lack of consistency with the EU Public Directive increases the potential for confusion amongst stakeholders and the compliance burden for taxpayers.

Explanation of Tax

The Draft Bill includes a requirement to provide justification for the differences between income tax accrued (current year) and the amount of income tax due if the statutory rate of the jurisdiction is applied to the profit or loss before income tax. In general, the reasons for these differences are limited to a few reasons (e.g., tax incentives, offset of tax losses), which are all normal business practices. However, the reasons may not be easily understood and thus misinterpreted by readers of the document. Furthermore, Pillar Two makes most of these differences less relevant. NFTC recommends that this information requirement be removed in order to align with the EU Public Directive. By removing this information, the appropriate level of data for public transparency that can be easily understood would be achieved.

Lack of Safeguards for Commercially Sensitive Data

NFTC remains very concerned about the lack of safeguards to protect against the disclosure of commercially sensitive data regarding business operations. While the Draft Bill contains a reference to allowing exemptions, there is no clarity on what might qualify for an exemption, and it appears to be at the discretion of the Commissioner. Such disclosures could harm the competitive position of businesses, eventually resulting in market distortions, particularly when compared to competitors not subject to disclosure (e.g., competitors with no operations in Australia).

As a result of the requirement to publish jurisdiction-by-jurisdiction information for 41 separately specified countries outside of Australia, this distortion could occur in other markets in the world (not just Australia) in which one business is required to publish as a result of the Australian legislation and a competitor is not. By failing to provide an exemption from the publication of commercially sensitive data, these requirements create a direct and significant disincentive for growing businesses to commence operations in Australia. Accordingly, information regarding a jurisdiction could reflect start-up operations, business costs with a single customer, or a single contract, any of which could be commercially sensitive.

There is no safeguard exempting the publication of data that is otherwise publicly available (e.g., through a public stock exchange filing). It is also concerning that the proposal seems to create a "workaround" to the confidentiality requirements agreed to by Australia and other governments that ratified the Multilateral Instrument negotiated as part of the OECD BEPS project. Requiring companies to participate in the elimination of the confidentiality protections afforded by that instrument is a violation of those agreements. Furthermore, ATO already has CbCR and other taxpayer data and is best placed to audit compliance with the law. Publishing this data risks undermining public trust in the ATO's ability to

National Foreign Trade Council
1225 New York Avenue NW, Suite 650B, Washington, DC 20005 202-887-0278
Serving America's Global Businesses Since 1914.
www.nftc.org

execute its statutory obligations, if those efforts are publicly questioned or second guessed by stakeholders relying solely on the public CbCR data.

The EU Public Directive permits reporting groups to withhold reporting of commercially sensitive information. This is also consistent with the OECD Model Tax Treaty and Commentary contained in Article 26. Consistent with the EU Public Directive and OECD Models, the Draft Bill should be modified to specifically permit reporting groups to withhold reporting of commercially sensitive information. At a minimum, we recommend that Australia adopt a safe harbor allowing MNEs to defer publication of information that would be seriously prejudicial to the commercial position of the MNE for five years, in line with the EU Public Directive.

Exemptions

In our April 2023 comments on the 2023 Exposure Draft on public CbCR, we highlighted concerns around the sensitivity of data requested for companies in the defense industry, with customers (typically ministries of defense) objecting to the disclosure of information due to national security and intelligence considerations. Large defense contractors regularly participate in classified programs and projects with the U.S. Department of Defense and other government agencies around the world, including Canada, the UK, and Australia. The disclosure of classified equipment sales and associated service activities through revenue reporting metrics, tangible assets, and employee metrics provide information that, in the wrong hands, could also pose a threat to each country's national security and defense secrets.

NFTC urges the Australian Government to obtain feedback from the ministries of defense of its ally nations (e.g., the U.S.) regarding the implications of requiring the disclosure of sensitive information by its defense contractor companies and consider providing an exemption for a class of entities that fall within the defense industry. While the Draft Bill 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, 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.

Compliance Burden

The Draft Bill, while more limited than the 2023 Exposure Draft, is extremely broad and will impose a disproportionate administrative burden on taxpayers. Such disclosure increases the compliance burden at a time when large MNEs are already facing the complex implementation of Pillar Two this year and preparing for Pillar One amid the on-going work at the Inclusive Framework. The information requested still exceeds the data included in OECD Confidential CbCR under BEPS Action 13. As a result, many in-scope businesses will not have this data readily available. Much of the information required is not data ordinarily prepared or retained by many companies at present.

In order to mitigate some of the compliance burden, NFTC recommends adopting the same standard format as the EU Public Directive or delaying the implementation date by 12 months. This will support the stated transparency objective while reducing the administrative burden for this reporting. A consistent format will avoid the unintended consequence of multiple versions of public CbCR, which may create confusion and undermine transparency.

Publication of Data

The Draft Bill states in Schedule 2, section 3D (3) & (4) that the taxpayer provides the data to the Commissioner, who then publishes the information on the Australian government website. The Explanatory Materials further clarify that "The CBC reporting parent will fulfill its requirement to publish

National Foreign Trade Council
1225 New York Avenue NW, Suite 650B, Washington, DC 20005 202-887-0278
Serving America's Global Businesses Since 1914.
www.nftc.org

the selected tax information by providing the information in the approved form to the Commissioner, for the purpose of the information being made public. The Commissioner will then make the information available on an Australian government website as soon as practicable." The direct publishing of the information without allowing the taxpayer to view or review it prior to publication is concerning. As contemplated, the taxpayer will have no opportunity to confirm that it is the correct data or provide any further context or explanations about the data that may assist the reader's understanding.

NFTC reiterates our prior recommendation that companies should have the option to publish the data in the prescribed format on their own website. Many companies will want to provide additional context around the data or include the data within a wider ESG report. Additionally, clarification on the details of the Maintenance of information on the Australian government website would be helpful. For example, the legislation should make clear how long the data will be maintained on the website. We note that the EU Public Directive provides for a five-year visibility period at which point the data can be removed. We recommend Australia adopt a similar approach.

Conclusion

NFTC has previously expressed its concerns with publicly available CbCR data and appreciates the revisions made to the Draft Bill. Notwithstanding our previously expressed concerns, if Australia chooses to pursue public CbCR as suggested by the Explanatory Memorandum, we recommend a more limited and proportional approach to disclosure that closely aligns with international standards, including the EU Public Directive. We recommend that the restriction on entity types in scope and safeguards against commercially sensitive data be adopted. We further recommend that the commencement date be delayed 12 months from enactment to allow time to meet this requirement. Finally, jurisdictions should not be deemed an in-scope jurisdiction to the extent that the jurisdiction has implemented or is committed to implementing a domestic minimum tax of at least 15 percent. NFTC appreciates the opportunity to provide comments and looks forward to continuing opportunities for constructive engagement.

National Foreign Trade Council
1225 New York Avenue NW, Suite 650B, Washington, DC 20005 202-887-0278
Serving America's Global Businesses Since 1914.
www.nftc.org