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5 March 2024

Director
International Tax Unit
Corporate and International Tax Division
Treasury
Langton Cres
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Via email: MNETaxTransparency@treasury.gov.au

RE: Public Country-by-Country Reporting Exposure Draft

Dear Sir or Madam:

The Australian government (the "Government") announced a transparency measure for multinational entities to prepare for public release certain tax information on a country-by-country ("CbC") basis and a statement on their approach to taxation, as part of the October 2022-23 Budget. As part of the ongoing refinement of this transparency measure, the Government released an exposure draft (the "Exposure Draft") on 12 February 2024 on public CbC reporting for consultation with interested stakeholders. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to respond to the consultation.

About TEI[1]

TEI was founded in 1944 to serve the needs of in-house tax professionals. Today, the organization spans the globe with 56 chapters, including membership in Australia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting fair tax policy at all levels of government. Our nearly 6,500 members represent 2,800 of the largest companies around the world.

TEI's members work for companies operating across all industries and market segments, including many companies who must currently file confidential

[1] TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Internal Revenue Code of 1986, as amended.

CbC reports pursuant to BEPS Action 13. We thus believe our perspective brings a balanced view to issues raised under the Exposure Draft.

TEI Comments on the Exposure Draft

In this section we reiterate several comments included in our 28 April 2023 and 21 July 2023 letters regarding the proposed public CbC reporting requirements that are not necessarily addressed in the Exposure Draft.[2]

TEI appreciates the opportunity to provide its views on the proposed requirement for large multinational enterprises ("MNEs") with operations in Australia to disclose certain tax information on a CbC basis. As noted in the Exposure Draft Explanatory Materials, large multinational enterprises are subject to confidential CbC reporting, in accordance with Action 13 of the OECD's base erosion and profit shifting ("BEPS") project. The Explanatory Materials go on to state, however, that "some companies voluntarily disclose some CbC information, but disclosures are fragmented leading to inconsistencies and difficulties interpreting and comparing the information."[3] Thus the Exposure Draft's requirement that certain MNEs publicly disclose CbC information is intended to "enhance transparency, as well as improve comparability and accessibility"[4] of such information.

General Comments on the Exposure Draft

Before discussing the details of the CbC report the Exposure Draft would require MNEs to publish, we note that it appears the Draft would apply extraterritorially, requiring non-Australian parent companies to disclose the requested information globally. This will trigger conflicts in terms of competence/authority as it renders certain elements of other jurisdictions' legislation ineffective. Other jurisdictions, however, have acknowledged that extraterritorial application of information reporting requirements is difficult and thus provided for an exception in such case. The European Union ("EU") public CbC reporting Directive, for example, provides for the possibility that EU subsidiaries of a non-EU MNE may not have access to the information the Directive requires to be publicly 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 recommend any final Australian legislation requiring publication of CbC information include a similar exception.

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2 TEI's prior letters on the proposed public CbC reporting requirements are available at: https://www.tei.org/sites/default/files/tei_comments_-_australia_public_cbcr_consultation_-_final_to_aus_treasury_28_april_2023.pdf and https://www.tei.org/sites/default/files/TEI%20Comments%20on%20Australia%20Public%20CbCR%20Consultation.pdf.

3 Explanatory Materials at paragraph 1.7.

4 *Id*. at paragraph 1.8.

Specific Comments on the Exposure Draft

Inconsistency with Other Public CbC Reporting

As noted in the Explanatory Materials quoted above, publishing CbC reports is intended to enhance transparency and comparability of publicly available information about the tax affairs of MNEs. However, TEI believes the structure of the Exposure Draft does not meet these stated aims in a balanced manner, and we question whether it is in line with Australia's international commitments, such as those under BEPS Action 13. It is our strong view that any obligation to publish CbC information should be coordinated through a multinational organization such as the OECD. It is worrisome enough that the EU has created its own standards for publishing CbC information, but if every country follows suit – as Australia proposes to do here – enormous complexity will be introduced by requiring production of CbC information under differing standards. Varying public CbC information reporting requirements will require MNEs to expend significant resources explaining why data reported in Australia is different from data reported in, *e.g.*, the EU.

More specifically, the proposal to make additional information, namely (i) the MNE's approach to tax; (ii) revenue (split between unrelated and cross-border related); (iii) book value of tangible assets; and (iv) income tax reconciliation, mandatory for public disclosure on a CbC basis is inconsistent with current international standards, therefore creating a disproportionate compliance burden for in-scope MNEs that is in addition to their existing CbC obligations. Revenue reporting is particularly problematic as the EU public CbC report only requires disclosure of Total Revenue whereas the Australia draft legislation requires revenue to be split between revenue from unrelated and related parties. Moreover, the Exposure Draft defines related party revenue differently, whereby intra-country transactions are to be excluded in the Australian draft, versus the existing Global non-public CbC report and EU Public CbC report, neither of which has the exclusion. This would create at least 5 different definitions of Revenue within CbC reports, creating confusion and thus less transparency. 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 will add significant incremental compliance burden to MNEs

Further, in-scope MNE groups may have to revamp their data collection or reporting processing to collect the additional data or analysis required, not only for operations in Australia, but also for those located in other jurisdictions that do not impose such requirements. The Government should appreciate that the additional amount of effort and resources required by these MNE groups in meeting the Exposure Draft's requirements would be especially disproportionate for a group with relatively small presence in Australia.

A simpler approach to better service the goals of transparency and comparability would be to require MNEs to publish CbC information under a single standard. The public reporting requirement could be introduced into Australian law by reference to such a standard.

In that regard, the CbC publication requirements of the Exposure Draft may result in less transparency and additional confusion. This is due to the type of data requested as well as the Exposure

Draft's definitions varying from non-public and public CbC standards / legislation. Adoption of the Exposure Draft will lead to different versions of public CbC information existing for the same MNE for the same time-period and even different data for the same measure under the implementation regulations published by different tax authorities. Thus, while more data might be published, there may also be more confusion, leading to additional ambiguity and effectively less transparency, which would be contrary to the Exposure Draft's stated goals. This will also lead to the expenditure of additional resources by both tax authorities and taxpayers futilely reconciling such information. We highlight some of these issues below.

Paragraph 1.6 of the Explanatory Materials notes that the Government is "committed to improving the quality and comparability of tax disclosures by large businesses in Australia, by introducing standardised reporting requirements for large businesses." However, certain aspects of the Exposure Draft are inconsistent with the internationally agreed OECD CbC reporting requirements and Australian Pillar Two legislation as the Draft includes different measures and different definitions. The Exposure Draft is therefore at odds with the OECD's effort to seek global alignment and consistent standards by requiring publication of additional and different information than what is included in the current non-public OECD CbC reports. Australia, as an OECD member, should respect this process and align to the international standards to which it agreed.

Flexibility of Preparation

In addition, the public CbC reporting requirements in the Exposure Draft are less flexible than those in the EU public CbC reporting rules, which are based on OECD requirements. The OECD requirements permit MNEs to use any of the MNE's consolidated reporting packages, separate entity statutory financial statements, regulatory financial statements, or internal management accounts as a basis for preparation of the MNE's CbC report. In contrast, the approach proposed by the Government mandates that the amounts to be published by the MNE group must be based on amounts as shown in the group's audited consolidated financial statements if such financial statements have been prepared, which is clearly more restrictive than that adopted by the EU and OECD.

Further, we note that for the purpose of applying the Transitional CbC Reporting Safe Harbour rules under Pillar Two, the requirements on the source of information also permit not only the use of consolidated financial statements but also the financial statements of each Constituent Entity with either an Acceptable Financial Accounting Standard or an Authorised Financial Accounting Standard, so long as the information contained in such statements is maintained based on that accounting standard and it is reliable.

For MNE groups that have been sourcing data from separate entity statutory financial statements or sources other than the consolidated financial statements, the Exposure Draft's requirement to use audited consolidated financial statements would mean that a tremendous (and duplicative) amount of time, effort, and resources would have to be invested to meet the Australian Public CbC report standards. Or, in practice, an MNE may be compelled to break away from their prior, consistent basis of preparation to comply with the new Australian requirement.

Given the objective of the public CbC reform, and at a time when MNEs are already struggling to comply with other new international tax rules (such as Pillar Two legislation), we strongly recommend the Government adopt the same basis of preparation of the public CbC with that of the EU public CbC and OECD CbC report.

Income Tax Reconciliation

The Exposure Draft requires MNEs to provide explanations 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 profit/loss before income tax. This is not required in the EU public CbC standards. The reasons for the differences may not be easily understood without substantial knowledge of the relevant domestic tax laws and accounting principles, and may therefore be misinterpreted by readers of the document. Moreover, with Pillar Two implementation, these differences will be less relevant.

We recommend final legislation remove this explanatory requirement to align the Australian rules with the EU public CbC reporting standards. The removal of this information would keep the Australian public CbC reporting to an appropriate level of data for public transparency that can be easily understood and, in any event, the need for such information can be reassessed after the implementation of Pillar Two.

Sensitive Data

In addition, much of the data the Exposure Draft requests is competitively sensitive, such as the role and location of every MNE entity. This may affect both the ability and likelihood of MNEs providing the requested data and, at worst, affect the attractiveness of Australian investment if such broad ranging disclosures are required. Regarding such commercially sensitive information, TEI recommends the Government adopt the EU approach that permits an MNE to defer the disclosure of specific items of information for five years, provided the MNE clearly discloses the existence of the deferral, gives a reasoned explanation for it in the report, and documents the basis for the reasoning.

The Exposure Draft requires the CbC information to be published on a website maintained by the Government. The Draft does not, however, state how long that information would remain on such a site. Publishing such information on a Government website is inconsistent with the EU's approach of requiring publication on the relevant MNE's website and for only five years. Whilst acknowledging the proposed amendments noted in the Explanatory Memorandum, TEI recommends the Government follow the EU approach.

In sum, to support the Exposure Draft's stated objectives whilst being balanced in the information requested, and to avoid the unintended consequences of multiple versions of public CbC reporting information we recommend the Government adopt the approach of the EU Public CbC Directive for purposes of the kind of information reported as well as how the information is made available publicly, with the same definitions and format.

De Minimis Threshold

We welcome the introduction of a *de minimis* threshold whereby MNE groups with Australian-sourced aggregated turnover of less than A$10 million would be outside the scope of the Australian public CbC reporting requirement.

The *de minimis* threshold of A$10 million, however, is relatively low, representing only one percent of group revenue for a MNE group with an annual global revenue of A$1 billion. This would imply that many MNE groups with a relatively small presence in Australia would still be subject to the Australian public CbC reporting requirements. Any data requirements beyond the EU or OECD rules would create further administrative burden for MNE groups that do not have obligation to provide such details for their existing CbC report. TEI recommends basing the *de minimis* threshold for Australian public CbC reporting purposes on the greater of a percentage of an MNE's global revenue, such as five percent, or $10 million, rather than just a flat dollar amount.

TEI Comments on the Explanatory Memorandum

Scope of Published Information

In this section we provide TEI's views on the Government's preferred option as set out in the Explanatory Memorandum. The Explanatory Memorandum incorporates many suggestions from TEI and other stakeholders and represents a significant improvement over the prior Exposure Draft. In particular, we appreciate the reduction in the scope of the proposed CbC report public disclosures and the deferred effective date. However, the Government's preferred approach still imposes an onerous burden on taxpayers.

As part of the material published with the Exposure Draft, there are 41 specified jurisdictions whose information will be disclosed on a jurisdictional instead of aggregate basis. This requirement also goes beyond what EU public CbC reporting requirements for aggregated reporting.

Problematically, the Exposure Draft does not specify any conditions that need to be satisfied before the power to make the determination to list any particular jurisdiction may be exercised. This again is a departure from EU public CbC reporting standards where for instance, EU grey or blacklisting of uncooperative jurisdictions is predicated upon jurisdictions failing to meet certain objective criteria such as failure to exchange information. Such objective criteria at least provides the affected jurisdictions the opportunity to make changes to seek delisting. The absence of objective criteria in the Exposure Draft for listing specified jurisdictions may lead to such listings being subjective and arbitrary.

TEI recommends the Government adopt the same black and grey lists in the EU Directive instead of having a separate list of 41 specified jurisdictions. This will remove additional reporting burden and focuses the information on "high risk" countries who are deemed to not meet certain tax transparency requirements, making such disclosure more meaningful to the interested parties.

Use and Interpretation of CbC Reporting Data

TEI's strong preference is for CbC reports to be exchanged confidentially between governments and the use of information contained within these reports be safeguarded via international tax treaties, as is the case with CbC reports filed pursuant to BEPS Action 13. Without the correct context, the information therein could be easily misunderstood or misinterpreted by public observers. Such potential outcomes do not add to the meaningful transparency and discourse the way we believe the Government has intended for the proposed measure.

Nonetheless, if the Government decides to proceed with public CbC reporting, we urge it to establish clear and necessary safeguards on the appropriate use and interpretation in the draft legislation. For instance, the ATO's role should not just be limited to facilitating the publication of the CbC reports (as intended under the current Exposure Draft). The ATO should work with relevant stakeholders to design and publish detailed accompanying guidance that would help the public and relevant stakeholders (i) use the CbC reports appropriately; and (ii) properly contextualize the information in a CbC report so that all parties can apply a common language when it comes to interpreting the information.

We wish to highlight that unlike the ATO Tax Transparency Code, which is voluntary, the current draft legislation makes public CbC reporting mandatory for in-scope MNEs and thereby creating a significant compliance. It therefore warrants the Government undertaking greater responsibilities in safeguarding against inappropriate use and misinterpretation of the CbC information beyond merely facilitating the publication of the CbC reports.

Exemption from CbC Reporting

The Australian Taxation Office ("ATO") Commissioner is empowered to exempt a reporting entity or a class of reporting entities from reporting or from disclosing a particular type of otherwise required information. As such, for greater taxpayer certainty and to alleviate the compliance burden on low risk MNEs, the Exposure Draft could be amended to provide for one or more of the following:

1. Exemption of MNEs that have achieved a high assurance (justified trust) rating as assessed by the ATO.[5]

2. Exemption of MNEs which have entered into APAs, MAPs, settlements or have rulings covering a substantial portion (e.g., 75%) of their Australia-related transactions.

3. Exemption of MNEs which have a clean record in relation to audits and penalties for the preceding 5 years.

[5] *See* https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/findings-report-top-100-income-tax-and-gst-program/top-100-income-tax-assurance-program.

Lead Times for Consultations and Implementation

While in-scope MNEs are used to preparing CbC reports under OECD BEPS Action 13, given that Australia's proposed regime extends significantly beyond current international standards, the Australian government should provide for a more robust consultation process, which should include a sufficiently long consultation period of at least two months. This is especially so when the government is concurrently consulting on other major tax proposals such as the software royalty draft ruling which could impact the same MNEs.

As there will be a need for ATO to issue implementing guidance (especially to safeguard appropriate use and interpretation) after the law is passed, the Government should provide for a sufficient lead time of at least 12 months from the issuance of implementing guidance and readiness of ATO reporting systems to enable impacted businesses to prepare for implementation by, for example, updating internal processes and systems, and communicating with internal and external stakeholders

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TEI appreciates the opportunity to comment on the Exposure Draft and accompanying materials. Should you have any questions regarding TEI's comments, please reach out to Benjamin R. Shreck of TEI's legal staff at bshreck@tei.org or 202.464.8353.

Respectfully submitted,

Sandhya Edupuganty

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