April 8, 2025

Australian Tax Office
GPO Box 9977
Canberra ACT 2601
PublicCBC@ato.gov.au

Re: Getting ready for Public Country-by-Country reporting - (Responsible Buy Now Pay Later and Other Measures) Act 2024- Country by Country Reporting

The National Foreign Trade Council (the "NFTC") requests guidance as described below on Schedule 4 of the Australian Government's *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024,* published on June 5, 2024 and signed into law on December 10, 2024 ("the Act"). NFTC previously provided comments on the prior iterations of the bill, including the *Exposure Draft for Taxation Laws Amendment (Measures for Future Bills) Bill 2023: Multinational Tax Transparency - Tax Changes* released in April 2023 (the "Exposure Draft") and *Treasury Laws Amendment Bill 2024: Multinational tax transparency—country by country reporting* ("CbCR"), released February 12, 2024 ("February Draft"). As most of our suggestions to the Australian Treasury ("the Treasury") on the February Draft were not incorporated, the NFTC welcomes ATO guidance to ensure clarity in the implementation of the law.

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. We value work that focuses on establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations.

Comments

Exclusions

The Act does not provide clear guidelines for exclusions, which makes it difficult for companies to predict whether they would be eligible for an exclusion. The exclusion process should be available prior to the beginning of the taxable year and at a minimum prior to the reporting period. It is burdensome and unnecessary for entities to prepare a report while submitting for an exemption. We also recommend that a multi-year exemption process is developed to allow for certainty and ease the compliance process.

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. NFTC requests public guidance to provide a transparent process and ensure consistent application of the rules. While the Act contains a reference to

allowing exemptions, there is no clarity on what might qualify for an exemption, and it is up to the discretion of the ATO 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 the 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.

Creating clear, transparent, and consistently applied guidelines on what qualifies for exemption on the grounds of commercially sensitive information and when a CbCR parent can reliably predict that the exemption will be granted in subsequent years could allow time to better develop protections for competition for sensitive data. The EU Public Directive permits reporting groups to withhold reporting of commercially sensitive information and allows this to be determined on a self-assessment basis. 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, guidance should be provided to specifically permit reporting groups to withhold reporting of commercially sensitive information. We recommend that ATO adopt a safe harbor for commercially sensitive data in ATO's Law Administration Practice Statement and guidance. Alternatively, we urge ATO and Treasury to recommend that Parliament amend the Act and allow 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.

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 (for example, any of the partners are individuals) or trusts of which any of the trustees is not a constitutional corporation.

Consistent with these exclusions, NFTC requests that pursuant to section 3DB(4) the Commissioner specify by way of legislative instrument that section 3D(3) does not apply to a foreign constitutional corporation that is treated as fiscally transparent in its country of organization such that the entity's income is subject to tax directly in the hands of its shareholders (or members or trustees) on a current basis and those shareholders (or members or trustees) are individuals.

Unavailable Data

NFTC recommends providing an exception from reporting for information that an entity does not possess or have reason to possess in the normal course of business. 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). Additional clarification from the ATO that local entities and employees should not otherwise be subject to penalties or other administrative sanctions for a foreign CbCR parent's refusal to provide data would also be welcomed.

Defense Industry 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

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

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 United Kingdom, 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 compromise each country's national security and defense.

We welcomed the addition in the Explanatory Memorandum ("EM") of the factors that the ATO Commissioner would take into account in considering exemption requests. Specifically, the explicit reference to the aspect of national security is helpful ensuring that the interest of Australia and its allies could be safeguarded. In light of the paramount importance of protecting national security and information of military sensitivity, and in line with Australia's Safeguarding Australia's Military Secrets ("SAMS") legislation, we urge the Australian Government to take one step further in exempting MNEs in the defense industry as a general class within the forthcoming guidance, and provide specific guidance as to the definition or qualification of MNEs falling within this class.

In administering the exemption request, there is currently an established exemption process for (non-public) CbCR submitted to the ATO, for instance related to matters of national security. To streamline these parallel processes under similar rationale and to reduce the administrative burden for both the ATO and the MNEs, we suggest the consideration of providing a mechanism to combine or substantially integrate the implementation of these exemption requests and approval, with each approval for a designated multi-year period.

The current framework does not offer a clear test or predictability for Defense Contractors from year-to-year. We recommend a clear exemption for defense-related data be included in the ATO's Law Administration Practice Statement and guidance so that sensitive information is not compromised and that taxpayers and the ATO are able to consistently apply the exemption in a straightforward manner.

We recommend, therefore, that ATO provide two defined exceptions in the guidance. A bright line test pursuant to section 3DB(4) specifying that multinational enterprise groups that conduct a majority of their business with the Department of Defence or government intelligence or security agencies (including Foreign Military Sales and direct military sales to allied governments) are a class of entity to which an automatic exemption from reporting applies. There is already precedent for such an exemption from existing CbCR in the United States issued by the Internal Revenue Service in *Notice 2018-31*. Further, a second exemption for affiliated groups that conduct significant business (but not a clear majority) in any particular jurisdiction with the Department of Defence or government intelligence or security agencies (including Foreign Military Sales and direct military sales to allied governments) should be allowed, with the approval of the ATO, to claim a similar exemption from reporting.

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 to take concrete steps in exempting the public disclosure of information that would undermine Australia's national security in line with the objectives of Australia's SAMS legislation. Such an exemption could be modeled off the U.S. exemption for certain defense contractors for the disclosure of specific non-public CbCR data that has existed for more than six years. 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.

Blacklist Criteria

We encourage Australia to develop and communicate a formal and transparent set of standards by which a foreign country will be included or excluded from this list. The World Trade Organization set precedent 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

require standards for black lists following a dispute put forth by Panama. The precedent provides that tax haven lists must be supported by objective criteria, or else it is considered discriminatory.

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 established international norms with a list of enumerated standards on the Black and Grey lists, instead of having a separate list of jurisdictions later promulgated by the Minister. Any reporting in these jurisdictions should also be subject to a de minimis exemption. This will remove additional reporting burden and focus the information on "high risk" countries deemed not to meet tax transparency requirements, making such disclosure more meaningful to the interested parties.

We recommend that 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.

Publication of Data

The Act states in section 3D (3) & (4) that the taxpayer provides the data to the ATO Commissioner, who then publishes the information on the Australian government website. The EM further clarifies that "[t]he CBC reporting parent will fulfill its requirement to publish 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 the approved form should allow companies to include optional commentary and 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 and refer readers to the data published on their own website. Furthermore, due to the differences in the OECD, EU, and Australian reporting metrics, companies may seek to provide context for these perceived differences. (The Act requires the use of audited financial statements, whereas the OECD permits other methods such as separate entity statutory financial statements, regulatory financial statements, or internal management accounts to reduce the compliance burden.) 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 ATO 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.

Simplification & Ensuring Consistency

Standardized Publishing Mechanisms

To the extent possible within the confines of the law and in the spirit of driving both transparency and simplification, NFTC advocates for aligning to one global standard for the format and mechanics of public CbCR. We request that the ATO format for CbCR publication utilize and standardize a publishing mechanism that allows for the use of the local or global MNE website to provide further context on the report. Further, if a machine-readable version is required to be published, we request ATO work with its international counterparts to standardize the XML file/schema already used for submitting other CbCR.

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

Globally aligning definitions for the same measures (e.g., revenue) will reduce compliance burdens for MNEs, therefore allowing greater transparency to be achieved.

Optionality on the Source Data

Additionally, having certain fields as optional for a transition period will help as MNEs comply with this new regime. For instance, differences between taxes paid and accrued. More optionality on the source of the data utilised in the CbCR will allow for simplicity and consistency with the non-public OECD CbCR, and consistency in data utilised with the EU public CbCR.

Currently, the Act requires the data to match that used for the post-consolidation audited financial statements, such as Form 10-K reporting in the U.S. This metric can be drastically different from the data used for the current OECD CbCR (and given the Pillar Two Safe Harbour qualification, which relies on the jurisdictional pre-consolidation 'reporting package' as the source). Without some optionality here, ATO could be driving less transparency by creating several different versions of public CbCR with different data shown for the same jurisdictional measures.

Description of Business Activities

Finally, we recommend that the ATO guidance provide flexibility for the description of main business activities and allow the use of either NACE codes or the OECD's standardized list of business activities. This optionality supports comparability while also recognizing that many multinational entities already report under the OECD framework and have systems aligned with those classifications. Adopting a similar approach would reduce compliance burdens and promote alignment with global reporting practices.

Conclusion

NFTC has previously expressed its concerns with publicly available CbCR data and the Act. We recommend that a robust exclusion process to include 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. NFTC appreciates the opportunity to provide written comments and looks forward to continuing opportunities for constructive engagement with ATO as the Law Administration Practice Statement and guidance are published.

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