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United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510–6200

May 24, 2021

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Yellen,

The Organisation for Economic Cooperation and Development (OECD) and the G20 have been working through the Inclusive Framework (IF) for more than five years to develop solutions to address perceived tax challenges from digitalization of the global economy. I appreciate the Treasury Department's continued efforts during the ongoing OECD negotiations to ensure any agreement does not discriminate against U.S. businesses or adversely affect American jobs and investment.

In recent weeks, Treasury has proposed significant changes to the OECD approach on both Pillar 1 and Pillar 2. These new proposals still appear to be in very early stages. Many details are under consideration, and there has been no public release or formal request for comment. While your staff has shared certain information about these proposals, significant unaddressed questions remain, particularly given the aggressive timeline being suggested for reaching agreement.

The questions and concerns outlined below are rooted in the bipartisan objectives and priorities that served as the foundation for the United States entering into the OECD negotiations. Consistent with these objectives, U.S. engagement should be based on achieving results that (1) do not harm U.S. businesses and the workers they employ, (2) do not undermine the United States' tax sovereignty and recognize Congress' constitutional role in setting domestic tax policy, and (3) ultimately protect the U.S. fisc. Additional information is needed to assess whether the OECD negotiations are moving in a direction that is consistent with these principles.

A Pillar 1 agreement redrawing international taxing rights should be based on clearly articulated and well-established tax principles. No agreement should be based on the United States ceding taxing rights without comparable cessions on the part of other jurisdictions.

At a high level, the original objective of Pillar 1 was to identify companies that have active and sustained participation in market jurisdictions, regardless of physical presence.

Treasury's proposed Pillar 1 strategy, on the other hand, would identify companies exclusively based on thresholds of high revenue and profit margins. Treasury has suggested reallocating profits of "large" corporations is "consistent with popular concerns in all our countries about mega-corporations."[1] Further, Treasury's approach would focus "only on those companies that benefit most from global markets, are most intangibles-driven, and are equipped to handle the compliance burden that Pillar 1 entails."[2] While this approach would set quantitative standards for determining which companies would be subject to Pillar 1, the rationale deviates from the original intent and appears to lack an articulated foundation in tax principles beyond populist appeal.

Given the thresholds being considered, a disproportionate amount of the reallocated profits of in-scope companies may be those of market-leading U.S. companies – namely, American technology, pharmaceutical and consumer products companies that are "intangibles-driven" because of successful research and product development activities performed in the United States. Because a Pillar 1 agreement would fundamentally alter the international tax landscape and primarily affect innovative U.S. companies, to be sustainable, any agreement must be based on sound international tax principles, and not arbitrary thresholds rooted in politics or popular opinion of the day. Treasury must clearly articulate to Congress the underlying tax policy of its proposed approach and demonstrate why the new strategy justifies ceding U.S. taxing rights over profitable U.S. companies to foreign jurisdictions.

An OECD agreement must not discriminate against, or disproportionately affect, American businesses.

There continues to be strong bipartisan, bicameral agreement the United States must not agree to an OECD approach that discriminates against American companies – a point Treasury clearly acknowledges. This principle is a red line.

To evaluate whether the new proposal crosses this bipartisan, bicameral red line, additional information must be provided to Congress regarding the proposed Pillar 1 strategy. Congress needs a detailed analysis of how many U.S. companies would be affected, which companies likely would be treated as "in scope," the magnitude of profits that would be reallocated, and the effect on U.S. tax revenues. It is clear the OECD and IF countries would not be willing to agree to a Pillar 1 agreement without knowing the degree to which U.S. digital companies would be covered; likewise, it is imperative Congress know how this approach would affect U.S. businesses, their workers, and the U.S. fisc.

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[1] While the Treasury proposal presented to the OECD in April has not been made public, it has been widely leaked and reported on by the press. *See, e.g.,* https://mnetax.com/wp-content/uploads/2021/04/US-slides-for-Inclusive-Framework-meeting-of-4-8-21-2.pdf; Mindy Herzfeld, *Treasury Proposes a Tax on U.S. Innovation,* Tax Notes Today, May 3, 2021, available at: https://www.taxnotes.com/tax-notes-today-federal/base-erosion-and-profit-shifting-beps/treasury-proposes-tax-us-innovation/2021/05/03/59pdy.

[2] *Id*.

Digital Services Taxes (DSTs) unfairly discriminate against U.S. companies, and their elimination must be a precondition for any agreement on Pillar 1.

An important condition for any Pillar 1 agreement is the repeal of unilateral DSTs and other discriminatory unilateral measures already imposed by other countries. As Members of Congress have said repeatedly and on a bipartisan basis, DSTs unfairly discriminate against American businesses. The elimination of unilateral measures and the shared goal of tax certainty remain a key outcome offered by the OECD for engaging in multilateral discussions.

However, recent reports suggest these concerns are not being taken seriously. Several weeks ago, the EU tax commissioner reportedly stated an OECD agreement "should not prevent the EU and its member states from adopting a digital levy."[3] More recently, a European Commission communication asserted that the EU digital levy—which "will ensure a fair contribution of the digital sector to the financing of the recovery in the EU"—will be "independent of" and "coexist with" an OECD agreement.[4]

These EU statements are directly counter to the OECD's key objective of the current negotiations. It would be unacceptable for the United States to endorse any agreement that would allow DSTs or similar unilateral measures to continue to be imposed on U.S. companies.

There is bipartisan consensus for ensuring that "every country plays by the same rules, including China" – as President Biden recently said.[5] No OECD agreement should provide carve-outs or exceptions for our biggest foreign competitors, including China.

Not only was the United States the first to enact a global minimum tax when it enacted the global intangible low-taxed income (GILTI) regime, we continue to be the only country to date that has enacted a global minimum tax. Because the United States already has a robust minimum tax, the IF acknowledged in 2020 there was good reason to treat GILTI as a "deemed compliant regime" – in large part because GILTI, in its current form, is already harsher in many respects than the Pillar 2 minimum tax under consideration at the OECD.[6]

Now, Treasury has proposed a significantly higher global minimum tax rate of 21 percent as part of the Pillar 2 global minimum tax, as well as a number of changes to make the global minimum tax rules far more stringent for U.S.-based businesses. Numerous countries have suggested they are not aligned with these changes, and others are reportedly seeking a carve-out or exception

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[3] Todd Buell, *US Global Digital Tax Plan Won't Stop EU, Gentiloni Says,* Law360, April 28, 2021, available at: https://www.law360.com/tax-authority/articles/1379508/us-global-digital-tax-plan-won-t-stop-eu-gentiloni-says.

[4] Communication from the Commission to the European Parliament and the Council, *Business Taxation for the 21st Century*, May 18, 2021, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/communication_on_business_taxation_for_the_21st_century.pdf#page=6.

[5] Remarks by President Biden in Address to a Joint Session of Congress, April 29, 2021, available at: https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/.

[6] OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at: https://doi.org/10.1787/abb4c3d1-en.

from Pillar 2.[7] While Treasury has proposed a 15 percent rate floor in recognition of the unlikelihood a 21 percent rate would be agreed to by other countries, it remains to be seen whether other countries will agree to implement any minimum tax. Pascal Saint-Amans, Director of the Centre for Tax Policy and Administration at the OECD, recently stated that not all countries will have to sign on to Pillar 2.[8] He has also suggested China may receive a carve-out or exception to Pillar 2.[9] An agreement that provides exceptions for our biggest competitors would be fundamentally inconsistent with the principle that all countries should be playing by the same rules. It would also hamstring the U.S. economy while simultaneously benefitting the economies of our primary competitors.

Consistent with these principles, please address the following questions:

1) A Pillar 1 agreement would require Congress to cede U.S. taxing rights over profitable U.S. companies to foreign jurisdictions. What would the United States receive in return? What are the sound tax principles underlying Treasury's proposed Pillar 1 approach? How does the determination that a company is large and profitable justify the reallocation of U.S. taxing rights to certain foreign jurisdictions? How sustainable would such an approach be?

2) Please provide Treasury's analysis of companies that would be identified as in-scope using the proposed Pillar 1 quantitative scope approach based on publicly available information, such as from the Compustat database. Please provide such information assuming a $10 billion revenue threshold and 15 percent profit margin, as well as under a $20 billion revenue threshold and 10 percent profit margin, both with and without carve-outs for extractives, financial services, and real estate (with the carve-outs as defined in the Report on the Pillar 1 Blueprint). Treasury's summary should include an estimate of the amount allocated from U.S. companies to foreign market jurisdictions as well as amounts reallocated from foreign jurisdictions to the United States.

3) An OECD agreement that allows continued imposition of DSTs would result in unfair discrimination against U.S. companies, which is plainly inconsistent with bipartisan objectives that serve as the basis for the negotiations. Will Treasury commit to accept only an agreement that requires foreign countries to repeal (and the EU to refrain from enacting) DSTs or similar unilateral measures once an initial OECD agreement is reached (currently scheduled for July 2021)?

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[7] *See, e.g.*, Hamza Ali, *EU Countries Balk at Accepting 21% Global Minimum Tax Rate*, Bloomberg Tax, April 29, 2021, available at: https://news.bloombergtax.com/daily-tax-report-international/eu-countries-balk-at-accepting-21-global-minimum-tax-rate; Stephen Gardner, *Biden 21% Minimum Tax Undercuts Global Talks, EU Lawmakers Say*, Bloomberg Tax, April 13, 2021 https://news.bloombergtax.com/daily-tax-report/biden-21-minimum-tax-undercuts-global-talks-eu-lawmakers-say.

[8] Alex M. Parker, *Global Tax Pact Won't Require All Nations, Saint-Amans Says*, April 30, 2021, Law360 120-179, available at: https://www.law360.com/tax-authority/articles/1380399/global-tax-pact-won-t-require-all-nations-saint-amans-says.

[9] Remarks by Pascal Saint-Amans, Director, OECD Centre for Tax Policy and Administration, at the International Tax Policy Forum, "Whither International Taxation: A New International Tax Architecture Based on the OECD Blueprints?," April 30, 2021.

4) If our foreign competitors are not subject to Pillar 2, U.S. companies would be at a significant competitive disadvantage in the global marketplace should the Administration's GILTI proposals become law. The United States already moved first by enacting GILTI. Will Treasury and the Administration commit not to take the second step of making GILTI far more stringent before other countries even take their first step of enacting a global minimum tax? Will Treasury and the Administration also commit that no agreement will be reached on Pillar 2 if the United States' biggest competitors, like China, are not subject to the same terms as the United States?

The issues being addressed at the OECD are complex, and I appreciate the work you and your team are doing to make progress and seek areas of agreement. However, the stakes for the United States and our national economy are high. The United States should not be willing to accept an agreement that continues to target American companies and lets our biggest competitors off the hook. Nor should the United States act to raise the GILTI rate – the sole international minimum tax in place – before our OECD competitors take action to implement their own global minimum taxes. These issues must be resolved in order for Congress to understand whether the current strategy will discriminate against U.S. companies and adversely affect the U.S. fisc. They are even more significant now as the success of American businesses at home and abroad is critical to our country's economic recovery from the largest economic shock on record stemming from the COVID-19 pandemic.

Thank you in advance for your prompt and detailed response to this request. Please provide your reply by Friday, June 4, 2021.

Sincerely,

Ranking Member