

United States Senate

WASHINGTON, DC 20510-6200

October 8, 2021

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

Dear Secretary Yellen,

As the Ranking Members of the Senate Finance Committee, Senate Foreign Relations Committee, and Senate Banking Committee, we are extremely concerned with the Administration's recent suggestions it is considering circumventing the Senate's constitutional treaty authority. The Administration's posture on this issue is even more problematic given the impending Organisation for Economic Co-operation and Development (OECD)/G20 agreement.

At last week's Senate Banking Committee hearing, you indicated the Administration was considering alternative means for significantly modifying existing bilateral tax treaties that would bypass Senate treaty approval. When asked whether implementation of Pillar One of the OECD/G20 agreement requires Senate approval of a treaty, you acknowledged that "would be one way" Congress could approve the agreement, but you also stated—without any further clarity—that there are "a number of ways" that Congress could implement Pillar One. Even more troubling, this week, a nominee for a senior position within the Treasury Department expounded upon these alternatives. He asserted the "updating" of international tax rules being contemplated by Pillar One "could occur through several means, such as through an Article II treaty, congressional executive agreement or through legislation overriding the existing treaties."

These comments are the first indication we have received from this Administration that it may be considering bypassing the Senate treaty process to implement Pillar One. As you know, under the U.S. Constitution, a bilateral or multilateral tax treaty would require the advice and consent of the Senate, with a two-thirds vote of approval. Further, we are unaware of any existing congressional authorization that would permit the Administration to conclude a lesser international agreement, such as a congressional-executive agreement. As described, the nature of changes required to implement Pillar One necessitates the conclusion of a treaty, not a congressional-executive agreement or other legislative override. Prior administrations and Congresses have attempted to avoid such outcomes, which risk creating inconsistent and incomplete fulfillment of U.S. obligations to our international partners. Instead of adhering to international norms, these statements suggest Treasury may pursue action that would undermine the Senate's constitutional authority, as well as the United States' role as a reliable trading partner.

Based on the limited details described in the OECD/G20 agreement released in July, Pillar One would require the United States to cede taxing rights over certain highly-profitable U.S. companies to foreign countries based on those companies' volume of sales in a particular

jurisdiction, regardless of their physical presence in that country. This fundamental change in taxing rights would require provisions within all of the United States' existing bilateral tax treaties to be modified or overridden. Each of these bilateral tax treaties was approved in the same manner—by a two-thirds vote of the Senate. Sweeping changes to modify these treaties and alter long-established protocols under these agreements must be processed through the same constitutionally mandated process. Bypassing this process to override our bilateral tax treaties would irreparably erode the exclusive treaty authority the Constitution provides to the Senate.

Implementing this agreement without a multilateral treaty would also subject U.S. companies to double taxation and tax uncertainty, ultimately giving their foreign counterparts a significant competitive advantage. Tax certainty and stability—primary objectives of a Pillar One agreement—depend upon the implementation of a dispute resolution mechanism that is binding on all contracting countries, which cannot properly be effectuated solely through domestic legislation or executive action. Without binding dispute resolution, U.S. companies may fall victim to aggressive foreign governments seeking to expand their tax base, resulting in significant double taxation, continued uncertainty, and ongoing litigation.

We are especially concerned given Treasury has failed to meaningfully consult our members on the potential treaty or legislative action that would be necessary to fully carry out the Pillar One agreement. In particular, the Senate Foreign Relations Committee, which has jurisdiction over treaty matters, has received no engagement from Treasury on this issue to date.

To be clear: our concerns are not limited to the process by which Treasury may attempt to implement this agreement—we have received minimal information regarding detailed provisions or the effect of Pillar One on U.S. companies. Back in June, you asserted Pillar One “will be largely revenue neutral” for the United States because “we will be on both the receiving and giving end of the proposed profit reallocations.” However, despite repeated requests for estimates on what the United States will be “receiving and giving,” Treasury has not detailed how much profit would be reallocated from the United States and to which foreign countries.

The lack of consultation, in addition to these latest statements, calls into question how serious Treasury is in achieving bipartisan consensus on any Pillar One agreement. Further, Treasury's continued use of the negotiations to advance the Administration's tax agenda on Pillar Two, at the expense of ceding substantial U.S. taxing rights to a global rulemaking body without seeking constitutionally mandated approval, puts the durability of any agreement at significant risk.

We request a detailed response outlining the Administration's proposed approach to Pillar One implementation. Please provide your response to this request by October 15, 2021.

Sincerely,



Mike Crapo
Ranking Member
Senate Finance Committee



James E. Risch
Ranking Member
Senate Foreign Relations
Committee



Pat Toomey
Ranking Member
Senate Banking Committee