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

February 16, 2022

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

Dear Secretary Yellen,

We have yet to receive a response to the important questions we raised in our letter dated December 22, 2021. In the intervening weeks, there have been a number of alarming developments that raise additional concerns regarding the effect of the OECD agreement on U.S. competitiveness and tax revenue. In particular, the Pillar 2 Model Rules, released in late December, confirm that the OECD Pillar 2 agreement would apply to U.S. companies far more broadly and adversely than the Treasury Department has represented. Without evidence to the contrary, we are increasingly concerned that Treasury has negotiated a deal that will harm U.S. businesses and jobs.

Last month, the Assistant Secretary of the Treasury for Tax Policy spoke about the "problem" of tax competition, fixable, in Treasury's view, by Pillar 2's minimum tax on foreign earnings.[1] The minimum tax, she stated, "sets a floor so that multinational corporations, whether headquartered in the United States or abroad, will pay taxes on their foreign earnings of at least 15 percent." While acknowledging that the United States is currently the only country with a minimum tax on foreign earnings, the Assistant Secretary asserted that Pillar 2 would create a "level playing field" that "will enhance [U.S. corporations'] competitiveness relative to foreign corporations."

The Model Rules, however, confirm a much different result, suggesting that the Treasury Department has not been fully transparent about the potential effects of the "global minimum tax" on U.S. companies and the U.S. fisc. As an initial matter, the Assistant Secretary failed to mention that the Pillar 2 Model Rules would also permit foreign countries to impose tax on American companies' U.S. profits. For example, under the Model Rules, a U.S. company with operations abroad could face additional tax liability – referred to as a top-up tax – in those

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[1] Remarks by Assistant Secretary for Tax Policy Lily Batchelder at the New York State Bar Association's Annual Meeting, *available at* https://home.treasury.gov/news/press-releases/jy0568.

foreign jurisdictions if it was determined the U.S. company did not pay adequate tax on its U.S. profits because of the Rules' treatment of U.S. tax credits and deductions. Ultimately, under the Treasury-negotiated agreement, foreign countries could effectively capture the benefit of congressionally-provided tax credits and deductions targeted at domestic innovation, investment, and job creation.

It appears that some countries, such as the United Kingdom, negotiated more successfully to protect their domestic tax laws and companies. For example, based on the recently released UK Pillar 2 consultation document, the benefit of the UK research and development (R&D) credit would not be eliminated or reduced, allowing it to remain "an effective instrument for promoting R&D activity in the UK."[2] However, in stark contrast, the U.S. R&D credit would not receive the same preferential treatment, nor would the low-income housing tax credit, new markets tax credit, or foreign derived intangible income. Congress specifically enacted these provisions to encourage U.S. jobs and investment. Yet, this Administration appears intent on thwarting Congress's constitutional tax-writing authority, including its authority to provide effective incentives that both parties agree are meaningful and necessary to promote U.S. investment and innovation.

The Treasury Department's failure to protect U.S. businesses and jobs also extends to the apparent treatment of the U.S. global minimum tax as a non-qualified regime. Despite the United States having the world's only global minimum tax, Treasury continues to take the position that Congress should make the U.S. global minimum tax harsher before other countries take any action. It is one thing for the Administration to advocate for higher taxes as part of its domestic tax agenda, but quite another to explicitly negotiate an international agreement that would subject U.S. companies to double taxation unless Congress acts accordingly. The European Commission's Pillar 2 directive confirms that EU countries are prepared to take advantage of Treasury's negotiating strategy.[3] Nonetheless, we believe the focus on Congress to make the U.S. global minimum tax harsher when it in a number of ways already exceeds the standards of the Pillar 2 minimum tax is misplaced. The United States has had a global minimum tax for four years. Rather than mounting a pressure campaign against Congress, the focus should be on whether other countries enact a global minimum tax in the first place.

Despite growing evidence that the OECD agreement would surrender a share of the U.S. tax base to foreign countries, Treasury continues to argue that it will not harm the U.S. fisc. In fact, the Assistant Secretary contends that "over the long term, the global minimum tax will benefit the US fisc … [and] ensure our corporate revenue stream is sustainable." Despite repeated requests, however, Treasury has declined to provide any data or analysis of the effect of the OECD agreement on U.S. revenue, not even to the nonpartisan experts at the Joint Committee on Taxation, so that independent estimates and analysis can be developed and provided to members of Congress on a bipartisan basis. The Assistant Secretary also neglected to mention the fact that 2021 corporate tax revenues are at a record high, and higher as a percentage of GDP than the

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[2] *OECD Pillar 2, Consultation on implementation*, HM Treasury and Revenue & Customs, January 2022, *available at* https://www.gov.uk/government/consultations/oecd-pillar-2-consultation-on-implementation.
[3] *Proposal for a Council Directive (on ensuring a minimum level of taxation for multinational groups in the Union)*, European Commission, Dec. 12, 2021, *available at* https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf.

average for the decade prior to the Tax Cuts and Jobs Act,[4] calling into question what problem the Administration is attempting to solve.

While Treasury has long argued that the agreement would end a supposed "race to the bottom" and "put a floor on tax competition once and for all," the Model Rules appear to open the door to another form of tax competition – to further reduce corporate tax rates and provide exemptions for tax subsidies in an effort to remain internationally competitive while still operating within the confines of the Model Rules. A recent Oxford University Policy Brief has concluded that not only will countries have an incentive to lower their tax rates, potentially to zero, but that incentive may become stronger with a Pillar 2 minimum tax in place.[5] As the brief states, for countries "to improve their competitive position over competitors they will have to reduce the Corporation Tax liability they impose by *more* than they would have had to do in the absence of Pillar 2. This implies that following the introduction of Pillar 2 there is an increased probability that some countries will compete down the Corporation Tax, perhaps even all the way to zero." Rest assured that China and other aggressive economic competitors will leverage that opportunity.

We, along with many other Republican and Democratic members of Congress, have highlighted the importance of ensuring U.S. businesses and workers remain globally competitive. The concerns highlighted above, while not exhaustive, raise serious questions about the effect of the Pillar 2 agreement on the competitiveness of U.S. businesses and workers, and of the United States as a location for investment. If this agreement is as critical to U.S. competitiveness as the Assistant Secretary recently argued, why has the Treasury Department not provided substantive responses to our repeated questions, and why have there been no public consultations or hearings in either congressional tax-writing committee to discuss these important issues?

In light of recent developments, we believe the best course of action for engaging Congress at this stage is for you or your lead negotiators to appear publicly before this Committee. At the very least, we request an in-person briefing to address these issues as well as written responses to our unanswered questions.

Sincerely,

Mike Crapo
U.S. Senator

Charles E. Grassley
U.S. Senator

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[4] Congressional Budget Office, Budget and Economic Outlook 2021-2031, *available at* https://www.cbo.gov/publication/56970.

[5] *Pillar 2: Rule Order, Incentives, and Tax Competition*, Michael Devereux, John Vella, and Heydon Wardell-Burrus, Oxford University Centre for Business Taxation, January 14, 2022.

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