

Congress of the United States
Washington, DC 20515

December 14, 2022

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

Dear Secretary Yellen,

For the past two years, the Biden Administration has routinely made commitments in the OECD negotiations it has no authority to fulfill. Despite Treasury's actions to date, it cannot dictate U.S. tax law or compel Congress to act. As we look to the beginning of the 118th Congress, the Administration must place the interests of the United States – the U.S. fisc, U.S. taxpayers, and U.S. workers – ahead of its political agenda. A critical first step is to recognize the fundamental flaws with the Pillar Two enforcement mechanism – the UTPR – and stop encouraging other countries to assert it on U.S. companies.

While some may believe that implementation by foreign countries of the model rules, including the UTPR, will lead the United States to follow suit, Congress's hand will not be forced. Nor will Congress sit idly by as U.S. companies and profits are taxed in a manner inconsistent with U.S. law and our bilateral tax treaties. This should have been clear to both the Administration and its international negotiating partners before, but it should be even more apparent now with the incoming divided government in the United States.

Prioritizing U.S. interests must include defending U.S. taxing rights and business interests consistent with our bilateral tax treaties. Despite the United States being the only country to implement a global minimum tax, this Administration has agreed to allow foreign countries to impose additional tax on U.S. companies' U.S. profits under the UTPR. The Administration has stated that Pillar Two can be implemented without treaty changes, conveniently bypassing the need for bipartisan support. However, there is growing consensus among tax experts, including former Treasury officials, that the Pillar Two UTPR is inconsistent with our bilateral tax treaties. That this Administration has encouraged foreign countries to assert new taxing rights against American interests, in violation of existing treaties, is unprecedented.

Under the 2020 Pillar Two Blueprint, the UTPR, formerly known as the undertaxed payments rule, targeted base erosion by disallowing deductions on payments made by an entity to a low-taxed affiliate. There was a clear connection between the jurisdiction asserting tax and the business activities of the taxpayer. As we have previously highlighted, the UTPR negotiated by this Administration – and sprung on the world when the Model Rules were released in December 2021 – is far more expansive. Now commonly known as the undertaxed profits rule, the UTPR

would allow a jurisdiction to reallocate income and collect tax from entities that have no nexus to that jurisdiction. Foreign countries could collect tax from U.S. activities with which there is no economic or transactional connection. This type of extraterritorial taxation is not permitted under Article 7 (or any other Article) of U.S. bilateral tax treaties.

As you are aware, the Administration cannot unilaterally override U.S. tax treaties by political agreement. The Constitution establishes a careful balance of authority between the Executive and Legislative branches, providing Congress with sole authority “to lay and collect taxes,” while the President is vested with the “power, by and with the advice and consent of the Senate, to make treaties.” While the Administration may have agreed to allow foreign countries to tax U.S. companies in a manner inconsistent with our tax treaties, Congress has not. The Administration must recognize the limitations of what it can and cannot unilaterally agree to in international tax negotiations.

Congress also expects the Administration to defend current U.S. tax law as passed by Congress, not the law the Administration wants it to be. For example, the 2020 Blueprint made the compelling case for GILTI to be treated as Pillar Two compliant, a position on which this Administration capitulated in order to achieve its failed partisan tax agenda. In addition, our members have repeatedly raised concerns about the more favorable treatment granted to refundable tax credits than nonrefundable tax credits under Pillar Two, even though U.S. business tax credits are generally nonrefundable. By failing to defend longstanding U.S. tax credits, many of which have significant bipartisan support, Treasury has put U.S. companies at risk and proffered U.S. tax revenues to fund foreign countries’ spending programs.

This Treasury Department has unsuccessfully attempted to blame the prior Administration for the UTPR’s flaws. However, it was this Administration that negotiated and agreed to the Pillar Two model rules behind closed doors, and immediately deemed them final with no public consultation or meaningful Congressional engagement. We are not aware of any administration – Republican or Democrat – that has so blatantly used its role in international tax negotiations to advance its partisan political agenda.

The Administration cannot continue to ignore the fundamental problems with the Pillar Two Agreement, concerns that have been raised with growing frequency in the United States and abroad. While the Administration may treat these Rules as final, we do not. And while foreign countries, and even Treasury, have threatened that U.S. companies will be subject to foreign tax under the UTPR, Congress has shown united opposition to extraterritorial taxes in the past and a willingness to respond to such measures.

Just two years ago, there was clear, bipartisan agreement on the primary U.S. objective in negotiating an OECD agreement: to put an end to foreign countries’ extraterritorial taxation of U.S. companies in the form of digital services taxes. Today, foreign countries continue to threaten extraterritorial taxes on U.S. companies, but they do so at the Treasury Department’s invitation pursuant to the UTPR. After two years of this failed approach, we urge the Administration to set aside its partisan agenda and work with Congress on a bipartisan basis to defend the United States’ interests.

Sincerely,



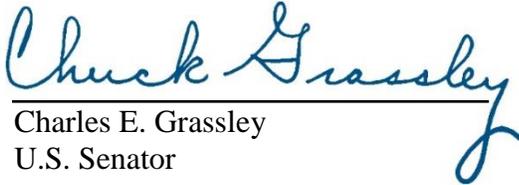
Mike Crapo
Ranking Member
Senate Finance Committee



James E. Risch
Ranking Member
Senate Foreign Relations
Committee



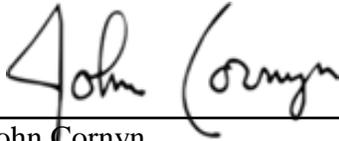
Kevin Brady
Ranking Member
House of Representatives
Ways and Means Committee



Charles E. Grassley
U.S. Senator



Vern Buchanan
U.S. Representative



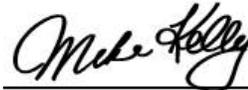
John Cornyn
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Adrian Smith
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John Thune
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Mike Kelly
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Richard Burr
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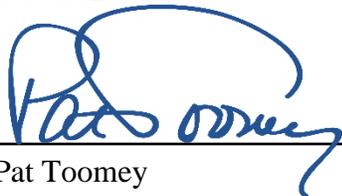
Jason Smith
U.S. Representative



Rob Portman
U.S. Senator



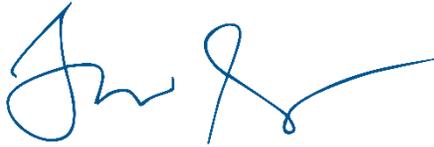
Tom Rice
U.S. Representative



Pat Toomey
U.S. Senator



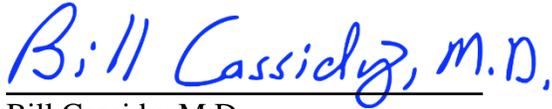
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Darin LaHood
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Bill Cassidy, M.D.
U.S. Senator



Brad Wenstrup
U.S. Representative



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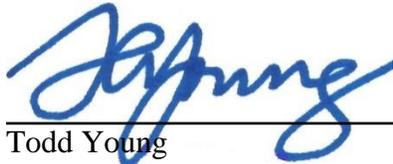
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Ron Estes
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John Barrasso, M.D.
U.S. Senator



Kevin Hern
U.S. Representative



Carol Miller
U.S. Representative

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Greg Murphy, M.D.
U.S. Representative

Handwritten signature of David Kustoff in blue ink.

David Kustoff
U.S. Representative