



March 4, 2024

Director
International Tax Branch
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600
Australia

Submitted electronically via MNETaxTransparency@treasury.gov.au

Re: Consultation on Draft Amendments Regarding Public Country-by-Country Reporting

Dear Director,

On behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition, this letter responds to the government's invitation to comment on the exposure draft legislation and accompanying materials regarding public country by country reporting (public CbCR) dated February 12, 2024.¹ This letter offers recommendations to better achieve the government's stated policy intent of improving tax transparency, and urges the government to swiftly advance the exposure draft in the form of final legislation after considering and incorporating said recommendations.

Key recommendations include:

- Adding Puerto Rico and four European Union member states to the final Taxation Administration (Country by Country Reporting Jurisdictions) Determination;
- Amending paragraph 3DA(1)(d) to include a given country by country reporting parent's jurisdiction of tax domicile; and
- Basing the measure's Australian presence test on a given country by country reporting group's Australian revenues, rather than income.

Background:

The FACT Coalition is a United States-based, non-partisan alliance of more than 100 state, national, and international organizations promoting policies to build a fair and transparent global financial system that limits abusive tax avoidance and curbs the harmful impacts of corrupt financial

¹Department of the Treasury (February 12, 2024), "Public country-by-country reporting – February 2024," <https://treasury.gov.au/consultation/c2024-488354>

practices.² FACT is a leading voice for public CbCR³ and has collaborated with policy-makers, investors, standard-setting bodies, and international advocates to advance public CbCR best practices and other tax transparency measures globally.

FACT applauded the Australian Treasury’s release of groundbreaking public CbCR draft legislation in April 2023, and noted in its official comments⁴ that the exposure draft represented “a strong, durable framework that may serve as a model for other jurisdictions seeking to introduce or enhance their own tax transparency regimes.”

Since the release of that draft, global momentum for enhanced tax transparency has only grown. At the end of 2023, the U.S. Financial Accounting Standards Board (FASB) finalized long-awaited rules requiring greater disaggregation of income taxes paid and other key tax information from U.S. companies.⁵ These changes – though falling short of full public CbCR – were widely supported by investors, who have for years sought additional information about the tax practices of multinational enterprises (MNEs) in their portfolios to better assess corporate governance, regulatory, tax enforcement, and other risks.⁶ The European Union’s public CbCR Directive, meanwhile, is set to enter into force in June 2024, and will require certain major multinationals doing business in the Union to publish tax and other operational data for a limited set of jurisdictions.⁷

Adding to this momentum, Australia’s initial draft legislation adopted the world-leading Global Reporting Initiative’s (GRI) 207-4 tax disclosure standard⁸ as its foundation. While it is disappointing that the government has since rolled back certain elements of the measure – particularly with regard to jurisdictional scope – the latest exposure draft still represents a meaningful improvement upon existing mandatory multinational tax transparency regimes. **The following comments provide feedback on where the draft legislation is likely to meet the government’s stated goal of**

² A full list of FACT members is available at: Financial Accountability and Corporate Transparency (FACT) Coalition (March 2024), “Coalition Members,” <https://thefactcoalition.org/about-us/coalition-members-and-supporters/>

³ See, e.g., FACT Coalition (November 17, 2023), “FACT, Allies Make the Case at UN for Enhanced Tax Transparency Measures to Meet Sustainable Development Goals,”

<https://thefactcoalition.org/fact-allies-make-the-case-at-un-for-enhanced-tax-transparency-measures-to-meet-sustainable-development-goals/>

⁴ FACT Coalition (April 28, 2023), “Re: Consultation on Draft Amendments Regarding Public Country-by-Country Reporting,”

https://thefactcoalition.org/wp-content/uploads/2023/04/FACT-Coalition_-_AU-Public-Country-By-Country-Reporting-Comment.pdf

⁵ Financial Accounting Standards Board (December 15, 2023), “Accounting Standards Update No. 2023-09, December 2023, Income Taxes (Topic 740), An Amendment of the FASB Accounting Standards Codification, Improvements to Income Tax Disclosures,”

[https://www.fasb.org/page/ShowPdf?path=ASU%202023-09.pdf&title=ACCOUNTING%20STANDARDS%20UPDATE%2023-09%E2%80%94Income%20Taxes%20\(Topic%20740\):%20Improvements%20to%20Income%20Tax%20Disclosures](https://www.fasb.org/page/ShowPdf?path=ASU%202023-09.pdf&title=ACCOUNTING%20STANDARDS%20UPDATE%2023-09%E2%80%94Income%20Taxes%20(Topic%20740):%20Improvements%20to%20Income%20Tax%20Disclosures)

⁶ FACT Coalition (May 11, 2023), “New Analysis Shows Investors Representing \$10T Support Greater Tax Transparency for Large Multinationals,”

<https://thefactcoalition.org/new-analysis-shows-investors-representing-10t-support-greater-tax-transparency-for-large-multinationals/>

⁷ Official Journal of the European Union (November 24, 2021), “DIRECTIVE (EU) 2021/2101 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches,”

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L2101&from=EN>

⁸ Global Reporting Initiative (September, 2019), “GRI 207: Tax,”

<https://www.globalreporting.org/standards/media/2482/gri-207-tax-2019.pdf>

improving tax transparency, where it falls short, and how best to ensure the ultimate efficacy of the proposed regime.

Comments:

1. Covered Entities

Notwithstanding concerns surrounding the application of an Australian presence test (discussed below in Section 1a), FACT appreciates that the government has largely maintained the definition of reporting entities laid out in the April 2023 consultation. Alignment of entities required to report under the draft legislation with pre-existing definitions of “country by country reporting parents” and “country by country reporting groups” ensures that a similar scope of entities are subject to both public and confidential reporting requirements, minimizing additional costs.

Crucially, the revised draft legislation would still capture both certain Australian resident entities and foreign parented MNEs with Australian permanent establishments, which is essential to achieving the draft legislation’s stated policy intent. Many of the largest MNEs operating in Australia today are foreign parented, and it is appropriate that these entities – which benefit greatly from their operations in Australia – be subject to the same transparency requirements as Australian-headquartered MNEs.

As such, **FACT urges the government to maintain, as proposed, the scope of covered entities outlined in the draft legislation, barring reconsideration or removal of the Australian presence test.**

1a. Entities with a Small Australian Presence Exempted

FACT appreciates the government’s interest in defining covered entities by reference to sufficient jurisdictional nexus with Australia. The government’s April 2023 exposure draft already accomplished this by covering entities with Australian tax residence or permanent establishment. The previous test would represent a superior implementation of the proposed public CbCR measure, consistent with the government’s stated policy intent of improving tax transparency. For a measure that is intended to address international tax practices of large MNEs, it is appropriate to apply well-established international tax tests for jurisdictional nexus, without, as currently proposed, applying an additional test drawn from domestic law.

However, to the extent that the government is committed to introducing an additional Australian presence test, such a test should not be based on income, but on revenues. The exposure draft should be revised to replace the reference to “one or more amounts of income from an Australian source” in Section 3D(1)(e)(i) with “revenues in Australia.” A revenue-based test would maximize the scope of entities captured by the measure’s reporting requirements, and minimize the risk of exempting MNEs engaged in profit shifting activities that relocate pre-tax income out of Australia. This approach would also ensure the continuity of reporting during any unprofitable years for MNEs with continuous and substantial Australian operations.

2. Jurisdictional Scope

It remains FACT’s position that the government’s stated policy goals “to provide the public with a comprehensive picture of (a given) CBC reporting group’s tax affairs”⁹ would be best supported by full, mandatory disaggregation of CbC information for every jurisdiction in which a given reporting group does business. **The decision to require CbCR for a limited subset of jurisdictions**, as outlined in the exposure draft and accompanying *Taxation Administration (Country by Country Reporting Jurisdictions) Determination*¹⁰ (henceforth, “the Determination,”) **would allow MNEs to avoid reporting in key jurisdictions that meaningfully contribute to and inform their overall tax strategies. Most notably, this approach leaves out MNEs’ parent jurisdictions and certain other tax havens, as detailed below.**

FACT recognizes and appreciates the government’s stated preference for full, voluntary disaggregation by jurisdiction of reported information by covered entities.¹¹ Explicitly exempting covered entities already engaging in, or otherwise taking up, true public CbCR from requirements to publish aggregated information for jurisdictions not included in the Treasurer’s Determination other than Australia will reduce compliance costs for said entities, and avoid introducing superfluous new responsibilities for industry-leaders in tax transparency. While FACT still recommends that full disaggregation by jurisdiction be mandatory, rather than recommended, in the government’s final legislation, we are hopeful that covered entities not already engaging in true public CbCR will begin to do so in alignment with the government’s intention and international best practices.

It is worth noting that, with the advent of reporting under the EU’s public CbCR Directive, and with reporting of similar information already happening under various implementations of the OECD’s confidential CbCR regime, it is likely that major MNEs intended to be captured by the government’s draft legislation will already have systems and mechanisms in place to collect the required information in every jurisdiction of operation. In this light, a more limited jurisdictional scope would only compromise the measure’s stated goal of improving tax transparency, without meaningfully reducing expected compliance costs for covered entities.

2a Recommendations to Improve the List of CbCR Jurisdictions

To the extent that the government is committed to the limited jurisdictional scope outlined in the current Exposure Draft, alignment of covered jurisdictions with Australia’s existing International Dealings Schedule specified countries or jurisdictions list¹² (hereafter, the “Specified Jurisdictions”) is a reasonable starting point. This approach would capture a large number of countries and territories widely recognized as posing profit shifting risks. Specifically, FACT applauds the inclusion of key jurisdictions associated with profit shifting activities, including Bermuda, the Cayman Islands, the Isle of Man, Switzerland, and Singapore, among others.

⁹ Department of the Treasury, “Explanatory Materials,” Section 1.32

¹⁰ Department of the Treasury (February 12, 2024), “Taxation Administration (Country by Country Reporting Jurisdictions) Determination 2024,” https://treasury.gov.au/sites/default/files/2024-02/c2024-488354-determination_0.pdf

¹¹ Department of the Treasury, “Explanatory Materials,” Section 1.25

¹² Australian Taxation Office (July 2, 2023), “Appendix 1: Specified countries or jurisdictions names and codes,” <https://www.ato.gov.au/forms-and-instructions/international-dealings-schedule-2023-instructions/appendixes/appendix-1-specified-countries-or-jurisdictions-names-and-codes>

However, improvements to said list would better serve the government’s stated policy aim of providing a comprehensive picture of a given MNE’s tax structure. Specifically, **FACT urges the addition of the following jurisdictions to the final Determination: four EU member states included in the ATO’s list of Specified Jurisdictions (Cyprus, Ireland, Luxembourg and Netherlands), and Puerto Rico.**

Firstly, the draft Determination should not exclude EU member states that are otherwise included in the ATO’s list of Specified Jurisdictions. The government’s explanation for these omissions is given in the draft Determination’s accompanying Explanatory Statement, which states only that “Many large multinational enterprises *may be* subject to tax information disclosures on a CBC basis for EU countries under the EU’s public CBC reporting regime.”¹³ (emphasis added)

The exclusion of noted tax havens like Cyprus, Ireland, Luxembourg and the Netherlands on the basis that covered entities “may” already have to report on their activities in said jurisdictions under a separate regime does not hold water. Most obviously, FACT is concerned that MNEs that have managed to avoid reporting through one of the EU regime’s many loopholes and exemptions, yet are covered by the government’s draft legislation, will not be required to report on these potentially critical jurisdictions under such an arrangement. There is simply no reason to exclude EU jurisdictions that are recognized as potential tax havens from reporting requirements.

Additionally, it should be noted that (as is discussed in Section 4) the government’s draft legislation requires categories of information to be reported that are largely based on the world-class GRI 207-4 standard, which constitutes a meaningful improvement upon the categories of information required to be publicly reported under the EU Directive. Even if a given MNE is subject to reporting requirements under both the EU Directive and the Australian regime, the information published in compliance with the EU Directive will necessarily be less comprehensive and useful for intended users. Specifically, this means that end users will lack key data for the EU jurisdictions excluded from the draft Determination, including revenues broken down into related-party and third-party buckets, as well as information pertaining to tangible assets. By including these jurisdictions, the government has an opportunity to both ensure that covered entities are unable to avoid reporting in said jurisdictions, and to meaningfully improve the quality of publicly available information.

Secondly, the determination should be revised to include Puerto Rico. Given that one stated goal of the draft legislation is to better inform investors of material tax-related risks to their portfolios,¹⁴ the Minister should also consider jurisdictions that constitute a profit-shifting risk outside of the Australian context. Puerto Rico has frequently been used as a tax haven by major U.S.-headquartered MNEs that are likely to be captured by the draft legislation. A major transfer pricing case in the U.S.¹⁵ involving Microsoft’s tax structure in Puerto Rico could result in roughly \$29 billion in additional tax liability, before penalties and interest that could drive the final bill much higher. These

¹³ Department of the Treasury (February 12, 2024), “Taxation Administration Act 1953, Taxation Administration (Country by Country Reporting Jurisdictions) Determination 2024, Explanatory Statement,” https://treasury.gov.au/sites/default/files/2024-02/c2024-488354-es_1.pdf

¹⁴ Department of the Treasury, “Explanatory Materials,” Section 1.1

¹⁵ FACT Coalition (November 8, 2023), “What the Microsoft Tax Case Shows Us About Tax Transparency,” <https://thefactcoalition.org/what-the-microsoft-tax-case-shows-us-about-tax-transparency/>

risks are clearly material to investors, both in Australia and abroad, and should be considered in the Minister's final determination.

2b. Additional Recommendation on Jurisdictional Scope

The proposed tax transparency regime will not provide the public with a “comprehensive picture” of a given MNE’s tax affairs without reporting on said MNE’s headquarters jurisdiction. While some MNEs covered under the draft legislation may be headquartered in Australia or in one of the jurisdictions prescribed in the Minister's Determination, many will not be. **As such, FACT recommends that the government amend paragraph 3DA(1)(d) to read:**

“the matters listed in subsection (3) for the reporting period in respect of each of the following jurisdictions:

(i) Australia;

(ii) a jurisdiction specified in a determination under subsection (4), if the country by country reporting group operates in that jurisdiction;

(iii) the jurisdiction of incorporation of the country by country reporting parent;”

By requiring information on a given parent entity's headquarters jurisdiction, the government could dramatically improve the usefulness of these disclosures to investors and other stakeholders without massively expanding the proposed measure's jurisdictional scope.

The United States is perhaps the clearest example. As home to a plurality of major MNEs, the United States is obviously a key jurisdiction toward evaluating base erosion, profit shifting, and other tax avoidance schemes globally. FACT is not suggesting that the United States or other headquarters jurisdictions be grouped with jurisdictions in the Determination “that are typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities.”¹⁶ However, tax information pertaining to the United States is clearly material for Australian investors and other end users *with regard to U.S.-headquartered multinationals specifically*. U.S. MNEs are also of particular significance in the Australian context given their central role in the ongoing PwC tax scandal.¹⁷

Effective analysis of CbCR data requires an understanding of which jurisdictions profits are being both shifted into and out of. Large MNEs are often headquartered in major market jurisdictions with average (or above average) statutory corporate tax rates, which can incentivise profit-shifting away from those jurisdictions. If pre-tax income is proportionally low (compared to revenues, employee headcount, tangible assets, etc.) in a given MNE's headquarters jurisdiction, but disproportionately high in other, smaller jurisdictions included in the Minister's Determination, an end user may be able to assess some level of profit shifting risk.

¹⁶ Department of the Treasury, “Determination 2024, Explanatory Statement”

¹⁷ See e.g. Australian Financial Review (May 5, 2023), “The inside story of PwC's tax scandal,”

<https://www.afr.com/companies/professional-services/the-inside-story-of-pwc-s-tax-scandal-20230504-p5d5k5>:

“...PwC Australia had a business plan called ‘Project North America.’ The plan targeted big US tech firms to sell them schemes to get around new laws aimed at international companies operating in Australia – the MAAL in 2016, the Diverted Profits Tax (DPT) and other later measures.... PwC tax partner Neil Fuller visited the head offices of dozens of US tech giants in 2015 to promote PwC's tax schemes for their Australian operations. The emails showed that those running Project North America had access to confidential Treasury documents that allowed them to build ways around the new laws – they knew what the laws would say and when they would be introduced.”

This rationale extends to all major market jurisdictions that are host to large MNEs that will be captured by the draft legislation. As such, FACT recommends adding a requirement to report CbC information on the headquarters jurisdiction of a given MNE, as detailed above, to better meet the government’s stated policy aims, alongside regular procedural adjustments and improvements to the Minister’s Determination.¹⁸

3. Other Exemptions

While it may be appropriate for particular entities to be exempted from reporting specific categories of information, in certain limited circumstances, it is critical that such exemptions are not self-executing. Given the stated transparency purpose of this legislation, any exemptions must be either subject to parliamentary review, or otherwise limited to a case-by-case exemption system tailored to the circumstances of a given entity.

In addition, the application of any exemptions should be transparent. To this end, the government should publish (and update on a regular basis) a list of entities that have been granted exemptions, and the nature of those exemptions (whether they were granted pertaining to specific categories of information or exempt the entity from reporting entirely, etc.) This is particularly important given that case-by-case exemptions are not considered legislative instruments, and as such are not subject to parliamentary review and scrutiny. FACT agrees with the government’s expectation that “these discretions will only be exercised in limited circumstances.”¹⁹

Exemptions that apply to entire entity classes²⁰ should likewise be issued only in exceedingly limited circumstances, in order to preserve the legislation’s policy intent of improving tax transparency. FACT appreciates that any action by the Commissioner specifying a class of entity as exempt from reporting requirements would be subject to appropriate parliamentary review.

4. Information Required to be Reported

FACT applauds the broad alignment of the categories required to be reported under the government’s proposal with the GRI 207-4 standard. The standard presented in the exposure draft makes meaningful improvements upon existing CbCR schemes by requiring disaggregation of revenues into related and unrelated-party categories, information on the book value of tangible assets in a given jurisdiction, and a qualitative reconciliation of income tax due in a jurisdiction with the expected amount due if the jurisdiction’s applicable statutory rate were applied to pre-tax income.²¹

Of these metrics, the most crucial is the differentiation between revenues derived from related and unrelated-parties. As FACT has noted in previous rounds of comments on elements of the government’s tax transparency platform, high levels of related party revenues can be a useful

¹⁸ FACT welcomes the government’s recognition that “It is appropriate to provide the Minister with the power to determine these jurisdictions to allow the Government to consider current and emerging circumstances and respond in a timely manner.”

¹⁹ Department of the Treasury, “Explanatory Materials,” Section 1.18

²⁰ Department of the Treasury, “Explanatory Materials,” Section 1.17

²¹ Department of the Treasury (February 12, 2024), “Treasury Laws Amendment Bill 2024: Multinational tax transparency—country by country reporting, Exposure Draft” Section 3DA(3), https://treasury.gov.au/sites/default/files/2024-02/c2024-488354-ed_0.pdf

indicator of aggressive tax planning and profit shifting.²² FACT strongly urges the government to maintain these categories of required information in its final legislation.

FACT also supports the inclusion of powers in paragraph 3DA(1)(f) allowing for additional categories of data to be required through future regulation.²³ As the government notes in the Explanatory Materials, ever-evolving best practices, including as outlined in GRI 207-4 and other relevant standards, should be considered when weighing the reporting obligations of covered entities. FACT appreciates the government's approach, in which the categories of information required under GRI 207-4 are considered an evergreen baseline that can be expanded upon as appropriate. This regulation-making power, in conjunction with the role of the Minister in producing the Determination, creates a flexible regime that can quickly adapt to global developments.

FACT also supports the government's decision to have all reported information published in an approved form on a government website to better facilitate easy access and readability for end users.²⁴ While many MNEs already engaging in public CbCR self-publish their reports, these reports sometimes differ radically in their presentation and accessibility. **By having all filed reports available in a single location and in a consistent format, the government can assure that this information is comparable and useful for public users.**

Finally, to best inform end users of published information, FACT supports the requirement for reporting entities that have prepared a comparable report under the EU CbCR Directive to provide a link to or copy of said report when publishing information required under the government's draft legislation.

5. Penalties

FACT applauds the application of appropriate penalties for non-compliance by covered entities, as well as these penalties' alignment with existing penalties for failure to file confidential CbCR information.²⁵ The application of these staged penalties for every 28 day period (or part of a given 28 day period) is appropriate given the time-sensitive nature of the information required to be reported for end users, particularly investors.

The government should affirm, however, that the 2,500 penalty unit maximum applies only to a single reporting period, and that, should a given MNE fail to comply with the public CbCR requirements year after year, this penalty will be applied again in subsequent years. While this appears to be the government's intent in the exposure draft and accompanying materials, explicit clarification that a given entity could not simply incur a one-time liability of 2,500 penalty units and be functionally exempt from all future reporting requirements would be welcome.

6. Application Date

²² FACT Coalition (April 28, 2023), "Re: Consultation on Draft Amendments Regarding Public Country-by-Country Reporting," Section 2

²³ Department of the Treasury, "Exposure Draft," Section 3DA, Subparagraph (1)(f)

²⁴ Department of the Treasury, "Explanatory Materials," Section 1.43

²⁵ Department of the Treasury, "Explanatory Materials," Section 1.54

FACT welcomes the government’s commitment to implement public CbCR requirements for affected entities for reporting periods beginning on or after July 1, 2024.²⁶ The government should move quickly to advance final legislation in line with its exposure draft, barring implementation of certain recommendations made above, to ensure that this vital measure is not subject to further delay.

Conclusion:

In November 2023, Australian Assistant Minister for Treasury Andrew Leigh said that the government’s aim “...is to be world leading in country-by-country reporting,” and noted that tax transparency is “about encouraging a race to the top in business productivity, not a race to the bottom in tax compliance.”²⁷ While the government’s revised draft legislation reflects certain efforts to align what was truly a “world leading” regime as presented in April 2023 with other, less ambitious and effective, standards, it still represents a meaningful step toward greater tax transparency. FACT urges the government to consider the recommendations made above, and to move quickly to shine much needed daylight on the tax practices of major multinationals by advancing final legislation in line with the current exposure draft.

FACT is grateful for the opportunity to comment, and remains available for further discussion and input. Please contact Zorka Milin at zmilin@thefactcoalition.org with any questions or comments.

Respectfully submitted,

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Zorka Milin, Policy Director, FACT Coalition

²⁶ Department of the Treasury, “Explanatory Materials,” Section 1.56

²⁷ United Nations Development Programme, Tax for SDGs Initiative (November 17, 2023), “Dialogue on Tax and SDGs – 2023 Edition / Day 4,” <https://www.taxforsdgs.org/event/dialogue-on-tax-and-sd-gs-2023-edition-day-4>