May 4, 2021

The Hon. Ron Wyden, Chair
The Hon. Sherrod Brown
The Hon. Mark Warner
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chair Wyden and Senators Brown and Warner:

We applaud your taking leadership in the reform of international tax law by presenting your proposal "Overhauling International Taxation".[1] Your plan would raise significant revenue, curb tax-haven abuse, protect American jobs, and begin to meet the challenge set by the Biden Administration to end the international race to the bottom in corporate tax collections. We thank you for this opportunity to comment.

ATF is a diverse coalition of more than 400 national, state and local endorsing organizations united in support of a fair tax system that works for all Americans. The Financial Accountability and Corporate Transparency (FACT) Coalition is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices.

Below are our views on the proposal's details.

QBAI: We endorse your proposal to eliminate the exemption of Qualified Business Asset Investment (QBAI) when figuring the U.S. tax on Global Intangible Low-Taxed Income (GILTI). As you correctly note, since QBAI is defined as 10% of offshore investments, the QBAI exclusion encourages shifting production out of the United States.

GILTI rate: We support your proposal to increase the GILTI rate and urge you to equalize it with the domestic rate. Equalization of rates is the best way to attract investment in the United States and create American jobs. As your plan leaves open the door to equalizing rates, it is potentially stronger than the corresponding section of President Biden's "Made In America Tax Plan," which proposes a 25% U.S. tax-rate discount for GILTI.[2]

Move GILTI to a country-by-country system: We endorse your goal of ending the global application of foreign tax credits when figuring the GILTI tax, since it allows corporations to use excess credits from high-tax nations to shield profits booked in tax havens. Of the two options

[1] https://www.finance.senate.gov/imo/media/doc/040121%20Overhauling%20International%20Taxation.pdf

[2] https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf

for reform you propose, we strongly prefer country-by-country application of credits. The No Tax Breaks for Outsourcing Act (S.714), which we endorse, provides a template for that option. Your second option—to classify nations as either high-tax or low-tax and only apply credits from the low-tax—is not as good as a country-by-country system. Our concern is that because the existing regulations on the high-tax exception (Reg. sec. 1.951A-2) do not allocate U.S. expenses, a country where a U.S. company's affiliate pays relatively high taxes (at a rate that would be above the minimum tax rate if expenses were allocated) could fall into the low-tax group. As a result, the company could generate excess foreign tax credits from that country that it can use to offset GILTI liability arising from its income reported in much lower-tax countries – giving it an incentive to invest in the relatively higher-tax country at the expense of the United States. The scope for game playing is much more constrained under country-by-country.

Allocations to foreign expenses: You propose a solution to the perceived problem of increased domestic research and development (R&D) spending indirectly increasing GILTI taxes and thereby discouraging home-based R&D. This phenomenon comes from the allocation of some domestic expenses like R&D to foreign profits—a correct and common practice—and the resulting shrinkage of foreign profits and taxes, and therefore of foreign credits used to reduce American tax liability. Your plan is to stop allocating any domestic R&D expenses to foreign profits. We advise against this element of your proposal. It could lead to a significant revenue loss, and R&D incentives exist elsewhere in the tax code (see next paragraph). What you propose here is an R&D incentive tied to foreign income—however, R&D incentives applicable to all income, or better yet public investments in R&D, are superior alternatives.

FDII: As noted above, we recommend equalizing the GILTI and domestic rates. Since you recognize that the Foreign Derived Intangible Income (FDII) rate should match the GILTI rate, adopting our recommendation means that FDII would be taxed like domestic income, in other words there would no longer be a FDII deduction. Even if the GILTI rate remains below the domestic rate, we still advise eliminating FDII and using the revenue for productivity-enhancing public investments. Your proposal is an entirely new R&D incentive: instead of defining the FDII eligible for U.S. tax discount as the excess on a "normal" investment return of U.S. based capital (which has the effect of discouraging domestic investments), it would tie the benefit to R&D spending in the United States, with the higher the spending, the more generous the tax break. But it is still ultimately tied to foreign income. As noted above, there is no compelling reason to privilege R&D activities generating exports over R&D activities serving domestic demand. Direct public investments in R&D are more effective and beneficial than tax incentives for corporate R&D, much of which would occur in any event. Moreover, FDII is under OECD review as a possible harmful tax practice and may violate World Trade Organization agreements.

Base Erosion and Anti-Abuse Tax (BEAT): We support proposals that provide strong protections against erosion of the U.S. tax base and assure a level playing field for U.S. and non-U.S. companies that do business in the United States. While that may have been the intention of the BEAT, it has fundamental flaws that are nearly impossible to correct. Instead, we believe the Administration's innovative SHIELD (Stopping Harmful Inversions and Ending Low-tax Developments) proposal to be a potentially powerful tool to achieve those goals by indirectly taxing low-taxed profits of the multinational group outside of the United States based on payments to affiliates. The proposal would deny U.S. multinational corporations tax deductions they get by stripping profits into tax havens -- and assess strong penalties if they do so. The SHIELD is aligned to the OECD blueprint and would constitute a strong incentive for other countries to adopt a global minimum tax, which would put a floor under the global race to the bottom on corporate tax. We strongly support that effort. The SHIELD should apply to payments to countries that fail to impose a global minimum tax of no less than the GILTI rate.

Anti-inversion provisions: Missing from your proposal are anti-inversion provisions, which should accompany an increase in the GILTI rate. We support the anti-inversion provisions in the Made in America Tax Plan and the No Tax Breaks for Outsourcing Act, which hold that any so-called "inverted" corporation still majority-owned by its pre-inversion shareholders and effectively controlled in the United States should be treated as an American corporation. Similar provisions are in the Stop Corporate Inversions Act of 2019 (S. 2140), sponsored by Sen. Durbin and cosponsored by 12 senators.

We thank you for considering these comments.

Sincerely,

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