April 16, 2021

The Honorable Ron Wyden
Chairman, Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Mark Warner
703 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Sherrod Brown
503 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Wyden, Senator Brown, and Senator Warner:

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, I write with comments and feedback on your recently released framework, "Overhauling International Taxation."[1] As experts and advocates who have been engaged on tax policy for decades, NTU appreciates more than most that designing a balanced, effective, and growth-oriented international tax framework is a significant challenge. That said, we have several concerns with the framework as written and believe the harm from intended or unintended consequences of these reforms could outweigh the expected benefits for U.S. businesses, workers, policymakers, and tax planners.

Overall, we sincerely hope that you and your colleagues keep four principles in mind if and when you enact changes to the current-law international tax framework:

1. **Don't put the cart before the horse.** As you know, negotiations on a global tax framework between the U.S. and 138 other countries are ongoing and are currently being facilitated through the Organisation for Economic Co-operation and Development (OECD).[2] The U.S. should not unilaterally make the business side of its tax code significantly less competitive before an OECD agreement is in place. The Biden administration proposes to significantly increase taxes on U.S. companies with a multinational presence and, subsequently, bring its OECD partner nations along on similar tax increases of their own. There is no guarantee, however, that other negotiating countries will be both willing and able to enact corporate tax hikes in concert with what the Biden administration is proposing and what is proposed in the framework here. Should Biden administration efforts fail but this framework succeed, the U.S. would be left at a significant competitive disadvantage compared to its peers and could see corporate profits, tax revenue, jobs, high-value intangible assets, and innovation shipped overseas to lower-tax countries.

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[1] Senate Finance Committee. (April 2021). "Overhauling International Taxation." Retrieved from: https://www.finance.senate.gov/imo/media/doc/040121%20Overhauling%20International%20Taxation.pdf (Accessed April 8, 2021.)
[2] OECD. (February 2021). "Members of the OECD/G20 Inclusive Framework on BEPS." Retrieved from: https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (Accessed April 8, 2021.)

We urge you to make any changes in this framework contingent on a satisfactory global agreement at the OECD.[3]

2. **Don't punish U.S. businesses simply for having a global presence.** The tax on Global Intangible Low-Taxed Income (GILTI), the deduction for Foreign-Derived Intangible Income (FDII), and the Base Erosion and Anti-Abuse Tax (BEAT) were all designed to discourage offshoring of profits, encourage onshoring of high-value intangible assets, and encourage exports of U.S. products and services. Few would argue that these complex and relatively new provisions of the 2017 tax law are working perfectly or just as intended, and indeed some of these rules may require some reform or revisitation by Congress and the Treasury Department. One thing policymakers should *not* do, however, is rip the rug out from under U.S. businesses with dramatic, effective-immediately changes, nor should they punish multinational businesses simply for having tangible assets overseas. We worry that some proposed changes in this framework, such as repealing the GILTI exemption for a 10-percent return on qualified business asset investments (QBAI), would punish companies for any number of legitimate reasons that they would have a facility, or workers, or tangible assets overseas. To punish these companies for having an offshore presence would be to deny the global and interconnected reality of a 21st-century economy.
3. **Avoid the unintended consequences of the early years of GILTI's implementation.** As NTU and NTU Foundation have noted many times before, GILTI's interaction with existing statutes left many companies facing effective tax rates on foreign income much higher than the effective 13.125 percent. "Thankfully," former NTU Foundation Vice President Nicole Kaeding wrote, "the Treasury Department released guidance to companies [in 2019] to prevent the unintended outcome, providing for a 'high-tax exemption' to GILTI."[4] Any *changes* to GILTI should avoid the pitfalls of GILTI's early implementation following the 2017 tax law, by recognizing that any number of interactions could lead U.S. businesses to paying taxes above and beyond the GILTI effective rate. We encourage lawmakers to pay particular attention to these complicated and overlapping dynamics as they consider changes to GILTI.
4. **The "race to the bottom" isn't what it seems.** Policymakers in Congress and the Biden administration have given considerable attention to the so-called "race to the bottom," as it pertains to corporate tax rates across the globe. We argue that, rather than a "race to the bottom," this trend is often a competition between countries to attract more innovation, job growth, wage growth, and economic growth. Any global tax regime should prevent base erosion and abusive tax maneuvers, certainly, but should *also* be focused on fostering an environment for economic growth in the wake of a global COVID-19 recession.

Keeping these principles in mind, we urge you to consider the following changes to your current framework:

- **Retain some robust exemption for returns on businesses' tangible overseas assets**: Your framework proposes repealing the GILTI exemption for a 10-percent return on QBAI. Because of the way GILTI is structured, raising the GILTI rate while repealing the QBAI exemption could effectively subject some U.S. businesses' tangible assets to significant taxes -- contrary to policymakers' goal when developing GILTI, which was to prevent U.S.-based multinationals from offshoring high-value intangible assets like intellectual property. While experts and advocates may disagree on the exact return that should be

[3] For more on NTU's engagement with the OECD Pillars One and Two Blueprints, see: Sepp, Pete. "Comments to the OECD Centre for Tax Policy and Administration." National Taxpayers Union, December 14, 2020. Retrieved from: https://www.ntu.org/publications/detail/comments-to-the-oecd-centre-for-tax-policy-and-administration

[4] Kaeding, Nicole. "Maintaining GILTI's High-Tax Exemption." National Taxpayers Union Foundation, February 27, 2020. Retrieved from: https://www.ntu.org/foundation/detail/maintaining-giltis-high-tax-exemption (Accessed April 8, 2021.)

allowed, there is less doubt about which industries would be most impacted by the repeal of QBAI or a reduced allowable return (such as the risk-free rate of return, as proposed by Rebecca M. Kysar[5]). In a recent paper from the Tax Foundation, of some major industries the group examined, the manufacturing industry had the lowest share of foreign profits above the 10-percent return on tangible assets -- meaning the manufacturing industry would be more heavily impacted by the repeal of the QBAI exemption for GILTI than the information industry; professional, scientific, and technical services industry; management industry; and more.[6] While some policymakers believe repealing QBAI would put an end to offshoring practices of U.S. multinationals and force them to bring manufacturing jobs back to America, we are more concerned of the opposite effect: repealing QBAI could convince some companies to *completely* move their operations overseas, further eroding the U.S. corporate tax base and sending high-quality, high-paying jobs and job opportunities to more competitive peer countries.

- **Don't raise the GILTI rate to 21 percent**: President Biden has proposed doubling the GILTI rate, from 10.5 percent to 21 percent.[7] Your framework calls for increasing the GILTI rate but does not specify an exact rate. While we acknowledge that retaining a 10.5-percent GILTI rate *while* raising the U.S. corporate income tax rate from 21 percent to 28 percent could incentivize U.S. multinationals to partially or completely offshore their operations and profits, given the gap between domestic tax rates and international tax rates would grow, we believe that both GILTI rate hikes and U.S. corporate rate hikes are bad policies. The U.S. and its peer nations may, indeed, endorse some global minimum tax during OECD discussions that differs from the effective GILTI rate of 13.125 percent in place today, but until that time, the U.S. should not prematurely and unilaterally disarm from tax competition with other highly developed countries. Doubling the GILTI rate from 10.5 percent to 21 percent would *especially* disadvantage the U.S. compared to competitor nations. What's more, several European Union (EU) officials have expressed concerns with President Biden's GILTI proposal, with one saying the proposal "makes an [OECD] agreement almost impossible."[8] This should give the Biden administration and its supporters in Congress significant pause.
- **Don't repeal FDII, as President Biden has proposed doing**: Though the framework does not outright propose repealing FDII, President Biden has proposed repealing FDII. We believe this would be a significant mistake. As the nonpartisan Congressional Research Service (CRS) recently noted, FDII "provides an incentive to locate intangible assets in the United States thereby reducing ... profit shifting."[9] CRS also noted FDII "encourages more high-margin tangible investment in the United States to increase the base for FDII."[10] Repealing FDII could produce the opposite effects, potentially providing an incentive for multinational companies to *offshore* intangible assets and to *offshore* high-margin tangible investment in the U.S. While policymakers should be sensitive to any World Trade Organization (WTO) complaints about the FDII regime and *may*, at some point, need to explore reform, we believe repealing FDII would do more harm than good.

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[5] Kysar, Rebecca M. "Critiquing (and Repairing) the New International Tax Regime." The Yale Law Journal Forum, October 25, 2018. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436942 (Accessed April 12, 2021.)
[6] Bunn, Daniel. "How GILTI Are U.S. Industries?" Tax Foundation, March 16, 2021. Retrieved from: https://taxfoundation.org/biden-gilti/ (Accessed April 12, 2021.)
[7] The White House. (March 31, 2021). "FACT SHEET: The American Jobs Plan." Retrieved from: https://bit.ly/3dV4nbM (Accessed April 12, 2021.)
[8] Gardner, Stephen. "Biden 21% Minimum Tax Undercuts Global Talks, EU Lawmakers Say." *Bloomberg*, April 13, 2021. Retrieved from: https://news.bloombergtax.com/daily-tax-report/biden-21-minimum-tax-undercuts-global-talks-eu-lawmakers-say (Accessed April 15, 2021.)
[9] Congressional Research Service. (December 2020). "Tax Expenditures: Compendium of Background Material on Individual Provisions." Retrieved from: https://www.govinfo.gov/content/pkg/CPRT-116SPRT42597/pdf/CPRT-116SPRT42597.pdf#page=77
[10] *Ibid*.

- **Don't "equalize" the GILTI and FDII rates unless accounting for GILTI's haircut on foreign tax credits**: The framework proposes 'equalizing' the GILTI rate on income (10.5 percent) with the effective rate on FDII (13.125 percent) after applying the 2017 tax law's 37.5-percent deduction. Unfortunately, this argument reflects a misconception about the effective GILTI rate after applying the so-called "FTC [foreign tax credit] haircut." As the Tax Foundation explains: "The new law's limitation on foreign tax credits throws yet another wrinkle in this calculation. Under the GILTI rules, foreign tax credits are limited to 80 percent of their value. For many firms, the effect of this limitation is to raise the GILTI tax rate from 10.5 percent to a 'maximum rate' of 13.125 percent."[11] In other words, for many businesses the GILTI and FDII rates are *already* equalized.

We appreciate the significant challenges ahead for lawmakers and the Biden administration as they consider such thorny issues as a global minimum tax and the taxation of profits earned on intangible assets by multinational firms. However, we believe several suggestions in your current framework should be significantly revised and reconsidered; otherwise, the proposed reforms could have the unintended effect of making the U.S. significantly less competitive on a global scale. To the extent that we can assist with further discussions or considerations of the above reforms, we are at your service.

Sincerely,

Andrew Lautz,
Director of Federal Policy

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[11] Bunn, Daniel. "U.S. Cross-border Tax Reform and the Cautionary Tale of GILTI." Tax Foundation, February 17, 2021. Retrieved from: https://taxfoundation.org/gilti-us-cross-border-tax-reform (Accessed April 12, 2021.)