United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510–6225

June 11, 2019

The Honorable Steven T. Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, D.C. 20220

Dear Secretary Mnuchin:

I write concerning the tax treaties currently pending before the Senate Foreign Relations Committee (SFRC), including bilateral agreements with Switzerland, Spain, Luxembourg, Japan, Chile, Hungary and Poland. I have voted in favor of each of these treaties in Committee on more than one occasion over the last eight years. It is deeply disappointing that these treaties have lingered in the Senate and are not yet in force due in large part to isolated Republican opposition. Regretfully, the Administration's engagement with the SFRC on the treaties this time around, including on new substantive matters, has been clumsy and haphazard and has resulted in otherwise avoidable delays in SFRC consideration. Nonetheless, my goal remains to achieve a level of understanding and comfort with the new issues such that I am in a position to once again vote in favor of the treaties and to encourage my colleagues to do so as well.

As you may be aware, the SFRC is the only Committee in Congress with jurisdiction over treaties. In recognition of this unique role, the Treasury Department, along with the State Department, has traditionally engaged in extensive outreach with both the Chairman and Ranking Member of the Committee on process and substance for Senate approval of tax treaties. Allow me to illustrate how this year's effort has been both different and unsatisfactory:

Last month, I was asked to sign off on resolutions of advice and consent for all seven of the bilateral treaties, with a view towards including the resolutions on an SFRC markup. These resolutions were provided to my office only two days prior. Each one contained a novel and complex reservations, requested by the Treasury Department, concerning the base erosion anti-abuse tax (BEAT). The reservations would have required renegotiation of each treaty. The requested reservations came as a complete surprise, as there had been no outreach from the Administration to me or my staff.

In a telephone call later that week, the Treasury Department confirmed for my staff the Department's view that this unprecedented reservation was required for all seven bilateral tax treaties. The Department also acknowledged that, despite the fact that the proposed reservation would require renegotiation of each treaty, the Administration had not engaged any of our bilateral partners to determine whether they would be willing to renegotiate and ratify the respective treaties based on the reservation.

At that time, I expressed two main concerns: it was impossible to analyze the complex reservation on such short notice, and the failure to engage treaty partners risked complications, delays, and perhaps an outright refusal to bring some or all of the treaties into force.

Subsequently, on May 20, I received a one-sentence letter from David Kautter, Assistant Secretary for Tax Policy. The one sentence stated that Treasury had finalized its review – a review that neither I nor my staff were previously aware of and on which no details were provided -- and then went on to reverse Treasury's position with regard to four of the treaties. The new position, as set out in Mr. Kautter's letter, is that the requested reservation would not be needed for four of the seven bilateral treaties: the Protocols with Switzerland, Spain, Luxembourg and Japan. Mr. Kautter offered no context or explanation for the reversal.

Then, on June 5, the Treasury Department provided my staff with a second requested reservation on the BEAT. This reservation, which I understand to supersede the first proposal, is significantly different from the original version. Once again, however, Treasury did not consult with me or my staff or provide any context or explanation, including for the differences between the two reservations. All we know at this point is that the Department would like to see the reservation applied to the treaties with Chile, Hungary, and Poland.

As noted above, I am inclined to support these treaties again, but I will not do so absent meaningful consultation, serious analysis of the requested reservation, and reliable assurances that, if the Senate approves the requested reservation, our treaty partners will renegotiate and ratify the respective treaties based on the terms therein. It is in this vein that I request your <u>expeditious and detailed response in writing</u> to the questions below. Please ensure that your responses are coordinated with and reflect the input of the State Department.

1) Please explain why, in Treasury's view, a BEAT reservation is necessary in the Chile, Poland and Hungary treaties. Please include an explanation of the June 5 version of the BEAT reservation and how that version will satisfy the perceived need for a BEAT reservation.

2) Please explain why the BEAT reservation was altered between May 13 and June 5. Please explain the differences between the two versions and whether, despite the differences in text, the two versions would have the same legal effect. If the two versions would not have the same legal effect, please explain the difference and why the June 5 version is preferable.

3) Please indicate whether the proposed reservations will require renegotiation of the pending tax treaties with Chile, Poland and Hungary and provide an explanation for the Department's position.

4) Please indicate whether the Administration has informed the governments of Chile, Poland and Hungary of the proposed reservations. If yes, please indicate when those discussions occurred, whether and when the governments were presented with the June 5 version, and whether those governments have committed to bringing the respective treaties into force if the June 5 version is included in the Senate's resolutions of advice and consent.

5) Please explain why the Treasury Department originally requested BEAT reservations for all seven bilateral treaties but now asserts such reservations are not needed for the protocols with Spain, Switzerland, Luxembourg, and Japan. Please include an explanation of the analysis that led to Treasury's original position, as well as an explanation of the analysis that led to the current position.

(6) Please provide Treasury's view of the likely effect if BEAT reservations are not included in the Senate's resolution of advice and consent in the Chile, Poland, and Hungary treaties, including on areas such as tax administration and taxpayer compliance, and any other area Treasury believes will be impacted by not including the reservation language. Please include an explanation of the analysis that led to this conclusion.

(7) Please indicate whether U.S. tax administration would still benefit from ratification of the treaties with Chile, Poland, and Hungary, such as new limitation on benefits clauses, mutual agreement procedures, and exchange of information, if the reservation language was not included in the Senate's resolution of advice and consent.

(8) I understand that the Treasury Department is revising the U.S. model tax treaty. Please indicate whether my understanding is accurate, and whether BEAT matters will be addressed in the revised model treaty such that BEAT reservations will not be needed for treaties negotiated based on the new model. Please confirm that you will keep the SFRC fully and currently informed with regard to the status, scope and text of revisions to the model tax treaty, including by providing the Chair and Ranking Member with text of the new model or any revision contained therein prior to negotiation of a new treaty based on that model or a particular revision contained therein.

Sincerely,

Robert Menendez
Ranking Member

CC: Mitch McConnell, Senate Majority Leader
Charles E. Schumer, Senate Minority Leader
James E. Risch, Chairman, U.S. Senate Committee on Foreign Relations
Chuck Grassley, Chairman, U.S. Senate Committee on Finance
Ron Wyden, Ranking Member, U.S. Senate Committee on Finance
Mike Pompeo, U.S. Secretary of State