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Tax Transparency: A Tale of Two Countries

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ARTICLE

TAX TRANSPARENCY: A TALE OF TWO COUNTRIES

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INTRODUCTION

On November 5, 2014, well-timed to coincide with the G20 Leaders' Summit in Australia, the International Consortium of Investigative Journalists ("ICIJ")[1] released 28,000 pages of confidential documents that it had obtained, allegedly from a former PricewaterhouseCoopers LLP ("PwC") auditor.[2] Antoine Deltour has

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1. The ICIJ is a global network of investigative journalists founded in 1997. *See* About the ICIJ, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, www.icij.org/about (last visited July 28, 2015).

2. Leslie Wayne et al., *Leaked Documents Expose Global Companies' Secret Tax Deals in Luxembourg*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 5, 2014, 4:00 PM), http://www.icij.org/project/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg. Subsequent leaks included tax rulings for PepsiCo

since received a 12-month suspended prison sentence after having been charged with "domestic theft, violation of professional secrecy, violation of business secrets, laundering, and fraudulent access to a system of automatic data treatment."[3] These documents, known as the Luxembourg Leaks or LuxLeaks, comprise the contents of 548 private tax rulings issued from 2002 to 2010 by the Luxembourg tax administration to approximately 340 clients of the public accounting firm PwC, including such well-known companies as Amazon, Verizon, FedEx, IKEA, Coach, Abbott Laboratories, and Deutsche Bank.[4] These tax rulings describe complicated financial and legal structures that are intended to provide tax savings for the multinational companies.[5] The press has described these tax rulings as "secret tax deals"[6] or "sweetheart fiscal deals" arranged for multinational companies.[7] Luxembourg Finance Minister Pierre Gramegna described the LuxLeaks as a "tsunami."[8]

The irony of this situation is obvious when one reads the G20 Leaders' Communique from the Brisbane Summit in November 2014:

Inc. and Walt Disney Co. as well as clients of other accounting firms including Deloitte, Ernst & Young, and KPMG. *See id.* For the most recent updates, see *Sign up for International Consortium of Journalists emails*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://signup.icij.org/.

3. Stephanie Bodoni, *Ex-PwC Auditor Charged in Leaks of Luxembourg Tax Cases*, BLOOMBERG BUS. (Dec. 15, 2014, 9:17 AM), http://www.bloomberg.com/news/articles/2014-12-15/ex-pwc-auditor-charged-in-leaks-of-luxembourg-tax-cases (portraying himself as Luxembourg's version of Edward Snowden, Deltour told the French newspaper *La Liberation* that he has ". . . acted according to conviction for my ideas . . . I am just one element in a more general movement."). *See also* Simon Bowers, *LuxLeaks Whistleblower Avoids Jail After Guilty Verdict*, GUARDIAN (July 29, 2016), https://www.theguardian.com/world/2016/jun/29/luxleaks-pwc-antoine-deltour-avoids-jail-but-is-convicted-of-theft.

4. *See* Wayne et al., *supra* note 2; *see also* Gaspard Sebag, *Corporate Tax Deals Across EU Face Scrutiny as Probe Widens*, BLOOMBERG (Dec. 17, 2014), http://www.bloomberg.com/news/articles/2014-12-17/sweetheart-tax-deals-across-eu-face-scrutiny-from-antitrust-arm-i3skpxef.

5. *See* Wayne et al., *supra* note 2; *see also* Lee Sheppard, *Luxembourg Lubricates Income Stripping*, 76 TAX NOTES INT'L 851 (2014).

6. Wayne et al., *supra* note 2.

7. *See* Sebag, *supra* note 4.

8. Stephanie Bodoni & Tom Mackenzie, *The Quiet Man Who Made Big Trouble for Little Luxembourg*, BLOOMBERG BUS. (Feb 23, 2015, 4:53 AM), http://www.bloomberg.com/news/articles/2015-02-23/the-quiet-man-who-made-big-trouble-for-little-luxembourg ("Luxembourg Finance Minister Pierre Gramegna in November called the leaked tax rulings a 'tsunami' that 'totally astonished' him.").

> We are taking actions to ensure the fairness of the international tax system and to secure countries' revenue bases. Profits should be taxed where economic activities deriving the profits are performed and where value is created. We welcome the significant progress on the G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan to modernize international tax rules. We are committed to finalising this work in 2015, *including transparency of taxpayer-specific rulings found to constitute harmful practices*.[9]

The OECD issued the BEPS report in February 2013.[10] Its subsequent report in July included an Action Plan of fifteen steps to address profit shifting by multinational corporations ("MNCs").[11] The OECD's interim report on countering harmful tax practices established the Forum on Harmful Tax Practices ("FHTP") to focus on the improvement of tax transparency, which includes "compulsory spontaneous exchange on rulings related to preferential regimes."[12] The LuxLeaks took this to an extreme, as none of the transparency devices being discussed by the FHTP would have released this information on rulings to the public. Rather, the focus has been on what information should be released to appropriate tax authorities.[13]

9. GROUP OF TWENTY [G20], G20 LEADERS' COMMUNIQUÉ, BRISBANE SUMMIT at point 13 (Nov. 2014), https://g20.org/wp-content/uploads/2014/12/brisbane_g20_leaders_summit_communique1.pdf (emphasis added) [hereinafter G20 BRISBANE SUMMIT].

10. OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING (Feb. 12, 2013), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page15 [hereinafter OECD, ADDRESSING BEPS]. This BEPS report reviewed various data and studies and found an increased separation between the locations of the actual business activities and the reporting of profits for tax purposes. *See id.* at 15.

11. OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING (July 19, 2013), http://www.oecd.org/ctp/BEPSActionPlan.pdf [hereinafter OECD, BEPS Action Plan]. The OECD BEPS Action Plan targets harmful tax practices by establishing a working party on aggressive tax planning and by requiring disclosure of aggressive tax planning arrangements. *See id.* at 17 ("Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes . . . "). *Id.* at 18. *See also id.* at 21–22.

12. OECD, COUNTERING HARMFUL PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE (Sept. 16, 2014), http://www.oecd-ilibrary.org/docserver/download/2314271e.pdf?expires=1459629786&id=id&accname=guest&checksum=480CE4987A99A4E06781DD6D8B3005E8 [hereinafter OECD, COUNTERING HARMFUL PRACTICES].

13. *See id*. at 36-46. However, the European Commission has proposed an amendment to the Accounting Directive which would require public country-by-country reporting by MNCs operating in the EU with global revenues exceeding EU€750 million a year. *See*

So the real question is: how much tax transparency is appropriate, and with whom should the information be exchanged? This article discusses certain aspects of the tax transparency issue.

The MNCs exposed in LuxLeaks are struggling and failing to win the public relations war by asserting that they have done nothing illegal, and that they have every right to structure their transactions in a way that minimizes taxes.[14] They have insisted they have a fiduciary obligation to their shareholders to take advantage of the favorable tax rules that exist in countries like Luxembourg and Ireland. Although such private tax rulings are commonplace in most developed countries, certain countries in the European Union (such as Luxembourg, Ireland, the Netherlands, and Belgium) have had a longtime reputation among international tax planners for being extremely taxpayer-friendly.[15] Luxembourg is particularly distinctive considering its former finance minister (1989-1995) and prime minister (1995-2013) Jean-Claude Juncker was elected president of the European Commission on March 7, 2014, took office on November 1, 2014,[16] and was subsequently accused of having a conflict of interest with respect to the war on tax evasion, "having presided over Luxembourg's development as a corporate tax haven."[17] There was even a vote taken on a Motion to Censure in the European Parliament on November 26, 2014.[18] However, he only

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European Commission, Fact Sheet: Introducing Public Country-by-Country Reporting for Multinational Enterprises – Questions & Answers, MEMO/16/1351 (Apr. 12, 2016). *See also infra* note 24.

14. *See*, *e.g.*, Hamish Boland Rudder, *PwC, Shire Grilled by UK MPs as LuxLeaks Response Continues*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 9, 2014, 6:00 AM), http://www.icij.org/blog/2014/12/pwc-shire-grilled-uk-mps-luxleaks-response-continues.

15. *See* Kristen A. Parillo, *Juncker Survives No-Confidence Vote in European Parliament*, WORLDWIDE TAX DAILY (Dec. 1, 2014), 2014 WTD 230-4 ("But of course we were promoting this and we were negotiating with these companies, as others did—the Irish, the Dutch, to some extent the Belgians.").

16. *See Who is Jean-Claude Juncker?*, JEAN-CLAUDE JUNCKER FOR PRESIDENT.COM, http://juncker.epp.eu/who-jean-claude-juncker (last visited Mar. 13, 2015).

17. Sheppard, *supra* note 5, at 851; *see also* Finbarr Bermingham, *Lux Leaks: Juncker Defends Role in Tax Avoidance as Pressure Mounts on President to Resign*, INT'L BUS. TIMES (Nov. 12, 2014, 2:28 PM), http://www.ibtimes.co.uk/lux-leaks-juncker-defends-role-tax-avoidance-pressure-mounts-president-resign-1474457.

18. *See November 2014 EP Plenary Newsletter: Motion of Censure, EU-Canada PNR Deal, Digital Single Market, and More*, VOTE WATCH EUROPE (Dec. 1, 2014), http://www.votewatch.eu/blog/november-2014-ep-plenary-newsletter-motion-of-censure-eu-canada-pnr-deal-digital-single-market-and-more/#sthash.kNB0r2ha.dpuf.

received 101 votes of no confidence (out of 650 votes cast) and remains the president of the European Commission.[19]

Although Commission President Juncker has publicly stated that he was unaware of the rulings practice, he is taking political responsibility as the former finance minister in that he should have known about his tax administration's ruling policy.[20] He has worked diligently to demonstrate that his Commission is doing everything possible with respect to combatting tax avoidance and tax evasion including facilitating administrative cooperation and encouraging tax transparency. On November 12, 2014, he announced that there would be an upcoming legal proposal in the form of a draft directive regarding the automatic exchange of information on tax rulings from Commissioner for Economic and Financial Affairs, Taxation and Customs Pierre Moscovici.[21] This proposed directive was released March 18, 2015 as part of a Tax Transparency Package,[22] and was adopted by the Economic and Finance Ministers Council ("ECOFIN") on December 8, 2015.[23] A further revision to the Administrative Cooperation Directive providing for the automatic exchange of information rules on the country-by-country reports of multinational companies as of 2017, was released on January 28, 2016 and adopted by the Council on May 25, 2016.[24]

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19. *See* Parillo, *supra* note 15. Acceptance of the motion to censure would have also required the resignation of President Juncker's entire twenty-eight member commission. *See id*.

20. *See* Peter Spiegel, *Jean-Claude Juncker Regrets Failing to Reform Luxembourg Tax Laws*, FIN. TIMES (Nov. 27, 2014, 3:00 PM), http://www.ft.com/cms/s/0/4b87f3f0-7637-11e4-a777-00144feabdc0.html#axzz3UIBUoMmY.

21. *See* Stephanie Soong Johnston, *European Commission Proposes Automatic Information Exchange on Tax Rulings*, WORLDWIDE TAX DAILY (Nov. 13, 2014), 2014 WTD 219-3; *see also* European Commission – Daily News 12/11/2014, MEX/14/1662 (Nov. 12, 2014), http://europa.eu/rapid/press-release_MEX-14-1662_en.htm.

22. *See* Commission Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, COM (2015) 135 final (Mar. 18, 2015) [hereinafter Commission Proposal].

23. *See* Council Directive 2015/2376 Amending Directive 2011/16/EU as Regards Mandatory Exchange of Information in the Field of Taxation, 2015 O.J. L 332/1 [hereinafter Directive to Exchange Cross-Border Rulings]. The directive modifies Directive 2011/16/EU as amended by Directive 2014/107/EU to require "the automatic exchange of information on advance cross-border rulings and advance pricing arrangements." *Id.*

24. Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, (2016/0018) (May 11, 2016).This implements Action 13 of the OECD Action plan that was endorsed by the G20 to fight base erosion and profit shifting. Some members of Parliament wish to go further by

Luxembourg's assumption of the six-month presidency of the Council of the European Union on July 1, 2015 required it to play a leadership role with respect to the common agenda, which includes "placing EU competitiveness in a global and transparent framework."[25] Part II of this Article describes the aftermath of the "LuxLeaks scandal" and its effect on the European Union's policies toward the administration of taxes, as well as the European Parliament's formation of a Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect ("TAXE Committee").[26]

Even before the LuxLeaks scandal, Luxembourg was working hard to overcome the "public perception of Luxembourg as a shady financial centre" and its reputation as a "tax haven."[27] Luxembourg, instead of exchanging information automatically under the EU Savings Directive, was only obliged to levy a withholding tax at a rate of thirty-five percent under a negotiated transition rule.[28] This transition rule allowed the Luxembourg banks to apply a withholding tax to the savings income without having to divulge details on individual clients or their income earned to the tax authorities. However, Luxembourg began participating in the automatic exchange of information within the European Union as of January 1, 2015.[29]

This change of position was necessary because Luxembourg agreed to share information with the United States pursuant to an

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requiring that some of this information be made public. Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosures of income tax information by certain undertakings and branches, COM (2016) 198 final (April 12, 2016).

25. *A Union for the citizens, Priorities of the Luxembourg Presidency*, GRAND DUCHY OF LUX., http://www.eu2015lu.eu/fr/la-presidence/a-propos-presidence/programme-et-priorites /index.html ("The Luxembourg Presidency aims to successfully conclude negotiations on the proposal on *transparency and exchange of information regarding tax rulings*.") (emphasis in original).

26. *See infra* Part II.

27. *Luxembourg Praised by OECD Peer Review*, LUX. FOR FIN. (Sept. 13, 2011), http://www.luxembourgforfinance.com/fr/news/luxembourg-praised-oecd-peer-review. Luxembourg for Finance is a quasi-governmental agency.

28. Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, 2003 O.J. L 157/38, art. 11 at 43 (regarding the taxation of savings income).

29. Prime Minister Juncker announced this change in his annual State of the Nation speech in April 2013. Ministère des finances Grand-Duché de Luxembourg, FAQ: Introducing automatic exchange of information in Luxembourg, http://mf.public.lu/actualites/2013/04/ faq_aut_exchange_1004131/index.html.

intergovernmental agreement negotiated on account of the Foreign Account Tax Compliance Act ("FATCA").[30] Furthermore, in July 2013, the G20 finance ministers unanimously endorsed the OECD's proposal for a global model for multilateral automatic exchange of tax information known as the Common Reporting Standard ("CRS")[31] and committed "to automatic exchange of information as the new, global standard."[32] On July 30, 2015, Luxembourg approved legislation that would introduce CRS as of January 1, 2017, reporting on calendar year 2016.[33] As detailed in Part I, Luxembourg also agreed to the adoption of the new "European FATCA" at the ECOFIN meeting that took place in Luxembourg in October 2014.[34]

Luxembourg also participates in the Global Forum on Transparency and Exchange of Information for Tax Purposes ("Global Forum"), which monitors the OECD work being done on tax transparency and exchange of information.[35] After receiving a rating

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30. *See Luxembourg Moving Towards Enhanced Cooperation in Taxation and Exchange of Information*, ERNST & YOUNG (July 2013), http://www.ey.com/Publication/vwLUAssets/EYe_on_Luxembourg_tax_-_Luxembourg_moving_towards_enhanced_cooperation_in_taxation_and_exchange_of_information/$FILE/Luxembourg-moving-towards-enhanced-cooperation-in-taxation-and-exchange-of-information.pdf. One interesting innovation in the Administrative Cooperation Directive was the addition of a most-favored-nation clause such that no Member State may refuse to extend its wider cooperation arrangements with third countries to another "Member State wishing to enter into such mutual wider cooperation." Communication from the Commission to the European Parliament and the Council on Concrete Ways to Reinforce the Fight against Tax Fraud and Tax Evasion including in Relation to Third Countries, at 7, COM (2012) COM 351 final (June 27, 2012) [hereinafter Communication on Tax Evasion]. Thus, legally any Member State has the right to demand from another Member State the same level of cooperation that is being provided to the United States.

31. *See* OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION (2013), http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf [hereinafter OECD, AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION].

32. GROUP OF 20 [G20], COMMUNIQUÉ MEETING OF FINANCE MINISTERS AND CENTRAL BANK GOVERNORS MOSCOW at point 19 (July 19-20, 2013), https://g20.org/wp-content/uploads/2014/12/Final_Communique_FM_July_ENG.pdf [hereinafter G20 MOSCOW] (noting that Luxembourg is a member of the OECD and is represented in the G20 by the European Union).

33. *See* Ann M. Miller, *Luxembourg Approves Bill on Automatic Exchange of Financial Information*, WORLDWIDE TAX DAILY (Aug. 4, 2015), 2015 WTD 149-10.

34. *See infra* Part I.

35. *See* OECD, THE GLOBAL FORUM OF TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES: INFORMATION BRIEF 2 (2013), http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf [hereinafter OECD, GLOBAL FORUM].

of "Non-Compliant" after its Global Forum peer review in October 2013, Luxembourg set out to implement reforms.[36] As detailed in Part I, Luxembourg has undergone a radical transformation from a vocal proponent of banking secrecy to an early adopter of the global standard for automatic exchange of financial account information developed by the OECD (working closely with the G20 and the European Union). One piece of evidence of this transformation is the signing of a Model I Intergovernmental FATCA Agreement ("FATCA IGA") with the United States on March 28, 2014.[37] This agreement requires Luxembourg financial institutions to report the required information on US account holders to the Luxembourg tax administration, which will then exchange the information with the Internal Revenue Service ("IRS").

The United States, on the other hand, while pledging reciprocity with respect to the exchange of information, is unable to even ratify the 2009 Protocol amending the US-Luxembourg Tax Treaty to provide for the then current OECD "foreseeably relevant" standard for exchange of information.[38] As the amended Article 28 ("Exchange of Information") is the legal basis for automatic exchange of information pursuant to the agreement, ratification of the Protocol by the United States was originally considered to be necessary before the Luxembourg-US FATCA IGA could enter into force.[39] Furthermore, while fifty-four countries (early adopters of CRS) have pledged to

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36. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES PEER REVIEWS: LUXEMBOURG 2013: PHASE 2: IMPLEMENTATION OF THE STANDARD PRACTICE 10 (2013), http://dx.doi.org/10.1787/9789264202672-en [hereinafter OECD, LUXEMBOURG 2013 REVIEW].

37. *See* Agreement Between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg to Improve International Tax Compliance and with Respect to The U.S. Information Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act, U.S.-Lux, Mar. 28, 2014, T.I.A.S. No. 15-729.1, https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Luxembourg-3-28-2014.pdf [hereinafter Luxembourg-US FATCA IGA].

38. *See* Protocol Amending the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Lux., May 20, 2009, S. Treaty Doc. NO. 111-8 (2009); Patricia Zengerle, *Senate Panel Approves Eight International Tax Treaties*, REUTERS (Nov. 10, 2015, 10:18 AM), http://www.reuters.com/article/us-usa-tax-treaties-idUSKCN0SZ1YD20151110. The U.S. Senate Foreign Relations Committee approved the tax treaties with Switzerland, Luxembourg, Hungary, Chile, Spain, Poland, Japan, and the Convention on Mutual Administrative Assistance in Tax Matters on November 10, 2015. As of August 7, 2016, these treaties were still awaiting approval by the full Senate.

39. *See infra* notes 121-22.

exchange information on financial accounts in 2017 and another forty-seven jurisdictions will begin this exchange in 2018,[40] the United States has not committed to participate in this global automatic exchange of information.[41] This article discusses the consequences of these significant events.

I. AUTOMATIC EXCHANGE OF INFORMATION

Banking secrecy was a well-established tradition in Luxembourg, dating back to the "French Penal Code of 1791 as subsequently amended by Luxembourg Parliament in 1879."[42] Parliament also made the banking secrecy rules "part of Luxembourg *public policy* provisions," such that any breach "constitutes a criminal offence subject to a fine and an imprisonment."[43] The first exceptions to banking secrecy were part of anti-money laundering legislation that required the banks to cooperate with any official investigation as well as to report any suspicious activities of their clients. Although the Luxembourg law was originally limited to the financial aspects of organized crime (i.e, drug money), the list of criminal activities was expanded to include financial crimes such as corruption in 2004.[44]

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40. OECD, SECRETARY GENERAL REPORT TO G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS: WASHINGTON D.C. 14 (April 2015), http://www.oecd.org/tax/transparency/2015-April-GF-report-G20.pdf [hereinafter OECD, REPORT TO G20]. For the complete list of countries, see OECD, AEOI: STATUS OF COMMITMENTS (101 JURISDICTIONS HAVE COMMITTED) (July 26, 2016), http://www.oecd.org/tax/transparency/AEOI-commitments.pdf (last visited August 7, 2016) [hereinafter OECD, AEOI: STATUS OF COMMITMENTS].

41. *See* OECD, REPORT TO G20, *supra* note 40, at 13 n.2. The United States' position with respect to the global automatic exchange of information is that it will pursue automatic information exchanges beginning in 2015 through FATCA, which includes reliance on intergovernmental agreements (IGAs), such as the Model 1A IGAs. This specific type of IGA "acknowledge[s] the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions." *Id*. Furthermore, the Model 1A IGAs incorporate "a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange." *Id*.

42. Alain Steichen, *New Exchange of Information Versus Tax Solutions of Equivalent Effect- Luxembourg Report*, EUR. ASS'N OF TAX LAW PROFESSORS, at 2, http://www.eatlp.org/uploads/public/2014/National%20report%20Luxembourg.pdf at 2; *see also id*. at 3 (stating that the banking bills of 1981 and 1993 "took great care in indicating that the specific bank secrecy merely was confirming for financial institutions the already existing rules.").

43. *Id*.

44. *See id*.

However, because the tax administration has no access to any information that results from anti-money laundering investigations, the tax administration was unable to exchange such information with foreign tax authorities.[45]

The Luxembourg Tax Code was amended in 1989 to ensure that the tax administration was not allowed access to any financial information from the banks regarding taxpayers. If Luxembourg did not have access to this data for its resident taxpayers, the tax authority also did not have this information to exchange with foreign tax authorities under the relevant tax treaty.[46] Article 26 §3 of the Model OECD Double Tax Convention on Income and Capital previously stated that a country is *not bound to go beyond its own domestic laws* in exchanging information with its treaty partner.[47] The Luxembourg Tax Code also distinguished *simple tax evasion,* where the tax authorities may not lift bank secrecy, from *aggravated tax fraud,* where the public prosecutor has the power to do so.[48] But even tax fraud still precluded information exchange under any of Luxembourg's tax treaties because "the information exchange only involves the tax authorities of the respective treaty partners" and there is no "exchange of information between the public prosecutor and the tax authorities within Luxembourg."[49]

Progress toward administrative cooperation was accelerated by the global financial crisis that highlighted the need for more exchange of information to combat tax avoidance and tax evasion.[50] In February of 2009, the European Commission proposed a new Council Directive on administrative cooperation in the field of taxation, which set up

45. *See id*. at 3-4.

46. *See* Alain Steichen, *Information Exchange in Tax Matters: Luxembourg's New Tax Policy in* EXCHANGE OF INFORMATION AND BANK SECRECY 12 (Alexander Rust & Eric Fort eds., 2012).

47. OECD, ARTICLES OF THE MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL art. 26 (Jan. 28, 2003), http://www.oecd.org/tax/treaties/1914467.pdf ("In no case shall the provisions of paragraph 1 and 2 be construed so as to impose on a Contracting State the obligation: . . . to supply information which is not obtainable under the laws . . . of that . . . Contracting State . . . .").

48. *See* Steichen, *supra* note 46, at 12; *see also id*. (noting that tax fraud is an extreme form of tax evasion involving sophisticated strategies, payment chains, and certain monetary amounts.).

49. *Id*. at 12-13.

50. *See generally* Irma Johanna Mosquera Valderrama, *EU and OECD Proposals for International Tax Cooperation: A New Road?*, 59 TAX NOTES INT'L 609 (2010).

procedures, scope, and conditions for the exchange of information on request, the automatic exchange of information, the spontaneous exchange of information, and administrative notification among Member States as well as between Member States and third countries.[51] One goal was to implement the 2005 revision of the OECD Standard on exchange of information that is set forth in paragraphs 4 and 5 of Article 26 of the OECD Model Convention.[52] This revision requires each party to use its powers to obtain and provide such information even if it is not needed for its own domestic tax purposes and even if it is held by a financial institution.[53] Initially, Luxembourg, as well as Austria, Belgium, and Switzerland, entered reservations with respect to this change.[54]

Due to increased pressure by the Global Forum, Luxembourg committed itself in 2009 to this global standard of transparency and exchange of information on request of all "foreseeably relevant" tax information that was adopted by OECD in 2005.[55] Luxembourg also negotiated new tax treaties and protocols in order to incorporate the 2005 revised version of Article 26 of the OECD Model Convention, including the Protocol with the United States.[56] Luxembourg is party to exchange of information agreements with over seventy-five jurisdictions through the use of double taxation conventions.[57] These include almost all of the OECD and G20 countries as well as all

51. *See Proposal for a Council Directive on Administrative Cooperation in the Field of Taxation: Communication from the Commission*, COM (2009) 29 Final (Feb. 2, 2009).

52. *See* Council of the European Union Press Release: Economic and Financial Affairs, 10737/09 (Presse 168), (June 9, 2009), https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/108392.pdf.

53. *See* OECD, UPDATE TO ARTICLE 26 OF THE OECD MODEL TAX CONVENTION AND ITS COMMENTARY art. 26(4) (2012), https://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf [hereinafter OECD, MODEL TAX CONVENTION] ("If information is requested by a Contracting State . . . the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes . . . ."); *see also id*. art. 26(5) ("In no case shall the provision of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution . . .").

54. *See* Steichen, *supra* note 46, at 15.

55. Werner Haslehner, *Luxembourg: The Standard of "Foreseeable Relevance"*, *in* TAX TREATY CASE LAW AROUND THE GLOBE 323 (E. Kemmeren et al. eds., 2014).

56. *See* OECD, LUXEMBOURG 2013 REVIEW, *supra* note 36, at 7.

57. *See* Administration des Contributions Directes du Grand-Duché de Luxembourg, *Conventions en vigueur*, http://www.impotsdirects.public.lu/conventions/conv_vig/index.html (last updated March 10, 2016).

major trading partners (Belgium, France, Germany, the Netherlands, and the United Kingdom).[58]

Another major improvement to the OECD Model in 2005 was to override banking secrecy; bank secrecy was no longer allowed to serve as a reason for categorical refusal to exchange information.[59] This change required Luxembourg to pass legislation in 2010 that granted access to banking information and other information previously protected by secrecy rules.[60] A Grand Ducal regulation adopted on February 1, 2010 prescribes rules with respect to information on numbered accounts.[61] Nevertheless, Luxembourg's restrictive judiciary has at times upheld the "domestic standard for bank secrecy and taxpayer protection."[62] The Global Forum labeled Luxembourg "Non-Compliant" with respect to this restrictive interpretation of the "foreseeably relevant" standard.[63] To rectify this state of affairs, Luxembourg passed legislation that clarifies that the tax administration is only allowed to verify "the formal legality of the information request."[64] The Global Forum also criticized Luxembourg for disclosing to taxpayers information about exchange of information ("EOI") requests, as it considers this to not be "in accordance with the principle that the information contained in an EOI request should be kept confidential."[65] The Luxembourg legislation also precludes the

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58. *See id*.

59. *See* OECD MODEL TAX CONVENTION, *supra* note 53, art. 26(5) ("In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution . . . .").

60. *See* OECD, LUXEMBOURG 2013 REVIEW, *supra* note 36, at 8.

61. OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES PEER REVIEWS: LUXEMBOURG 2011: PHASE 1: LEGAL AND REGULATORY FRAMEWORK (2011), http://dx.doi.org/10.1787/9789264117884-en [hereinafter OECD, LUXEMBOURG 2011 REVIEW].

62. Haslehner, *supra* note 55, at 331.

63. *Id*. at 332 ("Luxembourg has interpreted the foreseeably relevant standard in an unduly restrictive way resulting in information not being exchanged in some cases."); *see also id*. (citing OECD, LUXEMBOURG 2013 REVIEW, *supra* note 36).

64. *See* Haslehner, *supra* note 55, at 332.

65. OECD, LUXEMBOURG 2013 REVIEW, *supra* note 36; *see also* OECD, KEEPING IT SAFE: THE OECD GUIDE ON THE PROTECTION OF CONFIDENTIALITY OF INFORMATION EXCHANGED FOR TAX PURPOSES (2012), http://www.oecd.org/ctp/exchangeofinformation/Keeping%20it%20Safe_EN%20FINAL%20w_cover_WEB.pdf.

financial institutions from notifying their clients regarding the EOI request.[66]

In 2011, the EU Council finally adopted the Directive on Administrative Cooperation in the field of taxation ("DAC").[67] The 2011 DAC generally became effective January 1, 2013[68] and allows the information to be "used for the administration and enforcement of the domestic [tax] laws" as well as associated "judicial and administrative proceedings."[69] Member States must provide the required information within certain time limits (two months for information they already possess and six months for other information[70]) and are obligated to provide the information even if they do not need it for their own tax purposes and even if held by a bank or other financial institution.[71] This means that Member States cannot justify refusing to provide information on the basis of their banking secrecy laws.[72]

Commentators note that the Directive's articles on exchange of information on request conceivably go beyond the OECD Standard in its obligation to transmit any "information that is foreseeably relevant to the administration and enforcement of the domestic [tax] laws" because the requirements for a valid request are less onerous than those in the OECD Model Agreement on the Exchange of Information on Tax Matters.[73] The most important feature, however, was the extension of the mandatory automatic exchange of information that existed with respect to savings income to income from employment, director's fees, certain life insurance products, pensions, and

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66. *See* Werner Haslehner, *Luxembourg: Disclosure of Information Requests by the Court, in* TAX TREATY CASE LAW AROUND THE GLOBE, *supra* note 55, at 347-48; *see also* Recueil De Legislation, MEMORIAL JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG, du 25 novembre 2014 at 4170, http://www.impotsdirects.public.lu/legislation/legi14/Memorial-A—-N_-214-du-27-novembre-2014.pdf (on file with author).

67. *See* Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, 2011 O.J. L 64/1 [hereinafter 2011 DAC].

68. *See id*. art. 29 § 1.

69. *Id*. art. 16 § 1.

70. *See id*. art. 7 § 1.

71. *See id*. art. 18 § 1.

72. *See* Marius Vascega & Servaas van Thiel, *Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, 20 EC TAX REV. 148, 152 (2011).

73. *See id*. at 152–53; *see also* 2011 DAC, *supra* note 67, arts. 1 § 1, 24 § 1.

immovable property, to the extent that information is available.[74] As described *infra*, further steps have been taken with the revisions made to the Directive in 2014.[75] The article prescribing the automatic exchange of information took effect January 1, 2015 and covers tax periods beginning January 1, 2014.[76] As with all directives in the tax area, this required unanimous consent by all EU Member States.

It is generally understood that the automatic exchange of information is the most effective way to fight tax evasion. Thus, the Directive provided that automatic information exchange may be extended to other categories of income (such as dividends, capital gains, and royalties) in the future.[77] One interesting innovation in the 2011 DAC was the addition of a most-favored-nation clause such that no Member State may refuse to extend its wider cooperation arrangements with third countries to another "Member State wishing to enter into such mutual wider cooperation."[78] Legally, any Member State has the right to demand from another Member State the same level of cooperation that is being provided to the United States.[79] Thus, the FATCA IGA that Luxembourg negotiated with the United States necessitated increased cooperation within the European Union.

During 2014, amazing progress was made with respect to tax transparency compared to what transpired earlier. The US FATCA legislation was enacted in 2010[80] to enlist foreign financial institutions to report directly to the IRS certain information about financial accounts held by US taxpayers or by foreign entities in which US taxpayers hold a substantial ownership interest.[81] The US FATCA project had seemed doomed to failure as foreign financial institutions testified to the extreme costs of compliance at an IRS

74. *See* 2011 DAC, *supra* note 67, art. 8.

75. *See infra* notes 235-46 and accompanying text.

76. *See* 2011 DAC, *supra* note 67, arts. 8 § 1, 29 § 1.

77. *See id*. at pmbl. ¶ 10, art. 8 § 5; *see also* Communication on Tax Evasion, *supra* note 30.

78. 2011 DAC, *supra* note 67, at pmbl. ¶ 22; *see* also Valderrama, *supra* note 50, at 614.

79. *See* Communication on Tax Evasion, *supra* note 30, at 10.

80. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501–35, 124 Stat. 71, 97–115 (2010). Foreign Account Tax Compliance Act (FATCA) added sections 1471 to 1474 to the Internal Revenue Code (I.R.C.). For further history of FATCA, *see* Tracy Kaye, *Innovations in the War on Tax Evasion*, 2014 BYU L. REV. 363 (2014); Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. REV. 304 (2012).

81. *See* I.R.C. § 1471(b) (2015).

public hearing, expressing concerns over the complexity of the regulations and pleading for delays of the various effective dates.[82] For example, a survey done in 2014 by the Luxembourg Bankers' Association ("ABBL") and Ernst & Young ("EY") on the financial implications of FATCA to the Luxembourg Banks found that the total budget for implementing FATCA averaged EU€792,000 per institution, ranging from EU€2.4 million to EU€143,000, depending on the size of the bank.[83] Representatives of foreign governments ranging from Australia to Japan highlighted the foreign legal impediments to FATCA implementation and also pleaded for more time.[84] The IRS complied and announced later implementation dates for the due diligence and documentation procedures as well as the reporting requirements under FATCA on multiple occasions.[85]

FATCA also required US taxpayers holding specified foreign financial assets with an aggregate value exceeding US$50,000 offshore on the last day of the tax year (or more than US$75,000 at any time) to report those assets to the IRS on Form 8938 beginning with their 2011 tax return.[86] Failure to report foreign financial assets results in a penalty of US$10,000 (and a penalty of up to US$50,000

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82. *See* Shamik Trivedi, *Bank Representatives Seek Delay of FATCA Regs*, 66 TAX NOTES INT'L 695 (2012).

83. *See* Serge de Cillia, Denis Costermans, Olivier Maréchal, & Benoît Sauvage, *Survey on the cost of regulation and its impact on the Luxembourg financial market place*, ERNST & YOUNG (2014), http://www.ey.com/Publication/vwLUAssets/Survey_on_the_cost_of_regulation_and_its_impact_on_the_Luxembourg_financial_marketplace/$File/Cost-of-regulation-survey_ABBL-EY_September-2014.pdf. Extrapolating "to the Luxembourg market, the global FATCA budget is [EU€] 74 million . . ." *Id.* at 21. Forty-six out of 150 banks in the Luxembourg financial market responded to a detailed questionnaire on the costs and investments required by FATCA. This sample was particularly representative in that with respect to "type of activity, size, balance sheet total, net banking income or number of employees, coverage range[d] between 37% and 50%." *Id.* at 4.

84. *See Financial Institutions: Witnesses Urge IRS to Give Banks More Time to Comply with FATCA, Air Many Concerns*, DAILY TAX REP. (BNA), May 16, 2012, at GG-1.

85. *See e.g.*, I.R.S Announcement 2012-42, 2012-47 I.R.B. 561 (Timeline for Due Diligence and Other Requirements Under FATCA); I.R.S. Notice 2013-43, 2013-31 I.R.B. 113, 114. (Revised Timeline and Other Guidance Regarding the Implementation of FATCA).

86. I.R.C. § 6038D(a) (2015). Treas. Reg. §1.6038D-2(a) doubles these thresholds for individuals filing married or filing jointly. The threshold for a taxpayer living abroad is $200,000. Form 8938 is used to report the total value of all specified foreign financial assets including foreign stock or securities not held in a financial account as well as investment vehicles such as foreign hedge funds and foreign private equity funds. *See* Form 8938, Statement of Specified Foreign Assets, IRS (2015), https://www.irs.gov/pub/irs-pdf/f8938.pdf. *See also Instructions for Form 8938*, IRS (2015), http://www.irs.gov/pub/irs-pdf/i8938.pdf.

for continued failure after IRS notification).[87] Millions of Americans living abroad were outraged.[88] Senator Mike Lee from Utah traveled to an American Chamber of Commerce luncheon in Luxembourg in the fall of 2014 in order to assure these US citizens that he would be working hard to get FATCA repealed.[89] However, FATCA has greatly contributed to the success of the IRS's Offshore Voluntary Disclosure Programs ("OVDP") that have been in place since 2009 to allow US taxpayers to disclose overseas assets and pay reduced penalties.[90] By 2015, over 54,000 taxpayers had participated and approximately US$8 billion was collected from these voluntary disclosures.[91]

Senator Rand Paul has reintroduced his bill to repeal FATCA (*A Bill to Repeal the Violation of Sovereign Nations' Laws and Privacy Matters*),[92] which is co-sponsored by Senator Wicker.[93] Furthermore, on July 14, 2015, Senator Paul filed a lawsuit with members of

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87. *See* I.R.C. § 6038D(d). Underpayments of tax attributable to non-disclosed foreign financial assets will be subject to an additional substantial understatement penalty of forty percent. *See* Instructions for Form 8938, *supra* note 86.

88. *See* AMERICAN CITIZENS ABROAD, https://americansabroad.org (last visited Mar. 13, 2015); James George Jatras, *American Citizens Abroad Blasts FATCA In Comment To House Working Groups, Calls For Repeal As Part Of Tax Reform Framework*, REPEAL FACTA, http://www.repealfatca.com/index.asp?idmenu=4&idsubmenu=121&title=american-citizens-abroad-blasts-fatca-in-comment-to-house-working-groups-calls-for-repeal-as-part-of-tax-reform-framework (last visited Aug. 10, 2016).

89. *See Summary of ANTI-FATCA U.S. Congressional Visit to Luxembourg, with Senator Mike Lee*, AM. CHAMBER OF COMMERCE IN LUX., http://www.amcham.lu/photos/2014/summary-of-anti-fatca-us-congressional-visit-to-luxembourg-with-senator-mike-lee/.

90. *See* I.R.S. News Release IR-2014-73 (June 18, 2014), http://www.irs.gov/uac/Newsroom/IRS-Makes-Changes-to-Offshore-Programs. There are multiple programs that taxpayers may participate in so as "to come into compliance with their U.S. tax obligations" including OVDP, Streamlined programs, Transitional Relief and Delinquent FBAR). *See* Robert Wood, *Offshore Accounts? Choose OVDP or Streamlined Despite Fatca*, FORBES (June 30, 2015, 9:42 AM), http://www.forbes.com/sites/robertwood/2015/06/30/offshore-accounts-choose-ovdp-or-streamlined-despite-fatca/#554d8560a14c8.

91. *See* I.R.S., News Release IR-2015-116 (Oct. 16, 2015), https://www.irs.gov/uac/newsroom/offshore-compliance-programs-generate-8-billion-irs-urges-people-to-take-advantage-of-voluntary-disclosure-programs.

92. *See* S. 663, 114th Cong. (2015); *see also Sen. Rand Paul Introduces Bill to Repeal Anti-Privacy Provisions in FATCA*, RAND PAUL (Mar. 4, 2015), http://www.paul.senate.gov/news/press/sen-rand-paul-introduces-bill-to-repeal-anti-privacy-provisions-in-fatca.

93. *See S.663 A Bill to Repeal the Violation of Sovereign Nations' Laws and Privacy Matters*, US CONGRESS, https://www.congress.gov/bill/114th-congress/senate-bill/663/cosponsors (last visited June 17, 2015).

Republican Overseas Action[94] in the US District Court for the Southern District of Ohio that challenged the constitutionality of FATCA, stating:

> FATCA eschews the privacy rights enshrined in the Bill of Rights in favor of efficiency and compliance by requiring institutions to report citizens' account information to the IRS even when the IRS has no reason to suspect that a particular taxpayer is violating the tax laws.[95]

The petition also challenges President Obama's constitutional power to make international agreements because they override FATCA and exceed the scope of the President's independent constitutional powers.[96] Other claims were that the increased "reporting requirements for foreign financial accounts deny US citizens living abroad the equal protection of the laws."[97] However, the IRS regulations finalized in 2013[98] provided for increased thresholds for taxpayers living abroad of US$200,000 on the last day of the tax year (or more than US$300,000 at any time) for single taxpayers.[99]

The US District Court for the Southern District of Ohio denied the FATCA plaintiffs' motion for preliminary injunctive relief based on a lack of standing, determining that only one of the seven plaintiffs had standing.[100] The court held that the equal protection challenge to the increased reporting requirements for foreign financial accounts for Americans living abroad failed because the statute applies to all US

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94. William R. Davis & Andrew Velarde, *Sen. Paul Files Lawsuit Challenging FATCA*, 79 TAX NOTES INT'L 226 (2015) ("Republicans Overseas Action, a political organization that represents the interests of U.S. Republicans who live abroad.").

95. Verified Complaint for Declaratory and Injunctive Relief at 2, Crawford v. United States Department of the Treasury (S.D. Ohio 2015) (No. 15-250) 2015 WL 567552 [hereinafter Crawford v. United States complaint]; *see also* Davis & Velarde, *supra* note 94.

96. For previous discussions of the controversy over the legal status of IGAs, *see* Allison Christians, *Putting the Reign Back in Sovereign*, 40 PEPP. L. REV. 1373, 1404 (2013) (arguing that presenting IGAs "as diplomatic agreements…represents a significant expansion of the competent authority's interpretive role…."); *see also* the response by Susan Morse, *Why FATCA Intergovernmental Agreements Bind the U.S. Government*, 70 TAX NOTES INT'L 245 (2013).

97. Crawford v. United States complaint, *supra* note 95, at *40.

98. *See* T.D. 9610, 2013-41 I.R.B. 322.

99. Treas. Reg. §1.6038D-2(a) doubles these thresholds for individuals filing married or filing jointly to US$400,000 and US$600,000, respectively.

100. *See* Crawford v. U.S. Dep't of the Treasury (S.D. Ohio Sept. 29, 2015), (No. 3:15-CV-250), 2015 WL 5697552, at *11, *16.

citizens with offshore accounts regardless of residence.[101] Furthermore, the court held that the statute is rationally related to the legitimate state interest of addressing offshore tax evasion.[102]

Of the approximately 187,000 Form 8938s filed with the 2012 tax returns, only twenty-one percent were submitted with a foreign address.[103] Nevertheless, FATCA is being blamed for an increase in the number of Americans who are renouncing their citizenship.[104] In 2013, approximately 3,000 individuals renounced their citizenship or gave up their green cards, a significant increase over the 932 individuals who did so in 2012.[105] Another 3,415 renunciations took place in 2014[106] and 4,729 in 2015,[107] but keep in mind that there are approximately 8.7 million Americans living abroad.[108] It is true that FATCA has probably increased awareness of the US tax filing obligations of US citizens and tax residents living abroad due to the US tax rules requiring worldwide taxation of such individuals.[109] FATCA has also caused a renewed reexamination of this tax policy of worldwide taxation of nonresident US citizens and green card holders.[110]

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101. *Id*. at *13.

102. *Id*. The U.S. District Court also dismissed the complaint for lack of jurisdiction on April 25, 2016. *See* 2016 WTD 82-24 (April 26, 2016).

103. *See* TAXPAYER ADVOCATE SERVICE, 2013 ANNUAL REPORT TO CONGRESS 240 (2013), http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf.

104. *See* Caroline May, *Record Total Number US Taxpayers Renounce Citizenship in 2013*, DAILY CALLER (Feb. 9, 2014, 2:51 PM), http://dailycaller.com/2014/02/09/record-total-number-u-s-taxpayers-renounce-citizenship-in-2013/.

105. *See id.*; *see also* Laura Saunders, *The New Rules of Offshore Accounts*, WALL ST. J. (June 5, 2015, 9:41 AM), http://www.wsj.com/articles/the-new-rules-of-offshore-accounts-1433511676 [hereinafter Saunders, *The New Rules of Offshore Accounts*].

106. *See* Quarterly Publication of Individuals, Who Have Chosen to Expatriate, as Required by Section 6039G, 80 Fed. Reg. 7685 (Feb. 11, 2015), http://www.gpo.gov/fdsys/pkg/FR-2015-02-11/pdf/2015-02850.pdf.

107. *See* Quarterly Publication of Individuals, Who Have Chosen to Expatriate, as Required by Section 6039G, 81 Fed. Reg. 6598 (Feb. 8, 2016), http://www.gpo.gov/fdsys/pkg/FR-2016-02-08/pdf/2016-02312.pdf.

108. *See* U.S. DEPARTMENT OF STATE, BY THE NUMBERS: PASSPORTS, INTERNATIONAL TRAVEL, VISAS (May 20, 2015), http://travel.state.gov/content/dam/travel/CA%20by%20the%20Numbers-%20May%202015.pdf; *see also* Saunders, *The New Rules of Offshore Accounts*, *supra* note 105.

109. *See* Andrew Mitchel & Ryan E. Dunn, *2013 Expatriations Increase by 221%*, INT'L TAX BLOG (Feb. 6, 2014), http://intltax.typepad.com/intltax_blog/2014/02/2013-expatriations-increase-by-___.html.

110. *See generally* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 101 (2016); *see also* Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 481

Regardless, on July 1, 2014, FATCA went into effect with respect to the registration requirements for the foreign financial institutions ("FFIs"). By mid-2016, over 200,000 financial institutions had registered through the IRS FATCA Registration System.[111] Financial institutions and host country tax authorities will use the International Data Exchange Service to provide the IRS with information reports on financial accounts held by US persons.[112] FFIs registered with the IRS in order to begin reporting financial information on their US account holders in 2015 with respect to 2014 tax information.[113] Failure to comply with this regime could expose the financial institutions to thirty percent withholding on any US source investment income.[114]

Many more FFIs are governed instead by intergovernmental agreements ("IGAs") negotiated by their governments with the United States.[115] This intergovernmental approach, Treasury Model I, allows

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(2007) ("[I]t is reasonable to conclude that the retention of U.S. citizenship reflects . . . the belief that the benefits of citizenship are worth the tax cost."); *but see* Edward Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1349 (2011) (concluding that the worldwide taxation of U.S. citizens is not justified by the psychological benefits of U.S. citizenship); Michael DeBlis, III, *Are the Psychological Benefits of U.S. Citizenship an Adequate Justification for the Worldwide Taxation of Nonresident U.S. Citizens?*, TAX CONNECTIONS (Jan. 21, 2015), http://www.taxconnections.com/taxblog/update-to-comments-are-the-psychological-benefits-of-u-s-citizenship-an-adequate-justification-for-the-worldwide-taxation-of-nonresident-u-s-citizens/#.VQW840bOVU4 (stating the existence of psychological benefits as a result of U.S. citizenship is a "myth").

111. *See* Letter from Jacob J. Lew, Sec'y, U.S. Dep't of the Treasury, to Paul D. Ryan, Speaker, U.S. H.R. (May 5, 2016) (on file with U.S. Dep't of the Treasury); *see also FATCA Foreign Financial Institution (FFI) List Search and Download Tool*, IRS, http://apps.irs.gov/app/fatcaFfiList/flu.jsf (last visited Aug. 5, 2016).

112. *See* John A. Koskinen, *Prepared Remarks of John A. Koskinen Commissioner Internal Revenue Service Before the New York State Bar Association Section of Taxation*, COMM'R INTERNAL REVENUE SERV. (Feb. 24, 2015), http://www.irs.gov/PUP/newsroom/Commissioner%20Koskinen%20Remarks%20at%20the%20NYSBA%20on%20Feb%2023%202015.pdf.

113. Treas. Reg. § 1.1471-5(a)(2) (2015). ("U.S. account" is defined as any "financial account," including foreign financial assets, owned by a "specified U.S. person."); *see* Treas. Reg. § 1.1471-4(d)(3)(v) (2015) (FFIs will be making their disclosures using Form 8966 "FATCA Report"); *see also* I.R.C. § 1471(c) (2015).

114. *See* I.R.C. § 1471(a) (2015); *see also* I.R.C. § 1471(b)(1)(D)(i), (d)(6-7) (2015).

115. Press Release, U.S. Department of Treasury, Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden (July 26, 2012), https://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx [hereinafter Model I Press Release].

the financial institutions of these countries to report the required FATCA information to their own governments, which then transmit the data to the IRS.[116] This framework includes elimination of FFI's obligation to negotiate a separate agreement with the IRS.[117] An alternative arrangement for implementing FATCA is Treasury Model II, which retains the structure of direct reporting by the FFIs to the IRS followed by information exchange upon request by the governments.[118] Countries such as Japan and Switzerland have chosen this alternative arrangement in lieu of the automatic exchange being promised under Treasury Model I.[119] The United States has more than 110 IGAs with various countries, either signed or agreed to in substance.[120]

The FATCA IGA between Luxembourg and the United States is one such example of a Model I IGA.[121] As stated previously, the ratification of the 2009 Luxembourg Protocol by the United States was thought necessary before the Luxembourg-US FATCA IGA could enter into force.[122] Unfortunately, Senator Rand Paul was

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116. *See* U.S. Department of Treasury, Model 1 Template, Agreement Between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA, at 1, 16 (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf [hereinafter Treasury Model I].

117. *See* Model I Press Release, *supra* note 115.

118. *See* U.S. Department of Treasury, Model 2 Template, Agreement Between the Government of the United States of America and the Government of [FATCA Partner] for Cooperation to Facilitate the Implementation of FATCA, at 1 (June 6, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf [hereinafter Treasury Model II].

119. Press Release, U.S. Department of Treasury, Statement of Mutual Cooperation and Understanding between the U.S. Department of the Treasury and the Authorities of Japan to Improve International Tax Compliance and to Facilitate Implementation of FATCA, at 1 (June 11, 2013), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Statement-Japan-6-11-2013.pdf. "[T]he Japan-U.S. arrangement appears to have been carefully drafted to avoid being called an agreement," which would have necessitated approval by the Japanese Diet. Kristen Parillo, *Japan, U.S. Release FATCA Statement*, 2013 WTD 113-1 (June 12, 2013).

120. *See Resource Center: Foreign Account Tax Compliance Act (FATCA)*, U.S. DEP'T OF TREASURY (2016), http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last updated Aug. 3, 2016). Seventy-five such Model I agreements have been negotiated and the Treasury Department website lists additional countries where there is an agreement in substance that will be treated as having an IGA in effect. *See id*.

121. *See generally* Luxembourg-US FATCA IGA, *supra* note 37.

122. *See id.* at art. 10.

blocking the necessary approval of the Protocol in the US Senate because of concerns regarding American privacy rights.[123] Notes were exchanged between Luxembourg and the United States on March 31 and April 1, 2015 that modified Article 10 of the Luxembourg-US FATCA IGA to only require Luxembourg action to make the agreement effective.[124] The Luxembourg Parliament adopted the FATCA IGA, which had previously been signed on March 28, 2014, unanimously on July 1, 2015, a necessary formality for the agreement to become effective.[125] Thus, Luxembourg completed its internal procedures required for the entry into force of the Luxembourg-US FATCA IGA on July 29, 2015. September 30, 2015 was the date of the first exchange of information with respect to 2014 between the Luxembourg tax authorities and the US competent authorities that is prescribed by the Luxembourg-US FATCA IGA.[126]

The Luxembourg law that implements FATCA includes data protection and information obligations necessary to fulfill the fundamental rights to privacy and data protection under EU law.[127]

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123. *See* Patrick Temple-West, *Senator Paul Won't Budge on Blocking Tax Treaties*, REUTERS (June 4, 2014, 4:09 PM), http://www.reuters.com/article/2014/06/04/us-usa-tax-treaties-idUSKBN0EF25M20140604 ("I can't support a bulk collection tax treaty that has complete disregard for the important protections provided to every American by the Fourth Amendment."); Letter from Rand Paul, U.S. Senator, to Harry Reid, Senate Majority Leader (May 7, 2014), (on file with the Wall Street Journal.) http://online.wsj.com/public/resources/documents/PaulLetter050714.pdf (explaining how under Senate rules a senator can place a "hold" to prevent a motion from reaching the Senate floor).

124. Echange de notes y relatives, signées les 31 mars et 1er avril 2015 – Entrée en vigueur (Memorial A, n° 156, p. 3796 du 10 août 2015), http://www.impotsdirects.public.lu/legislation/legi15/Memorial-A—-N_-156-du-10-aout-2015.pdf (on file with author) (stating that internal procedures have been satisfied and law has entered into effect).

125. Loi du 24 juillet 2015 portant approbation (Memorial A, n° 145, p. 2984 du 29 juillet 2015), http://www.impotsdirects.public.lu/legislation/legi15/Memorial-A—-N_-145-du-29-juillet-2015.pdf (on file with author) [hereinafter Law of 29 July 2015]; *see also FATCA-IGA Approved by the Parliament*, BONN STEICHEN & PARTNERS (July 2, 2015), http://www.bsp.lu/publications/articles-books/fatca-iga-approved-parliament#.VZqR93hjqxL; Véronique Poujol, *Fatca fait l'unanimité*, PAPERJAM (July 2, 2015, 9:06 AM), http://paperjam.lu/news/fatca-fait-lunanimite.

126. *See* Rectificatif de la loi du 24 juillet 2015 relative á FATCA (Oct. 12, 2015) (on file with author).

127. *See*, *e.g.*, Charter of Fundamental Rights of the European Union art. 8, 2000 O.J. C 364/11 ("Everyone has the right to the protection of personal data concerning him or her," in particular with respect to the fair processing of data "for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."); Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, U.N.T.S. 213; Convention for the Protection of Individuals with Regard to Automatic

The FATCA Implementation Law explicitly states that Reporting Financial Institutions ("RFI") are data controllers within the meaning of Luxembourg data protection law.[128] Thus, in advance of a data transmission to the Luxembourg authorities, the RFI must inform any affected person that personal data relating to this person will be collected and transferred in application of the Luxembourg-US IGA.[129] Furthermore, this new law details the "elements need[ed] to be part of this communication . . . [including] that the person concerned has the right to access and rectify the data transmitted."[130]

The Luxembourg tax authorities have also released final versions of administrative circulars that provide FATCA guidance.[131] One circular deals with the information to be reported to the Luxembourg direct tax authorities by June 30 for the information from the previous year. The Luxembourg tax authorities granted a delay until August 31, 2015 for the 2014 reporting.[132]

As detailed earlier, the G20 finance ministers unanimously endorsed the OECD's CRS proposal in July 2013[133] and committed "to automatic exchange of information as the new, global standard."[134] This is noteworthy as Luxembourg is a member of the OECD and is represented in the G20 by the European Union, which is the twentieth member of the G20. This new standard built upon the FATCA Model I IGA and requires "the automatic annual exchange of

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Processing of Personal Data art. 16(1), Jan. 28, 1981 ETS 108/1981; *see also* Council Directive 95/46/EC on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. L 281/31 art. 2(a) (defining personal data as "any information relating to an identified or identifiable legal person ('data subject')").

128. *See* Law of 29 July 2015, *supra* note 125, at art. 4(3).

129. *See id*. at art. 4(4).

130. *FATCA-Luxembourg Law Transposing the Luxembourg-US IGA, and Circular Letters Published*, DELOITTE (2015), http://www2.deloitte.com/lu/en/pages/tax/articles/fatca-lux-law-transposition-lux-us-iga-circular-letters.html?Id=lu:2em:3cc:4dcom_share:5awa:6dcom:tax [hereinafter FATCA Circulars].

131. For an example of a circular created by the Luxembourg government, see *Circulaire du directeur des contributions*, *GOUVERNEMENT DU GRAND-GRAND-DUCHÉ DE LUXEMBOURC* (Feb. 18, 2016), http://www.impotsdirects.public.lu/legislation/legi16/Circulaire-ECHA-3bis-du-18-fevrier-2016.pdf.

132. *See Newsletter du 31 juillet 2015*, ADMINISTRATION DES CONTRIBUTIONS DIRECTES, http://www.impotsdirects.public.lu/archive/newsletter/2015/nl_31072015/index.html ("Le délai pour échanger les fichiers de l'année fiscale 2014 dans le cadre de FATCA est reporté exceptionnellement au 31 août 2015.").

133. *See* OECD, AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION, *supra* note 31, at 6.

134. G20 MOSCOW, *supra* note 32.

bank information on residents of countries who directly or indirectly hold bank accounts in other countries."[135] The head of the OECD's Center for Tax Policy Pascal Saint-Amans explained, "[t]he idea is to put an end to the fact that you can hide your money in an offshore jurisdiction, and not report that money."[136] The G7 leaders reaffirmed their commitment to promoting this global standard for automatic exchange of information at the G7 Summit in Germany on June 8, 2015.[137] On July 30, 2015, Luxembourg approved legislation that would introduce CRS as of January 1, 2017, reporting on calendar year 2016.[138]

The pending increased exchange of information with the United States also accelerated the timetable for the automatic exchange of information between the Member States. Thus, on June 12, 2013, the Commission proposed an extension of mandatory automatic information exchange to dividends, capital gains, other financial income, and account balances as of January 1, 2015 for information from the 2014 tax year.[139] The Commission acknowledged that the IGAs that the EU Member States have concluded with the United States with regard to FATCA "have given further impetus to [automatic exchange of information] as a way of combating tax fraud

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135. *Id.*; *see* Byrce Baschuk, *G-20 Nations Say They Are on Track To Fight International Tax-Evasion Activity*, DAILY TAX REP. (BNA), Nov. 18, 2014, at I-2. ("Specifically, the standard requires banks in a particular jurisdiction to report to their government all the banking information—transactions, account balances, interest, dividends and other forms of financial income.").

136. G20 MOSCOW, *supra* note 32. Saint-Amans told reporters at a G20 news conference, "[i]f you don't hold the account directly, which is very often the case of high-end wealth individuals, but through a company which is held offshore, through a trust which is held offshore, this information still will have to be sent to the country of residence, or the beneficial owner—the ultimate owner of the bank account." Baschuk, *supra* note 135.

137. *See* Press Release, The White House, G-7 Leaders' Declaration (June 8, 2015), https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration. ("Moreover, we look forward to the rapid implementation of the new single global standard for automatic exchange of information by the end of 2017 or 2018, including by all financial centres subject to completing necessary legislative procedures. We also urge jurisdictions that have not yet, or not adequately, implemented the international standard for the exchange of information on request to do so expeditiously.").

138. *See* Ann M. Miller, *Luxembourg Approves Bill on Automatic Exchange of Financial Information*, WORLDWIDE TAX DAILY, Aug. 4, 2015.

139. *See* Commission Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, COM (2013) 348 final (June 12, 2013) at 9-10.

and evasion."[140] The Member States adopted a revision to the 2011 DAC in December 2014 that essentially implements the new OECD/G20 global standard of automatic exchange (CRS) within the European Union starting in 2017 (also known as "European FATCA").[141] Luxembourg and other Member States are required to implement European FATCA by enacting domestic legislation by December 31, 2015.[142] Luxembourg did so on August 10, 2015.[143]

The Commission set up an Expert Group on automatic exchange of financial account information for direct taxation purposes ("AEFI Group") in October 2014 to attempt to ensure that the EU legislation aligns with the OECD global standard on automatic exchange so as to minimize the administrative burden on financial intermediaries.[144] Unfortunately, this has not been done successfully with respect to the FATCA implementation rules, and there is no single global standard. The automatic exchange of information required by European FATCA and CRS goes beyond FATCA, as there are no thresholds and all amounts must be reported.[145] Also, the CRS does not exempt certain vehicles that are excluded by Annex II to the Model I FATCA IGA from reporting, such as treaty-qualified retirement funds, financial institutions with only low value accounts, and sponsored

140. *Id.* at 3.

141. *See* 2011 DAC, *supra* note 67, amended by Council Directive 2014/107/EU, 2014 O.J. L. 359 [hereinafter DAC II or European FATCA]. On December 9, 2014, Council Directive 2003/48/EC of June 3, 2003, on taxation of savings income in the form of interest payments, was completely replaced by Council Directive 2014/48/EU of March 24, 2014, and this latest directive will now be eliminated and absorbed by Council Directive 2011/16/EU on administrative cooperation, as amended by Council Directive 2014/107/EU of December 9, 2014.

142. *See, e.g.*, *U.K. Revenue & Customs, U.K. Issues Financial Accounts Automatic Info Exchange Guidance*, WORLDWIDE TAX DAILY, May 22, 2015.

143. *See* Projet de loi n° 6858, Session ordinaire 2014-2015, http://www.impotsdirects.public.lu/archive/newsletter/2015/nl_27052015/Projet-de-loi-n_-6858.pdf.

144. EUROPEAN COMMISSION, FIRST REPORT OF THE COMMISSION AEFI EXPERT GROUP ON THE IMPLEMENTATION OF DIRECTIVE 2014/107/EU FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION European Commission (Mar. 2015), http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/mutual_assistance/financial_account/first_report_expert_group_automatic_exchange_financial_information.pdf (on file with author).

145. *Luxembourg-"European FATCA" in 2016*, KPMG, http://www.kpmg.com/global/en/issuesandinsights/articlespublications/taxnewsflash/pages/2014-2/luxembourg-european-fatca-in-2016.aspx (last visited June 2, 2015) (on file with author).

investment entities.[146] Furthermore, CRS lacks the small local financial intermediary exception of the IGAs. With respect to an investment entity, including one in a non-adopting jurisdiction, "CRS's due diligence standards require the custodian use its anti-money laundering and know your customer information to report what it knows about the managers or beneficial ownership of the entity."[147] Although for FATCA, "financial institutions can stop identification processes once they reach a reportable entity," CRS ensures transparency by requiring "institutions to look through and determine controlling persons for both passive nonfinancial entities and investment entities in nonparticipating jurisdictions."[148]

One hundred and one jurisdictions have committed to the automatic exchange of information.[149] The OECD states in a footnote to its list of automatic exchange of information commitments that the United States will be undertaking automatic information exchanges from 2015 onward in accordance with FATCA and pursuant to its Intergovernmental Agreements with other jurisdictions.[150] Critics are saying that this resistance to the global disclosure standards of CRS is effectively making the United States "the biggest tax haven in the world."[151] The IRS's response is that it will only engage in reciprocal information exchanges with foreign jurisdictions that meet stringent

146. OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS IMPLEMENTATION HANDBOOK 89-90 (2015), http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf [hereinafter OECD, CRS HANDBOOK]. For a detailed comparison of CRS and FATCA Model I IGA, *see id.* at Part III.

147. Lee Sheppard, *The Reformation of FATCA*, 78 TAX NOTES INT'L 597, 598 (2015).

148. Andrew Velarde, *Official Questions Treatment of U.S. on OECD Reporting Standard*, 147 TAX NOTES 1008, 1008 (2015); *see also* OECD, CRS HANDBOOK, *supra* note 146, at 94.

149. For the complete list of countries, see OECD, AEOI: STATUS OF COMMITMENTS, *supra* note 40.

150. *See id.* at n.1.

151. Jesse Drucker, *The World's Favorite New Tax Haven is the United States*, BLOOMBERG BUSINESSWEEK (Jan. 27, 2016, 12:01 AM), http://www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-united-states (noting how, for example, Rothschild, a European financial institution, is moving the wealth of foreign clients out of tax havens such as Bermuda into trusts set up in Nevada, "one of several states promoting low taxes and confidentiality in their trust laws."); *see also* Scott Dyreng et al., *Exploring the Role Delaware Plays as a Tax Haven* (Oxford University Centre for Business Taxation), Working Paper No. WP 12/12 (2012).

privacy and technical standards.[152] The Tax Justice Network report severely criticizes the United States' unwillingness to participate in transparency initiatives such as the CRS and the creation of public registers of beneficial ownership, moving it up to third place on its financial secrecy index.[153] On the other hand, the report praises the progress being made by Luxembourg, moving it from second to sixth place.[154]

The US' Model 1A IGAs "include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange."[155] Starting with payments of interest not effectively connected with a US trade or business made in 2013 from an account maintained at a US office,[156] both US and certain non-US resident accounts will be uniformly disclosed to the IRS pursuant to Treasury regulations finalized in 2012.[157] This will facilitate "the ability of the United States to offer cooperative, reciprocal tax information exchange arrangements" with designated foreign tax administrations.[158] However, even though Senator Levin strongly recommended that the bank deposit regulations also be made applicable to accounts opened by corporations, trusts, or other entities that are beneficially owned by individuals,[159] this recommendation

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152. *See* Robert Wood, *U.S. Ranks as Top Tax Haven, Refusing to Share Tax Data Despite FATCA*, FORBES (Nov. 3, 2015, 8:46 AM), http://www.forbes.com/sites/robertwood/2015/11/03/u-s-ranks-as-top-tax-haven-refusing-to-share-tax-data-despite-fatca/#1b5b5ddd5928.

153. *See Financial Secrecy Index 2015 reveals improving global financial transparency, but USA threatens progress*, TAX JUSTICE NETWORK, Nov. 2, 2015, http://www.taxjustice.net/wp-content/uploads/2013/04/FSI-2015-Presser.pdf.

154. *See id*. at 6 ("In 2013, we called Luxembourg the 'Death Star of financial secrecy inside Europe'…Yet Luxembourg is among our greatest improvers . . . ").

155. OECD, AEOI: STATUS OF COMMITMENTS, *supra* note 40, at n.1.

156. Treas. Reg. §§ 1.6049-4(b)(5), 1.6049-8(a) (as amended in 2012).

157. Treas. Reg. §§ 1.6049-4, 1.6049-5, 1.6049-6 (as amended in 2012).

158. *Proposed Regulations to Require Reporting of Nonresident Alien Deposit Interest Income: Hearing Before the H. Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Financial Services*, 112th Cong. 96 (2011) (letter from Sen. Carl Levin to Comm'r Douglas H. Shulman) [hereinafter Hearing on Interest Reporting Regulations].

159. *See id*. at 99 ("[I]f a financial institution knows that the beneficial owner of an account is a non-U.S. individual, the financial institution should disclose the account to the IRS, even if the account is nominally held in the name of a foreign entity."). Senators Levin and Grassley were also advocating legislation that would require states to document the beneficial owners of the corporations. *See* Incorporation Transparency and Law Enforcement Assistance Act, S. 1483, 112th Cong. (2011). This legislation has been introduced in the 114th

was unfortunately not followed in the final bank deposit regulations. FATCA, on the other hand, requires foreign financial institutions to report on accounts held by an entity where more than ten percent is owned by a US person.[160] Thus, the bank deposit reporting rules only apply to the nonbusiness interest on directly held bank deposits of certain nonresident individuals.[161]

The preamble to the finalized bank deposit regulations stressed that information will only be exchanged where the United States is satisfied that the "foreign jurisdiction's legal framework" guarantees the confidentiality of the taxpayer information.[162] Thus, the finalized bank deposit regulations only require reporting of "interest paid to a nonresident alien individual resident in a country with which the United States has" an information exchange agreement in force.[163] This is extremely unfortunate because, from a compliance standpoint, it is easier for financial institutions to report all interest.[164] Furthermore, the United States does not have as extensive a network of information exchange agreements as some of our trading partners.[165] However, the list of countries eligible for the automatic exchange of the information being collected under these regulations has increased from a single country, Canada, to a list of thirty-seven countries.[166] Nevertheless, as the United States is expecting global

Congress in the House of Representatives as H.R. 4450 and in the Senate as S. 2489. Incorporation Transparency and Law Enforcement Assistance Act, H.R. 4450, 114th Cong. (2016) and S. 2489, 114th Cong. (2016).

160. *See* I.R.C. §§ 1471(d), 1473(2)(A)(i).

161. *See* Lee A. Sheppard, *Will U.S. Hypocrisy on Information Sharing Continue?*, 138 TAX NOTES 253, 256 (2013) ("[I]n other words, the stupid rich. Because the sophisticated rich use corporations and Delaware LLCs, they would not be affected.").

162. T.D. 9584, 77 Fed. Reg. at 23392 [hereinafter Bank Deposit regulations].

163. *Id*. at 23393 (noting these countries must be willing and able to reciprocate as well as have effective confidentiality laws and practices that ensure the use of the information only for the purposes of administering and enforcing their own tax laws).

164. Payors of course "may elect to report interest payments to all nonresident alien individuals" but financial institutions may not feel that they can do so unless mandated by law. *Id.* at 23393.

165. A revenue procedure lists the eligible countries and territories that have the appropriate agreements to exchange information by request. *See* Rev. Proc. 2014-64, 2014-53 I.R.B. 1022 (listing "countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of information").

166. *See id*. at § 4. Countries where Treasury has deemed automatic exchange is appropriate include Australia, Canada, Denmark, Finland, France, Germany, Guernsey, Ireland, Isle of Man, Italy, Jersey, Malta, Mauritius, Mexico, Netherlands, Norway, Spain, and

compliance from foreign financial institutions, US financial institutions should be collecting the same information.[167]

On May 26, 2014, Luxembourg ratified the *Convention on Mutual Administrative Assistance in Tax Matters* as well as its amending protocol. It entered into force on November 1, 2014.[168] The parties of the Convention provide administrative assistance to each other in tax matters such as exchange of information, assistance in recovery, and service of documents.[169] Although the United States is a founding signatory of the *Convention on Mutual Administrative Assistance in Tax Matters*,[170] the Convention did not enter into force until April 1, 1995 subject to certain reservations.[171] Pursuant to these reservations, the United States will not provide or receive assistance: (1) for taxes imposed by local authorities; (2) in the recovery of any tax claim; or (3) in serving documents.[172] On May 27, 2010, the Deputy Secretary of State signed, on behalf of the United States, a Protocol to the *Convention on Mutual Administrative Assistance* at the OECD in Paris, France.[173] However, as of July 2016, the United States has yet to either deposit the instrument of ratification or enter the Protocol into force.[174]

The United States does actively participate in the Global Forum on Transparency and Exchange of Information for Tax Purposes, the multilateral framework within which work on tax transparency and

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the United Kingdom. This list has been supplemented to add nineteen additional countries. *See* Rev. Proc. 2015-50, 2015-42 I.R.B. 583 and Rev. Proc. 2016-18, 2016-17 I.R.B. 635.

167. *See* Kaye, *supra* note 80, at 390.

168. *See generally* OECD, JURISDICTIONS PARTICIPATING IN THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS STATUS (Feb. 8, 2016), http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf [hereinafter OECD, STATUS OF THE CONVENTION].

169. *See generally* OECD, CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS AND AMENDING PROTOCOLS (1988).

170. *See generally* OECD, STATUS OF THE CONVENTION, *supra* note 168. The United States signed the Original Convention in 1989 and provided the deposit of instrument of ratification in 1991.

171. *See id*.

172. STAFF OF THE JOINT COMM. ON TAXATION, 101ST CONG., EXPLANATION OF PROPOSED CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS 3 (Comm. Print 1990) https://www.jct.gov/publications.html?func=startdown&id=3160.

173. Press Release, U.S. Department of Treasury, United States Signs Protocol to Multilateral Treaty on Mutual Administrative Assistance in Tax Matters (May 27, 2010), http:// www.treasury.gov/press-center/press-releases/Pages/tg726.aspx.

174. OECD, STATUS OF THE CONVENTION, *supra* note 168.

exchange of information has been accomplished since 2000 by over 120 OECD and non-OECD jurisdictions.[175] The Global Forum performs peer reviews of its member jurisdictions in two phases: in Phase 1, examining the quality of the "legal and regulatory framework for transparency and the exchange of information for tax purposes";[176] and in Phase 2, evaluating the implementation in practice of the international standards reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, as well as Article 26 of the OECD *Model Tax Convention on Income and on Capital* (*OECD Model Tax Convention*) and its commentary.[177]

As of 2011, the Global Forum had completed its combined Phase 1 and Phase 2 reviews of the US tax system.[178] It examined the categories of availability of information, access of information, and exchanging information.[179] With respect to availability of information, the United States was largely compliant concerning ownership information and reliable accounting records for entities and compliant with respect to banking information.[180] Regarding the access of information and exchanging information categories, the Global Forum determined the United States to be compliant.[181] However, recommendations were provided for each of the respective categories.[182] For example, information exchange partners had complained about the unavailability of beneficial ownership information of LLCs in several states, including Delaware.[183] Following the combined review, an overall rating of "Largely Compliant" was awarded to the United States.[184]

The Obama Administration has acknowledged the importance of the information received from the US treaty and information

175. OECD, GLOBAL FORUM, *supra* note 35, at 2.
176. *Id*. at 3-4.
177. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES PEER REVIEWS: UNITED STATES 2011: COMBINED: PHASE 1+ PHASE 2, 5 (2011), http://dx.doi.org/10.1787/9789264115064-en [hereinafter OECD, UNITED STATES 2011 REVIEW].
178. *See id*. at 11-12.
179. *See id*. at 11.
180. *See* OECD, GLOBAL FORUM, *supra* note 35, at 16 tbl.2.
181. *See id*.
182. OECD, UNITED STATES 2011 REVIEW, *supra* note 177, at 91, 93, 96.
183. *Id*. at 38-39, 87.
184. *See* OECD, GLOBAL FORUM, *supra* note 35, at 30 tbl.1.

exchange partners to the IRS enforcement efforts against offshore tax evasion.[185] As detailed in Intergovernmental Agreements, these jurisdictions such as Luxembourg expect US cooperation and reciprocity in information exchange.[186] Since the enactment of FATCA, the President has repeatedly proposed that US financial institutions be required to report to the IRS the same information "with respect to accounts held by certain foreign persons, or certain passive entities with substantial foreign owners" currently required of FFIs.[187] Enactment of these proposals is necessary if the IRS is to exchange equivalent information to be used by the US information exchange partners in their efforts to address the tax evasion by their residents. It is concerning that the current breakdown of the US legislative process has not allowed the United States to participate fully in the global movement toward transparency after having been the leading proponent of this movement. Luxembourg has the advantage of being able to swiftly enact the legislation necessary to implement the transparency policies accepted by its government.

II. ADVANCE TAX RULINGS

In the fall of 2014, a former PwC auditor allegedly leaked documents to the ICIJ.[188] The LuxLeaks incident has put Luxembourg even further on the defensive. In an interview, Luxembourg Finance Minister Gramegna stated that "[u]nfortunately, people who don't know Luxembourg all too often believe that our success is built on secrecy or that multinational companies come here to benefit from alleged '*tax deals.*'"[189] He further explained that these tax rulings were merely advance decisions confirming the tax treatment of a

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185. *See* US Department of the Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals 219 (Feb. 2015) [hereinafter 2016 Greenbook].

186. *See, e.g.*, Luxembourg-US FATCA IGA, *supra* note 37.

187. 2016 Greenbook, *supra* note 185, at 220. *See also* US Department of the Treasury, General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals 203 (February 2016), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2017.pdf.

188. *See* Wayne et al., *supra* note 2. Antoine Deltour has since received a 12-month suspended prison sentence after having been charged with "domestic theft, violation of professional secrecy, violation of business secrets, laundering, and fraudulent access to a system of automatic data treatment." *See* Bowers, *supra* note 3.

189. Pierre Gramegna, *Expertise, Not Taxes is the Secret to Luxembourg's Success*, LUXEMBOURGFORFINANCE (Jan. 2015), http://www.luxembourgforfinance.com/sites/luxembourgforfinance/files/lff_mag_december_v8_0.pdf at 3.

given transaction that is issued by the tax administration. These rulings are not publicly available,[190] just like all other tax documents related to the taxpayer's filing, but are accessible to the tax authorities of the company's home office. He went on to insist that "Luxembourg has embraced transparency" and is "committed to ensuring that all bank clients are tax compliant and that companies pay their fair share of taxes."[191]

The OECD's 1998 report entitled *Harmful Tax Competition: An Emerging Global Issue* set forth its criteria for evaluating preferential tax regimes[192] and certain Luxembourg provisions (such as the Luxembourg 1929 holding company regime) were subsequently identified as "potentially harmful."[193] Further, the 1998 report noted:

> [W]here a non-transparent regime allows the tax administration to give a prior determination to an individual taxpayer . . . this failure to notify the foreign tax authority [affected by such a decision] may curtail the ability of that tax authority to enforce effectively its rules.[194]

The OECD Harmful Tax Competition Report's recommendations focused on improving transparency and communication among nations and led to the establishment of the *OECD Model Agreement on Exchange of Information in Tax Matters* in 2002.[195]

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190. *See id.*

191. *Id.*

192. *See* OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 19–35 (1998), http://www.oecd.org/tax/transparency/44430243.pdf [hereinafter OECD, HARMFUL TAX COMPETITION REPORT]. The 1998 Report identified four main criteria for determining whether a preferential tax regime is harmful: (1) no or low taxation on the relevant income; (2) lack of transparency; (3) lack of effective exchange of information; and (4) the regime is ring-fenced from the domestic economy. *See id.*

193. OECD, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES 12-13 (2000), http://www.oecd.org/tax/harmful/2090192.pdf. Three tax regimes located in Luxembourg that were identified as potentially harmful included: 1. Insurance - "Provisions for Fluctuations in Re-Insurance Companies"; 2. Financing and Leasing – "Finance Branch"; and 3. Fund Managers – "Management companies [Taxation of management companies that manage only one mutual fund (1929 holdings)]." *Id*. at 13.

194. OECD, HARMFUL TAX COMPETITION REPORT, *supra* note 192, ¶ 66, at 30.

195. *See* OECD, AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS 4, http://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf (last visited Mar. 26, 2015)

Commissioned by the G20 after the financial crisis, the OECD issued a report on base erosion and profit shifting ("BEPS")[196] in February 2013 and followed up this report in July 2013 with an Action Plan of fifteen steps to address profit shifting by multinational corporations.[197] The OECD BEPS Action Plan once again targets harmful tax practices by establishing a working party on aggressive tax planning and by requiring disclosure of aggressive tax planning arrangements.[198] The second priority listed in the Harmful Tax Practices Interim Report for Action Item 5 (*Countering Harmful Practices More Effectively, Taking into Account Transparency and Substance*) is the improvement of tax transparency, which includes "compulsory spontaneous exchange on rulings related to preferential regimes."[199] The Harmful Tax Practices Interim Report highlights the inability of the home country to take defensive measures when the host country has negotiable tax provisions and a lack of transparency with respect to the administration of its tax regime.[200] The OECD guidance set forth in 2004 clarifies that advance tax rulings can cause issues where not shared with the resident country affected.[201]

Similar tax ruling procedures are common in many jurisdictions in the European Union. The Commission has been looking into the tax ruling practices of certain Member States because of "media reports alleging that some companies have received significant tax reductions by way of 'tax rulings' issued by national tax authorities."[202] The Commission is examining the compatibility of the

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(providing a non-binding agreement that sets forth two models for bilateral agreements for increasing transparency among nations).

196. *See* OECD, ADDRESSING BEPS, *supra* note 10, at 15 (reviewing various data and studies, and finding an increased separation between the locations of the actual business activities and the reporting of profits for tax purposes).

197. *See* OECD, BEPS ACTION PLAN, *supra* note 11.

198. *See id*., Action 5, at 18 ("Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on . . . "). The OECD envisions revising the existing framework by December 2015. *See id*. at 31.

199. OECD, COUNTERING HARMFUL PRACTICES, *supra* note 12, at 35.

200. *See id*.

201. *See* OECD, CONSOLIDATED APPLICATION NOTE: GUIDANCE IN APPLYING THE 1998 REPORT TO PREFERENTIAL TAX REGIMES 53 (2004), http://www.oecd.org/ctp/harmful/30901132.pdf.

202. European Commission Press Release IP/14/663, State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg) (June 11, 2014),

tax ruling practices with EU state aid rules "in the context of aggressive tax planning by certain multinationals with a view to ensure a level playing field."[203] The commissioner for taxation noted:

> Fair tax competition is essential for the integrity of the Single Market, for the fiscal sustainability of our Member States, and for a level-playing field between our businesses. Our social and economic model relies on it, so we must do all we can to defend it.[204]

EU State aid rules prohibit granting certain companies selective advantages that distort competition in the internal market. In general, State aid is financial support given by a government to a certain business sector, enterprise, or geographic region through either direct or indirect transfer of resources.[205] Specifically, Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"), states:

> Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market.[206]

Case law from the Court of Justice of the European Union ("CJEU") has found that selective tax advantages may amount to State aid.[207] The point is that in order to guarantee "free and fair competition within the EU's internal market, national governments [are] restrained from giving special tax benefits (or subsidies) to

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http://europa.eu/rapid/press-release_IP-14-663_en.htm [hereinafter Press Release, Transfer Pricing Arrangements].

203. European Commission Press Release IP/14/2742, State Aid: Commission Extends Information Enquiry on Tax Rulings Practice to all Member States (Dec. 17, 2014), http://europa.eu/rapid/press-release_IP-14-2742_en.htm [hereinafter Press Release, Enquiry on Tax Ruling Practice] ("A number of Member States *see*m to allow multinational companies to take advantage of their tax systems and thereby reduce their tax burden.")

204. Press Release, Transfer Pricing Arrangements, *supra* note 202, at 1 (emphasis removed).

205. CARLO PINTO, TAX COMPETITION AND EU LAW 100 (2003).

206. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2012 O.J. C326/47 at 91 [hereinafter TFEU]; *see also* Wolfgang Schön, *Taxation and State Aid Law in the European Union*, 36 COMMON MKT. L. REV. 911, 919 (1999).

207. *See* Pierpaolo Rossi-Maccanico, *Fiscal Aid, Tax Competition, and BEPS*, 75 TAX NOTES INT'L 857, 858 (2014); *see also* Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998, O.J. C 384/03.

specific sectors of the economy or to individual companies" unless this would "serve a common European goal."[208]

The Commission takes the position that as long as a tax administration's advance ruling system merely interprets the relevant tax provisions, the tax rulings will not violate the state aid provisions:[209]

> Tax rulings as such are not problematic: they are comfort letters by tax authorities giving a specific company clarity on how its corporate tax will be calculated or on the use of special tax provisions. However, tax rulings may involve state aid within the meaning of EU rules if they are used to provide selective advantages to a specific company or group of companies.[210]

Thus, starting in June 2013, the Commission began demanding documents with respect to the tax ruling practices of seven Member States: Belgium, Cyprus, Ireland, Luxembourg, Malta, the Netherlands, and the United Kingdom.[211] Luxembourg asserted that the Commission was overreaching and filed a lawsuit in the General Court of the European Union alleging "infringement of the procedural rules on state aid investigations and an encroachment on the autonomous competence of the Member States in direct tax matters."[212] This action for annulment was based on Article 263 TFEU, which gives the General Court the competence to "review the legality . . . of acts of the Commission . . . on grounds of lack of competence, infringement of an essential procedural requirement, . . . or misuse of powers."[213]

On June 11, 2014, the Commission began three formal investigations to determine whether the tax rulings issued by the tax

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208. Raymond Luja, *EU State Aid Rules and Their Limits*, 76 TAX NOTES INT'L 535 (2014). When there are State aid violations, the Commission is able to intervene and "order the recovery of any tax benefit or subsidy received in violation of EU rules, plus interest." *Id*. (citing Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty art. 14, 1999 O.J. L 83).

209. *See* TFEU, *supra* note 206. However, discretionary powers that allow the tax administration to deviate from the tax law are presumed to constitute unlawful state aid especially when there is a lack of transparency with respect to the decisions rendered. *See id*.

210. Press Release, Transfer Pricing Arrangements, *supra* note 202.

211. *See* Press Release, Enquiry on Tax Ruling Practice, *supra* note 203.

212. Werner Haslehner, *Advance Rulings and State Aid: Investigative Powers of the EU Commission (T-258/14)*, *in* ECJ-RECENT DEVELOPMENTS IN DIRECT TAXATION 2014, 90 (Michael Lang et al. eds., 2015) [hereinafter Haslehner, *Advance Rulings and State Aid*].

213. *Id*. at 92.

administrations in Ireland, The Netherlands, and Luxembourg with respect to the transfer pricing arrangements of Apple, Starbucks, and Fiat Finance and Trade, respectively, violate state aid restrictions.[214] The calculation of the taxable income proposed by the corporation can include reimbursement of a subsidiary or a branch based on fair market value. State aid will not be found as long as this reflects normal conditions of competition. However, calculations not reflecting market terms "could imply a more favourable treatment of the company compared to the treatment other taxpayers would normally receive under the Member States' tax rules. This may constitute state aid."[215] The Commission Vice President in charge of competition policy stated:

> In the current context of tight public budgets, it is particularly important that large multinationals pay their fair share of taxes. Under the EU's state aid rules, national authorities cannot take measures allowing certain companies to pay less tax than they should if the tax rules of the Member State were applied in a fair and non-discriminatory way.[216]

In the fall of 2014, the Commission made preliminary findings that Ireland's APA with Apple Inc. and the Netherland's APA with Starbucks Corp. constituted illegal state aid.[217] The Commission, after

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214. *See* Press Release, Transfer Pricing Arrangements, *supra* note 202; *see also id*. at 1 ("The opening of an in-depth investigation gives interested third parties, as well as the three Member States concerned, an opportunity to submit comments."); *id*. at 1-2 ("Transfer pricing refers to the prices charged for commercial transactions between various parts of the same group of companies, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of the same group. Transfer pricing influences the allocation of taxable profit between subsidiaries of a group located in different countries.").

215. *Id*. at 2 ("The Commission will examine if the three transfer pricing arrangements validated in the following tax rulings involve state aid to the benefit of the beneficiary companies: the individual rulings issued by the Irish tax authorities on the calculation of the taxable profit allocated to the Irish branches of Apple Sales International and of Apple Operations Europe; the individual ruling issued by the Dutch tax authorities on the calculation of the taxable basis in the Netherlands for manufacturing activities of Starbucks Manufacturing EMEA BV; the individual ruling issued by the Luxembourgish tax authorities on the calculation of the taxable basis in Luxembourg for the financing activities of Fiat Finance and Trade.").

216. *Id*. at 1.

217. *See* Commission Decision of State Aid SA. 38375 (2014/NN) (ex 2014/CP) Luxembourg: Alleged Aid to FFT, C (2014) 3627 final of June 11, 2014; European Commission Decision of State Aid SA. 38373 (2014/C) (ex 2014/NN) (ex 2014/CP) Ireland:

examining the information supplied by the Irish authorities "decided to initiate the procedure laid down in Article 108(2) TFEU."[218] If the Commission finds against Ireland, Apple Inc. will be required to repay ten years of tax savings back to Ireland.[219] In October 2015, the Commission found that the Fiat and Starbucks tax rulings did grant a selective tax advantage.[220]

Luxembourg, unlike the Netherlands and Ireland, did not provide the Commission with the complete information demanded, specifically a list of all of the tax rulings made in 2010, 2011, and 2012.[221] Because of the failure to adequately answer these requests for information, the Commission adopted an information injunction ordering Luxembourg to deliver the requested information.[222] The procedural regulation on State aid "entitles the Commission to request any information it deems necessary to assess for a state aid investigation."[223] Furthermore, Member States are not allowed to invoke professional secrecy as a justification "for refusing to provide information requested by the Commission."[224]

Alleged Aid to Apple, C (2014) 3606 final of June 11, 2014 [hereinafter Commission Decision, Alleged Aid to Apple].

218. Commission Decision, Alleged Aid to Apple, *supra* note 217, at 1.

219. *See* Devika Krishna Kumar, *Apple Says EU Probe of Irish Tax Policy could be 'Material'*, REUTERS (Apr. 29, 2015, 2:44 PM), http://www.reuters.com/article/2015/04/29/us-apple-tax-idUSKBN0NK2AU20150429.

220. *See* European Commission Press Release IP/15/5880, Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands are Illegal Under EU State Aid Rules (Oct. 21, 2015), http://europa.eu/rapid/press-release_IP-15-5880_en.htm.

221. *See* Haslehner, *Advance Rulings and State Aid*, *supra* note 212, at 91; s*ee also id*. (stating that the Commission had "requested detailed information regarding Luxembourg's tax ruling practice …and also a complete list of all rulings issued by Luxembourg's tax administration for the years 2010, 2011 and 2012…"); *id*. (noting that Luxembourg had responded by only providing information on the legal mechanisms of its ruling practice, taking the position that the demand for the list was "without proper legal basis.").

222. *See* European Commission Press Release IP/14/1309, State Aid: Commission Orders Luxembourg to Deliver Information on Tax Practices, (Mar. 24, 2014), http://europa.eu/rapid/press-release_IP-14-309_en.htm; *see also* Haslehner, *Advance Rulings and State Aid, supra* note 212, at 92 (citing Commission decision C (2014) 1986 final (case number SA.37267), Pratiques en matiere fiscal-Luxembourg).

223. Press Release, Enquiry on Tax Ruling Practice, *supra* note 203; *see also* Council Regulation 659/1999, art.10(3), 1999 O.J. L 83 (laying Down Detailed Rules for the Application of Article 108 of the Treaty on the Functioning of the European Union).

224. Press Release, Enquiry on Tax Ruling Practice, *supra* note 203; *see also* Commission Communication C(2003) 4582 of 1 December 2003 on Professional Secrecy in State Aid Decisions, 2003 O.J. C 297/03.

A draft law submitted to the Luxembourg Parliament on October 15, 2014, prior to the LuxLeaks, introduced a formal procedure for tax rulings.[225] The Luxembourg tax ruling procedures were heavily criticized after the LuxLeaks scandal, which probably assured speedy legislative action.[226] As adopted on December 19, 2014, these new procedures require, after a written request, that the head of the competent tax office confirm the tax consequences of the transactions contemplated by the taxpayer. This confirmation binds the Luxembourg tax authorities for five years.[227] On December 23, 2014, the government adopted a Grand-Ducal Regulation that provided further details, such as the creation of "a tax ruling commission to assist tax offices with the execution and the harmonized application of Luxembourg domestic and international tax law."[228] In a further initiative toward tax transparency, tax rulings will be published as "anonymous summaries in the annual report of the Luxembourg tax administration."[229] Tax rulings are issued to provide legal certainty for taxpayers, and these new procedures will assist in the uniform interpretation of tax laws.

Luxembourg withdrew the lawsuit against the Commission when the Commission agreed to expand its investigation into the compatibility of tax ruling practices with EU State aid rules to all Member States.[230] According to Luxembourg's finance minister: "Luxembourg has repeatedly stated that the analysis of matters relating to international taxation and tax rulings calls for a broad

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225. *See* Patrick Mischo & Franz Kerger, *After 'Lux Leaks': Welcome Changes to Luxembourg's Tax Ruling Practice*, 77 TAX NOTES INT'L 1197, 1197 (2015) [hereinafter Mischo & Kerger]; OECD, LUXEMBOURG 2011 REVIEW, *supra* note 61, at 12-13. Luxembourg is a small country with a constitutional monarchy and a unicameral legislature. The Chamber of Deputies comprises sixty members who have been elected for a five-year term. The Grand Duke, as Head of State, "promulgates laws and issues regulations and decrees for execution of laws." International law, including European Union law, "takes precedence over domestic law, including the Luxembourg Constitution." *Id.*

226. *See* Hamish Boland-Rudder, *Luxleaks A 'Game-Changer' For Europe: Finance Minister*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 22, 2014, 3:00 PM), http://www.icij.org/blog/2014/12/luxleaks-game-changer-europe-finance-minister.

227. *See* Mischo & Kerger, *supra* note 225, at 1200.

228. *Id*. at 1197-8.

229. *Id*. at 1200.

230. Press Release, Luxembourg Committed to Establishing a Level Playing Field With Regard To Transparency On Tax Rulings; Provides Commission With Requested Information, Ministère des Finances, (Dec. 18, 2014), http://www.mf.public.lu/actualites/2014/12/lux_rulings_181214/.

perspective, and cannot be limited to one country's regulatory framework and practice."[231] The Commission has requested that all Member States provide information about their tax ruling practice as well as a list of all companies receiving a tax ruling during the period ranging from 2010 to 2013.[232] The commissioner for competition policy, Margrethe Vestager, declared:

> We need a full picture of the tax rulings practices in the EU to identify if and where competition in the Single Market is being distorted through selective tax advantages. We will use the information received in today's enquiry as well as the knowledge gained from our ongoing investigations to combat tax avoidance and fight for fair tax competition.[233]

This demand complements the "recent calls for more transparency of tax rulings" by OECD and the G20. In addition, President Juncker committed to a legal proposal regarding the automatic exchange of information on tax rulings in December 2014.[234]

On March 18, 2015, Commissioner Moscovici presented the Commission's package of tax transparency measures designed to address "corporate tax avoidance and harmful tax competition in the EU."[235] The Commission points out that the aggressive tax planning engaged in by some MNCs has been aided by the tax rulings issued by certain tax administrations especially when there is a lack of transparency.[236] Thus, information exchange on advance cross-border rulings and advance pricing arrangements "that potentially affect the tax bases of more than one Member State requires a common and compulsory approach."[237] The Directive on Administrative Cooperation ("DAC")[238] had previously provided for mandatory spontaneous exchange of information between Member States in

231. Sebag, *supra* note 4 (quoting an e-mailed statement by Luxembourg Finance Minister Pierre Gramegna).

232. *See* Press Release, Enquiry on Tax Ruling Practice, *supra* note 203.

233. *Id*.

234. *See id*.

235. Press Release, IP/15/4610, Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency Package (Mar. 18, 2015), http://europa.eu/rapid/press-release_IP-15-4610_en.htm.

236. *See* Commission Proposal, *supra* note 22, at 2.

237. *Id*. at 4.

238. *See* 2011 DAC, *supra* note 67, at 1.

cases where the competent authority of one Member State had knowledge that there might be a loss of tax revenue in another Member State from such cross-border tax rulings.[239] However, the discretion given to the issuing Member State to determine which other Member States should be informed led to a negligible exchange of information of advance cross-border tax rulings and advance pricing arrangements.[240] In fact, De Masi, a German member of the European Parliament who testified in Deltour's defense in the case before the Luxembourg District Court, asserts that Luxembourg violated this Directive by not exchanging some of these tax rulings with the relevant Member States.[241]

The European Council adopted the Directive to Exchange Cross-Border Rulings on December 8, 2015, stating that an increase in transparency was urgently required.[242] The Directive requires mandatory automatic exchange on a biannual basis of basic information on a standardized form with respect to cross-border tax rulings and advance pricing agreements between all EU Member States and also with the Commission.[243] Concerns over the potential for disclosure of commercial, industrial, or professional secrets seem unwarranted due to the limited nature of the information that is required to be shared with all Member States through access to a secure central directory.[244] The form would include the following information: (1) the taxpayer (unless an individual) and any group of companies to which it belongs; (2) a summary of the content of the advance cross-border ruling or APA, including a description of the

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239. *See* Commission Proposal, *supra* note 22, at 7-8.

240. *See id*. at 3, 8 ("There is, in practice, little information exchange between Member States on their advance tax rulings or transfer pricing arrangements even where these have an impact on other countries.").

241. *See* Teri Sprackland, Luxembourg Broke EU Law, LUXLEAKS Trial Witness Says, WORLDWIDE TAX DAILY (Apr. 28, 2016), 2016 WTD 82-1.

242. *See* Directive to Exchange Cross-Border Rulings, *supra* note 23, at pmbl. ("[R]ulings concerning tax–driven structures have, in certain cases, led to a low level of taxation of …income in the country issuing…the advance ruling and left artificially low amounts of income to be taxed in any other countries involved.").

243. *See id*. art. 8a (1) (the "competent authority of a Member State … shall, by automatic exchange, communicate information" about defined tax rulings that they issue or amend after December 31, 2016 "to the competent authorities of all other Member States" and the Commission; *id*. art. 8a(2) (this obligation extends to rulings issued in the five years before January 1, 2017, the date on which the Directive takes effect, which are still valid on the date of entry into force of the Directive.).

244. *See id*. at pmbl. (9), (12), (14), (19).

relevant business activities or transactions; (3) the transfer price; (4) the identification of the other Member States affected by the ruling; and (5) the identification of other Member States' legal entities affected by the ruling.[245] Member States must rely on exchange of information on request procedures to obtain additional information, such as the full text of advance cross-border tax ruling or the APA.[246]

The United States confronted a similar transparency issue in the 1970s when the publisher Tax Analysts sued to obtain disclosure of private letter rulings ("PLRs").[247] There were concerns over the unfairness of the development of private legal libraries for tax rulings by a few law firms and the major public accounting firms, which gave them "exclusive rights to IRS' ruling position on dynamic areas of tax law."[248] This dispute was resolved by the enactment of section 6110 in 1976,[249] which requires, with certain exceptions, that the text of any written determination the IRS issues and the related background documents must be made available for public inspection.[250] A written determination includes any ruling or determination letter.[251] Before making the documents available, the IRS must delete sensitive information, such as identifying details, trade secrets, and confidential commercial and financial information.[252] The Internal Revenue Code ("I.R.C." or "Code") also specifies the administrative and judicial remedies available to resolve disputes over the scope of the information disclosed.[253] Furthermore, the US Congress has exempted other statutory exclusions, such as return information, from these

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245. *See id*. art. 8a(6)(a)-(k).

246. *See id*. art. 8a(10).

247. *See* Michael J. McIntyre, *The Case for Public Disclosure of Advance Rulings on Transfer Pricing Methodologies*, 2 TAX NOTES INT'L 1127, 1129 (1990).

248. Rob Marvin, *Transfer Pricing: BNA Files Lawsuit to Force IRS to Release Redacted APAs*, DAILY TAX REP. (BNA), Feb. 28, 1996; *see also* McIntyre, *supra* note 247. Prior to the release of PLRs to the general public, the "rulings comprised the hidden tax law of the United States." *Id*. Available, however, to large firms in DC and New York, this access "gave the privileged firms an advantage in practicing before the IRS." *Id*.

249. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976).

250. *See* I.R.C. § 6110(a).

251. *See* I.R.C. § 6110(b)(1); I.R.C. § 6110(b)(2) (defining ''background file documents'' as any written material submitted in support of the request as well as any communications between the IRS and persons outside the IRS concerning such written determination that occur before the IRS issues the determination).

252. *See* I.R.C. § 6110(c).

253. *See* I.R.C. § 6110(f).

public disclosure requirements.[254] Return information includes any part of a written determination or background file that is not disclosed under section 6110.[255] The IRS released 1,756 redacted PLRs in 2010, 1,503 in 2011, 1,369 in 2012, 1,256 in 2013, 1,599 in 2014, and 1,119 in 2015.[256]

In 1991, the IRS issued a revenue procedure with details for obtaining a special type of private letter ruling known as an advance pricing agreement ("APA").[257] An APA "is a binding agreement between the Service and a taxpayer regarding future transfer pricing in international transactions."[258] The APA program focuses on identifying the appropriate transfer pricing methodology in order to resolve international transfer pricing issues prior to the filing of the corporate tax return. Taxpayers voluntarily participate in the APA program by submitting among other items: detailed tax and financial information; an economic study of the general industry pricing practices; a functional analysis; and a list of the taxpayer's competitors to the IRS for consideration.[259] The IRS engages in an extensive analysis of the taxpayer's functions and risks.

As private libraries of APAs started developing in the major public accounting and law firms, the Bureau of National Affairs, Inc. ("BNA") filed in federal court for the release of the transfer pricing methodologies approved in these APAs on February 27, 1996 under the Freedom of Information Act ("FOIA"), or under section 6110.[260]

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254. *See* I.R.C. § 6110(c)(3).

255. *See* I.R.C. § 6103(b)(2)(B) ("The term 'return information' means . . . any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110").

256. These findings are based on an original Lexis search, on file with author.

257. *See* Rev. Proc. 1991-22, 1991-1 C.B. 526 (this revenue ruling has since been superseded).

258. JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INT'L TAXATION, ¶ A3.11[13][a] (2015) (Westlaw (Advance Pricing Agreements (Private Letter Rulings)) [hereinafter KUNTZ & PERONI]. A bilateral APA is an advance agreement establishing an approved transfer pricing methodology entered into among the taxpayer, the IRS, and a foreign tax authority.

259. *See id.* at ¶ A3.11[13][b] (agreement procedure).

260. *See* Marvin, *supra* note 247 (noting that BNA Vice President and Executive Editor Kathleen D. Gill stated: "We hope to win the release of the transfer pricing methodologies with the taxpayer-specific information redacted from the released APAs, much like private letter rulings."); *see also* Bureau of National Affairs Inc. v. Commissioner, No. 96-CV376 (DC DC), filed on February 27, 1996; Bureau of National Affairs Inc. v. Commissioner, Nos. 96–376, 96–2820 (DC DC) and 96–1473 (D.D.C.).

Because APAs are prospective in application, BNA contended that they are not return information[261]: "Thus, at the time they are entered into, they do not relate to the determination of the existence, or possible existence, of liability or amount thereof [. . .]."[262] BNA also argued that the development of a public library of transfer pricing methodologies would be beneficial to all taxpayers by stating that "[t]axpayers will be able to compare the approved methods and design their own APAs based on IRS' past practice, thus expediting the approval of APAs to the benefit both of taxpayers and IRS."[263]

FOIA specifies the information that a federal agency must disclose[264] but also provides an exemption for items specifically exempted from disclosure by a statute.[265] Under section 6103, returns and return information are confidential and cannot be disclosed unless authorized by the Code. The Code defines return information broadly to include:

> [A] taxpayer's identity, any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax [. . .].[266]

Thus, returns and return information that section 6103 deems confidential are exempt from disclosure under FOIA.

The IRS had taken the position that all "information received or generated as part of the APA process pertains to a taxpayer's liability

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261. *See* Tax Management Portfolio No. 890 Foreign Income Transfer Pricing: Alternative Practical Strategies, 890 TM A107 (2006) [hereinafter Tax Management Portfolio].

262. STAFF OF THE JOINT COMM. ON TAXATION, 106TH CONG., GEN. EXPLANATION OF TAX LEGIS. ENACTED IN THE 106TH CONGR. (Comm. Print 2001), http://www.jct.gov/s-2-01.pdf [hereinafter JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION].

263. Marvin, *supra* note 248 (noting that BNA Vice President and Executive Editor Kathleen D. Gill stated BNA filed the complaint after exhausting its administrative options to obtain the transfer pricing methodologies, which multinational corporations use in part to determine how much income from intercompany transactions will be attributed to the United States for tax purposes and how much will be attributed to jurisdictions abroad).

264. *See* 5 U.S.C. § 552(a)(2) (2009).

265. *See* 5 U.S.C. § 552(b)(3) (2009). An agency is not required to disclose matters that are "specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . " Id.

266. I.R.C. § 6103(b)(2)(A) (2015).

and therefore was return information . . . subject to section 6103's restrictions on the dissemination of returns and return information."[267] However, in 1999, "the IRS conceded that APAs are 'rulings'" and agreed to their release.[268] The January 1999 notice stated that disclosure under "section 6110 will fully protect the confidentiality interests . . . while helping taxpayers better understand the issues involved in APAs and increasing public confidence in the fairness of the tax system as a whole."[269]

Perceived concerns over the insufficiency of the section 6110 procedures to protect their confidential information led some organizations and corporations to approach the US Congress for legislation to block this release.[270] By amending section 6103 to include APAs in the definition of return information,[271] "the IRS cannot publicly disclose an APA or the information, data, and documents related to an APA."[272] Because section 6110 is the exclusive means for the public to view IRS written determinations,[273] the public also cannot use FOIA to obtain APAs. As APAs and the related background information are excluded from the definition of "written determinations," the public inspection rules do not apply.[274]

The legislation does, however, require the IRS to publish an annual report that includes "information about the structure, composition, and operation of the APA program" but no information

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267. JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION, *supra* note 262, at 34 n.32 (citing Rev. Proc. 91–22, sec. 11, 1991–1 C.B. 526, 534 and Rev. Proc. 96–53, sec.12, 1996–2 C.B. 375, 386); *see also* I.R.C. § 6103(b)(2)(A).

268. JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION, *supra* note 262, at 34.

269. I.R.S. News Release IR-1999-05 (Jan. 11, 1999), http://www.irs.gov/pub/irs-news/ir-99-05.pdf.

270. *See id*.; *see also* KUNTZ & PERONI, *supra* note 258, at ¶ A3.11[13][c] (discussing Policy Considerations Regarding Public Disclosure).

271. *See* Ticket to Work and Work Incentives Improvement Act, Pub. L. No. 106-170, § 521(a), 113 Stat. 1925 (1999) (adding I.R.C. § 6103(b)(2)(C) and amending I.R.C. § 6110(b)(1)) [hereinafter Work Improvement Act]. By adding section 6103(b)(2)(C), the term "return information" includes any APA and any background information related to such an agreement. Tax Management Portfolio, *supra* note 261, at A107.

272. Martin A. Sullivan, *How To Decode APAs And Still Keep A Secret*, 21 TAX NOTES INT'L 1250, 1250 (2000); *see also* Work Incentives Improvement Act, § 521(a), 113 Stat. 1925 (1999).

273. *See* I.R.C. § 6110(m) (2012).

274. JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION, *supra* note 262, at 35.

that would identify a particular taxpayer.[275] The reports must also contain general descriptions of the methodologies and sources of comparables as well as statistics on the time to complete the process and the number of APA applications filed, executed pending, and renewed.[276] The most recent report "describes the experience, structure, and activities of the APMA Program during calendar year 2015. It does not provide guidance regarding the application of the arm's length standard."[277]

In 2012, the APA Program was transferred from the "Office of Chief Counsel to the Office of Transfer Pricing Operations within the Large Business and International Division of the IRS" and merged "with the United States Competent Authority staff responsible for transfer pricing cases" to form the Advanced Pricing and Mutual Agreement ("APMA") Program.[278] Thus, the team developing the IRS position in a bilateral or multilateral case and concluding the APA with the taxpayer is also responsible for obtaining an agreement on the case with the respective treaty partner(s). This single APA team eliminates inefficiencies and decreases resolution time with the treaty partner(s).[279] The current procedures can be found in Rev. Proc. 2015-41 and stress a preference for bilateral and multilateral APAs over unilateral APAs.[280]

The APMA program has concluded "more than 11,000 unilateral, bilateral, and multilateral agreements since 1991."[281] Unlike the private letter rulings, these rulings are not being released to the public. Given the global movement toward tax transparency, the LuxLeaks, and the European Union's State aid investigations into various multinationals transfer pricing arrangements, it is time to reexamine this policy and determine whether the public should have full access to the rulings (sanitized of course to remove all names and

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275. Tax Management Portfolio, *supra* note 261, at A108; *see also* Work Improvement Act, § 521(b), 113 Stat. 1925-27 (1999). The IRS issued the first such report in 2000; I.R.S. Announcement 2000-35, 2000-16 I.R.B. 922.

276. *See* JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION, *supra* note 262, at 35-6.

277. I.R.S. Announcement 2016-12, 2016-16 I.R.B. 1 (Announcement and Report Concerning Advance Pricing Agreements) [hereinafter I.R.S. Announcement on Advance Pricing Agreements].

278. *See id*. at 2.

279. *See id*.

280. *See* Rev. Proc. 2015-41, 2015-35 I.R.B. 263.

281. I.R.S. Announcement 2015-11, 2015-15 I.R.B. 883, 884.

confidential data). Professor McIntyre argued back in 1990 as the APA program was being formulated that a "need for some secrecy, however, does not justify total secrecy."[282]

The previous arguments for releasing the APAs to the public are still valid today. Taxpayer guidance such as this is imperative for a tax system that depends on voluntary compliance. The IRS should be able to redact enough information so that the taxpayer cannot be identified, while still releasing a version that is meaningful to other taxpayers.[283] Most of the taxpayers involved in the APMA program are publicly traded corporations that already submit significant amounts of information to the US Securities and Exchange Commission. These agreements are withheld "from the public while some taxpayers proclaim to the tax press that they have obtained such agreements."[284] Releasing the advance pricing agreements will build confidence in the APMA program by demonstrating that particular taxpayers are not getting favored treatment.[285] Similar to the rulings exchange system being established in the European Union, the disclosure should have a positive effect on the tax arrangements being approved.

Martin Sullivan has stated that with "the same effort required of other agencies complying with [FOIA]—Congress could have provided the public with access to valuable information contained in APAs and still protected taxpayer confidentiality."[286] Instead, the IRS is expending substantial taxpayer resources to help single taxpayers. The user fees for APA requests have historically been set at fifty percent of the government's estimated cost of completing the APA.[287] The new revenue procedure has increased these fees to approximately fifty-four percent of the estimated costs. Not until 2020 will the fees cover the total estimated cost of approving an APA.[288] The need for

282. McIntyre, *supra* note 247.

283. *See* KUNTZ & PERONI, *supra* note 258, at ¶ A3.11[13][c] (discussing Policy Considerations Regarding Public Disclosure).

284. *Id*.

285. *See id*.

286. Sullivan, *supra* note 272, at 1250.

287. *See* Kristen A. Parillo & Marie Sapirie, *Final APA, Competent Authority Guidance Hikes User Fees*, TAX NOTES INT'L, Aug. 17, 2015, (statement of Varley).

288. *See id*. ("Our plan is to raise the fee incrementally over the next five years, so by 2020 the fees will cover the total estimated cost").

efficiency strongly suggests release of these APA agreements so as to allow the substance of the agreements to help multiple taxpayers.

The fact that the burden of proof is on the government agency to justify nondisclosure and that administrative difficulties cannot justify nondisclosure are important FOIA principles.[289] Tremendous taxpayer resources are being expended to operate the APMA program without all taxpayers benefitting from the information, a valuable and growing body of tax law. Furthermore, the United States does not have State aid rules like the European Union to regulate companies gaining a competitive advantage over each other. More transparency in the APMA process would ensure such a result.

CONCLUSION

On April 4, 2016, the International Consortium of Investigative Journalists announced their access to the "Panama Papers," 11.5 million documents comprising forty years of emails, bank accounts and client records from the Panamanian law firm Mossack Fonseca.[290] This latest public disclosure reveals the offshore accounts of individuals and corporations from over 200 countries and demonstrates that the movement toward global transparency is inevitable. The Panama Papers are also a powerful reminder that transparency matters greatly in the war on tax evasion.

The public and the press, however, often fail to distinguish between tax avoidance and tax evasion, thus governments are scrambling to find further ways to curtail offshore tax avoidance as well as tax evasion. The European Union has reacted much more quickly than the United States. For example, in addition to sharing information between the EU tax authorities as previously discussed, the European Commission has also proposed a requirement for the public disclosure of key information by large multinationals.[291] After the public outcry following the Panama Papers revelations, the Commission tweaked this proposal to require country-specific

289. *See* Sullivan, *supra* note 272, at 1251.

290. Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://panamapapers.icij.org/20160403-panama-papers-global-overview.html.

291. *See* European Commission Press Release, IP/16/1349 (April 12, 2016).

reporting for tax haven jurisdictions in the final proposed directive.[292] Furthermore, the G5 countries of France, Germany, Italy, Spain and the United Kingdom have pledged to develop a global initiative for the automatic exchange of beneficial ownership information stating that "identifying the ultimate beneficial owner behind corporate structures is [the] key to fight[ing] tax evasion, money laundering, and elicit[ing] finance effectively."[293] The US Treasury Department has proposed regulations that require foreign-owned single–member limited liability companies to disclose beneficial ownership information.[294]

As discussed in Part I, the Obama Administration has acknowledged the importance of the information received from the US information exchange partners to the IRS enforcement efforts against offshore tax evasion. The President has repeatedly proposed that US financial institutions be required to report to the IRS the same information on nonresidents currently required of FFIs with respect to US account holders. Only if such legislation is adopted will the IRS be able to exchange equivalent information to be used by the US information exchange partners in their efforts to address the tax evasion by their residents. As detailed in Part II, with respect to corporate tax avoidance, legislation is also necessary to bring more transparency to the APMA process. The current breakdown of the US legislative process has not allowed the United States to participate fully in the global movement toward transparency after having been the leading proponent of this movement with the enactment of FATCA.

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292. *See* Ryan Finley, Proposed EU Directive Requires Country-Specific Data for Tax Havens, TAX NOTES INT'L 234 (2016). The Commission's final proposal includes a "requirement for disaggregated data regarding non-EU member states that 'do not respect international tax good governance standards.'" *Id.* at 235.

293. Ryan Finley, EU Countries Announce Beneficial Ownership Exchange Plan, TAX NOTES INT'L 238, 239 (2016).

294. *See id.* at 239.