EXPLANATION OF PROPOSED PROTOCOL TO THE INCOME TAX TREATY BETWEEN THE UNITED STATES AND SWITZERLAND

Scheduled for a Hearing
Before the
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

On June 7, 2011

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION

May 20, 2011
JCX-31-11

CONTENTS

INTRODUCTION

This pamphlet,[1] prepared by the staff of the Joint Committee on Taxation, describes the proposed protocol to the present income tax treaty between the United States and Switzerland (the "proposed protocol"). The proposed protocol was signed on September 23, 2009, and is accompanied by official understandings implemented by an exchange of diplomatic notes (collectively, the "diplomatic notes") carried out on that same day. The Senate Committee on Foreign Relations has scheduled a public hearing on the proposed protocol for June 7, 2011.[2]

Part I of the pamphlet provides a summary of the proposed protocol. Part II provides a brief overview of U.S. tax laws relating to international trade and investment and of U.S. income tax treaties in general. Part III contains a brief overview of Swiss tax laws. Part IV contains an article-by-article explanation of the proposed protocol. Part V contains a discussion of issues relating to the exchange of information under the modernized article in the proposed protocol, including the extent to which the proposed protocol is an adequate response to concerns about bank secrecy and the need for greater transparency for tax purposes.

---

[1] This pamphlet may be cited as follows: Joint Committee on Taxation, *Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Switzerland* (JCX-31-11), May20, 2011. References to "the Code" are to the U.S. Internal Revenue Code of 1986, as amended. This document is available on the internet at http://www.jct.gov.

[2] For a copy of the proposed protocol, see Senate Treaty Doc. 112-1.

I. SUMMARY

The principal purposes of the present treaty between the United States and Switzerland are to reduce or eliminate double taxation of income earned by residents of either country from sources within the other country and to prevent avoidance or evasion of the taxes of the two countries. The present treaty also is intended to promote close economic cooperation between the two countries and to eliminate possible barriers to trade and investment caused by overlapping taxing jurisdictions of the two countries.

The proposed protocol modifies several provisions in the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington on October 2, 1996 (the "present treaty") and the Protocol signed at Washington on October 2, 1996 (the "1996 Protocol"). The rules of the proposed protocol generally are similar to rules of recent U.S. income tax treaties, the 2006 U.S. model income tax treaty ("U.S. Model treaty"), and the 2010 model income tax treaty of the Organisation for Economic Co-operation and Development ("OECD Model treaty"). The present treaty, as amended by the proposed protocol, however, includes certain substantive deviations from these treaties and models. The deviations found in the articles modified by the proposed protocol are noted in the article-by-article description of the proposed protocol in Part IV of this pamphlet.

The proposed protocol amends Article 10 (Dividends) of the present treaty to expand the prohibition on source-country taxation of dividends beneficially owned by pension or other retirement arrangements resident in the other treaty country. Under the proposed protocol, the prohibition on source-country taxation also applies to dividends that are beneficially owned by an individual retirement savings plan set up in, and owned by a resident of, the other treaty country, so long as the competent authorities agree that the individual retirement savings plan generally corresponds to an individual retirement savings plan recognized in the other treaty country for tax purposes. The prohibition on source-country taxation is not available if the beneficial owner controls the company paying the dividend.

The proposed protocol changes the voluntary arbitration procedure of Article 25 (Mutual Agreement Procedure) of the present treaty to a mandatory arbitration procedure that is sometimes referred to as "last best offer" arbitration, in which each of the competent authorities proposes one and only one figure for settlement, and the arbitrator must select one of those figures as the award. Under the proposed protocol, unless a taxpayer or other "concerned person" (in general, a person whose tax liability is affected by the arbitration determination) does not accept the arbitration determination, it is binding on the treaty countries with respect to the case. A mandatory and binding arbitration procedure is included in the U.S. treaties with Belgium, Canada, France, and Germany.

Mutual administrative assistance is modernized under the proposed protocol. The proposed protocol replaces Article 26 (Exchange of Information) of the present treaty and paragraph 10 of the 1996 Protocol with rules that conform generally to the OECD standards. The proposed rules generally provide that, in response to specific requests, the two competent authorities will exchange such information as may be relevant in carrying out the provisions of the domestic laws of the United States and Switzerland concerning taxes covered by the treaty, to the extent the taxation under those laws is not contrary to the treaty.

Article 5 of the proposed protocol provides that the proposed protocol will enter into force upon the exchange of instruments of ratification, and it sets forth rules for when the provisions of the proposed protocol will take effect.

II. OVERVIEW OF U.S. TAXATION OF INTERNATIONAL TRADE AND INVESTMENT AND U.S. TAX TREATIES

This overview briefly describes certain U.S. tax rules relating to foreign income and foreign persons that apply in the absence of a U.S. tax treaty. This overview also discusses the general objectives of U.S. tax treaties and describes some of the modifications to U.S. tax rules made by treaties.

A. U.S. Tax Rules

The United States taxes U.S. citizens, residents, and corporations on their worldwide income, whether derived in the United States or abroad. The United States generally taxes nonresident alien individuals and foreign corporations on all their income that is effectively connected with the conduct of a trade or business in the United States (sometimes referred to as "effectively connected income"). The United States also taxes nonresident alien individuals and foreign corporations on certain U.S.-source income that is not effectively connected with a U.S. trade or business.

Income of a nonresident alien individual or foreign corporation that is effectively connected with the conduct of a trade or business in the United States generally is subject to U.S. tax in the same manner and at the same rates as income of a U.S. person. Deductions are allowed to the extent that they are related to effectively connected income. A foreign corporation also is subject to a flat 30-percent branch profits tax on its "dividend equivalent amount," which is a measure of the effectively connected earnings and profits of the corporation that are removed in any year from the conduct of its U.S. trade or business. In addition, a foreign corporation is subject to a flat 30-percent branch-level excess interest tax on the excess of the amount of interest that is deducted by the foreign corporation in computing its effectively connected income over the amount of interest that is paid by its U.S. trade or business.

U.S.-source fixed or determinable annual or periodical income of a nonresident alien individual or foreign corporation (including, for example, interest, dividends, rents, royalties, salaries, and annuities) that is not effectively connected with the conduct of a U.S. trade or business is subject to U.S. tax at a rate of 30 percent of the gross amount paid. Certain insurance premiums earned by a nonresident alien individual or foreign corporation are subject to U.S. tax at a rate of one or four percent of the premiums. These taxes generally are collected by means of withholding. Certain payments of U.S.-source income paid to foreign financial institutions and other foreign entities are also subject to withholding tax at a rate of 30 percent unless the foreign financial institution or foreign entity is compliant with specific reporting requirements.

Specific statutory exemptions from the 30-percent withholding tax are provided. For example, certain original issue discount and certain interest on deposits with banks or savings institutions are exempt from the 30-percent withholding tax. An exemption also is provided for certain interest paid on portfolio debt obligations. In addition, income of a foreign government or international organization from investments in U.S. securities is exempt from U.S. tax.

U.S.-source capital gains of a nonresident alien individual or a foreign corporation that are not effectively connected with a U.S. trade or business generally are exempt from U.S. tax, with two exceptions: (1) gains realized by a nonresident alien individual who is present in the United States for at least 183 days during the taxable year, and (2) certain gains from the disposition of interests in U.S. real property.

Rules are provided for the determination of the source of income. For example, interest and dividends paid by a U.S. resident or by a U.S. corporation generally are considered U.S.-source income. Conversely, dividends and interest paid by a foreign corporation generally are treated as foreign-source income. Notwithstanding this general rule that dividends and interest are sourced based upon the residence of the taxpayer making such a payment, special rules may apply in limited circumstances to treat as foreign source certain amounts paid by a U.S. resident taxpayer and treat as U.S. source certain amounts paid by a foreign resident taxpayer.[3] Rents and royalties paid for the use of property in the United States are considered U.S.-source income.

Because the United States taxes U.S. citizens, residents, and corporations on their worldwide income, double taxation of income can arise when income earned abroad by a U.S. person is taxed by the country in which the income is earned and also by the United States. The United States seeks to mitigate this double taxation generally by allowing U.S. persons to credit foreign income taxes paid against the U.S. tax imposed on their foreign-source income. A fundamental premise of the foreign tax credit is that it may not offset the U.S. tax liability on U.S.-source income. Therefore, the foreign tax credit provisions contain a limitation that ensures that the foreign tax credit offsets only the U.S. tax on foreign-source income. The foreign tax credit limitation generally is computed on a worldwide basis (as opposed to a "per-country" basis). The limitation is applied separately for certain classifications of income. In addition, a special limitation applies to credits for foreign taxes imposed on foreign oil and gas extraction income and foreign oil related income.

For foreign tax credit purposes, a U.S. corporation that owns 10 percent or more of the voting stock of a foreign corporation and receives a dividend from the foreign corporation (or is otherwise required to include in its income earnings of the foreign corporation) is deemed to have paid a portion of the foreign income taxes paid by the foreign corporation on its accumulated earnings. The taxes deemed paid by the U.S. corporation are included in its total foreign taxes paid and its foreign tax credit limitation calculations for the year in which the dividend is received.

---

[3] For tax years beginning before January 1, 2011, all (or a portion) of a payment of interest by a resident alien individual or domestic corporation was treated as foreign source if such individual or corporation met an 80-percent foreign business requirement. Although this provision was generally repealed for tax years beginning after December 31, 2010, other rules still apply to treat certain payments of interest by a foreign bank branch or foreign thrift branch of a domestic corporation or partnership as foreign source. Similarly, several rules apply to treat as U.S.-source certain payments made by a foreign resident. For example, certain interest paid by a foreign corporation that is engaged in a U.S. trade or business at any time during its taxable year or has income deemed effectively connected with a U.S. trade or business during such year is treated as U.S. source.

B. U.S. Tax Treaties

The traditional objectives of U.S. tax treaties have been the avoidance of international double taxation and the prevention of tax avoidance and evasion. Another related objective of U.S. tax treaties is the removal of the barriers to trade, capital flows, and commercial travel that may be caused by overlapping tax jurisdictions and by the burdens of complying with the tax laws of a jurisdiction when a person's contacts with, and income derived from, that jurisdiction are minimal. To a large extent, the treaty provisions designed to carry out these objectives supplement U.S. tax law provisions having the same objectives; treaty provisions modify the generally applicable statutory rules with provisions that take into account the particular tax system of the treaty partner.

The objective of limiting double taxation generally is accomplished in treaties through the agreement of each country to limit, in specified situations, its right to tax income earned within its territory by residents of the other country. For the most part, the various rate reductions and exemptions agreed to by the country in which income is derived (the "source country") in treaties are premised on the assumption that the country of residence of the taxpayer deriving the income (the "residence country") may tax the income at levels comparable to those imposed by the source country on its residents. Treaties also provide for the elimination of double taxation by requiring the residence country to allow a credit for taxes that the source country retains the right to impose under the treaty. In addition, in the case of certain types of income, treaties may provide for exemption by the residence country of income taxed by the source country.

Treaties define the term "resident" so that an individual or corporation generally will not be subject to tax as a resident by both of the countries. Treaties generally provide that neither country may tax business income derived by residents of the other country unless the business activities in the taxing jurisdiction are substantial enough to constitute a permanent establishment or fixed base in that jurisdiction. Treaties also contain commercial visitation exemptions under which individual residents of one country performing personal services in the other are not required to pay tax in that other country unless their contacts exceed certain specified minimums (for example, presence for a set number of days or earnings in excess of a specified amount). Treaties address the taxation of passive income such as dividends, interest, and royalties from sources within one country derived by residents of the other country either by providing that the income is taxed only in the recipient's country of residence or by reducing the rate of the source country's withholding tax imposed on the income. In this regard, the United States agrees in its tax treaties to reduce its 30-percent withholding tax (or, in the case of some income, to eliminate it entirely) in return for reciprocal treatment by its treaty partner. In particular, under the U.S. Model treaty and many U.S. tax treaties, source-country taxation of most payments of interest and royalties is eliminated, and, although not provided for in the U.S. Model treaty, many recent U.S. treaties forbid the source country from imposing withholding tax on dividends paid by an 80-percent owned subsidiary to a parent corporation organized in the other treaty country.

In its treaties, the United States, as a matter of policy, generally retains the right to tax its citizens and residents on their worldwide income as if the treaty had not come into effect. The United States also provides in its treaties that it allows a credit against U.S. tax for income taxes paid to the treaty partners, subject to the various limitations of U.S. law.

The objective of preventing tax avoidance and evasion generally is accomplished in treaties by the agreement of each country to exchange tax-related information. Treaties generally provide for the exchange of information between the tax authorities of the two countries when the information is necessary for carrying out provisions of the treaty or of their domestic tax laws. The obligation to exchange information under the treaties typically does not require either country to carry out measures contrary to its laws or administrative practices or to supply information that is not obtainable under its laws or in the normal course of its administration or that would reveal trade secrets or other information the disclosure of which would be contrary to public policy. Several recent treaties and protocols provide that notwithstanding the general treaty principle that treaty countries are not required to take any actions at variance with their domestic laws, a treaty country may not refuse to provide information requested by the other treaty country simply because the requested information is maintained by a financial institution, nominee, or person acting in an agency or fiduciary capacity. This provision thus explicitly overrides bank secrecy rules of the requested treaty country. The Internal Revenue Service (the "IRS"), and the treaty partner's tax authorities, also can request specific tax information from a treaty partner. These requests can include information to be used in criminal investigations or prosecutions.

Administrative cooperation between countries is enhanced further under treaties by the inclusion of a "competent authority" mechanism to resolve double taxation problems arising in individual cases and, more generally, to facilitate consultation between tax officials of the two governments. Several recent treaties also provide for mandatory arbitration of disputes that the competent authorities are unable to resolve by mutual agreement.

Treaties generally provide that neither country may subject nationals of the other country (or permanent establishments of enterprises of the other country) to taxation more burdensome than the tax it imposes on its own nationals (or on its own enterprises). Similarly, in general, neither treaty country may discriminate against enterprises owned by residents of the other country.

At times, residents of countries that do not have income tax treaties with the United States attempt to use a treaty between the United States and another country to avoid U.S. tax. To prevent third-country residents from obtaining treaty benefits intended for treaty country residents only, treaties generally contain "anti-treaty shopping" provisions designed to limit treaty benefits to bona fide residents of the two countries.

III. OVERVIEW OF TAXATION IN SWITZERLAND[4]

A. Income Taxes

Overview

Switzerland is a federation of 26 sovereign cantons (states). Income taxes are levied at both the federal and cantonal levels. In addition, Switzerland's 2,600 municipalities are generally empowered to levy their own taxes. The federation's ability to impose taxes is limited to those set out in the Federal Constitution. The Swiss Federal Constitution provides the federation with the right to levy, among others, a direct federal income tax. The constitutions of the cantons enable the cantons to levy income taxes as well. The Swiss Federal Constitution states that increases to the top individual or corporate income tax rates require a constitutional amendment by popular referendum. The same holds true of new cantonal taxes, which require constitutional amendments and popular referenda at the cantonal level.

In general, Swiss income taxes are imposed on a worldwide basis. Foreign business income as well as income from foreign immovable property, however, is exempt from Swiss federal tax, but considered when determining tax rates. In addition, tax relief is granted for dividends received from foreign and domestic participations at both the federal and cantonal level, and the cantons exempt holding companies of foreign entities from the cantonal income tax. Taxable income is computed annually and is either collected by assessment or withholding.

Individuals

The taxable income of individuals is divided into four categories: (1) earned income, including business income such as employment or self-employment income; (2) income from capital, including income from movable and immovable property; (3) income from social security and private pensions; and (4) other income, including irregular or singular income such as lottery prizes. Individuals are also taxed on the rental value of owner-occupied homes. Self-employed taxpayers may carry forward business losses for seven years, but may not carry back losses. Deductions and depreciation of business income of individuals is governed by the same principles that govern corporations (see below – "Corporations").

Capital gains are taxed at the federal level only if the asset was held for business purposes. The same treatment applies at the cantonal level, except that the cantons impose a gains tax on real estate held as a private asset. Capital gains from business assets are generally taxed at ordinary income rates at both the federal and cantonal levels. The cantons impose a higher real estate gains tax on short-term gains than on long-term gains.

---

[4] The information in this section relates to foreign law and is based on the staff of the Joint Committee on Taxation's review of publicly available secondary sources, including in large part Peter R. Altenburger et al., *Business Operations in Switzerland*, Tax Management Portfolio No. 986-3rd, and Roger M. Cadosch, International Bureau of Fiscal Documentation, IBFD European Taxation Database, Switzerland, available at http://checkpoint.riag.com (last accessed May 20, 2011). The description is intended to serve as a general overview; it may not be fully accurate in all respects, as many details have been omitted and simplifying generalizations made for ease of exposition.

Taxes are withheld at the federal level only for certain passive income—including dividends, some interest income, lottery winnings, and some life insurance benefits—and on wages of some foreign resident workers. The withholding rate on dividends, interest on bank accounts and bonds, and lottery gains is 35 percent. The rate on pensions and annuities is 15 percent while life insurance payments above a threshold are withheld at an eight-percent rate. Residents can claim a credit or refund for taxes withheld.

Individuals may deduct alimony payments, interest paid on loans for business purposes and limited amounts of interest on loans for nonbusiness purposes, charitable donations up to 20 percent of taxable income, and expenses due to sickness or accident above five percent of taxable income. Individuals may also claim deductions for dependent children or other dependents. Additionally, they may deduct noncreditable foreign withholding taxes from countries with which Switzerland has no tax treaty. Dual wage earning married couples may claim a special deduction from the income of the spouse with the lower income. Contributions to pension plans are fully deductible, while payments from pensions are subject to income tax. Premiums for health and life insurance are deductible up to a limit.

Federal tax rates are constitutionally limited to a maximum rate of 11.5 percent. There are two progressive rate schedules. One applies to married couples, co-habiting same sex registered couples, and widowed, divorced, or single persons living with minor children. The second rate schedule applies to single individuals and all other taxpayers. Cantons impose their own tax, using their own progressive rate schedules. The tax rate is the "base amount" which can be modified only by constitutional amendment. Cantons set a "multiplier" to be applied to the base amount; this multiplier can be adjusted to reflect revenue needs. The multiplier multiplied by the base amount yields the tax owed at the cantonal level. Municipalities also use multipliers.

Corporations

The corporate tax system is classical, with tax applied to corporate earnings at the entity level and to distributions of corporate earnings at the shareholder level. In principle, resident corporations, defined as those incorporated in Switzerland or those that are effectively managed or controlled from Switzerland, are taxed on their worldwide income, yet this principle is mitigated by the failure to tax foreign permanent establishments and by the tax relief granted to dividends from foreign participations. Capital gains and interest are taxed at ordinary income rates at the federal level. Some cantons impose a capital gains tax, instead of an income tax, on capital gains from real property.

In general, dividends are taxable; however, corporations receive a "participation deduction" for certain qualified dividends at the federal and cantonal levels. Dividends qualify for a participation deduction if the parent company owns (i.e., "participates in") at least 10 percent of the total share capital of the subsidiary, or holds shares worth at least one million Swiss Francs (CHF) ($1.069 million).[5] Additionally, a parent corporation can receive the

[5] Except where otherwise indicated, the quoted tax rates and threshold amounts apply in 2011. U.S. dollar equivalents were calculated using the currency rate for January 1, 2011, according to OANDA's FX Converter, available at http://www.oanda.com.

participation deduction if it is entitled to 10 percent of the profits of the subsidiary. Corporations also receive a deduction for capital gains from sales of qualifying participations. The deductible portion of the participating dividend is a fraction equal to the ratio of the net dividend over the corporation's net total income. The net dividend is the participating dividend, less interest on loans, and less nonrefundable foreign withholding taxes. Corporations deduct from the net dividend five percent of the gross dividend for personnel and management costs. Hybrid instruments do not qualify for the participation deduction. The participation deduction applies at the federal and cantonal levels. A resident corporation may also qualify as a cantonal holding company if its main activity is administering its participations. As such, it will be exempt from cantonal and municipal income taxes and will only pay reduced cantonal net worth taxes, but it will not be exempt from Swiss federal taxes. The latter, however, will be reduced by relief for qualifying dividend income.

Switzerland's tax treaties and general federal tax law provide that certain items are not taxable to resident corporations, including income from a foreign permanent establishment or from real property outside of Switzerland. This exclusion applies even if no treaty is in force. Shareholder equity contributions, the conversion of debt into equity, and gains on like-kind exchanges are also exempt from tax. Additionally, various reorganization transactions are not subject to income tax.

Companies may carry forward losses seven years, but may not carry losses back. Corporations may also deduct from taxable income payments for the use of intangibles, rent, charitable contributions, social security (called "social insurance") contributions, and all taxes paid or accrued. Corporations may depreciate all tangible and some intangible assets using either the straight line or declining balance method. The Federal Tax Administration sets depreciation rates for various assets. Some examples are: office buildings, four percent; oil and water tanks, 20 percent; machinery and equipment, 30 percent; and goodwill and patents, 40 percent. Corporations may elect annually to write off up to one-third of the cost of their inventory, at both the federal and cantonal levels.

Because Switzerland has three levels of taxation, corporate income tax rates vary significantly depending on the canton and municipality of a corporation's residence. The maximum federal corporate income tax rate is 8.5 percent. The 2007 combined corporate tax rates for the cities of Basel, Geneva, Zug, and Zurich (including federal, cantonal, municipal taxes and their deductibility) were 24.8 percent, 24.2 percent, 16.3 percent, and 21.3 percent, respectively. Corporations also pay a net worth tax on their share capital at the cantonal and municipal levels at rates ranging from 0.08 percent to 0.52 percent.

Dividends distributed to nonresidents from resident companies and investment funds are withheld at 35 percent, and this also applies to dividends distributed by holding companies. Many tax treaties, however, reduce or even eliminate this withholding at the source. Bonds and bank accounts paying interest to nonresidents also withhold at the same rates. There are no taxes withheld on royalties at the federal level.

B. International Aspects of Taxation in Switzerland

Individuals

Individuals with permanent or temporary residence in Switzerland are subject to tax on their worldwide income, with the exception of income from a foreign permanent establishment, a foreign business, or foreign real property.[6] Swiss law looks to the individual's intent, as evidenced by his or her personal and business interests, to determine residence. An individual is a temporary resident for tax purposes if he or she remains in the country for 30 days or more and is gainfully employed, or if he or she otherwise remains in the country for 90 days or more.

Switzerland taxes nonresidents on Swiss-source income only. Included in this tax liability is income from ownership in Swiss enterprises or permanent establishments located in Switzerland, income earned from employment or contractual fees, income derived from real property, and income from activities as real property agents. Finally, dividends and interest from Swiss payors to nonresident payees are subject to a 35-percent withholding tax.

Corporations

Companies resident in Switzerland are subject to tax on their worldwide income, with the exception of income from a foreign permanent establishment, a foreign business, or foreign real property. In addition, resident companies enjoy tax relief on distributions from foreign participations. Moreover, holding companies of foreign entities are exempt from the cantonal income taxes. Resident corporations are defined as those incorporated in Switzerland or those that are effectively managed or controlled from Switzerland.

Nonresident corporations are subject to a 35-percent withholding tax on dividends, interest from bonds and bank accounts, and income from a Swiss investment fund, if less than 80 percent of the fund's income is foreign source. Nonresident corporations are also subject to tax on certain Swiss-source income such as income or capital gains from a business or permanent establishment in Switzerland, income from real property located in Switzerland, and income from a trade in real property located in Switzerland.

Under an agreement between the European Union ("EU") and Switzerland, certain dividends paid by Swiss subsidiaries to EU parents, or vice versa, are not subject to withholding tax. To receive this treatment, the parent must directly hold at least 25 percent of the shares in the subsidiary for at least two years; one corporation must be resident (for tax purposes) in the EU and the other must be resident in Switzerland; neither corporation may be resident in a third country under a double tax agreement with that third country; and both corporations must be subject to corporate income tax and be limited companies. Interest payments flowing between Switzerland and the EU are exempt from withholding under similar rules.

[6] Although this foreign income is exempt from tax, it is considered in the determination of the tax rate applicable to the taxpayer's taxable income.

Relief from double taxation

If there is no tax treaty, Switzerland allows two methods for individuals and corporations to eliminate or mitigate double taxation on foreign-source income: the exemption with progression method or the deduction method. Exemption with progression applies to income from foreign-based enterprises, foreign permanent establishments, and foreign immovable property. For other income, the deduction method allows taxpayers to take a deduction for foreign withholding taxes. In addition, dividends paid by foreign subsidiaries are subject to the participation deduction. If there is no tax treaty, Switzerland provides no foreign tax credit relief.

C. Other Taxes

Inheritance gift and wealth taxes

There are no inheritance or gift taxes at the federal level; however, the cantons may impose such taxes. In addition, the cantons impose an annual net worth tax on the share capital of corporations.

Social security taxes

The Swiss social security system is comprised of three mutually interdependent tiers or "pillars"—social security, company pension, and private savings. The government-run retirement, survivors, and disability plan is the first pillar, and it provides every resident with a minimum income. Premiums are approximately 12.1 percent of the individual's gross salary. Employees and employers split the payment of premiums, and the premiums are deductible by both parties.

The second pillar is managed by employers' pension funds. It is mandatory for all employees older than 24 with an annual salary over CHF 20,880 ($22,312). The amount of annual salary between CHF 24,360 ($26,031) and CHF 83,520 ($89,249) must be insured. Plans may insure salaries above the maximum required, but such additional insurance is not mandatory. Taxpayers may deduct contributions to pension plans that correspond to the amount of retirement income insured by the second pillar.

The third pillar is made up of individual pension plans, personal savings, or life insurance. Contributions to such savings vehicles are deductible to a limited extent depending on the individual's participation in the pension funds described in the second pillar.

Other indirect taxes

Switzerland imposes a value added tax ("VAT") on goods and services within Switzerland, services from a foreign business above CHF 10,000 ($10,686) per year, and imported goods. The amount subject to tax is the invoice value, net of tax. Prior to 2011, the rate was generally 7.6 percent; from January 1, 2011, onward the rate is generally eight percent with a reduced rate of 2.5 percent applying to certain goods and services.

At the federal level, Switzerland also imposes a one-percent stamp tax on the issuance of securities, the transfer of securities, and on the payment of insurance premiums. There is a lower stamp tax on the issuance of bonds and money market papers. With some exemptions, the taxable amount is equal to the total amount contributed to the company or the value of the shares issued, whichever is higher.

IV. EXPLANATION OF PROPOSED PROTOCOL

Article 1. Dividends

The proposed protocol amends Article 10 (Dividends) of the present treaty. Article 10 of the present treaty generally allows full residence-country taxation and limited source-country taxation of dividends. The present treaty includes a generally applicable maximum rate of withholding at source of 15 percent and a reduced five-percent maximum rate for dividends received by a company owning at least 10 percent of the voting stock of the dividend-paying company. Special rules apply to dividends received from regulated investment companies ("RICs") and real estate investment trusts ("REITs").

Paragraph 3 of Article 10 of the present treaty exempts from source-country taxation dividends paid to a pension plan or other retirement arrangement that is a resident in the other country if the pension plan or other retirement arrangement does not control the company paying the dividend. The Technical Explanation of the present treaty[7] notes that individual savings plans, such as individual retirement accounts in the United States and contributory private savings plans in Switzerland, are not pension plans or other retirement arrangements for purposes of this exemption.

The proposed protocol replaces paragraph 3 of Article 10 of the present treaty. The proposed protocol exempts from source-country taxation dividends paid to a pension plan or other retirement arrangement that is a resident in the other country, or an individual retirement savings plan that is set up in and owned by a resident of the other country. This exemption does not apply if such pension plan or other retirement arrangement or such individual retirement savings plan controls the company paying the dividend. The Technical Explanation of the proposed protocol[8] notes that in order to qualify for the exemption, a pension or retirement arrangement or individual retirement savings plan must satisfy the requirements of paragraph 2 of Article 22 (Limitation on Benefits).

Article 2. Mutual Agreement Procedure

Like other U.S. income tax treaties, the present treaty includes provisions in Article 25 (Mutual Agreement Procedure) that allow taxpayers to bring to the attention of the competent authorities problems under the treaty and that authorize the competent authorities of the two countries to cooperate to resolve disputes, clarify issues, and address cases of double taxation not provided for in the treaty. Under these provisions, collectively referred to as the mutual agreement procedure ("MAP"), a case that the competent authorities are unable to resolve may

---

[7] Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income Signed at Washington on October 2, 1996 and the Protocol Signed at Washington on October 2, 1996.

[8] Department of the Treasury Technical Explanation of the Protocol Signed at Washington on September 23, 2009 Amending the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Signed at Washington on October 2, 1996, as Amended by the Protocol Signed on October 2, 1996 (hereinafter referred to as the "Technical Explanation").

be submitted to arbitration if the competent authorities and the affected taxpayer agree to arbitration. The proposed protocol replaces this optional arbitration provision with rules for mandatory and binding arbitration for certain cases about which the competent authorities cannot reach a negotiated agreement. The diplomatic notes accompanying the proposed protocol provide additional rules and procedures governing the mandatory and binding arbitration. A mandatory and binding arbitration procedure is not included in the U.S. Model treaty, but has recently been included in the U.S. income tax treaties with Belgium, Canada, France, and Germany.

In general, the proposed protocol provides that a case will be resolved through arbitration if under the MAP the competent authorities have tried but are unable to reach complete agreement in a case and if three additional conditions are satisfied.

First, tax returns must have been filed with at least one of the treaty countries for the taxable years at issue in the case. Second, the case must not be one that the competent authorities agree, before the date on which arbitration proceedings otherwise would have begun, is not suitable for determination by arbitration. Third, all concerned persons and their authorized representatives or agents must agree (in a "confidentiality agreement") before the arbitration proceedings not to disclose to any other person any information, other than the determination of the arbitration panel, received during the course of the arbitration proceeding from either treaty country or the arbitration panel. The Technical Explanation states that the confidentiality agreement may be executed by any concerned person that has legal authority to bind any other concerned person on the matter. For example, according to the Technical Explanation, a parent corporation with the legal authority to bind its subsidiary to keeping information confidential may execute a confidentiality agreement for itself and its subsidiary. The term "concerned person" means both the person that has presented a case to a competent authority for consideration under the MAP and all other persons whose tax liability to either treaty country may be directly affected by a mutual agreement arising from that consideration.

In no event, however, may an unresolved case be submitted to arbitration if a decision on the case has already been rendered by a court or administrative tribunal of either treaty country.

The diplomatic notes include confidentiality rules for arbitration panel members and staff, and for the competent authorities. Those individuals may not disclose information relating to an arbitration proceeding (including the panel's determination) unless disclosure is permitted by the treaty and the domestic laws of the United States and Switzerland. According to the diplomatic notes, all material prepared in the course of or relating to an arbitration proceeding is considered information exchanged between treaty countries. All members of the arbitration panel and their staffs must send to each country statements in which they agree to abide by and be subject to the confidentiality and nondisclosure requirements of the treaty's exchange of information article and the applicable domestic laws of each treaty country. If any of those provisions conflict, the most restrictive provision applies.

The diplomatic notes provide that an arbitration panel's determination is limited to a conclusion about the amount of income, expense, or tax reportable to the treaty countries. The treatment of any associated interest or penalties is outside of the scope of the proceeding as is determined by the applicable domestic laws of each treaty country.

Under the diplomatic notes, even after an arbitration proceeding has been initiated, the competent authorities may agree to resolve a case and terminate the proceeding, and a concerned person may withdraw a request that the competent authorities engage in the MAP (and thereby terminate an arbitration proceeding) at any time.

The proposed protocol provides that arbitration proceedings in a case begin on the later of (1) two years after the commencement date of that case, unless both competent authorities previously have agreed to a different date, or (2) the earliest date on which both competent authorities have received from all concerned persons the confidentiality agreements described above. The commencement date of a case is the earliest date on which both competent authorities have received the information necessary to undertake substantive consideration for a mutual agreement.

The diplomatic notes provide that each competent authority must confirm in writing to the other competent authority and to the concerned person or persons the date on which it received the information necessary to undertake substantive consideration for a mutual agreement. Such information is submitted to the competent authorities under relevant internal rules and procedures of each of the treaty countries. However, this information is not considered received until both competent authorities have received copies of all materials submitted to either treaty country by the concerned person or persons in connection with the MAP.

Under the diplomatic notes, each treaty country has 90 days from the date on which an arbitration proceeding begins to send a written communication to the other treaty country appointing one member of the arbitration panel. The members of the arbitration panel may not be employees of the tax administration of the treaty country that appoints them. Within 60 days of the date on which the second such communication is sent, the two members appointed by the treaty countries must appoint a third member, and that member will serve as chair of the panel. If the members appointed by the treaty countries fail to agree to a third member, those members will be treated as dismissed and each treaty country must appoint a new member within 30 days of the dismissal of the original members. The competent authorities are directed to develop a nonexclusive list of individuals with familiarity in international tax matters who may serve as the chair of the panel, but in no case may the chair be a citizen of either treaty country. The diplomatic notes provide that the arbitration panel may adopt any procedures necessary for the conduct of its business so long as the procedures are not inconsistent with any other provisions of Article 25 or of the diplomatic notes.

Under the diplomatic notes, each treaty country is permitted to submit within 60 days of the appointment of the chair of the arbitration panel a proposed resolution of the case and a supporting position paper. The proposed resolution describes the proposed disposition of the specific amounts of income, expense, or taxation at issue in the case. The arbitration panel is required to provide copies of each treaty country's proposed resolution and supporting position to the other treaty country on the date on which the panel receives the latter of the submissions. If only one treaty country submits a proposed resolution to the panel within the 60-day time period, that proposed resolution is deemed to be the panel's determination, and the proceeding will be terminated. Each treaty country is permitted to submit a reply submission to the panel within 120 days of the appointment of the panel chair to address any points raised by the proposed resolution or position paper submitted by the other treaty country. The arbitration panel may request additional information, but the treaty countries are not otherwise permitted to submit additional information. If the arbitration panel asks a treaty country for additional information, the panel must provide to the other treaty country a copy of its request and a copy of the response it receives on the days on which the request is made and the response is received. Except in relation to limited logistical matters, the treaty countries and the arbitration panel may communicate only through written communications between the competent authorities and the chair of the panel.

The diplomatic notes provide that within 90 days of the appointment of the chair of the arbitration panel the presenter of the case to the competent authority of a treaty country may submit a position paper for consideration by the arbitration panel. The arbitration panel is required to provide copies of any such submission to both treaty countries on the date on which the panel receives the latter of the treaty country's submissions.

The diplomatic notes provide that the arbitration panel must deliver a determination in writing to the treaty countries within six months of the appointment of the chair. The panel must adopt as its determination one of the proposed resolutions submitted by the treaty countries.

The proposed protocol provides that unless a concerned person does not accept the determination of an arbitration panel, the determination constitutes a resolution by mutual agreement and will be binding on both treaty countries with respect to only that case. The diplomatic notes provide that the determination may not state a rationale and has no precedential value. Under the diplomatic notes, each concerned person must, within 30 days of receiving the panel's determination from the competent authority to which the case was first presented, advise that competent authority whether that concerned person accepts the determination. In the event the case is in litigation, any concerned person who is a party to the litigation must also advise, within the same time period, the relevant court of its acceptance of the determination of the arbitration panel as the resolution by mutual agreement and withdraw from the consideration of the court the issues resolved through the arbitration. If a concerned person fails to advise the relevant competent authority, and any relevant court, within the 30-day period, the determination is considered not to have been accepted. Any case in which the determination of the arbitration panel is not accepted may not later be a subject of arbitration.

The members of the arbitration panel and their staffs are considered persons or authorities to whom information may be exchanged under Article 26 (Exchange of Information) of the present treaty.

The diplomatic notes provide several additional rules related to the operation of an arbitration proceeding. An arbitration panel in a particular case will meet in facilities provided by the treaty country whose competent authority initiated the MAP in that case. In general, the fees of members of the arbitration panel will be set at a fixed amount of $2,000 per day or the equivalent amount in Swiss francs, subject to modification by the competent authorities. In general, the expenses of members of the arbitration panel are set in accordance with the International Centre for Settlement of Investment Disputes Schedule of Fees for arbitrators, as in effect on the date on which the arbitration proceedings begin, subject to any modifications by the competent authorities. The arbitration panel members' fees and expenses, as well as any fees for language translation, are borne equally by the United States and Switzerland. The treaty country whose competent authority initiated a MAP in a particular case is to provide, at its own cost, meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the proceeding. Any other costs are borne by the treaty country that incurs them.

The competent authorities of the treaty countries may modify or supplement the rules and procedures provided in the diplomatic notes to the extent necessary to better implement the intent of mandatory arbitration to eliminate double taxation.

Article 3. Exchange of Information

The proposed protocol replaces Article 26 of the present treaty with an article that is largely based on exchange of information provisions in the OECD Model treaty and the U.S. Model treaty, with several important exceptions. The description below explains the scope and operation of the individual paragraphs in the amendment to the treaty.

The United States and Switzerland agree to exchange such information as "may be relevant" in carrying out the provisions of the proposed protocol or in carrying out the provisions of the domestic laws of the two treaty countries concerning taxes that are imposed by a treaty country and subject to the treaty. Thus, the exchange of information is not restricted by paragraph 1 of Article 1 (Personal Scope), but is limited by Article 2 (Taxes Covered). The limitation on taxes that may be the subject of an exchange of information is a significant departure from both the OECD Model and U.S. Model treaties.

The use of the phrase "may be relevant" establishes a standard for the breadth of permissible exchanges. The language in the proposed protocol conforms to the standard used in Code section 7602, which is the principal source of authority for United States information gathering and examination of records. Under section 7602, IRS may request to examine any books, records or other material that "may be relevant," as confirmed by the U.S. Supreme Court in a line of cases beginning with *United States v. Powell.*[9]

In the United States, the administrative authority of the IRS to obtain information by service of an administrative summons extends to the territories and possessions under Code section 7651 in the same manner as if the possession or territory were a state. Thus, even though the definition of "United States" in paragraph 1(h) of Article 3 (General Definitions) limits its meaning to its geographic sense for most purposes under the treaty and specifically carves out possessions and territories, information in U.S. possessions is subject to exchange of information pursuant to a proper request under the treaty.

The proposed protocol provides that information may be exchanged to enable each treaty country to discharge one's treaty obligations and to administer and enforce its own domestic law with respect to taxes covered by the treaty, to the extent that taxation under that law is not contrary to the treaty. According to the Technical Explanation, administration of domestic tax law is an appropriate basis for exchange of information in cases in which the transaction to

[9] 379 U.S. 48 (1964).

which the information relates is a purely domestic transaction in the requested country and information about the transaction is not needed to carry out the proposed protocol. As an example, the Technical Explanation states (referencing the OECD Model treaty) that if a U.S. company and a Swiss company transact with one another through a company resident in a third country that has no treaty with the United States or Switzerland, the U.S. and Swiss competent authorities may, to enforce their internal rules, exchange information about prices their respective resident companies paid in their transactions with the third-country company.

In permitting exchanges of information for the purpose of enforcing domestic tax law, the proposed protocol encompasses information relating not only to the determination of tax, but also all aspects of civil and criminal tax cases, from initial investigations to collection, appeals, or judicial proceedings.

Accordingly, information about persons who are residents of neither Switzerland nor the United States may be requested and provided under the proposed protocol. For example, a third-country resident with a Swiss bank account that is reportable to the IRS may be the subject of a request by the competent authority for information with respect to the bank account.

Any information exchanged under the proposed protocol is to be treated as secret in the same manner as information obtained under the domestic laws of the treaty country receiving the information. The exchanged information may be disclosed only to persons or authorities (including courts, administrative bodies and legislative bodies) involved in the administration, enforcement or oversight of the tax laws. Such functions include assessment, collection, civil and criminal prosecution, and the determination of appeals in relation to the taxes to which the proposed protocol applies. The authority to disclose information to persons involved in oversight of taxes includes authority to disclose to persons or authorities such as the tax-writing committees of the U.S. Congress and the Government Accountability Office. Such persons or authorities receiving the information may use the information only in the performance of their role in overseeing the administration of U.S. tax laws. Finally, exchanged information may be disclosed in public court proceedings or in judicial decisions.

A treaty country is not required to carry out administrative measures at variance with the laws and administrative practice of either treaty country, to supply information that is not obtainable under the laws or in the normal administrative practice of either treaty country, or to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy. The Technical Explanation notes, however, that if a treaty country is asked to provide information, it should provide the information even if its own statute of limitations period has expired for the issue to which the information relates. According to the Technical Explanation, the statute of limitations of the treaty country making the request should govern. The Technical Explanation also states that even if the limitations on information exchange mean that a treaty country is not obligated to supply information in response to a request from the other treaty country, the requested country may choose to supply the information if doing so does not violate its internal law.

The proposed protocol limits the ability of either country to decline a request for information based on the lack of need for such information in a domestic tax investigation, or the expiration of the limitations period in the requested treaty country. If the information may be relevant to the requesting treaty country, the limitations described immediately above will not support a refusal to exchange the information.

If information is requested in accordance with the proposed protocol, the requested treaty country must obtain the information in the same manner and to the same extent as if the tax of the requesting treaty country were the tax of the requested treaty country and were being imposed by that treaty country, notwithstanding that the requested treaty country may not need the information at that time for purposes of administering its own tax rules. According to the Technical Explanation, the limitations on information exchange described elsewhere in the treaty (or as described below, under domestic law) do not prevent a treaty country from requesting information from a bank or a fiduciary that the treaty country does not need for its own tax purposes.

The proposed protocol limits the ability of either country to posit that domestic laws preclude response to a request for information. Unlike the U.S. Model treaty, it affirmatively grants information gathering power in certain circumstances. It does so by providing that the requested treaty country shall have the power to compel production of information held by banks, financial institutions, nominees, or persons acting in an agency or fiduciary capacity, or related to ownership interests in a person, if necessary to comply with a request to exchange such information, even if the information gathering powers of a treaty country would not otherwise include access to obtain bank or financial institution information for purposes of administering its domestic law. Thus, a competent authority receiving a request for information from a financial institution may not decline the request based on an argument that domestic bank secrecy or similar rules override the treaty obligations and preclude honoring the request. Procedural rights that do not depend upon status as a bank, financial institution, or the items described above (e.g., attorney-client privilege) are not affected by this provision.

Unlike the U.S. Model treaty, the exchange of information provision in the proposed protocol is of limited retroactivity. It applies only to requests for exchange of information after the date that the proposed protocol enters into force. Such requests may seek information relating to taxable periods beginning in the calendar year 2010 or later. If relevant, however, records of banks or financial institutions may be exchanged with respect to any time after signature of the proposed protocol, September 23, 2009.

Article 4. Paragraph 10 of the October 2, 1996 Protocol Relating to Exchange of Information

In addition to replacing Article 26, as described above, the proposed protocol also amends the 1996 Protocol that was executed and ratified contemporaneously with the present treaty. Article 4 of the proposed protocol replaces paragraph 10 of the 1996 Protocol. The new paragraph elaborates on the intent of the proposed protocol and details the manner in which the proposed Article 26 (Exchange of Information) is to be implemented, as described below.

Under the 1996 Protocol, paragraph 10 details the understanding of tax fraud or related fraudulent conduct that would support an exchange of information of banking information.

Neither the proposed Article 26 nor the proposed amendment to the 1996 Protocol requires that tax fraud or fraudulent behavior be established in order to permit exchange of information.

Subparagraph (a) of proposed paragraph 10 summarizes the understanding of the treaty countries about the information to be included in a specific request for exchange of information. The required information compromises five elements. They are: (1) information sufficiently specific to identify the person under examination or investigation; (2) the period of time for which information is requested; (3) the information that is sought, including the nature and form in which the information should be provided; (4) a statement of the tax purpose to which the information relates; and (5) the name of the person believed to be in possession of the requested information. With respect to the first described element, the proposed paragraph 10 includes an illustrative list of information that may be sufficient to identify a person, such as name, address, and account numbers.

Subparagraph (b) of proposed paragraph 10 explains the reasoning for requiring that the competent authority explain the purpose for which the information is needed. The treaty countries agree that the information requested need only meet a standard of "may be relevant" to tax matters in the requesting treaty country, to permit the "widest possible" production without authorizing "fishing expeditions." Despite the concern that a request for information may be so overbroad as to be irrelevant, the requirements of the proposed protocol proposed paragraph 10 are not to be interpreted in a manner that would frustrate effective exchange of information.

Subparagraph (c) of proposed paragraph 10 provides that, upon specific request by the competent authority of a treaty country, the other competent authority must provide information in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of the requested country with respect to its own taxes. A treaty country may request that responsive information be provided in an authenticated form that will facilitate use of that information in the administrative or judicial proceedings in the requesting country.

The proposed protocol commits the parties to honor only specific requests for exchange of information that comply with the requirements of subparagraph (a) of proposed paragraph 10. Subparagraph (d) of proposed paragraph 10 makes it clear that neither automatic nor spontaneous exchanges of information are required by the proposed protocol. Neither the treaty, the proposed protocol, nor the proposed paragraph 10 precludes such exchanges on a voluntary basis.

Article 5. Entry into Force

The proposed protocol provides that the protocol is subject to ratification in accordance with the applicable procedures of each treaty country and instruments of ratification will be exchanged as soon as possible. The proposed protocol will enter into force upon the exchange of instruments of ratification.

With respect to withholding taxes, the provisions of the proposed protocol will have effect for amounts paid or credited on or after the first day of January in the first calendar following the year in which the proposed protocol enters into force. Thus, if the proposed protocol enters into force on September 15, 2011, the withholding tax provisions have effect with respect to amounts paid or credited on or after January 1, 2012.

The proposed protocol applies with respect to Articles 3 and 4 to requests made on or after the date the proposed protocol enters into force. For information described in paragraph 5 of Article 25, the proposed protocol applies to information relating to any date beginning on or after September 23, 2009 (the date of signature of the proposed protocol). With respect to all other information, the proposed protocol applies to taxable periods beginning on or after January 1, 2010 (the year following the date of signature of the proposed protocol).

The proposed protocol sets forth a specific date for purposes of the binding arbitration provisions of new paragraphs 6 and 7 of revised Article 25 (Mutual Agreement Procedure). These provisions of the proposed protocol apply with respect to cases that are under consideration by the competent authorities as of the date the proposed protocol enters into force, and to cases that come under consideration after the proposed protocol enters into force. For cases under consideration as of the date the proposed protocol enters into force, the commencement date is the date the proposed protocol enters into force. The Technical Explanation notes that as a result, cases that are open and unresolved as of the date of the entry into force of the proposed protocol will go into binding arbitration on the later of two years after the entry into force of the proposed protocol (unless both competent authorities have previously agreed to a different date) and the earliest date upon which the agreement required by new paragraph 6(d) of revised Article 25 has been received by both competent authorities.

V. BACKGROUND AND ISSUES IN EXCHANGE OF INFORMATION AND ADMINISTRATIVE ASSISTANCE

Tax treaties establish the scope of information that can be exchanged between treaty parties. Exchange of information provisions first appeared in the late 1930s,[10] and are now included in all double tax conventions to which the United States is a party. A broad international consensus has coalesced around the issue of bank transparency for tax purposes and strengthened in recent years, in part due to events involving one of Switzerland's largest banks, UBS AG, the global financial crisis, and the general increase in globalization. As part of the greater attention to means of restoring integrity and stability to financial institutions, greater efforts have been made by the United States and other G-20 jurisdictions to reconcile the conflicts between jurisdictions, particularly between jurisdictions with strict bank secrecy, such as Switzerland and Luxembourg, and those seeking information needed to enforce their own tax laws. Although they have had a bilateral income tax treaty in force since 1951, the United States and Switzerland have engaged in limited exchange of information under the applicable tax treaties, due principally to strict bank secrecy rules under Swiss law and a commitment by the Swiss to protect such secrecy. The proposed protocol is thus a response to that history as well as part of the international trend in exchange of information. The following discussion addresses matters specific to the U.S.-Swiss experience, including the background of the U.S.-Swiss exchange of information to date, how both the United States and Switzerland have addressed the issue of transparency, and the extent to which the proposed protocol may avoid future problems. In the concluding section we discuss the U.S. position on exchange of information in general, as reflected in the U.S. Model treaty.

A. Background

The exchange of information article in the 1951 treaty was limited to "prevention of fraud or the like." Under the treaty, Switzerland applied a principle of dual criminality, requiring that the purpose for which the information was sought also be a valid purpose under local law. Because "fraud or the like" was limited to nontax crimes in Switzerland, information on civil or criminal tax cases was not available. The provision was substantially revised for the present treaty, signed in 1996, and accompanied by a contemporaneous protocol that elaborated on the terms used in the exchange of information article. That 1996 Protocol was intended to broaden the circumstances under which tax authorities could exchange information to include tax fraud or fraudulent conduct, both civil and criminal. It provided a definition at paragraph 10 of "tax fraud" to mean "fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of tax paid to a contracting state." In practice, exchange apparently remained limited, leading the competent authorities to negotiate a subsequent memorandum of understanding that included numerous examples of the facts upon which a treaty country may base its suspicions of fraud to support a request to exchange information.[11]

---

[10] Article XV of the U.S.-Sweden Double Tax Convention, signed on March 23, 1939.

[11] "Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Tax Convention of October 2, 1996," reprinted at paragraph 9106, *Tax Treaties*, (CCH 2005).

In response to the difficulties in compelling production of information across-borders, the United States has enacted a variety of statutory measures to require greater enhanced information reporting and encourage voluntary disclosure, at the risk of incurring penalties or adverse findings. These measures range from third-party information reporting and withholding at source rules, as well as enforcement measures such as specific authority for the Tax Court to order foreign entities invoking its jurisdiction to provide all relevant information[12] and a statutory exclusionary rule affecting admissibility of foreign-based documents that had not been provided to the government earlier in administrative or judicial proceedings.[13] Each is a valuable tool, but is limited to the situation in which an offshore transaction has been identified and selected for examination; they do not assist in identifying an offshore transaction. In the latter situation, the IRS may make use of its authority to issue so-called "John Doe" summonses, although recent experience has shown that enforcement of these summonses can be particularly difficult when the information sought is located in jurisdictions with restrictive bank secrecy laws.

1. The private banking scandals

The difficulties faced by the IRS and the Department of Justice ("DOJ") in obtaining information needed to enforce U.S. tax laws against U.S. persons who utilize foreign financial accounts or foreign entities have long concerned administrators and legislators alike. These difficulties were brought into focus by two scandals in 2008 involving private banking practices (i.e., wealth management services), one involving a Liechtenstein bank and the second, UBS AG, a Swiss financial institution.

In February 2008, the first global tax scandal erupted after a former employee of Liechtenstein Global Trust ("LGT") provided German authorities with data on hundreds of persons with accounts at LGT in Liechtenstein. The Liechtenstein information consisted of information about German clients of LGT as well as clients from other countries. Germany shared the information it received with other OECD countries who are members in the Forum for Tax Administration. In February 2008, Germany announced it had taken a number of enforcement actions on the basis of that information. In late February 2008, a number of other jurisdictions, including the United States, followed suit.[14]

[12] Code sec. 7456(b).

[13] Code sec. 982.

[14] IRS News Release, "IRS and Tax Treaty Partners Target Liechtenstein Accounts," IR-2008-26 (February 26, 2008) at 1; see also, e.g., HM Revenue & Customs Press Release, "Tax Commissioners battle against tax evasion," No. Nat 09/08 (February 26, 2008); Agenzia Entrate media release, "Agenzia Entrate ha ricevuto informazione su italiani con depositi in Liechtenstein" (February 26, 2008); Ministère du Budget, des comptes publics et de la fonction publique, "Lutte contre la fraude et l'évasion fiscale" (February 26, 2008); La Agencia Tributaria media release, "La Agencia Tributaria analiza información sobre ciudadanos españoles incluidos en las cuentas y depósitos bancarios de Liechtenstein" (February 26, 2008); Australian Taxation Office Media Release, "Tax Commissioners battle against tax evasion," No. 2008/08 (February 26, 2008).

The second occurred in May 2008, when the United States arrested Bradley Birkenfeld, a private banker formerly employed by UBS AG, on charges of having conspired with a U.S. citizen and business associate to defraud the United States of $7.2 million in taxes owed on $200 million of assets hidden in offshore accounts in Switzerland and Liechtenstein. UBS, based in Switzerland and one of the world's largest financial institutions, entered into an agreement with the IRS, effective January 1, 2001, to act as a qualified intermediary ("QI") for withholding with respect to U.S.-source income earned by non-U.S. persons. The conduct of Birkenfeld and his associates resulted in violations of the QI agreement.

A QI is defined as a foreign financial institution or a foreign clearing organization, other than a U.S. branch or U.S. office of such institution or organization, which has entered into a withholding and reporting agreement (a "QI agreement") with the IRS.[15] A foreign financial institution that becomes a QI is not required to forward beneficial ownership information with respect to its customers to a U.S. financial institution or other withholding agent of U.S.-source investment-type income to establish their eligibility for an exemption from, or reduced rate of, U.S. withholding tax.[16] Instead, the QI is permitted to establish for itself the eligibility of its customers for an exemption or reduced rate, based on information as to residence obtained under the "know-your-customer" rules to which the QI is subject in its home jurisdiction as approved by the IRS or as specified in the QI agreement. The QI certifies eligibility on behalf of its customers and provides withholding rate pooled information to the U.S. withholding agent as to the portion of each payment that qualifies for an exemption or reduced rate of withholding.

In exchange for entering into a QI agreement, the QI is able to shield the identities of its customers from other intermediaries (for example, other financial institutions in the chain of payment that may be business competitors of the QI) in certain circumstances and is subject to reduced information reporting duties to the IRS compared to those that apply in the absence of the QI agreement. This ability to shield customer information is limited, however, with respect to accounts of U.S. persons for which it acts as QI, because the QI is required to furnish Forms 1099 to its U.S. customers if it has assumed primary reporting and backup withholding responsibility for these accounts, or to provide Forms W-9 or information sufficient to complete a Form W-9, to the withholding agent in cases in which the QI has not assumed such primary responsibility.

Many of UBS's U.S. clients apparently did not wish to be identified nor did they agree to have taxes withheld, or in the alternative, to sell their U.S. assets as required under the QI agreement. Despite its obligations under the QI agreement, UBS later acknowledged, as part of the deferred prosecution agreement described below, that its bankers assisted U.S. customers in concealing their ownership of the assets held in UBS accounts by helping to create nominee and

---

[15] The definition also includes: a foreign branch or office of a U.S. financial institution or U.S. clearing organization; a foreign corporation for purposes of presenting income tax treaty claims on behalf of its shareholders; and any other person acceptable to the Internal Revenue Service. Treas. Reg. sec. 1.1441-1(e)(5)(ii).

[16] U.S. withholding agents are allowed to rely on a QI's Form W-8IMY without any underlying beneficial owner documentation. By contrast, nonqualified intermediaries are required both to provide a Form W-8IMY to a U.S. withholding agent and to forward with that document Form W-8s or W-9s for each beneficial owner.

sham entities. These entities were set up in various jurisdictions, including Switzerland, Liechtenstein, Panama, the British Virgin Islands, and Hong Kong. The UBS bankers and their U.S. customers then claimed that the accounts were owned by these nominee and sham entities and were therefore not subject to the reporting requirements imposed by the QI agreement.

2. Administrative response to the private banking scandals

Enforcement measures against UBS and its clients

On February 18, 2009, the United States District Court for the Southern District of Florida accepted a deferred prosecution agreement between the United States and UBS.[17] As part of the agreement, UBS acknowledged that, beginning in 2000 and continuing through 2007, it participated in a scheme to defraud the United States and the IRS by actively facilitating the creation of accounts in the names of offshore companies and allowing U.S. taxpayers to conceal their ownership of, or beneficial interest in, the accounts in an effort to evade U.S. tax reporting and payment requirements.

On February 19, 2009, the government filed a petition with the United States District Court for the Southern District of Florida to enforce a previously issued John Doe summons and to order UBS to disclose to the IRS the identities of the bank's U.S. customers with undeclared Swiss accounts.[18] The lawsuit alleged that there may be as many as 52,000 undeclared accounts with approximately $14.8 billion in assets as of the mid-2000s. UBS stated that its ability to comply with the summons was restricted by Swiss law; in particular, Swiss law prohibited UBS from producing information located in Switzerland. UBS took the position that it could produce only information located in the United States.[19] UBS also expressed concern that further enforcement of the summons would be in violation of the original QI agreement and the information exchange provisions of the income tax treaty between Switzerland and the United States. In particular, the QI agreement entered into between UBS and the IRS in 2001 expressly recognized that UBS would open and maintain accounts covered by Swiss financial privacy laws for U.S. clients who chose not to provide a Form W-9, as long as those accounts held no U.S. securities.

---

[17] See *United States v. UBS AG*, 09-60033-CR-COHN (S.D. Fl.). As part of the agreement, UBS agreed to pay $780 million in fines, penalties, interest, and restitution, and acknowledged the Statement of Facts in Exhibit C to that agreement.

[18] On July 1, 2008, a Federal district court in Florida granted the IRS permission to issue a summons to UBS seeking the names of U.S. citizens who were UBS customers for which reporting or withholding obligations may not have been met. In applications for such a summons, a taxpayer under investigation is identified as "John Doe," hence the term "John Doe summons."

[19] Written Testimony of Mark Branson, Chief Financial Officer of UBS AG, Hearing on Tax Haven Banks and U.S. Tax Compliance − Obtaining the Names of U.S Clients with Swiss Accounts Before the Permanent Subcommittee on Investigations, Senate Committee On Homeland Security and Governmental Affairs, 111th Congress, 1st Session, March 4, 2009. As part of the deferred prosecution agreement, the Swiss banking authorities allowed UBS to agree to transfer to DOJ approximately 250 names of U.S. resident account holders for which there was a reasonable suspicion of conduct constituting what Swiss law considers fraudulent acts. See Lee Sheppard, "Don't Ask, Don't Tell, Part III: UBS's Sweet Deal," *Tax Notes* (March 2, 2009), p. 1050.

On August 19, 2009, the U.S. and Swiss governments signed an agreement under which (1) the IRS subsequently submitted a separate request under the U.S.-Switzerland income tax treaty for information regarding approximately 4,450 accounts of certain U.S. customers of UBS, and (2) the Swiss government has agreed to process the request and to direct UBS to turn over information on those U.S. customers.[20] The agreement required the Swiss government to establish a task force to expedite its decisions as to disclosure under the treaty request. The Swiss Federal Tax Administration was required to render final decisions on 500 accounts within 90 days after the IRS submitted the treaty request and to render final decisions on the remaining accounts within 360 days after the treaty request. The Swiss government also agreed to review and process additional requests for information for other banks in cases in which an equivalent pattern of facts and circumstances exist. An annex to the agreement set forth the criteria used to determine which U.S. accounts were subject to the agreement. On November 16, 2010, the IRS announced that it had received information on over 4,000 accounts in response to the treaty request and anticipated receiving information on account holders whose objections to disclosure were pending in proceedings before the Swiss Federation Administration Court. Having received substantially all of the information requested under the treaty, the IRS withdrew the summons served on UBS AG.[21]

Voluntary disclosure initiatives

On March 26, 2009, as part of its efforts to manage the use of enforcement resources on offshore banking cases, the Commissioner of the IRS announced a voluntary compliance initiative under the terms of which it proposed to waive a significant portion of penalties in return for voluntary disclosure of previously undisclosed offshore accounts.[22] This initiative was the second compliance initiative available to the population of U.S. taxpayers who used offshore accounts to avoid paying taxes. The IRS had first attempted such an initiative in 2003, under the Offshore Voluntary Compliance Initiative ("OVCI").[23] That program encouraged the voluntary disclosure of offshore accounts accessed through credit card or other financial arrangements similar to those targeted by an IRS enforcement program known as the Offshore Credit Card Program. It was not, however, limited to those who used credit cards; its terms were broad enough to extend the partial amnesty to clients of offshore private banking. Under the OVCI, the IRS waived the civil fraud penalty and certain penalties relating to failure to file information and

[20] See Agreement Between the United States and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation (August 19, 2009); see also, "USA Requests Administrative Assistance in UBS Case," Federal Authorities of the Swiss Confederation, press release (August 31, 2007), available at http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=28799, last accessed March 1, 2011.

[21] IRS Commissioner Doug Shulman's Statement on UBS/Voluntary Disclosure Program (November 16, 2010), available at http://www.irs.gov/newsroom/article/0,,id=231520,00.html, last accessed March 1, 2011.

[22] See Kristen A. Parillo and Jeremiah Coder, "IRS Reduces Penalties on Voluntarily Disclosed Offshore Accounts," 2009 *Tax Notes Today* 57-02, reporting the statement from IRS Commissioner Doug Shulman on offshore income and the release of several internal memoranda outlining the settlement conditions for those who voluntarily disclose.

[23] Rev. Proc. 2003-11, sec. 2.02, 2003-1 C.B. 311.

other returns,[24] but taxpayers remained liable for back taxes, interest, and certain accuracy-related and delinquency penalties.[25]

Although the IRS reported that, as of July 31, 2003, it had received OVCI applications from 1,299 taxpayers who paid over $75 million in taxes and identified over 400 offshore promoters of abusive credit card or other financial arrangements,[26] success of the initiative was difficult to measure. Then IRS Commissioner Mark Everson discussed the limited success of the OVCI initiative at a hearing on August 1, 2006, during which he stated, "In reality, we did not have a good idea of the potential universe of individuals covered by this initiative. As a result, the incentive for taxpayers to come forward and take advantage of this initiative was diminished due to the fact that we did not have the ability to identify immediately and begin examinations for all non-participating individuals."[27]

With the high-profile prosecution of UBS AG and the efforts to identify its clients, the risk that bank customers who did not participate in the second initiative would nonetheless be discovered by the IRS was greater. Under the terms of the guidance issued to field agents, no FBAR[28] penalty would be imposed on any delinquent FBAR filer who was otherwise in compliance with the tax laws. Those who were not in compliance with the tax laws but who voluntarily disclosed and submitted delinquent FBARs and other information returns by September 23, 2009, were subject to an "offshore penalty" in lieu of the otherwise applicable FBAR penalties. The offshore penalty equaled 20 percent of the aggregate account balances at their highest point in any of the six years covered by the voluntary disclosure. Taxpayers who made voluntary disclosures were required to make all delinquent filings (e.g., FBARs, or information or income tax returns) for the six years covered and to pay all taxes, interest, and an accuracy or delinquency penalty. The offshore penalty amount could be reduced to five percent if the taxpayer did not open the account, there was no account activity while the taxpayer controlled the account, and all taxes were paid on the account.[29]

The IRS recently announced the 2011 Offshore Voluntary Disclosure Initiative, under terms similar to, but less generous than, those under the 2009 initiative. The maximum offshore penalty is now 25 percent of the aggregate account balance at any time in the years 2003 through

---

[24] News Release, Internal Revenue Service, IR-2003-48 (April 10, 2003). Taxpayers wishing to participate in the OVCI program were required to apply before April 15, 2003.

[25] Rev. Proc. 2003-11, *supra* ; News Release, Internal Revenue Service, IR-2003-5 (January 14, 2003).

[26] News Release, Internal Revenue Service, IR-2003-95 (July 31, 2003).

[27] Written Testimony of Commissioner of Internal Revenue Mark Everson Before Senate Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations Hearing on Offshore Abuses: The Enablers, The Tools and Offshore Secrecy, 109th Cong., 2d Sess., August 1, 2006.

[28] FBAR refers to the form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts," required by the Bank Secrecy Act, 31 U.S.C. sec. 5311. Failure to file the form is subject to both civil and criminal penalties.

[29] For news coverage of the 2009 voluntary disclosure announcement, see Kristen A. Parillo and Jeremiah Coder, "IRS Reduces Penalties on Voluntarily Disclosed Offshore Accounts," *Tax Notes* (March 30, 2009), p. 1561.

2010. As before, the offshore penalty may be reduced under certain circumstances. In the new initiative, the reduced penalty may be reduced to five percent if the taxpayer did not open the account, there was no account activity while the taxpayer controlled the account, and all taxes were paid on the account. In addition, taxpayers whose accounts did not exceed $75,000 in any year may be eligible for a reduced offshore penalty of 12.5 percent. All participants must pay taxes, interest, and an accuracy or delinquency penalty for all eight years in that period. The deadline for taxpayers to participate in the initiative is August 31, 2011.[30]

Expansion and modernization of U.S. exchange of information network

In response to the private banking scandals, efforts were made to modernize the exchange of information articles in bilateral treaties to which the United States is a party to ensure that exchange of information was required without regard to countries' domestic bank secrecy laws and to expand the U.S. exchange of information network. The proposed protocol is illustrative of those efforts. In addition to the proposed protocol, the United States and Luxembourg signed a protocol amending the U.S.-Luxembourg income tax treaty to conform that treaty to the exchange of information article in the U.S. Model treaty, as part of its efforts to bring all treaties to which the United States is a party into accord with OECD standards.[31] Expansion of the exchange of information network was also accomplished by expanding the network of countries with which the United States has executive agreements known as Tax Information Exchange Agreements ("TIEAs").

TIEAs are entered into by the Administration, without the advice and consent of the Senate. In contrast to the bilateral tax treaties, TIEAs are generally limited in scope to mutual exchange of information,[32] and entered into with countries that impose little or no income tax, or with which the United States has no tax treaty. The objective of a TIEA is to promote international cooperation in tax matters (civil and criminal) through exchange of information. A country must have adequate process for obtaining information; if the country is required to enact measures providing such process, then the entry into force of the TIEA may be delayed until such requirements have been met. The provisions of the TIEA generally require a country to override its domestic laws and practices pertaining to disclosure of information regarding taxes. The OECD adopted and published a model TIEA in 2002, with commentary; to date, the U.S. Treasury Department has not published its own model TIEA.

Since the 1980s, the United States has entered into over 20 such agreements. The recently intensified expansion efforts resulted in execution of a TIEA with Liechtenstein, signed on December 8, 2008, with Gibraltar, signed March 31, 2009, with Monaco, signed September 8,

---

[30] News Release, Internal Revenue Service, IR-2011-14 (February 8, 2011).

[31] U.S. Treasury Press Release, TG-143 (May 21, 2009).

[32] Section 274(h)(6)(C); see also *Barquero vs. United States*, 18 F.3d 1311, 1314-15 (5th Cir. 1994); Congressional Research Service, "Treaties and Other International Agreements: the Role of the United States Senate, A Study Prepared for the Committee on Foreign Relations," United States Senate, Library of Congress (January 2001), S. Prt. 106-71.

2009, and with Panama, signed November 30, 2010.[33] The terms of the TIEAs generally conform to the OECD model TIEA.

3. Legislative response to the private banking scandals - FATCA

Hearings before the Senate Permanent Subcommittee on Investigations, Senate Finance Committee, and House Committee on Ways and Means all addressed the problem of the evasion of U.S. tax through the use of offshore accounts in the wake of the whistleblower disclosures and the UBS summons proceedings. Expanded reporting obligations were enacted in the Hiring Incentives to Restore Employment ("HIRE") Act in 2010.[34] Subtitle A of Title V of the HIRE Act, entitled "Foreign Account Tax Compliance," was based on legislative proposals in the Foreign Account Tax Compliance Act ("FATCA"), a bill introduced in both the House and Senate on October 27, 2009.[35]

The HIRE Act made a number of changes to U.S. tax law to improve tax compliance, including changes with respect to foreign accounts and cross-border transactions. The Act added new Chapter 4 to Subtitle A of the Code, a reporting and withholding regime. Chapter 4 requires reporting of specific information by third parties for certain U.S. accounts held in foreign financial institutions ("FFIs").[36] Information reporting is encouraged through the withholding of tax on payments to FFIs unless the FFI enters into and complies with an information reporting agreement with the Secretary of the Treasury.[37]

The HIRE Act repeals certain foreign exceptions to the registered bond requirements, treats certain dividend equivalent payments received by foreign persons as U.S. source dividends for withholding tax purposes, and modifies certain rules in respect of foreign trusts. In addition to the added responsibilities of foreign financial institutions, changes in the reporting required of taxpayers were also enacted. U.S. individuals and, to the extent required by regulations, any domestic entity availed of by such individuals must disclose on their federal income tax returns their foreign financial assets and foreign financial accounts if the aggregate value of such assets exceeds $50,000. Failure to do so results in both a failure to disclose penalty as well as an increase in the otherwise applicable accuracy-related penalty. In addition, the HIRE Act extends

---

[33] Each of these TIEAS has since entered into force on the following dates: Liechtenstein on December 4, 2009; Gibraltar on January 1, 2010 (except with respect to criminal matters, for which it was effective as of December 22, 2009); Monaco on March 11, 2010, and Panama on April 18, 2011.

[34] Pub. L. No. 111-147.

[35] H.R. 3933 and S. 1934, respectively.

[36] Under section 1471(c), an FFI must report (1) the name, address, and taxpayer identification number of each U.S. person or a foreign entity with one or more substantial U.S. owners holding an account, (2) the account number, (3) the account balance or value, and (4) except as provided by the Secretary, the gross receipts and gross withdrawals or payments from the account.

[37] The information reporting requirement under the HIRE Act generally applies to payments made after December 31, 2012.

the statute of limitations for taxpayers who do not comply with foreign financial asset disclosure obligations or significantly under-report income associated with foreign assets.

4. Multilateral efforts gain momentum

In addition to purely domestic measures such as FATCA, the United States is one of many jurisdictions seeking new ways to ensure an adequate network of bilateral exchange of information agreements, whether by tax treaty or TIEA and exploring multilateral programs to complement those domestic efforts. To the extent that there is less than near universal acceptance of any emerging norms on the desirability of greater exchange of information, countries that are implementing international standards on exchange of information are understandably concerned that capital for investment will flow to noncompliant jurisdictions. Since 2008, several jurisdictions previously reluctant to commit to OECD standards of transparency ("the OECD standards") have done so, suggesting that political tolerance for shielding tax avoidance from exposure has been exhausted.

The development of international norms in recent years owes a great deal to the work done on transparency and exchange of information by the OECD Global Forum on Transparency and Exchange of Information (the "Global Forum"), begun in 1996. The OECD Standards require:

- Exchange of information where it is "foreseeably relevant" to the administration and enforcement of the domestic laws of a requesting State;
- No restrictions on exchange caused by bank secrecy or domestic tax interest requirements;
- Availability of reliable information and powers to obtain it;
- Respect for taxpayer rights; and
- Strict confidentiality of information exchanged.[38]

The OECD Standards have been endorsed by the G-20 Ministers of Finance. Also initiated in 1996 was the OECD's Harmful Tax Practices Project, which is carried out through the Forum on Harmful Tax Practices ("FHTP"). FHTP focuses on (1) eliminating harmful tax practices of preferential tax regimes of OECD Member states; (2) identifying tax havens and pursuing their commitments to OECD Standards; and (3) encouraging other non-OECD counties to associate themselves with FHTP work.[39] As of 2000, FHTP had identified more than 40 jurisdictions with harmful tax practices. By 2005, 35 of these had become "committed jurisdictions," that is, jurisdictions that formally documented their commitment to the OECD Standards. While seven jurisdictions on the original list initially refused to become committed

[38] Overview of the OECD's Work on International Tax Evasion (A note by the OECD Secretariat), p. 3 (March 23, 2009) ("2009 OECD Overview").

[39] 2009 OECD Overview, pp. 3-4.

jurisdictions, by early 2009, the list of noncooperative jurisdictions was reduced to three: Andorra, Monaco, and Liechtenstein.

As a meeting of the G-20 to be held in London on April 2, 2009, approached, concerns arose that the list of noncooperative jurisdictions would be revisited and possibly expanded at that meeting, on the basis of a survey conducted by the OECD of 46 jurisdictions that had not yet made sufficient progress with respect to the exchange of information and banking secrecy, including Luxembourg and Switzerland.[40] When a progress report was published at the end of the London meeting, Switzerland and Luxembourg were listed as jurisdictions that recently committed to the OECD standards.[41] Both jurisdictions avoided inclusion on the final list of noncooperative jurisdictions by announcing less than a month earlier their intention to commit to the OECD standards, as did Austria, Belgium, and Liechtenstein.[42]

At the conclusion of the 2009 G-8 Meeting, the Finance Ministers of the members of G-8 issued a statement[43] expressing support for efforts to improve tax information exchange and transparency. They endorsed efforts to expand the commitment to the implementation of the OECD Standards. In addition, they committed to the development of an effective peer-review mechanism to assess compliance with the same standards, and proposed that responsibility for development and conduct of such a process be charged to the Global Forum.

At the Global Forum meeting in Mexico City on September 1 and 2, 2009, the Global Forum began the process of establishing a Peer Review system. It formed a Peer Review Group and a Steering Group to develop the methodology and detailed terms of reference for a robust, transparent and accelerated process.[44] The methodology and terms developed by these groups and later adopted by the Global Forum contemplate a peer review conducted in two phases. Phase I, which began in 2010, examines the legal and regulatory framework in each jurisdiction. The Global Forum anticipates that it will complete Phase I reviews of all member countries within the initial three-year mandate.[45] Phase II evaluates the implementation of standards in

---

[40] Randall Jackson, Kristen A. Parillo, and David Stewart, "Tax Havens Agree to OECD Transparency Standards," 53 *Tax Notes Int'l* 1027 (March 23, 2009).

[41] OECD, *A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard* (April 2, 2009), reprinted at 2009 *Tax Notes Today* 62-65.

[42] Randall Jackson, Kristen A. Parillo, and David Stewart, "Tax Havens Agree to OECD Transparency Standards," 53 *Tax Notes Int'l* 1027 (March 23, 2009).

[43] Statement of G8 Finance Ministers, Lecce, Italy, June 13, 2009.

[44] OECD Centre for Tax Policy, Summary of Outcomes of the Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes Held in Mexico on 1-2 September 2009, (September 2, 2009), available at http://www.oecd.org/dataoecd/44/39/43610626.pdf (last accessed March 1, 2011).

[45] The United States, as well as several other countries with robust exchange of information programs and demonstrated commitment to the standards, agreed to a review combining Phases I and II. The review was conducted in late 2010. A report has not yet been issued.

practice. The Phase I peer review of Switzerland began in the second half of 2010. Its Phase II peer review is scheduled for the second half of 2012.[46]

[46] OECD, Launch of a Peer Review Process, Schedule of Reviews (2010).

B. The Swiss Response and the Proposed Protocol

As discussed above, Switzerland announced its commitment to the OECD standards at a time when it appeared that it could be included in a list of jurisdictions considered by the G-20 to be noncooperative. In March 2009, the Swiss Federal Council withdrew its reservation regarding Article 26 (Exchange of Information) of the OECD Model treaty, thus adopting the OECD standards on administrative assistance in tax matters.[47] It simultaneously announced key elements that it would require in implementing this position. These conditions can be read as a statement of the Swiss negotiating position, much as the U.S. Model treaty is the starting point for U.S. negotiators. The Swiss conditions established by the Federal Council are the following: (1) limitation of administrative assistance to individual cases and thus no fishing expeditions; (2) limitation to the exchange of information upon specific and justified request; (3) maintenance of procedural protections; (4) fair transitional solutions; (5) limitations to taxes governed by the agreement; (6) principle of subsidiarity in accordance with the OECD Model treaty; (7) willingness to eliminate discrimination; and (8) prohibition of retroactivity. Although Switzerland is now listed by the OECD on its progress reports as a jurisdiction that has fully committed to and implemented the transparency standards of the OECD,[48] a recent statement by the Swiss Federal Tax Authority alludes to negative feedback received in the course of Phase I of its peer review.[49]

The proposed protocol, by replacing Article 26 (Exchange of Information and Administrative Assistance) of the present treaty and amending paragraph 10 of the 1996 Protocol, closely adheres to the principles announced by Switzerland. It also conforms to the standards, if not the language, of the exchange of information provisions in the U.S. Model treaty in many respects. As a result, the proposed protocol may facilitate greater exchange of information than has occurred in the past, chiefly by eliminating the present treaty requirement that the requesting treaty country establish tax fraud or fraudulent conduct or the like as a basis for exchange of information and providing that domestic bank secrecy laws and lack of a domestic interest in the requested information are not possible grounds for refusing to provide requested information. Lack of proof of fraud, lack of a domestic interest in the information requested, and Swiss bank secrecy, alone or in combination, were previously relied upon by Swiss authorities in declining to exchange information. The proposed protocol attempts to

---

[47] See "Switzerland to adopt OECD standard on administrative assistance in fiscal matters," Federal Department of Finance, FDF (March 13, 2009), available at http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863 (last accessed March 1, 2011).

[48] OECD, *A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard* (February 18, 2011), available as Annex III to the background information brief at http:///www.oecd.org/dataoecd/32/45/43757434.pdf. The progress report updates the original report, published April 2, 2009, reprinted at TNT 62-65, in which the OECD reported that Switzerland had committed to, but not implemented, the OECD standards.

[49] Federal Authorities of the Swiss Confederation, "Requirements for administrative assistance in tax matters are to be revised," (Bern, February 2, 2011), ("Swiss Statement") available at http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=en&msg-id=37645 (as of March 2, 2011).

ensure that subsequent changes in domestic law cannot be relied upon to prevent access to the information by including in the proposed protocol a self-executing statement that the competent authorities are empowered to obtain access to the information notwithstanding any domestic legislation to the contrary.

Nevertheless, there are several areas in which questions about the extent to which the exchange of information article in the proposed protocol may prove effective are warranted. The proposed revisions to paragraph 10 of the 1996 Protocol reflect complete adoption of the first element listed above in the Swiss negotiating position, "limitation of administrative assistance to individual cases and thus no fishing expeditions." The limitation poses issues regarding (1) the extent to which the Swiss will continue to reject requests that do not name the taxpayer as a result of the requirement that a taxpayer be "typically" identified by name, and (2) the standard of relevance to be applied to requests for information, in light of the caveat against "fishing expeditions." In addition, the appropriate interpretation of the scope of purposes for which exchanged information may be used may be unnecessarily limited by comments in the Technical Explanation. One such concern is the extent to which the agreement that information may be used for purposes beyond the purposes identified in paragraph 1 of Article 26, is consistent with the comment in the Technical Explanation that such authority will only be exercised if consistent with the Mutual Legal Assistance Agreements.

1. Extent to which taxpayer names will continue to be required

The need to identify the taxpayers to whom the request for information relates is subject to varying interpretations about the extent to which information provided by the requesting treaty country is sufficiently specific. The proposed protocol mandates exchange of information only if made pursuant to specific requests for exchange of information and only if the request contains information sufficient to identify the taxpayer. It is not clear what information other than a name will be sufficient within the meaning of the proposed protocol to obtain the names of persons within an ascertainable class of persons. In the context of Code section 7609(f) and John Doe summonses in the United States, the persons whose tax data is sought must belong to an ascertainable class of persons who may have taken steps to avoid taxes. That standard was satisfied in the UBS controversy.

The ultimately successful treaty request submitted under the terms of the August 2009 settlement with UBS, which led to production of the information and withdrawal of the John Doe summons, was not the first time that a treaty request was considered in that case. Enforcement of the summons was sought in 2009 only after the United States, through the U.S. Competent Authority, had requested the information, despite long experience with Switzerland suggesting that the request would be futile both because the United States could not supply the names of the taxpayers involved and because it did not yet have information sufficiently probative of tax fraud or fraudulent conduct.[50] The purpose of the request was to obtain those names. Only after enforcement proceedings were approaching a point at which Swiss courts would be asked to grant comity to a U.S. court order were the treaty countries able to agree that exchange of

[50] See Declaration of Barry B. Shott, submitted with petition to enforce the summons, *United States v. UBS AG*, 09-20423 mc-GOLD (S.D. Fl.) (February 19, 2009).

information was permissible under the treaty. Use of the treaty request under the agreement negotiated by the United States and Switzerland as well as the United States and UBS enabled the Swiss to preserve Swiss sovereignty while nevertheless providing the information needed by the United States.

Although the proposed paragraph 10 to the 1996 Protocol, which details the information to be included in a request, includes the word "typically" in listing items to be provided, the Committee may wish to inquire about the nature and extent of assurances provided by Switzerland that the language in the proposed paragraph 10 will be treated as illustrative and not prescriptive, and that it will not be interpreted in a manner that would thwart future attempts to acquire information of the type received under the UBS treaty request. In a decision issued February 13 and published February 15, 2011, the Swiss tax authorities referred to negative comments in the course of Phase I of its Peer Review to the effect that Swiss conditions for administrative assistance were too restrictive and could prove to be a possible hindrance to effective exchange of information. In response, to proceed to Phase II of the Peer Review, Switzerland said it would revise its position on the need for identity of the taxpayer and the person in possession of the requested information to state "Other means of identification should also be admissible in the future."[51]

The rule of interpretation included in proposed paragraph 10 to the effect that the procedural requirements for an administrative assistance request must not be interpreted in a way that frustrates effective exchange of information is the subject of a proposed resolution before the Swiss Parliament. On April 6, 2011, the Swiss Federal Council asked that the Swiss Parliament concur with a resolution to the effect that the February 13 decision is consistent with the rule of interpretation in the proposed protocol. At the same time, the Swiss Federal Council requested authority to amend nine other bilateral agreements already ratified by Parliament and announced its intention to renegotiate 20 other agreements in order to add such a rule of interpretation and bring the agreements into conformity with the February 13 statement. In doing so, the Swiss authorities also stated that the rule of interpretation and the administrative assistance practices "still have to be fleshed out by defining the rule on interpretation."[52]

2. Standard of relevance for requests for exchange of information

The proposed protocol permits the competent authorities to exchange such information as may be relevant to the assessment, collection, and enforcement of the domestic laws of the two treaty countries, rather than limiting the information to that which is necessary. This conforms to the standard of Code section 7602 as confirmed by the U.S. Supreme Court in a line of cases beginning with *United States v. Powell*,[53] under which information need only be relevant to a legitimate purpose to be required to be produced. Despite that clear statement in Article 3 of the

[51] See http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=en&msg-id=37645.

[52] See http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=38487.

[53] 379 U.S. 48 (1964).

proposed protocol, proposed paragraph 10 in Article 4 of the proposed protocol clouds the standard of relevance that is to be applied by referring to "fishing expeditions" by the requesting treaty country and concerns that information requested may be unlikely to be relevant to the tax affairs of a given taxpayer.

By suggesting that the procedural safeguards elsewhere in the proposed protocol are insufficient to prevent "fishing expeditions" by the requesting treaty country, the proposed paragraph implies that previous requests and exchanges have been overly broad, despite clear history to the contrary in the conduct of the U.S.-Swiss exchange of information program.

Although the proposed paragraph concludes with a caveat that the concerns about fishing expeditions should not be used to justify use of procedural safeguards to frustrate exchange of information, the proposed paragraph as a whole suggests a problem to be curbed. Without guidance in the protocol as to whether the receiving treaty country is permitted or even expected to evaluate the relevance of a request independently of the apparent conclusion by the requesting Competent Authority that the information is relevant to a legitimate purpose, the paragraph suggests fertile ground for new bases on which to refuse to comply with requests for information. Given the history of difficulties with the exchange of information with Switzerland and the differing cultural expectations about access to such information, the Committee may wish to inquire about the inclusion of this paragraph, and whether there are other agreements, such as TIEAs, treaties, or protocols, that include such language. The use of the phrase "fishing expeditions" is typically pejorative, used as a cautionary expression to describe clearly improper practices rather than close questions. For example, in enacting John Doe summons authority, the House of Representatives reported that it balanced the concerns about privacy and freedom from "fishing expeditions" against the need for the tax authorities to gain access to information for civil purposes, and concluded that "It is enough for the Service to reveal to the court evidence that a transaction has occurred, and that the transaction (in the context of such facts as may be known to the Service at that time) is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported."[54]

3. Other issues about scope of exchanges

The proposed protocol limits use of information to matters pertaining to the taxes covered by the treaty, unless both treaty countries agree upon a proposed use of the information that would be consistent with domestic law of both countries. The proposed protocol and the proposed paragraph 10 do not elaborate on the scope of proposed uses that may be acceptable. In the Technical Explanation, Treasury states that the parties have agreed that the only such use of exchanged information will be limited to those uses that are within the scope of the Mutual Legal Assistance Treaty ("MLAT"). The reference to matters consistent with the scope of the MLAT is not given as an example of a use beyond those specified in the treaty; rather it is stated as a firm limitation on such uses. Although use of information consistent with an MLAT would clearly be consistent with law of both treaty countries and likely to be a use on which the treaty

[54] H. Rep. No. 94-658, p. 311 (1975).

countries would agree, it is not clear why such uses must be the only uses not specified in the treaty. The Committee may wish to inquire about this interpretation of the language of the proposed protocol, the commitment to limit use of information in the manner described in the Technical Explanation, and the rationale for that commitment.

To the extent that there were other perceived deficiencies in the former information exchange program, the Committee may wish to seek reassurances that they have been addressed and that a recurrence is unlikely. In addition to disagreements about appropriate interpretations of the treaty provisions, administrative concerns about timeliness and the form in which information was provided may be explored.

C. Effectiveness of the U.S. Model Treaty Article 26

In addition to the above issues, which are specific to the agreement between United States and Switzerland, there are several questions about the effectiveness and scope of provisions that conform to the U.S. Model treaty. As described above, there has been a developing international consensus around the issue of bank transparency for tax purposes. That consensus has increased attention to efforts to reconcile the conflicts between jurisdictions, particularly between jurisdictions with strict bank secrecy laws and those seeking bank information to enforce their own tax laws.[55] As a result, the Committee may wish to inquire as to whether the U.S. Model treaty published in 2006 remains the appropriate standard by which to measure an effective exchange of information program.

The U.S. Model treaty conforms with the norms for transparency and effective exchange of information articulated by the OECD, which are in turn the standards by which the OECD determines whether a country is committed to transparency. Those standards require the existence of mechanisms for exchange of information upon request; the availability of exchange of information for purposes of both criminal and civil tax matters; absence of restrictions of information exchange caused by application of the dual criminality principle[56] or a domestic tax interest requirement; respect for safeguards and limitations; strict confidentiality rules for information exchanged; and availability of reliable information (in particular bank, ownership, identity, and accounting information) and powers to obtain and provide such information in response to a specific request.[57]

1. Methods of exchange of information

The OECD standards do not require exchange other than upon specific requests for information, although the language permits the treaty countries to agree to provide for other exchange mechanisms. The OECD, in its commentary to the exchange of information provisions in the OECD Model treaty, specifies that the treaty "allows" the competent authorities to exchange information in any of three ways that treaty countries have traditionally operated[58] –

[55] See Joint Committee on Taxation, *Description of Revenue Provisions Contained in the President's Fiscal Year 2010 Budget Proposal; Part Three: Provisions Related to the Taxation of Cross-Border Income and Investment* (JCS-4-09), September 2009. Section VI of that pamphlet provides an overview of the international efforts to address these issues.

[56] The principle of dual criminality derives from the law regarding extradition and grounds for refusal to grant a request. Extradition is generally permitted only if the crime for which a person is to be extradited is treated as a similarly serious offense in the state in which the fugitive has sought refuge. *Restatement (Third) of the Foreign Relations Law of the United States*, sec. 476 (1987). The principle is relevant to a request for exchange of tax information only if the treaty in question limits the scope of its permitted exchanges to criminal tax matters.

[57] OECD, *Tax Cooperation: Towards a Level Playing Field, 2008 Assessment by the Global Forum on Taxation*, p. 8.

[58] OECD, Commentary on the Model Treaty Article 26, par. 9.

routine, spontaneous,[59] or specific exchanges.[60] With regard to the latter type of exchange, the Committee may wish to inquire as to the extent to which a request that a treaty country provide information in response to a John Doe summons[61] is a specific request within the meaning of the article, and whether protracted litigation similar to that which occurred in the UBS litigation[62] can be avoided or shortened.

The Committee may wish to explore issues related to "routine exchange of information." In this type of exchange, also referred to as "automatic exchange of information," the treaty countries identify categories of information that are consistently relevant to the tax administration of the receiving treaty country and agree to share such information on an ongoing basis, without the need for a specific request. Information that is automatically shared under this authority may include information that is not taxpayer-specific, such as news about changes in domestic tax legislation, or it may comprise voluminous taxpayer filings, such as magnetic disks containing the information from IRS Form 1042-S, relating to U.S.-source fixed or determinable income paid to persons claiming to be residents of the treaty country receiving the forms. The type of information, when it will be provided, and how frequently it will be provided are determined by the respective Competent Authorities after consultation. Once an agreement is reached, the information is automatically provided.

The Committee may wish to inquire about the existence of any practical impediments to effective automatic exchange of information under the proposed protocol and what steps are needed to remove the impediments. In the past, there have been concerns that information received pursuant to automatic exchanges under bilateral and multilateral agreements was not in a usable form. Examples of practical hurdles that reportedly limited the value of information exchanged were the lack of timeliness of its production, lack of conformity in reporting periods, the need to translate the language of the documents and the currencies, and its voluminous

---

[59] A "spontaneous exchange of information" occurs when one treaty country in possession of an item of information that it determines may interest the other treaty country for purposes of its tax administration spontaneously transmits the information to its treaty country through their respective competent authorities.

[60] A "specific exchange" is a formal request by one treaty country to another for information that is relevant to an ongoing investigation of a particular tax matter. These cases are generally taxpayer specific. Those familiar with the case prepare a request that explains the background of the tax case and the need for the information and submit it to the Competent Authority in their country. If he determines that it is an appropriate use of the treaty authority, he forwards it to his counterpart.

[61] When the existence of a possibly noncompliant taxpayer is known but not his identity, as in the case of holders of offshore bank accounts or investors in particular abusive transactions, the IRS is able to issue a summons to learn the identity of the taxpayer, but must first meet greater statutory requirements, to guard against fishing expeditions. Prior to issuance of the summons intended to learn the identity of unnamed "John Does," the United States must seek judicial review in an *ex parte* proceeding. In its application and supporting documents,[61] the United States must establish that the information sought pertains to an ascertainable group of persons, that there is a reasonable basis to believe that taxes have been avoided, and that the information is not otherwise available.

[62] See *United States v. UBS AG*, Civil No. 09-20423 (S.D. Fla.), enforcing a "John Doe summons" which requested the identities of U.S persons believed to have accounts at UBS in Switzerland. On August 19, 2009, the United States and UBS announced an agreement (approved by the Swiss Parliament on June 17, 2010) under which UBS provided the requested information.

nature.[63] To the extent that useful information can be gathered through exchange of information, the United States may be able to reduce its reliance upon self-reporting, that is, information provided by the taxpayer and, therefore, only available with respect to those in compliance with the tax laws.

Practical challenges with automatic exchanges are not exclusive to the United States. The OECD has developed standards for the electronic format of such exchanges, to enhance their utility to tax administration.[64] Despite these efforts to standardize the information exchanged and improve its usefulness, there remain numerous shortcomings, both practical and legal, in the routine exchange of information. Chief among them is the lack of taxpayer identification numbers ("TINs") in the information provided under the exchange, despite the recommendation of the OECD that member states provide such information.[65] Ideally, the information received by the IRS should either include a TIN or be subject to a process referred to as "TIN perfection" to enable the IRS to correlate account data in the information received with a valid TIN in its taxpayer databases, although such an undertaking may be time-consuming and costly. Working Party 10 in the OECD continues work to standardize information production. As part of that effort, it recently surveyed countries about their experience, impediments to greater use of automatic exchanges, and preferences for improving such exchanges. The Committee may wish to inquire how the United States responded to the OECD inquiries, and the priority it places on such improvements. In particular, an understanding of how and to what extent the IRS is able to use any information currently provided would help to evaluate the exchange of information programs.

The Committee may also wish to inquire about recently proposed regulations that expand information reporting by U.S. financial institutions on interest paid to nonresident aliens. Such reporting is not currently required, except with respect to payments to residents of Canada.[66] The recently proposed regulations would expand such reporting to include payments to any nonresident alien. In support of the proposed regulations, the preamble states "requiring routine reporting to the IRS of all U.S. bank deposit interest paid to any nonresidential alien individual will further strengthen the United States exchange of information program consistent with adequate provisions for reciprocity, usability and confidentiality in respect of this information."[67] The Committee may wish to explore the usability of the information exchanged with Canada under present regulations, its relationship to the exchange of information program with Canada, the extent to which expanded regulations would strengthen exchange of information under the

---

[63] Letter from Commissioner, IRS, to Chairman, Senate Committee on Finance (June 12, 2006), 2006 *Tax Notes Today* 115-17.

[64] See OECD, Committee on Fiscal Affairs, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, Module 3 (January 23, 2006) ("OECD Exchange Manual").

[65] OECD Exchange Manual refers to a recommendation dating to 1997, "Recommendation on the use of Tax Identification Numbers in an International Context" C(97)29/FINAL (1997).

[66] Treas. Reg. sec. 1.6049-4(b)(5).

[67] Prop. Treas. Reg. sec. 1.6049-4, 76 Fed. Reg. 1105 (January 7, 2011).

pending protocol, as well as any additional attendant burdens that may arise as a result of these regulations.[68]

2. U.S. reciprocity in providing information

The United States has come under increasing pressure to eliminate policies that provide foreign persons with the ability to shelter income. The criticism has focused on disparities between the U.S. standards and foreign standards governing "know-your-customer" rules for financial institutions and the maintenance of information on beneficial ownership. With respect to the latter, U.S. norms have been criticized in recent years.[69] The Committee may wish to explore the extent to which either the existing U.S. know-your-customer rules or the corporate formation and ownership standards prevent the United States from providing information about beneficial ownership on a reciprocal basis with its treaty countries. The Committee may also consider whether there are steps to take that would help refute the perception that the United States permits states to operate as tax havens and that would help the United States better respond to information requests from treaty countries who suspect that their own citizens and residents may be engaging in illegal activities through U.S. corporations and limited liability companies.[70]

3. Override of domestic law privileges or confidentiality

The scope and operation of the provision that overrides potential arguments based on bank secrecy law of the requested treaty country presents questions about its possible impact on other privileges. Under the proposed article as well as both the OECD Model and U.S. Model treaties, a treaty country is generally not obligated to take any action at variance with its domestic law, including disclosure of professional or trade secrets. That principle is limited by a special rule, which provides that a treaty country may not decline to provide information on the ground that the information is held by a financial institution, nominee, or person acting in an agency or intermediary capacity. The Technical Explanations to the proposed protocol and to the U.S. Model treaty state that this rule overrides claims of bank secrecy, but do not address its potential intersection with the law of professional privileges. In contrast, the OECD explains the general principle and provides as an example of information that a requested treaty country could

---

[68] The IRS and Treasury Department have requested written and electronic comments on the proposed regulations. A public hearing at which oral comments were presented was held on May 18, 2011.

[69] Financial Action Task Force, IMF, *Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism United States of America,* pp. 10-11 (June 23, 2006); Government Accountability Office, *Company Formations: Minimal Ownership Information Is Collected and Available,* a report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate GAO-06-376 (April 2006); Government Accountability Office, *Suspicious Banking Activities: Possible Money Laundering by US Corporations Formed for Russian Entities*, GAO-01-120 (October 31, 2006).

[70] For example, the "Incorporation Transparency and Law Enforcement Assistance Act," S. 569, 111th Congress (2009), would require states to obtain and periodically update beneficial ownership information from persons who seek to form a corporation or limited liability company.

decline to obtain any information that would violate safeguards against self-incrimination.[71] The OECD further explains the abrogation of the general principle and clarifies that the provision may limit the use of certain claims of professional privilege, but only to the extent that the domestic law in question was so broad as to base its protection solely on the status of the person holding the information.[72] Under the OECD approach, a treaty country may refuse to supply information held by a bank, financial institution, agent, fiduciary, or nominee as long as the ground for refusal is not the mere fact of the custodian's status as a bank, financial institution, agent, fiduciary, or nominee. The OECD provides an example of a legal representative acting for a client in an agency capacity. To the extent that confidential communications between the legal representative and his or her client are protected under local law, the general rule against requiring a treaty country to violate its own law continues to apply and the treaty country may decline the request to exchange information.

At least one recently concluded treaty, the Income Tax Treaty between the United States and Finland,[73] departs from the U.S. Model treaty and expressly provides that the override of domestic law is not intended to include the ability to obtain information that would reveal confidential communications between a client and an attorney in cases in which the client seeks legal advice. The Committee may wish to inquire as to the intended scope of the provision of the proposed protocol and of the U.S. Model treaty, the extent to which the provision may override any privilege or confidentiality law that may be available under a treaty country's domestic law, and the circumstances in which this provision is likely to be involved. The Committee may wish to specifically inquire about its effect on the attorney-client privilege in the United States.

[71] OECD, "Commentary to the OECD Model Treaty Article 26," par. 15.2.

[72] OECD, "Commentary to the OECD Model Treaty Article 26," pars. 19.12, 19.14.

[73] Senate Treaty Doc. 109-18.