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PROTOCOL AMENDING TAX CONVENTION WITH LUXEMBOURG

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Mr. RISCH, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 111–8]

The Committee on Foreign Relations, to which was referred the Protocol Amending the Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed on May 20, 2009 at Luxembourg and a related agreement effected by the exchange of notes also signed on May 20, 2009 (the "Protocol") (Treaty Doc. 111–8), having considered the same, reports favorably thereon with one declaration, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

CONTENTS

		Page
I.	Purpose	1
II.	Background	2
III.	Major Provisions	2
IV.	Entry Into Force	2
V.	Implementing Legislation	3
VI.	Committee Action	3
VII.	Committee Comments	3
VIII.	Text of Resolution of Advice and Consent to Ratification	4
IX.	Annex 1.—Technical Explanation	5

I. PURPOSE

The purpose of the Protocol, along with the underlying treaty, is to promote and facilitate trade and investment between the United States and Luxembourg, and to bring the existing treaty with Luxembourg into conformity with current U.S. tax treaty policy. Principally, the Protocol would amend the existing tax treaty with Lux-

embourg (the "Treaty") in order to bring the exchange of tax information provisions into conformity with current U.S. tax policy.

II. BACKGROUND

The United States has a tax treaty with Luxembourg that is currently in force, which was concluded in 1996. The Protocol was negotiated to modernize our relationship with Luxembourg in the area of tax information exchange and to update the 1996 treaty to better reflect current U.S. and Luxembourg domestic tax policy.

III. MAJOR PROVISIONS

A detailed article-by-article analysis of the Protocol may be found in the Technical Explanation Published by the Department of the Treasury on June 7, 2011, which is included in Annex 1 of this report. In addition, the staff of the Joint Committee on Taxation prepared an analysis of the Protocol, JCX-30-11 (May 20, 2011), which was of great assistance to the committee in reviewing the Protocol. A summary of the key provisions of the Protocol is set forth below.

The Protocol is intended to bring the existing Luxembourg treaty into conformity with current U.S. tax treaty policy regarding exchange of information. Through amendments to Article 28 of the Luxembourg Convention, the Protocol replaces the existing Convention's tax information exchange provisions with updated rules that are consistent with current U.S. tax treaty practice. See 2006 U.S. Model Income Tax Convention Article 26. The Protocol allows the tax authorities of each country to exchange information relevant to carrying out the provisions of the Convention or the domestic tax laws of either country, including information that would otherwise be protected by the bank secrecy laws of either country.

It also enables the United States to obtain information (including from financial institutions) from Luxembourg whether or not Luxembourg needs the information for its own tax purposes, including information that would otherwise be protected by the bank secrecy laws of either country. The proposed related agreement sets forth understandings between the parties regarding the updated provisions on tax information exchange, including that: (1) the United States and Luxembourg will ensure that their competent authorities have the authority to obtain and provide upon request information held by financial institutions and information regarding ownership of certain entities; and (2) information shall be exchanged without regard to whether the conduct being investigated would be a crime under the laws of the requested State.

IV. ENTRY INTO FORCE

The proposed Protocol will enter into force between the United States and Luxembourg on the date of the later note in an exchange of diplomatic notes in which the Parties notify each other that their respective applicable procedures for ratification have been satisfied. The various provisions of this Protocol shall have effect as described in paragraph 2 of Article II of the Protocol.

V. Implementing Legislation

As is the case generally with income tax treaties, the Protocol is self-executing and does not require implementing legislation for the United States.

VI. Committee Action

The committee has held three public hearings on the Protocol. The transcript for the committee hearing held in the 112th Congress on June 7, 2011, can be found in Annex 2, pages 19–66 of Exec. Rept. 112–1. The committee heard testimony from Manal Corwin, Deputy Assistant Secretary, International Tax Affairs, Department of the Treasury, Washington, D.C. and Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, Washington, D.C.

The transcript for the committee hearing held in the 113th Congress on February 26, 2014 can be found in Annex 2, pages 21–95, in Exec. Rept. 113–7. The committee heard testimony from Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation; Robert B. Stack, Deputy Assistant Secretary for International Tax Affairs, Department of the Treasury; William A. Reinsch, President, National Foreign Trade Council, Washington, D.C.; Paul Nolan, Vice President, Tax, McCormick and Company, Inc., Sparks, MD; and Nancy McLernon, President and CEO, Organization for International Investment, Washington, D.C.

The transcript for the committee hearing held in the 114th Congress on October 29, 2015 can be found in Annex 2, pages 23–69, in Exec. Rept. 114–1. The committee heard testimony from Robert B. Stack, Deputy Assistant Secretary for International Tax Affairs at the Department of the Treasury, Washington, D.C., and from Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, Washington, D.C.

In addition, in the 116th Congress, the committee hosted a staff briefing from Department of the Treasury and Department of State officials with Senate Foreign Relations, Finance and Joint Tax Committee staff on June 11, 2019

The committee has considered the Protocol and reported it favorably in three prior congresses; in the 112th Congress on July 26, 2011; in the 113th Congress on April 1, 2014; and in the 114th Congress on November 10, 2015.

On June 25, 2019, the committee considered the Protocol and ordered it favorably reported, with a quorum present and without objection. The Protocol and the resolution of consent to ratification considered by the committee are the same, with no changes other than dates, to those considered under the prior three congresses.

VII. Committee Comments

The Committee on Foreign Relations believes that the Protocol will stimulate increased trade and investment, strengthen provisions regarding the exchange of tax information, and promote closer co-operation between the United States and Luxembourg. The committee therefore urges the Senate to act promptly to give advice and consent to ratification of the Protocol, as set forth in this report and the accompanying resolution of advice and consent.

A. EXCHANGE OF INFORMATION

The Protocol would replace the existing Convention's tax information exchange provisions with updated rules that are consistent with current U.S. tax treaty practice. The Protocol would allow the tax authorities of each country to exchange information relevant to carrying out the provisions of the Convention or the domestic tax laws of either country, including information that would otherwise be protected by the bank secrecy laws of either country. It would also enable the United States to obtain information (including from financial institutions) from Luxembourg whether or not Luxembourg needs the information for its own tax purposes.

The committee takes note of Paragraph 3 of the Exchange of Notes, which sets forth information that should be provided to the requested State by the requesting State when making a request for information. It is the committee's understanding based upon the testimony and Technical Explanation provided by the Department of the Treasury that while this paragraph contains important procedural requirements that are intended to ensure that "fishing expeditions" do not occur, the provisions of this paragraph will be interpreted by the United States and Luxembourg in order not to frustrate effective exchange of information. In particular, the committee understands that with respect to the requirement set forth in subparagraph 3(a) of the Exchange of Notes that a request must include the identity of the person under examination or investigation, the requesting state is not required in all instances to provide the name of the person, but will be permitted to provide other information sufficient to identify the person.

B. DECLARATION ON THE SELF-EXECUTING NATURE OF THE PROTOCOL

The committee has included one declaration in the recommended resolution of advice and consent. The declaration states that the Protocol is self-executing, as is the case generally with income tax treaties. Prior to the 110th Congress, the committee generally included such statements in the committee's report, but in light of the Supreme Court decision in *Medellin* v. *Texas,* 128 S. Ct. 1346 (2008), the committee determined that a clear statement in the Resolution is warranted. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110–12.

VIII. TEXT OF RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Protocol Amending the Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed on May 20, 2009, at Luxembourg (the Protocol) and the related agreement effected by exchange of notes also signed on

May 20, 2009 (Treaty Doc. 111–8), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

The Convention is self-executing.

IX. ANNEX 1.—TECHNICAL EXPLANATION

DEPARTMENT OF THE TREASURY TECHNICAL EXPLANATION OF THE PROTOCOL SIGNED AT LUXEMBOURG ON MAY 20, 2010 AMENDING THE CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL, SIGNED AT LUXEMBOURG ON APRIL 3, 1996

This is a Technical Explanation of the Protocol signed at Luxembourg on May 20, 2010 (the "Protocol"), and the related Exchange of Notes ("Exchange of Notes") amending the Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Luxembourg on April 3, 1996 (the "existing Convention").

Negotiations took into account the U.S. Department of the Treasury's current tax treaty policy and the Treasury Department's Model Income Tax Convention, published on November 15, 2006 (the "U.S. Model"). Negotiations also took into account the Model Tax Convention on Income and on Capital, published by the Organization for Economic Cooperation and Development (the "OECD Model"), and recent tax treaties concluded by both countries.

This Technical Explanation is an official guide to the Protocol and Exchange of Notes. It explains policies behind particular provisions, as well as understandings reached during the negotiations with respect to the interpretation and application of the Protocol.

References to the existing Convention are intended to put various provisions of the Protocol into context. This Technical Explanation does not, however, provide a complete comparison between the provisions of the existing Convention and the amendments made by the Protocol and Exchange of Notes. This Technical Explanation is not intended to provide a complete guide to the Convention as amended by the Protocol and Exchange of Notes. To the extent that the Convention has not been amended by the Protocol and Exchange of Notes, the technical explanation of the Convention remains the official explanation. References in this technical explanation to "he" or "his" should be read to mean "he or she" or "his or her."

ARTICLE I

Article I of the Protocol replaces Article 28 (Exchange of Information) of the existing Convention. This Article provides for the exchange of information and administrative assistance between the competent authorities of the Contracting States.

Paragraph 1 of Article 28

The obligation to obtain and provide information to the other Contracting State is set out in new paragraph 1. The information to be exchanged is that which is foreseeably relevant for carrying out the provisions of the Convention or the domestic laws of the United States or Luxembourg concerning taxes of every kind applied at the national level, to the extent that the taxation thereunder is not contrary to the Convention. This language incorporates the standard of the OECD Model, which is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

This standard is to be interpreted consistently with 26 U.S.C. section 7602, which authorizes the IRS to examine "any books, papers, records, or other data which may be relevant or material." (emphasis added). In United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984), the Supreme Court stated that the language "may be" reflects Congress's express intention to allow the IRS to obtain "items of even potential relevance to an ongoing investigation, without reference to admissibility." (emphasis in original). However, the standard would not support a request in which a Contracting State simply asked for information regarding all bank accounts maintained by residents of that Contracting State in the other Contracting State.

Exchange of information with respect to each State's domestic tax law is authorized to the extent that taxation under domestic tax law is not contrary to the Convention. Thus, for example, information may be exchanged with respect to a covered tax, even if the transaction to which the information relates is a purely domestic transaction in the requesting Contracting State and, therefore, the exchange is not made to carry out the Convention. An example of such a case is provided in the OECD Commentary: a company resident in one Contracting State and a company resident in the other Contracting State transact business between themselves through a third-country resident company. Neither Contracting State has a treaty with the third state. To enforce their internal laws with respect to transactions of their residents with the third-country company (since there is no relevant treaty in force), the Contracting States may exchange information regarding the prices that their residents paid in their transactions with the third-country resident.

The taxes covered for purposes of this Article constitute a broader category of taxes than those referred to in Article 2 (Taxes Covered). Exchange of information is authorized with respect to taxes of every kind imposed by a Contracting State at the national level. Accordingly, information may be exchanged with respect to U.S. estate and gift taxes, excise taxes or, with respect to Luxembourg, value added taxes.

Information exchange is not restricted by Article 1 (General Scope). Accordingly, information may be requested and provided under this Article with respect to persons who are not residents of either Contracting State. For example, if a third-country resident has a permanent establishment in Luxembourg, which engages in transactions with a U.S. enterprise, the United States could re-

quest information with respect to that permanent establishment, even though the third-country resident is not a resident of either Contracting State. Similarly, if a third-country resident maintains a bank account in Luxembourg, and the Internal Revenue Service has reason to believe that funds in that account should have been reported for U.S. tax purposes but have not been so reported, information can be requested from Luxembourg with respect to that person's account, even though that person is not the taxpayer under examination.

Although the term "United States" does not encompass U.S. possessions for most purposes of the Convention, Section 7651 of the Code authorizes the Internal Revenue Service to utilize the provisions of the Internal Revenue Code to obtain information from the U.S. possessions pursuant to a proper request made under Article 26. If necessary to obtain requested information, the Internal Revenue Service could issue and enforce an administrative summons to the taxpayer, a tax authority (or a government agency in a U.S. possession), or a third party located in a U.S. possession.

Paragraph 3 of the Exchange of Notes lists the information that should be provided to the requested State by the requesting State when making a request for information under Article 28 to demonstrate the foreseeable relevance of the information. While this paragraph contains important procedural requirements that are intended to ensure that "fishing expeditions" do not occur, the provisions of this paragraph must be interpreted liberally in order not to frustrate effective exchange of information.

Subparagraph 3(a) of the Exchange of Notes provides that a request must include the identity of the person under examination or investigation. In a typical case, the identity of the person under examination or investigation would include a name, and to the extent known, an address, account number, or similar identifying information. There can, however, be circumstances in which there is information sufficient to identify the person under examination or investigation even though the requesting State cannot provide a name. For example, this requirement may be satisfied by supplying an account number or similar identifying information.

Subparagraph 3(b) of the Exchange of Notes provides that a request for information must contain a statement of the information sought, including its nature and the form in which the requesting State wishes to receive the information from the requested State. Subparagraph 3(c) of the Exchange of Notes provides that a request for information must contain a statement of the tax purpose for which the information is sought. Subparagraph 3(d) of the Exchange of Notes provides that a request must also include the grounds for believing that the information requested is held in the requested State or is in the possession or control of a person within the jurisdiction of the requested State. Subparagraph 3(e) of the Exchange of Notes provides that, to the extent known, the name and address of any person believed to be in possession of the requested information must also be provided. Subparagraph 3(f) provides that a requesting State must also provide a statement that the request is in conformity with the laws of the requesting State, that if the requested information was within the jurisdiction of the requesting State it would be able to obtain the information, and that it is in conformity with the Convention. Subparagraph 3(g) of

the Exchange of notes provides that the requesting State has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties.

Paragraph 2 of Article 28

New paragraph 2 provides assurances that any information exchanged will be treated as secret, subject to the same disclosure constraints as information obtained under the laws of the requesting State. Information received may be disclosed only to persons, including courts and administrative bodies, involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1. The information must be used by these persons in connection with the specified functions. Information may also be disclosed to legislative bodies, such as the tax-writing committees of Congress and the Government Accountability Office, engaged in the oversight of the preceding activities. Information received by these bodies must be for use in the performance of their role in overseeing the administration of U.S. tax laws. Information received may be disclosed in public court proceedings or in judicial decisions.

Paragraph 3 of Article 28

New paragraph 3 provides that the obligations undertaken in paragraph 1 and 2 to exchange information do not require a Contracting State to carry out administrative measures that are at variance with the laws and administrative practice of either State. Nor is a Contracting State required to supply information not obtainable under the laws or in the normal course of the administration of either State, or to disclose trade secrets or other information, the disclosure of which would be contrary to public policy.

Thus, a requesting State may be denied information from the other State if the information would be obtained pursuant to procedures or measures that are broader than those available in the requesting State. However, the statute of limitations of the Contracting State making the request for information should govern a request for information. Thus, the Contracting State of which the request is made should attempt to obtain the information even if its own statute of limitations has passed. In many cases, relevant information will still exist in the business records of the taxpayer or a third party, even though it is no longer required to be kept for domestic tax purposes.

While paragraph 3 states conditions under which a Contracting State is not obligated to comply with a request from the other Contracting State for information, the requested State is not precluded from providing such information, and may, at its discretion, do so subject to the limitations of its internal law.

Paragraph 4 of Article 28

New paragraph 4 provides that when information is requested by a Contracting State in accordance with this Article, the other Contracting State is obligated to obtain the requested information as if the tax in question were the tax of the requested State, even if that State has no direct tax interest in the case to which the re-

quest relates. In the absence of such new paragraph 4, some taxpayers have argued that paragraph 3(a) prevents a Contracting State from requesting information from a bank or fiduciary that the Contracting State does not need for its own tax purposes. This paragraph clarifies that paragraph 3 does not impose such a restriction and that a Contracting State is not limited to providing only the information that it already has in its own files.

Paragraph 1 of the Exchange of Notes also provides that the requested State shall exchange such information regardless of whether the conduct being investigated would constitute a crime under the laws of the requested State if it had occurred in the territory of the requested State.

Paragraph 5 of Article 28

New paragraph 5 provides that a Contracting State may not decline to provide information solely because that information is held by financial institutions, nominees or persons acting in an agency or fiduciary capacity. Thus, paragraph 5 would effectively prevent a Contracting State from relying on paragraph 3 to argue that its domestic bank secrecy laws (or similar legislation relating to disclosure of financial information by financial institutions or intermediaries) override its obligation to provide information under paragraph 1. This paragraph also requires the disclosure of information regarding the beneficial owner of an interest in a person, such as the identity of a beneficial owner of bearer shares.

Paragraph 2(a) of the Exchange of Notes provides that each Contracting State shall ensure that its competent authority has the authority to obtain and exchange upon request information held by financial institutions, nominees, or persons acting in an agency or fiduciary capacity, including nominees and trustees. Paragraph 2(b) of the Exchange of Notes provides that each Contracting State shall also ensure that its competent authority has the authority to obtain and provide upon request information regarding the ownership of companies, partnerships, trusts, foundations, and other persons, including information regarding settlers, trustees, and beneficiaries. A Contracting State is not obligated to provide information that is neither held by its authorities (which for this purpose includes government agencies, political subdivisions and local authorities) nor in the possession or control of persons who are within it territorial jurisdiction, nor is it obligated to provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

Paragraph 6 of Article 28

New paragraph 6 provides that the requesting State may specify the form in which information is to be provided (e.g., depositions of witnesses and authenticated copies of original documents). The intention is to ensure that the information may be introduced as evidence in the judicial proceedings of the requesting State. The requested State should, if possible, provide the information in the form requested to the same extent that it can obtain information in that form under its own laws and administrative practices with respect to its own taxes.

Paragraph 7 of Article 28

New paragraph 7 provides for assistance in collection of taxes to the extent necessary to ensure that treaty benefits are enjoyed only by persons entitled to those benefits under the terms of the Convention. Under paragraph 7, a Contracting State will endeavor to collect on behalf of the other State only those amounts necessary to ensure that any exemption or reduced rate of tax at source granted under the Convention by that other State is not enjoyed by persons not entitled to those benefits. For example, if the payer of a U.S.-source portfolio dividend receives a Form W-8BEN or other appropriate documentation from the payee, the withholding agent is permitted to withhold at the portfolio dividend rate of 15 percent. If, however, the addressee is merely acting as a nominee on behalf of a third country resident, paragraph 7 would obligate Luxembourg to withhold and remit to the United States the additional tax that should have been collected by the U.S. withholding agent.

This paragraph also makes clear that the Contracting State asked to collect the tax is not obligated, in the process of providing collection assistance, to carry out administrative measures that would be contrary to its sovereignty, security or public policy.

Treaty effective dates and termination in relation to exchange of information

Article II of the Protocol sets forth rules governing the effective dates of the provisions of Article I of the Protocol. Once the Protocol is in force, the competent authority may seek information under the Convention, as amended by the Protocol, with respect to a year beginning on or after January 1, 2009. With respect to earlier years, the provisions of Article 28 of the Convention prior to amendment by the Protocol and Exchange of Notes shall apply.

A tax administration may also seek information with respect to a year for which a treaty was in force after the treaty has been terminated. In such a case the ability of the other tax administration to act is limited. The treaty no longer provides authority for the tax administrations to exchange confidential information. They may only exchange information pursuant to domestic law or other international agreement or arrangement.

ARTICLE II

Article II of the Protocol contains the rules for bringing the Protocol into force and giving effect to its provisions.

Paragraph 1

Paragraph 1 provides that the Protocol is subject to ratification in accordance with the applicable procedures of the United States and Luxembourg. Further, the Contracting Stats shall notify each other by written notification, through diplomatic channels, when their respective applicable procedures have been satisfied. In the United States, the process leading to ratification and entry into force is as follows: Once a protocol or treaty has been signed by authorized representatives of the two Contracting States, the Department of State sends the protocol or treaty to the President, who formally transmits it to the Senate for its advice and consent to

ratification, which requires approval by two-thirds of the Senators present and voting.

Prior to this vote, however, it generally has been the practice of the Senate Committee on Foreign Relations to hold hearings on the protocol or treaty and make a recommendation regarding its approval to the full Senate. Both Government and private sector witnesses may testify at these hearings. After the Senate gives its advice and consent to ratification of the protocol or treaty, an instrument of ratification is drafted for the President's signature. The President's signature completes the process in the United States.

Paragraph 2

Paragraph 2 provides that the Protocol will enter into force on the date of the later of the notifications referred to in paragraph 1. Once the Protocol is in force, the competent authority may seek information under Article 26 as amended by the Protocol with respect to a year beginning on or after January 1, 2009.

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