Testimony of Michael J. McIntyre and Robert S. McIntyre
On the Proposed Income Tax Treaties with France, Malta, and New Zealand
Before the U.S. Senate Committee on Foreign Relations
November 10, 2009

We thank the committee for the opportunity to present our views on three proposed income tax treaties: the proposed protocol to the U.S.-France treaty, the proposed U.S.-Malta treaty, and the proposed protocol to the U.S.-New Zealand treaty. One of us, Michael J. McIntyre, is a professor of law at Wayne State University in Detroit. He has written extensively on international tax matters. The other of us, Robert S. McIntyre, is the Director of Citizens for Tax Justice. Our remarks are limited to the treatment of information exchange under these three agreements.

Each of the proposed agreements contains a provision for information exchange that is consistent with the OECD standard, promulgated in 2002, in its model Tax Information Exchange Agreement (TIEA). In particular, the proposed agreements provide for an exchange of information only on specific request. That standard is obsolete. It is common knowledge that the OECD TIEA (2002) has been ineffective in limiting international tax evasion and aggressive tax avoidance.[1] After the unfortunate experience with Switzerland in the UBS case, the United States should not enter into a tax treaty unless the treaty would permit it to get the names of U.S. tax cheats in the next such case. Yet, all three of the agreements before this committee have that major flaw. Of course, the agreements are reciprocal in that they do not require the United States to assist France, Malta, and New Zealand in uncovering their own tax cheats unless those countries can identify the tax cheats by name to the U.S. tax authorities.

At a time when our European allies are working hard to reach agreement within Europe for an effective exchange of information, the United States, in its treaty policies, is lagging behind the times. The emerging international standard for effective exchange of information requires information not only on specific request but also automatic and spontaneous exchanges. In a spontaneous exchange, a country provides its treaty partner with information about likely tax cheats if it happens to uncover such information during its own audits. An automatic exchange, sometimes called a "routine exchange" can take many forms. One of the most useful forms is the exchange in electronic form of information regarding various items of periodical income (e.g., dividends, rents, royalties, interest) received in one Contracting State by residents of the other Contracting State.

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[1] *See* Lee A. Sheppard, "Don't Ask, Don't Tell, Part 4: Ineffectual Information Sharing," 122 Tax Notes 1411 (Mar. 23, 2009) ("The standard OECD information exchange agreement is nearly worthless."); Michael J. McIntyre, "How to End the Charade of Information Exchange," 56 Tax Notes Int'l 255-268 (October 26, 2009) ("The view is widely held that the OECD TIEA is ineffective — not nothing, but not much.").

The United States has automatic exchanges of information under its tax treaties with Canada and Mexico. New Zealand has such an arrangement with Australia. France is supporting automatic exchanges of information with its EU partners, and Malta is likely to be pressured by the EU in the near term to accept automatic exchanges. Under these circumstances, it seems likely that the Treasury Department could have negotiated an effective information exchange agreement with all three countries if it had wished to do so. We are not dealing here with Switzerland, which has recently negotiated an ineffective treaty with the U.S. Treasury Department that barely meets the inadequate OECD standard of 2002.

The United States needs to shoulder some of the responsibility for the weakness of the OECD TIEA (2002). In 1998, the OECD announced an intention to stamp out what it referred to as "harmful tax competition" — picking up a phrase coined by the European Parliament. By this term was meant the use by countries of various predatory practices that undermined the ability of a country to enforce its domestic tax and regulatory laws. In particular, the OECD initiative was an attack on the bank-secrecy rules of offshore financial centers. Under the Clinton administration, the United States was a leading force within the OECD for effective information exchange. That changed with the change in U.S. leadership in 2001.

On May 10, 2001, then U.S. Treasury Secretary Paul O'Neill, under pressure from U.S. banking interests and anti-tax zealots, issued a statement claiming that the OECD had gone too far in combating tax evasion. He stated that the Treasury Department was only willing to support the OECD initiative if it was limited to "exchanging specific and limited information necessary for the prosecution of illegal activity." He characterized the OECD initiative on information exchange as "too broad" and stated that "it is not in line with this Administration's tax and economic priorities." Having lost the support of its most powerful member, the OECD pulled back, resulting in the ineffective OECD TIEA issued in 2002.

This committee has the opportunity to put to rest the widespread impression that the United States is not particularly interested in effective information exchange. We respectfully suggest that the committee return the proposed treaty and treaty protocols to the Treasury Department with a stern request that it negotiate an effective information exchange provision in each of these agreements. If it should turn out that these three countries are not interested in such a provision, so be it. The chances are high, however, that one or more of these countries would join the United States in endorsing the emerging international standard for transparency and effective information exchange. By encouraging a codification of that standard in U.S. tax treaty policy, this committee will have taken a significant step in combating the widespread international tax evasion that is undermining the U.S. tax system and the tax systems of countries all around the globe.