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December 18, 2015

The Honorable David O'Sullivan
Ambassador of the European Union to the United States of America
2725 K Street, N.W.
Washington, DC 20037

Dear Ambassador O'Sullivan:

As you know, the European Commission ("EU Commission") has been conducting State aid investigations of three of its member States regarding tax rulings and advanced pricing arrangements provided to multinational businesses, most of them U.S. firms. In June 2014, the EU Commission issued opening decisions with respect to Ireland (regarding Apple), Netherlands (regarding Starbucks) and Luxembourg (regarding Fiat Financing and Trade). In October 2014, the EU Commission issued an opening decision with respect to Luxembourg (regarding Amazon). On December 3, 2015, the EU Commission announced its opening decision with respect to Luxembourg (regarding McDonalds).

On October 21, 2015, final decisions were announced in the Netherlands – Starbucks case and the Luxembourg – Fiat case. In those decisions, the EU Commission ordered those countries to recover retrospective tax revenue the EU Commission believes should have been collected from the companies going back up to ten years. Both Luxembourg and the Netherlands are appealing the EU Commission's decisions. In a letter to the Dutch Parliament announcing its appeal, the Dutch Minister of Finance, J.R.V.A. Dijsselbloem, said "the [EU] Commission applies its own new criterion for profit calculation, which is incompatible with domestic regulations and the OECD framework." Final decisions on the cases involving Apple and Amazon are expected soon, and both Ireland and Luxembourg have stated their positions that EU Commission's state aid allegations are without merit.

On December 1, 2015, the House Ways and Means Committee's Subcommittee on Tax Policy held a hearing on the "OECD Base Erosion and Profit Shifting (BEPS) Project." During this hearing, several members of the Subcommittee expressed concern and outrage that the EU Commission's investigations and potential decisions are targeting U.S. firms to expand the EU's tax base on a retroactive basis, to the detriment of U.S. taxpayers and the U.S. fisc, and took issue with the apparent lack of procedural fairness for the targeted companies in these cases. Subcommittee members questioned Robert Stack, Treasury's Deputy Assistant Secretary (International Tax Affairs), about Treasury's views of these cases and steps Treasury is taking to protect the interests of the United States.

Mr. Stack responded that Treasury has made clear to the EU Commission that the United States has a stake in these cases. In particular, Mr. Stack said Treasury is concerned because (i) the EU Commission may be "substituting its own tax determination for that of the Member States" which would "call into question our bilateral relationships with members of the EU," (ii) the amounts of retroactive taxes at stake are potentially "eye-popping" and the US taxpayers could end up "footing the bill" through foreign tax credits, (iii) the EU commission is applying a novel approach on a retroactive basis, rather than a more appropriate prospective remedy. Mr. Stack said that Treasury has been public about its concern that "fairness calls for a prospective approach" and has made, and will continue to make, its concerns known to the EU Commission. Beyond that, Mr. Stack said it is unclear what else can be done.

We also followed with interest a hearing held later on December 1st by the Senate Committee on Finance, where Mr. Stack testified to these same issues and Finance Committee members expressed similar concerns. In addition, Mr. Stack said that Treasury is "greatly concerned that the EU Commission is reaching out to tax income that no member state had the right to tax under internationally accepted standards."

As the leaders of the House Ways and Means Committee's Subcommittee on Tax Policy, we are writing to make clear that we, and many of our Subcommittee's members, have significant concerns about EU Commission's State aid investigations, and the radical precedents they are setting. We are not questioning the EU Commission's role in pursuing these cases and enforcing EU competition law against its EU Member States. We find it deeply problematic, however, that the EU Commission appears to be targeting U.S. firms by ordering its Member States to retroactively tax earnings that, under internationally accepted standards and precedents, no EU Member had a right to tax.

The United States and the European Union enjoy a strong relationship based on shared values and a mutual interest in promoting economic growth, as demonstrated by the progress that has been made toward a Transatlantic Trade and Investment Partnership (TTIP) in the past year. Predictable and judicious tax policy is an important part of a fair and stable environment to promote business and investment. In the United States, Congress and Treasury are very careful not to prescribe tax policy that penalizes taxpayers who rely on laws, regulations and related interpretations that are in effect at the time they engaged in transactions, or made investment decisions. Going back in time to penalize taxpayers under a new law or a new interpretation of an existing law, without notice, is not only unjust, but also undermines the stability of the investment climate. The EU Commission surely understands the importance of promoting a tax environment that is equitable, efficient, and economically pro-growth.

We support Treasury's efforts make sure the EU Commission is aware that the United States has a stake in these cases and has serious concerns about their fairness and potential impact on the U.S. fisc. Our concerns are driven not only by these initial cases, but also by the precedent they will set that could pave the way for the EU to retroactively tax the historical earnings of many more U.S. companies, without notice, and under any circumstances.

As Mr. Stack said at our hearing, the United States "has an interest in understanding with clarity the precise nature of income tax enforcement administration in the EU." Accordingly, amplifying Treasury's efforts, we respectfully request a briefing from the EU Delegation to the United States to gain a better understanding of the EU Commission's actions and to make clear our serious concerns that those actions could reach retroactive results that are inconsistent with internationally accepted standards. We view such results as a direct threat to the interests of the United States.

Please feel free to contact Melissa Gierach with Congressman Boustany's office (Melissa.Gierach@mail.house.gov) and Brandon Casey with Congressman Neal's office (Brandon.Casey@mail.house.gov) to discuss possible dates and times for a briefing, or if you have any further questions.

Sincerely,

C.W. Boustany

Charles W. Boustany Jr., MD
Chairman, Subcommittee on Tax Policy

Richard E. Neal

Richard E.Neal
Ranking Member