

DEPARTMENT OF THE TREASURY
TECHNICAL EXPLANATION OF THE PROTOCOL
AMENDING THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN
TAX MATTERS

This is a Technical Explanation of the Protocol signed on May 27, 2010 (the “Protocol”) to the Convention on Mutual Administrative Assistance in Tax Matters (the “existing Convention”), which was signed by the United States in 1989 and ratified in 1991. The Explanatory Report accompanying the existing Convention was drafted by the Council of Europe and the Organization for Economic Co-operation and Development (the “OECD”). At the time of signature of the Protocol, Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, the Netherlands, Norway, Poland, Sweden, the United Kingdom, and Ukraine, along with the United States, were parties to the existing Convention. Canada, Germany, and Spain had signed the existing Convention but had not ratified it. Drafting of the Protocol was carried out by the Coordinating Body of the Convention, consisting of Parties to the Convention, in joint session with an Ad Hoc Committee for Revision of the Convention open to the member states of the Council of Europe and of the OECD. The United States was actively involved in the process of drafting the Protocol and its accompanying Explanatory Report.

This Technical Explanation is the United States Treasury Department’s official guide to the Protocol. It reflects the United States’ understanding of the meaning and application of particular provisions of the Protocol. The United States accepts the Protocol’s accompanying Explanatory Report.

Neither the Protocol nor the existing Convention affects substantive rules of taxation. They are solely concerned with mutual assistance in the administration of the tax laws of signatory States. The Protocol is currently in force for the countries that have signed and ratified it. As of January 16, 2014, a total of sixty-three countries, including the United States, have signed the Protocol. The process of ratification has been completed in thirty-four countries.

The amendments contained in the Protocol bring the existing Convention into closer conformity with current internationally agreed standards, which are also reflected in the OECD’s Model Tax Convention on Income and Capital (the “OECD Model”) and the 2006 U.S. Model Income Tax Convention (the “U.S. Model”). The amendments also open the existing Convention to countries which are not members of the OECD or of the Council of Europe and specify the level of detail to be provided in a request for information. Finally, two procedural issues are addressed in the Protocol: the entry into force and date of effect of the amendments; and the relationship between the Protocol and the existing Convention.

Article I

Article I amends the Preamble of the existing Convention. Paragraph 1 deletes the reference in the Preamble of the existing Convention providing that States should not carry out measures or supply information except in conformity with their domestic law and practice.

Paragraph 2 adds a recital to the Preamble of the existing Convention noting that a new cooperative international information exchange environment has emerged, and that in this context it is desirable for a multilateral instrument for information exchange to be made available to the widest number of States to obtain the benefits of this new environment.

Article II

Article II amends Article 4 (General provisions) of the existing Convention. New paragraph 1 of Article 4 requires the Parties to exchange any information that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by the existing Convention. Article II deletes paragraph 2 of Article 4 of the existing Convention, which required prior authorization by a jurisdiction supplying information in order for the information being supplied to be used as evidence before a criminal court. These revisions bring the existing Convention into closer conformity with the U.S. and OECD Models.

Article III

Article III amends Article 18 (Information to be provided by the applicant state) of the existing Convention. The existing Convention specifies the details that the applicant State must provide to the requested State when making a request for information. In some situations, the name of the person under examination is not known to the applicant State, but other information sufficiently identifies the person. Paragraph 1 of Article III amends paragraph 1.b of Article 18 to provide that a requesting State may provide the name, address or any other identifying particulars of the person in respect of whom the request is made. Paragraph 2 of Article III is a conforming change to the Protocol to address deletions to the existing Convention made by Article IV of the Protocol (described below).

The Explanatory Report accompanying the Protocol explains that the existing Convention was amended in this regard to clarify that the more details the applicant State can provide, the better the information it receives is likely to be. Paragraph 1.b of Article 18 of the existing Convention as modified by the Protocol asks the applicant State to provide the requested State with all available information which can assist in identifying the person, but the details provided need not necessarily include a name and address and the details may identify an ascertainable group or category of persons. As noted in the Explanatory Report accompanying the Protocol, however, this provision does not mean that Parties can engage in fishing expeditions.

Article IV

Article IV deletes Article 19 (Possibility of declining a request) of the existing Convention, the body of which appears in revised but substantially similar form at subparagraph 2(g) of Article 21 (Protection of persons and limits to the obligation to provide assistance) of the existing Convention as amended by Article V of the Protocol (described below).

Article V

Article V deletes and replaces Article 21 (Protection of persons and limits to the obligation to provide assistance) of the existing Convention. Article 21 relates to the protection of the rights or safeguards of persons and the limits of a State's obligation to provide assistance to another State. The changes bring Article 21 of the existing Convention into closer conformity with the U.S. and OECD Models.

Paragraph 1 of Article 21

New paragraph 1 of Article 21 is a restatement of paragraph 1 of Article 21 of the existing Convention. This paragraph provides that nothing in the Convention as amended by the Protocol shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State.

Subparagraph 2(a) of Article 21

New subparagraph 2(a) of Article 21 restates subparagraph 2(a) of Article 21 of the existing Convention, which provides that, except in the case of Article 14 (Time limits), the provisions of the Convention as amended by the Protocol shall not be construed so as to impose on the requested State the obligation to carry out measures at variance with its own laws or administrative practices (or the laws or administrative practices of the applicant State). This rule is equivalent to subparagraph 3(a) of Article 26 (Exchange of Information and Administrative Assistance) of the U.S. Model.

Subparagraph 2(b) of Article 21

Subparagraph 2(b) of Article 21 of the existing Convention refers to cases where a State considers that certain measures would be contrary to public policy (*ordre public*) or to its essential interests. New subparagraph 2(b) limits the exceptions to carrying out measures that would be contrary to public policy and removes the reference to "its essential interests."

Subparagraph 2(c) of Article 21

New subparagraph 2(c) of Article 21 restates subparagraph 2(c) of Article 21 of the existing Convention. New subparagraph 2(c) provides that, except in the case of Article 14 (Time limits), the provisions of the Convention as amended by the Protocol shall not be construed so as to impose on the requested State the obligation to supply information which is not obtainable under its own laws or its administrative practices (or under the laws of the applicant State or its administrative practices). This rule is equivalent to subparagraph 3(b) of Article 26 of the U.S. Model. The Explanatory Report accompanying the Protocol explains that the reciprocity provided for in subparagraphs 2(a) and 2(c) establishes a kind of minimum position whereby the requested State is not obliged to do more in providing assistance than the applicant State can do under its domestic law. Moreover, the requested State need supply no more information than is the normal practice for that State.

Subparagraph 2(d) of Article 21

New subparagraph 2(d) of Article 21 largely restates subparagraph 2(d) of Article 21 of the existing Convention. New subparagraph 2(d) provides that the provisions of the Convention as amended by the Protocol shall not be construed so as to impose on the requested State the obligation to supply information which 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 (*ordre public*). The prior reference to “its essential interests” is omitted from new subparagraph 2(d). This rule is equivalent to subparagraph 3(c) of Article 26 of the U.S. Model.

Subparagraph 2(e) of Article 21

New subparagraph 2(e) of Article 21 restates subparagraph 2(e) of Article 21 of the existing Convention. New subparagraph 2(e) provides that except in the case of Article 14 (Time limits), the provisions of the Convention as amended by the Protocol shall not be construed so as to impose on the requested State the obligation to provide administrative assistance if and insofar as it considers the taxation in the applicant State to be contrary to generally accepted taxation principles, the provisions of a convention for avoidance of double taxation, or any other convention which the requested State has concluded with the applicant State. The Explanatory Report accompanying the Protocol suggests that consultation between the Parties should take place whenever there is some doubt as to whether the taxation in the applicant State is of such kind as to justify a refusal under the provisions of subparagraph 2(e).

Subparagraph 2(f) of Article 21

New subparagraph 2(f) of Article 21 restates subparagraph 2(f) of Article 21 of the existing Convention to clarify that the obligation to exchange information provided therein does not impose the obligation to provide administrative assistance in cases where the administrative assistance is requested to administer or enforce tax laws of the applicant State that discriminate between a national of the requested State and a national of the applicant State in the same circumstances. The Explanatory Report accompanying the Protocol provides that subparagraph 2(f) relates to an exceptional circumstance and is intended to ensure that the Convention as amended by the Protocol does not result in discrimination between nationals of the requested State and identically placed nationals of the applicant State. The exception for the application of Article 14 ensures that the limitation on the exchange of information included by subparagraph 2(f) does not apply in a case where the requested State is allowed to gather and supply information to the applicant State even though the requested State could not do so for its own tax purposes because the statute of limitations is closed for domestic tax purposes.

Subparagraph 2(g) of Article 21

New subparagraph 2(g) is based on the wording of Article 19 (Possibility of declining a request) of the existing Convention. It clarifies that a Party need not provide administrative assistance if the applicant State has not pursued all reasonable measures available under its domestic laws or administrative practice prior to making the request, except where recourse to

such measures would give rise to disproportionate difficulty. Paragraph 2(g) is consistent with paragraph 9(a) of the Commentary to Article 26 of the OECD Model, and is also reflected in many tax information exchange agreements concluded by the United States and the OECD Model Tax Information Exchange Agreement.

Subparagraph 2(h) of Article 21

New subparagraph 2(h) allows a Party to the Convention as amended by the Protocol to refuse to provide assistance in tax recovery in cases where the administrative burden for that Party is clearly disproportionate to the benefit to be derived by the applicant State.

Paragraph 3 of Article 21

New paragraph 3 of Article 21 provides that when information is requested by a Party in accordance with this Article, the requested State is obligated to use its information gathering measures to obtain the requested information as if the tax in question were the tax of the requested State, even if that Party has no direct tax interest in the case to which the request relates. The Explanatory Report accompanying the Protocol defines “information gathering measures” as laws and administrative or judicial procedures that enable a State to obtain and provide the requested information. In the absence of such new paragraph 3, some taxpayers have argued that paragraph 2(a) prevents a Party from requesting information from a bank or fiduciary that that Party does not need for its own tax purposes. This paragraph clarifies that paragraph 2 does not impose such a restriction and that a Party is not limited to providing only the information that it already has in its own files. This new paragraph conforms to the analogous provision in the U.S. and OECD Models.

Paragraph 4 of Article 21

New paragraph 4 of Article 21 provides that a requested State may not decline to supply information solely because the information is held by financial institutions, nominees or persons acting in an agency or fiduciary capacity, or because it relates to ownership interests in a person. Thus, paragraph 4 effectively prevents a Party from relying on the provisions of the Convention, and in particular the provisions of paragraphs 1 and 2 of Article 21, to claim 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 new paragraph conforms to the analogous provision of the U.S. and OECD Models.

Article VI

Article VI deletes and replaces paragraphs 1 and 2 of Article 22 (Secrecy) of the existing Convention. The purpose of these amendments is to bring the confidentiality rules of the existing Convention regarding exchanged information and the limitations regarding the use of such information into conformity with the U.S. and OECD Models.

Paragraph 1 of Article 22

New paragraph 1 of Article 22 provides that any information obtained by a Party under this Convention shall be treated as secret in the same manner as information obtained under the domestic laws of that Party, and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party (requested State) as required under its domestic law. The Explanatory Report accompanying the Protocol provides that respect for the confidentiality of information is a corollary of the powers of tax authorities and is necessary to protect the legitimate rights of taxpayers. Mutual assistance between tax administrations is therefore possible only if each administration is assured that the other administration will treat with proper confidence the information which it obtains in the course of their cooperation.

The Explanatory Report accompanying the Protocol also explains that this provision is intended to ensure that a Party receiving information shall treat the information as secret in compliance not only with its own domestic law, but also with safeguards that may be required to ensure data protection under the domestic law of the supplying Party. However, specification of the safeguards may not be necessary if the supplying Party is satisfied that the Party receiving information ensures the necessary level of data protection with respect to the data being supplied. In any case, these safeguards should not go beyond what is needed to ensure data protection.

The United States strictly observes its domestic confidentiality laws, which ensure high levels of protection of personal data. When acting as a requested State, the United States will supply information only to the extent the applicant State observes the secrecy obligations under Article 22 of the revised Convention and, to the extent needed to ensure the necessary level of protection of personal data, U.S. domestic confidentiality laws.

Paragraph 2 of Article 22

New paragraph 2 of Article 22 provides that information received may be disclosed only to persons, including courts and administrative or supervisory bodies, concerned with the assessment, collection, or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes imposed by a Party. The information may be used only by these persons and only in connection with the specified functions. Information may also be disclosed to legislative bodies, such as, in the case of the United States, 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 the tax law of the Party in question. Information received may be disclosed in public court proceedings or in judicial decisions relating to the taxes imposed by a Party. Paragraph 2 of Article 22 generally conforms to the provisions of paragraph 2 of Article 26 of the U.S. and OECD Models.

Article VII

Article VII deletes and replaces paragraph 2 of Article 27 (Other international agreements or arrangements) of the existing Convention. The purpose of the amendment is to clarify that Parties that are Member States of the European Union can apply, in their mutual relations, the

possibilities of assistance provided by the Convention in so far as they allow a wider cooperation than the possibilities offered by the applicable European Union rules. This paragraph only applies between Member States of the European Union and in no way prejudices the application of the Convention between member States of the European Union and other Parties to the Convention.

Article VIII

Article VIII amends Article 28 (Signature and entry into force of the Convention) of the existing Convention by adding four new paragraphs. The primary purpose of the new paragraphs is to allow any country to request to be invited to sign and ratify the Convention as amended by the Protocol, thereby becoming a Party thereto. Article VIII also makes a related amendment to Article 30 (Reservations).

Paragraph 4 of Article 28

New paragraph 4 of Article 28 provides that any member State of the Council of Europe or any member country of the OECD that becomes a Party to the Convention after the Protocol enters into force shall be considered a Party to the Convention as amended by the Protocol, unless they express a different intention in a written communication to one of the Depositaries (the Council of Europe and the OECD).

Paragraph 5 of Article 28

New paragraph 5 of Article 28 provides that after the Protocol has entered into force, any State that is not a member of the Council of Europe or the OECD may request to be invited to become a Party to the Convention as amended by the Protocol. Such requests shall be directed to one of the Depositaries. The decision to invite States that have made such a request shall be taken by consensus by the Parties to the Convention as amended by the Protocol through the Coordinating Body.

New paragraph 5 provides that with respect to any State that, in accordance with this paragraph, ratifies the Convention as amended by the Protocol, the Protocol shall enter into force on the first day of the month following the expiration of a three month period after the date that that State has deposited its instrument of ratification with one of the Depositaries.

Paragraph 6 of Article 28

New paragraph 6 of Article 28 provides rules for the effective dates of the provisions of the Protocol. The amendments shall have effect for administrative assistance related to taxable periods beginning on or after January 1 of the year following the year in which the Convention as amended by the Protocol entered into force in respect of a Party, or where there is no taxable period, for administrative assistance related to charges to tax arising on or after January 1 of the year following the year in which the Convention as amended by the Protocol entered into force in respect of a Party. Any two or more Parties may mutually agree that the Convention as

amended by the Protocol may have effect for administrative assistance related to earlier taxable periods or charges to tax.

Paragraph 7 of Article 28

New paragraph 7 of Article 28 provides that notwithstanding new paragraph 6 of that Article, for criminal tax matters, the Convention as amended by the Protocol shall have effect for any earlier taxable period or charge to tax, from the date of entry into force in respect of a Party.

Subparagraph 1(f) of Article 30

New subparagraph 1(f) of Article 30 (Reservations) provides that, in relation to new paragraph 7 of Article 28, a Party may nevertheless lodge a reservation according to which the provisions of the amended Convention will have effect for administrative assistance related to criminal tax matters only as related to taxable periods beginning from the third year prior to the year in which the Convention as amended by the Protocol entered into force in respect of that Party.

Article 30 of the existing Convention provides that States may make reservations with respect to several specified aspects of the Convention. The United States made several reservations to the existing Convention, which were contained in its instrument of ratification deposited on February 13, 1991, with the Depositories to the Convention. The Protocol to the existing Convention does not affect the United States' reservations to the existing Convention.

Article IX

Article IX provides rules for the entry into force of the Protocol. The Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of ratification by five parties to the existing Convention. A Party which ratifies the Protocol after the Protocol has entered into force will be bound by the Protocol beginning on the first day of the month following the expiration of a period of three months after the date of deposit of its instrument of ratification.

Article X

Article X of the Protocol describes the functions of the two Depositories of the Convention: the Council of Europe and the OECD. Article X provides that when an act, notification, or communication has been accomplished with a Depository, that Depository shall notify the other Depository, the member States of the Council of Europe, the member countries of the OECD, and any Party to the Convention as amended by this Protocol of: any signature, the deposit of any instrument of ratification, acceptance or approval, any date of entry into force of the Protocol, and any other act, notification, or communication relating to the Protocol.