

ORRIN G. HATCH, UTAH, CHAIRMAN

CHUCK GRASSLEY, IOWA  
MIKE CRAPO, IDAHO  
PAT ROBERTS, KANSAS  
MICHAEL B. ENZI, WYOMING  
JOHN CORNYN, TEXAS  
JOHN THUNE, SOUTH DAKOTA  
RICHARD BURR, NORTH CAROLINA  
JOHNNY ISAKSON, GEORGIA  
ROB PORTMAN, OHIO  
PATRICK J. TOOMEY, PENNSYLVANIA  
DANIEL COATS, INDIANA  
DEAN HELLER, NEVADA  
TIM SCOTT, SOUTH CAROLINA

RON WYDEN, OREGON  
CHARLES E. SCHUMER, NEW YORK  
DEBBIE STABENOW, MICHIGAN  
MARIA CANTWELL, WASHINGTON  
BILL NELSON, FLORIDA  
ROBERT MENENDEZ, NEW JERSEY  
THOMAS R. CARPER, DELAWARE  
BENJAMIN L. CARDIN, MARYLAND  
SHERROD BROWN, OHIO  
MICHAEL F. BENNET, COLORADO  
ROBERT P. CASEY, Jr., PENNSYLVANIA  
MARK R. WARNER, VIRGINIA

# United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

CHRIS CAMPBELL, STAFF DIRECTOR  
JOSHUA SHEINKMAN, DEMOCRATIC STAFF DIRECTOR

May 23, 2016

The Honorable Jacob Lew  
United States Secretary of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Dear Secretary Lew:

Thank you for your recent response to our letter regarding our concerns about the European Commission's (EC) State aid investigations of tax rulings given by Member States to U.S. companies or their subsidiaries. We applaud the efforts you and your staff have taken to date. We encourage Treasury to continue its active engagement with officials of the EC and Member States and to work with other agencies, such as the United States Trade Representative, to ensure the United States is using all of the tools at its disposal to protect U.S. interests in these matters.

We are disappointed that, to date, EC officials generally have dismissed our concerns and continue to insist they are not targeting U.S. companies. At the same time, their responses have actually shown our concerns are justified. EC officials have tried to assure us that these investigations are routine and that our concerns are merely due to our "misunderstanding" of European Union (EU) law. In fact, however, in her February 29 letter to you, Commissioner Vestager states that the EC is now using State aid as one of its "tools" to achieve a "reform agenda," which confirms our suspicion that these cases are about more than objectively enforcing existing competition policies. The retroactive effect of these State aid investigations contradicts the notion of reform, and any retroactive application of a "reform agenda" is improper and plainly undermines legal certainty and the rule of law.

Also in her letter to you, Commissioner Vestager says that EC's tax ruling investigations "must be seen" in the context of the 170 State aid decisions since 1999, "only a handful" of which concerned U.S. companies. That context, however, obscures the fact that four of the five investigations of company-specific tax rulings, and nearly all of the amounts at stake, involve U.S. companies. Moreover, the encroachment on U.S. tax jurisdiction that results from these cases appears to be intentional. A policy document on State aid and national tax rulings prepared by the Directorate-General for Internal Policies of the European Parliament encourages Member States to ensure the method of recovery is through collection of "back taxes as to be eligible for

foreign tax credits” in non-EU countries.<sup>1</sup> In other words, the prospect of U.S. taxpayers “footing the bill” for State aid recoveries not only forms the basis for our view that these cases are a direct threat against U.S. interests, it is apparently the EU’s intended result.

The Commission appears to be ignoring the national practice and law of its Member States and to be imposing its own new standard for transfer pricing determinations. In effect, the Commission appears to be asserting supremacy over and becoming the final arbiter of transfer pricing and other international tax determinations in the EU. As a result, we believe the United States needs to determine for itself the implications of the EC being the final arbiter of how its Member States apply international tax standards as part of their own tax laws and what actions should be taken in response.

Accordingly, in addition to your continued review of section 891,<sup>2</sup> we request Treasury to elaborate on the concerns that you have expressed, which we share, in light of the EC’s responses to date. In particular, we request that you consider the following issues:

- a. Whether, in your view, EC’s continued insistence that it is not disproportionately targeting U.S. companies is accurate?
- b. Whether, in your view, Commissioner Vestager’s statement in her February 29 letter to you that “EU Courts have long established that under EU State aid rules Member States cannot give multinational groups a more favorable tax treatment than standalone companies” (i) is accurate; (ii) supports the EC’s assertion that these tax ruling investigations do not involve the application of new legal theories; and (iii) means the EC is the ultimate authority over how Member States apply international tax standards, such as the arm’s length principle, that are designed to reach appropriate profit allocation results for multinational groups?
- c. Whether the EC’s investigations appear to be based on the application of international tax standards in place during the recovery period, or even those developed through the G20-OECD’s Base Erosion and Profit Shifting project? We recognize the opacity of the EC’s process and the bases for their State aid decisions presents challenges. However, we are troubled by indications that the EC appears to be targeting, as you said in your letter to President Juncker, “income that Member States have no right to tax under well-established international tax standards.”<sup>3</sup>
- d. The competency of the EC Directorate-General for Competition in applying international tax standards.

---

<sup>1</sup> Directorate General for Internal Policies, Policy Department A, EU State Aid law and National Tax Rulings, at 20 (October 2015).

<sup>2</sup> In a March 2 letter to us, Treasury said it is reviewing section 891 and its history closely. We note that EC officials have flatly rejected the assertion that the recent State aid investigations have discriminated against U.S. companies. We remain highly skeptical of the EC’s position that they are not targeting U.S. companies. However, we also note that section 891 asks whether U.S. companies are being subjected to “discriminatory *or extraterritorial* taxes” (emphasis added).

<sup>3</sup> We also find it troubling that the EC is using BEPS rhetoric to justify its actions, but is doing so not only retroactively, but also in a manner that appears, at least in some cases, to contradict a key objective of BEPS – to align taxing rights with value creation. You made a similar point in your letter to President Juncker.

- e. The implications of the EC being the final arbiter of how Members States apply international tax standards, including the impact on (i) reaching multilateral consensus with respect to such standards at the OECD; and (ii) bilateral tax treaties with Member States and the ability of the United States to rely on such treaties.

Again, we applaud Treasury’s continued efforts to urge the EC to reconsider its approach of applying new theories of State aid retroactively targeted at U.S. companies in a manner that is inconsistent with international tax standards. As we previously stated, our concerns are driven not only by the initial cases, but also by the precedent they will create and their long-term implications.



Orrin G. Hatch  
Chairman



Ron Wyden  
Ranking Member



Rob Portman  
U.S. Senator



Charles Schumer  
U.S. Senator