

How to End the Charade of Information Exchange

By Michael J. McIntyre

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“Tax havens, banking secrecy, that’s all over,” said French President Nicolas Sarkozy on the eve of the G-20 meeting in Pittsburgh on September 24-25.¹ Well, it’s not over yet. One of the key tools for combating tax haven abuses is supposed to be an effective exchange of information. The G-20 countries, at their April 2009 meeting, declared that countries that refuse to meet the international standard for effective information exchange would be blacklisted and subject to sanctions.² So far, the blacklist has been a sad joke. The OECD also has a gray list, and that list is also a joke.

Instead of promoting an effective exchange of information, the OECD and leading G-20 countries treat the OECD’s discredited 2002 model tax information exchange agreement as the international standard for transparency and cooperation. The view is widely held that the OECD TIEA is ineffective — not nothing, but not much.³ Tax haven countries that agree to this ineffective TIEA are provided with an undeserved patina of respectability. They have been eager to sign up, and most have done so.⁴

¹“Sarkozy to Push G20 on Tax Haven Sanctions,” the Tocqueville Connection, Sept. 23, 2009, available at <http://www.adetocqueville.com/cgi-bin/loc/searchTTC.cgi?displayZop+004b01d2>.

²London Summit — Leaders’ Statement, Apr. 2, 2009, available at <http://www.londonsummit.gov.uk/resources/en/news/15766232/communique-020409>. (“We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over.”)

³See Lee A. Sheppard, “News Analysis: Don’t Ask, Don’t Tell, Part 4: Ineffectual Information Sharing,” *Tax Notes*, Mar. 23, 2009, p. 1411, *Doc 2009-6201*, or *2009 TNT 54-7*. (“The standard OECD information exchange agreement is nearly worthless.”)

⁴As of September 30, 2009, the OECD reports that more than 90 TIEAs have been signed and more than 60 tax treaties have been negotiated or renegotiated in response to the April call of the G-20 countries to end tax haven abuses. Few, if any, of these countries would have signed if they had expected that by doing so they would no longer be able to attract deposits from tax cheats. Before the G-20 proclamation in favor of information exchange, the countries that had refused to sign a TIEA probably did so out of a fear that prospective clients would overestimate the effectiveness of a TIEA.

Symbolic of the G-20 retreat is the recent addition of Switzerland to the OECD’s white list of cooperative countries.⁵ Switzerland! For many decades, that fine country’s economy has depended heavily on the revenue derived from the servicing of international tax cheats. Over the past several months, its finance minister, Hans-Rudolf Merz, has been telling every news outlet at his disposal that Swiss bank secrecy is alive and well. The simple fact is that Switzerland is unable, politically, to sign an effective information exchange agreement. To do so would cripple its politically influential and lucrative private banking industry and would send the tax cheats it now services to Singapore and other points east.

I do not mean to condemn the G-20 and the OECD for promoting a TIEA with limited effectiveness. In international politics, brazen hypocrisy is sometimes a useful tool for good. The G-20 countries understand that the countries that facilitate international tax evasion and aggressive tax avoidance will not fold their tents quickly. They also know, or are learning, that their own financial services industries are aggressive enablers of international tax evasion — as well as accounting fraud and lots of other bad practices.

Given the short-term political obstacles to effective reform, there is something to be said for the OECD strategy of getting the offshore financial centers to acknowledge that bank secrecy has its limits and that all countries have some obligation to assist other countries in controlling the unsavory practices of the international banking community. The offshore centers may not really mean it, but so what? As François de La Rochefoucauld famously quipped, “Hypocrisie est un hommage que la vice rend à la vertu.” (Hypocrisy is a tribute vice pays to virtue.)

Also, I am not pessimistic about the prospects in the medium term for fulfilling a good part of Sarkozy’s vision of a world without the pandemic tax haven abuses we now endure. The economic crisis and deep recession brought on by the abuses of the international financial industry have fostered a sea change in public attitudes toward that industry. Banks surely will become subject to new transparency regulations, and political pressure to prevent a repeat of past abuses is not going away. For the first time in world history, the opponents of tax haven abuses have a genuine opportunity to foster meaningful change.

⁵“Swiss to Exit Bank Secrecy List, OECD Says on G20 Eve,” Reuters, Sept. 23, 2009, available at <http://www.reuters.com/article/businessNews/idUSTRE58M5SU20090923?feedType=RSS&feedName=businessNews>. See also David D. Stewart, “OECD Promotes Switzerland to White List,” *Tax Notes Int’l*, Oct. 5, 2009, p. 8, *Doc 2009-21372*, or *2009 WTD 185-1*.

In Section A of this article, I analyze the new protocol between the United States and Switzerland. It is typical of agreements based primarily on the OECD TIEA. For reasons provided in that section, I believe that the agreement is nearly useless as a device for ferreting out a significant number of American tax cheats operating out of Switzerland. Still, making the agreement was a painful step for Switzerland to take. It is a signal to the world that even Switzerland has been pressured to acknowledge that facilitating international tax evasion is no longer an acceptable practice for countries to follow.

I describe in Section B a number of recent developments that underscore my optimism that significant reforms of banking practices are really coming. Of course, my list of promising developments is merely illustrative. In brief, I find that several countries are committing to transparency and effective information exchange.

I refer throughout this report to the need for an *effective* exchange of information. To give real content to that concept, I offer in Appendix A a model TIEA that I prepared. In Appendix B, I provide a detailed comparison between my draft of an effective TIEA and the OECD TIEA. I prepared the draft and offered it for consideration by the United Nations' Committee of Experts on International Cooperation in Tax Matters while serving as a member of the U.N. Committee's subcommittee on information exchange. I acted as interim chair of that subcommittee in 2007, during which time I prepared the draft commentary to accompany the revision of article 26 (exchange of information) of the U.N. model tax treaty. The commentary, only slightly watered down, was approved in October 2008.

The draft TIEA and companion document are my own work and have not been commissioned, approved, or even reviewed by the U.N. Committee. My hope, however, is that the members of that committee, especially those from developing and emerging countries, will see that their countries would benefit by a U.N. endorsement of an information exchange agreement with real bite. Also, I hope that some members from OECD countries will put aside the desire for institutional hegemony and recognize that the United Nations can and should play a positive role in the common campaign against international tax evasion and aggressive tax avoidance.

A. The Disappointing Protocol

The U.S. Treasury Department recently announced, with pride, that it had entered into a protocol with Switzerland "to allow for greater tax information exchange."⁶ The protocol it negotiated, however, is mostly a charade. According to the Treasury release, the "protocol revises the existing U.S.-Switzerland income tax treaty to allow for the exchange of information for income tax purposes to the full extent permitted by Article 26 of the Organization for Economic Co-operation

and Development (OECD) Model Income Tax Convention." It does nothing of the kind.

True, article 26 of the existing treaty, which permits Switzerland to avoid any exchange of information that would be inconsistent with its strict bank secrecy laws, would be replaced by an article largely based on the OECD model treaty. Article 26 as revised in 2005 attempts to eliminate the right of a treaty partner to refuse to provide information on the grounds that so doing would be contrary to its bank secrecy laws. Article 26 is far from perfect, and, to have much bite, must be read in conjunction with the OECD commentary on that article. But I would not lightly dismiss the Switzerland-U.S. protocol if it actually imposed the obligations on the parties contemplated by article 26.

What the agreement seems to say in the revised article 26 is countermanded by an explanatory document appended to the main body of the treaty. That explanatory document is part of the treaty, just as much as article 26 itself. In particular, the appended language requires that the United States already have identified an individual as a likely tax evader before Switzerland has an obligation to assist the United States in combating international tax evasion. In effect, the Swiss have made a conditional promise to assist the United States in documenting a tax fraud case that the United States has already developed. This help is important, of course, in the context of a particular case. But it is not helpful in addressing the pandemic tax evasion that confronts the United States and many other countries. What the United States needs from the Swiss is help in detecting the hundreds of thousands of tax evaders who are using Swiss bank secrecy laws to cover their tracks. The Swiss protocol offers no help in that endeavor.

The protocol specifies that the agreement "shall not commit a Contracting State to exchange information on an automatic or spontaneous basis." Article 26 of the OECD model treaty has no such limitation, and paragraph 9 of the commentary to that article states that automatic and spontaneous exchanges are anticipated.⁷

After the new article 26 has been limited by subsequent language in the protocol, the obligations assumed by the United States and Switzerland are essentially the same as those contemplated in the OECD TIEA. That is not good news.

The OECD model income tax treaty has always had language that accommodates countries like Switzerland and Liechtenstein, which do not want to exchange information, and countries like France and Canada, which do. The OECD model initially adopted in 1977 achieved this goal by providing that a contracting party did not have to exchange information if doing so would violate its domestic laws (that is, bank secrecy). That hypocrisy ended with the 2005 revision of article 26, which specifically requires an override of domestic bank secrecy laws. Still, article 26 means different things to different countries.

⁶Treasury Press Release TG-297, "United States, Switzerland Sign Agreement to Bolster Tax Information Exchange," Sept. 23, 2009, available at <http://www.treas.gov/press/releases/tg297.htm>.

⁷That paragraph states, in relevant part:
9. The rule laid down in paragraph 1 allows information to be exchanged in three different ways: a) on request . . . ; b) automatically . . . ; c) spontaneously . . .

The dual nature of the OECD model is preserved to some degree by language in the OECD commentary prohibiting so-called fishing expeditions.⁸ The Swiss apparently understand a fishing expedition to be a search for tax evaders when the name of the evader is not yet known.

The admonition against fishing expeditions found in the OECD commentary has found its way into the new Switzerland-U.S. protocol. The protocol states:

The purpose of referring to information that may be relevant is intended to provide for exchange of information in tax matters to the widest possible extent without allowing the Contracting States to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

The first part of the quotation above is excellent — just what is needed if a period were placed after “widest possible extent” and the rest of the language deleted. The rest of the quotation, however, narrows the phrase “widest possible extent.” How restrictive the “fishing expedition” language is intended to be is unclear — a decent reason for avoiding such metaphors in a tax treaty. The commentary to the U.N. version of article 26 does not include any admonitions against fishing expeditions.

One might fairly ask, what, in this context, is a fishing expedition? I cannot say for sure what kind of request for information would be considered a fishing expedition under the protocol. I am confident, however, that the Swiss viewed the U.S. request for the names of suspected American tax cheats in the UBS case to be a fishing expedition. Do the Swiss believe they have committed themselves to come clean in the next UBS case? Not a chance.

Opponents of effective information exchange have often referred to information exchange as a fishing expedition, which they characterize as unacceptable behavior by a tax department. If a fishing expedition is understood to be a systematic search for tax cheats, I would think such an expedition would be exactly what the governments of the world require to deal effectively with their tax evasion problems.

In an actual fishing expedition, professional fishermen determine from experience and various information sources where the fish they seek are likely to be located. They then go fishing. What would happen to the fishing industry if fishermen could only catch a fish if they knew its name or if the fish had an identifying tag? The only reason I can imagine for wanting to put such a ridiculous limitation on fishermen would be to keep them from catching fish.

Is that the problem with an effective information exchange — that it might allow governments to catch tax cheats? Do the Swiss object to a fishing expedition because they don’t want the IRS to catch tax cheats operating out of Swiss banks? A pretty good guess, I would say.

Let me add, however, that Switzerland is not alone in objecting to fishing expeditions. As noted above, the

OECD, in its commentary on article 26, has taken the position that its version of the international standard for transparency does not permit fishing expeditions. Is something fishy really going on? Perhaps not.

The OECD commentary to article 26 is a complex political document, designed to appeal to countries that want to exchange information and those that do not. The ban on fishing expeditions in paragraph 5 of the commentary is largely vitiated by the approval of automatic exchanges of information in paragraph 9. In an automatic exchange, a contracting state might receive a list of its residents who have a bank account or are receiving dividend payments in the other contracting state. The United States and Canada provide for such exchanges on a regular basis. I believe that the Swiss would view a request for a list of banking customers as a fishing expedition. Switzerland is not bound by paragraph 9 because that paragraph is artfully drafted to provide that article 26 *allows* but does not *require* automatic exchanges.

B. Recent Positive Developments

Despite the disappointing formalism of the OECD and the G-20 countries on information exchange, the campaign for greater transparency and for effective information exchange remains robust. There are many reasons for guarded optimism. Here is a short list.

1. Mexico requests U.S. bank data. Mexico recently requested, in a letter to Treasury Secretary Timothy Geithner from Mexican Finance Secretary Agustín Carstens, that the United States agree to implement a system of automatic information exchange regarding deposits held in Mexican banks by Americans and in American banks by Mexicans. Here is an excerpt from that letter:

As you are aware, Mexico and the United States regularly exchange information, on a case-by-case basis, in accordance to our bilateral Tax Treaty. We also exchange bulk information on interest payments (between corporations), dividends and royalties. However, we do not exchange information on interest paid by banks from one country to residents of the other country.

Canada and the US implemented such mechanism years ago. Mexico and Canada began exchanging such information years ago as well. Being the world’s largest trading block under the NAFTA, and fighting considerably higher security threats than a decade ago, I truly believe that we should enhance our cooperation and strengthen our capacities to protect our peoples and wealth. The exchange of information on interest paid by banks will certainly provide us with a powerful tool to detect, prevent and combat tax evasion, money laundering, terrorist financing, drug trafficking and organized crime.⁹

⁹Letter to Treasury Secretary Timothy Geithner from Mexican Finance Secretary Agustín Carstens (Feb. 9, 2009), *Doc 2009-5928, 2009 TNT 50-12*.

⁸See paragraph 5 of the OECD commentary to article 26.

Given its professed interest in tracking down American tax cheats and in cooperating with other countries in their similar endeavors, the Obama administration will be hard pressed not to respond positively to Carstens's proposal. After all, the United States and Mexico are both bound by the OECD commentary to article 26, which provides in paragraph 9 for automatic exchange of information.

Still, political opposition from U.S. banks, especially those with major branches in Texas and Florida, can be expected. That opposition surfaced when the Clinton administration, late in its final term, issued proposed regulations that would provide information about bank deposits to many OECD countries under existing tax treaties. The Bush administration revoked those proposed regulations early in its term in response to pressures from the U.S. financial services industry. It issued revised proposed regulations offering an exchange of information with a shorter list of OECD countries, not including Mexico.¹⁰ The proposed regulations languished and were never issued as final regulations. Estimates at the time suggested that Florida banks alone held deposits of \$10 billion from residents in Latin American countries.¹¹

Mexico surely understands that an agreement for automatic exchange with the United States will induce Mexican tax cheats, who reputedly have large sums deposited in Texas and Florida banks, to move their money to less cooperative jurisdictions. That Mexico still wants automatic exchange suggests that it now believes the campaign against international tax evasion is for real.

The Mexico initiative is important in its own right, and it is also a useful test of the Obama administration's commitment to effective information exchange. Even more importantly, it may serve as a precedent for other U.S. treaty partners seeking to tax their own tax cheats investing in the United States. I believe that many existing U.S. tax treaties require the United States to provide automatic exchange of information regarding tax-free income earned on deposits in U.S. banks.

I also believe that most existing U.S. tax treaties obligate the United States to provide, on request, an automatic exchange of information regarding income earned on investments in U.S. companies through qualified intermediaries. A QI is a foreign bank or other financial intermediary that has been set up to handle anonymously the investments in the United States by foreign tax cheats. Hundreds of billions of dollars flow into the United States under this system. It is rife with corruption, as the UBS case revealed in great detail. The Obama administration has proposed some commendable changes in the QI program to make it less easy for U.S. citizens and residents to use, illegally, the QI system.

¹⁰See Robert Goulder, "Banks Welcome Narrowed Proposed Regs on Interest Reporting," *Tax Notes*, Aug. 5, 2002, p. 790, *Doc 2002-17774*, or *2002 TNT 148-5*. The listed countries were Australia, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom.

¹¹*Id.* at 791.

However, the United States loses moral leadership on the tax evasion issue as long as it has an active program encouraging foreign tax cheats to invest in the United States.

The Obama administration has shown no interest as yet in eliminating the QI system as it applies to foreign tax cheats investing in the United States. The program can be undermined, however, if U.S. treaty partners successfully force the United States to comply with its obligation to provide information about their residents who are the beneficial owners of QI investments. If U.S. treaty partners successfully press the United States to comply with its treaty obligations regarding requests for information on the QI investments of their residents, the Mexican rock down the hill may trigger an avalanche.

2. U.N. commentary on Article 26. Last October the United Nations' Committee of Experts on International Cooperation on Tax Matters, which is the keeper of the U.N. model tax treaty, updated its provisions on information exchange. The revised rules require countries with bank secrecy laws to override those laws when requested to provide information possessed by their financial institutions. The U.N. language, for the most part, mirrors the language contained in article 26 of the OECD model treaty. However, there are two important differences.

First, the U.N. model explicitly requires an exchange of information to combat tax avoidance as well as tax evasion. The result is that countries following the U.N. model cannot refuse to exchange information on the ground that only tax avoidance is involved.

Second, the U.N. commentary goes well beyond the OECD commentary in promoting an effective exchange of information. For example, it takes the position that a country such as the United States is required under article 26 to provide information to its treaty partners about banking interest on an automatic basis. It also takes the position that a country such as the United States cannot use a QI rule to duck its obligation to provide information about the beneficial owners of investment income.¹²

Unlike the OECD commentary, which generally is binding on OECD treaty partners unless they have explicitly made a reservation to the commentary with the OECD,¹³ the U.N. commentary has no special legal status. It is incumbent on the treaty partners to provide explicitly in the notes accompanying their agreement that they will abide by the interpretations of language in their treaty contained in the U.N. commentary if that language is in accord with the U.N. model treaty. Unfortunately, countries have not followed this practice, as far as I can

¹²For discussion of the changes the United States must make to gain the high ground needed to lead reform, see Michael J. McIntyre, "A Program for International Tax Reform," *Tax Notes*, Feb. 23, 2009, p. 1021, *Doc 2009-609*, or *2009 TNT 34-46*.

¹³The legal status of the OECD commentary can be complex, in part because the commentary may be written or amended long after the treaty being interpreted had come into force. For discussion, see Brian J. Arnold and Michael J. McIntyre, *International Tax Primer*, 2nd ed., Kluwer Law International, The Hague and Cambridge, Mass. (2002), at 112-116.

determine. That situation must change if the 2008 U.N. commentary on article 26 is to have its intended effect.

3. Panama free trade agreement nixed. Another hopeful development was the withdrawal by the Obama administration of consideration of Panama for a free trade agreement because of Panama's record of facilitating tax evasion through its strict bank secrecy laws. Rep. Lloyd Doggett, D-Texas, and Sen. Carl Levin, D-Mich., have led the campaign in Congress to require Panama to sign an effective information exchange agreement before discussions on a free trade agreement could go forward. Panama has not signed any information exchange agreements, although it informed the OECD in 2002 that it intended to do so.¹⁴

What makes the Panama case special is that the members of Congress are insisting on an *effective* information exchange agreement, such as the one provided in the appendix to this article. The nearly worthless OECD TIEA will not be enough to remove congressional opposition to the United States entering into a free trade agreement with Panama.

4. Reform of EU savings directive. Tax reformers can take heart from the recent efforts of the EU Commission to reform its loophole-ridden savings taxation directive. That initiative, taken in 2005, had initial promise, but it was gutted by a failure to take account of even the most primitive forms of tax planning.

Any plan to curb international tax evasion must have at least two prongs. One prong, as already noted, is effective information exchange. The other prong is the reestablishment of source jurisdiction, which the OECD, through its model tax treaty, has seriously weakened. The major industrial countries have to curb the free flow of funds out of the country of production to offshore locations by imposing reasonable withholding taxes on remittances.

The EU initiative was a first step in asserting the right of its member states to tax interest income of foreigners that arises within their territorial borders. The lack of success of that initial effort was a major disappointment. It faltered in part from fierce opposition from Switzerland and a lack of support from the Bush administration. We can hope for a policy change from the Obama administration. That the EU Commission is now prepared to take advantage of the weakened position of the banking interests is very good news.

C. Civil Society

Finally, the emergence of nongovernmental organizations and other members of civil society as a force in combating international tax evasion is cause for optimism. Most notable has been the work of the Tax Justice Network,¹⁵ which has worked in the United States in cooperation with Citizens for Tax Justice.

Governments often have difficulty being candid about their problems in combating tax evasion, sometimes

because they fear that a candid assessment, which would show that tax evasion is pandemic, would encourage more taxpayers to evade. They are also afraid in many cases to offend the powerful interests that benefit from facilitating international tax evasion. Civil society can both offer an independent assessment of problems and can help generate public support for reform efforts.

D. Conclusion

President Sarkozy was premature, at best, in announcing the end of tax haven abuses and bank secrecy. As noted above, the OECD efforts at getting countries to sign information exchange agreements based on its model TIEA is a sideshow, even a charade. With all these illusory TIEAs being signed with great fanfare, some may fear that we are seeing the end of the reform movement rather than the beginning.

I agree that there are reasons for concern about the future direction of reform. That said, I find a lot to be encouraged about. I have discussed a few of the encouraging developments in Section B. There are many other items that could be added to that list. For example, I am encouraged by the action of the French banks, under pressure from their government, to close their branches located in noncomplying countries. Sure, the French banks are not major players in those locations. At a minimum, nevertheless, it is important symbolism. Also encouraging is the initiative of the Cayman Islands to offer automatic exchange of information to selected countries. And there are some encouraging signals coming out of the U.S. Congress. The Stop Tax Haven Abuse Act, recently introduced by Levin to pay some of the costs of healthcare reform, contains a grab bag of provisions that would give the IRS better tools to combat offshore tax evasion.

The next step in the campaign against international tax evasion is for the responsible elements in the international tax community to push for effective information exchange. That goal could be achieved through the widespread adoption of the proposed TIEA attached in Appendix A. I have presented that draft TIEA to the U.N. Committee of Experts on International Cooperation in Tax Matters, which met in Geneva October 19-23. I hope the formulation of a U.N. TIEA will be an important part of the agenda of that committee in the coming year.

We all should understand that the trillion dollar business of tax evasion is going to have a lot of vocal defenders. No one should imagine that controlling tax abuses will be easy. Right now, however, the momentum is with the tax reformers and not with the tax cheats and their enablers.

¹⁴See OECD, "Overview of the OECD's Work on Countering International Tax Evasion: A Background Information Brief" (Oct. 6, 2009), at 7.

¹⁵The Tax Justice Network produced a report on information exchange that is not entirely flattering to the OECD. See Tax

(Footnote continued in next column.)

Justice Network, "Tax Justice Briefing: Tax Information Exchange Arrangements," May 2009, available at <http://taxjustice.blogspot.com/2009/04/draft-briefing-paper-on-exchanging.html>.

Appendix A. A Model Effective TIEA

Agreement Between the Government of [Country A] and the Government of [Country B], for the Exchange of Information Relating to Taxes

The Government of A and the Government of B, desiring to facilitate the effective exchange of information relating to taxes, have agreed as follows:

Article 1. Object and Scope

The Contracting States shall provide each other with information concerning civil and criminal tax matters covered by this Agreement that may be relevant to the administration or enforcement of their domestic laws. In particular, they shall exchange information that would be helpful in preventing avoidance or evasion of those taxes, including information that may be relevant to the determination, assessment, and collection of those taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. The competent authorities shall, through consultation, develop appropriate methods and techniques for the effective exchanges of information under this Article.

Article 2. Jurisdiction

A requested party is obligated to provide information which is held by its authorities or is in the possession of or under the control of a resident or nonresident person over which it is able to exercise jurisdiction. In particular, a requested party is obligated to provide information concerning resident and nonresident persons if those persons are engaged in business within that jurisdiction, are making investments in that jurisdiction, are required to register in that jurisdiction, or are otherwise subject to the laws or regulations of that jurisdiction.

Article 3. Taxes Covered

1. This Agreement shall apply to all national taxes imposed on behalf of a Contracting State, irrespective of the manner in which they are levied.

2. The existing taxes to which the Agreement shall apply are, in particular:

- (a) In the case of [Country A]: . . .
- (b) In the case of [Country B]: . . .

3. This Agreement shall also apply to any identical or substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the [Country A] or [Country B] taxes. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting States in the form of an exchange of letters. The competent authorities of the Contracting States shall notify each other of any substantial changes to the taxation and related information-gathering measures covered by this Agreement.

Article 4. Definitions

For the purposes of this Agreement, unless the context otherwise requires:

1. The term "Contracting State" means [Country A] or [Country B], as the context requires.
2. The term "competent authority" means:
 - (a) for [Country A], . . . , and
 - (b) for [Country B],

3. The term "person" means a natural person, a company, a partnership, a trust, an estate, a foundation, or any other body or group of persons.

4. The term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes by either Contracting State.

5. The term "tax" means any tax covered by this Agreement.

6. The term "requested party" means the party to this Agreement which is requested to provide or has provided information in response to a request.

7. The term "requesting party" means the party to this Agreement submitting a request for or having received information from the requested party.

8. The term "information-gathering measures" means judicial, regulatory, or administrative procedures enabling a requested party to obtain and provide the information requested.

9. The term "information" means any fact, statement, document, or record in whatever form.

10. The term "tax evasion" means any act intended to defraud the public revenue or to evade or attempt to evade any tax liability.

11. The term "tax avoidance" means any act that is legal under the tax laws of the relevant Contracting State but nevertheless defeats the ostensible purpose of those tax laws, typically because the form of the act is inconsistent with its substance or because the act does not have a substantial business purpose other than the avoidance of tax.

12. The term "publicly traded company" means any company whose principal class of shares is listed on a recognized stock exchange provided its listed shares can be and are readily purchased and sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors.

13. The term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company.

14. The term "recognized stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties.

15. The term "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares, or other interests in the fund or scheme can be readily purchased, sold, and redeemed by the public. Units, shares, or other interests in the fund or scheme can be readily purchased, sold, and redeemed "by the public" if the purchase, sale, and redemption is not implicitly or explicitly restricted to a limited group of investors and sales and purchases by persons outside a limited group actual occur on a regular basis.

Article 5. Exchange of Information Upon Request

1. The competent authority of the requested party shall provide upon request by the requesting party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested party if it had occurred in the territory of the requested party.

2. If the information in the possession of the competent authority of the requested party is not sufficient to enable it to comply with the request for information, the requested party shall take all relevant information gathering measures to provide the requesting party with the information requested, notwithstanding that the requested party may not, at that time, need such information for its own tax purposes.

3. If specifically requested by the competent authority of the requesting party, the competent authority of the requested party shall provide information under this Article in the form of depositions of witnesses and authenticated copies of original records.

4. The competent authority of the requesting party shall provide the following information to the competent authority of the requested party when making a request for information under this Agreement in order to indicate the possible relevance of the information sought by the request:

- (a) A statement of the information sought, including its nature and the form in which the requesting party wishes to receive the information from the requested party.
- (b) To the extent known, the name and address of the person under examination or investigation.
- (c) The purpose for which the information is sought.
- (d) To the extent known, the name and address of any person believed to possess or have control over the information requested.
- (e) A statement that the request for information is in conformity with this Agreement and with the law and administrative practices of the requesting party and that, if the requested information were within the jurisdiction of the requesting party, then the competent authority of the requesting party would be able to obtain the information under the laws of the requesting party or in the normal course of its administrative practices.

A requested party may request additional information from the requesting party that it believes would be helpful to it in complying with a request. No information, other than the information listed above, however, may be required by a requested state as a condition for providing the requested information.

5. The competent authority of the requested party shall forward the requested information as promptly as possible to the competent authority of the requesting party. To ensure a prompt response, the competent authority of the requested party shall act as follows:

- (a) It shall confirm receipt of a request for information in writing to the competent authority of the

requesting party, and shall notify the competent authority of the requesting party of any deficiencies in the request within 30 days of receipt of the request.

(b) If the competent authority of the requested party has been unable to obtain and provide the information requested within 90 days of receipt of the request, it shall explain immediately to the competent authority of the requesting party the reasons for its inability, including an explanation of any obstacles it may have encountered in furnishing the information.

(c) If the competent authority of the requested party intends to decline to provide the information in accordance with the provisions of Article 9 of this Agreement, it shall provide a statement to the competent authority of the requesting party its intent not to comply with the request for information and the basis for its refusal. Unless that statement is provided within 30 days of receipt of the request for information, the rights of the requested party to refuse to supply the information under Article 9 is waived.

Article 6. Automatic Exchange of Information

1. With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, the Contracting States shall exchange automatically the information referred to in Article 1.

2. In particular, each Contracting State shall establish procedures for the automatic exchange of information on:

- (a) the formation of a legal entity or body, including corporations, partnerships, or trusts, in that Contracting State that is controlled by persons resident in, or citizens of, the Other Contracting State;
- (b) the payment of dividends, interest, rents, royalties, or other periodical income paid by a resident of a Contracting State to a resident or citizen of the Other Contracting State.

Exchanges under this paragraph shall occur annually or at such shorter intervals as agreed to by the competent authorities.

3. The Contracting States are obligated under this Article to provide information in electronic form if such action is necessary for an effective exchange of information.

Article 7. Spontaneous Exchange of Information

1. A Contracting State shall, without prior request, forward to the Other Contracting State information of which it has knowledge in the following circumstances:

- (a) The first-mentioned Contracting State has grounds for supposing that there may be a loss of tax revenue in the Other Contracting State as a result of tax evasion;
- (b) Business dealings between a person acting within the first-mentioned Contracting State and a taxpayer in the Other Contracting State are conducted in such a way that tax avoidance is likely to result in the Other Contracting State.

2. Each Contracting State shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to the Other Contracting State.

Article 8. Tax Examinations (or Investigations) Abroad

1. The requested party may, to the extent permitted under its domestic laws, allow representatives of the competent authority of the requesting party to enter the territory of the requested party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned. The competent authority of the requesting party shall notify the competent authority of the requested party of the time and place of the meeting with the persons concerned.

2. At the request of the competent authority of the requesting party, the competent authority of the requested party may permit representatives of the competent authority of the requesting party to attend a tax examination in the territory of the requested party.

3. If the request referred to in paragraph 2 is granted, the competent authority of the requested party conducting the examination shall, as soon as possible, notify the competent authority of the requesting party of the time and place of the examination, the authority or person authorized to carry out the examination, and the procedures and conditions required by the requested party for conducting the examination. The requested party shall make all decisions regarding the manner of conducting the examination.

Article 9. Possibility of Declining a Request

1. The competent authority of the requested party may decline a request for information or other assistance:

- (a) whenever the request is not made in conformity with this Agreement; or
- (b) whenever the disclosure of the information requested constitutes a state secret or otherwise would be contrary to the public policy of the requested party and would threaten its vital interests.

A public policy inconsistent with the obligations established under Article 11 of this Agreement shall not constitute a ground for declining a request for information under this paragraph.

2. This Agreement shall not impose upon a Contracting State any obligation to provide any trade, business, industrial, commercial, or professional secret or any secret trade process if that trade or other secret information has significant commercial value. Financial information, including books and records, does not by its nature constitute a trade, business, or other secret within the meaning of this paragraph. Also, a Contracting State may not decline to provide information under this paragraph merely because the information is included in a document that contains information protected from disclosure under this paragraph. Information held by financial institutions or that the requested party must be able to provide under Article 11, paragraph 2 shall not be treated as a secret or trade process merely because it meets the criteria in that paragraph.

3. This Agreement shall not impose on a Contracting State an obligation to obtain or provide information which would reveal a confidential communication between an attorney, solicitor, or other admitted legal representative and that person's client when the communication:

- (a) is protected from disclosure under the laws of the Contracting State in which the advice was given;
- (b) was produced either for the purpose of seeking or providing legal advice or for the purpose of use in existing or contemplated legal proceedings;
- (c) is unrelated to the status of the legal representative as an agent, fiduciary, or nominee.

The protection for a confidential communication between a client and a legal representative does not apply to any documents that were delivered to the legal representative to avoid disclosure. Also, documents or other items held by a legal representative with the intention of furthering a criminal purpose are not protected from disclosure. When the context permits, the protection for a confidential communication should be interpreted narrowly so as not to frustrate an effective exchange of information.

4. A request for information shall not be refused on the ground that the tax liability giving rise to the request is disputed by the taxpayer.

5. The requested party shall not be required to obtain and provide information which the requesting party would be unable to obtain in similar circumstances under its own laws for the purpose of the enforcement of its own tax laws or in response to a valid request from the requested party under this Agreement.

6. In no case shall the provisions of this article be construed to permit a requested party to decline to supply information on the ground that the information is held by a bank, other financial institution, nominee, or person acting in an agency or a fiduciary capacity or because the information relates to ownership interests in a person.

7. If information is requested by a requesting party in accordance with this Agreement, the requested party shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own purposes. In no case shall a requested party be permitted to decline to supply information because it has no domestic interest in such information.

8. A requested party may fulfill a request for information under this Agreement even if it could invoke this Article to decline that request. If the requested party declines to exercise its right under this Article and supplies the requested information, the information exchanged remains within the framework of the Agreement and is subject, for example, to the confidentiality requirements of Article 10.

Article 10. Confidentiality

1. Any information received under Article 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State.

2. If the information provided was originally regarded as secret in the state of the requested party, it shall be disclosed only to persons or authorities (including judicial, administrative, and oversight authorities) officially concerned with the purposes specified in Article 1. It may be used by such persons or authorities only for such purposes or for oversight purposes, including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in other judicial proceedings.

3. Information received under Article 1 may be used for a purpose other than for the purposes stated in Article 1 only with the prior consent of the requested party. That consent shall not be withheld unreasonably.

4. Information received under Article 1 may be disclosed to a person not specified in subparagraph 2, above, only with the prior consent of the requested party. That consent shall not be withheld unreasonably.

Article 11. Implementation Legislation

1. Each Contracting State shall enact any legislation and establish any administrative practices necessary to comply with, and give effect to, the terms of this Agreement.

2. In particular, each Contracting State shall ensure that its competent authority, for the purposes of this Agreement, has the authority to obtain and provide upon request the following information:

(a) Information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity.

(b) Information regarding the nominal and beneficial ownership of companies, partnerships, trusts, estates, foundations, "Anstalten," and other persons, including all persons in an ownership chain or within a common ownership group.

3. The information specified in paragraph 2, above, shall include:

(a) In the case of trusts, information on settlors, trustees, and direct and indirect beneficiaries, and persons having the ability to direct the way assets of the trust are managed, held, or distributed.

(b) In the case of foundations, information on founders, members of the foundation council, beneficiaries, and persons having the ability to direct the way assets of the foundation are managed, held, or distributed.

(c) In the case of collective investment funds, information on shares, units, and other interests.

4. This Agreement does not create an obligation on the Contracting Parties to enact legislation or establish administrative procedures that would allow it to obtain or provide ownership information with respect to companies or public collective investment funds that are widely held and are publicly traded on a recognized stock exchange.

Article 12. Safeguards

Rights and safeguards secured to persons by the laws or established administrative practices of the requested party shall not be applied to the extent that these laws

and practices act as impediments to an effective exchange of information under this Agreement.

Article 13. Administration Costs or Difficulties

1. Unless otherwise agreed to by the competent authorities:

(a) Ordinary costs incurred in providing assistance shall be borne by the requested party;

(b) Extraordinary direct costs, including litigating expenses, incurred in providing assistance shall be borne by the requesting party.

2. In the event that compliance with the obligations under this Agreement create undue difficulties for either Contracting State, as a result either of the number or the complexity of requests, the respective competent authorities shall consult with a view to resolving the difficulties under Article 14.

Article 14. Mutual Agreement Procedure

1. Should difficulties arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavor to resolve the difficulties by mutual agreement.

2. The competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5, 6, 7, and 8.

3. The competent authorities of the Contracting Parties may communicate with each other directly, rather than through diplomatic channels, for purposes of reaching agreement under this Article.

4. The competent authorities of the Contracting Parties may agree to pursue other forms of dispute resolution, including mediation and arbitration.

Article 15. Entry into Force

1. This Agreement shall enter into force when each party has notified the other of the completion of its necessary internal procedures for entry into force.

2. Upon entry into force, this Agreement shall have effect with respect to all civil and criminal matters covered in Article 1 beginning on January 1, 20xx.

Article 16. Termination

1. This Agreement shall remain in force until terminated by either Contracting State.

2. Either Contracting State may terminate this Agreement by giving notice of termination in writing through diplomatic channels or by letter to the competent authority of the other Contracting Party.

3. A notice of termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of that notice by the Other Contracting State.

4. A Contracting State after termination of this Agreement shall remain bound by the provisions of Article 10 (Confidentiality) with respect to any information obtained under this Agreement.

In witness whereof, the undersigned, being duly authorized in that behalf by the respective parties, have signed this Agreement.

Done at [...], in duplicate, this [...] day of [...].

For the Government of [Country A]:

For the Government of [Country B]:

Appendix B. Comparison of OECD Model TIEA and Model Effective TIEA

Summary

The model effective tax information exchange agreement builds on the TIEA prepared by the OECD in 2002. Some changes are made simply for clarity or to improve the organizational structure of the model agreement. Many changes are substantive, some of major importance, and some of lesser importance. Changes are needed because the OECD model TIEA has not been effective in combating the widespread tax evasion that is being achieved in countries that have signed a TIEA based largely on the OECD model TIEA. Indeed, the OECD program has provided a patina of respectability to countries that are actively assisting taxpayers in evading taxes in their home country.

The following are the most significant changes in the new model from the OECD model TIEA:

1. The new model requires not only an exchange of information on specific request but also on an automatic and spontaneous basis. Through automatic exchanges, a contracting state can identify taxpayers having accounts in the banks of a treaty partner and can take steps to determine whether those taxpayers have properly reported their income from those accounts.
2. Information relating to tax avoidance is required to be exchanged under the new model. The OECD model limits the exchange to matters of tax evasion.
3. The rules in article 9 (Possibility of Declining a Request), which allow for the avoidance of an obligation to exchange information under some circumstances, have been tightened significantly and clarified.
4. The jurisdictional limitations found in the OECD model TIEA have been relaxed significantly to prevent the use of those limitations to avoid an effective exchange of information.

Article by Article Discussion

Article 1 (Object and Scope)

For clarity, the effective model uses the term “may be relevant” rather than the OECD term “foreseeably relevant” in specifying the information that must be exchanged. The OECD Commentary to Article 26 (Exchange of Information) of its Convention With Respect to Taxes on Income and on Capital implies that the two terms have essentially the same meaning. Although the meaning of the term “foreseeably relevant” is unclear, perhaps intentionally so, the term “may be relevant” probably is the broader term. It is the term used in article 26, paragraph 1 (Exchange of Information) of the U.S. model treaty (2006).

The OECD commentary to its TIEA states:

The standard of foreseeable relevance 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 Parties 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.

The term “fishing expeditions” is obviously intended metaphorically. It is not defined and has no clear meaning within the tax literature. In context, it appears to mean that the requesting party must have some basis for believing that the requested information may be relevant. The term “may be relevant” is used to make clear that a requesting party is entitled to information even if it has not identified by name a particular taxpayer thought to be evading or avoiding tax.

This article is redrafted to make clear that the obligation to provide information is imposed on the contracting states and that the competent authorities are merely the instrumentalities through which the exchange is accomplished. For clarity, the term “exchange” is not used in the initial statement of the obligations of the contracting states because those obligations are applicable even if only one party is providing information.

Following the important innovation in the U.N. model treaty, this article provides explicitly that information is to be exchanged to help prevent not only tax evasion but also tax avoidance. The line between aggressive tax avoidance and tax evasion is not always easy to draw. By adding tax avoidance to the list of purposes for which information may be exchanged, the article avoids the need to draw that line. As the U.N. commentary notes, although avoidance and evasion are different in their legality, they both undermine the ability of a government to impose and collect taxes in a fair and efficient manner.

The OECD model TIEA includes language in article 1 about confidentiality and the rights of taxpayers. Those matters are addressed in article 10 (Confidentiality) and article 12 (Safeguards) of the effective model TIEA.

Article 2 (Jurisdiction)

The OECD model TIEA has used the jurisdictional limitation of article 2 to significantly reduce the obligation of parties to exchange information. The effective model converts article 2 into a positive statement of an obligation rather than a negative statement. The result is that the article does not provide a requested state with an improper justification for noncompliance. The effective model also does not use the term “within its territorial jurisdiction.” The term “territorial jurisdiction” is unclear and, in any event, is an unnecessary restriction on the obligation to exchange information. A contracting state should be obligated to exchange information that it has the power to obtain without engaging in fine points about the nature of the jurisdictional basis for that power.

Article 3 (Taxes Covered)

Some changes in language are made for clarity and to conform to some existing U.S. TIEAs. No major changes in substance are intended, other than the one noted below.

The effective model does make clear that a new tax is covered if it replaces a tax that is “substantially similar.” The OECD model TIEA requires that the replacement tax be “identical.” It seems unlikely that a contracting state would bother to replace one tax for another if the two taxes are “identical.” The OECD is unlikely to give a strict reading to the term “identical.” For “similar” taxes, the OECD model TIEA requires agreement between the

competent authorities. That rule is unwise. The obligation to exchange information should not depend on the fine points of the domestic tax laws of a contracting state.

Article 4 (Definitions)

The definitions in the two model TIEAs are similar. Definitions included in the OECD model TIEA are not included in the effective model if the terms defined are not used. The effective model provides a definition of tax evasion and tax avoidance; those terms are not defined in the OECD model TIEA. The effective model makes some small changes in language to reduce opportunities for abuse.

Article 5 (Exchange of Information Upon Request)

Paragraphs 1 to 3, 5, and 6 of the OECD model TIEA are substantially similar to paragraphs 1 to 5 of the effective model. Paragraph 4 of the OECD model TIEA is contained, in somewhat modified form, in article 11 (Implementation Legislation) of the effective model.

The first three paragraphs of the effective model are nearly identical to the corresponding paragraphs of the OECD model TIEA and do not make any changes in substance.

Paragraph 4. Paragraph 4 modifies paragraph 5 of the OECD model TIEA to eliminate some inappropriate grounds for denying a request for information and to clarify certain points. In particular:

i. Subparagraph (a) of the OECD model TIEA becomes subparagraph (b) of the effective model but otherwise is unchanged.

ii. Subparagraph (b) of the OECD model TIEA becomes subparagraph (a) of the effective model. Also, the paragraph is modified to eliminate the need to specifically identify the taxpayer under investigation by name if the requesting party does not know that name. In some cases, the point of the request may be to learn the name of a taxpayer engaging in suspicious activity.

iii. Subparagraph (c) is modified by changing “tax purpose” to “purpose.” The term “tax purpose” is vague and unnecessary. The purpose of an exchange of information is specified in article 1.

iv. Subparagraph (d) of the OECD model TIEA (requiring a statement explaining why the requesting party believes the requested information is available to the requested party) is omitted. Such a statement does not advance the goal of an effective exchange of information.

v. Subparagraph (e) of the OECD model TIEA is similar to subparagraph (d) of the effective model; the only substantive change is that the requesting party is asked to provide whatever information it may have not only about the person thought to possess the requested information but also the person thought to have control over that information. It seems appropriate for a requesting party to give that additional information so as to reduce the burden on the requested party.

vi. Subparagraph (f) of the OECD model TIEA is similar to subparagraph (e) of the effective model; no substantive changes are intended from the changes in language.

vii. Subparagraph (g) of the OECD model TIEA, which requires a statement that the requesting party has pursued all reasonable means “available in its own territory to obtain the information,” is omitted. That requirement

is not found in Article 26 (Exchange of Information) in the OECD or U.N. model treaties and is inconsistent with the purposes of a TIEA set forth in article 1 of the agreement.

viii. New flush language is added at the end of paragraph 4 to make clear that the requested party may request additional information from the requesting party but that the requesting party does not need to comply with that request as a condition for receiving the information it has requested.

Paragraph 5. Much of paragraph 6 of the OECD model TIEA, which sets forth some notice requirements, is preserved in substance in paragraph 5 of the effective model. One change in the effective model is that the time period for confirming receipt of a request for information is shortened from 60 days to 30 days. The time period for giving excuses for an inability to comply is kept at 90 days. Also, the effective model provides that if the requested party intends not to comply because of a right provided in the agreement, it must notify the requesting party within 30 days of receipt of the request that it does not intend to comply, with a statement of the grounds for not complying. A failure to meet this notice requirement would constitute a waiver of the right not to comply.

Article 6 (Automatic Exchange of Information)

This article is not contained in the OECD model TIEA. This addition is one of the most important changes made in the effective model. Information exchange by request can be useful when the requesting party has good information that a particular taxpayer is engaging in tax evasion. Automatic exchange of information is needed, however, to detect previously unsuspected tax evasion or avoidance. The Convention on Mutual Administrative Assistance in Tax Matters (1988), prepared by the Council of Europe and the OECD, provides for an automatic exchange of information, although it leaves all the details to the competent authorities. Article 6 gives greater detail in order to compel the contracting states to be serious about automatic exchanges.

Article 7 (Spontaneous Exchange of Information)

This article also is not contained in the OECD model TIEA. The text is drawn in part from the provision for spontaneous exchanges contained in the Convention on Mutual Administrative Assistance in Tax Matters (1988).

Article 8 (Tax Examinations (or Investigations) Abroad)

The United States always likes to have a provision allowing its agents to operate abroad. This article is based on article 6 of the OECD model TIEA. No changes of substances are intended.

Article 9 (Possibility of Declining a Request)

This article is a modified version of article 7 of the OECD model TIEA. The modifications are in language and in substance.

Paragraph 1. The right to refuse a request not in conformity with the agreement is the same in both models.

A right to refuse based on a state secret is also contained in both models, but the language is narrower in the effective model. The qualifications in the text are drawn from the OECD commentary, which states:

Paragraph 4 [paragraph 1(b) of the effective model] stipulates that Contracting Parties do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*). “Public policy” and its French equivalent “*ordre public*” refer to information which concerns the vital interests of the Party itself. This exception can only be invoked in extreme cases. For instance, a case of public policy would arise if a tax investigation in the applicant Party were motivated by political or racial persecution. Reasons of public policy might also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested Party. Thus, issues of public policy should rarely arise in the context of requests for information that otherwise fall within the scope of this Agreement.

The OECD tends to treat its commentary as having the force of law, which in many countries is contrary to fact. To make sure that the public policy exception is not interpreted broadly, some of the qualifications contained in the OECD commentary are inserted into the text.

Paragraph 2. Both the effective model and the OECD model TIEA preserve the lawyer/client privilege, although both have provisions intended to prevent abuse of the privilege. The effective model incorporates into the text some limitations found in the OECD and U.N. commentaries.

Paragraph 3. This paragraph, which corresponds exactly to article 7, paragraph 5 of the OECD model TIEA, makes clear that a request for information cannot be denied merely because the taxpayer disputes liability.

Paragraph 4. The substance of this paragraph is included in article 7, paragraph 1 of the OECD model TIEA.

Paragraph 5. Paragraph 5 makes clear that a requesting party cannot avoid disclosure because of its bank secrecy rules or its secrecy rules for fiduciaries. That result is obtained through article 5, paragraph 4 in the OECD model TIEA. The effective model takes that set of issues out of article 5. The obligation to overcome bank and fiduciary secrecy is included in article 11 (Implementation Legislation). Given the importance of the issue, it is also expressly addressed in paragraph 4 to make clear that domestic secrecy rules are not a valid excuse for failure to provide requested information.

Paragraph 6. Paragraph 6 makes clear that a requested party cannot avoid an obligation to exchange information merely because it has no domestic interest in the matter. Article 5, paragraph 1 (last sentence) of the OECD model TIEA makes the same point. Article 26, paragraph 4 of the OECD model treaty has a similar rule.

Paragraph 7. This paragraph makes the common-sense point that information provided by a requested party remains confidential even if the requested party was not obligated to exchange the information under this agreement.

Note on article 5, paragraph 6 of the OECD model TIEA. Paragraph 6 of the OECD model TIEA states:

The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision

of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

The OECD commentary suggests that the discrimination against nationals almost never occurs. This paragraph is omitted in the effective model.

Article 10 (Confidentiality)

Both models recognize that confidentiality is a requirement for an effective exchange of information. The main difference in the two models is that the effective model breaks various rules into separate paragraphs. The effective model adds a provision indicating that the requested party should not unreasonably withhold consent for the requesting party to use information received for purposes not stated in article 1 or to disclose information to persons not permitted to receive that information under the agreement.

Article 11 (Implementation Legislation)

Both models require the contracting states to overcome bank secrecy and fiduciary secrecy under their domestic law and administrative practices. The effective model places these requirements in a separate article, whereas the OECD model TIEA includes them in article 5 (Exchange of Information Upon Request), paragraph 4. The change in location is needed in part because the effective model requires information exchange not only by request but also automatically and spontaneously. The new location also highlights an essential feature of an effective exchange of information agreement.

The two models are largely the same on implementation legislation. The effective model is more precise about some categories of information that must be made available, and it narrows the exception for publicly traded entities. The material is reorganized somewhat for clarity.

Article 12 (Safeguards)

The effective model does not offer affirmative protection for various taxpayer safeguards that a contracting state may have adopted. It does provide, as does the OECD model TIEA, that such safeguards are not to be allowed to prevent an effective exchange of information. The concern is that a requested party will notify the taxpayer that information has been requested and then allow the taxpayer to engage in protracted litigation to prevent the disclosure. There is no need to affirmatively recognize rights under the agreement because the agreement does not include provisions overturning those rights. What is needed, however, is a requirement that those rights not be used as a shield to prevent an effective exchange of information.

Article 13 (Administration Costs or Difficulties)

The OECD model TIEA leaves all matters relating to costs for resolution by the contracting states. The effective model provides as a general rule that each side will pay the costs it incurs but that exceptional costs will be paid by the requesting party. That model also provides for disputes over costs to be settled under the mutual agreement article.

Article 14 (Mutual Agreement Procedure)

The two models are essentially the same, with minor drafting differences.

Article 15 (Entry into Force)

The provisions for the agreement to come into force are similar, except that the OECD model TIEA has some special timing rules for criminal matters. Those rules are irrelevant to the effective model, which does not have special rules for criminal conduct.

Article 16 (Termination)

The two models are essentially the same, with minor drafting differences.

Your Nobel Prize — The IRS Man Cometh

By Conrad Teitell

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Some pundits believe President Obama's Nobel Peace Prize is a political liability. I won't discuss that possible liability, but I will discuss the potential tax liability of the \$1.4 million cash award.

Before Obama accepts his peace prize or you accept yours for notarial science, keep in mind that section 61(a) states that all income from whatever source derived is includable in gross income, unless specifically excluded.

Before the Tax Reform Act of 1986, prizes and awards for charitable, religious, scientific, educational, artistic, literary, or civic achievement could be excluded from gross income if the recipient had not applied for the award and was not required to render substantial services to receive it. But since TRA 1986, even if a prize meets those requirements, it can be excluded from gross income only if the recipient assigns it to a governmental unit or charity entitled to receive deductible charitable contributions.¹ Amounts assigned by the prize recipient are not deductible charitable contributions.

The Joint Committee on Taxation's General Explanation of the Tax Reform Act of 1986 fleshes out the code:

The designation must be made by the taxpayer (the award recipient), and must be carried out by the party making the prize or award, before the taxpayer uses the item that is awarded (e.g., in the case of an award of money, before the taxpayer spends, deposits and invests, or otherwise uses the money).

Disqualifying uses by the taxpayer include such uses of the property with the permission of the taxpayer or by one associated with the taxpayer (e.g., a member of the taxpayer's family). Absent a disqualifying use, however, the taxpayer can make the required designation of the governmental unit or charitable organization (to which the award is to be transferred by the payor) after receipt of the prize or award.

In Rev. Proc. 87-54, 1987-2 C.B. 669, the IRS explains how to do this. Portions of that revenue procedure are reproduced at the end of this article, together with a model gift-assignment form suggested by the IRS.

The prize recipient, in my view, has three choices (not mutually exclusive):

¹Section 74(b)(3).