Comparison of OECD Model TIEA and Proposed UN Model TIEA

Summary

The proposed United Nations Model Tax information Exchange Agreement (UN TIEA) builds upon 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 that 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 proposed UN Model from the OECD Model TIEA:

1. The UN 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 UN Model. The OECD Model limits the exchange to matters of tax evasion.

3. The rules in Article 9 (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 proposed UN Model uses the term “may be relevant” rather than the OECD term “forseeably 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 “forseeably relevant” is unclear, perhaps intentionally so, the term “may be relevant” probably is the broader term. It is the term used in Article 26, para. 1 (Exchange of Information), of the U.S. Model Income Tax Convention (2006) and the recent U.S.-Swiss Protocol (2009).
The OECD Commentary to its TIEA states as follows:

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 United Nations Model Income Tax Convention (2008), 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 UN Commentary notes, although avoidance and evasion are different in their legality, they both underline 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 UN 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 UN 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 UN 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 UN 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 UN Model if the terms defined are not used. The UN Model provides a definition of “tax evasion” and “tax avoidance”; those terms are not defined in the OECD Model TIEA. The UN Model makes some small changes in language to reduce opportunities for abuse.

Article 5 (Exchange of Information Upon Request)

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

The first three paragraphs of UN 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 UN Model but otherwise is unchanged.

ii. Subparagraph (b) of the OECD Model TIEA becomes subparagraph (a) of the UN Model. In addition, 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 already 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 UN 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 UN 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 UN Model Income Tax Conventions 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 UN Model. One change in the UN 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. In addition, the UN 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 UN 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 of 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 UN Model. The qualifications in the text are drawn from the OECD Commentary, which states as follows:

Paragraph 4 (paragraph 1(b) of the UN 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 UN Model and the OECD Model TIEA preserve the lawyer/client privilege, although both have provisions intended to prevent abuse of the privilege. The UN Model incorporates into the text some limitations found in the OECD and UN 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 UN 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 Convention With Respect to Taxes on Income and on Capital 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 OECD Model TIEA

Paragraph 6 of the OECD Model TIEA provides as follows:

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.

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 UN Model breaks various rules into separate paragraphs. The UN 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 UN 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 UN 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 UN 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 UN 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 UN 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 UN Model, which does not have special rules for criminal conduct.

Article 16 (Termination)

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