

Memo

Wayne State University Law School

To: Committee of Experts on International Cooperation in Tax Matters

From: Michael J. McIntyre, Member, Information Exchange Subcommittee

Subject: Proposed UN Model TIEA

Date: September 30, 2009

In 2002, the OECD produced a model tax information exchange agreement (TIEA). The TIEA was intended to guide countries that wanted to have a treaty with certain countries that had no income tax and, as a result, had no strong reason to negotiate a general income tax treaty. The focus of the OECD initiative was on certain off-shore financial centers that were thought to facilitate international tax evasion and aggressive forms of tax avoidance. At the time, the OECD TIEA represented a major step forward because it signaled a commitment of the majority of the OECD countries to place limits on the bank secrecy rules of off-shore financial centers.

In the view of most academics of my acquaintance, treaties based on the OECD TIEA have been largely ineffective. In addition, the OECD TIEA does not reflect the emerging consensus on transparency and information exchange that has formed in response to the banking crisis of 2008 — a crisis that has hit the developing countries particularly hard, despite the fact that the crisis resulted from actions taken (or not taken) by the major OECD countries. The OECD TIEA only provides for information exchange on specific request, when the suspected tax evader has already been targeted by the country requesting the information. As recognized in the Commentary to Article 26 of the UN Model Treaty, an effective exchange of information requires not only information on specific request but also automatic and spontaneous exchanges.

I believe the time has come for the UN Committee to take a leadership role in promoting an effective exchange of information. It has been encouraged to do so by ECOSOC, its parent body and the ultimate controller of its budget. One step in that direction would be to adopt the Code of Conduct that I prepared for the Committee at its request in 2007 and that I later modified to accommodate the requests of various members. My version of the Code of Conduct reflects the emerging international standard and not the antiquated standard embodied in the OECD TIEA of 2002. If the UN Committee wishes to be relevant in framing the debate over the obligations of countries to assist other countries in combating tax evasion, it need to adopt a Code of Conduct that reflects its high aspirations and encourages conduct that actually would advance an effective exchange of information.

In addition, I believe that the UN Committee needs to promulgate its own TIEA — a TIEA that reflects the widespread view of developing countries that an effective exchange of information is essential for them to control money laundering and to mitigate international tax evasion and aggressive avoidance. To assist the UN Committee in that endeavor, I have attached a draft TIEA that I prepared as a member of the subcommittee on information exchange. That draft includes a report that compares the proposed UN TIEA to the OECD's 2002 TIEA. I hope that the committee finds this draft and report useful.

A Model Effective Tax Information Exchange Agreement

Drafted by Professor Michael J. McIntyre (2009) and
Proposed for Adoption by
the United Nations Committee of Experts
on International Cooperation in Tax Matters

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, to the extent allowable under its domestic laws, 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 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. In addition, 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. In addition, 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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:

(i) 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.

(ii) 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..

(iii) 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 1 January 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.

3. 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]:

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.