

EMail

To: Miguel Ferre, Chair, Exchange of Information Subcommittee

From: Michael J. McIntyre, Member, Exchange of Information Subcommittee, and Professor of Law, Wayne State University

Subject: Objections to Revised Code of Conduct

Date: April 14, 2009

I've read the draft [Code of Conduct, as revised by the chair]. I am very disappointed.

In my professional opinion, the current draft is a major step backwards and is, at best, a mere affirmation of Article 26 of the treaty, which we all know is not very effective in combating international tax evasion or avoidance. The point of the Code was to move far beyond Article 26.

I see no point in a code of conduct that is empty of substance. Of course, many countries will not abide by a serious code of conduct, and many will not promise to observe it, at least initially. The point of the code is to put pressure on these countries to conform to a high standard. It is utterly useless to water down the code so that countries that are unwilling to meet the emerging standards are prepared to sign onto the code. The point is to change conduct, not to give a glow of propriety to continued abuses.

The UN Committee has a brief moment to distinguish itself. Unfortunately, the delays in adopting the code of conduct have already weakened the ability of the committee to play a significant role in the current efforts to deal with dishonest banks and the countries that shelter them. If the code, in a robust form, had been ready for the G-20 meeting, we might have seen a lot more progress at that meeting than actually emerged. Still, there is time to make a mark, but only if the code is a serious code that shows that the UN committee understands what is in play.

The present version of the code lacks seriousness. No one reading it would think that the UN Committee is doing any more than what we have seen from the OECD. It does not even call for regular exchanges of information, limiting exchanges to specific requests. Everyone familiar with current practices under the "request" rule knows that it is ineffective in blocking international tax evasion or avoidance. It fails to acknowledge that international accounting firms, such as KPMG, and previously respectable banks, such as UBS, have been credibly accused of criminal conduct. If the Isle of Man will sign a TIEA, we know that its officials do not view a TIEA as an effective measure at combating international tax evasion.

When I did the draft of the initial code, I was fairly cautious. With the collapse of the credit markets, major bank failures, and the resulting worldwide recession, the world has changed a lot since then. The need now is for a code that is even bolder than the one I proposed. Instead, the current draft retreats into the dark shadow of the OECD.

Let me be candid. Many tax experts around the world are deeply troubled by the recent actions of the OECD. They see a pattern in which the OECD is giving a cover of respectability to its so-called gray-list countries, allowing them to wait out the world's current enthusiasm for dealing with banking crimes. These experts may be wrong or excessively cynical. Still, the negative impression of recent OECD actions is widespread, largely because the OECD is claiming victory when it is doing next to nothing. It is getting a few countries to sign a TIEA, although many people doubt that many of these countries will actually provide any useful information to other countries about the tax evaders they are harboring. It is putting all countries that have signed a TIEA on a "white list", despite the widespread experience that TIEAs, which only provide for information on request and have no effective sanction for delays and noncompliance, are ineffective. And it has taken people off the black list (onto the gray list) for vague promises to discuss the possibility of signing a TIEA. Any current Black list, for example, that does not include Switzerland, is a sham. After all, Switzerland is refusing to allow UBS to disclose the names of thousands of people credibly suspected of tax evasion.

I'm sure many tax experts would see the current draft of the UN code of conduct as evidence of the OECD's limited interest in fundamental reform of the international banking regimes. That is, they would see the UN draft as essentially an OECD product, designed to lower expectations.

I drafted the initial code of conduct and brought the matter to the UN Committee in the hope that the UN committee would establish its own identity and push forward with a set of standards that reflected the values of the developing countries and the more enlightened developed countries --- those not under the spell of the big banks and the MNEs. I hope that the vision can still be realized.

Finally, a code of conduct is intended to inspire action. It is not a good practice to draft such a code in the suffocating language of bureaucracy.