

Bahamas Financial Services Board

Bahamas Tax Information Exchange Agreement Q & A

On March 20, 2010, The Bahamas achieved the G20 standard on Transparency and Cooperation in Tax Matters. This standard was first promulgated by the Organisation for Economic Cooperation and Development (“OECD”) in the 1990s. In 1998, the OECD sought to have 40 plus countries, including The Bahamas, adopt this standard. The Bahamas, in a 1999 presentation to the OECD, insisted on a level playing field. This principle was formally accepted by the OECD in 2002 and represented in a communiqué issued by The Bahamas in 2002.

For more than 10 years, The Government of The Bahamas held firm to this principle and kept faith with the industry; likewise in 2009, The Bahamas, as an integrated member of the international community, moved to implement the standard immediately following global consensus and the achievement of its key pre-condition.

Over a 12 month period culminating in March 2010, The Bahamas successfully concluded 19 agreements to achieve the standard. As of July 1, the enforcement date of the International Tax Cooperation Act, The Bahamas had inked 22 Tax Information Exchange Agreements (“TIEAs”).

During the past year, many have posed questions regarding the G20 standard The Bahamas sought to achieve. With the enactment of the enabling legislation BFSB is pleased to provide an overview of The Bahamas’ policy and legislative response.

What is the G20 Standard?

The G20 specified that a jurisdiction must have 12 agreements that meet the OECD standard for transparency and tax cooperation. The OECD standard provides for exchange on request of foreseeable relevant information for the administration or enforcement of the domestic tax laws of a requesting party.

This standard has now evolved away from the 12 agreement litmus test. In an OECD Global Forum on Transparency and Exchange of Information for Tax Purposes report “Terms of Reference. To Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes”, the standard is clarified as follows: *“Ultimately, the standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that*

jurisdiction in order to properly administer and enforce its tax laws, this should be drawn to the attention of the Peer Review Group, as it may indicate a lack of commitment to implement the standards". The full extract is included in the endnote i.

What steps have been taken by The Bahamas?

Subject to numerous conditions and protections set out in bilateral agreements, The Bahamas agrees to provide on request information that is relevant for the administration or enforcement of the domestic tax laws of a requesting party.

What is the level playing field The Bahamas sought?

In 2002 The Bahamas advised the OECD that a level playing field was required prior to its implementing the OECD standard; specifically, The Bahamas *"would protect its economic interests and fiscal autonomy in all negotiations with the OECD. The Bahamas considers the establishment of a level playing field among all OECD members and also those non-member jurisdictions with which it is materially in competition in the provision of cross-border financial services to be critical to its economic interests"*.

During the 2nd week in March 2009, Hong Kong, Luxembourg, Macau, Singapore, Switzerland and many others agreed to adopt the G20 standard. By March 13th, all major international financial services jurisdictions had committed to the OECD Standard for Transparency and Cooperation in Tax Matters, advancing significantly the level playing field sought by The Bahamas. On this basis, the Prime Minister of The Bahamas announced on March 23, 2009 that The Bahamas would immediately seek to meet the G20 Standard of a minimum of 12 agreements in compliance with the OECD Standard.

Do TIEAs impose greater burdens of transparency and cooperation than Double Taxation Agreements ("DTAs")?

The Standard can be adopted through a TIEA or Article 26 of the Model Convention with respect to Taxes on Income and on Capital without reservation. The Global Forum report referenced above, "Terms of Reference. To Monitor and Review Progress towards Transparency and Exchange of Information for Tax Purposes", states *"Article 26 provides for the same standards as the Model TIEA Agreement"*. The Global Forum Report continues: *"some aspects of Article 26 are beyond the scope of the standards. For example, Article 26 allows for automatic and spontaneous exchange of information which is not included in the Standard."*

Do these agreements permit fishing expeditions?

The Global Forum in defining its requirements states that the Standard does not permit fishing expeditions. The Bahamas TIEAs require that not only are all requests submitted in writing but that the submissions must be specific in nature.

The Government has designated the Minister of Finance, an individual of significant presence in The Government of The Bahamas, as the Competent Authority for TIEA requests. Prior to a request being submitted to the Minister of Finance, an experienced team will review and analyse the request. The Bahamas has tremendous experience with such reviews having signed its first bi-lateral cooperation agreement in 1988 and its first TIEA (with the United States of America) in 2002. The Minister of Finance has the ability to draw on all arms of Government to support his own review, including the Office of The Attorney General.

The Bahamas' history of Common Law, its in-depth experience gained with anti-fishing reviews over the years and the high degree of specificity included in agreements provide a firm platform for the prevention of fishing expeditions. Significant assurance can be taken in light of procedures and human capacity to determine the legitimacy of any request.

Does the person for whom a request has been received have any rights?

This person has a number of important rights, including access to judicial review. Other safeguards include adherence to applicable standards of limitation and that this person receive, at a minimum, the same treatment that would be afforded to a taxpayer in the requesting country. Moreover, the request can only be submitted to The Bahamas where a designated senior public official in the requesting country has authorized its submission to the competent authority in The Bahamas.

What are the practical steps involved in implementing the Standard?

Location of Information: The Bahamas does not enforce direct taxation, as such information that may be sought will not be held by the Minister of Finance ("MOF"). Regulations in The Bahamas demand that certain minimum information is held with the financial institution.

Need to Make a Request. The Government cannot share information without the person's knowledge: Should the Government approve a request, the MOF will make a request to the holder of the relevant information. As a result, in the majority of enquiries regarding private individuals, the MOF will have to submit a request for information to a financial institution

No Gag Order Key to Access to the Courts: There are no legal constraints to prevent a financial institution from advising a client of the request from the MOF. If informed of any request for information, the client is in the best position to determine whether the request is valid or represents a fishing expedition.

Further, the client is best able to assess whether the requesting country has indeed exhausted all efforts prior to approaching The Bahamas Competent Authority.

Should the client wish to pursue judicial review, the holder of the information would be informed and action initiated in the courts of The Bahamas.

Is the Court or Judicial Review required?

In each request for information, judicial review is not required. However, the holder of information has full access to the courts, should he/she wish to challenge The Bahamas' consent to cooperate. The protocols are established to provide (1) that no information is shared prior to the notification of the holder and (2) the holder of information has the opportunity to seek judicial review.

Can a requesting party approach a person in The Bahamas directly for Information?

No, the TIEAs specifically prevent this direct approach. If a requesting party would like to interview or conduct an examination of a person in The Bahamas, the requesting party may only approach The Bahamian authorities. Only where the person in The Bahamas voluntarily agrees, and any additional conditions the Minister of Finance might impose are met, can the requesting party approach a person in The Bahamas.

Further there have been allowances to ensure that the day to day operations of concerned institutions will not be impacted by the implementation of these TIEAs.

Who can submit a request to The Bahamas?

Where The Bahamas has a TIEA with the country, an authorized senior official in the competent authority may submit a request for information. Some have expressed the view that junior civil servants in the competent authority, judges, and other persons interacting with a tax payer may seek to request information under the TIEA. This broad access to the provisions of the Bahamas' TIEAs is specifically prevented; each agreement and relevant protocols specify the person(s) authorized to represent each country. Further, there are measures in place for the verification of any person submitting a request.

Can The Bahamas effectively administer the TIEAs?

Since 2004, a team in the Ministry of Finance has been in place to administer the TIEA with the United States of America ("USA"). During the negotiating process for the 2009/2010 TIEAs, this team was augmented with additional experts from the Office of the Attorney General as well as the Central Bank of the Bahamas.

Congruent with The Bahamas meeting the G20 standard, more attorneys and other support resources are being secured for the Unit within the Ministry of Finance.

Are there any new record keeping requirements?

Existing law requires the keeping of records for 5 years. The TIEAs do not mandate timeframes, and should information not be available at the time of any request, it would be possible for an

institution to so indicate as long as it can be shown that this is consistent with Bahamian law and internal policies.

Why is the MOF the Competent Authority rather than the Office of the Attorney General (“OAG”)?

At the time of the TIEA with the USA, the MOF was designated the Competent Authority. Further to that decision, the institutional knowledge for the negotiation and administration of TIEAs rests within the Ministry Of Finance. Industry continues to support this historical designation as it is considered proper and convenient to have a divide between pure tax requests and other international requests, the latter being the purview of the OAG.

Will The Bahamas share information on an automatic basis?

There are no protocols in The Bahamas that permit cooperation in tax matters on an automatic basis. Based on the existing regulatory standards, there is no basis to anticipate that automatic exchange of information will be introduced in the foreseeable future. In particular, the adherence by the Government of The Bahamas to the Level Playing Field principle over a ten year period is evidence of the consistent application of policy across political parties as is the measured level of commitment to a competitive financial services sector.

ⁱ Extract from an OECD Global Forum on Transparency and Exchange of Information for Tax Purposes report “Terms of Reference : To Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes” *As agreed by the Global Forum’s Sub-group on Level Playing Field issues in its paper Taking the Process Forward in a Practical Way (November 2008), a country is considered to have substantially implemented the standard of exchange of information for the purposes of this Global Forum assessment if it has in place signed agreements or unilateral mechanisms that provide for exchange of information to[the] standard with at least 12 OECD countries. This benchmark was considered to be an appropriate dividing line at that point in time, between those countries that are implementing the standards and those that are not. However, this benchmark was recognised as part of a staged process and would have to be re-evaluated as circumstances evolved. In addition, in conjunction with the G20 Leaders’ meeting in London on 2 April 2009, the Secretary-General of the OECD issued a progress report determining that a country that had signed agreements with 12 jurisdictions, whether OECD countries or other jurisdictions, would be considered to have substantially implemented the standard on exchange of information. It is apparent that for some jurisdictions, 12 agreements are likely to be too few to allow for exchange with all relevant requesting countries. Ultimately, the standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws, this should be drawn to the attention of the Peer Review Group, as it may indicate a lack of commitment to implement the standards.*