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SPECIAL REPORTS

Information Exchange Between the U.S. and Latin America: The U.S. Perspective, Part 1

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I. Introduction

A. Overview

Tax information exchange between the United States and Latin American countries is going through revolutionary changes. In recent years, national governments, pressed by severe fiscal deficits, continue to unilaterally act to capture revenue from the international sector, especially offshore undeclared bank accounts. International organizations and informal groups have also increased their demands for more tax transparency, higher standards regarding anti-money-laundering and counterterrorism financial compliance and enforcement, and compliance with other financial regulatory regimes. While the United States and Latin American countries had few income tax treaties and tax information exchange agreements, they are now negotiating many, partly because of increased trade and investment and partly because of the U.S. Foreign Account Tax Compliance Act.

The United States exchanges information under tax treaties and TIEAs. A new subset of the TIEA is an intergovernmental agreement. Like the TIEA, the IGA itself is complex and has various components, including two annexes.

In addition to bilateral exchange of information agreements, the United States also exchanges information in tax cases under the 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (CMAATM). It reserved on the service of process and collection provisions of the convention. It has also signed, but has not ratified, the 2010 protocol.[1]

Occasionally, the United States uses the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague evidence convention) to gather and furnish evidence in tax cases.[2]

In criminal tax cases, the United States sometimes uses mutual assistance in criminal matters treaties to obtain and furnish evidence.[3]

U.S. exchange of tax information articles have three main provisions:

- The articles have a general obligation on the part of the competent authorities to exchange information in order to carry out the provisions of the treaty or the domestic laws pertaining to the taxes covered by the treaty.
- The articles restrict the use and disclosure of information received by the requested state. These provisions require that the requested state treat the

[1]For more information on the convention and the list of signatories and ratifications to the 1988 convention and 2010 protocol, see http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention%2023_December_Jurisdictions.pdf.

[2]For the text of The Hague evidence convention and a list of members, see http://www.hcch.net/index_en.php?act=conventions.text&cid=82.

[3]For a summary of the procedures for processing the requests for assistance under the various mutual legal assistance treaties, see Internal Revenue Manual section 11.3.28.3.1, Disclosures Based on a Mutual Legal Assistance Treaty (MLAT) Request in Criminal Matters.

information received as secret and allow disclosure of that information only to persons specified by the treaty as concerned with the taxes covered by the treaty.

- The requested state need not provide information that:
  - — is not obtainable, either by the requesting competent authority under its own laws or by the requested competent authority;
  - — would require the requested competent authority to carry out administrative procedures at variance with its law or those of the requesting state; or
  - — would disclose trade secrets or other information contrary to public policy.

TIEAs and some treaty exchange articles require a requested state to provide banking and financial information even with any limitations in domestic laws.

The provisions of tax treaties or TIEAs, together with section 6103(k)(4), permit the U.S. competent authority and officials who have been delegated the authority to carry out the functions of the competent authority under U.S. tax treaties and TIEAs to disclose tax returns and/or tax return information to the competent authority of a foreign treaty partner or his delegates. The delegated U.S. competent authority for purposes of exchange of information is the director of the international unit at the Large Business and International Division.

Exchange of information has occurred primarily either spontaneously or as the result of a request made by one competent authority to another.

As of January 18, 2014, the United States has 68 income tax treaties, 18 estate and gift tax treaties, 28 TIEAs, and 20 FATCA IGAs. It is also a member of the CMAATM and The Hague evidence convention. These agreements are the primary sources of exchange of tax information.

The United States processes a large number of information requests annually in addition to administering a program of both spontaneous and automatic exchange. As of 2011, on average the United States annually had replied to approximately 1,000 cases (each generally constituting multiple requests for information), and it automatically exchanges approximately 2.5 million items of information each year.[4]

B. Exchange of Information Programs

1. Routine Exchange of Information

Information is routinely or spontaneously exchanged periodically (that is, annually). This is sometimes called automatic exchange of information. The United States provides to treaty partners information from IRS Forms 1042S, concerning U.S.-source fixed or determinable income paid to persons claiming to be residents of the receiving country. This includes interest paid to nonresident aliens with countries with tax treaties or TIEAs that the IRS will designate under a revenue procedure.

The information the IRS provides and receives consists of hundreds of thousands of records exchanged by magnetic media (tapes or disks). Under the FATCA IGA, information will start going from browser to browser.

2. Specific Exchange of Information Program

This program involves the coordination of both incoming and outgoing requests for information about specific taxpayers. Most requests arose from examination of a particular tax return, although requests may also arise from collection activities or criminal investigations. The IRS tax attaché (former Revenue Service Representative) handles most requests. However, exchange of information team program analysts in the office of the director, international (LB&I), handle incoming and outgoing requests involving Canada and France, and cases in which a summons must be prepared to secure the information requested by a treaty partner.

Most of the work done to obtain information for a treaty partner is done in the IRS field offices. Information gathered is transmitted to either the exchange of information team or to the IRS tax attaché as the case may be. The latter then prepares the necessary competent authority correspondence to legally disclose and transmit the information to the treaty partner.

3. Spontaneous Exchange of Information

The program consists of the exchange of information that has not been specifically requested but which in the judgment of the providing competent authority may indicate noncompliance with a treaty partner's tax laws and requirements.

Outgoing (that is, U.S.-initiated) spontaneous exchanges generally start when a revenue agent or international examiner encounters information during the course of an audit. This information concerns the treaty partner's taxpayer that may indicate noncompliance with the treaty partner's tax laws. Spontaneous exchanges may also be generated by other IRS investigation functions including Criminal Investigation and Small Business/Self-Employed Division Compliance. The information is forwarded through the appropriate field officials to the director of the international unit at LB&I, who evaluates it. If appropriate for exchange, the necessary competent authority correspondence is prepared and the information is sent to the foreign competent authority for evaluation.

[4]OECD, ''Global Forum on Transparency and Exchange of Information for Tax Purposes, Peer Review Report Combined: Phase 1 + 2, incorporating Phase 2 ratings, United States'' (hereafter OECD GF U.S. Report), 7 (2011).

Exchange of information program analysts and IRS tax attachés also evaluate incoming (that is, foreign-initiated) spontaneous exchange items and forward appropriate cases to IRS field offices for action. The program analysts and tax attachés also follow up on the outcome of all spontaneous exchanges.

4. Industrywide Exchanges of Information Program

These exchanges of information consist of meetings between U.S. and treaty partner Examination or CI personnel. They do not involve specific taxpayer information. Rather, they are exchanges of information about trends, operating practices, pricing policies, know-how or experience, and so forth, in specific industries or economic sectors. Exchange of information team program analysts work with field personnel, IRS tax attachés, and foreign officials in arranging these meetings.

5. SEP and SCIP Programs

These programs involve cases in which the United States and a treaty partner are examining or investigating a taxpayer or related taxpayers with common issues. In a simultaneous examination program (SEP) or simultaneous criminal investigation program (SCIP) meeting, the examiners or investigators are given the opportunity to discuss issues, audit plans, and information needs. Exchange of information team program analysts work with field personnel, IRS tax attachés, and foreign officials to present proposals from foreign competent authorities and to facilitate any exchanges of information between governments that may be appropriate for each country to complete its examination or investigation.[5]

II. Framework of Agreements

This section discusses the framework of three of the major instruments regarding exchange of tax information: treaties, TIEAs, and the CMAATM.

A. Income Tax Treaties

Article 26 of the model U.S. income tax treaty adopted in November 2006 concerns exchange of information.

Paragraph 1 requires the competent authorities of the contracting states to exchange such information as may be relevant for carrying out the provisions of this convention or of the domestic laws of the contracting states concerning taxes of every kind imposed by a contracting state to the extent that the taxation thereunder is not contrary to the convention, including information relating to the assessment or collection of, the enforcement or prosecution, or the determination of appeals regarding those taxes. The exchange of information is not restricted by article 1(1) (general scope) or article 2 (taxes covered).

This language incorporates the standard in 26 U.S.C. section 7602, which authorizes the IRS to examine ''any books, papers, records, or other data that may be relevant or material.'' In *United States v. Arthur Young & Co.*,[6] the Supreme Court stated that the language ''may be'' reflects Congress's express intention to allow the IRS to obtain ''items of even potential relevance to an ongoing investigation, without reference to its admissibility.'' However, the language ''may be'' would not support a request in which a contracting state simply asked for information regarding all bank accounts maintained by residents of that contracting state in the other contracting state, or even all accounts maintained by its residents concerning a particular bank.

Paragraph 1 clarifies that information may be exchanged that relates to the assessment or collection of, the enforcement or prosecution regarding, or the determination of appeals regarding the taxes covered by the treaty. Thus, the competent authorities may request 2006 U.S. model technical explanation and provide information for cases under examination or criminal investigation, in collection, on appeals, or under prosecution.

The taxes covered by the treaty for purposes of this article constitute a broader category of taxes than those referred to in article 2 (taxes covered). Exchange of information is authorized for taxes of every kind imposed by a contracting state at the national level. Accordingly, information may be exchanged regarding U.S. estate and gift taxes, excise taxes, or, regarding the other contracting state, VAT.

Information exchange is not restricted by article 1(1) (general scope). Accordingly, information may be requested and provided under this article regarding persons who are not residents of either contracting state. For example, if a third-country resident has a permanent establishment in the other contracting state, and that PE engages in transactions with a U.S. enterprise, the United States could request information regarding that PE, even though the third-country resident is not a resident of either contracting state. Similarly, if a third-country resident maintains a bank account in the other contracting state, and the IRS has reason to believe that funds in that account should have been reported for U.S. tax purposes but have not been so reported, information can be requested from the other contracting state regarding that person's account, even though that person is not the taxpayer under examination.[7]

Paragraph 2 requires that any information received under this article by a contracting state must be treated as secret in the same manner as information obtained

[5]IRM section 4.60.1.1 (Jan. 1, 2002).

[6]465 U.S. 805, 814 (1984).

[7]Technical explanation to U.S. model income tax treaty, *available at* http://www.treasury.gov/press-center/press-releases/Documents/hp16802.pdf.

under the domestic laws of that state and can be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution regarding, or the determination of appeals regarding the taxes referred to above, or the oversight of those functions. Those persons or authorities must use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

Paragraph 3 provides that the obligations undertaken in paragraphs 1 and 2 to exchange information do not require a contracting state to carry out administrative measures that are at variance with the laws or administrative practice of either state. Nor is a contracting state required to supply information not obtainable under the laws or administrative practice of either state, or to disclose trade secrets or other information, the disclosure of which would be contrary to public policy. Thus, a requesting state may be denied information from the other state if the information would be obtained under procedures or measures that are broader than those available in the requesting state. However, the statute of limitations of the contracting state making the request for information should govern a request for information. Thus, the contracting state of which the request is made should attempt to obtain the information even if its own statute of limitations has passed. In many cases, relevant information will still exist in the business records of the taxpayer or a third party, even though it is no longer required to be kept for domestic tax purposes.

While paragraph 3 states conditions under which a contracting state is not obligated to comply with a request from the other contracting state for information, the requested state is not precluded from providing such information, and may, at its discretion, do so subject to the limitations of its internal law.[8]

Paragraph 4 provides that, if information is requested by a contracting state in accordance with this article, the other contracting state must use its information gathering measures to obtain the requested information, even though that other state may not need such information for its own purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3, but in no case will that limitation be construed to permit a contracting state to decline to supply information because it has no domestic interest in such information.

Paragraph 4 provides that when information is requested by a contracting state in accordance with this article, the other contracting state is obligated to obtain the requested information as if the tax in question were the tax of the requested state, even if that state has no direct tax interest in the case to which the request relates. In the absence of such a paragraph, some taxpayers have argued that paragraph 3(a) prevents a contracting state from requesting information from a bank or fiduciary that the contracting state does not need for its own tax purposes. This paragraph clarifies that paragraph 3 does not impose such a restriction and that a contracting state is not limited to providing only the information that it already has in its own files.[9]

Paragraph 5 provides that a contracting state may not decline to provide information because that information is held by financial institutions (FIs), nominees, or persons acting in an agency or fiduciary capacity. Thus, paragraph 5 would effectively prevent a contracting state from relying on paragraph 3 to argue that its domestic bank secrecy laws (or similar legislation relating to disclosure of financial information by FIs or intermediaries) override its obligation to provide information under paragraph 1. This paragraph also requires the disclosure of information regarding the beneficial owner of an interest in a person, such as the identity of a beneficial owner of bearer shares.

Paragraph 6 provides that the requesting state may specify the form in which information is to be provided (for example, depositions of witnesses and authenticated copies of original documents).

The intention is to ensure that the information may be introduced as evidence in the judicial proceedings of the requesting state. The requested state should, if possible, provide the information in the form requested to the same extent that it can obtain information in that form under its own laws and administrative practices regarding its own taxes.

Paragraph 7 provides for assistance in collection of taxes to the extent necessary to ensure that treaty benefits are enjoyed only by persons entitled to those benefits under the terms of the treaty. Under paragraph 7, a contracting state will endeavor to collect on behalf of the other state only those amounts necessary to ensure that any exemption or reduced rate of tax at source granted under the treaty by that other state is not enjoyed by persons not entitled to those benefits. For example, if the payer of a U.S.-source portfolio dividend receives a Form W-8BEN or other appropriate documentation from the payee, the withholding agent is permitted to withhold at the portfolio dividend rate of 15 percent. If, however, the addressee is merely acting as a nominee on behalf of a third-country resident, paragraph 7 would obligate the other contracting state to withhold and remit to the United States the additional tax that should have been collected by the U.S. withholding agent.

This paragraph also clarifies that the contracting state asked to collect the tax is not obligated, in the

[8] *Id.*

[9] *Id.*

process of providing collection assistance, to carry out administrative measures that are different from those used in the collection of its own taxes, or that would be contrary to its sovereignty, security, or public policy. As this article discusses below, at least five treaties provide for broader assistance in collection.

Paragraph 8 provides that the requested state will allow representatives of the applicant state to enter the requested state to interview individuals and examine books and records with the consent of the persons subject to examination.

Paragraph 9 states that the competent authorities of the contracting states may develop an agreement upon the mode of application of the article. The article authorizes the competent authorities to routinely exchange information, on request regarding a specific case, or spontaneously. It is contemplated that the contracting states will use this authority to engage in all of these forms of information exchange, as appropriate.

The competent authorities may also agree on specific procedures and timetables for the exchange of information. In particular, the competent authorities may agree on minimum thresholds regarding tax at stake or take other measures aimed at ensuring some measure of reciprocity regarding the overall exchange of information between the contracting states.

B. Tax Information Exchange Agreements

The Cayman-U.S. TIEA concluded November 29, 2013, is representative of U.S. TIEA policy, since it is the latest TIEA the U.S. Treasury has concluded.

Article 1 (object and scope of the agreement) requires the competent authorities of the contracting parties to provide assistance to each other through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the contracting parties concerning taxes covered by the TIEA. The information must include information that is foreseeably 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.

Article 2 (jurisdiction) states that a requested party is not required to provide information that is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction. However, the requested party must provide information regardless of the residence or nationality of the person holding the information or to whom the information relates.

Article 3 (taxes covered) applies in the case of the United States to all federal taxes and in the case of the Cayman Islands, to any tax imposed by the Cayman Islands that is substantially similar to the taxes described in the provisions.

Article 4 contains definitions.

Article 5 (exchange on request) requires the requested party to provide information for the purposes in article 1 on request, without regard to whether the requested party needs that information for its own tax purposes or whether the conduct being investigated would constitute a crime under the laws of the requested party if the conduct occurred in the requested party.

Article 5(2) states that if the information in the possession of the competent authority of the requested party is not enough to enable it to comply with the request for information, the requested party will use all relevant information gathering measures to provide the applicant party with the information requested, even though the requested party may need the information for its own tax purposes. Privileges under the laws and practices of the applicant party will not apply in the execution of a request by the requested party and the resolution of those matters will be solely the responsibility of the applicant party.

Article 5(3) provides for specific assistance the requested party must give, to the extent allowed under its domestic laws, such as taking testimony or the production of books, papers, records, and other data.

Article 5(4) requires each contracting party to ensure that it has the authority to obtain and provide on request information held by banks, other FIs, and any person acting in an agency or fiduciary capacity, including nominees and trustees and information regarding the ownership of entities, including companies and trusts.

Article 5(5) requires the requesting party to provide detailed information about the person or ascertainable group or category of persons under examination or investigation, the period regarding which the information is requested, and so forth.

Articles 6, 7, and 8 provide for automatic exchange of information, spontaneous exchange of information, and tax examinations abroad, respectively.

Article 9 sets forth the grounds for the possibility of declining a request. Article 9(1) states that the requested party will not be required to obtain or provide information that the requesting party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The requested party may decline to assist when the request is not made in conformity with the agreement. The requested party may decline to assist when the requesting party has not pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

Article 9(2) states that the agreement does not impose on a requested party the obligation to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process.

Article 9(3) states that the agreement does not impose on the requested party the requirement to obtain or provide information protected by the attorney-client privilege.

Article 9(4) allows a requested party to decline a request for information if the disclosure of the information would be contrary to public policy (*ordre public*).

Under article 9(5) a request for information cannot be refused on the ground that the tax claim giving rise to the request is disputed.

Article 9(6) provides that the statute of limitations of the requesting party pertaining to the taxes to which the agreement applies will govern a request for information.

Article 10 provides for confidentiality, while article 11 provides for costs. Article 12 provides for a mutual agreement procedure (MAP) if there are difficulties or doubts regarding the implementation or interpretation of the agreement.

Article 13 concerns entry into force while article 14 governs termination.

C. CMAATM

Administrative assistance in the CMAATM includes exchanges of information and simultaneous tax service of documents. Two or more parties can examine the tax liabilities of a taxpayer simultaneously and examinations can occur abroad. However, the tax convention allows signatory countries, through reservations, to limit its applicability to specific types of taxes (for example, social security or local taxes) and to limit the duty to assist either in collecting taxes or serving tax documents. A party may also refrain from actions that are at a variance with its own public policy or laws, and decline to furnish information regarding trade secrets or processes. Information obtained through the tax treaty may be used only for tax enforcement purposes and must be treated as a secret according to the most restrictive secrecy laws among the particular countries exchanging information.

The tax treaty covers a broad variety of taxes — far beyond the coverage of bilateral tax treaties — including income, capital gains, net wealth, state and local, social security contributions, estate, inheritance, gift, and other taxes. The tax treaty's scope is not restricted by the residence or nationality of the taxpayer.

These potentially intrusive results of the tax treaty's broad scope engendered the initial opposition of many business groups, including member groups of the International Chamber of Commerce (ICC). ICC member groups also criticized the tax treaty because it fails to adequately distinguish between tax evasion and legitimate tax avoidance. Another criticism is that only national, and not state, governments are involved in tax cooperation under the tax convention. Some European nations have objected to the possibility of U.S. states participating in tax information exchanges themselves and with the U.S. federal government concerning matters such as unitary taxation, and have declined to sign the tax treaty.

Article 21 of the OECD model provides limits to the obligation of the requested state to provide assistance. For instance, the requested state need not supply information that is not obtained under its own laws or its administrative practice or to supply information that would disclose any trade, business, industrial, commercial, or professional secret, or trade process, or information, the disclosure of which would contravene public policy. It need not provide administrative assistance if it would lead to discrimination between a national of the requested state and nationals of the applicant state in the same circumstances. The commentary to the article explains that if a requested state has no power to take measures of conservancy, it could decline to take those measures on its behalf, or if seizure of goods to satisfy a tax claim is not allowed in the applicant state, the requested state is not obliged to seize goods when providing assistance in collection. Hence, only those powers and practices that the treaty states have in common are the ones the requested state is obliged to implement.

Article 23(1) provides that proceedings relating to measures taken under the treaty by the requested state will be brought only before the appropriate body of that state. The OECD commentary to the article specifies that the article confers powers on the authority and the question arises when the individual is entitled to require the authority to exercise them especially when the failure to exercise a power violates a right guaranteed by the national law of the authority in question. Specifically, when a taxpayer wants to resist the recovery of a tax or the enforcement of the tax laws, two grounds normally exist in the laws of a treaty country on which the tax claim can be resisted. Either the taxpayer can contest the existence of the enforceability of the claim, or he can try to contest the enforcement measures themselves.

Since the competent authority of the treaty country may not always have the entire information on a case, only the taxpayer involved may be able to provide the competent authority with the information to know when to take actions allowed under the provisions of articles 21 and 23. The ability of the requested state to have the input of the taxpayer may determine the very liberty of the taxpayer and his property.

Before the ratification debate, officials of the U.S. Treasury and Justice departments promised to issue regulations giving notice to taxpayers affected by requests for information to object and participate in the requests for information. These promises mollified the Senate and concerned taxpayers about the scope, intrusiveness, and potential adverse impact of the treaty on taxpayers, as expressed by the Senate Committee on Foreign Relations, when it voted to approve ratification, and by the ICC, bar associations, and other interested groups. However, subsequently the U.S. government decided not to issue regulations giving notice to taxpayers and has opposed efforts of the bar association to recommend that notice. Sometimes, Treasury sends letters and informally requests custodians of records to comply with requests for tax information by foreign governments.

The treaty has enormous potential to revolutionize U.S. exchange of information and international tax enforcement generally because it is broader than most treaties and TIEAs and because of its large membership. As of March 19, 2014, 36 countries had ratified the 2010 protocol and 63 countries had signed it. It will be the vehicle through which automatic exchange of information is provided.

III. Exchange on Request

This program involves the coordination of both incoming and outgoing requests for information about specific taxpayers. Most requests emanate from the examination of a particular tax return, although requests may also arise from SB/SE Compliance activities or CIs. All domestic sources of information must be exhausted before requesting assistance from abroad.

Some foreign governments restrict investigative activity within their borders by other tax administrations. As a result, all exchanges of information with foreign tax administrations must occur through the U.S. competent authority. Exchanges outside of competent authority channels may result in unauthorized disclosure of tax return information.

The director of the international unit at LB&I is the U.S. competent authority and the only person authorized to exchange information with other tax authorities. The authority to sign on behalf of the director has been delegated within the office of the director, international LB&I by Delegation Order 114.[10]

A. Exchangeable Information

Information that may be exchanged under treaties and TIEAs includes, but is not limited to, information pertaining to processing of double taxation cases and related issues under competent authority consideration, information exchanged on a regular or routine basis (that is, information returns filed on behalf of NRAs), information relating to a specific taxpayer or tax matter under review, information discovered during an investigation or examination when there is the potential for noncompliance with the tax law of a foreign country, and changes in tax law.[11]

B. Confidentiality, Disclosure, Treaty Secrecy

Information exchanged under tax treaties and TIEAs is confidential under the provisions of sections 6103 and 6105, and the provisions of the treaty or TIEA. The treaties require both that information received by the IRS from a foreign government be treated as secret in the same manner as information obtained under the domestic laws of the United States, and that the information may be disclosed only to persons or authorities involved in specified activities in the United States. Specified persons or authorities include court and administrative bodies, personnel involved in the assessment, collection, or administration of the enforcement or prosecution regarding, or the determination of appeals regarding, taxes covered by the treaty or TIEA, or specified oversight bodies such as congressional taxwriting committees or the Government Accountability Office.

Section 6103 provides for the confidentiality of returns and return information and restricts disclosures of returns and return information.

Section 6103(k)(4) provides that returns and return information may be disclosed to a foreign competent authority in accordance with the treaty or TIEA between that country and the United States. Most U.S. treaties and TIEAs have articles providing for the exchange of information. In general, the information received under the treaty or TIEA is treated as secret to the same extent as under U.S. domestic law and may be disclosed only to those persons (including courts and administrative bodies) concerned with the assessment, collection, enforcement, or prosecution of taxes specified in the treaties or TIEAs.

Generally, a taxpayer can obtain access to his tax returns and return information. However, if a taxpayer's file contains information obtained from another country under a treaty or TIEA, the situation is different. Section 6103(c)(6) states that taxpayer return information may not be disclosed to any person if it is determined that the disclosure would seriously impair federal tax administration. Questions concerning the disclosure and use of treaty or TIEA information must be coordinated with LB&I disclosure personnel and, if necessary, with counsel.

Section 6103(p)(3) requires IRS tax attachés and the Office of Overseas Operations, exchange of information team, to account for disclosures of returns and return information to third parties other than those exempt under section 6103(p)(3)(A), which includes disclosures to a foreign competent authority. The Internal Revenue Manual on disclosure of official information provides information on accounting for written and oral disclosures of information.[12]

1. Disclosure to U.S. Agencies and Tax Authorities

Because of the treaty secrecy provision, tax treaty information generally may not be disclosed to state tax agencies under section 6103(d), the U.S. Department of Justice, or other federal agencies under section 6103(i) or under any other provision of section 6103 allowing disclosure for nonfederal tax administration purposes.

The Mexico-U.S. and Canada-U.S. tax treaties provide that information exchanged under the treaties may be shared with state and local authorities. Under these

[10]IRM section 4.60.1.2 (Jan. 1, 2002).

[11]IRM section 4.60.1.2.1 (Jan. 1, 2002).

[12]IRM section 4.60.1.2.2 (Jan. 1, 2002).

treaties, states may be allowed access to tax treaty information received from the relevant foreign tax authority. Information received by the deputy commissioner of the international unit at LB&I or from the foreign tax authority of these countries can be sent directly to state tax agencies.

2. Disclosure to U.S. Taxpayer

Information obtained from a foreign tax authority under a tax treaty or TIEA can be disclosed to the U.S. taxpayer to whom it relates, upon written request from the taxpayer, under section 6103(e). In those circumstances, the taxpayer is considered to be concerned with assessment, collection, enforcement, or prosecution regarding the taxes that are the subject of the tax treaty or TIEA. Disclosure of information in response to these requests should be coordinated with headquarters. In a case that is not in litigation, the deputy commissioner of the international unit at LB&I must be contacted before disclosure of this information. In a case in litigation, disclosure of such information must be coordinated with Branch 7, Associate Chief Counsel.

The deputy commissioner of the international unit at LB&I has the final authority to approve disclosure of information exchanged under a tax treaty or TIEA. Disclosure will not be made to the taxpayer if the IRS or the foreign tax authority providing the information objects to disclosure or if disclosure would seriously impair federal tax administration.[13]

C. Contacts With Foreign Governments

An IRS employee is not allowed to make direct contact with a foreign tax official without first contacting the jurisdictional IRS tax attaché or the exchange of information team. If a foreign official directly contacts an IRS office, the IRS office should refer the contact to the IRS tax attaché or the exchange of information team.

No information, oral or by document, should be disclosed to a foreign government outside the U.S. competent authority channels. All tax-related information must be formally exchanged through the established competent authority channels. No provisions exist for informal exchanges.[14]

D. U.S.-Initiated Specific Requests

IRS Document 6743, Sources of Information Abroad, has information on types and availability of records maintained in foreign countries. The Overseas Operations, Exchange of Information Team, LM:IN:OO:EOI, provides assistance with and information concerning records located in foreign countries. The IRS agent should contact the exchange of information team when there is no IRS tax attaché assigned to the foreign country where the records are located. The IRS agent should contact the IRS tax attaché before requesting foreign-based records to discuss the availability of the information.[15]

1. Telephone Requests

A request for foreign-based publicly available information may be made by telephone if it is routine, not complicated, and the information can be secured within several days. The IRS tax attaché will obtain the information and report to the requester. In all cases, the IRS tax attaché will determine if the request must be in writing.[16]

2. Written Request Format

The request should be in writing if it is complex in nature, the gathering of information will require a significant investment of time to obtain, or if a treaty or TIEA partner will be gathering the information. The IRM requires that requests follow a specific format. Second-level management approves all requests to a foreign tax authority, and they are forwarded directly to the jurisdictional IRS tax attaché or the exchange of information team.

3. U.S.-Initiated Request Procedures

A request for information under a treaty or TIEA should be sent to the IRS tax attaché who has jurisdiction for the country where the information is located or to the manager, exchange of information team when no IRS tax attaché has jurisdiction for the foreign country or if the requests involves Canada or France. A program analyst of the exchange of information team or the IRS tax attaché will prepare a letter to the foreign tax administration requesting the needed information. The request follows a specific format.

The IRS tax attaché or exchange of information program analyst assigned to the case will provide a status report on the case every 60 days. If a status report is required sooner, the requester should contact the IRS tax attaché or exchange of information program analyst directly.

Once the information is obtained, the response will be reviewed by the IRS tax attaché or exchange of information program analyst to ensure all information requested was provided. The information will then be sent to the requester. If only a portion of the information is received, it may still be provided to the requester. This is deemed a partial replay. The IRS tax

[13]IRM section 11.3.25.2 (Information Received From Foreign Tax Authorities), referring to IRM 11.3.13, Freedom of Information Act, and the need to follow those procedures in the event a FOIA request for tax treaty information is received.

[14]IRM section 4.60.1.2.3 (Jan. 1, 2002).

[15]IRM section 4.60.1.2.4 (Jan. 1, 2002).

[16]IRM section 4.60.1.2.4.1 (Jan. 1, 2002).

attaché or exchange of information program analyst will follow up on the outstanding portion and will forward it upon receipt.[17]

E. Foreign-Initiated Specific Requests

Requests from treaty or TIEA partners for tax information concerning specific taxpayers are considered on a case-by-case basis and require specific identification of the taxpayer, an itemized list of specific information requested, a detailed narrative identifying the tax nexus or relevance of the information sought to the taxpayer and issues examined, and an explanation of how the request for transactions, facts, or documents pertains to a tax or a tax liability covered by the treaty or TIEA. The IRM provides specific procedures for SB/SE and LB&I cases.

The revenue agent (RA) or international examiner (IE) will obtain the requested information within 60 days from the date of the transmitting memorandum. If they cannot meet this deadline, the RA or IE will contact the IRS tax attaché or exchange of information program analyst to provide a status report and the estimated completion date.

If it is determined that a summons is required after the case assignment, the RA or IE will contact the IRS tax attaché or the exchange of information program analyst for assistance with summons preparation.

Once obtained, the information will be sent to the IRS tax attaché or the exchange of information program analyst. The IRS tax attaché, on behalf of the U.S. competent authority, will forward the information to the foreign competent authority. If the information is not provided, the IRS tax attaché will provide the foreign competent authority the reason the information could not be provided.

Sometimes, foreign-initiated requests for information result in the opening of an examination in the United States. If a U.S. examination is opened, the exchange of information team is advised.[18]

1. Notification of Taxpayer

Generally, U.S. law does not require the IRS to notify a taxpayer before providing a treaty or TIEA partner information in the possession of the IRS, and taxpayers and third parties have no right to oppose or challenge the provision of information to a requesting party. Tax administration generally is an exception to the rule under the Right to Financial Privacy Act (RFPA) prohibiting disclosure of information to federal government authorities without notice to the customer, and criminal and civil penalties exist for notifying a person whose records have been subpoenaed.[19]

The IRS must provide notice to the taxpayer in many cases when the IRS uses its compulsory summons authority (as opposed to an information document request (IDR)) to acquire information from third parties.[20] In particular, the IRS must mail a summons to the taxpayer.[21] Exceptions to this requirement apply to some types of information sought in criminal cases, or when a court order is obtained upon showing there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information by other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

Any person who is entitled to a notice of a summons can petition within 20 days of service a federal court to quash the summons. The grounds for quashing an IRS summons are narrow. In determining whether a summons is enforceable, courts look at whether:

- the summons was issued under a legitimate purpose;
- the information sought is relevant to that purpose;
- the information is not already within the IRS's possession; and
- the administrative steps required by the IRC have been followed.

When the IRS already has the information request in its possession, and when the IRS obtains information from third parties, whether under a voluntary request or a summons, the IRS is not required to notify taxpayers or third parties that the information will be transmitted to a treaty or TIEA partner.

As a result of the lack of notice to U.S. taxpayers, I have tried a number of years ago to have the American Bar Association Section of International Law adopt a resolution that Treasury should give notice to taxpayers before sending taxpayer information in response to foreign requests. The U.S. government representatives opposed the resolution on the basis that notice is usually given and hence the requirement of notice is not needed.

On May 23, 1989, speaking at a program of the ''Foreign Investment in the United States'' seminar in New York City, Anne Fisher, of the U.S. Treasury Office of International Tax Counsel at the time, said that the United States was planning to sign the CMAATM

[17]IRM section 4.60.1.2.4.3 (Jan. 1, 2002).

[18]IRM section 4.60.1.2.5 (Jan. 1, 2002).

[19]18 U.S.C. section 1510(b) (criminal fines and prison terms of up to five years); 12 U.S.C. section 3420(b) (RFPA civil penalties for disclosure).

[20]Section 7602(c)(1).

[21]Section 7609.

in two weeks. In order to obtain support from business and bar groups, Fisher explained that Treasury was strengthening taxpayer protection and will share this information with the business community. In response to an inquiry of Marshall J. Langer, counsel, Shutts & Bowen, at the time, whether Treasury plans to extend the taxpayer notification to bilateral tax treaties as well, Fisher said that it plans for the long term, but first the United States wants to try it with CMAATM.[22]

During the discussion of the ratification process, on May 10, 1989, James P. Springer, international tax counsel, DOJ, at a briefing of the Committee on International Tax Law, ABA Section of International Law & Practice, explained the provisions that Treasury would adopt to provide some U.S. taxpayers with notification of a request and an opportunity to object to the United States assisting those requests. Springer stated that the bulk of requests for assistance under income tax treaties are, and will continue to be, third-party requests for records of banks, accounting firms, and attorneys. Springer explained that Treasury does not intend at least initially to apply the potentially proposed notification procedures to bilateral treaties.[23]

In November 1988, Treasury convened a meeting at which it expressed its desire for persons knowledgeable and experienced in the legal areas covered by the convention to suggest the position(s) the United States should take and any implementing regulations. Fisher noted that Treasury was preparing international procedures to apply the convention once it takes effect. These procedures would provide taxpayers affected by the convention with notification and the right to participate in whether, and how, the United States responds to a request for cooperation. The procedures will provide more expanded notification and due process than the IRS presently affords taxpayers under bilateral tax treaties.[24]

Undoubtedly, the promise of Treasury to issue regulations giving notice to taxpayers affected by requests for information to object and participate in the requests for information mollified the Senate and concerned taxpayers about the scope, intrusiveness, and potential adverse impact of the convention on taxpayers, as expressed by the Senate Committee on Foreign Relations,[25] when it voted to approve ratification, and by the ICC, bar association, and other interested groups.

In August 2005, the U.S. government opposed a proposed resolution by two ABA sections that called for taxpayer notification when the U.S. government receives a request for exchange of tax information.[26]

2. Informal Evidence Gathering Process

Before exercising the formal summons authority, a revenue agent can in some circumstances first request the information through an IDR to the party in possession of the information. The IDR, although an official IRS request, does not have the same compulsory force as a summons. If the agent believes great compulsion is appropriate or necessary in light of the circumstances (including generally when information is requested from a bank), the agent will issue an administrative third-party summons for the information as an initial matter. Similarly, a summons will be issued if an IDR process is not successful or incomplete information is provided in response to an IDR.

3. Counsel Involvement

A summons is sometimes required when the taxpayer or third party refuses to provide the information requested by tax treaty or TIEA partners. Associate counsel international will provide guidance on issuance and enforcement of summonses. They will also help local counsel offices in matters involving summonses. Summonses are routinely required in cases involving bank or financial organization records. They are not routinely issued, unless otherwise specified, and are authorized only when the information cannot be obtained otherwise.

Summonses concerning requests from treaty or TIEA partners can only be prepared by the IRS tax attaché or the exchange of information team program analyst assigned to the request. These summonses require approval of the Office of the Associate Chief Counsel (International).[27]

4. Issuance of Summons

A summons compels the person summoned to produce the records or testimony sought within a limited period (normally within a month's time). While in many instances, the taxpayer identified in the summons (in addition to the person summoned) will be provided with notice of the summons within three days of the summons's service, the ability to pose a legal challenge to the summons is quite narrow.

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[22]Bruce Zagaris, ''Fisher States That U.S. Expected to Sign Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters,'' 5 *Int'l Enforcement L. Rep.* 179, 179-180 (May 1989).

[23]Zagaris, ''Springer Briefs Committee on International Tax Developments,'' 5 *Int'l Enforcement L. Rep.* 182, 182-183 (May 1989).

[24]Zagaris, ''Governments Take Divergent Paths on OECD Convention on Administrative Assistance in Tax Matters,'' 5 *Int'l Enforcement L. Rep.* 8 (Jan. 1989).

[25]Report of the Senate Committee on Foreign Relations on the OECD Convention on Mutual Administrative Assistance in Tax Matters, Exec. Rept. 101-26, 101st Cong., 2nd Sess., 1990.

[26]Zagaris, ''U.S. Bar Association Withdraws Taxpayer Notification Resolution,'' *Tax Notes Int'l*, Oct. 3, 2005, p. 37.

[27]IRM section 4.60.1.2.5.2 (Jan. 1, 2002).

The IRS, including the U.S. competent authority, exercises its powers directly and does not need to invoke special procedures, whether administrative, judicial, or otherwise, to exercise those powers effectively. In some situations when the IRS has issued an administrative summons, it may choose to bring judicial action to enforce the summons if the party summoned does not comply, and the taxpayer in some situations may start a judicial proceeding to quash the summons.[28]

When a taxpayer or a third-party record keeper does not provide information voluntarily and it is necessary to issue and enforce a summons for information and documents, the IRS generally will seek judicial enforcement in collaboration with the DOJ, which will represent the IRS in a judicial enforcement proceeding brought before a federal district court judge. The IRS has a close working relationship with the DOJ, which has a long and successful record of enforcing IRS summonses regarding both U.S. tax and foreign exchange of information requests.[29]

The IRS has the authority to obtain information in response to a request for exchange of information regardless of whether the IRS has any need for the information for its own tax purposes. To be valid and enforceable, any summons must:

- seek information that may be relevant to the investigation;
- be issued under a proper purpose;
- seek information that the IRS does not already possess; and
- comply with administrative steps required in the IRC.[30]

A summons enforcement proceeding started on behalf of a foreign tax authority under a tax treaty that meets the statutory requirements and is issued in good faith is valid and enforceable.[31] Summons enforcement has also been upheld in court for requests under TIEAs.[32] An affidavit of the U.S. competent authority can be used to establish a prima facie case under the four-factor test in *Powell* for enforcement of an IRS summons. The legitimate purpose requirement is fulfilled by the need to efficiently meet the U.S. government's obligation under the tax treaty.[33] The courts have rejected arguments that a summons was unenforceable because it would not be permissible under the law of the foreign country, because the foreign investigation is not an ongoing tax investigation for this purpose, or because the court should be required to examine the request from the foreign tax authority.[34]

5. Compulsory Powers

If any person is summoned under tax laws to appear, testify, or to produce books, papers, records, or other data, the U.S. District Court for the district in which that person resides or is found has jurisdiction by appropriate process to compel compliance.[35] A person convicted for failure to comply with an administrative summons can be punished by a fine of up to $1,000 or a prison sentence of up to one year or both, together with the costs of prosecution.[36] If a summoned person does not comply with a U.S. court's order to produce, the U.S. court has inherent powers under U.S. common law to impose civil contempt sanctions, such as daily imposition of fines and/or incarceration, until the summoned person complies with the court's enforcement order.

Any person required to pay any tax, or required to make a return (including information returns), keep any records, or supply any information, who willfully fails to pay such tax, make such return, keep such records, or furnish such information, at the time or times required by law or regulations, must, in addition to other penalties provided by law, is guilty of a misdemeanor and, upon conviction, can be fined not more than $25,000 in the case of a corporation or imprisoned not more than one year, or both, together with the costs of prosecution.[37]

Some classes of entities are also subject to additional specific penalties for failure to comply with a summons. For instance, a ''reporting corporation'' subject to the rules of section 6038A or section 6038C (25 percent foreign-owned or engaged in U.S. trade or business) is subject to a special civil penalty adjustment for failure to comply with an administrative summons for information relating to a transaction with a foreign-related party. In the event of such a failure, the IRS may use its discretion and the limited information then in its possession to determine the federal tax treatment of the transaction.[38] The IRS has the authority more generally to determine the federal tax treatment of a

[28]Section 7609.

[29]OECD GF U.S. report, *supra* note 4, at 63-64.

[30]*U.S. v. Powell*, 379 U.S. 48 (1964).

[31]*U.S. v. Stuart*, 489 U.S. 353 (1989); *Lidas v. U.S.*, 238 F.3d 1076 (9th Cir. 2001).

[32]*Zarate Barquero v. U.S.*, 18 F.3d 1311 (5th Cir. 1994).

[33]*Mazurek v. U.S.*, 271 F.2d 226 (5th Cir. 2001).

[34]*See, e.g., Azouz v. U.S.*, 1999 U.S. Dist. LEXIS 21396 (S.D.N.Y.); *Fernandez-Marinelli v. U.S.*, 1995 U.S. Dist. LEXIS 17695 (S.D.N.Y.); *U.S. v. Hiley*, 2007 WL 2904056 (S.D. Cal. 2007); *Salomon Juan Marcos Villarreal v. U.S.* (10th Cir., Case No. 12-1131, filed Apr. 22, 2013) (affirming district court's denial of evidentiary hearing to taxpayer even though he showed recent success in forcing the foreign tax authority to nullify its seizure of a bank account).

[35]*See* sections 7604, 7609.

[36]Section 7210.

[37]Section 7203.

[38]Section 6038A(e), 6038C(d).

transaction in the absence of appropriate information (including the provision of sale information by filing a return for the taxpayer).[39]

6. Trade Secrets

Generally, treaties and TIEAs provide for the nondisclosure of any trade, business, industrial, commercial, or professional secret or process. If a disagreement exists between the IRS and a third party on whether the information secured is a protected trade secret or process, and so forth, the third party should follow the procedures in Rev. Proc. 77-16, 1977-1 C.B. 572, as amplified by Rev. Proc. 79-31, 1979-1 C.B. 599. These procedures provide guidance for requesting assistance from the U.S. competent authority to determine the availability of a U.S. taxpayer of benefits and safeguards provided under the income tax treaties. Tax examinations in progress will continue while the request is being considered, unless the competent authority directs otherwise.[40]

7. Grand Jury Cases

Information from a U.S. grand jury may be supplied to the respective competent authority for tax administration purposes under a Rule 6(e) of the Federal Rules of Criminal Procedure order. The tax treaty partner must meet the requirements of showing a particularized need for the information that is sought preliminarily to or in connection with a judicial proceeding.[41]

8. Obtaining Financial Records From Banks

a. In General. Many requests from foreign tax authorities concern access to financial records. The IRS most commonly uses the administrative summons procedure authorized by sections 7602 and 7609 to obtain financial records from banks for federal tax purposes. The RFPA has a specific exception to its confidentiality rules regarding the disclosure of financial information when ''such financial records are disclosed in response to an administrative subpoena or summons.''[42]

If an NRA has an account with a U.S. bank, the confidentiality requirements of the RFPA would not prevent the IRS from obtaining information regarding that account under its normal procedure for obtaining bank information. No requirement exists that the United States be provided the name of the account holder in order to obtain bank information regarding that person. As a practical matter, sufficient identifying information, such as an account number or a taxpayer identification number, will be required in order to fulfill the request. Also, when the information otherwise represents an appropriate information exchange request, information regarding an ascertainable class of account holders that can be identified with specificity can be obtained. Some tax authorities have indicated that they have had some difficulty in practice obtaining bank information, and in particular noted the long processing times. 12 U.S.C. section 3413(k) authorizes the disclosure of the names and addresses of account holders to Treasury for purposes of withholding taxes on NRAs.[43]

Law enforcement and the IRS have the authority to compel production of financial records through the issuance of administrative, grand jury, or civil subpoenas. Law enforcement can conduct searches of persons or premises to obtain evidence of financial crimes, including the seizure of financial documents, if a search warrant is obtained from an appropriate judicial authority or where exigent circumstances exist that negate the necessity of obtaining a search warrant. The documents obtained through the issuance of subpoenas or obtained through searches can be used in the investigation and prosecution of various financial crimes. Search and seizure powers are available for the investigation of all crimes (including, but not limited to, tax and financial crimes). Although the RFPA generally forbids disclosure of information to federal government authorities without notice to the customer and an opportunity for the customer to challenge the request, it has exceptions in the context of administrative, grand jury, or civil subpoenas or, most notably, any enforcement procedure under the IRC. Also, criminal and civil penalties exist for notifying a person whose records have been subpoenaed.[44]

b. United States Issues Final Regulations on Reporting Interest Paid to NRAs. On April 17, 2012, Treasury and the IRS issued final regulations[45] and a revenue procedure[46] implementing the final regulations regarding the reporting requirements for interest that relates to deposits maintained at U.S. offices of some FIs and is paid to some NRA individuals. These regulations will affect commercial banks, savings institutions, credit unions, securities brokerages, and insurance companies that pay interest on deposits.

On January 7, 2011, Treasury and the IRS published a notice of proposed rulemaking (REG-146097-09) (the 2011 proposed regulations) in the *Federal Register* (76 F.R. 1105, corrected by 76 F.R. 2852, 76 F.R. 20595, and 76 F.R. 22064) under section 6049. The 2011 proposed regulations withdrew proposed regulations that had been issued on August 2, 2002 (67 F.R. 50386) (the 2002 proposed regulations).

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[39]Section 6020(b).

[40]IRM section 4.60.1.2.5.3 (Jan. 2, 2002).

[41]IRM section 4.60.1.2.6 (Jan. 1, 2002).

[42]RFPA, section 3402.

[43]OECD GF U.S. Report, *supra* note 4, at 67.

[44]18 U.S.C. section 1510(b) (criminal fines and prison terms of up to five years); 12 U.S.C. section 3420(b) (RFPA civil penalties for disclosure).

[45]IRS, ''Final Regulations on Reporting Interest Paid to Nonresident Aliens,'' T.D. 9584, 2012-20 IRB 900, RIN 1545-BJ01, Apr. 19, 2012.

[46]Rev. Proc. 2012-24, 2012-20 IRB 913, ''Implementation of Nonresident Alien Deposit Interest Regulations.''

The regulations explain that their main goal is to combat offshore tax evasion. In order to ensure that U.S. taxpayers cannot evade U.S. tax by hiding income and assets offshore, the United States must be able to obtain information from other countries regarding income earned and assets held in those countries by U.S. taxpayers. Under present law, the measures available to assist the United States in obtaining this information include both treaty relationships and statutory provisions. However, the effectiveness of these measures depends significantly on the U.S. government's ability to reciprocate.

In 2010 Congress supplemented the established network of information exchange agreements by enacting, as part of the Hiring Incentives to Restore Employment Act of 2010, provisions commonly known as FATCA that require overseas FIs to identify U.S. accounts and report information (including interest payments) about those accounts to the IRS. In many cases, however, the implementation of FATCA will require the cooperation of foreign governments in order to overcome legal impediments to reporting by their resident FIs. Like the United States, those foreign governments are keenly interested in addressing offshore tax evasion by their own residents and need tax information from other jurisdictions, including the United States, to support their efforts.

As an additional measure to further increase awareness among concerned nonresidents regarding the IRS's use of information collected under these regulations, the revenue procedure will also include a second list identifying the countries with which Treasury and the IRS have determined that it is appropriate to have an automatic exchange relationship regarding the information collected under these regulations. This determination will be made only after further assessment of a country's confidentiality laws and practices and the extent to which the country is willing and able to reciprocate.

The IRS will update the revenue procedure periodically as new information exchange agreements are entered. To avoid the burdens this may cause, the 2012 final regulations allow a payer to elect to report interest payments made to all NRA individuals.

The final regulations reject the comments that the regulations would impose a new administrative burden on U.S. FIs, especially to those that have a larger percentage of customers who are NRA individuals. The final regulations respond to those comments. All NRA individual account holders who maintain accounts in the United States are already required to complete a Form W-8BEN, declaring their non-U.S. status and the country in which they reside. U.S. FIs can use their existing W-8 information to produce Form 1042-S disclosures for the relevant NRA individual account holders. Nearly all U.S. banks and other FIs have automated systems to produce Form 1099-INT, ''Interest Income,'' for U.S. account holders and Form 1042-S, ''Foreign Person's United States Source Income Subject to Withholding,'' for Canadian account holders. As a result, the information collection requirements in these regulations build on reporting and information collection systems familiar to and currently used by U.S. FIs, including small business entities. The amount of time required to complete the Form 1042 and Form 1042-S is minimal and the statement that is required to be collected is brief. Accordingly, the final regulations state that it should not be a significant burden to adapt those systems to report regarding depositors who are resident in other countries with which the United States has an information exchange agreement. Therefore, the final regulations conclude that a regulatory flexibility analysis is not required.

Some of the comments warned that foreign investors would stop investing in the United States and would remove their deposits if the United States starts reporting their receipt of interest income to their tax authorities. In this regard, Sen. Marco Rubio, R-Fla., and Rep. Bill Posey, R-Fla., introduced bills (that is, S. 1506 and H.R. 2568) in 2011 that would prevent Treasury from expanding U.S. bank reporting regulations regarding interest on deposits paid to NRAs.

c. U.S District Court Upholds IRS Regs Requiring Reporting on Interest Paid to NRAs. On January 13, 2014, District Judge James E. Boasberg of the U.S. District Court for the District of Columbia granted Treasury motion for summary judgment in support of the income-reporting requirements issued in 2012 by the IRS, requiring U.S. banks to report the amount of interest earned by account holders residing in foreign countries.

The Florida Bankers Association and the Texas Bankers Association challenged the reporting requirements, alleging that the regulations violate the Administrative Procedure Act (APA) and the Regulatory Flexibility Act.[47]

Boasberg rejected the arguments of the bankers associations that the IRS got the economics of its decision wrong and that the requirements will cause much more harm to banks than anticipated. He found that the IRS reasonably concluded that the regulations will improve U.S. tax compliance, deter foreign and domestic tax evasion, impose a minimal reporting burden on banks, and not cause any rational actor, except a tax evader, to withdraw his funds from U.S. accounts. Boasberg reviewed the argument that the IRS's decision to issue the final regulations was not supported by substantial evidence because the IRS did not know how much money NRAs have deposited in U.S. banks. He found that the IRS used estimates based on extensive Treasury data and that the APA does not prevent the IRS from estimating. However, he explained further

[47] *Florida Bankers Association, et al. v. United States Department of Treasury, et al.*, U.S. District Court for D.C., C.A. No. 13-529 (JEB), Memorandum Opinion, Jan. 13, 2014.

that the IRS did not only focus on the potential of NRAs moving their money, but to the extent it did, the IRS concluded reasonably that the regulations would cause a large movement of money.

Under the final rule, effective January 1, 2013,[48] banks must report interest payments to NRAs, but only for aliens from countries with which the United States has an exchange agreement. The IRS explained in the preamble to the final rule that expanded reporting was ''essential to the U.S. Government's efforts to combat offshore tax evasion.'' Boasberg also upheld the certification by the IRS, under the Regulatory Flexibility Act, that the regulations would ''not have a significant economic impact on a substantial number of small entities.'' However, he considered only the direct burdens that would affect the regulated community, which may be a point of contention if there is an appeal.

Boasberg rejected the bankers associations' argument that the expansion from reporting the earnings of citizens of one foreign country, Canada, to reporting income earned by citizens of an additional 70 countries was unwarranted. The judge observed that, even with the differences among the 70 covered countries in their populations, forms of government, and financial systems, those countries have one very important similarity to Canada: Each has concluded an exchange treaty with the United States. Since the IRS narrowed its list from all 196 countries worldwide to its 70 treaty partners, it was not arbitrary or capricious to extend the reporting requirements to that specific group. Since the regulations are directed toward improving U.S. treaty compliance, it would not make much sense to narrow the group any further.

The DOJ issued a press release, in which Assistant Attorney General Kathryn Keneally of the Tax Division said that ''this ruling advances the Department of Justice's and Internal Revenue Service's continuing efforts to pursue taxpayers trying to evade taxes through offshore accounts.'' Keneally added that ''the court's opinion today represents an important step in our commitment to work with our treaty partners to eliminate cross-border tax evasion.''[49]

The decision and memorandum opinion strengthen the efforts of Treasury to enforce FATCA, especially through concluding FATCA IGAs to enforce it. Article 3 requires the United States to fully reciprocate in gathering and exchanging information. The plaintiffs have appealed the case.

9. John Doe Summonses on Behalf of Foreign Authorities

On July 29, 2013, the DOJ announced that federal courts in Minnesota, Texas, Pennsylvania, Oklahoma, Virginia, and California have issued orders authorizing the IRS to serve John Doe summonses on some U.S. banks and FIs, seeking information about persons who have used specific credit or debit cards in Norway. Orders have been entered in seven of the cases while the U.S. government's petitions in three additional cases are pending.[50]

The U.S. government filed the lawsuits on July 19 and 22, 2013, in nine federal districts in response to the request of the Norwegian government under the Norway-U.S. income tax treaty. The U.S. government is seeking the identities of persons who have used specific debit or credit cards issued by some U.S. FIs so that Norway can determine if those persons have complied with Norwegian tax laws. The United States and Norway have identified a total of 18 U.S. FIs in the court filings. The petitions do not allege that these FIs have violated any U.S. laws regarding these accounts.

According to the petitions of the U.S. government, Norwegian authorities have reason to believe, based on the use of payment cards in Norway that were issued by U.S. banks, that unidentified card holders may have failed to report financial account information or income on their Norwegian tax returns. The filings of the U.S. government cite examples in which individuals using non-Norwegian payment cards have claimed to be tax residents of other countries but were in fact found to have resided in Norway for a sufficient time to be subject to taxes in Norway.[51]

The petitions requesting courts to issue John Doe summonses are part of ongoing international efforts to investigate and prosecute persons using foreign financial accounts as a means to evade taxes. Already, courts have previously approved John Doe summonses to permit the IRS to identify individuals using offshore accounts to evade their U.S. tax obligations.[52]

The suits are ex parte proceedings brought under 26 U.S.C. section 7609(f) and (h) for leave to serve an IRS John Doe summons on the banks concerned. Courts may grant leave to serve a John Doe summons that does not identify the person regarding whose liability it is issued if the United States establishes three factors: The summons relates to a particular person or group of individuals, there is a reasonable basis to believe that person or group may not have complied with the IRC, and the information sought is not readily available from some other source.

The U.S. briefs cite article 28 of the Norway-U.S. income tax treaty as the authority for bringing the suit. Article 28 provides that, upon a proper request under

[48]77 *Fed. Reg.* 23, 391.

[49]U.S. DOJ Tax Division, ''Court Rejects Banking Associations Challenge to Regulations Addressing Offshore Tax Avoidance,'' Press Release 14-042, Jan. 13, 2014.

[50]U.S. DOJ, ''Federal Courts Authorize Service of John Doe Summonses Seeking Identities of Persons Using Payment Cards in Norway,'' Press Release, July 29, 2013.

[51]*Id.*

[52]*Id.*

the treaty, each country ''shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the [requesting] state were the tax of the other state and were being imposed by the other state.''[53] According to declarations filed by IRS Deputy Commissioner Michael Danilack and RA Cheryl Kiger, Norway requested information about payment cards issued by U.S. FIs that were used in Norway over a period and in certain dollar volumes within certain geographic locations so that, in their totality, they suggest taxable residence in Norway. The Norwegian request arises out of the Norwegian Directorate of Taxes' (NDT) Payment Card Project, in which information on the use of payment cards (debit and credit cards) issued by foreign financial institutions is used to identify noncompliant Norwegian taxpayers. The NDT's investigations have shown that Norwegian taxpayers have used cards issued by FFIs to make substantial purchases anonymously.

The U.S. briefs explain that, upon a request for information from its treaty partner Norway, the income tax treaty allows the United States to use any methods available to obtain information on its own behalf. The John Doe summons is available to the United States to obtain information about an unidentified taxpayer, so long as the conditions to obtain judicial authorization for that type of summons have been met. Hence, the United States can use a John Doe summons upon a request from Norway, so long as the otherwise applicable conditions are met.[54]

Some of the other banks and districts involved include PNC Bank and RBS Citizens Bank in the Western District of Pennsylvania, USAA Federal Savings Bank in the Western District of Texas, BOKF and 66 Federal Credit Union in the Northern District of Oklahoma, and East West Bank and Global Cash Card in the Central District of California.[55]

The comparatively large U.S. financial market, the absence of tax on interest paid to foreign depositors, and, until now, the absence of automatic exchange of information reporting (with the exception of with Canada) means that other foreign tax authorities may well make requests similar to those made by Norway.

10. Attorney-Client Privilege

The attorney-client privilege in the United States preserves confidential communications between attorneys and their clients that are disclosed in order to give or obtain legal advice or assistance. Generally, the rule provides that a communication made in confidence by a client is privileged when legal advice of any kind is sought from a professional legal adviser in his capacity as such and the communication relates to that purpose. When the advice sought from the legal professional is not legal advice but, for example, accounting advice, the privilege does not apply. U.S. courts have ruled that ''[a]ttorney-client privilege does not apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity, such as an accountant, escrow agency, negotiator, or notary public.''[56] Hence, to the extent that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director, or under a power of attorney to represent a company in its business affairs, exchange of information resulting from and relating to any such activity cannot be denied because of the attorney-client privilege rule. Communications are also not privileged when communications between an attorney and client are used to further a crime or fraud.

With one limited exception, U.S. attorney-client privilege does not extend to communications between a client and a third party who is not an attorney. A limited rule applies to some expert third parties, such as accountants, when an attorney engages such a person to assist in connection with (or in contemplation of) legal proceedings. The exception only applies when the assistance of the expert is essential to the provision of the legal advice. If what is sought is not legal advice but only accounting services,[57] or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.[58]

11. Disclosures to Foreign Countries in Collection Matters

The United States and five of its treaty partners assist each other in the collection of taxes covered by their respective tax treaties. The program is referred to as the Mutual Collection Assistance Program (MCAP), which will be discussed in more detail in Section VIII of part two of this article, and falls within the scope of the mutual assistance article of the tax treaties in question. The five countries that participate in the MCAP with the United States are Canada, Denmark, France, the Netherlands, and Sweden.

Under the MCAP, a requested country will endeavor to collect taxes owed to the requesting country by a citizen of the requesting country who is residing in the requested country. Data such as name, address, identification number, type of tax, amount of tax, and any

[53]Protocol to Norway-U.S. treaty, Article XII.

[54]*See, e.g., In the Matter of the Tax Liabilities of John Doe, Norwegian taxpayer holding Prairie Sun Bank payment card XXXXXXXXXXXX7857*, U.S. District Court Minnesota, Case No. 0:13-cv-1950, Memorandum in Support of Ex Parte Petition for Leave to Serve ''John Doe'' Summons.

[55]Janet Novack, ''U.S. Seeks PNC, Wells Fargo, JP Morgan Records to Find Tax Cheats — From Norway,'' *Forbes*, July 28, 2013.

[56]*See Harlandale Independent School District v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App. 2000).

[57]*Olender v. United States*, 210 F.2d 7985, 805-806 (9th Cir. 1954); *see Resiman v. Caplin*, 61-2 U.S.T.C. P9673 (1961).

[58]*Kovel v. United States*, 296 F.2d 918 (2d Cir. 1961).

other information deemed necessary to assist the collection process are exchanged with the participating treaty partner.

12. Problems of Lack of Access to Information

A limitation in obtaining information from the United States is that most information about beneficial ownership of corporations, limited liability companies, and other entities is controlled by state governments in the United States. Many states do not require ownership information to be provided to the state's authorities, either at the time the corporation or LLC is formed or subsequently. Neither is it required to be kept in the United States. Similarly, only limited information may be required to be reported regarding the entities' management.

The communications contact provides the identity of a natural person. However, this person is merely authorized to receive communications on behalf of the entity from the registered agent, and there is no necessity for that person to have ownership information regarding the entity. If the person is outside the territorial jurisdiction of the United States, there is no guarantee of receiving or responding to any communication from the IRS. The only consequence for failure to provide the identity of the communications contact to the registered agent is that the registered agent may resign on that basis.[59]

The Global Forum observes that the Financial Action Task Force has rated the United States noncompliant regarding its Recommendation 33 (legal persons — beneficial ownership). Peer jurisdictions have also identified issues concerning obtaining ownership information on Delaware entities or LLCs in general. Some persons raised concerns about the legal framework for ensuring the availability of this information, and in other cases peers cited examples in which requests for information were unanswered. The IRS can, and does, use its information to inquire into ownership information in these cases, but the effectiveness of these powers will be limited when the information is not held by any person within the territorial jurisdiction of the United States.[60] ◆

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[59]OECD GF U.S. Report, *supra* note 4, at 38-39. *See also* GAO, ''Company Formations, Minimal Ownership Information Is Collected and Available'' (Apr. 21, 2006) (discussing the serious deficiencies in the formation of legal persons and providing examples of how they are used in illegal activities, both in the United States and in foreign countries), *available at* http://www.gao.gov/new.items/d06376.pdf.

[60]OECD GF U.S. Report, *supra* note 4, at 39. For a critique arguing that the OECD peer review of the U.S. is over-friendly to the U.S., see Eduardo Morgan Jr., ''OECD's Double Standard in the Global Forum on Transparency and Exchange of Information: The Rating of the United States,'' *available at* http://www.eduardomorgan.com/blog/?p=2104.