



# Guide to Tax Information Exchange Agreements

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# Preface

Set out below is some useful information on Tax Information Exchange Agreements. This summary is by no means exhaustive and does not purport to be a complete review of issues pertaining to Tax Information Exchange Agreements. For further information please contact the Private Client & Wealth Management team at Higgs & Johnson.

### What is a Tax Information Exchange Agreement (“TIEA”)?

A Tax Information Exchange Agreement is a bilateral agreement that has been negotiated and signed between two countries to establish an official system for the exchange of information relating to taxes. More specifically, a TIEA allows for the free exchange of financial tax information irrespective of differences in either country's requirement or definition of a predicate crime to money laundering. However, it must be duly noted that information will only be provided if a proper request is made pursuant to all of the treaty provisions, which require that the requesting party first make a prima facie case.

Countries may narrowly tailor the conditions that would trigger the requirement to exchange information, and restrict the categories of data that would have to be transferred. Conceivably, the Bahamas and the countries it chooses to enter into a TIEA with would be able to define specific circumstances that would elicit the exchange of information, but that do not infringe on the Bahamas' general interest in safeguarding and protecting its financial industry.

### How does the Bahamas enter into TIEAs?

TIEAs are negotiated on behalf of the Bahamas by a team of representatives from the Ministry of Finance. After the negotiations are complete and the text of agreements agreed to pursuant to the relevant constitutional arrangements and approval processes, a ceremony takes place where the formal agreements are signed by officials on behalf of the respective countries. These agreements, however, must go through the legislative processes of the signing jurisdictions to be brought into effect. After the legislative processes are complete, the agreements usually come into effect at the beginning of the taxable period, which is 1 January for the Bahamas.

### Why do we need TIEAs?

Conflicts can emerge when a country must access information that may be protected by a foreign legal system, in order to enforce its own laws. These types of conflicts have generally been resolved through the execution of collaborative tax treaties.

The Organization for Economic Co-operation and Development (OECD) has established standards on transparency and exchange of information for tax purposes, and has strongly encouraged countries to adopt these standards. The OECD and the Financial Action Task

Force, members of which are the G-20 countries, have stated that a country must have a minimum of twelve (12) TIEAs in order to be regarded as co-operating in matters of tax information exchange transparency. Jurisdictions that fail to do so will be regarded as non-cooperative jurisdictions, and the G-20 countries have stated that action will be taken against such jurisdictions. Whilst twelve (12) TIEAs are the minimum standard at the present time, G-20 countries are encouraging international financial centres to execute collaborative treaties in excess of this mandated requirement.

Currently, OECD and non-member countries are negotiating more than 40 separate tax information exchange agreements, many of which will be signed and ratified over the coming year. TIEAs are intended to allow full exchange of information on criminal and civil tax matters between the two signatories. Each TIEA will come into force once both countries have given legal effect to it.

### What a TIEA is not?

A TIEA is not an automatic information exchange between the two signatories to the treaty. TIEAs are by request only, and information will never be exchanged aimlessly or arbitrarily. All TIEAs set forth specific guidelines and criteria by which the Requesting party must submit a request for information. These guidelines and criteria expressly provide that all requests must be validly made and relevant to the matter at hand. All requests must be set forth with specificity, detailing the nature of the information being requested and the substance of the evidence to support the request.

### What does the OECD Model TIEA provide for?

Most TIEAs are based on an OECD Model Agreement, which was published in 2002 by the Global Forum on Taxation, a loose institution formed in 2001 as a result of the OECD's Harmful Tax Practices Project. This Forum includes many international financial centres, such as Aruba, Bermuda, the Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, Seychelles, and San Marino.

The OECD's Model TIEA, entitled “*Agreement on Exchange of Information on Tax Matters*” presents two models: a multilateral version and a bilateral version, which largely share the same text. The Model TIEA requires only the provision of information exchange “upon request.” It includes strict conditions about the form of such request, which is designed to prevent so-called “fishing expeditions.” A request must be detailed, with specified

criteria set out. This ensures that the requesting party has a genuine, strong case before requesting the information.

### How many TIEAs have the Bahamas signed?

Recently, there has been an international effort for increased transparency and regulatory supervision. The Bahamas has sought to comply with such international initiatives and standards on tax information exchange. Presently, the Bahamas is a party to thirty-one TIEAs that provide for the exchange of information upon request, and is in negotiations for several additional agreements. These TIEAs are with the United States, the United Kingdom, San Marino, Monaco, New Zealand, the People's Republic of China, Argentina, The Netherlands, France, Belgium, Mexico, the Nordic countries (Norway, Sweden, Finland, Denmark, Iceland, Greenland, and the Faroe Islands), Spain, Australia, Germany, Canada, Japan, India, Korea, Guernsey, Aruba, Malta, United Mexican States, South Africa and Czech Republic which all meet the OECD's standard.

The Bahamas signed its first TIEA with the United States in January 2002, to be made effective in 2004 as to criminal tax matters, and 2006 as to civil tax matters. The Bahamian Government is currently awaiting the counterparties' completion of internal processes so that such agreements can be signed.

### Can the Bahamas decline a Request for Tax Information?

The Bahamas may decline a request for tax information, typically, based on the following reasons:

- if the Requesting party has not exhausted all avenues in its own country to obtain the information;
- if disclosure of the information is contrary to the public interest of the Bahamas;
- if the request is general without any specified detail, or
- if the request was not made in conformity with the TIEA.

### What happens if the Bahamian Government decides to comply with the Request?

Should the Ministry of Finance or other Bahamian authority determine that the request has met all the criteria set forth in the TIEA, it may order that all persons,

requested information, provide such information as may be specified in the request within a specified period of time. All information provided must be kept confidential, and cannot be disclosed to any other persons, nations, or authorities without the express consent of the Requested Party.

### A Look at Bahamas TIEAs

Set forth below is a highlight of the US and UK TIEAs which provide particulars into the procedure and guidelines of collaborative tax treaties.

- *The Bahamas-U.S. TIEA*

The Bahamas has continued to demonstrate that its foremost concern is its financial services offerings to clients and financial institutions that allow for privacy of one's financial affairs and records, while providing unconstrained access to international capital markets. Under the Bahamas-US TIEA, the Bahamas will only provide specific information requested by the United States that is relevant to the matter at hand. The TIEA relates only to US federal income taxes, and state taxes are inapplicable. Moreover, the United States must exhaust all measures of obtaining such data within the United States, and the Ministry of Finance in the Bahamas must be satisfied that sufficient evidence exists to support the allegation of criminal tax evasion under US federal tax law.

In addition, the Bahamas-US TIEA provides that the Bahamas will only relinquish the requested information so long as the United States is able to present evidence linking the suspected individual's bank accounts to either tax evasion or criminal activity, primarily money laundering. That is, the United States has to prove that the request is not merely a "fishing expedition. Moreover, if information is requested by the United States relating to persons not resident in the United States, it has to be established to the satisfaction of the Bahamas that such information is foreseeably relevant or material to the administration and enforcement of the federal tax laws of the United States.

All requests by the US authority must be in writing and contain specific information as to the matter of the request that include:

- the name of the person;
- the type of information requested;
- the period of time to which the information is requested;
- the likely location of the information;
- the applicable federal tax law;
- whether the matter is criminal or civil in nature; and
- the substantiation for the belief that the requested information is foreseeably relevant or material to the administration and enforcement of the federal tax laws of the US.

Any subsequent changes made to the TIEA must be approved by the Parliament of the Bahamas. All privileges, such as legal privileges, are preserved under the TIEA. Although the Bahamas-US TIEA has been in existence for over five years, the Ministry of Finance has not been overwhelmed with requests pursuant to the treaty.

- *The Bahamas-UK TIEA*

The Bahamas entered into a TIEA with the United Kingdom on the 29<sup>th</sup> October, 2009. The TIEA covered criminal tax matters and applied retroactively to all criminal tax matters arising from January 1, 2004. The start date for UK-related criminal tax matters is on the same date as the start date for US-related criminal tax matters under the Bahamas-US TIEA.

The Bahamas has demonstrated its commitment to comply with international standards without “compromising the viability of the financial services industry.

- *The Bahamas-Canada TIEA*

The TIEA with Canada extends exempt surplus treatment to dividends paid to Canada to a parent company by its foreign affiliates resident and carrying on business in The Bahamas. Such dividends are thereby exempted from tax in Canada.

### **The Bahamas: Still the International Financial Centre of Choice**

The Bahamian Government has re-affirmed its commitment to international standards of transparency and exchange of information as accepted by and applied to all the member countries of the OECD and by the majority of international financial centres. The Bahamas continues to co-operate with the international community in the international fight against financial crimes and money laundering. Yet, the Bahamas has demonstrated its unwavering commitment to its financial institutions and clientele, and has resolved to remain a leader in global financial services.

With a strong political framework, stable administrative environment, sophisticated private client commercial practitioners and financial officers, and the presence of some of the most notable financial institutions in the world, the Bahamas continues to remain the jurisdiction of choice.

*As of 10 March 2014*