

Private Client & Wealth Management BULLETIN

The Bahamas & Cayman Islands Surpass OECD's Requirements

The Bahamas and the Cayman Islands' commitment to international tax transparency standards has been recognised by the Organisation for Economic Co-Operation and Development ("OECD") which has moved both jurisdictions onto the OECD's "White List" of jurisdictions that are compliant with international tax transparency standards.

The Bahamas has signed 18 bilateral Tax Information Exchange Agreement ("TIEA's")

and Cayman has signed 14 TIEAs surpassing the OECD's minimum requirement of 12 set in April 2009 for a jurisdiction to evidence that it is committed to and compliant with international tax transparency standards. It is expected that both jurisdictions will soon have many more TIEAs in place and the respective governments are confident that they are well placed to ensure the smooth operation of the TIEA's.

TAX EXTENDERS ACT OF 2009

US proposed legislation requires foreign financial institutions to enter into agreements with the IRS to avoid 30% withholding tax on all US-sourced income and capital payments.

On December 9, 2009, the House of Representatives (United States) passed the "Tax Extenders Act of 2009" ("TEA"). The Senate is currently reviewing TEA, and it is likely that the Senate will approve the contents therein. The TEA reintroduces the Foreign Account Tax Compliance Act of 2009 ("FATCA") with certain helpful amendments. Its purpose is to prevent the avoidance of tax on income and proceeds from assets held abroad by United States' ("US") citizens or residents. The TEA was designed to provide greater disclosure to the Internal Revenue Service

("IRS") by foreign financial institutions in respect of assets held by them by US persons. The United States Government has concluded that many U.S. individuals looking to evade their tax obligations in the United States have sought to hide income and assets from the IRS by opening secret foreign bank accounts with foreign financial institutions. Because many of the foreign financial institutions that hold accounts on behalf of U.S. persons are outside the reach of U.S. law, US legislators have determined that the appropriate solution is to impose taxes on foreign financial institutions, many of which have substantial investments in U.S. financial assets or hold substantial U.S. financial assets for the account of others.

It is an extremely important bill and will change the way trust and financial services providers in The Bahamas and the Cayman Islands conduct business in the future. Under the TEA, foreign financial institutions are required to determine which of its equity and debt holders (and certain other of its counterparties and other "account holders") are US persons and to report this information to the IRS or otherwise be subject to a 30% withholding tax on its U.S.-source income and/or the proceeds of certain sales and other dispositions. The withholding tax could be avoided only if the foreign financial institution enters into an agreement with the Treasury or the IRS to provide information relating to US persons that directly or indirectly maintain an account at such financial institution.

TEA Provisions Relating to Foreign Trusts

Under present law, a U.S. person is treated as the owner of the property transferred to a foreign trust if the trust has a U.S. beneficiary. Under current Treasury regulations, a foreign

trust is treated as having a U.S. beneficiary if any current, future or contingent beneficiary of the trust is a U.S. person. Notwithstanding this requirement, the US government has concluded that some taxpayers have taken positions that are contrary to this regulation. In order to enhance compliance with this regulation, the TEA would codify this regulation into the statute.

The TEA would also clarify that a foreign trust will be treated as having a U.S. beneficiary if (1) any person has discretion to determine the beneficiaries of the trust unless the terms of the trust specifically identify the class of beneficiaries and none of those beneficiaries are U.S. persons or (2) any written, oral or other agreement could result in a beneficiary of the trust being a U.S. person. As a final clarification, the TEA would clarify that the use of any trust property will be treated as a payment from the trust in the amount of the fair market value of such use. The TEA also sets forth other provisions relating to presumptions and penalties of foreign trusts.

The information contained in this bulletin is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This guide can in no way serve as a substitute in such cases.