

Terms of Reference

Introduction

The Global Forum met on 1-2 September 2009 in Mexico and agreed in its Summary of Outcomes on a restructuring of the Global Forum and a three-year mandate to establish a robust and comprehensive peer review process to monitor and review progress made towards full and effective exchange of information.

In order to carry out monitoring and peer reviews, the Global Forum set up a Peer Review Group. The composition of the Peer Review Group was later agreed by the Global Forum and communicated by the chair to all members on 30 September. The Peer Review Group was mandated to “develop a methodology and detailed terms of reference for a robust, transparent and accelerated process” (see mandate in Annex 1).

The standards on transparency and exchange of information for tax purposes as developed by the Global Forum and the OECD are now almost universally agreed. The sources of the standards are described in Annex 2. The hallmarks of a good peer review system are open procedures coupled with a clear statement of the standards against which subjects are being reviewed. The terms of reference describe the standards and break them down into 10 essential elements to be assessed through the monitoring and peer reviews.

The terms of reference will be used by the assessment teams as the standards and key elements against which jurisdictions’ legal and administrative framework and actual implementation of the standards will be assessed. They also served as a basis for the Secretariat to develop questionnaires that form the basis of the peer reviews. The questionnaires allow assessors to have a clear roadmap to conduct the peer reviews, which in turn will ensure that reviews are consistent and complete.

The Standards of Transparency and Exchange of Information for Tax Purposes

The principles of transparency and effective information exchange for tax purposes are primarily reflected in the 2002 OECD's Model Agreement on Exchange of Information on Tax Matters (the OECD Model TIEA) and its commentary and in Article 26 of the OECD Model Tax Convention on Income and on Capital ("the OECD Model Tax Convention") and its commentary as updated in 2004 (and approved by the OECD Council on 15 July 2005). The revisions to Article 26 aimed at reflecting the work that the Global Forum has done have also been incorporated in the United Nations Model Double Taxation Convention between Developed and Developing Countries ("the UN Model Tax Convention"). The standards are now almost universally accepted. They were endorsed by the G20 Finance Ministers and Central Bank Governors at their meeting in Berlin in 2004. All members of the Global Forum have also now endorsed the standards.

The standards provide for exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

In addition to the primary authoritative sources of the standards, there are a number of documents which have provided guidance in how the standards should be applied, in particular as regards transparency. For instance, in connection with ensuring the availability of reliable accounting information the Joint Ad Hoc Group on Accounts ("JAHGA")² developed guidance on accounting transparency. Other secondary sources include the Manual on Exchange of Information (2006), the 2004 Guidance notes developed by the Forum on Harmful Tax Practices, and the FATF recommendations, standards and reports (see Annex 2).

Exchange of information for tax purposes is effective when reliable information, foreseeably relevant to the tax requirements of a

² The JAHGA was set up in 2003 under the auspices of the Global Forum. For the standards developed by the JAHGA see "Enabling Effective Exchange of Information: Availability Standard and Reliability Standard," (the JAHGA Report).

requesting jurisdiction is available, or can be made available, in a timely manner and there are legal mechanisms that enable the information to be obtained and exchanged.³ It is helpful, therefore, to conceptualize transparency and exchange of information as embracing three basic components:

- availability of information
- appropriate access to the information, and
- the existence of exchange of information mechanisms

In other words, the information must be **available**, the tax authorities must have **access** to the information, and there must be a basis for **exchange**. If any of these elements are missing, information exchange will not be effective.

The remainder of this section breaks down the principles of transparency and effective exchange of information into their essential elements. In order for assessors to be able to evaluate whether a jurisdiction has implemented the standards or not, they will have to be in the position to understand each of the key principles and what a jurisdiction must do to satisfy that requirement. The sections are divided as discussed above into availability of information (Part A), access to information (Part B) and finally information exchange (Part C).

Availability of Bank, Ownership, Identity and Accounting Information

Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested.

³ JAHGA Report, para. 1.

A. Availability of Information – Essential Elements

A.1 Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements⁴ is available to their competent authorities.

A.1.1. Jurisdictions⁵ should ensure that information is available to their competent authorities that identifies the owners of companies and any bodies corporate.⁶ Owners include legal owners, and, in any case where a legal owner acts on behalf of any other person as a nominee or under a similar arrangement, that other person, as well as persons in an ownership chain.⁷

A.1.2. Where jurisdictions permit the issuance of bearer shares they should have appropriate mechanisms in place that allow the owners of such shares to be identified.⁸ One possibility among others is a custodial arrangement with a

⁴ The term “Relevant Entities and Arrangements” includes: (i) a company, foundation, Anstalt and any similar structure, (ii) a partnership or other body of persons, (iii) a trust or similar arrangement, (iv) a collective investment fund or scheme, (v) any person holding assets in a fiduciary capacity and (vi) any other entity or arrangement deemed relevant in the case of the specific jurisdiction assessed.

⁵ It is the responsibility of the jurisdiction under whose laws companies or bodies corporate are formed to ensure that ownership information in relation to those entities is available. In addition, where a company or body corporate has a sufficient nexus to another jurisdiction, including being resident there for tax purposes (for example by reason of having its place of effective management or administration there), that other jurisdiction will also have the responsibility of ensuring that ownership information is available.

⁶ OECD Model TIEA Article 5(4) (please note, however, exceptions for publicly-traded companies or public collective investment funds or schemes) and JAHGA Report paragraph 1. Note that FATF Recommendations state that jurisdictions should take measures to prevent the unlawful use of legal persons in relation to money laundering and terrorist financing by ensuring that their commercial, corporate and other laws require adequate transparency concerning the beneficial ownership and control of legal persons. Similar provisions apply to require adequate transparency concerning the beneficial ownership and control of trusts and other legal arrangements, as the case may be.

⁷ See B.1.1.

⁸ See footnote 3 above.

recognized custodian or other similar arrangement to immobilize such shares.

- A.1.3. Jurisdictions should ensure that information is available to their competent authorities that identifies the partners in any partnership that (i) has income, deductions or credits for tax purposes in the jurisdiction, (ii) carries on business in the jurisdiction or (iii) is a limited partnership formed under the laws of that jurisdiction.⁹
- A.1.4. Jurisdictions should take all reasonable measures¹⁰ to ensure that information is available to their competent authorities that identifies the settlor, trustee¹¹ and beneficiaries of express trusts (i) created under the laws of that jurisdiction, (ii) administered in that jurisdiction, or (iii) in respect of which a trustee is resident in that jurisdiction.¹²
- A.1.5. Jurisdictions that allow for the establishment of foundations should ensure that information is available to their competent authorities for foundations formed under those laws to identify the founders, members of the foundation council, and beneficiaries (where applicable), as well any other persons with the authority to represent the foundation.¹³
- A.1.6. Jurisdictions should have in place effective enforcement provisions to ensure the availability of information, one

⁹ OECD Model TIEA Article 5(4).

¹⁰ The Global Forum will re-examine this aspect in light of the experience gained by jurisdictions in the context of the peer reviews and decide, before the end of Phase 1, if further clarifications are required to ensure an effective exchange of information.

¹¹ The term “trustee” as used herein shall be deemed to include a trust protector, administrator, and each other person (regardless of that person’s applicable title with regard to the trust) who, under the terms of the trust and/or applicable law, has responsibility for the distribution and/or administration of the trust, whether or not that authority must be exercised in a fiduciary capacity, is shared with another person or persons, or is limited in its scope.

¹² OECD Model TIEA Article 5(4). See also commentary on express trusts in the appendix to the JAHGA Report, para. 6.

¹³ OECD Model TIEA Article 5(4).

possibility among others being sufficiently strong compulsory powers.¹⁴

A.2 Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.¹⁵

A.2.1. Accounting records should (i) correctly explain all transactions, (ii) enable the financial position of the Entity or Arrangement to be determined with reasonable accuracy at any time and (iii) allow financial statements to be prepared.

A.2.2. Accounting records should further include underlying documentation, such as invoices, contracts, etc. and should reflect details of (i) all sums of money received and expended and the matters in respect of which the receipt and expenditure takes place; (ii) all sales and purchases and other transactions; and (iii) the assets and liabilities of the relevant entity or arrangement.

A.2.3. Accounting records should be kept for 5 years or more.

A.3 Banking information should be available for all account-holders.

A.3.1. Banking information should include all records pertaining to the accounts as well as to related financial and transactional information.¹⁶

Access to Bank, Ownership, Identity and Accounting Information

A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities.

¹⁴ FATF, AML/CFT Evaluations and Assessments: Handbook for Countries and Assessors, criteria 33.1-33.3, at p. 62 (April 2009).

¹⁵ See JAHGA Report.

¹⁶ See B.1.

Peer Review Group assessors shall determine if the access powers in a given jurisdiction cover the right types of persons and information and whether rights and safeguards are compatible with effective exchange of information.

B. Access to Information – Essential Elements

B.1. Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).¹⁷

B.1.1. Competent authorities should have the power to obtain and provide information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees, as well as information regarding the ownership of companies, partnerships, trusts, foundations, and other relevant entities including, to the extent that it is held by the jurisdiction's authorities or is within the possession or control of persons within the jurisdiction's territorial jurisdiction, ownership information on all such persons in an ownership chain.¹⁸

B.1.2. Competent authorities should have the power to obtain and provide accounting records for all relevant entities and arrangements.¹⁹

B.1.3. Competent authorities should use all relevant information-gathering measures to obtain the information requested, notwithstanding that the requested jurisdiction may not need the information for its own tax purposes (*e.g.*, information should be obtained whether or not it relates to a taxpayer that is currently under examination by the requested jurisdiction).

B.1.4. Jurisdictions should have in place effective enforcement provisions to compel the production of information.²⁰

¹⁷ See, however, section C.4.

¹⁸ See OECD Model TIEA Article 5(4).

¹⁹ See JAHGA Report paragraphs 6 and 22.

B.1.5. Jurisdictions should not decline on the basis of its secrecy provisions (*e.g.*, bank secrecy, corporate secrecy) to respond to a request for information made pursuant to an exchange of information mechanism.

B.2 The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

B.2.1. Rights and safeguards should not unduly prevent or delay effective exchange of information.²¹ For instance, notification rules should permit exceptions from prior notification (*e.g.*, in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction).

Exchanging Information

Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. The legal authority to exchange information may be derived from bilateral or multilateral mechanisms (*e.g.* double tax conventions, tax information exchange agreements, the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters) or arise from domestic law. Within particular regional groupings information exchange may take place pursuant to exchange instruments applicable to that grouping (*e.g.* within the EU, the directives and regulations on mutual assistance). Peer Review Group assessors will be tasked with determining whether the network of information exchange that a jurisdiction has is adequate in their particular circumstances.

C. Exchanging Information – Essential Elements

C.1. Exchange of information mechanisms should provide for effective exchange of information and should:

²⁰ See JAHGA Report paragraph 22.

²¹ See OECD Model TIEA Article 1.

- C.1.1. allow for exchange of information on request where it is foreseeably relevant²² to the administration and enforcement of the domestic tax laws of the requesting jurisdiction.²³
- C.1.2. provide for exchange of information in respect of all persons (*e.g.* not be restricted to persons who are resident in one of the contracting states for purposes of a treaty or a national of one of the contracting states).
- C.1.3. not permit the requested jurisdiction to decline to supply information solely because the information is held by a financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.²⁴
- C.1.4. provide that information must be exchanged without regard to whether the requested jurisdiction needs the information for its own tax purposes.²⁵
- C.1.5. not apply dual criminality principles to restrict exchange of information.
- C.1.6. provide exchange of information in both civil and criminal tax matters.
- C.1.7. allow for the provision of information in specific form requested (including depositions of witnesses and production of authenticated copies of original documents) to

²² See Articles 1 and 5(5) OECD Model TIEA and accompanying commentary. It is incumbent upon the requesting state to demonstrate that the information it seeks is foreseeably relevant to the administration and enforcement of its tax laws. Article 5(5) of the OECD Model TIEA contains a checklist of items that a requesting state should provide in order to demonstrate that the information sought is foreseeably relevant.

²³ See Article 1 of the OECD Model TIEA, paragraph 5.4 of the Revised Commentary (2008) to Article 26 of the UN Model Convention and paragraph 9 of the Commentary to Article 26 of the OECD Model Convention.

²⁴ OECD and UN Model Tax Conventions, Art. 26(5); OECD Model TIEA, Art. 5(4)(a).

²⁵ OECD and UN Model Tax Conventions, Art. 26(4); OECD Model TIEA, Art. 5(2).

the extent possible under the jurisdiction’s domestic laws and practices.

C.1.8. be in force; where agreements have been signed, jurisdictions must take all steps necessary to bring them into force expeditiously.

C.1.9. be given effect by the enactment of legislation necessary for the jurisdiction to comply with the terms of the mechanism.²⁶

C.2 The jurisdictions’ network of information exchange mechanisms should cover all relevant partners.²⁷

C.3 The jurisdictions’ mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

²⁶ OECD Model TIEA, Art. 10.

²⁷ As agreed by the Global Forum’s Sub-group on Level Playing Field issues in its paper *Taking the Process Forward in a Practical Way* (November 2008), a country is considered to have substantially implemented the standard of exchange of information for the purposes of this Global Forum assessment if it has in place signed agreements or unilateral mechanisms that provide for exchange of information to standard with at least 12 OECD countries. This benchmark was considered to be an appropriate dividing line at that point in time, between those countries that are implementing the standards and those that are not. However, this benchmark was recognised as part of a staged process and would have to be re-evaluated as circumstances evolved. In addition, in conjunction with the G20 Leaders’ meeting in London on 2 April 2009, the Secretary-General of the OECD issued a progress report determining that a country that had signed agreements with 12 jurisdictions, whether OECD countries or other jurisdictions, would be considered to have substantially implemented the standard on exchange of information. It is apparent that for some jurisdictions, 12 agreements are likely to be too few to allow for exchange with all relevant requesting countries. Ultimately, the standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws, this should be drawn to the attention of the Peer Review Group, as it may indicate a lack of commitment to implement the standards.

C.3.1. Information exchange mechanisms should provide that any information received should be treated as confidential and, unless otherwise agreed by the jurisdictions concerned, may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the exchange of information clause. Such persons or authorities shall use the information only for such purposes.²⁸ Jurisdictions should ensure that safeguards are in place to protect the confidentiality of information exchanged.²⁹

C.3.2. In addition to information directly provided by the requested to the requesting jurisdiction, jurisdictions should treat as confidential in the same manner as information referred to in C.3.1 all requests for such information, background documents to such requests, and any other document reflecting such information, including communications between the requesting and requested jurisdictions and communications within the tax authorities of either jurisdiction.

C.4 The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

C.4.1. Requested jurisdictions should not be obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or information which is the subject of attorney client privilege or information the disclosure of which would be contrary to public policy.³⁰

C.5 The jurisdiction should provide information under its network of agreements in a timely manner.

²⁸ See Article 8 OECD Model TIEA; Article 26(2), OECD and UN Model Tax Conventions.

²⁹ See B.2.

³⁰ See OECD and UN Model Tax Conventions Article 26(3)(b) and commentary and OECD Model TIEA Article 7.

- C.5.1. Jurisdictions should be able to respond to requests within 90 days of receipt by providing the information requested or providing an update on the status of the request.³¹
- C.5.2. Jurisdictions should have appropriate organisational processes and resources in place to ensure timely responses.
- C.5.3. Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions.

Output of the Peer Review Process

For analytical purposes, it is important to distinguish the two phases in terms of their primary thematic scope. Phase 1 is concerned with a jurisdiction's legal framework and Phase 2 deals with the practical application of that framework. It is worth bearing in mind, however, that to the extent they are carried out sequentially Phase 2 would normally encompass to some degree the issues in Phase 1. Phase 2 reviews may also help clarify the significance of any shortcomings identified in Phase 1. Subsequent phases of peer review processes also typically review remedial efforts made by jurisdictions in response to issues identified in earlier review reports. This natural overlap between phases exists in other peer review systems, including the FATF and OECD Working Group on Bribery.

Phase 1 Reviews: The legal and regulatory framework

The Phase 1 review will assess each jurisdiction's legal and administrative framework against the essential elements. It will examine the jurisdiction's network of international agreements based on the information collected in the ongoing assessment of new agreements, updated as necessary. The review will also include situations where the treaty obligation may need to be incorporated into domestic law through legislation. The review will also verify that the absence of a domestic tax interest or the existence of strict secrecy provisions does not affect the ability to obtain and exchange information, and that domestic law provides for the relevant investigatory powers as appropriate. The availability of information in each jurisdiction will also be reviewed, including an appraisal of a jurisdiction's requirements to maintain accounting records against the JAHGA standards.

³¹ See Article 5(6)(b) of the OECD Model TIEA.

Accordingly, the report produced in connection with the Phase 1 review will include a detailed description of the elements of the jurisdictions' legal and administrative framework for transparency and exchange of information. This will be presented under 3 headings:

- i) Availability of information
- ii) Access to information
- iii) Exchanging information

These sections would each be sub-divided between the essential elements described above. Some of the essential elements are susceptible to a yes or no determination following the Phase 1 review. In broad terms it will be possible to indicate whether a given jurisdiction has exchange of information arrangements with all relevant parties, if they have access to all relevant information and whether such information must in all cases be available. However, certain of the essential elements will require a Phase 2 review before any judgment can be made as to whether the jurisdiction satisfies the standard or not. In particular, whether the jurisdiction delivers information in a timely manner, and whether the rights and safeguards afforded persons in a jurisdiction unduly prevent or delay effective exchange of information will generally require an assessment of the practical application of a jurisdiction's legal framework for exchange.

In addition, the report will identify and describe any shortcomings that exist and provide recommendations as to how these might be addressed. Recommendations should be specific and provide clear guidance to the jurisdiction as to what is expected. To assist jurisdictions in implementing the standards the report may suggest a program of technical assistance where appropriate. In addition, the reviews may note that a jurisdiction engages in exchange of information practices that go beyond the standard, such as automatic or spontaneous exchanges of information, simultaneous examinations, or allowing representatives of the requesting jurisdiction to enter its territory to conduct interviews or examine records, or conduct such interviews or examine such records on behalf of another jurisdiction. This will not affect the assessment.

Phase 2: Monitoring and reviewing of the actual implementation of the standards

The second phase of the monitoring and peer review will focus on the effectiveness of exchange of information. Even if

satisfactory international instruments are in place together with a sound domestic legal framework, the effectiveness of exchange of information will depend on the practice of the competent authorities. Ultimately, the reviews will assess the quality of the information exchanged taking into account the views of the requesting parties.

There is a wide range of potential deficiencies, from lack of willingness to practical impediments such as insufficient resources to seek and exchange the required information or procedural requirements that frustrate effective exchange of information. There are also potential deficiencies in the quality of the requests made. Assessment of the effectiveness of the exchange of information requires quantitative data, such as statistics allowing meaningful review of the treatment of requests and the period between request and response, and qualitative data, indicating the reliability and relevance of the information exchanged to the requesting parties. Peer review should seek out input from a variety of sources, including at the on-site visit as appropriate, about the adequacy of the resources dedicated to achieving effective exchange of information.

The report on Phase 2 reviews will follow the same structure as in Phase 1, that is divided between exchange, access and availability of information. However, Phase 2 reviews will focus on the practical application in these areas and include an analysis of a jurisdictions' experience in information exchange. The assessments already made under Phase 1 could now be reviewed in light of the Phase 2 results. Where recommendations were provided following the Phase 1 review, these will be reviewed to determine whether they have been implemented. Where a jurisdiction generally performs satisfactorily in terms of providing the information requested within a reasonable time, then there will be little need to provide specific recommendations. However, where appropriate, recommendations will be made so that any potential difficulties in maintaining or achieving effective exchange of information can be avoided.

Annex 1 - Peer Review Group Mandate

The Summary of Outcomes agreed at the Global Forum meeting in Mexico on 1-2 September in relation to the establishing of a peer review process states:

Establishing a robust and comprehensive monitoring and peer review process

- In order to carry out an in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes, the Global Forum agreed on the setting up of a Peer Review Group (PRG) to develop the methodology and detailed terms of reference for a robust, transparent and accelerated process.
- The terms of reference will be based on the proposals set out in the framework paper for more in depth monitoring and peer review as discussed at the meeting. There will be two phases for the peer review. Phase 1, which will examine the legal and regulatory framework in each jurisdiction, will begin early in 2010 and will be completed for all members within the initial three-year mandate. Phase 2, which will also begin early in 2010, will evaluate the implementation of the standards in practice. The Global Forum agreed that all members and relevant non-member jurisdictions will be covered by Phase 1 and Phase 2 reviews. The Peer Review Group will propose the scheduling of jurisdictions to be reviewed under Phase 2.
- Contrary to Phase 2 reviews, Phase 1 reviews would not normally require on site visits.
- In addition to the two phases of the peer review, the Global Forum will monitor legal instruments for exchange of information (*e.g.* double taxation treaties and tax information exchange agreements (TIEAs)). Such monitoring will now be continuous and cover both Global Forum members and relevant non-member jurisdictions, identifying and distinguishing between agreements in force and agreements signed but

not in force. It will focus on whether these agreements meet the standard. The first report is expected by December 2009.

- The Global Forum will continue to publish its annual updates and will issue the schedule of its upcoming reviews.
- The whole monitoring and peer review process will be an ongoing exercise. Evaluation reports will be published after adoption by the Global Forum. Jurisdictions will be expected to act on any recommendations in the review and to report back to the Global Forum on actions taken.

The Peer Review Group will develop more detailed guidance on how to implement these conclusions.

Annex 2 - Sources of the Internationally Agreed Standards on Transparency and Effective Exchange of Information for Tax Purposes (the Standards)

1. This annex briefly describes the authoritative sources setting out standards on transparency and effective exchange of information for tax purposes as well as additional sources that may be useful to assessors, the Peer Review Group and the Global Forum in applying the standards in the monitoring and peer review process. The internationally agreed standards on transparency and effective exchange of information for tax purposes may be divided into a primary authoritative source and a number of complementary elements.

2. The primary authoritative source contains:

- The 2002 Model Agreement on Exchange of Information on Tax Matters and its Commentary (“Model Agreement”);
- Article 26 of the OECD Model Tax Convention on Income and on Capital (“Model Tax Convention”) and its Commentary, which has now been incorporated in the UN Model Tax Convention;

3. This primary authoritative source is complemented by a number of secondary documents which give elements of context for the understanding and interpretation of the standards. These documents have been developed by the relevant OECD bodies or by the Global Forum. Finally, as work on standard-setting and evaluation closely relates to areas covered by other international bodies, and in particular the FATF, the principles developed by the FATF may be taken into consideration to interpret and apply the standards where appropriate.

I. Primary Authoritative Source

A. *Model Agreement and Commentary*

4. In 2002, the Global Forum created a Working Group on Effective Exchange of Information (the Global Forum Working Group). It included representatives from several OECD countries and Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. The Working Group developed the 2002 Model Agreement which has been used as the basis for the negotiation of over 150 Tax Information Exchange Agreements (TIEAs).

5. The Model Agreement and Commentary is an authoritative source of the Global Forum standards on transparency and effective exchange of information for tax purposes. It addresses the standards for exchange of information in detail including with regard to the obligation to provide all information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes, the narrow acceptable grounds for declining a request, the format of requests, confidentiality, attorney-client privilege and other matters.

6. The Model Agreement and Commentary also address the scope of information that must be available to be accessed and exchanged. The scope is primarily determined by the foreseeable relevance standard, *i.e.*, all information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes.

7. In addition to establishing the general foreseeable relevance standard, the Model Agreement and Commentary identify specific types of information that the requested jurisdictions must have the authority to obtain and provide, including bank information and ownership and identity information.

8. The specific examples in the Model Agreement and Commentary are not exhaustive of the scope of information that must be available, accessible and reliable under the foreseeable relevance standard. They do not refer, for example, to accounting information. The scope of accounting information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes is addressed specifically in the JAHGA paper (see below).

9. The Model Agreement and Commentary contains standards on access to information. For example, it provides that where the required review by the requested party of information in its possession proves inadequate to provide the requested information, it must take all “relevant

information gathering measures” in order to be able to provide the requested information.

10. The Model Agreement Commentary recognises that the standard it establishes can be implemented in several ways, including through double taxation agreements. Most double taxation agreements are based on the OECD Model Tax Convention.

B. Article 26 of the Model Tax Conventions and their Commentary

11. The Model Tax Convention is the most widely accepted legal basis for double taxation agreements. More than 3000 bilateral treaties are based on the Model Tax Convention. Article 26 of the Model Tax Convention in turn provides the most widely accepted legal basis for bilateral exchange of information for tax purposes.

12. In 2002, the OECD Committee on Fiscal Affairs (CFA) undertook a comprehensive review of Article 26 of the Model Tax Convention and its Commentary to ensure that they reflected current jurisdiction practices and to take account of the development of the Model Agreement by the Global Forum Working Group. In 2004, the current version of Article 26 and its Commentary was agreed and was first published in the 2005 version of the Model Tax Convention. The UN Committee of Experts on tax matters also incorporated the updated version of Article 26 in the UN Model Tax Convention. As of December 2009 the last reservations to Article 26 by Brazil and Thailand had been withdrawn.

13. Article 26 provides for the same standards as the Model Agreement. Both use the standard of “foreseeable relevance” to define the scope of the obligation to provide information. Both require information exchange to the widest possible extent, but do not allow “fishing expeditions”, *i.e.*, speculative requests for information that have no apparent nexus to an open inquiry or investigation.³²

³² The text of Article 26(1) was modified in 2005 to provide for the same basic “foreseeable relevance” standard as under the Model Agreement. The previous version of Article 26 used the standard of “necessary”. The Commentary explains that the change from “necessary” to “foreseeably relevant” was not intended to alter the effect of the provision but was made to better express the balance between requiring information exchange to the widest possible extent while excluding fishing expeditions, and to achieve consistency with the Model Agreement. See Commentary paras. 4.1 and 5.

14. Although Article 26 is generally very similar in approach to the Model Agreement, some aspects of Article 26 are beyond the scope of the standards. For example, Article 26 allows for automatic and spontaneous exchange of information which is not included in the standard.

II. Complementary authoritative sources

A. *The Joint Ad Hoc Group on Accounts (JAHGA) Report*

15. Accounting information comes under the general foreseeably relevant standard established by the Model Agreement and Article 26 of the Model Tax Convention. However, the source of detailed standards with regard to the requirements for available, accessible and reliable accounting records is the JAHGA Report. Before being approved by the Global Forum in 2005, it was developed jointly by representatives of OECD and non-OECD countries through their cooperation in the JAHGA.³³

16. The JAHGA Report sets out the standards with regard to requiring the maintenance of reliable accounting records, the necessary accounting record retention period and the accessibility to accounting records.

17. These apply to all “Relevant Entities and Arrangements”, which are broadly defined to include (i) a company, foundation, Anstalt and any similar structure, (ii) a partnership or other body of persons, (iii) a trust or similar arrangement, (iv) a collective investment fund or scheme, and (v) any person holding assets in a fiduciary capacity (e.g. an executor in case of an estate). The JAHGA Report includes helpful explanatory notes on trusts and partnerships in an appendix.

B. *The 2006 OECD Manual on Information Exchange*

18. In 2006, the CFA approved a new Manual on Information Exchange (the “Manual”). The Manual provides practical assistance to officials dealing with exchange of information for tax purposes and may also be useful in designing or revising national manuals. It was developed with the input of both member and non-member countries of the OECD.

³³ The JAHGA participants consisted of representatives from Antigua and Barbuda, Aruba, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, Cook Islands, France, Germany, Gibraltar, Grenada, Guernsey, Ireland, Isle of Man, Italy, Japan, Jersey, Malta, Mauritius, Mexico, Netherlands, Netherlands Antilles, New Zealand, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Slovak Republic, Spain, Sweden, United Kingdom, and the United States.

19. The Manual follows a modular approach and some modules, such as the one on automatic exchange of information, are not relevant to the standards. However, two modules in particular provide useful guidance: the General Module on general and legal aspects of exchange of information and Module 1 on Exchange of Information on Request.³⁴

C. The 2004 Guidance Notes developed by the Forum on Harmful Tax Practices

20. In 2004, the Forum on Harmful Tax Practices, a subsidiary body of the CFA, developed guidance notes on the issue of Transparency and Effective Exchange of Information³⁵. The Introduction notes that the guidance notes, while providing useful guidance to jurisdictions that have made commitments to transparency and effective exchange of information, should not be understood as expanding the standards to which the jurisdictions had agreed to adhere (§ 13). The notes provide important guidance with regard to standards in the area of the availability of relevant and reliable information, including with regard to the identity of legal and beneficial owners and other persons.

D. FATF Recommendations, Standards and Reports

21. In addition to tax-specific materials addressed above, it is important to recognise that efforts to improve on transparency and effective exchange of information for tax purposes take place in a broader context. This is particularly the case with regard to the work of FATF relating to issues of domestic institutional measures to provide information, mutual legal assistance, and transparency with regard to information about ownership and the identity of owners and other stakeholders. These are key components of the foreseeably relevant information that jurisdictions must be able to provide under the Global Forum standards. FATF concepts may provide useful guidance and be taken into consideration to interpret and apply the standards where appropriate.

³⁴ The Manual is available at http://www.oecd.org/document/5/0,3343,en_2649_33767_36647621_1_1_1_1,00.html

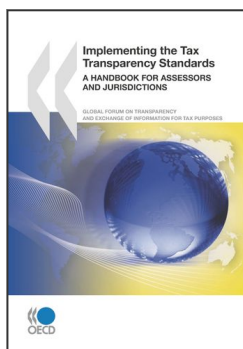
³⁵ The guidance notes are available at <http://www.oecd.org/dataoecd/60/32/30901132.pdf>. They were published under the title Consolidated Application Note: Guidance in Applying the 1998 Report to Preferential Tax Regimes, and also addressed a variety of other preferential tax regimes. The notes on transparency and exchange of information are at pp. 9-19.

E. The 2008 Note on Taking the Process Forward and the 2009 Framework Note

22. The 2008 Note on Taking the Process Forward (para. 15) and the Framework Note (paras. 14-18) contain an important discussion of standards and issues relating to the assessment of progress made by jurisdictions in concluding new international agreements and the review of the relevance of those agreements. For example, they notably recognise that assessment of the number of agreements, including with regard to the benchmark of 12 agreements with OECD countries, (i) must be appreciated as part of a dynamic approach; (ii) should take account of the fact that bilateral agreements and their entry into force require action by both parties; and (iii) should record refusals to enter into agreements with partners, in particular ones of economic significance, because they may indicate a lack of commitment to implement the standards. Ultimately, the standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance.

F. Annual Assessments

23. The Global Forum has published annual assessments of the transparency and exchange of information regimes of many jurisdictions. They can be an important source of information about the standards and their implementation. The 2006 annual assessment report contains a summary of the standards and the annual assessments report generally on the application of the standards.



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