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Copy to:

- Members of the United Nations Committee of Experts on International Cooperation in Tax Matters ("UN Tax Committee") and*
- Observers at the October 19-23, 2009 Meeting of the UN Tax Committee in Geneva*

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Automatic Exchange of Information and The United Nations Tax Committee

Dear Mr. Oliver,
Ladies and Gentlemen,

The Tax Justice Network has the following comments on the "U.N. Code of Conduct on Cooperation in Combating International Tax Evasion" as approved by the United Nations Committee of Experts on International Cooperation in Tax Matters ("UN Tax Committee") on October 23, 2009 ("Code of Conduct"). In summary, the Tax Justice Network believes that the UN Tax Committee should focus on the technical needs of developing countries and countries with economies in transition, giving "special attention" to those developing countries and countries in transition, as emphasized by the UN Economic and Social Council (ECOSOC) when it approved on November 11, 2004, the conversion of the

Ad Hoc Group of Experts on International Cooperation in Tax Matters, into the Committee of Experts on International Cooperation in Tax Matters. The Tax Justice Network urges the UN Tax Committee to move beyond its current focus on exchange of information upon request, which is not effective, and to focus more intensively on automatic exchange of information which is effective, in order to assist developing countries to implement automatic exchange of information.

This paper covers the following issues:

- (1) The Code of Conduct
- (2) The 2000 OECD Bank Information Report
- (3) The OECD Manual on Automatic Exchange of Information
- (4) OECD Training Course on Automatic Exchange of Information
- (5) UN Stiglitz Commission
- (6) Some Example of Automatic Exchange of Information
- (7) Exchange of Information upon Request is Not an Effective Method of Exchange of Information
- (8) Exchange of Information Upon Request is Not the “International Agreed Tax Standard”
- (9) Automatic Exchange of Information Is Not Difficult to Implement
- (10) Developing Countries, and the Technical Capacity Argument
- (11) The Role of the UN Tax Committee
- (12) Conclusion.

(1) THE CODE OF CONDUCT. The Code of Conduct states (Section III(d)) that “Governments commit to.... Ensure that the reliable information is available, in particular, bank account, ownership, identity and relevant accounting information, with powers in place to obtain and provide such information in response to a specific request” The Code of Conduct further provides that:

These commitments are to be implemented by the following actions:

- (a) Unilateral actions: the national implementation of these standards may require that countries amend their domestic legislation and practices.
- (b) Bilateral, or as appropriate multilateral, including regional, actions: the principles of transparency and effective exchange of information will generally be implemented through bilateral agreements implementing the substance of Article 26 and the accompanying Commentary on the United Nations Model Tax Convention, as finalized by the United Nations Committee of Experts on International Cooperation in Tax Matters in 2008.

Note, however, that although the Code of Conduct refers explicitly to exchange of information upon request, the Commentary to Article 26 of the United Nations Model Tax Convention refers explicitly to automatic exchange of information, in addition to exchange of information upon request and spontaneous exchange of information.

(2) THE 2000 OECD BANK INFORMATION REPORT. The March 2000 OECD report, “Improving Access to Bank Information for Tax Purposes”, emphasized the importance of automatic reporting of tax information by financial institutions to the government, and automatic exchange of information between governments (Preface, and paragraphs 58 and 109):

The [OECD Fiscal Affairs] Committee is analyzing ways to improve the exchange of information on an automatic basis within the context of its study of the use of withholding and/or exchange of information to enhance the taxation of cross-border interest flows and the [OECD Fiscal Affairs] Committee will review progress on this work.

Tax administrations and taxpayers can benefit from automatic reporting of information by financial institutions. Automatic reporting of information by financial institutions can be very useful to tax administrations for the verification of information reported by taxpayers. Automatic reporting [by financial institutions of information to the tax authorities] also can serve to increase voluntary compliance. If taxpayers know that their banks are required to report income information to the tax authorities, taxpayers will be more likely to file accurate returns regarding this income. In addition, automatic reporting enables tax administrations to implement programs that may benefit tax payers by reducing their compliance burden. Without access to bank information, none of these benefits can be achieved... The [OECD Fiscal Affairs] Committee will continue to work on improvements in automatic reporting and automatic exchange of information in connection with the study of the use of withholding taxes and/or exchange of information to enhance the taxation of cross-border interest flows. (Emphasis added).

In view of this confirmation by the OECD of the benefits of automatic reporting of information and automatic exchange of information, the OECD can not argue objectively that exchange of information upon request is effective exchange of information. The OECD never published such study on automatic reporting and automatic exchange of information.

(3) THE OECD MANUAL ON AUTOMATIC EXCHANGE OF INFORMATION. The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, approved by the OECD Committee on Fiscal Affairs on January 23, 2006 has Module 3 on Automatic (or Routine) Exchange of Information, analyzing the practical aspects of implementing automatic exchange of information. See also the Recommendation of the [OECD] Council on the Use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes (March 21, 2001—C (2001) 28).

(4) OECD TRAINING COURSE ON AUTOMATIC INFORMATION EXCHANGE

One training course on exchange of information given by the OECD for the government of a developing country included the technical aspects of automatic exchange of information, with the following program topics: (a) Overview of Extensible Markup Language (XML); (b) Overview of Automatic Exchange of Information and the Importance of Standardization; (c) the Current OECD Standard Magnetic Format (SMF) and the OECD Standard Transmission Format; (d) Organizational Requirements for Establishing the Capacity to Exchange Information Automatically (e.g. hardware, and software requirements, operating systems, programming languages, etc); (e) How Automatic Exchange of Information Works in two OECD countries (Where does the information originate from, what domestic use is the information put to, and what information is sent to treaty partners); (f) Practical Example of Automatic Exchange; (g) Encryption of Information Exchanged Electronically, (g) Experience of the Government with Automatic Exchange of Information; and (h) Developing the Government Capacity to Exchange Information: the Next Steps.

The Handout Materials for that training course included the following: (i) the OECD Manual on the Implementation of Exchange of Information; (ii) the OECD Standard Magnetic Format Record Layout; (iii) the OECD User Manual on the OECD Standard Magnetic Format; (iv) the Proposed New OECD Standardized Format for Automatic Exchange of Information; and (vi) Proposed OECD Procedures for the Secure Electronic Transmission of Tax Information.

(5) U.N. STIGLITZ COMMISSION. The U.N. Commission of Experts on Reforms of the International Monetary and Financial System, chaired by Joseph Stiglitz, a Nobel Laureate in economics (“Stiglitz Commission”), in its report of March 19, 2009 (paragraph 41), emphasized the close link between regulatory arbitrage and tax evasion and supported strengthening the U.N. Committee of Experts on International Cooperation in Tax Matters (“U.N. Tax Committee). The Stiglitz Commission also recommended in this report (paragraph 79) automatic exchange of tax information:

The effective implementation of national systems of taxation form a crucial part of domestic development finance. Measures must be taken to preserve national autonomy in the selection of sources and methods of government financing while ensuring that national differences do not create incentives to evade responsibility of contributors to the support of government policies. An efficient method of achieving this result would be the acceptance by all countries of an amendment of Article 26 of the [U.N. model income tax treaty] to make the exchange of information automatic. (Emphasis added).

(6) SOME EXAMPLES OF AUTOMATIC EXCHANGE OF INFORMATION. The Tax Justice Network asserts that automatic exchange of information is more prevalent than is commonly recognized, providing ample evidence that it can be implemental widely. Some notable examples of automatic exchange of information are:

(a) EU Savings Tax Directive. The European Union Directive on the Taxation of Savings (“EU Savings Tax Directive”) provides for automatic exchange of information on interest income paid within the EU to individuals resident in the EU. The EU is trying to expand the scope of the EU Savings Tax Directive to other types of income and to other types of recipients, and also to other jurisdictions. Other jurisdictions in Europe (Andorra, Liechtenstein, Monaco, San Marino and Switzerland), and also

offshore EU dependent and associated jurisdictions have partially adhered to the EU Savings Tax Directive.

(b) Bilateral Income Tax Treaties. The March 2000 OECD report “Improving Access to Bank Information for Tax Purposes” (“2000 OECD Bank Information Report”), discussed (page 40) automatic exchange of information under income tax treaties:

92. A number of countries (Australia, Canada, Denmark, Finland, France, Japan, Korea, New Zealand, Norway, Sweden, United Kingdom) automatically exchange bank information with their treaty partners. In some cases, the automatic exchange of information is limited to certain treaty partners based on an agreement (Denmark, France, Korea, Sweden). The automatic exchange of bank information also may depend on reciprocity (Australia, Canada, Denmark, France, Norway, Sweden).

The Tax Justice Network believes that in the almost nine years since the 2000 OECD Bank Information Report was issued, at least several other countries are exchanging information automatically pursuant to applicable income tax treaties.

(c) The Nordic Countries. The Convention between the Nordic Countries (Denmark, Faroe Islands, Finland, Iceland, Norway and Sweden) on Mutual Administrative Assistance in Tax Matters (effective 1991) requires automatic exchange of information with regard to dividends, interest, ownership of real property, royalties, wages, salaries, fees, pensions, and insurance (Articles 11 and 20).

(d) Mexico and the United States, and Mexico and Canada. The letter (February 9, 2009) from Mexican Secretary of Finance Agustin Carstens, formerly Deputy Managing Director of the IMF, to US Treasury Secretary Geithner confirms that the U.S. and Mexico already exchange automatically certain types of tax information, (interest payments between corporations, dividends and royalties), and indicates that Mexico wants the United States to exchange automatically information about interest paid by banks from one country to residents of the other country:

Mexico and the United States regularly exchange information, on a case-by-case basis, in accordance to our bilateral Tax Treaty. We also exchange bulk information on interest payments (between corporations), dividends and royalties. However, we do not exchange information on interest paid by banks from one country to residents of the other country. Canada and the US implemented such mechanism years ago, Mexico and Canada began exchanging such information years ago as well. Being the world’s largest trading block under the NAFTA, and fighting considerably higher security threats than a decade ago, I truly believe that we should enhance our cooperation and strengthen our capacities to protect our peoples and wealth. The [automatic] exchange of information on interest paid by banks will certainly provide us with a powerful tool to detect, prevent and combat tax evasion, money laundering, terrorist financing, drug trafficking and organized crime.

The Carstens letter confirms that the automatic exchange between governments of bank account information (interest paid by banks) would substantially diminish not only cross-border tax evasion, but also cross-border illicit financial flows from other illegal activities.

(e) Canada and the United States. The U.S. Internal Revenue Code (Section 6049 and the regulations there under) in effect provides for the automatic exchange of information by the United States with Canada with regard to interest on bank deposits in the United States by individuals resident in Canada.

(f) Australia and New Zealand. At the meeting of the UN Tax Committee on Wednesday October 21, 2009, Robin Oliver, member of the UN Tax Committee and Deputy Commissioner, Policy Advice, Inland Revenue Department of the Government of New Zealand, presented on behalf of the Subcommittee on Exchange of Information of the UN Tax Committee, the draft Code of Conduct which would require only exchange of information upon request. But in the following discussions at the UN Tax Committee that day, Mr. Oliver admitted that Australia and New Zealand exchange automatically tax information.

(g) The United States and the Rest of the World. The United States qualified intermediary (“QI”) provisions (U.S. Internal Revenue Code section 1441 and Revenue Procedure 2000-12) in effect require each foreign financial institution that is a qualified intermediary (“QI”) to provide information automatically to the U.S. Government about U.S. persons investing in the United States through that QI. This is in effect automatic exchange of information, not between a foreign government and the U.S. Government, but between (a) each foreign financial institution which is a QI, and (b) the U.S. Government. (However, the QI program permits foreign persons to invest in the United States through a QI in a foreign jurisdiction without their identity being disclosed to the U.S. payers of income nor to the U.S. Government, thereby making it impossible for the United States to exchange the relevant information with the respective foreign government, that is, the government of the jurisdiction where the foreign investor is resident.)

The proposals of the Obama Administration, and the proposed Foreign Account Tax Compliance Act of 2009 (“FATCA”), introduced by U.S. Senators Baucus and Kerry pursuant to those proposals, would in effect expand the QI and its automatic exchange of information provisions by imposing a tax of 30 percent on most U.S. source income earned by a foreign financial institution for its own account or for its clients, unless that foreign financial institution agreed to become a QI and therefore provide information automatically to the U.S. Government about U.S. persons with accounts at that foreign financial institution. FATCA would apply to both U.S. and foreign source income earned by U.S. persons through a foreign (non-U.S.) financial account. With regard to beneficial ownership of foreign entities with foreign financial accounts, FATCA would require the foreign financial institution to determine whether any foreign entity has a “substantial U.S. owner,” defined as a U.S. person who owns more than ten percent of that foreign entity. The details of FATCA have to be clarified, and it has not yet been enacted.

Therefore, the United States through its QI program is in effect trying to require foreign financial institutions to provide automatically to the U.S. Government information about U.S. persons with foreign financial accounts. This is a method of automatic exchange of information, not between two governments, but between foreign financial institutions and one government (the United States).

The role of financial institutions in helping implement automatic exchange of information has to be further studied.

(7) EXCHANGE OF INFORMATION UPON REQUEST IS NOT AN EFFECTIVE METHOD OF EXCHANGE OF INFORMATION.

Exchange of information upon request is not effective exchange of information because in effect it requires the requesting government already to know the information that it is requesting. This is evidenced by the very small number of requests for information that are made, and the smaller number of requests that actually are implemented.

Although the OECD Model TIEA (March 2002) provides only for exchange of information upon request, the OECD had issued in March 2001 the OECD Model Memorandum of Understanding between the Competent Authorities of (State X) and (State Y) on the Automatic Exchange of Information for Tax Purposes. Further, and more importantly, Prof. Michael Mc Intyre has prepared A Model Effective Tax Information Exchange Agreement, which provides for exchange of information upon request (Article 5), Automatic Exchange of Information (Article 6), and Spontaneous Exchange of Information (Article 7): http://faculty.law.wayne.edu/tad/Documents/UN/UN_tiea-all.pdf.

Also, the ineffectiveness of the OECD Model Tax Information Exchange Agreement is highlighted by the proposed U.K.- Liechtenstein Tax Information Exchange Agreement. That UK-Liechtenstein TIEA and the accompanying Memorandum of Understanding, both dated August 11, 2009 explicitly provide that any bank account in Liechtenstein of a U.K. person which is not disclosed by the account holder to the U.K. Government within five years of the effective date of that TIEA must be closed by the Liechtenstein financial institution. This TIEA envisions the active role of financial institutions in cross-border tax compliance, and this TIEA is a form of automatic exchange of information.

(8) EXCHANGE OF INFORMATION UPON REQUEST IS NOT THE

“INTERNATIONAL AGREED TAX STANDARD”. In view of the practice of automatic exchange of information, and the efforts by governments to expand automatic exchange of information, the OECD can not validly assert that exchange of information upon request is “the internationally agreed tax standard.”

(9) AUTOMATIC EXCHANGE OF INFORMATION IS NOT DIFFICULT TO

IMPLEMENT. Automatic exchange of information is not difficult to implement, step-by-step, and does not require “Rocket-science” technology. Most developing countries already handle automatic information very effectively at their border controls. The processes use swipe technology and passport identification numbers to automatically retrieve Interpol records. The basic information required as a first step, is the name of the foreign investor, his/her/its address (country of residence), and the type and amount of income, and some additional identification procedure (code). In order that automatic exchange of information becomes more sophisticated and developed, the automatic exchange of information would be based on the use of taxpayer identification numbers (or other identification numbers).

(10) DEVELOPING COUNTRIES AND THE TECHNICAL CAPACITY

ARGUMENT. It has been asserted that automatic information can not be implemented by developing countries because they do not have the technical capacity. That argument is not valid for at least three reasons:

First, as indicated in paragraph (9), above, implementing automatic exchange of information does not, in the initial stage, require great technical capacity.

Second, that argument is very condescending to developing countries because it assumes not only that developing countries do not at present have the technical capacity but also that developing countries are not capable of acquiring such technical capacity. If developing countries do not at present have the technical capacity, the UN Tax Committee should focus on helping developing countries acquire that capacity.

Third, some developing countries clearly have at present the technical capacity to implement automatic exchange of information. Mexico has indicated in the February 9, 2009 letter from Agustin Carstens to Timothy Geithner that it receives automatically some tax information from the United States. Also, Chile has a highly developed electronic tax compliance system, and is providing technical advice about that to certain developing countries in Latin America and Africa. Therefore, it would be possible to focus initially on those developing countries which already have the necessary technical expertise. Clearly, the tax administrations of developing countries have various levels of technical expertise. And therefore, common sense leads us to conclude that automatic exchange should be implemented initially with those developing countries which at present can most easily implement such automatic exchange, and that programs should be developed in order to enhance the technical capacity of other developing countries, so that they also can implement automatic exchange of information.

In view of the above, the argument that all developing countries do not have the technical capacity to implement automatic exchange of information is specious. That argument merely masks a policy (most likely based on the position of OECD financial centers and other financial centers) against automatic exchange of information. As most cross-border illicit financial flows are from developing countries to OECD financial centers and other financial centers, with the resulting tax evasion in developing countries, those financial centers have a vested interest in not having automatic exchange of information implemented with developing countries.

The Tax Justice Network has issued a paper entitled “The Non-Perils of Information Exchange” (July 6, 2009), available at <http://taxjustice.blogspot.com/2009/07/non-perils-of-information-exchange.html> . This paper disproves other arguments against automatic exchange of information.

(11) THE ROLE OF THE UN TAX COMMITTEE. The UN Tax Committee has the responsibility of giving special attention to developing countries and countries with economies in transition, with regard to capacity building and technical assistance, in order to enhance and promote international tax cooperation. The UN Economic and Social Council (ECOSOC) approved on November 11, 2004, the conversion of the Ad Hoc Group into the Committee of Experts on International Cooperation in Tax Matters (“UN Tax Committee”). In that ECOSOC resolution, ECOSOC determined that the Committee will:

- i. Keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries;
- ii. Provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities.
- iii. Consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations;
- iv. Make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition;
- v. Give special attention to developing countries and countries with economies in transition in dealing with all the above issues; (Emphasis added).

(12) **CONCLUSION.** The Tax Justice Network believes that, in accordance with the ECOSOC resolution that established the UN Tax Committee, the UN Tax Committee should focus on the technical needs of developing countries and countries with economies in transition, giving “special attention” to those developing countries and countries with economies in transition as emphasized by ECOSOC, in order to assist such countries with capacity building and technical assistance in implementing automatic exchange of information.

The Tax Justice Network looks forward to working with the UN Tax Committee on these exchange of information issues.

Kind regards

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