

*TEI Annual Conference
October 30, 2013
IRS Administrative Affairs*

INFORMATION EXCHANGE: U.S. AND FOREIGN GOVERNMENT TACTICS AND TOOLS FOR AUDITS, DOCUMENT PRODUCTION AND DISCOVERY

Colleen Brown
Barrick Gold Company
Salt Lake City, UT

Alex Sadler
Ivins, Phillips & Barker
asadler@ipbtax.com

Douglas Andre
Ivins, Phillips & Barker
dandre@ipbtax.com

WHAT FOREIGN EVIDENCE CAN THE IRS DISCOVER FOR A US AUDIT?

- Any records or information located in a foreign jurisdiction that may be relevant to the correct determination of a taxpayer's U.S. tax liability (e.g., to support a transfer pricing adjustment).
- Such as –
 - Tax returns and related return information
 - Bank statements and business records
 - Interviews with taxpayers and third parties
 - Public records (*i.e.*, company and land registry documents)

WHAT FOREIGN EVIDENCE CAN THE IRS DISCOVER FOR A US AUDIT?

- The foreign evidence must be in the “possession, custody, or control” of the US taxpayer.
- Information is under a party’s “control” when the party has the right, authority, or practical ability to obtain the materials sought on demand. See, e.g., *Costa v. Kerzner Int’l Resorts, Inc.*, 277 F.R.D. 468 (S.D. Fla. 2011) (compelling production of information held by Bahamian affiliates).
- “The fact that documents are situated in a foreign country does not bar their discovery.” *Cooper Indus. v. British Aerospace*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984).
- Where foreign law imposes criminal or civil penalties for producing information, the court must balance the interests of the respective jurisdictions. See, e.g., *Dexia Credit Local v. Rogan*, 231 F.R.D. 538 (N.D. Ill. 2004).

HOW CAN THE IRS OBTAIN FOREIGN EVIDENCE FOR A US AUDIT?

- Voluntary requests and compliance
 - The IRS can simply ask for the information, documents, or testimony in an IDR served on the taxpayer or by sending a letter to a third party.
 - This is frequently the fastest and cheapest way for the IRS to get the information.
- Compliance with such a request is entirely voluntary.
- Voluntary compliance is not always permitted in every jurisdiction.
 - May be ILLEGAL and subject a party to prosecution.
 - Certain discovery may be prohibited or require express authority from the foreign government.
 - Both the IRS and the taxpayer must be mindful of the forum state's rules (check State Department country flyers).

Judicial Assistance - Country-Specific Information - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://travel.state.gov/law/judicial/judicial_2510.html

Most Visited Latest Headlines http://www.washingt... http://googleads.g.d...

Judicial Assistance - Country-Specific...

Newsroom | About Us | U.S. Embassies & Consulates | Help & Contacts

 **TRAVEL.STATE.GOV**
A SERVICE OF THE BUREAU OF CONSULAR AFFAIRS
U.S. Department of State

INTERNATIONAL TRAVEL PASSPORTS VISAS CHILD ABDUCTION **LAW & POLICY** Search this Site GO

Laws, Regulation & Public Policy
Family Issues
Retain a Foreign Attorney
Judicial Assistance
Consular Notification and Access
Citizenship and Nationality
Legal and Public Policy Information
Law Enforcement Issues

Judicial Assistance - Country-Specific Information

Print Email

COUNTRY SPECIFIC INFORMATION

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

B

Belgium
Bosnia and Herzegovina
Brazil

C

Canada
Cape Verde

http://travel.state.gov/

STATE DEPT. – SWITZERLAND PAGE

 **Obtaining Evidence in Civil and Commercial Matters: Switzerland is a party** to the [Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters](#). See [Switzerland's response to the 2003 Questionnaire on the Practical Operation of the Hague Evidence Convention](#). See also [Switzerland's formal declarations and reservations](#) regarding the Convention made when Switzerland became a party to the treaty.

Taking Depositions of Willing Witnesses : The [Swiss Office of Federal Justice – Conditions for a Commissioner or Diplomatic or Consular Official to Obtain Evidence in Switzerland](#) explains that the taking of a voluntary deposition in Switzerland is subject to prior authorization by the Federal Department of Justice and Police. Foreign requests must be addressed to the central authority of the canton where the evidence is to be taken or where the person to be deposed is located. To speed up the process, Swiss authorities recommend that you send a copy to the Federal Office of Justice, International Private Law Unit, 3003 Bern, Switzerland. Review carefully the [Swiss Office of Federal Justice – Conditions for a Commissioner or Diplomatic or Consular Official to Obtain Evidence in Switzerland](#) regarding the information that must be submitted before a request will be considered.

Section 271 of the Swiss penal code provides that attorneys attempting to take a deposition or serve process in Switzerland outside of these authorized methods are subject to arrest on criminal charges.

HOW ELSE CAN THE IRS OBTAIN FOREIGN EVIDENCE FOR A US AUDIT?



Summons

In the matter of Tax Liability of John Does*
Internal Revenue Service (Division): Large Business & International Division
Industry/Area (name or number): International Individual Compliance
Periods: Years ending 12/31/2002, through 12/31/2011

The Commissioner of Internal Revenue

To: UBS AG

At: 1285 Avenue of the Americas, New York, NY 10019

You are hereby summoned and required to appear before Cheryl R. Kiger or Designee
an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See attachment

* "John Does" are United States taxpayers who, at any time during the years ended December 31, 2002, through December 31, 2011, directly or indirectly had interests in or signature or other authority (including authority to withdraw funds, trade or give instructions or receive account statements, confirmations or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through Wegelin & Co. and financial accounts maintained at, monitored by, or managed through other Swiss financial institutions that Wegelin & Co. permitted to transact client business through its United States correspondent account at UBS AG.

Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Territory Manager

Signature of IRS officer serving the summons

Title

Business address and telephone number of IRS officer before whom you are to appear:

Place and time for appearance at Internal Revenue Service 761 Main Avenue, Norwalk, CT 06851



Department of the Treasury
Internal Revenue Service
www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

on the _____ day of February, 2013 at 10:00 o'clock a m.
Issued under authority of the Internal Revenue Code this _____ day of January, 2013
(year) (year)

Signature of issuing officer

Territory Manager

Title

Signature of approving officer (if applicable)

Title

Part A - to be given to person summoned

IRS SUMMONS

- Section 7602 confers broad authority upon the IRS to command the production of documents and testimony from taxpayers and third parties that might be relevant to a US audit.
- Limitations:
 - The IRS must give a taxpayer at least 10 days to respond to a summons.
 - In the case of a third-party summons, the IRS must notify the taxpayer and give it 23 days to bring a proceeding to quash the summons.
 - The evidence sought must have some potential relevance (“might thrown light upon”) a taxpayer’s correct tax liability.
 - The evidence sought must be in the possession, custody, or *control* of the summoned party, which as noted may apply to foreign-based evidence.
 - Normal privileges (e.g., attorney-client, work product, etc.) apply.
 - The taxpayer may refuse to comply.

IRS SUMMONS ENFORCEMENT

- If taxpayer doesn't comply, IRS may refer to DOJ for enforcement.
- *Powell* (US, 1964) factors for judicial enforcement:
 - Summons issued for legitimate purpose.
 - Evidence sought may be relevant to that purpose.
 - Not in the IRS's possession.
 - Proper administrative steps have been followed.
- *Prima facie* case for enforcement established by declaration of an IRS agent, shifting burden to taxpayer.
- A foreign person (e.g., Toyota Motor Corporation) is subject to summons enforcement if it has "minimum contacts" with the US (e.g., intending to sell cars in the US).
- Failure to comply with enforced summons = contempt of court.

TRANSACTIONS WITH FOREIGN RELATED PARTIES – SPECIAL CONSIDERATIONS

- Sections 6038A and 6038C give the IRS considerable power to compel disclosure of foreign records relating to transactions between U.S. corporations and branch offices and foreign related parties.
- Rules apply to U.S. and foreign companies that are 25 percent owned by a foreign corporation.
- Failure to comply with summons for foreign records:
 - IRS given “sole discretion” to disallow deductions and adjust transfer prices subject to very limited Tax Court review.
 - IRS may issue notice of noncompliance and assert penalties (\$10K for every 30 days), but subject to reasonable cause defense.
- Impact is that covered taxpayers may not refuse to produce foreign records on jurisdictional grounds.

HOW ELSE CAN THE IRS OBTAIN FOREIGN EVIDENCE FOR A US AUDIT?

- Section 982 authorizes the IRS to issue a Formal Document Request (FDR) to compel production of foreign-based documentation after an IDR has been issued.
- “Foreign-based documentation” means any documentation located outside the US which may be relevant or material to the tax treatment of the examined item.
- Taxpayer may file motion to quash FDR based on the absence of the *Powell* factors in the appropriate federal district court within 90 days of the date the FDR is issued.
- FDRs and summonses are not mutually exclusive. FDRs effectively give the IRS more negotiating leverage.

FOREIGN DOCUMENT REQUESTS

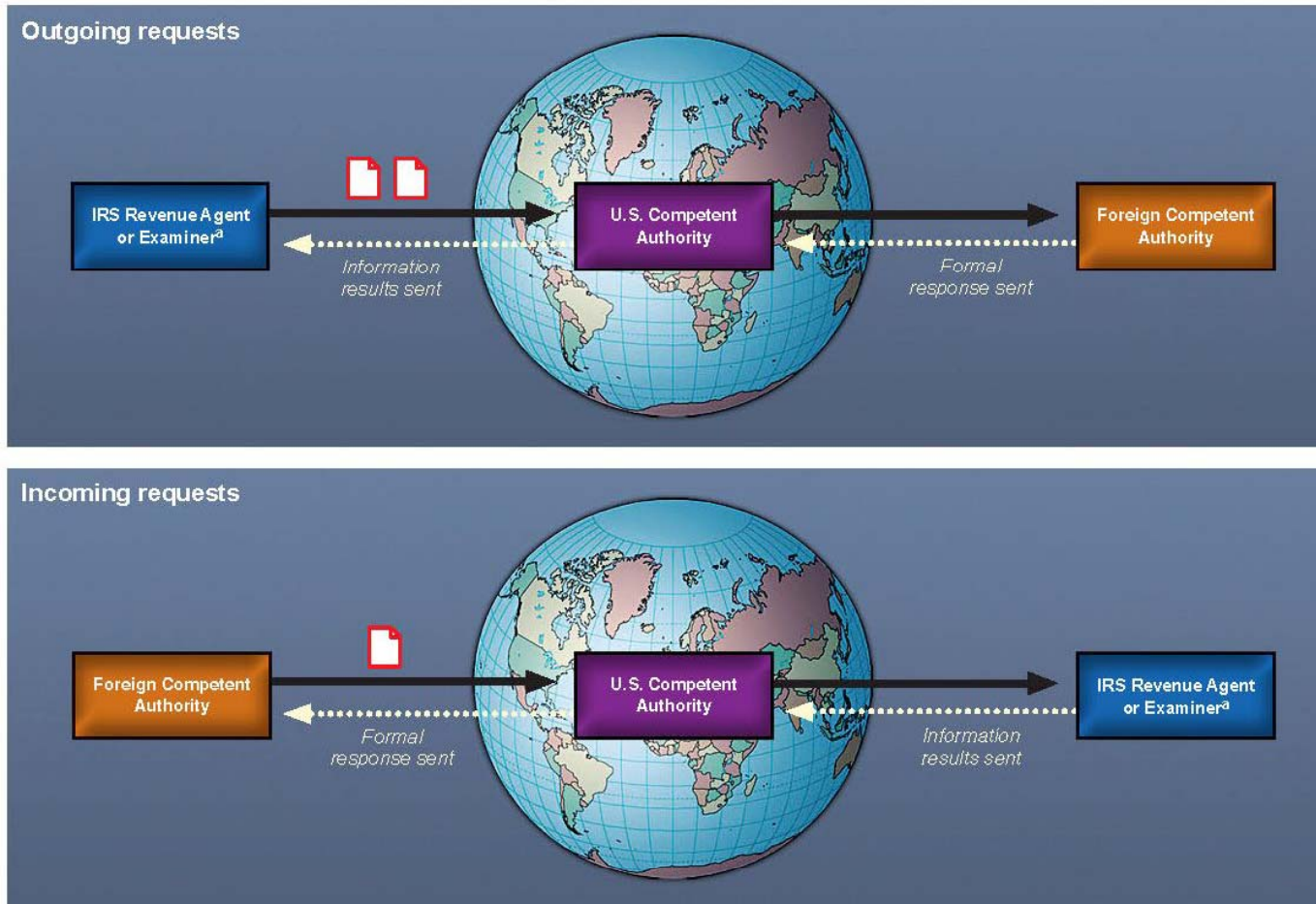
- Substantial compliance with the production of the requested foreign-based documentation must occur within 90 days unless otherwise agreed by the IRS or if a motion to quash has been filed.
- “Substantial compliance” is a facts-and-circumstances determination.
- A taxpayer who fails to “substantially comply” with an FDR generally will be prohibited from admitting the requested foreign-based documentation as evidence in a civil tax case.
 - Subject to a reasonable cause exception, which does not include the fact that foreign law would result in criminal or civil penalties if the documentation were produced to the IRS.

HOW CAN THE IRS OBTAIN FOREIGN EVIDENCE WHERE THERE IS NO U.S. CUSTODIAN, AND HOW CAN A FOREIGN GOVERNMENT OBTAIN EVIDENCE FROM US TAXPAYERS?

- Bilateral tax treaties and tax information exchange agreements (TIEAs) usually contain provisions for the exchange of information (EOI) between the competent authorities of the two states.
- The IRS and foreign governments can use treaties and TIEAs to obtain documents or conduct interviews of foreign or US persons with information that may be relevant to a tax investigation.

TREATIES

COMPETENT / CENTRAL AUTHORITIES



TAX TREATIES



Sources: GAO analysis of data from Thomson Reuters, Government Printing Office (GPO), LexisNexis, and the Department of State, Map Resources (map).

Australia
Austria
Bangladesh
Barbados
Belgium
Bermuda
Bulgaria
Canada
China
Cyprus

Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Hungary
Iceland

India
Indonesia
Ireland
Israel
Italy
Jamaica
Japan
Kazakhstan
Latvia
Lithuania

Luxembourg
Malta
Mexico
Morocco
Netherlands
New Zealand
Norway
Pakistan
Philippines
Poland

Portugal
Republic of Korea
Romania
Russia
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Sweden

Switzerland
Thailand
Trinidad and Tobago
Tunisia
Turkey
Ukraine
United Kingdom
Venezuela

TAX INFORMATION EXCHANGE AGREEMENTS



Sources: GAO analysis of data from Thomson Reuters, Government Printing Office (GPO), LexisNexis, and the Department of State; Map Resources (map).

Antigua and Barbuda
Aruba
Bahamas
Barbados
Bermuda

British Virgin Islands
Cayman Islands
Curacao
Costa Rica
Dominica

Dominican Republic
Gibraltar
Grenada
Guernsey
Guyana

Honduras
Isle of Man
Jamaica
Jersey
Liechtenstein

Marshall Islands
Mexico
Monaco
Panama
Peru

St. Lucia
St. Maarten
Trinidad and Tobago

US-CANADA INCOME TAX CONVENTION

ARTICLE XXVII Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall endeavor to obtain the information to which the request relates in the same way as if its own taxation was involved notwithstanding the fact that the other State does not, at that time, need such information. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall endeavor to provide information under this Article in the form requested, such as depositions of witnesses and copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.

US-CANADA INCOME TAX CONVENTION

- Article XXVII, Para. 3 – EOI does not impose on Contracting States an obligation:
 - To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or
 - To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy. (See Rev. Proc. 2006-54 for competent authority procedures for relief.)

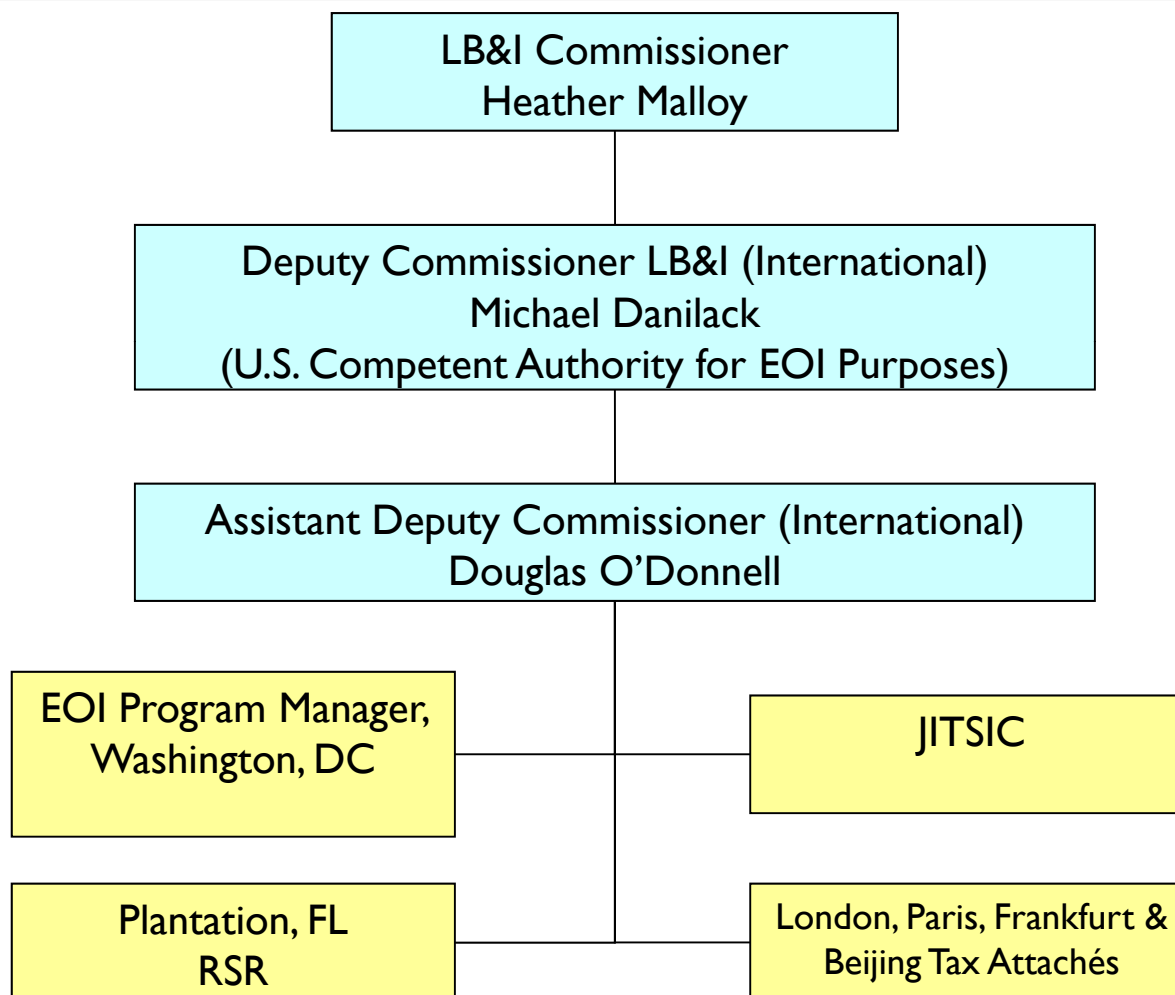
TREATIES AND TIEAs

- Within the IRS, treaty and TIEA requests are administered by the EOI Program Manager in DC and the IRS Tax Attachés in London, Paris, Frankfurt, and Beijing, and the RSR in Plantation, Florida.
- EOI employees act as intermediaries between the United States and other countries for information gathering purposes.
- Information exchanged under the tax treaties and TIEAs is confidential under the terms of sections 6103 and/or and the terms of the Tax Treaty or TIEA.

REGIONS COVERED

BEIJING	SOUTHEAST ASIA, PACIFIC RIM, SOUTH PACIFIC (EXCLUDING AUSTRALIA AND NEW ZEALAND FOR EOI MATTERS)
FRANKFURT	CENTRAL EUROPE, EASTERN EUROPE, FORMER SOVIET UNION
PARIS	SOUTHERN EUROPE (EXCLUDING FRANCE FOR EOI MATTERS), NORTHERN AFRICA
PLANTATION, FL	WESTERN HEMISPHERE (EXCLUDING CANADA)
DEPUTY COMMISSIONER INTERNATIONAL IN WASHINGTON, DC	EOI MATTERS RELATING TO AUSTRALIA, NEW ZEALAND, AND FRANCE AND ALL MATTERS RELATING TO CANADA

EOI ORGANIZATIONAL CHART



US-INITIATED SPECIFIC REQUESTS

- The assigned EOI analyst or Tax Attaché:
 - Sends a request to the foreign tax administration with relatively detailed information regarding the taxpayer, tax issues, and information requested.
 - Sends the requester a status report every 60 days.
 - Reviews and forwards secured information and follows up as appropriate.
- Potential problems are delays in negotiating with the foreign government over what information is accessible, and determinations by the foreign government that certain information cannot be released.

FOREIGN-INITIATED SPECIFIC REQUESTS

- Requests from Tax Treaty or TIEA partners for tax information regarding specific taxpayers are considered on a case-by-case basis and require:
 - Specific identification of the taxpayer
 - Itemized list of specific information requested
 - Detailed narrative identifying the tax nexus or relevance of the information sought to the taxpayer and issues examined
 - An explanation of how the request for transactions, facts or documents pertains to a tax or a tax liability covered by the Tax Treaty or TIEA
- The EOI analyst or Tax Attache' will forward foreign initiated requests to the appropriate office for action.
- An Internal Examiner or Revenue Agent will be assigned to secure the information.
- The IE or RA will attempt to obtain the information through IDRs. If necessary, the IE or RA will work with the EOI analyst or Tax Attache' and IRS Counsel to prepare a summons.

FOREIGN-INITIATED SPECIFIC REQUESTS

- Summons enforcement considerations:
 - The normal *Powell* factors generally apply.
 - While absence of US tax liability and expiration of US statute of limitations is irrelevant, the expiration of foreign limitations period is a potential defense.
 - The treaty “as is necessary” relevance standard is arguably stricter than the “might thrown light upon” *Powell* standard.
 - The trade secret protection afforded by EOI provisions is available. See Rev. Proc. 2006-54 for relief procedures.
 - Normal privileges (e.g., attorney-client, work product) also apply.

OTHER EOI PROGRAMS

- **Simultaneous Examination Program (SEP)**
 - Carried out according to written Working Arrangements entered into by the Director, International (LMSB), who is the US Competent Authority, and the competent authority of certain of our Tax Treaty or TIEA partners.
- **Industry-wide Exchanges of Information**
 - Exchanges of comprehensive data on worldwide industry practices and operating patterns, enabling a more effective review of the tax returns of multinational enterprises.
- **Spontaneous Exchanges of Information**
 - Typically involves information discovered during a tax examination which suggests or establishes noncompliance with the tax laws of a treaty or TIEA partner.

HOW ELSE MIGHT THE IRS OR A FOREIGN GOVERNMENT OBTAIN INFORMATION?

- Joint International Tax Shelter Information Centre (JITSIC)
 - Formed in 2004 by 4 countries (United States, Canada, UK, and Australia); now 9 members.
 - Delegates work out of offices in DC and UK.
 - Designed to help countries coordinate and accelerate their attacks on “abusive” tax shelters.
 - Focuses on sharing information among the revenue authorities of member countries to identify abusive arrangements and their promoters.
 - Primarily targets multinational companies.

HOW ELSE MIGHT THE IRS OR A FOREIGN GOVERNMENT OBTAIN INFORMATION?

- Convention on Mutual Administrative Assistance in Tax Matters
 - 43 members, including the US
 - Provides for extensive administrative cooperation between states in the assessment and collection of taxes, with a view to combating tax evasion
 - Includes EOI mechanisms, simultaneous tax examinations, assistance in recovery, service of documents, and joint audits.
 - Covers all compulsory taxes except custom duties
 - Subject to the laws of the requested state and strict confidentiality protections

HOW ELSE MIGHT THE IRS OR A FOREIGN GOVERNMENT OBTAIN INFORMATION?

- Reporting under Foreign Account Tax Compliance Act (FATCA)
 - “Withholdable Payments” to foreign entities and “Substantial U.S. Ownership” of certain foreign entities required to be reported beginning for tax year 2014
 - Model I Inter-Governmental Agreements – reciprocal information exchanges with respect to financial institutions
 - General migration toward more automatic information exchange of taxpayer data

DO ADDITIONAL MECHANISMS COME INTO PLAY IF THE DISPUTE GOES TO COURT?

- Letters of request under the Hague Convention
 - Ratified by 56 countries
 - Provides streamlined procedures for securing evidence
 - Subject to local laws, practices, and customs
- Letters Rogatory
 - Traditional procedure in which a court in one country requests a court in another country for assistance
 - Transmitted via the diplomatic channel; execution may take a year or more
- Mutual Legal Assistance Treaties (MLATs)
 - Negotiated by the Department of State in cooperation with the Department of Justice to facilitate cooperation in criminal matters (e.g., bank records, other financial information).

MUTUAL LEGAL ASSISTANCE TREATIES



Sources: GAO analysis of data from Thomson Reuters, Government Printing Office (GPO), LexisNexis, and the Department of State; Map Resources (map).

Antigua and Barbuda
Argentina
Australia
Austria
Barbados
Belgium
Belize
Brazil
Bulgaria
Canada
China

Cyprus
Czech Republic
Denmark
Dominica
Egypt
Estonia
Finland
France
Germany
Greece
Grenada

Hong Kong
Hungary
India
Ireland
Isle of Man
Israel
Italy
Jamaica
Japan
Latvia
Liechtenstein

Lithuania
Luxembourg
Malaysia
Malta
Mexico
Morocco
Netherlands
Nigeria
Philippines
Poland
Portugal

Republic of Korea
Romania
Russia
Slovak Republic
Slovenia
South Africa
Spain
St. Kitts and Nevis
St. Lucia
St. Vincent and Grenadines
Sweden

Taiwan
Thailand
Trinidad and Tobago
Turkey
Ukraine
United Kingdom
Venezuela

Questions?