

Special Reports



A Comparative Analysis of The Channel Islands and Isle of Man TIEAs

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Editor's Note: In the 14 October 2002 edition of Tax Notes International the authors reviewed the U.S. tax information exchange agreement network of the Caribbean countries of the Bahamas, the British Virgin Islands and the Cayman Islands. This article extends that comparative analysis to include the recent U.S.-Jersey exchange agreement, as well as the Guernsey and Isle of Man agreements.

During the past three months, the United States government has continued to successfully conclude tax information exchange agreements (TIEAs) with key offshore jurisdictions. On 19 September 2002, then-U.S. Treasury Secretary Paul O'Neill signed the United States-Guernsey TIEA (Guernsey TIEA).¹ Two weeks later, on 3 October 2002, O'Neill signed the United States-Isle of Man TIEA (Isle of Man TIEA).² A little more than a month later,

O'Neill signed the United States-Jersey TIEA (Jersey TIEA).³

The new TIEAs highlight the U.S. government's commitment to crack down on abusive offshore structures that reportedly "cheat" the U.S. government out of billions of tax dollars each year.⁴ Outgoing IRS Commissioner Charles O. Rossotti appealed to the U.S. Congress to increase appropriations to enable the IRS to better administer and enforce the U.S.

tax laws.⁵ The outcome of Rossotti's budgetary appeal is undetermined, but the IRS is reallocating its audit resources to audits of offshore credit card users

¹Agreement Between the Government of the United States of America and the Government of the States of Guernsey for the Exchange of Information Relating to Taxes, Treasury Department News Release PO-3441, 19 Sept. 2002.

²Agreement Between the Government of the United States of America and the Government of the Isle of Man for the Exchange of Information Relating to Taxes, Treasury Department News Release PO-3502, 3 Oct. 2002.

³Agreement Between the Government of the United States of America and the Government of the States of Jersey for the Exchange of Information Relating to Taxes, Treasury Department News Release PO-3595, 4 Nov. 2002. The OECD also has promulgated a model tax information exchange agreement, as discussed in David E. Spencer, "OECD Model Agreement is a Major Advance in Information Exchange," 13 *J. Int'l Tax'n* 10 (Nov. 2002).

⁴Washington, D.C. attorney Jack A. Blum, a consultant for the IRS's offshore credit card initiative, has estimated that as much as \$70 billion in federal revenue may be lost through offshore accounts. Senate Finance Committee, "Unofficial Transcript of Finance Committee Hearing on Fraudulent Tax Schemes," 2002 *TNT* 75-48 (18 Apr. 2002).

⁵David Cay Johnston, "Departing Chief Says I.R.S. is Losing its War on Tax Cheats," *The New York Times*, 5 Nov. 2002 at A1.

and high-income taxpayers to effectively and proactively address Rossotti's concerns.⁶

The three TIEAs evidence the U.S. government's commitment to force tax havens and tax-favored jurisdictions to disclose tax-related information to the U.S. government for civil and criminal tax administration purposes. The United States also has entered into TIEAs with the Cayman Islands,⁷ the Bahamas,⁸ the British Virgin Islands,⁹ Antigua and Barbuda,¹⁰ and the Netherlands Antilles.¹¹

This article's comparative analysis aims to assist U.S. tax counsel representing clients in TIEA-related matters.¹² It also underscores the importance of U.S. tax counsel understanding local law to work more effectively with local counsel on the foreign jurisdiction's applicable law that implements the TIEAs.

Although the TIEA-affected jurisdictions discussed have not yet enacted "internal procedures," there is no question that each jurisdiction is considering those implementing rules. The Guernsey and Jersey TIEAs have *immediate* effective dates (subsequent to the required notification exchange) for criminal tax matters, so it is paramount to have local "internal procedures" for those jurisdictions.¹³

The three most recent TIEAs clearly signal that the sun is setting on the abusive tax haven industry.¹⁴ From a non-TIEA perspective, the IRS continues to gather more evidence from summonses on credit card issuers and vendors.¹⁵ Commentators have suggested that the IRS should institute an updated voluntary disclosure initiative to assist it in offshore credit card cases.¹⁶ Currently, the IRS has taken the position that the IRS's offshore credit card examination program will disqualify the taxpayers from making voluntary disclosures.¹⁷

The following discussion emphasizes the variances and nuances of the Guernsey, Jersey

and Isle of Man TIEAs on a comparative basis. The Guernsey and Jersey TIEAs (Guernsey/Jersey TIEAs) are virtually identical.¹⁸ The Isle of

⁶*Id.* (stating that the Bush Administration says the IRS is getting "the right amount of money in its budget"); "IRS Sets New Audit Priorities," *Tax Notes Today*, 17 Sept. 2002, 2002 TNT 180-49. Sharp, Harrison, Lunsford, and Harty, "U.S. Tax Information Exchange Agreements: A Comparative Analysis," 28 *Tax Notes Int'l* 193 (14 Oct. 2002) at notes 2-3 (2002 WTD 199-22 or Doc 2002-23147 (14 original pages)). The IRS estimates that the American taxpayers illegally using tax haven structures cost the U.S. government as much as US \$70 billion annually. *Id.*

⁷Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands for the Exchange of Information Relating to Taxes, Treasury Department News Release PO-823, 27 Nov. 2001.

⁸Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas for the Provision of Information With Respect to Taxes and Other Information, Treasury Department News Release PO-949, 25 Jan. 2002.

⁹Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes, Treasury Department News Release PO-2063, 3 Apr. 2002.

¹⁰Agreement Between the Government of the United States of America and the Government of Antigua and Barbuda for the Exchange of Information with Respect to Taxes, Treasury Department News Release PO-846, 6 Dec. 2001.

¹¹Agreement Between the Government of the United States of America and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes, Treasury Department News Release PO-3007, 17 Apr. 2002.

¹²Sharp, Harrison, et al., *supra* note 6. Tax counsel representing clients in TIEA-related matters should not only understand the specific TIEA at issue, but also should develop a more insightful perspective by understanding the varying terms and conditions of each TIEA. By understanding these differences, tax counsel should be in a better position to

render legal advice to clients involved in a specific TIEA-related matter. *Id.*

¹³As discussed in Sharp, Harrison, et al., *supra* note 6, on any TIEA-related matter the early input of U.S. tax counsel as well as U.S. white collar criminal counsel usually will be important. In many TIEA-triggered disclosure requests, whether the matter is being pursued as a civil tax matter or a criminal tax matter will not always be clear. Although a discussion of that issue is beyond the scope of this article, both U.S. and foreign legal counsel should be mindful of the lack of clarity, at times, between whether a tax matter is civil or criminal.

¹⁴*Id.*

¹⁵Bloomberg News, "I.R.S. Sues for Disclosure of Offshore Accounts," *The New York Times*, 29 Aug. 2002, at C12. The IRS has estimated that more than two million U.S. taxpayers may have credit cards issued by banks in tax haven countries. *Id.* The IRS asked 18 district courts to issue John Doe summonses to more than 100 vendors where the credit cards were used. Then using the information received, the IRS sent the first 1,000 cases to the field. *Id.* Some of those cases have been referred to IRS Criminal Investigation (CI). *Id.*

¹⁶*Id.*

¹⁷*Id.* See also, William Garofalo, Val Albright, and Marnin J. Michaels, "IRS Issues More Summonses for Offshore Credit Card Data," 13 *J. Int'l Tax'n* 44 (Nov. 2002). In a recent meeting of the Washington, D.C. Bar tax section's Tax Audits and Litigation Committee, many practitioners stated that taxpayers with unreported income caught in the offshore credit card summons program should be eligible for some form of voluntary disclosure treatment. Sheryl Stratton, "Disclosure Initiative Sought for Offshore Credit Card Crackdown," 97 *Tax Notes* 745 (11 Nov. 2002). As discussed in note 15, *supra*, the IRS has estimated that as many as, if not more than, two million U.S.-affected taxpayers may hold cards issued by offshore banks, and interestingly, a large percentage of those taxpayers reside in Florida, North Carolina, and South Carolina. *Id.* The IRS also reports that by April 2003, the IRS will have 1,400 trained revenue agents assigned to offshore credit card cases. *Id.*

¹⁸Guernsey TIEA; Jersey TIEA. Even though the Guernsey/Jersey TIEAs are virtually identical, the adoption dates of the two treaties are 19 September 2002 and 4 November 2002, respectively. Although the delay in execution of the Jersey TIEA may be attributed to a number of logistical, scheduling, or other administrative reasons, one also could surmise that Jersey's government "held out" somewhat longer to attempt to negotiate a more favorable treaty. Given the identical language of the two treaties, it is unlikely that it succeeded.

Man TIEA is substantially similar to its English counterparts, but contains some important differences. From a transatlantic comparative perspective, the English-regional TIEAs differ substantially from their Caribbean-regional counterparts. In particular, the Bahamas TIEA, which is in substance an “information provision agreement,” rather than an “information exchange agreement,” varies materially from the English-regional TIEAs.¹⁹ The Bahamian, British Virgin Islands, and Cayman Islands TIEAs bear a strong resemblance to the Guernsey, Jersey, and Isle of Man TIEAs, but even so, important differences exist.

I. Comparison of Agreement Provisions

A. Preamble of the Agreements

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs contain nearly identical preamble language that memorializes each jurisdiction’s active role in “international efforts in the fight against financial and other crimes, including recent efforts against terrorist financing”²⁰ and intention to provide simplified withholding and reporting obligations for income payments from the United States to an account holder through one or more foreign intermediaries.²¹ The preambles also say that “present legislation already provides for information exchange in criminal tax matters” and that “the parties wish to establish the terms and conditions governing the exchange of information relating to taxes.”²²

2. Isle of Man TIEA

In contrast to the Guernsey/Jersey TIEAs’ expansive preamble language, the Isle of Man TIEA provides that the U.S. and Isle of Man governments desire “to facilitate the exchange of information relating to taxes.”²³

B. Scope of the Agreement

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs contain an abbreviated “scope” article that provides the exchange protocol and the requirement that the information exchanged should be “foreseeably relevant” to the requesting party’s domestic tax law administration and enforcement.²⁴ The scope article provides that the parties “shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the parties concerning the taxes covered” by the TIEA.²⁵ The Guernsey/Jersey TIEAs explain that the basic information exchange protocol also pertains to

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any “information that is foreseeably relevant to the determination, assessment, enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation or prosecution of criminal matters in relation to such persons.”²⁶

The Guernsey/Jersey TIEAs include the more stringent “foreseeably relevant” standard, as opposed to the simple “relevant” standard of the Cayman and BVI TIEAs.²⁷ The prerequisite “necessary internal procedures” for the TIEAs to enter into force²⁸ should provide appropriate guidance on the meaning of

“foreseeably relevant.” Even if the “necessary internal procedures” do not define the term “foreseeably relevant,” Guernsey or Jersey law, rather than U.S. law, will ultimately determine the meaning — assuming the United States is the requesting party.²⁹

2. Isle of Man TIEA

Similar to the Guernsey/Jersey TIEAs, the Isle of Man TIEA requires that the information sought must be “foreseeably relevant” as a threshold for an

¹⁹Sharp, Harrison, et al., *supra* note 6.

²⁰Each jurisdiction’s preamble states that the U.S. has determined that each country’s “know your customer” (or KYC) rules are acceptable under the qualified intermediary regime. A “qualified intermediary” (or QI) is a financial or investment institution that receives U.S. source income on behalf of another party and fulfills certain information collection requirements. See section 1441 and Treas. reg. section 1.1441-1(e)(5). All section references are to the Internal Revenue Code of 1986, as amended.

²¹Guernsey TIEA Preamble; Jersey TIEA Preamble.

²²Guernsey TIEA; Jersey TIEA.

²³Isle of Man TIEA Preamble.

²⁴Guernsey TIEA art. 1; Jersey TIEA art. 1.

²⁵*Id.*

²⁶*Id.*

²⁷Cayman TIEA art. 1; BVI TIEA art. 1. The Guernsey/Jersey TIEAs do not limit the subject of criminal matters to criminal tax evasion, as do the Cayman and BVI TIEAs. Cayman TIEA art. 1; BVI TIEA art. 1; Guernsey TIEA art. 1; Jersey TIEA art. 1.

²⁸Guernsey TIEA art. 12; Jersey TIEA art. 12. “Necessary internal procedures” are not defined in the Guernsey/Jersey TIEAs.

²⁹*Id.* The U.S. likely will be the requesting party under these new TIEAs, because the U.S. is the party actively pursuing the implementation of the agreements with a number of nations. The other contracting parties may choose to pursue requests under those agreements, however. See Sharp, Harrison, et al., *supra* note 6 at note 4. Because Guernsey, Jersey, and Isle of Man each have income tax regimes, they may seek to obtain information from the U.S. on tax enforcement. See *infra* text accompanying notes 46-49, 51-53.

information exchange request. Also like the Guernsey/Jersey TIEAs, the Isle of Man laws, as opposed to the U.S. laws, likely will define those provisions, again assuming the United States is the requesting party.³⁰

In contrast, however, to the Guernsey/Jersey TIEAs, the Isle of Man TIEA's scope provision (labeled "object and scope," as opposed to just "scope") provides for confidential information exchange in accordance with article 8.³¹ "The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information."³²

This language clearly indicates the Isle of Man's concern, as a "requested Party," to ensure that the legal rights of Isle of Man residents, citizens, and connected persons will be protected if those rights and safeguards do not "unduly prevent or delay" effective information exchange. The Isle of Man's "necessary internal procedures" or other enabling legislation likely will provide guidance on the protection's meaning.

The Isle of Man TIEA refers to tax matters' investigation or prosecution, including criminal tax matters in its scope by the reference to prosecution.³³ Similar to the Guernsey/Jersey TIEAs, the Isle of Man TIEA does not use the more limited standard of "criminal tax evasion," the term used in the Cayman and BVI TIEAs.³⁴

C. Jurisdiction

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs state that information provided under the TIEAs by the requested party will be made available "without regard to whether the person to whom the information relates is, or whether the information is held by, a resident of a party."³⁵ Nonetheless, a requested party "is not obliged to provide information which is neither held

by its authorities nor in the possession of persons who are within its territorial jurisdiction."³⁶

Information must be "held by" or in the possession of persons within the country's jurisdiction. Ultimately, whether information is "held by" those persons will be determined under the laws of Guernsey or Jersey, as the case may be.

2. Isle of Man TIEA

The jurisdiction provision of the Isle of Man TIEA is much simpler than those of the Guernsey/Jersey

The 'residency disclaimer' language in the Guernsey/Jersey TIEAs clearly means that the IRS may request information from the Jersey competent authority about a non-Jersey foreign national who resides outside of Jersey, even if this person never travels to the United States.

TIEAs. The Isle of Man provision simply says that a "requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction."³⁷ The Isle of Man TIEA jurisdiction provision does not say that information will be provided "without regard to whether the person to whom the information relates is, or whether the information is held by, a resident of a party."³⁸ The omission of the "residency

disclaimer" language that is in the Guernsey/Jersey TIEAs arguably supports the position that some form of residency or other *in personam* jurisdictional nexus is required for the Isle of Man to exchange information under the agreement.

The "residency disclaimer" language in the Guernsey/Jersey TIEAs clearly means that the IRS may request, for example, "foreseeably relevant" information from the Jersey competent authority about a non-Jersey foreign national who resides outside of Jersey, even if this person never travels to the United States, if the other conditions for a request are satisfied.³⁹ The language's omission from the Isle of Man TIEA does not necessarily mean that the information exchange provisions will not apply to an Isle of Man nonresident, but

³⁰See discussion *supra* note 29.

³¹Isle of Man TIEA art. 1.

³²*Id.* Even though the Guernsey/Jersey TIEAs do not contain the language in their respective scope provisions, that absence should not negate or otherwise limit the article 8 confidentiality provisions of Guernsey and Jersey.

³³Isle of Man TIEA art. 1.

³⁴Cayman TIEA art. 1; BVI TIEA art. 1.

³⁵Guernsey TIEA art. 2; Jersey TIEA art. 2.

³⁶*Id.* The Guernsey/Jersey TIEAs do not refer to the principle of "possession or control" as used in the Cayman TIEA, art. 2(b) and the BVI TIEA art. 2(b), but rather use the "held by" and "possession" language, which arguably indirectly includes the principle of "control" as a legal term of art. Subject to local law resolution (or by the TIEA's internal procedures), it appears that the absence of the term "control" might create a more restrictive information request threshold for the requesting party. See discussion in text *infra* accompanying notes 95-102.

³⁷Isle of Man TIEA art. 2.

³⁸*Id.* Guernsey TIEA art. 2; Jersey TIEA art. 2.

³⁹Sharp, Harrison, et al., *supra* note 6 at 195 (discussing the issue in the context of the Cayman and BVI TIEAs).

it leaves an open question that could result in future litigation.

The Isle of Man TIEA also refers to information not only “held by” the requested party’s authorities, but also “in the possession or control” of persons located within the country’s jurisdiction. The Guernsey/Jersey TIEAs do not use the legal “control” standard that is in the Isle of Man TIEA, as well as the Cayman and BVI TIEAs.⁴⁰

D. Taxes Covered

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs cover “all federal taxes” of the United States and “all insular taxes” of Jersey and Guernsey.⁴¹ The “taxes covered” provision also provides that “any identical or substantially similar taxes” enacted after the TIEAs’ effective date will be covered, provided the parties agree.⁴² The Guernsey/Jersey TIEAs require that each party’s competent authority “notify the other of changes in laws which may affect the obligations” of the other party.⁴³ The Guernsey/Jersey TIEAs do not state the level of law changes that would trigger the notification obligation, but they may be addressed in the “internal procedures,” or other enabling legislation.

The Guernsey/Jersey TIEAs’ “taxes covered” provision provides that the TIEA will not apply to any action or proceeding that is barred by the requesting party’s statute of limitations.⁴⁴ Finally, the TIEA will not apply to taxes imposed by any state, municipality or other political subdivision, or possessions of a party. The “carve-out” for local and state taxes and property taxes is consistent with other TIEAs.⁴⁵

Jersey’s income tax rate is 20 percent on income, less the personal allowances and applicable deductions.⁴⁶ Companies resident in Jersey also are subject to the Corporation Tax at 20 percent on their worldwide income.⁴⁷ A company incorporated in Jersey that is wholly owned by nonresi-

dents may elect exempt status, and thus be treated as a nonresident.⁴⁸ The Guernsey corporate and individual tax rate is 20 percent, as well.⁴⁹ The Channel Islands do not impose capital gains, death, inheritance, or wealth taxes — only income taxes.

2. Isle of Man TIEA

Consistent with the Guernsey/Jersey TIEAs, the Isle of Man version specifies that “taxes covered” include “all federal taxes” of the United States, as well as taxes on income or profits in the Isle of Man.⁵⁰ The Isle of Man TIEA “taxes covered” provision

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states that the types of taxes covered by the TIEA may be modified by agreement of the contracting parties. The Isle of Man TIEA does not include the notification obligation nor the “carve-out” for local and state taxes.

The Isle of Man has two personal income tax brackets, with rates of 10 percent (reduced from 12 percent effective 6 April 2002) and 18 percent.⁵¹ Resident trading companies are subject to 10 percent and 15 percent tax rates (reduced from 12 percent and 18

percent).⁵² Nonresident companies are subject to an 18 percent tax rate.⁵³ Similar to the Channel Islands, the Isle of Man does not impose capital gains, death, inheritance, or wealth taxes.

The “all federal taxes” provisions of the Guernsey/Jersey TIEAs and the Isle of Man TIEA are consistent with the “taxes covered” provision in the Bahamas TIEA.⁵⁴ In contrast, the Cayman and BVI TIEAs only cover “federal income taxes,” subject to extension to other types of taxes by exchanging letters (mutual agreement).⁵⁵

⁴⁰See discussion *supra* note 36.

⁴¹Guernsey TIEA art. 3(1)(a), (b); Jersey TIEA art. 3(1)(a), (b).

⁴²Guernsey TIEA art. 3(2); Jersey TIEA art. 3(2).

⁴³*Id.*

⁴⁴Guernsey TIEA art. 3(3); Jersey TIEA art. 3(3). A similar limitation is provided in the Bahamas TIEA art. 2(4), and the limitation also is implicit in the Cayman and BVI TIEAs. See Sharp, Harrison, et al., *supra* note 6 at 200.

⁴⁵Cayman and BVI TIEAs art. 3; Bahamas TIEA art. 2.

⁴⁶John G. Goldsworth, “A Review of the Tax Characteristics of Countries on the Fringe of the European Community,” *Tax Notes Int’l*, 18 Jan. 1993, p. 128, or 93 *TNI* 11-5.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰Isle of Man TIEA art. 3 (a), (b).

⁵¹Assessor of Income Tax, “Income Tax Rates Reduced and Allowances Increased,” *Practice Note* 90/02 http://www.gov.im/treasury/income_tax/technical/PN90-02.html (19 Mar. 2002). Tax rates previously were 14 percent and 20 percent. Robert Goulder, “A Tale of Two Tax Havens,” 21 *Tax Notes Int’l* 2860 (15 Dec. 2000) (2000 *WTD* 245-1 or *Doc* 2000-33722 (9 original pages)).

⁵²*Id.* See also Trident Trust, *Isle of Man Brochure* (visited 18 Nov. 2002) <http://www.tridenttrust.com/iom.htm>.

⁵³Practice Note 90/02, *supra* note 51.

⁵⁴Bahamas TIEA art. 2.

⁵⁵Cayman TIEA art. 3; BVI TIEA art. 3.

E. Definitions

1. *Guernsey/Jersey TIEAs*

The Guernsey/Jersey TIEAs define terms for the TIEAs' application. For example, the competent authority for Jersey is the Comptroller of Income Tax and for Guernsey is the Administrator of Income Tax. However, the Jersey or Guernsey Attorney General may act as the competent authority for criminal tax matters until 1 January 2006.⁵⁶ The U.S. competent authority is the Secretary of the Treasury.⁵⁷

The broad criminal law provision includes "all criminal laws designated as such under domestic law, irrespective of whether contained in the tax laws, the criminal code or other statutes."⁵⁸ In the Guernsey/Jersey TIEAs, "criminal tax matters" refer to intentional conduct on tax matters for which a person could be prosecuted under the criminal laws of the party requesting information under the TIEA.⁵⁹

The information gathering measures in the Guernsey/Jersey TIEAs include "judicial, regulatory, criminal or administrative procedures" that enable the requested party to acquire and provide the information requested under the TIEA to the requesting party.⁶⁰

Information includes "any fact, statement, document or record in whatever form," which includes as broad a range of "information" as possible.⁶¹ "Person" includes any natural person, company, or "any other body or group of persons," a broad definition encompassing a variety of entities.⁶²

The requested party is the party from which information is requested. The requesting party is the party submitting the information request under the agreement.⁶³

A U.S. resident is any U.S. citizen, or "any legal person, partnership, corporation, trust, estate, association, or other entity deriving its status as such from the laws enforced in the United States."⁶⁴ A Guernsey resident is

any person resident in Guernsey, under The Income Tax (Guernsey) Law 1975, as amended.⁶⁵ A Jersey resident is any person resident in Jersey, under The Income Tax (Jersey) Law 1961, as amended.⁶⁶

For the United States, the contracting parties have jurisdiction to compel production of information in the United States of America, Puerto Rico, The Virgin Islands, Guam, and any other U.S. possession or territory.⁶⁷ For Jersey, it is the Island of Jersey, and for Guernsey, it is Guernsey, Alderney, and Herm.⁶⁸

The broad criminal law provision includes 'all criminal laws designated as such under domestic law, irrespective of whether contained in the tax laws, the criminal code or other statutes.'

The Guernsey/Jersey TIEAs do not define the phrase "items subject to privilege," although the phrase is used in article 7(2) of the TIEAs. Any other term, which is not defined or for which the competent authorities have not agreed to a common meaning, will have the meaning that it has under the contracting parties' domestic tax laws.⁶⁹

2. *Isle of Man TIEA*

Many of the Isle of Man TIEA's definitions are very similar to those of the Guernsey/Jersey TIEAs. For example, the U.S. competent authority is the Secretary of Treasury, and for the

Isle of Man, the Chief Financial Officer of the Treasury is the competent authority.⁷⁰ "Person" includes an individual, company, or other body of persons, which is identical to the Guernsey/Jersey definition.⁷¹ A company is "any body corporate or any entity that is treated as a body corporate for tax purposes."⁷²

Tax is any tax described in TIEA article 3.⁷³ The Isle of Man TIEA calls the requesting party the "applicant party," but uses the term requested party.⁷⁴

Similar to the Guernsey/Jersey TIEAs, the Isle of Man TIEA defines "information gathering measures" as law and administrative or judicial procedures that a contracting party uses to obtain and provide requested information.⁷⁵ The definition of informa-

⁵⁶Jersey TIEA art. 4(1); Guernsey TIEA art. 4(1).

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*

⁶⁴Guernsey TIEA art. 4(1)(a); Jersey TIEA art. 4(1)(a). Individuals may be considered U.S. residents if they hold a U.S. permanent residency visa (green card) or spend sufficient time in the U.S. during a calendar year to qualify as a U.S. resident under the substantial presence test. Section 7701(b)(1)(A).

⁶⁵Guernsey TIEA art. 4(1)(b).

⁶⁶Jersey TIEA art. 4(1)(b).

⁶⁷Guernsey TIEA art. 4(2); Jersey TIEA art. 4(2).

⁶⁸*Id.*

⁶⁹Guernsey art. 4(3); Jersey TIEA art. 4(3). See *infra* text accompanying notes 78-82 for discussion of Isle of Man TIEA definition of privilege.

⁷⁰Isle of Man TIEA art. 4(1)(b)(ii).

⁷¹Isle of Man TIEA art. 4(1)(c).

⁷²Isle of Man TIEA art. 4(1)(d).

⁷³Isle of Man TIEA art. 4(1)(e).

⁷⁴Isle of Man TIEA art. 4(1)(f), (g).

⁷⁵Isle of Man TIEA art. 4(1)(h).

tion appears identical to the Guernsey/Jersey TIEAs.⁷⁶ Criminal tax matters also are defined the same.⁷⁷ The only notable difference in the definitions between the Guernsey/Jersey TIEAs and the Isle of Man TIEA is the definition of “items subject to legal privilege” included in the Isle of Man TIEA.⁷⁸ Items subject to legal privilege include:

- Communications between a professional legal advisor and a client or client’s representative when giving legal advice to the client;⁷⁹
- Communications between a professional legal advisor and the client’s representative, or between the advisor or the client or the representative and another person in contemplation of legal proceedings and for those proceedings;⁸⁰ and
- Items enclosed with or referred to in communications when giving legal advice or in contemplation of legal proceedings and for the purposes of those proceedings.⁸¹

The privileged items definition incorporates common law legal privilege principles and the attorney-work product doctrine. The extension of that privilege to communications between a client’s representative, other than the legal advisor, and “any other person” in connection with or in contemplation of legal proceedings may be intended to incorporate the privilege discussed in the U.S. federal court of appeals case *U.S. v. Kovel*. There, the court ruled that communications between a taxpayer and an accountant, whose help was needed to “translate” information for the legal advisor, were privileged.⁸²

As in the Guernsey/Jersey TIEAs, items not defined within the Isle of Man TIEA will be defined under the domestic laws of the contracting parties, unless otherwise agreed.⁸³

The definitions between the Guernsey/Jersey TIEAs and the

Isle of Man TIEA are very similar. They also are consistent with the definitions in the TIEAs between the United States and the Bahamas, the British Virgin Islands, and the Cayman Islands. The most notable difference is the absence of the definition of items subject to legal privilege in the Guernsey/Jersey TIEAs. Because the definition is not included, the term in the Guernsey/Jersey TIEAs article 7(2) should be defined under the domestic law of each party, which is consistent with the Bahamas TIEA provision.⁸⁴

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F. Exchange of Information on Request

1. Guernsey/Jersey TIEAs

Article 5 of the Guernsey/Jersey TIEAs implements the general mandate of article 1 for each country to exchange information that is foreseeably relevant to the administration and enforcement of domestic tax laws. Article 5 mandates that on request, the requested party’s competent authority will provide information to the requesting party, even though the requested party does not require the information for its tax purposes, or the investigated conduct would not be criminal under the requested party’s laws.⁸⁵

That information exchange obligation is activated when the requesting party “has pursued all reasonable means available in its own territory” to obtain the requested information but is unable to do so.⁸⁶ However, even that provision has a further exception: if the means would cause “disproportionate difficulty,” the requesting party may make the request.⁸⁷

Following a TIEA request, if the requested information in the “possession” of the requested party’s competent authority is insufficient for the requested party to comply with the information request, then the requested party must take “all relevant information gathering measures” to fulfill the information exchange request.⁸⁸ That information gathering obligation is imposed even if the requested party does not require the information for its own tax purposes.⁸⁹

⁷⁶Isle of Man TIEA art. 4(1)(i).

⁷⁷Isle of Man TIEA art. 4(1)(j), (k).

⁷⁸Isle of Man TIEA art. 4(1)(l).

⁷⁹Isle of Man TIEA art. 4(1)(i).

⁸⁰Isle of Man TIEA art. 4(1)(ii).

⁸¹Isle of Man TIEA art. 4(1)(iii). The Guernsey/Jersey TIEAs do not define this term but do refer to such items in art. 7(2)(a).

⁸²*U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961). See also *U.S. v. Adlman*, 68 F.3d 1495 (2d Cir. 1995) (stating that if the accountant’s advice rather than the attorney’s advice is sought, the privilege will not apply).

⁸³Isle of Man TIEA art. 4(2).

⁸⁴Bahamas TIEA art. 2(9).

⁸⁵Guernsey TIEA art. 5(1); Jersey TIEA art. 5(1).

⁸⁶Guernsey TIEA art. 5(5)(i); Jersey TIEA art. 5(5)(i).

⁸⁷*Id.* “Disproportionate difficulty” is not defined.

⁸⁸Guernsey TIEA art. 5(2); Jersey TIEA art. 5(2).

⁸⁹*Id.* As stated earlier, “information gathering measures” is broadly defined as judicial, regulatory, criminal, or administrative procedures enabling the requested party to obtain and provide the requested information.

The requesting party also may request production of information by depositions and document authentication. Article 5 provides that the requesting party may ask the requested party to provide information by witness depositions and authenticated copies of original documents to the extent these processes are allowed under the requested party's domestic laws.⁹⁰ Accordingly, under both Guernsey and Jersey law, local counsel should advise if those information gathering processes are allowable. U.S. legal counsel should work closely with local counsel to protect the client's rights under local law (assuming the affected taxpayer is aware of the TIEA request). Therefore, under the usual tax information request submitted by the United States to either Guernsey or Jersey, the jurisdiction's local law will govern the extent that the United States may insist on extraordinary information gathering forms, such as witness depositions.⁹¹

Article 5 further provides that each party must "ensure" that it has the authority (subject to the jurisdictional limitation of article 2, as discussed above) to obtain and provide through its competent authority:

- Information of banks and other financial institutions, as well as information of nominees and trustees acting as agents or fiduciaries.
- Information on the beneficial ownership of companies, partnerships, and other persons, including information on shares, units, and other interests of collective investment funds, and for trusts, information on settlors, trustees, and beneficiaries.⁹²

The disclosure obligations are not required for publicly traded companies or public collective investment trusts, unless the information can be obtained without causing disproportionate difficulties.⁹³

Article 5 also provides that each party will submit a request with the "greatest degree of specificity possible," provided that in "all cases, such requests shall specify in writing" the following:

- the identity of the taxpayer under examination or investigation;
- the time period for which the information is requested;
- the nature of the information requested and the form in which the requesting party would prefer to receive it;

Under the usual U.S. tax information request to either Guernsey or Jersey, the jurisdiction's local law will govern the extent that the United States may insist on extraordinary information gathering forms.

- the matter under the requesting party's tax law for which the information is sought;
- the reasons for believing that the information requested is foreseeably relevant or material to the tax administration and enforcement of the requesting party for the person identified;
- reasonable grounds for believing that the information requested is present or is in the possession of a person within the requested party's jurisdiction;

- to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- a statement that the request conforms to the requesting party's law and administrative practice and would be obtainable by the requesting party under its laws or in the normal course of administrative practice in similar circumstances — both for its tax purposes and for a valid request from the requested party under this Agreement; and
- a statement that the requesting party has pursued all reasonable means available in its own territory to obtain the information, except if that would give rise to disproportionate difficulty.⁹⁴

It is interesting that the "greatest degree of specificity" checklist does not include the legal principle of "control" as is present in other TIEAs. In other words, the requesting party must submit reasonable grounds for believing that the information requested is in the requested party's jurisdiction or is in the possession (but not necessarily control) of a person within the requested party's jurisdiction. Does this mean that a Jersey-based trust that does not physically possess relevant information, such as a non-Jersey bank account, but that may have legal "control" over the information is not in "possession" of the information? The competent authorities

⁹⁰Guernsey TIEA art. 5(3); Jersey TIEA art. 5(3).

⁹¹The information forms only may be provided to the extent allowed under the requested party's domestic laws. Guernsey TIEA art. 5(1); Jersey TIEA art. 5(1).

⁹²Guernsey TIEA art. 5(4)(a), (b); Jersey TIEA art. 5(4)(a), (b).

⁹³*Id.*

⁹⁴Guernsey TIEA art. 5(5); Jersey TIEA art. 5(5).

may have to agree on what “possession” means because it is not a defined term.⁹⁵

2. *Isle of Man TIEA*

Similar to the Guernsey/Jersey TIEAs, article 5 of the Isle of Man TIEA provides a nearly identical rule on the general information exchange mechanics. It includes the carve-out that information will be exchanged even if the investigated conduct would not be a crime under the requested party’s laws and the conduct occurred in that jurisdiction.⁹⁶

Unlike the Guernsey/Jersey TIEAs, the Isle of Man TIEA requires the requesting party to pursue “all means available in its own territory,” and to make an information request only when it is unable to obtain the requested information in its own territory.⁹⁷ The Guernsey/Jersey TIEAs require the requesting party to pursue “all reasonable means.”⁹⁸ In other words, the Isle of Man TIEA appears to require more effort by the requesting party to obtain the information before making a request because the word “reasonable” is removed.

The Isle of Man TIEA contains the same requirement for the requested party to use all “relevant information gathering measures” to fulfill an information request even through the requested party may not require the information for its own taxes.⁹⁹ The Isle of Man information exchange provision also contains the same provision as the Guernsey/Jersey TIEAs on witness depositions and authenticated copies, only if the provision of such information is “allowable” under Isle of Man law.¹⁰⁰

Similarly, the Isle of Man information exchange provision contains the same mandate that each contracted party will give its competent authorities the authority to obtain information from banks, trusts, and other sources on underlying beneficial ownership information, subject to

the same carve-out for publicly traded entities.¹⁰¹

Similar to the Guernsey/Jersey TIEAs, the Isle of Man information exchange provision requires that a requesting party provide certain information when making a request. Even though that provision does not require the “greatest degree of specificity,” as in the Guernsey/Jersey TIEAs and the Bahamas TIEA, “possession” may be defined to incorporate the legal principle of control.¹⁰² The listed requirements provide the

Unlike the Guernsey/Jersey TIEAs, the Isle of Man TIEA requires the requesting party to pursue ‘all means available in its own territory,’ and to make an information request only when it is unable to obtain the requested information in its own territory.

requested party with valuable assistance to comply with the request.

However, certain important differences exist. For example, the Isle of Man TIEA does not require the requesting party to show its reasons for believing that the information requested is “foreseeably relevant or material” to tax matters. That may be implicit from the TIEA’s statement that requires the information sought to describe the “nature and form the applicant party wants to receive the information” and “the

tax purpose for which the information is sought.”¹⁰³ Nonetheless, the request is subject to the “foreseeable relevance” language in article 1 and the requirements list is designed to clearly draw this connection.

G. Tax Examinations Abroad

1. *Guernsey/Jersey TIEAs*

In the Guernsey/Jersey TIEAs, article 6 provides that one contracting party may enter the territory of another contracting party to conduct examinations, as limited by the requested party’s domestic laws.¹⁰⁴ A request to enter another party’s territory requires reasonable advance notice, as well as the prior written consent of the individuals concerned.¹⁰⁵ The competent authority of the party requesting entrance to perform an examination or interview must notify the requested party’s competent authority of the time and place of the scheduled meeting with the “individuals concerned.”¹⁰⁶

On request, the requested party’s competent authority may permit the requesting party’s representatives to attend a tax examination in the requested

⁹⁵Guernsey TIEA art. 4(3); Jersey TIEA art. 4(3). See also discussion *supra* note 35.

⁹⁶Isle of Man TIEA art. 5(1).

⁹⁷Isle of Man TIEA at 5(5)(g).

⁹⁸The Bahamas TIEA also requires the requesting party to make “all reasonable efforts” to obtain the information by other means. Bahamas TIEA art. 2(1).

⁹⁹Isle of Man TIEA art. 5(2).

¹⁰⁰*Id.* These provisions also are present in the Caribbean TIEAs. Cayman TIEA art. 5(3); BVI TIEA art. 5(3); Bahamas TIEA art. 2(6).

¹⁰¹Isle of Man TIEA art. 5(4)(a), (b).

¹⁰²Guernsey TIEA art. 5(5); Jersey TIEA art. 5(5); Bahamas TIEA art. 2(3).

¹⁰³Isle of Man TIEA art. 5(5)(b).

¹⁰⁴Guernsey TIEA art. 6(1); Jersey TIEA art. 6(1).

¹⁰⁵*Id.*

¹⁰⁶*Id.*

party's territory.¹⁰⁷ If the request is granted, the requested party must notify the requesting party as soon as possible of the examination's time and place, the person authorized to perform the examination, and the required procedures and conditions for the examination. The requested party conducting the examination will make any decisions on the examination's format.¹⁰⁸

2. Isle of Man TIEA

The Isle of Man TIEA includes almost identical provisions for tax examinations abroad, with a few subtle distinctions. For example, although the Guernsey/Jersey TIEAs require the prior written consent of the *individuals* concerned, the Isle of Man TIEA requires the written consent of the *persons* concerned. From the provision's context, the individuals or persons concerned appear to refer to the person who is interviewed, not necessarily the person under examination. The distinction would be whether a bank employee must consent to be interviewed, whether the bank must consent, or both.¹⁰⁹

The other nuance in the provision's drafting is that the Isle of Man TIEA provides that the requested party may allow the requesting party's representative to be present at "the appropriate part of a tax examination" in the requested party's territory.¹¹⁰ Although that "appropriateness" language may be implied for the Guernsey/Jersey TIEAs, the requesting party could take the position that permission to attend the tax examination in the requested party's territory constitutes permission to attend the entire examination.

The permission to attend examinations abroad, or to enter the requested party's territory to conduct an examination is consistent with the Cayman and BVI TIEAs' provisions, although the Bahamas TIEA does not permit entry into its territory for examinations.¹¹¹

An issue raised in our previous article on the Cayman, BVI, and Bahamian TIEAs has not been resolved in this new round of agreements. That is, must taxpayers under investigation be notified of requests involving them under the applicable TIEA? Another issue raised is whether the party subject to the request may inform the taxpayer of the pending request.¹¹² The extent to which notification is permitted should be clarified before the information exchanges begin under the new TIEAs.

The Guernsey/Jersey TIEAs further provide that no party under the agreement must provide items subject to legal privilege.

H. Possibility of Declining a Request

1. Guernsey/Jersey TIEAs

The requested party may decline an information exchange request when the request does not conform with the terms and conditions of the Guernsey/Jersey TIEAs.¹¹³ In addition, the requested party may decline to assist if the requesting party has not pursued all means in its own territory to obtain the requested information. However, an exception to this requirement is if "recourse to such means would give rise to disproportionate difficulty."¹¹⁴ The request must state that "all reasonable means" have

been pursued.¹¹⁵ The language of the Guernsey/Jersey TIEAs appears to be inconsistent. Finally, the requested party may decline to assist if the disclosure requested "would be contrary to the public policy of the requested party."¹¹⁶

The Guernsey/Jersey TIEAs further provide that no party under the agreement must provide items subject to legal privilege.¹¹⁷ The agreements exempt from disclosure trade, business, industrial, commercial, or professional secrets or trade processes, provided that the information described in article 5(4) will not by definition be treated as such a secret or trade process.¹¹⁸ The carve-out referenced in article 5(4) provides that a requested party may not take the position that information protected by the requested party's bank secrecy or other confidentiality laws would by that fact alone be treated as a secret or trade process. The days of concealing underlying beneficial ownership through nominee corporations or trust arrangements are effectively over. Finally, the Guernsey/Jersey TIEAs will not

¹⁰⁷Guernsey TIEA art. 6(2); Jersey TIEA art. 6(2).

¹⁰⁸Guernsey TIEA art. 6(2), (3); Jersey TIEA art. 6(2), (3).

¹⁰⁹Isle of Man TIEA art. 6(1); Guernsey TIEA art. 6(1); Jersey TIEA art. 6(1).

¹¹⁰Isle of Man TIEA art. 6(2).

¹¹¹Cayman TIEA art. 6; BVI TIEA art. 6; Bahamas TIEA.

¹¹²See discussion in Sharp, Harrison, et al., *supra* note 6 at 196.

¹¹³Guernsey TIEA art. 7(1); Jersey TIEA art. 7(1).

¹¹⁴Guernsey TIEA art. 7(1)(b); Jersey TIEA art. 7(1)(b).

¹¹⁵Guernsey TIEA art. 5(5)(i); Jersey TIEA art. 5(5)(i).

¹¹⁶Guernsey TIEA art. 7(1)(c); Jersey TIEA art. 7(1)(c).

¹¹⁷Such items are not defined in the TIEA. See discussion *supra* notes 79-81.

¹¹⁸Guernsey TIEA art. 7(2)(a); Jersey TIEA art. 7(2)(a).

impose an obligation on any party to carry out “administrative measures at variance with its laws and administrative practices.”¹¹⁹ Again, an exception to this prohibition references article 5(4).

The Guernsey/Jersey TIEAs clearly provide that a requesting party’s information request will not be declined because the tax liability underlying the request is in dispute.¹²⁰ Finally, the requested party will not be required to obtain and provide information the requesting party would be unable to obtain under the requesting party’s internal laws to administer or enforce its own tax laws or in response to a valid request from the requested party under the agreement.¹²¹

2. Isle of Man TIEA

Similar to the Guernsey/Jersey TIEAs, article 7 of the Isle of Man TIEA provides that the requested party will not be required to obtain or provide information that the requesting party would not be able to obtain under its own laws to administer or enforce its own tax laws.¹²² The Isle of Man TIEA provides that the requested party may decline a request if it does not conform with the TIEA.¹²³

The Isle of Man TIEA contains the prohibition against obtaining information subject to legal privilege and the prohibition for information disclosure that would affect a trade or business or other secret or trade process.¹²⁴ At the same time, confidential information protected by local bank secrecy law or other confidentiality law is consistently carved out of the prohibition.¹²⁵

Finally, the Isle of Man TIEA contains the same prohibitions as the Guernsey/Jersey TIEAs on information disclosure that would be contrary to public policy.¹²⁶ The requesting party may not decline an information exchange request because the tax claim is in dispute.¹²⁷

Unlike the Guernsey/Jersey TIEAs, the Isle of Man TIEA allows the requested party to

decline a request if the information requested to administer or enforce a provision of the requesting party’s tax law “discriminates against a national” of the requested party, compared to a national of the requesting party in the same circumstances.¹²⁸ This is a provision borrowed from bilateral income tax treaty “nondiscrimination clauses.”¹²⁹

I. Confidentiality

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs provide that all information provided and received by a requesting party will be kept confi-

The Guernsey/Jersey TIEAs provide that all information provided and received by a requesting party will be kept confidential.

dential. The information may not be used for purposes other than the purposes stated in article 1 (see above) unless the requested party provides prior written consent for other use of the information.¹³⁰ Furthermore, the information provided under the TIEAs may be disclosed only to persons “officially concerned” with the purposes described in article 1, although information gathered under the TIEA may be disclosed in public judicial proceedings.¹³¹ The TIEA expressly prohibits the retransmission of information disclosed under the TIEA to any third party, with a specific

reference to another government’s agency or employee.¹³²

2. Isle of Man TIEA

The Isle of Man TIEA confidentiality provision is substantially similar to the Guernsey and Jersey counterparts. The only variance is that the Isle of Man TIEA does not include the provision that information exchanged under the agreement may be used only for the purposes stated in article 1, without written consent of the requested party.¹³³ It is unclear why that provision was not included in the Isle of Man TIEA.

The Caribbean TIEAs’ confidentiality provisions also are similar, although the restrictions on information disclosure under the Bahamian TIEA are far more detailed.¹³⁴ The Bahamian TIEA expressly prohibits the use of information obtained on a criminal matter prior to 1 January 2006 for

¹¹⁹Guernsey TIEA art. 7(2)(b); Jersey TIEA art. 7(2)(b).

¹²⁰Guernsey TIEA art. 7(3); Jersey TIEA art. 7(3).

¹²¹Guernsey TIEA art. 7(4); Jersey TIEA art. 7(4).

¹²²Isle of Man TIEA art. 7(1).

¹²³*Id.*

¹²⁴Isle of Man TIEA art. 7(2).

¹²⁵*Id.*

¹²⁶Isle of Man TIEA art. 7(3). *See also* Bahamas TIEA art. 2(7), Cayman TIEA art. 7(1)(c); BVI TIEA art. 7(1)(c).

¹²⁷Isle of Man TIEA art. 7(4).

¹²⁸Isle of Man TIEA art. 7(5).

¹²⁹*See* U.S. Model Income Tax Treaty (1996), art. 24(1), states that nationals of one contracting state will not be subject to more burdensome taxation or requirements by the other contracting state than nationals of the other contracting state.

¹³⁰Guernsey TIEA art. 8(1), (2); Jersey TIEA art. 8(1), (2).

¹³¹Guernsey TIEA art. 8(3); Jersey TIEA art. 8(3).

¹³²Guernsey TIEA art. 8(4); Jersey TIEA art. 8(4).

¹³³Isle of Man TIEA art. 8.

¹³⁴Cayman TIEA art. 8; BVI TIEA art. 8; Bahamas TIEA art. 3.

any other matter, unless the Bahamian competent authority consents in writing.¹³⁵

J. Costs

1. Guernsey/Jersey TIEAs

The requesting party must reimburse the requested party for all the “direct costs” incurred for providing information under the Guernsey/Jersey TIEAs. The TIEAs do not define the term “direct cost,” however, article 9 says the parties should consult with one another if a specific request’s costs are expected to be significant.¹³⁶

2. Isle of Man TIEA

The Isle of Man TIEA is more specific on which party is responsible for costs incurred for an exchange request. Unless otherwise agreed, the requested party is responsible to pay “ordinary costs” and the requesting party must pay all “extraordinary costs.” “Extraordinary costs” include the cost of engaging external advisors for litigation or otherwise.¹³⁷

The Isle of Man TIEA cost provision also requires the parties to consult in advance of an exchange request that is expected to generate significant costs.

K. Mutual Agreement Procedure

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs direct each jurisdiction’s competent authorities to use their “best efforts” to resolve by mutual agreement difficulties or doubts on the implementation or interpretation of the TIEAs.¹³⁸

2. Isle of Man TIEA

Although enumerated as article 11 instead of article 10, the Isle of Man TIEA provides for an almost identical mutual agreement provision, again using the “best efforts” standard.¹³⁹ The best efforts standard also is used in the Cayman and BVI TIEAs.¹⁴⁰ The Bahamas TIEA, however, merely requires the parties to “endeavor”

to resolve disputes by mutual agreement.¹⁴¹

L. Implementation Legislation

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs do not include a specific, separate, and enumerated article for implementation legislation, nor do the Cayman, BVI, or Bahamian TIEAs.

2. Isle of Man TIEA

The Isle of Man TIEA directs the contracting parties — the United States and Isle of Man —

Unlike the Guernsey/Jersey TIEAs, when the Isle of Man TIEA enters into force, it will be effective from 1 January 2004 for criminal tax matters for taxable periods beginning on or after 1 January 2004.

to enact legislation necessary to comply with, and give effect to, the agreement terms.¹⁴²

M. Entry Into Force — Early Effective Dates

1. Guernsey/Jersey TIEAs

The Guernsey/Jersey TIEAs become effective when each party has notified the other that its “necessary internal procedures” are complete. After that notification, the TIEAs “shall have effect for criminal tax matters forthwith.”¹⁴³ As soon as the entry into force notification is received, the TIEAs will apply to criminal

tax matters, which is a material departure from the other TIEAs. They contain an effective date for criminal tax matters of 1 January 2004.¹⁴⁴ For matters covered in article 1 other than criminal tax, the TIEAs are effective 1 January 2006, although an “earlier date . . . may be agreed in the exchange of letters” by the competent authority.¹⁴⁵

Under the Guernsey/Jersey TIEAs, a criminal tax matter could arise as early as 15 April 2004 if the TIEAs are effective during 2003. For criminal charges to be brought for tax evasion, a tax must be due and owing for the tax year involved.¹⁴⁶ Therefore, because U.S. federal income taxes for the 2003 tax year generally are due by 15 April 2004, requests under the Guernsey/Jersey TIEAs arguably could be made soon after that date. That provision accelerates by approximately one year the timeframe that the United States may request information under the Guernsey/Jersey TIEAs, relative to other TIEAs.

¹³⁵Bahamas TIEA art. 3(4).

¹³⁶Guernsey TIEA art. 9; Jersey TIEA art. 9. That term is consistent with the cost provision in the Bahamas TIEA article 6(4) as well as the direct “out-of-pocket” cost reimbursement requirement of the Cayman and BVI TIEAs’ article 10.

¹³⁷Isle of Man TIEA art. 9.

¹³⁸Guernsey TIEA art. 10; Jersey TIEA art. 10.

¹³⁹Isle of Man TIEA art. 11.

¹⁴⁰Cayman TIEA art. 11; BVI TIEA art. 11.

¹⁴¹Bahamas TIEA at 6(2).

¹⁴²Isle of Man TIEA art. 10.

¹⁴³Guernsey TIEA art. 12; Jersey TIEA art. 12. See *supra* notes 13 and 28.

¹⁴⁴Sharp, Harrison, et al., *supra* note 6.

¹⁴⁵*Id.*

¹⁴⁶Sharp, Harrison, et al., *supra* note 6 at 195. The Guernsey/Jersey TIEAs do not restrict criminal matters to criminal tax evasion, however, the Cayman and BVI TIEAs do contain that limitation. Cayman TIEA art. 4; BVI TIEA art. 4.

2. *Isle of Man TIEA*

The Isle of Man TIEA contains a similar entry into force procedure that requires each party to notify the other of the party's completion of "necessary internal procedures" before entry into force.¹⁴⁷ Unlike the Guernsey/Jersey TIEAs, when the Isle of Man TIEA enters into force, it will be effective from 1 January 2004 for criminal tax matters for taxable periods beginning on or after 1 January 2004. If there is no taxable period, it will be effective for all events or matters arising on or after 1 January 2004.¹⁴⁸ In addition, on entry into force, the Isle of Man TIEA will be effective from 1 January 2006 for all other matters covered in article 1 and "relating to taxable periods beginning on or after January 1, 2006." If the matter does not cover a taxable period, then the fallback effective date applies to all charges to tax arising on or after 1 January 2006.¹⁴⁹

N. Termination

1. *Guernsey/Jersey TIEAs*

The Guernsey/Jersey TIEAs have no set term, and will remain in force until otherwise terminated.¹⁵⁰ Either party may terminate the TIEA by giving notice of termination in writing. The termination will become effective on the first day of the month following the expiration of

three months after the receipt date of termination notice by the other party.¹⁵¹ It should be noted that the terminating party "shall remain bound by the provisions of article 8 with respect to any information obtained" under the Guernsey/Jersey TIEAs.¹⁵² No post-termination clause appears to bind the party that did not terminate the TIEA. This appears to be a drafting oversight, but it is consistent with the parallel provision in the Cayman and BVI TIEAs.¹⁵³

2. *Isle of Man TIEA*

The Isle of Man TIEA provides that either party may terminate the TIEA by a termination notice by letter to the other party.¹⁵⁴ The termination's effective date is the first day of the month following the expiration of six months — instead of three — after the receipt date of the notice.¹⁵⁵ The confidentiality provisions in article 8, similar to the Guernsey/Jersey TIEAs, will bind a terminating party. No continuing confidentiality provision is provided for the non-terminating party, which begs the question of whether this is a glaring oversight.

II. Conclusion

The Guernsey, Jersey, and Isle of Man TIEAs clearly show that the U.S. government's commitment to control abusive offshore structures has traveled across the Atlantic Ocean and onto European

shores. The IRS now is armed with a new set of TIEAs to broaden its assault on improper offshore transactions. Unlike its Caribbean counterparts, the new TIEAs contain a number of varying technical terms, as well as materially different wholesale provisions — including the accelerated effective dates for criminal tax matters in the Guernsey/Jersey TIEAs. However, similar to its Caribbean counterparts, the new TIEAs must promulgate or enact "internal procedures" for guidance and clarification on many open or unclear agreement provisions. ♦

¹⁴⁷Isle of Man TIEA art. 12.

¹⁴⁸Isle of Man TIEA art. 12(2)(a). The limitation to tax periods beginning on or after 1 January 2004 mirrors the provision of article 12(2) of the Cayman and BVI TIEAs.

¹⁴⁹*Id.*

¹⁵⁰Guernsey TIEA art. 13(1); Jersey TIEA art. 13(1).

¹⁵¹Guernsey TIEA art. 13(2); Jersey TIEA art. 13(2).

¹⁵²Guernsey TIEA art. 13(3); Jersey TIEA art. 13(3).

¹⁵³Cayman TIEA art. 13(3); BVI TIEA art. 13(3). The Bahamas TIEA requires only three months notice to terminate the agreement. Bahamas TIEA art. 7(7).

¹⁵⁴Isle of Man TIEA art. 13(1).

¹⁵⁵Isle of Man TIEA art. 13(2).