

# FIELD PROCEDURES FOR HANDLING FOREIGN-INITIATED “SPECIFIC” REQUESTS UNDER E.O.I. AGREEMENTS

## Authors

Stanley C. Ruchelman  
Sheryl Shah

## Tags

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## INTRODUCTION

For some clients, questions regarding exchanges of information between the I.R.S. and the tax authorities of another country are a matter of concern. For a business, the worry may not be directed to automatic exchanges of information, because those exchanges are part of a global attack on noncompliance. Rather, the concern involves ordinary business operations. Can the I.R.S. obtain information regarding the U.S. business transactions of a foreign corporation, and if it can, will the information be turned over to a foreign tax authority?

In December 2015, the I.R.S. issued three International Practice Units describing how the I.R.S. treats requests for exchanges of information (“E.O.I.’s”) from foreign tax authorities. These International Practice Units are listed below:

- Document E.O.I./P.U.O./P\_20.2\_04(2015) – Field Procedures for Handling Foreign Initiated “Specific” Requests under E.O.I. Agreements
- Document E.O.I./C.U./P\_20.1\_01(2015) – Overview of Exchange of Information Programs
- Document E.O.I./C.U./P\_20.1\_02(2015) – Types of E.O.I. Exchanges

An E.O.I. involves the coordination of taxpayer information related to examinations, inquiries, or investigations generally resulting from an on-going examination of a particular tax return, collection matter, criminal investigation, or other tax administrative procedure. A foreign-initiated specific E.O.I. request involves a foreign country that is a party to a tax information sharing agreement (*i.e.*, a foreign partner). The foreign partner initiates a specific request for tax-related information that is sent to the the U.S. Competent Authority. The information request is disseminated to various operating divisions within the the I.R.S. in order to obtain the requested information.

These International Practice Units describe the processes and procedures for I.R.S. field personnel to follow when complying with a foreign-initiated E.O.I., the different types of exchanges, and the variety of information that can be requested.

## E.O.I. AGREEMENTS<sup>1</sup>

The international tax sharing agreements that may lead to an exchange of tax-related information include the following:

- Tax treaties, which are primarily intended to prevent double taxation

<sup>1</sup> Document E.O.I./C.U./P\_20.1\_01(2015).



- Tax information exchange agreements (“T.I.E.A.’s”), which are designed to facilitate the exchange of tax-related information between foreign partner countries
- Mutual legal assistance treaties, which authorize the E.O.I. for the purpose of enforcing criminal laws, including criminal tax laws
- Multilateral agreements to which the U.S. is a party and which authorize E.O.I. for tax purposes
- Tax implementation or coordination agreements, which are bilateral agreements that allow for exchanges of tax-related information between the United States and its five territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands)
- Intergovernmental agreements, which are bilateral agreements involving mutual promises by the contracting states intending to prevent double taxation or perhaps double non-taxation

Many of the E.O.I. articles in such treaties are based on Article 26 of the U.S. Model Income Tax Convention (the “Convention”). The Convention permits the Competent Authorities to exchange information that may be relevant to the assessment, collection, enforcement, or prosecution of the taxes covered by the treaty. Information received under Article 26 is expressly required to be confidential and to be used only for tax purposes.

Competent Authorities are responsible for international tax information sharing exchanges and agreements. The U.S. Competent Authority is the Secretary of the Treasury, and the functions have been delegated to the Deputy Commissioner (International) of the Large Business & International (“LB&I”) Division. That authority has been delegated to certain officers within the Office of the Deputy Commissioner, LB&I.

All E.O.I.’s under tax treaties and T.I.E.A.’s are administered by (i) the Program Manager, Exchange of Information in Washington, D.C.; (ii) the Revenue Service Representative (“R.S.R.”) in Plantation, F.L.; (iii) the Tax Attachés stationed at the various overseas I.R.S. posts; and (iv) the Program Manager, Joint International Tax Shelter Information and Collaboration (“J.I.T.S.I.C.”) in Washington, D.C. J.I.T.S.I.C. was originally established in 2004 as the Joint International Tax Shelter Information Centre to combat cross-border tax avoidance. Building on its initial achievements, the J.I.T.S.I.C. network was re-established in 2014 as part of the Forum for Tax Administration (“F.T.A.”), and all members of the F.T.A. may participate.

Improper disclosure of returns and return information, as defined under Code §6103(b), may result in civil or criminal penalties under Code §§7431 and 7213. To avoid such complications, and to ensure compliance with applicable disclosure and confidentiality rules, only I.R.S. employees assigned to the E.O.I. headquarters, the R.S.R. office, the attaché offices, and J.I.T.S.I.C. may contact, provide any information to, request any information from, or exchange any information with a foreign tax official.<sup>2</sup>

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<sup>2</sup> For transfer pricing and mutual agreement proceedings, employees assigned to the Advance Pricing and Mutual Agreement Program and the Treaty Assistance and Interpretation Team may contact foreign tax officials with taxpayer information.

## THE PROCESS<sup>3</sup>

### **Process Steps**

When a specific E.O.I. request is received from a foreign partner country, the request is assigned to a particular I.R.S. employee who determines whether the request falls within the scope of the applicable tax sharing agreement. Once the request is determined to be appropriate, the analyst reaches out to the pertinent field office to fulfill the request, as some documents may already be part of ongoing investigations. Taxpayer-specific information may only be provided to a foreign authority through the U.S. Competent Authority under a tax information sharing agreement. This means that, as previously stated, I.R.S. field personnel cannot contact a foreign government office directly in connection with an examination.

### **Step 1: E.O.I. Request to Field**

Once the E.O.I. analyst determines that the assistance of I.R.S. civil examiners or criminal agents is required, the analyst forwards the following to the appropriate civil group manager or executive director:

- A cover memorandum and attached guidance<sup>4</sup>
- An Information Document Request (“I.D.R.”), which is the way the I.R.S. requests information from a person
- An administrative summons,<sup>5</sup> which must be issued and served, if necessary, when the I.D.R. has been unproductive
- Any other additional documentation or instructions pertinent to the request

I.R.S. personnel generally have 60 days from the date of the E.O.I. memorandum to fulfill the request. In the event the deadline cannot be met, I.R.S. field personnel must notify the E.O.I. analyst and provide a status report. Once the requested information is secured by field personnel, it is sent to the E.O.I. analyst. If the field personnel believe any of the information should not be disclosed to the foreign tax authority, the specific rationale must be provided.

A foreign-initiated request for information does not require the existence or initiation of an I.R.S. examination and does not constitute an I.R.S. examination. If an I.R.S. examination is contemplated as a result of the request, the I.R.S. field personnel must advise the E.O.I. manager.

### **Step 2: Field Response to E.O.I. Request**

All information obtained by I.R.S. field personnel is sent to the E.O.I. analyst at the address provided via secure email or regular mail in a traceable manner. The I.R.S. personnel may not directly provide any information to the foreign authorities.<sup>6</sup> Any such contact constitutes improper disclosure.

<sup>3</sup> Document E.O.I./P.U.O./P\_20.2\_04(2015).

<sup>4</sup> I.R.M. 4.60.1.2.2.3.

<sup>5</sup> *Id.*

<sup>6</sup> Code §6103.

***“A foreign-initiated request for information does not require the existence or initiation of an I.R.S. examination and does not constitute an I.R.S. examination.”***

### **Step 3: Use of Summons to Fulfill an E.O.I. Request**

A summons may be issued by I.R.S. personnel pursuant to an E.O.I. request even if the U.S. has no tax interest in the matter. These summonses may be prepared only by E.O.I. program personnel. Administrative summonses are prepared to request information from banks or other financial institutions.

## **EXCEPTIONS**

Tax sharing agreements limit the information that can be requested by the use of language such as “are not obligated to be exchanged” or “will not be exchanged,” usually referring to any trade, business, industrial, commercial, or professional secret or process that would harm a taxpayer’s competitive position. Consequently, all exchanges of information pursuant to tax information sharing agreements are subject to strict considerations of disclosure and confidentiality, including confidentiality attached to trade and other business secrets.<sup>7</sup>

## **TYPES OF EXCHANGES<sup>8</sup>**

### **Specific Requests**

These requests involve both inbound and outbound requests for information pertaining to a specific taxpayer, entity, or group under examination or investigation for a specific tax period, and may arise from collection, criminal, or other administrative matters. All domestic means of obtaining the requested information should be exhausted unless it would give rise to disproportionate difficulties.

### **Spontaneous Exchanges**

These exchanges involve the exchange of information that may not have been specifically requested but which the providing authority deems may be of interest to a foreign partner for tax purposes. The information may pertain to nonresident aliens, United States citizens, domestic or foreign corporations, or other taxpayers.

### **Automatic Exchanges**

These exchanges are coordinated through the E.O.I. headquarters, and the information exchanged generally includes “fixed, determinable, annual or periodical” income data routinely reported by payors in one country reporting for payees in the other. This information may be used by countries to verify whether the information is being correctly reported in those countries.

### **Industry-Wide Exchanges**

These exchanges take place in the form of meetings between tax officials of two or more partner countries that do not involve specific taxpayer information and focus on trends, policies, and operating practices of particular industries.

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<sup>7</sup> See I.R.M. 4.60.1.1.2.5, Limitations on Exchange of Information – Trade Secrets.

<sup>8</sup> Document E.O.I./C.U./P\_20.1\_02(2015).

*“All exchanges of information pursuant to tax information sharing agreements are subject to strict considerations of disclosure and confidentiality, including confidentiality attached to trade and other business secrets.”*

## **Simultaneous Examinations**

Under the oversight of an E.O.I. analyst, representatives of the I.R.S. and its foreign partners conduct separate independent examinations of select taxpayers within their respective jurisdictions. The objective of this program is to facilitate E.O.I.'s between the United States and its foreign partners, and to mutually secure other tax compliance efficiencies and benefits. This program is coordinated through E.O.I. headquarters.

## **Joint Audits**

During the course of the examination, representatives of the I.R.S. and the foreign partner coordinate strategies to jointly examine issues central to the two tax administrations. Joint audits are not the same as the simultaneous examination program. A joint audit involves two or more countries joining together to form a single audit team to examine transactions of one or more related taxpayers with cross-border business activities, and in which the countries have a common or complementary interest. The taxpayer jointly makes presentations and shares information with the countries. The audit team may include an LB&I Advance Pricing and Mutual Agreement Program representative to address double taxation issues from each country. This program is currently coordinated through J.I.T.S.I.C.

In contrast, a simultaneous examination is an arrangement between two or more tax administrations to examine simultaneously the tax affairs of taxpayers in which they have a common or related interest, with a view to exchanging any relevant information obtained. Each country conducts its audit in its own territory.

## **Simultaneous Criminal Investigation Program (“S.C.I.P.”)**

A combination of the previous two examinations, the S.C.I.P. involves the exchange of information and conducting of separate, independent criminal income tax investigations by the countries within their respective jurisdictions. During the course of these investigations, the personnel may meet to coordinate and discuss issues under the oversight of the assigned analyst. This program is coordinated through E.O.I. headquarters.

S.C.I.P.'s may be conducted pursuant to written working arrangements entered into by the U.S. Competent Authority (*i.e.*, the Deputy Commissioner (International), LB&I) and the Competent Authority of a foreign partner. However, the absence of a working arrangement does not preclude the I.R.S. from conducting a simultaneous criminal investigation with another tax administration.

## **Mutual Legal Assistance Treaty (“M.L.A.T.”)**

The Department of Justice, Office of International Affairs, Criminal Division is authorized to act as the U.S. Central Authority for M.L.A.T.'s. They receive and execute requests and administer the treaty relationship. Requests received by the United States from foreign treaty partners may require I.R.S. involvement in the form of financial investigative assistance and the production of tax returns and/or tax return information.

The role of E.O.I. headquarters is limited to obtaining tax returns and tax return information, with the assistance of I.R.S. Associate Chief Counsel (International), Branch 7 and the I.R.S. Disclosure Headquarters. I.R.S. Criminal Investigation

addresses all other components of the request, including any financial investigative assistance.

### **Mutual Collection Assistance Request (“M.C.A.R.”)**

Certain U.S. tax treaties provide for mutual collection assistance, including income tax treaties with the following countries:

- Canada (Article XXVIA)
- Denmark (Article 27)
- France (Article 28)
- The Netherlands (Article 31)
- Sweden (Article 27)

The Office of the Commissioner, LB&I has a working arrangement with designated Revenue Officers of the Small Business/Self Employed Division (“S.B./S.E. M.C.A.R. Coordinators”) to process M.C.A.R.’s. Analysts at E.O.I. headquarters coordinate with these designated officers to fulfill each M.C.A.R.

