EXPLANATORY MEMORANDUM TO

THE INTERNATIONAL TAX ENFORCEMENT (BERMUDA) ORDER 2008

2008 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Commissioners for Her Majesty's Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty.

This memorandum contains information for the Select Committee on Statutory Instruments.

2. Description

The draft Order brings into effect those arrangements specified in the Tax Information Exchange Arrangement set out in the Schedule to the draft Order and summarised in the attached Annex.

3. Matters of special interest to the Select Committee on Statutory Instruments

3.1 Type of resolution

The draft Order is subject to the affirmative resolution procedure.

3.2 Details of the Arrangement

Further details of the Arrangement scheduled to the draft Order are annexed to this memorandum.

4. Legislative Background

4.1 General

This Order is made under section 173(1) of the Finance Act 2006 (c. 25).

Section 173 provides the mechanism by which international tax arrangements may include provisions about, among other things, the exchange of information foreseeably relevant to the administration, enforcement or recovery of any tax or duty.

The relevant arrangement is scheduled to the draft Order. It is thus given domestic legislative effect.

In accordance with section 173(7) of the Finance Act 2006, a draft of this Order is required to be laid before and approved by a resolution of the House of Commons prior to submission to Her Majesty in Council.

4.2 EU Legislation

This instrument does not implement EU legislation.

5. Extent

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Secretary, the Rt. Hon. Jane Kennedy MP, has made the following statement regarding Human Rights:

In my view the provisions of the draft International Tax Enforcement (Bermuda) Order 2008 are compatible with the Convention rights.

7. Policy background

7.1 In order to counter cross border tax evasion and avoidance, tax authorities must be able to share tax information. Effective exchange of information is needed so that tax authorities can enforce their domestic tax laws in an increasingly globalised world. Exchange of information supports fair tax competition whilst protecting national tax bases from abusive practices.

Tax Information Exchange Arrangements facilitate the exchange of information between tax authorities for direct tax purposes. They assist Her Majesty's Revenue and Customs' tax compliance activities by allowing it to receive information from other countries or territories which helps to ensure that taxpayers pay the right amount of tax at the right time in the right country or territory. Tax Information Exchange Arrangements include safeguards to ensure that the information exchanged remains confidential and is used for tax purposes only.

7.2 The UK and Bermuda are committed to the elimination of harmful tax practices and this includes a commitment to the exchange of information on tax matters.

7.3 The competent authorities of the UK and Bermuda have also concluded a Memorandum of Understanding (MoU) on the application and interpretation of the Arrangement. The text of the MoU is included in the attached Annex.

8. Impact

8.1 On business, charities, etc.

There is no significant Regulatory Impact on businesses, charities, voluntary bodies or individuals arising from this Arrangement. Nor is there an impact on the UK public sector.

8.2 On the Exchequer

Tax Information Exchange Arrangements enable countries to obtain information to assist them to properly enforce their domestic tax laws. Such arrangements do not have an Exchequer cost; rather, they improve Her Majesty's Revenue and Customs' ability to assess and collect the correct amount of tax owed by UK taxpayers.

9. Contact

Jeff Worrell at HM Revenue and Customs, Tel: 020 7147 2723 or e-mail: jeff.worrell@hmrc.gsi.gov.uk can answer any queries regarding the instrument.

ANNEX

GENERAL

This, the first comprehensive Tax Information Exchange Arrangement (TIEA) to be signed by the UK with an Overseas Territory, broadly follows the OECD Model Agreement on Exchange of Information on Tax Matters. The UK previously concluded limited agreements providing for the exchange of information in relation to the taxation of income from savings with Jersey, Guernsey, the Isle of Man, Gibraltar, the Cayman Islands, the British Virgin Islands, Anguilla, the Turks & Caicos Islands, Montserrat, the Netherlands Antilles and Aruba. Bermuda already has TIEAs in force with the United States and Australia. This Arrangement will enter into force once both the UK and Bermuda have completed the domestic legislative procedures necessary to give effect to the Arrangement.

NOTES ON DETAILS

PARAGRAPH 1 – OBJECT AND SCOPE OF THE ARRANGEMENT

This Paragraph states that the competent authorities of the UK and Bermuda ("the Territories") will provide assistance through the exchange of information relevant to administering or enforcing the domestic laws of the Territories in respect of the taxes covered by this Arrangement.

PARAGRAPH 2 – JURISDICTION

This Paragraph limits the obligation on a Territory to provide information held by its authorities or in the possession or control of persons within its territorial jurisdiction.

PARAGRAPH 3 – TAXES COVERED

This Paragraph provides that the taxes covered by the Arrangement are taxes of every kind and description currently imposed by the UK and Bermuda. This formulation is based on the 'Exchange of Information' article of the OECD Model Tax Convention on Income and Capital.

It further states that the Arrangement will also apply to any identical or substantially similar taxes imposed after the date of its signature. The competent authorities of the Territories will notify each other of any major changes to their domestic taxation and related information gathering laws.

PARAGRAPH 4 – DEFINITIONS

This Paragraph defines the terms used in the Arrangement.

Sub-paragraph 1 lists the definitions alphabetically.

Sub-paragraph 2 states that the term "relevant" in respect of information, is to be interpreted such that information will be considered relevant even although its relevance to a current investigation can be determined only after the information has been received.

Sub-paragraph 3 states that any term not defined in the Arrangement will be construed by a Territory in accordance with its domestic law.

PARAGRAPH 5 – EXCHANGE OF INFORMATION UPON REQUEST

This Paragraph describes the specific elements, constraints and requirements for the effective exchange of information between the Territories.

Sub-paragraph 1 provides that that the competent authority of the requested Territory will provide, upon request, information irrespective of whether conduct being investigated would constitute a crime under the laws of the requested Territory.

Sub-paragraph 2 provides that if the competent authority in the requested Territory does not already hold the information requested, it will use all relevant information gathering powers to obtain the information regardless of whether it requires that information for its own tax purposes.

Sub-paragraph 3 states that information may be provided in the form of depositions of witnesses and authenticated copies of original records to the extent this is permitted under its domestic laws.

Sub-paragraph 4 provides that each Territory must ensure that its competent authority has the authority to obtain and provide information held by banks, other financial institutions or by any person (including a nominee or trustee) acting in an agency or fiduciary capacity and information on the ownership of companies, partnerships, etc.

Sub-paragraph 5 provides some general limitations on the obligation to provide information under this Arrangement.

Sub-paragraph 6 provides that the competent authority of the requested Territory must be satisfied that, where information relating to a non-resident or non-national is requested, or to someone who is not carrying on business in one or other of the Territories, such information is necessary for properly administering and enforcing the applicant Territory's fiscal laws.

Sub-paragraph 7 prescribes the information that shall be included by the requesting Territory when making any request.

Sub-paragraph 8 provides that the competent authority of the requested Territory will forward the requested information to the applicant Territory as quickly as possible. To this end the former will confirm receipt of a request in writing, notify the other Territory of any deficiencies in the request and of any obstacles encountered in supplying the information within prescribed time limits.

Sub-paragraph 9 sets out the criteria for determining whether a taxpayer is carrying on a business for both the United Kingdom and Bermuda.

PARAGRAPH 6 – TAX EXAMINATIONS ABROAD

This Paragraph provides that officials from one Territory may, under certain conditions, visit the other Territory to pursue tax investigations.

Sub-paragraph 1 provides that representatives from one Territory may enter the other to interview individuals and examine records.

Sub-paragraph 2 provides that representatives from one Territory may attend tax examinations undertaken by the authorities in the other. Sub-paragraph 3 prescribes the procedures applicable to examinations referred to in sub-paragraph 2.

PARAGRAPH 7 – POSSIBILITY OF DECLINING A REQUEST

This Paragraph describes various circumstances in which the competent authority of the requested Territory may (and may not) decline a request for information.

Sub-paragraph 1 provides that a Territory may decline to assist where the request is not valid (e.g. is outside the scope of the Arrangement or does not conform to the requirements of Paragraph 5), on public policy grounds, or where the requesting Territory's domestic laws would prevent it obtaining the same information from a person within its jurisdiction.

Sub-paragraph 2 additionally states that a Territory is not obliged to supply information that would disclose trade, industrial or commercial secrets.

Sub-paragraph 3 states that a Territory is not obliged to obtain or provide, in certain circumstances, information that is subject to legal privilege.

Sub-paragraph 4 states that a request for information may not be refused simply because a tax claim to which it relates is disputed by the taxpayer.

Sub-paragraph 5 provides that a requested Territory may decline a request for information where a tax law of the applicant Territory discriminates against a national of the requested Territory compared with a national of the requesting Territory in the same circumstances.

PARAGRAPH 8 – CONFIDENTIALITY

This Paragraph provides that any information received by a Territory under this Arrangement will be treated as confidential, indicates to whom the information may be disclosed (broadly, only persons concerned with the assessment or enforcement of tax) and describes the conditions attached to any wider disclosure.

PARAGRAPH 9 – SAFEGUARDS

This Paragraph confirms that the rights and safeguards conferred on persons by the requested Territory's laws or administrative practices continue to apply but they may not be applied in such a way that effective exchange of information is unduly prevented or delayed.

PARAGRAPH 10 – COSTS

This Paragraph provides that the incidence of any costs incurred in providing assistance will be agreed by the Territories' competent authorities. A Memorandum of Understanding between the competent authorities of the UK and Bermuda, signed on 4th December 2007 (text reproduced below) provides details of the initial cost-sharing arrangements.

PARAGRAPH 11 – MUTUAL AGREEMENT PROCEDURE

This Paragraph states that the Territories' competent authorities will jointly endeavour to resolve any difficulties in interpreting or applying this Arrangement and to this end may mutually determine the procedures to be used and communicate with each other directly.

PARAGRAPH 12 – ENTRY INTO FORCE

This Paragraph provides for mutual notification by the Territories of completion of the procedures required for the bringing this Arrangement into force and stipulates the date of its entry into force as the date of the later notification, with the Arrangement having effect twelve months following the date that the Government of Bermuda confirms their mutual acceptance of the Arrangement. (This date was 4th December 2007, so the Arrangement will commence twelve months after this date.)

PARAGRAPH 13 – TERMINATION

This Paragraph provides for termination of the Arrangement by either Territory and stipulates the date termination becomes effective and the conditions attached to it.

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE MINISTRY OF FINANCE OF BERMUDA

AND

HER MAJESTY'S REVENUE AND CUSTOMS

IN RELATION TO THE ARRANGEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF BERMUDA ON THE EXCHANGE OF INFORMATION RELATING TO TAX MATTERS

The Ministry of Finance of Bermuda and Her Majesty's Revenue and Customs, desiring to Facilitate the exchange of information relating to taxes, have reached the following understanding:

This Memorandum of Understanding is not intended to create legal relations either in international law or the domestic law of either party.

A**.** **Costs for obtaining and providing information in response to a request**

1. Pursuant to paragraph 10 of the Arrangement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Bermuda on the Exchange of Information Relating to Taxes (the Arrangement), it is mutually agreed that ordinary costs that are incurred for the purpose of responding to a request for information will be borne by the requested Territory. Such ordinary costs would normally cover internal administration costs of the Competent Authority and any minor external costs such as the cost of couriers.

2. All reasonable costs incurred by third parties in complying with the request for exchange of information are considered extraordinary costs and will be borne by the applicant Territory. Examples of extraordinary costs include, but are not limited to, the following:

(a) reasonable fees charged for staff employed by third parties in assisting with the request;
(b) reasonable fees charged by third parties for carrying out research;
(c) reasonable fees charged by third parties for copying documents;
(d) reasonable costs of engaging experts, interpreters, or translators;
(e) reasonable costs of conveying documents to the applicant Territory;
(f) reasonable litigation costs of the requested Territory in relation to a specific request for information;
(g) reasonable costs for obtaining depositions or testimony; and
(h) reasonable fees and expenses, determined in accordance with amounts

allowed under applicable law, of the person who voluntarily appears for an interview, deposition or testimony relating to a particular information request.

3. The Competent Authorities will consult each other in any particular case where extraordinary costs are likely to exceed $US 500 to determine whether the applicant Territory will continue to pursue the request and bear the cost.

4. In the event that the requested Territory finds it difficult or impossible to comply with a request or a series of requests for information from the applicant Territory because of limited staff or financial resources, the Competent Authorities will consult and, if mutually agreed, the applicant Territory will bear the costs associated with complying with a request.

B. **Interpretation and application of Paragraph 5**

5. The Competent Authorities are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

6. Recognising that only a small number of named senior officials in the United Kingdom are designated as an authorised representative of the Commissioners for Revenue and Customs for the purposes of Arrangement, only those named persons may make requests in accordance with paragraph 5 of this Arrangement. When making a request, in a matter which does not constitute serious tax evasion, such persons will certify that the request being made is necessary for the determination of the tax liability of the taxpayer in question. The competent Authority of the United Kingdom will regularly (normally, once a year) provide the Competent Authority of Bermuda with a list of the designated senior officials.

For the Bermuda Ministry of Finance	For Her Majesty's Revenue and Customs
Donald A. M. Scott Financial Secretary Ministry of Finance of Bermuda Date: 4th December 2007	Andrew J. Dawson Head of the Tax Treaties Team HM Revenue and Customs Date: 4th December 2007