

banning of tax patents to the application of anti-laundering statutes. For example, the American Institute of Certified Public Accountants and KPMG LLP both support efforts to curb tax patents while the American Bar Association and the Intellectual Property Owners Association are apprehensive about efforts to change patent law. CT Corp., a legal software and services provider, is worried about the provisions that would apply anti-money-laundering standards to business formation agents such as law firms.

### Clarity Coming Soon

Driving the intensifying interest in the Stop Tax Haven Abuse Act is that the political climate has changed significantly from the time the bill first emerged in 2007. Senate Finance Committee Chair Max Baucus, D-Mont., is working on his own anti-tax-haven bill, although his bill lacks several provisions found in the Levin-Doggett bill, such as a blacklist. Adding to the momentum was the announcement by Obama, who as a senator was a cosponsor of the 2007 Stop Tax Haven Abuse Act, of his international tax reform and anti-tax-haven plan, which includes some elements of the Levin-Doggett bill dealing with ownership of offshore accounts, reporting, and other anti-tax-haven efforts.

The final form of any large-scale anti-tax-haven bill remains unclear, but observers suggest that clarity will come sooner rather than later. Quinlan agrees that the political momentum has changed. Last year he had only what he called informational meetings with several congressional offices — in part because it was expected Congress would not act on the bill at the time. Now things are different, he said, stressing that the next crucial step in drafting legislation will be a scoring of a bill for revenues.

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“I would say the political future is pretty good” for the Stop Tax Haven Abuse Act, said Blum. “The hammer is down.” Blum speculated that the end product will not completely mirror the Levin-Doggett bill but will be something between it and the Baucus draft. “Up to now nobody has thought this would go anywhere,” he said. ■

*Kristen A. Parillo contributed to this article.*

## A Cayman Islands-Based Attorney Talks About Offshore Tax Havens

*By Jeremiah Coder — jcoder@tax.org*

This March, as the Obama administration and lawmakers were preparing to crack down on what many see as abuse of tax havens overseas, attorneys with one of the major international law firms specializing in investment and finance paid a visit to Washington. Charles Jennings, joint managing partner of Maples and Calder in the Cayman Islands, subsequently agreed to respond to questions by email from *Tax Notes* contributing editor Jeremiah Coder.

**Tax Analysts:** Maples and Calder has been called the largest offshore law firm in the world. What are some common misconceptions about the type of work you do?

**Maples and Calder:** The primary misconception is that Maples and Calder has formed thousands of companies which are owned by U.S. individuals seeking to use bank secrecy laws to avoid U.S. taxes. On the contrary; our business focuses on facilitating international financial and commercial activity for an almost exclusively institutional client base of international financial institutions, investors, and corporations from 99 countries around the world. We are the leading Cayman Islands law firm for the formation of international investment funds — including hedge funds and private equity funds, capital markets and structured finance companies, and funds used to finance commercial aircraft and ships, joint venture vehicles, and companies formed to effect public offerings.

Insofar as the United States is concerned, our work facilitates the formation of investment funds by U.S. fund managers for their international investors for foreign investment into the U.S. and the export sale of U.S. products. As stated in the July 2008 Government Accountability Office report on the Cayman Islands, “Ex-Im Bank officials explained that they frequently created Cayman Islands entities to facilitate the purchase of U.S. aircraft.” Similarly, the GAO report notes that “OPIC officials stated that foreign investors . . . value the Cayman Islands’ reputation for legal neutrality towards investors from different jurisdictions.” Moreover, only approximately 5 percent of the entities which we form are wholly owned by U.S. persons, and nearly all of those are owned by U.S. corporations. [For the GAO report, see *Doc 2008-16393* or *2008 TNT 144-17*.]

Our clients do not come to the Cayman Islands for bank secrecy. In fact, the Cayman Islands has a tax information exchange agreement with the

United States, and the 2008 GAO report quotes an IRS official who “told us that the Cayman Islands government has provided the requested information in a timely manner for all TIEA requests.” The report also quotes a senior official from the Department of Justice who told the GAO “that the Cayman Islands is one of DOJ’s best partners among offshore jurisdictions.”

**TA:** How has advising companies regarding international structured finance transactions changed over the past decade?

**Maples and Calder:** The typical Cayman Islands company and partnership structures used in international structured finance transactions are robust and have been in a settled form for approximately the last 20 years or so, having been thoroughly vetted and approved by a broad range of institutional investors and the credit rating agencies. In terms of major change, the Cayman Islands introduced internationally compliant anti-money-laundering laws, and so (unlike Delaware and several other U.S. states) we undertake significant due diligence and know-your-customer checks on our clients before they can form entities.

**TA:** What changes to structuring international financial transactions do you think are on the horizon?

**Maples and Calder:** We are aware that bodies such as the Financial Accounting Standards Board, the European Union, and the G-20 are studying financial services regulation and the relevant accounting treatment in light of the current global economic crisis. The Cayman Islands is committed to cooperating constructively with whichever body the G-20 or the EU may appoint to review financial services regulation. It is too early to tell at this stage whether any new regulations will change the structuring of international financial transactions in the Cayman Islands.

**TA:** How could potential legislation by the U.S. Congress to combat perceived offshore tax abuses affect global finance?

**Maples and Calder:** The Cayman Islands is receptive to exploring additional ways in which it can work cooperatively with foreign governments, including the U.S., to address their concerns. Whilst it is not for us to comment on U.S. tax policy changes, we understand that U.S. business groups such as the Managed Funds Association and the U.S. Chamber of Commerce, amongst others, have recently expressed concerns about possible unintended negative consequences of proposed changes on foreign investment into the United States that could lead to the loss of U.S. business with a consequential loss of U.S.-based jobs and taxable revenue.

**TA:** In advising businesses on relocation or incorporation issues, how do you handle short-term shifts in tax competitiveness among countries?

**Maples and Calder:** We are qualified to advise only on the laws of the Cayman Islands, Ireland, and the British Virgin Islands. We therefore are not qualified to, and do not, advise clients on these issues, upon which we require our clients to take advice from experienced legal counsel in the other relevant jurisdictions.

**TA:** Given a number of tax-advantaged jurisdictions in the EU and elsewhere, such as Ireland, what advantages do the Cayman Islands offer that attract businesses to the country?

**Maples and Calder:** The Cayman Islands offer to sophisticated international institutional business and investors a tax and exchange control-neutral jurisdiction in the Eastern time zone region for forming companies and partnerships for international transactions, a well-regarded regulatory system for investment funds, a robust litigation and legal system — with final rights of appeal to the Privy Council in London, a creditor-friendly regime which recognizes security interests, a bankruptcy regime which does not impede the enforcement of security interests, highly qualified professional service firms and advisers, and a high degree of acceptance amongst the investors and business community.

**TA:** What challenges does the international finance sector face as a result of multinational efforts to clamp down on terrorist financing?

**Maples and Calder:** The Cayman Islands’ regulatory system has vigorously addressed the challenges relating to money laundering and terrorist financing. As the GAO found in its 2008 report, “The Cayman Islands regulatory regime has also been deemed by the International Monetary Fund to be well-developed and in compliance with a wide range of international standards. Pursuant to a 2007 on-site evaluation, the Caribbean Financial Action Task Force (CFATF) also cited the Cayman Islands as having a strong compliance culture to anti-money-laundering and terrorist-financing activities.” Thus, in 1989 the Cayman Islands criminalized, among other things, dealings with the proceeds of drug trafficking. All-crimes anti-money-laundering legislation was introduced in 1996 with the Proceeds of Criminal Conduct Law [PCCL], which has been regularly amended and revised to meet international standards.

The Cayman Islands was the first Caribbean jurisdiction to introduce such legislation, and the PCCL has been used as a legislative model for other regional jurisdictions. The PCCL essentially provides for the criminalization of various forms of

money laundering; a mandatory reporting obligation and tipping-off offense; the empowerment of the police and courts to search for, freeze, and confiscate the proceeds of crime; and the ability of the courts and relevant authorities to assist in the enforcement of foreign confiscation judgments.

In addition, the Terrorism Law was introduced in 2003 and provides for terrorism and terrorist financing offenses. The Terrorism Law includes a mandatory reporting obligation and tipping-off offense and, since October 2001, the Cayman Islands have also applied the Terrorism (United Nations Measures) (Overseas Territories) Order, which provides for similar offenses.

**TA:** Does the shifting environment for bank secrecy have any effect on the business climate for your firm?

**Maples and Calder:** Our clients do not come to the Cayman Islands because of “bank secrecy.” So this does not affect our business. The Cayman Islands government has already entered into several tax information exchange agreements, including with the U.S., and it adopted the EU savings directive in 2004 to share bank account information with EU states.

**TA:** Has the IRS or Justice Department ever sought to acquire the names of taxpayers from you?

**Maples and Calder:** Only once. In September 2008 we received a notice for production from the Cayman Islands Tax Information Authority under the U.S. TIEA in relation to a specific group of companies for which we provided registered office services, and we complied with the request.

**TA:** What sort of relationship does the Cayman Islands now have with the OECD?

**Maples and Calder:** The Cayman Islands has agreed with the OECD to implement tax information agreements with its members and are on the OECD list of jurisdictions that have “committed to the internationally agreed tax standards.” In fact, the OECD recently praised the Cayman Islands for “setting a good example” in relation to tax information exchange arrangements and the introduction of a unilateral mechanism for providing tax information to other jurisdictions. The Cayman Islands has entered into 20 tax information exchange arrangements — 8 bilateral and 12 unilateral.

Footnote 4 to the OECD list recognizes that the Cayman Islands has enacted legislation to allow unilateral tax information disclosure and that that legislation is being reviewed by the OECD. The fact that this legislation has already been approved by the Irish, British, and German governments leads us to believe that its formal approval by the OECD will be confirmed shortly. The Cayman Islands government is also negotiating bilateral tax information

exchange agreements with several other countries in the spirit of international cooperation.

**TA:** Why is the Cayman Islands often referred to as a tax haven, and what steps has the country taken to shed that image?

**Maples and Calder:** As acknowledged by the U.S. Treasury in its recent letter to the GAO, it is very difficult to define a “tax haven.” As used by the OECD and similar bodies, we believe that it means a low- or no-tax jurisdiction that refuses to share tax information with other jurisdictions. Under this definition, the Cayman Islands is not a tax haven and, as described above, it has taken steps to share information with other jurisdictions through the execution of both bilateral and unilateral tax information exchange arrangements and through the introduction of automatic reporting of interest income under the EU savings directive.

**TA:** What specific services do you provide to your clientele, who are primarily corporations and hedge funds?

**Maples and Calder:** We provide advice on Cayman Islands, Irish, and British Virgin Islands law. We have affiliated companies, which provide registered office services, fund administration, accounting, registrar and transfer agency services, liquidation, and other related services to investment funds and companies. ■