



Supplementary Peer Review Report Phase 1 Legal and Regulatory Framework

BERMUDA



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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 100 jurisdictions, which participate in the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary as updated in 2004. These standards have also been incorporated into the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 plus Phase 2 – reviews. The Global Forum has also put in place a process for supplementary reports to follow-up on recommendations, as well as for the ongoing monitoring of jurisdictions following the conclusion of a review. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once approved by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to www.oecd.org/tax/transparency and www.eoi-tax.org.

Executive Summary

1. This is a supplementary report on the legal and regulatory framework for transparency and exchange of information in Bermuda. It complements the original Phase 1 Peer Review report on Bermuda (the 2010 Report) which was adopted and published by the Global Forum in October 2010.

2. This supplementary report considers the changes made by Bermuda since May 2010, the date at which the legal and regulatory framework was previously assessed, to address the recommendations made in the 2010 Report. Bermuda considers that legislative amendments introduced relating to elements A1 (availability of ownership and identity information), A2 (availability of accounting information), and C1 (effective exchange of information mechanisms) should mean that these elements are now considered to be in place, and the recommendations removed. Further, in respect of element B1 (access to information), which was “in place” in the 2010 Report, Bermuda considers that legislative amendments introduced means that the recommendation made for that element should be removed. On the basis of these legislative amendments, Bermuda has asked for a supplementary peer review report pursuant to paragraph 58 of the Methodology. Since the 2010 Report, Bermuda has also signed three new EOI agreements, and this further development of its network of EOI relationships is reflected in element C2.

3. This supplementary report concludes that in respect of element C.1, that Bermuda has made significant progress in addressing the recommendation made and that this element should now be considered to be in place, with no recommendations made. Also, the signature by Bermuda of a further seven EOI agreements since the 2010 report, is reflected in Part C of this report, concluding that those new agreements are in line with the international standard. Concerning element A.1, legislative amendments introduced since 2010 have the result that the recommendation on enforcement measures should be narrowed to relate to a smaller class of entities. For element A.2, accounting record obligations have been enhanced for some types of entities since the 2010 Report, with the result that the scope of entities to which the recommendation on that element relates, has been narrowed.

4. Regarding its ability to access information, Bermuda has now passed legislation to ensure that search and seizure powers previously only available for requests made under its EOI agreement with the US, are now available for requests made by all of its EOI partners. This change addresses the recommendation made on element B.1 in the 2010 Report, which is now deleted. For both elements B.1 and B.2, the determination remains that these element are in place, and there are now no recommendations made for either element.

5. Since 2010 Bermuda has taken steps to fully address two of the recommendations made in the 2010 Report, and has partially addressed two further recommendations. Combined with the signing of a further seven EOI agreements and the conclusion of a number of competent authority agreements, this demonstrates Bermuda's ongoing commitment to meet the international standards on tax transparency and information exchange. Bermuda is encouraged to continue to review and update its legal and regulatory framework in line with the remaining recommendations made in the 2010 Report, particularly as concerns the availability of ownership and identity information (element A1) and accounting information (element A2). Any further developments in the legal and regulatory framework, as well as the application of the framework to the EOI practices of Bermuda's competent authority will be considered in detail in the Phase 2 Peer Review which is scheduled to commence in the second half of 2012.

Introduction

Information and methodology used for the supplementary peer review of Bermuda

6. This supplementary peer review report was prepared pursuant to paragraph 58 of the Global Forum’s Methodology, and considers recent changes to the legal and regulatory framework of Bermuda based on the international standards for transparency and exchange of information as described in the Global Forum’s Terms of Reference. The assessment was based on information available to the assessment team including the laws, regulations, and exchange of information arrangements in force or effect as at November 2011, and other information supplied by Bermuda. It follows the 2010 Report on Bermuda which was adopted and published by the Global Forum in October 2010.¹

7. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. In respect of each essential element a determination is made that (i) the element is in place, (ii) the element is in place but certain aspects of the legal implementation of the element need improvement, or (iii) the element is not in place. These determinations are accompanied by recommendations for improvement where relevant. In particular, this report considers changes in Bermuda’s legal and regulatory framework which relate to the availability of accounting information and its information exchange mechanisms.

8. The supplementary review was conducted by an assessment team, which consisted of two expert assessors and one representative of the Global Forum Secretariat: Sarita de Geus, Senior Policy Advisor, International Tax Law at the Directorate-General for the Tax and Customs Administration of the Netherlands Ministry of Finance and Kotaro Yamada, Section Chief,

1. The 2010 Report was based on information available up to May 2010.

International Tax Policy Division Tax Bureau, Ministry of Finance, Japan; and Caroline Malcolm from the Global Forum Secretariat.

9. An updated summary of determinations and factors underlying recommendations in respect of the 10 essential elements of the Terms of Reference, which takes into account the conclusions of this supplementary report, is set out on page 29.

Compliance with the Standards

A. Availability of information

Overview

10. Effective exchange of information requires the availability of reliable information. This report considers the legal and regulatory framework now in place in Bermuda in so far as it relates to the enforcement measures in place to ensure compliance with record-keeping requirements (element A.1), as well as amendments to the obligations on companies and partnerships to keep relevant accounting records (element A.2.).

11. The 2010 Report found that in respect of ownership and identity information, that whilst Bermuda's legal and regulatory framework was generally sufficient to meet the international standard, three recommendations were made on this element (A.1) which was found to be in place but needing improvement. In 2011, Bermuda introduced the Specified Business Legislation Amendment Act 2011 (SBLA Act) which made a broad range of changes to Bermuda's legal framework relevant for EOI purposes, and that Act has now entered into force. In respect of the availability of relevant information, the SBLA Act introduced enforcement measures for some instances where previously there had been no sanctions for non-compliance with ownership and identity information obligations. However, it is not clear that any enforcement measure has been introduced for partnerships and companies in all instances, so the recommendation concerning enforcement measures remains, but its scope has been narrowed. The recommendations in the 2010 report for element A.1 concerning nominees and private trust companies also remain. There has been no change to the determination for element A.1.

12. In respect of the availability of accounting information under element A.2, the SBLA Act introduced amendments concerning partnerships and companies which generally appear to have addressed the recommendation made in the 2010 Report. However, in respect of foreign partnerships with a sufficient nexus with Bermuda, the requirements to retain all relevant account information, including underlying documents, is not clear. Therefore, the recommendation on element A.2 remains, but its scope has been narrowed to apply only to the accounting records required to be maintained by trusts, foreign companies and foreign partnerships with a sufficient nexus with Bermuda. The determination for element A.2 has not been changed.

13. The 2010 Report found that in respect of banking information, Bermuda has in place obligations to ensure that all records pertaining to accounts as well as relate financial and transactional information is available. Element A.3 was therefore determined to be in place, and no recommendations were made.

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

14. The 2010 Report found that in respect of ownership and identity information, the obligations imposed on companies, partnerships and trusts were generally sufficient to meet the international standard. Overall, in respect of ownership and identity obligations element A.1 was found to be in place, but needing some improvement with three recommendations made. Since the 2010 Report, Bermuda has introduced a number of legislative amendments, particularly in introducing additional penalties for noncompliance, with the result that the scope of the recommendation in element A.1 on enforcement measures has been narrowed.

15. However, recommendations still remain in respect of obligations to maintain ownership and identity information where Private Trust Companies act as trustees. There are currently 222 active registered Private Trust Companies operating in Bermuda. Also, where a trust is created under the laws of Bermuda which has no other connection with Bermuda, there may be no information about the trust available in Bermuda. Also, for nominees, the recommendation remains for an obligation to be established ensuring that all nominees maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person.

Enforcement measures (ToR A.1.6)

16. A recommendation was also made on element A.1 in the 2010 Report regarding the absence of enforcement measures in the case of non-compliance with some ownership and identity information obligations on companies and partnerships. Sections 65 and 66 of the Companies Act require all companies formed under Bermudian law to maintain a shareholder register at the company's registered office. The Specified Business Legislation Amendment Act 2011 (SBLA Act) has introduced amendments to the Companies Act by inserting s66A which imposes a penalty in the case of contravention of the obligations in sections 65 and 66 of the Companies Act. The penalty is BD75 per day, liable on summary conviction to the company and any officer of the company who knowingly contravenes, or permits or authorises the contravention.

17. A “permit company” is a company formed outside of Bermuda which engages in or carries on any trade or business in or from Bermuda, and which must obtain a permit from the Minister of Finance. The 2010 Report noted that a permit company must disclose all beneficial ownership upon application for a permit, and that it is the usual practice of the Minister, as referred to in section 136(1) of the Companies Act, to include a condition that the company must inform the Minister of any change in its beneficial ownership. In addition to the Minister's investigatory powers (section 146, Companies Act), the general penalty provision in section 148 of the Companies Act will apply to any overseas company, whether a permit company or not, which fails to comply with any provision of that Part of the Act, such that “the company, its officers and the person who appears to the court trying the case to be in charge of its affairs in Bermuda shall be liable to a fine of one thousand dollars”.

18. However in respect of Bermudian limited partnerships, including exempted limited partnerships, there are no penalties imposed for contravention of the obligation on the general partner to keep up to date the register of ownership and identity information of the limited partners (required by s7, Limited Partnership Act). There also remains an absence of penalties for non-compliance with obligations to keep ownership and identity information relating to foreign partnerships carrying on business in Bermuda, and trusts where the trustee is a Private Trust Company². On these grounds, the recommendation made in the 2010 Report regarding enforcement measures

2. A Private Trust Company is a company that provides trustee services only to those trusts which are specified in its memorandum of association or permit (clause 3, Trusts Exemption Order). As well as being exempt from licensing obligations, Private Trust Companies are also exempt from Bermuda's AML regime. See further, section A1.3 of the 2010 Report.

remains, but its scope is reduced to refer only to Limited Partnerships (including Exempted Limited Partnerships), foreign partnerships carrying on business in Bermuda and trusts where the trustee is a Private Trust Company.

Determination and factors underlying recommendations

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement	
Factors underlying Recommendations	Recommendations
There are currently inconsistent obligations on nominees to maintain ownership and identity information in respect of all persons for whom they act as the legal owner.	An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person.
Identity and ownership information may not consistently be available in respect of all express trusts with respect to which Private Trust Companies act as trustees.	Private Trust Companies should be required to maintain relevant identity and ownership information.
<u>In the case of Limited Partnerships (including Exempted Limited Partnerships), foreign partnerships carrying on business in Bermuda and trusts where the trustee is a Private Trust Company, some cases</u> there are currently no penalties for non-compliance with obligations to maintain ownership and identity information.	In so far as there are no penalties provided, introduce effective sanctions <u>for these types of</u> against entities and arrangements where they fail to comply with requirements to maintain and provide ownership and identity information.

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

19. The 2010 Report found that there were limited specific obligations imposed on entities other than Bermudian companies and exempted partnerships to keep reliable accounting records, including underlying documents. For all entities, there was no express minimum retention periods for which accounting records had to be kept. However, the 2011 SPLA Act introduced amendments concerning companies, partnerships and trusts which for most relevant entities has addressed the recommendation made in the 2010 Report.

Companies

20. All Bermudian companies must keep all relevant accounting records, including underlying documents pursuant to section 83 of the Companies Act. The SBLA Act has added an express 5-year minimum retention period for these records, as well as a penalty of BD7 500 for non-compliance (liable on summary conviction to the company and any officer of the company who knowingly contravenes, permits or authorises the contravention), with the insertion of section 83(5) and (6) of the Companies Act.

21. No amendment has been made however in respect of the accounting record obligations on Permit companies. The 2010 Report noted that Permit companies are only subject to a requirement to keep in Bermuda records of its acts and financial affairs to adequately show the business or trade being engaged in or carried on in Bermuda (s145, Companies Act). It is not clear that this includes all relevant accounting records, including underlying documents, and there is no express time period for which these records must be kept. Therefore, the recommendation on element A.2 in respect of companies has been narrowed to apply only to the accounting record requirements for foreign companies with a sufficient nexus with Bermuda.

Partnerships

22. The SPLA Act inserted sections 14(6) and 14(7) to the Exempted Partnerships Act, and s9A to the Limited Partnerships Act to ensure that clear requirements now apply to keep accounting information, including underlying documents for a 5 year minimum period. The SPLA Act amendments have also imposed penalties (of BD 7 500, liable on summary conviction to the company and any officer of the company who knowingly contravenes, permits or authorises the contravention) for non-compliance with those obligations.

23. However, in respect of relevant foreign partnerships, for example where they are carrying on business in Bermuda, the requirements to retain all relevant account information, including underlying documents, remains unclear. The Overseas Partnerships Act 1995 refers only to the keeping of “proper records of account”, with the scope of such records not defined. On the other hand, the obligation to keep such “proper records” for a minimum 5 year period has been made express. Therefore, the recommendation on element A.2 remains, but its scope has been significantly narrowed regarding partnerships to only apply to the accounting records required to be maintained by foreign partnerships carrying on business in Bermuda.

Trusts

24. The 2010 Report notes that all Bermuda trustees are subject to common law obligations to ensure that records and accounts are prepared and maintained for a reasonable period of time. Also, for licensed trustees, there is non-binding guidance in the Code of Practice and the Statement of Principles made under the Trusts Regulation Act. Compliance with the Code of Practice and Statement of Principles will be taken into account by the Bermudan Monetary Authority when determining whether a licensee fulfils the minimum criteria for granting or renewal of a trust license. However, neither the Code nor the Statement makes specific reference to the retention of underlying documentation, nor a minimum retention period for accounting records. Also, un-licensed trustees including Private Trust Companies are not subject to these obligations.

25. Since the 2010 Report was prepared, Bermuda has enacted an additional requirement to retain trust accounting records, for trusts which are exempt from the licensing regime (in particular, trusts administered by Private Trust Companies). The Trusts (Regulation of Trust Business) Exemption Order 2002 has been amended to require under clause 8, that all trustees exempted from licensing under that Order, to nonetheless retain “trust records of account” for a period of 5 years from the date such records were prepared. However, there is no definition of “trust records of account”, and there is no obligation to prepare such records in the first instance. The recommendation on element A.2 is therefore maintained, including to the extent it applies to trusts administered by Private Trust Companies.

26. Therefore, on the basis of the amendments made regarding accounting records through the SBLA Act, the scope of the recommendation on element A.2 has been narrowed. In particular, the deficiencies in respect of Exempted Partnerships, Limited Partnerships and all companies formed in Bermuda have been addressed. No change has been made to the determination for this element.

Determination and factors underlying recommendations

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
<p><u>Bermudan companies as well as Limited and Exempted Limited Partnerships are subject to obligations to keep relevant accounting records, including underlying documentation, for a minimum 5 year period. However, for other relevant entities and arrangements including trusts, and foreign companies and foreign partnerships carrying on business in Bermuda, there are currently inconsistent obligations on relevant entities and arrangements to maintain reliable accounting records including underlying documentation, for a minimum 5 year period.</u></p>	<p>Introduce consistent, binding requirements on all relevant entities and arrangements, <u>in particular trusts, and foreign companies and partnerships carrying on business in Bermuda</u>, to maintain reliable accounting records including underlying documentation for a minimum of 5 years.</p>

A.3. Banking information

Banking information should be available for all account-holders.

27. The 2010 Report found that Bermuda has a legal framework in place to ensure the availability of relevant banking information for all account holders. No change to the determination in respect of element A.3 is made.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

B. Access to information

28. A variety of information may be needed in respect of the administration and enforcement of relevant tax laws and jurisdictions should have the authority to access all such information. The 2010 Report found that both element B1 and B2 were in place. In respect of element B1 a recommendation was made, with the 2010 Report noting that search and seizure powers were available to access information for requests made pursuant to one of Bermuda’s TIEAs. The recommendation proposed that Bermuda should consider extending search and seizure powers to requests made by all of its EOI partners.

29. In the Specified Business Legislation Amendment Act 2011, Bermuda has addressed that recommendation, extending the search and seizure powers to all of its EOI partners. No other relevant changes have been made by Bermuda concerning elements B1 and B2 since the 2010 Report. Therefore the recommendation on element B1 is removed, with the result that both elements B1 and B2 remain in place, and with no recommendations made in respect of either element.

B.1. Competent Authority’s ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

30. The 2010 Report found that Bermuda’s competent authority has broad powers to obtain relevant information from any person holding such information. This included search and seizure powers under the supervision of a judge when a request was made under the USA-Bermuda EOI Agreement.

31. In 2011, the SBLA Act 2011 amended the International Cooperation (Tax Information Exchange Agreement) Act (“International Cooperation Act”), replacing the definition of agreement to include a “Double Taxation Agreement,

or a treaty or agreement that incorporates an agreement to exchange information concerning tax”. Section 6A was also introduced, which granted search and seizure powers for all such agreements to the Financial Secretary or Assistant Financial Secretary, under the supervision of a judge who must issue a warrant. This power is similar to the search and seizure power previously only available for requests made under the USA-Bermuda EOI Agreement. The recommendation made concerning this issue in the 2010 Report, is therefore removed.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	Recommendations
In certain circumstances, the competent authority has search and seizure powers available, however only in respect of an EOI request made pursuant to the USA-Bermuda EOI agreement	Bermuda should consider extending the search and seizure powers, with appropriate pre-conditions as safeguards, to EOI requests made by all of Bermuda’s EOI partners.

B.2. Notification requirements and rights and safeguards

The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

32. The 2010 Report found that the rights and safeguards available in Bermuda are compatible with the effective exchange of information. In particular, there is no obligation to notify the subject of a request for information. The discretion to exchange certain information, namely trade, business, industrial, commercial or professional secret or relating to matters of public policy, is consistent with the international standard. In respect of information subject to legal privilege or public policy restrictions, this limitation is incorporated into Bermuda’s domestic law (s4, International Cooperation Act), as well as being found in EOI agreements. No changes have been made to Bermuda’s legal and regulatory framework concerning element B.2 since the 2010 Report.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

C. Exchanging information

33. This section of the report examines whether a jurisdiction has in place a network of agreements that would allow it to achieve effective exchange of information in practice. The 2010 Report noted that element C1 was in place but needing improvement. In particular, a recommendation was made that noted certain provisions in Bermuda's EOI agreements may limit the effectiveness of exchange of information and should correspond with the international standard. For each of the elements C2, C3 and C4 however, the 2010 Report determined they are in place. As with other Phase 1 reports, in respect of C5 the report noted that it involved issues of practice that would be dealt with in Bermuda's Phase 2 review.

34. In respect of the recommendation made on element C.1 in the 2010 Report, Bermuda has worked actively to ensure that the provisions in its EOI agreements will be interpreted in a manner consistent with the international standard. In this regard, it has begun a program of negotiating competent authority agreements (CAAs) with its EOI partners, which aim *inter alia* to clarify any possible questions of interpretation. Bermuda has already signed 10 CAAs, and has concluded negotiations on a further two. In this way, Bermuda has made significant progress in addressing the matters raised under element C1 in the 2010 Report. The supplementary report concludes therefore, that the recommendation on element C1 should be removed, and the element upgraded to "element in place".

35. Further, since the 2010 Report, Bermuda has continued to develop its exchange of information (EOI) network with relevant partners, in line with the recommendation made on element C2. It has signed a further seven EOI agreements, with Argentina, China, the Czech Republic, India, Indonesia, Malta and South Africa. Each of these agreements is in line with the standard, and generally follows the terms of the OECD Model TIEA. As with the earlier EOI agreements signed by Bermuda, the confidentiality of information exchanged pursuant to these New Agreements remains protected by provisions in the agreements themselves as well as in Bermuda's domestic law. The discretion for Bermuda to exchange certain types of information (such as business, or professional secrets, or information the subject of attorney-client privilege), which is permitted under the standard, is also incorporated in domestic law as well as Bermuda's EOI agreements.

36. Overall therefore, each of elements C.1, C.2, C.3 and C.4 are found to be in place, with no determination made in respect of element C.5 which concerns issues of practice that will be dealt with in Bermuda’s Phase 2 Review which is scheduled to commence in the second half of 2012.

C.1. Exchange of information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

37. The additional seven exchange of information agreements signed by Bermuda since the 2010 Report (the New Agreements)³ are considered below. The International Cooperation Act is described in Parts B and C of the 2010 Report, and that Act sets out the access powers and the domestic application of Bermuda’s EOI mechanisms. It applies equally to the New Agreements.

Foreseeably relevant standard (ToR C.1.1.)

38. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless it does not allow “fishing expeditions”, *i.e.* speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of “foreseeable relevance” which is included in Article 1 of the OECD Model TIEA.

39. Each of the New Agreements includes a provision equivalent to Article 1.

40. In respect of Bermuda’s older agreements, and although all of the EOI agreements concluded by Bermuda generally follow the terms of the OECD Model TIEA, the 2010 Report (paragraphs 148-152) noted that some agreements contained additional provisions which could have been interpreted to have a restrictive impact on the effective exchange of information. In particular, some agreements required a specific certification issued by a senior official of the requesting jurisdiction regarding the relevance of the request for the determination of the tax liability under the laws of the applicant party. Also, the use of the words “tax liability” in some agreements may not have completely covered the object and scope as stated in Article 1 of each EOI agreement, for instance information relevant to the collection of tax, investigation or prosecution of tax matters; and in addition that certain agreements limited the obligation of the requested party to provide information for a period more than 6 years prior to the tax period under consideration.

3. Tax Information Exchange Agreements between Bermuda and Argentina, China, the Czech Republic, India, Indonesia, Malta and South Africa

41. Since then Bermuda has been proactive in addressing the points concerning element C.1.1 highlighted in the 2010 Report. It has commenced the negotiation of, and in many cases already signed, Competent Authority Agreements (CAAs) with its EOI partners to ensure that its agreements are interpreted consistently with the standard in line with the intention of the parties. To date, Bermuda has signed CAAs with Canada, Japan, the Nordic countries (Denmark, Faroe Islands, Finland, Greenland, Iceland, Norway, and Sweden) and South Africa, whilst negotiations on CAAs with Germany and the United Kingdom have been concluded. In addition to clarifying questions of interpretation, certain of the CAAs also include templates for requests for information and address the allocation of costs between the requested and requesting parties.

42. Thus, in its CAAs with Japan and the Nordic countries it has been clarified, that the term “senior official” refers to every person with Competent Authority status, and in its CAA with Japan that the term “tax liability” includes also information relevant to the collection of taxation, investigation or prosecution of tax matter. Further, the CAAs with Canada, Japan, and the Nordic countries it has been clarified that the period a requested state should provide information for extends beyond the 6 years prior to the tax period under consideration, if information is still in the possession and /or control of a person Bermuda. Through the CAAs already signed, and those currently being negotiated, Bermuda ensures that, in line with the intention of the parties, the provisions of its EOI agreements are in line with the international standards in these regards.

In respect of all persons (ToR C.1.2.)

43. All of the New Agreements contain a provision concerning jurisdictional scope which is equivalent to Article 2 of the OECD Model TIEA.

Exchange information held by financial institutions, nominees, agents and ownership and identity information (ToR C.1.3.)

44. The New Agreements do not allow the requested jurisdiction to decline to supply information solely because it is held by a financial institution, nominee or person acting in an agency or a fiduciary capacity, or because it relates to ownership interests in a person.

Absence of domestic tax interest (ToR C.1.4.)

45. All of the New Agreements signed by Bermuda allow information to be obtained and exchanged notwithstanding it is not required for any domestic tax purpose in Bermuda.

Absence of dual criminality principles (ToR C.1.5.)

46. None of the New Agreements apply the dual criminality principle to restrict the exchange of information.

Exchange of information in both civil and criminal tax matters (ToR C.1.6.)

47. All of the New Agreements concluded by Bermuda provide for the exchange of information in both civil and criminal tax matters.

Provide information in specific form requested (ToR C.1.7.)

48. All of the New Agreements allow for information to be provided in the specific form requested, to the extent allowable under the requested jurisdiction's domestic laws.

In force (ToR C.1.8.)

49. Three of New Agreements (with Argentina, China and India) have entered into force so far. Of the total 30 EOI agreements now signed by Bermuda, 20 have entered into force. In respect of each Bermuda's signed agreements, Bermuda has taken all steps necessary for its part to bring those agreements into force with the exception of one of the New Agreements (signed in 2011, with Malta). See Annex 3 for details of signing and entry into force dates of Bermuda's EOI agreements.

Be given effect through domestic law (ToR C.1.9.)

50. The International Cooperation Act and the USA Bermuda Tax Convention Act give effect to Bermuda's arrangements for the exchange of information for tax purposes. Those Acts appoint the Minister of Finance as the competent authority of Bermuda for the purposes of its EOI agreements. Paragraphs 168-169 of the 2010 Report note that the International Cooperation Act expands, in a limited way (relating principally to in the absence of agreement with its EOI partner on payment of the costs incurred in providing EOI assistance), the circumstances in which the competent authority may decline a request. In many cases, the CAAs now concluded by Bermuda address the apportionment of costs relating to EOI requests, as between the requested and requesting parties.

Conclusion

51. In the 2010 Report, some issues were identified under element C1 in respect of Bermuda’s mechanisms for the effective exchange of information. These are minor issues that did not warrant a downgrade of the determination to “not in place” at the time of the Phase 1 report. Since then, with respect to 10 of the EOI relationships referred to therein, Bermuda, has signed CAAs and has already concluded negotiations for a further two CAAs. This addresses many of the issues raised under element C1 in the 2010 Report, and Bermuda has advised that its program of negotiations is continuing. Further, since the 2010 Report was made, the Global Forum’s view of the issues raised under element C1 of the 2010 Report has evolved, and the subsequent reports adopted by the Global Forum regarding Bermuda’s EOI partners have not consistently raised the same issues.

52. Therefore, the matters raised in the 2010 Report should now be addressed consistently with these latter reports, and taking into account that Bermuda through the negotiation of CAAs, has nonetheless taken steps to address any uncertainty about the interpretation of its EOI agreements in line with the standard. As the issues concerned were determined to be of a minor nature at the outset, and considering the continuing efforts taken to address them on a bilateral basis. Therefore, the recommendation under element C1 is removed and the element upgraded to “element in place”. Further, the effective working of this arrangement of EOI agreements complemented by CAAs, can be considered in the Phase 2 review of Bermuda scheduled to commence in the second half of 2012.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is <u>in place</u>, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
The provisions within Bermuda’s domestic law and EOI agreements which have been highlighted, may limit the effectiveness of information exchange. The practical effect of these discretions and obligations will be considered in the Phase 2 Peer Review of Bermuda.	In principle, the provisions in Bermuda’s domestic legislation and EOI agreements which have been highlighted in this section should correspond with the international standard.

C.2. Exchange of information mechanisms with all relevant partners

The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

53. Since the 2010 Report, Bermuda has signed a further seven agreements for the exchange of information which meet the international standard (TIEAs with Argentina, China, the Czech Republic, India, Indonesia, Malta and South Africa).

54. To date therefore, Bermuda has signed 30 EOI agreements, of which 20 are presently in force. With the exception of one of the New Agreements (signed in 2011, with Malta) Bermuda has taken all steps necessary for its part to bring each of its signed EOI agreements into force. An up-to-date list of Bermuda's exchange of information mechanisms can be found in Annex 3.

55. No change to the determination or recommendation in respect of element C.2 is made.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	Recommendations
	Bermuda should continue to develop its EOI network with all relevant partners.

C.3. Confidentiality

The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

Information received: disclosure, use and safeguards (ToR C.3.1.) and all other information exchanged (ToR C.3.2.)

56. The New Agreements meet the standard for confidentiality including the limitations on disclosure of information received and use of the information exchanged, which are reflected in Article 8 of the OECD Model TIEA.

57. Further, as noted in Part C3 of the 2010 Report and which apply equally in respect of the New Agreements, section 8 of the International Cooperation Act requires that information obtained by the competent authority pursuant to a notice it has issued shall be kept confidential by the Minister.

Also, the original Official Secrets Act 1911 (UK) applies to Bermuda’s public servants and creating an offence for instances of improper communication or retention of certain information, which would include information received or exchanged in respect of an EOI request.

58. No change is made to the determination for element C.3.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

C.4. Rights and safeguards of taxpayers and third parties

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

Exceptions to requirement to provide information (ToR C.4.1.)

59. In respect of the limits on information which must be exchanged, the New Agreements mirror the exceptions provided for in the OECD Model TIEA. That is, information which is subject to legal privilege; would disclose any trade, business, industrial, commercial or professional secret or trade process; or which would be contrary to public policy, is not required to be exchanged. In respect of the exceptions for legal privilege and the public policy exclusion, these are also incorporated into Bermuda’s domestic law under section 4 of the International Cooperation Act.

60. Further, paragraph 181 of the 2010 Report noted that the definition of attorney-client privilege in the Bermuda-Canada TIEA appeared to include information that may have gone beyond the exemption for attorney-client privilege under the international standard. Both Bermuda and Canada have confirmed that they interpret the definition of attorney-client privilege used in their EOI agreement in line with the international standard. No change is made to the determination in respect of element C.4.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

C.5. Timeliness of responses to requests for information

The jurisdiction should provide information under its network of agreements in a timely manner.

Responses within 90 days (ToR C.5.1.)

61. There are no specific legal or regulatory requirements in place which would prevent the Bermuda responding to a request for information by providing the information requested or providing a status update within 90 days of receipt of the request. Bermuda’s new agreements with Argentina, China, Czech Republic, India and Malta include an obligation to either respond to the request, or provide a status update within 90 days of receipt of the request. Bermuda’s new agreements with Indonesia and South Africa requires that the parties shall acknowledge receipt of the request and use their best endeavours to forward the requested information with “the least reasonable delay”

Organisational process and resources (ToR C.5.2.)

62. As noted in the 2010 Report, although there is no separate agency dedicated to providing international assistance in tax matters, the Bermuda Monetary Authority and the Ministry of Finance form a complimentary system for ensuring appropriate domestic measures and responding to requests from Bermuda’s EOI partners. The Minister of Finance, or his authorised representative, is the competent authority for Bermuda.

Absence of restrictive conditions on exchange of information (ToR C.5.3.)

63. Other than the matters identified earlier in this report, there are no further conditions in Bermuda’s legal and regulatory framework which may restrict the provision of exchange of information assistance. A review of the practical application of Bermuda’s framework and the resources available to manage Bermuda’s EOI arrangements and individual EOI requests, will be conducted in the context of its Phase 2 review.

Determination and factors underlying recommendations

Phase 1 Determination

The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. (<i>ToR A.1.</i>)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	There are currently inconsistent obligations on nominees to maintain ownership and identity information in respect of all persons for whom they act as the legal owner.	An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person.
	Identity and ownership information may not consistently be available in respect of all express trusts with respect to which Private Trust Companies act as trustees.	Private Trust Companies should be required to maintain relevant identity and ownership information.
	In the case of Limited Partnerships (including Exempted Limited Partnerships), foreign partnerships carrying on business in Bermuda and trusts where the trustee is a Private Trust Company, there are currently no penalties for non-compliance with obligations to maintain ownership and identity information.	In so far as there are no penalties provided, introduce effective sanctions for these types of entities and arrangements where they fail to comply with requirements to maintain and provide ownership and identity information.

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. <i>(ToR A.2.)</i>		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	Bermudan companies as well as Limited and Exempted Limited Partnerships are subject to obligations to keep relevant accounting records, including underlying documentation, for a minimum 5 year period. However, for other relevant entities and arrangements including trusts, and foreign companies and foreign partnerships carrying on business in Bermuda, there are currently inconsistent obligations to maintain reliable accounting records including underlying documentation, for a minimum 5 year period.	Introduce consistent, binding requirements on relevant entities and arrangements, in particular trusts, and foreign companies and partnerships carrying on business in Bermuda, to maintain reliable accounting records including underlying documentation for a minimum of 5 years.
Banking information should be available for all account-holders. <i>(ToR A.3.)</i>		
The element is in place.		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). <i>(Tor B.1.)</i>		
The element is in place.		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. <i>(ToR B.2.)</i>		
The element is in place.		
Exchange of information mechanisms should allow for effective exchange of information. <i>(ToR C.1.)</i>		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. <i>(ToR C.2.)</i>		
The element is in place.		Bermuda should continue to develop its EOI network with all relevant partners.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. <i>(ToR C.3.)</i>		
The element is in place.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. <i>(ToR C.4.)</i>		
The element is in place.		
The jurisdiction should provide information under its network of agreements in a timely manner. <i>(ToR C.5.)</i>		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.		

Annex 1: Jurisdiction’s Response to the Supplementary Report*

Reviewed jurisdictions may wish to use this annex to note recent changes made to their EOI framework or EOI mechanisms or to present future plans which impact on transparency and exchange of information for tax purposes.

* This Annex presents the Jurisdiction’s response to the review report and shall not be deemed to represent the Global Forum’s views.

Annex 2: Request for a Supplementary Report Received from Bermuda

François d'Aubert
Chair, Peer Review Group
and
Pascal Saint-Amans, OECD Secretariat to the Global Forum

Good day François, Pascal, friends at OECD.

We are pleased to advise that Bermuda's Legislature (Parliament and Senate) has passed the legislative amendments to address recommendations in Bermuda's Phase One Assessment. Our Senate completed the approval process at last week's Senate meeting on 22nd June 2011.

This also serves as our 12 month Report.

The Specified Business Legislation Amendment Act 2011 is attached and we formally request a follow up report to reflect the changes to our legal framework and that the follow up report removes the recommendations attached to our initial assessment report.

Detailed written report for the PRG to consider,
clearly indicating why the change justifies a revision of the determinations

The assessors recommendations under ToR A.1. should be removed because where there were no penalties the revised legislation now imposes penalties/sanctions.

The assessors recommendations under ToR A.2 should be removed because where there inconsistent obligations on relevant entities the revised legislation implements consistent, binding requirements on all relevant entities and arrangements.

The assessors recommendations under ToR B.1 should be removed because the revised legislation now imposes search and seizure powers where there were none.

The assessors recommendations under ToR C.1 should be removed because in the combined reviews of other jurisdictions that have been published involve jurisdictions that have for the most part not shared information under a TIEA for as long as Bermuda. The cross-over issues discussed at the last Global Forum should be taken into account to ensure consistency in treatment. Bermuda's view is that we have a successful track record of sharing information for over 25 years with the USA in a timely manner without obstructions from Bermuda therefore the practical effect of the similar discretions and obligations that are in our new TIEAS are for the most part also in our TIEA with the USA and the track record is that of successfully answering requests without the similar discretions and obligations causing any hindrance for over 25 years. Also, adding search and seizure in our legislative amendment brings it on par on that matter. Therefore the text in the middle and last columns should be removed. At most the only comment should be "To be completed once a representative subset of Phase 2 reviews have been completed", and the phase 1 comment in column 1 should have no words after the statement "The element is in place."

Best regards,

Wayne
Ministry of Finance
Bermuda

Annex 3: List of all Exchange-of-Information Mechanisms in Force

	Jurisdiction	Type of Eol Arrangement	Date Signed	Date Entered Into Force
1	Argentina	TIEA	22.08.2011	14.10.2011
2	Aruba	TIEA	20.10.2009	01.12.2011
3	Australia	TIEA	10.11.2005	20.09.2007
4	Bahrain	DTA	22.04.2010	Not Yet In Force
5	Canada	TIEA	14.06.2010	01.07.2011
6	China	TIEA	02.12.2010	03.11.2011
7	Curaçao (formerly Netherlands Antilles)	TIEA	28.09.2009	Not Yet in Force
8	Czech Republic	TIEA	15.08.2011	Not Yet In Force
9	Denmark	TIEA	16.04.2009	25.12.2009
10	Faroe Islands	TIEA	16.04.2009	09.09.2010
11	Finland	TIEA	16.04.2009	31.12.2009
12	France	TIEA	08.10.2009	28.10.2010
13	Germany	TIEA	03.07.2009	Not Yet In Force
14	Greenland	TIEA	16.04.2009	Not Yet In Force
15	Iceland	TIEA	16.04.2009	Not Yet In Force
16	India	TIEA	07.10.2010	03.11.2010
17	Indonesia	TIEA	22.06.2011	Not Yet In Force
18	Ireland	TIEA	28.07.2009	11.05.2010
19	Japan	TIEA	01.02.2010	01.08.2010
20	Malta	TIEA	2.11.2011	Not Yet In Force
21	Mexico	TIEA	15.09.2009	09.09.2010
22	Netherlands	TIEA	08.06.2009	01.02.2010

	Jurisdiction	Type of Eol Arrangement	Date Signed	Date Entered Into Force
23	New Zealand	TIEA	16.04.2009	23.12.2009
24	Norway	TIEA	16.04.2009	22.01.2010
25	Portugal	TIEA	10.05.2010	16.03.2011
26	Sint Maarten (formerly Netherlands Antilles)	TIEA	28.09.2009	Not Yet In Force
27	South Africa	TIEA	06.09.2011	Not Yet In Force
28	Sweden	TIEA	16.04.2009	25.12.2009
29	United Kingdom	TIEA	05.12.2007	10.11.2008
30	United States	TIEA	02.12.1988	02.12.1988

Annex 4: List of all Laws, Regulations and Other Material Received

- Specified Business Legislation Amendment Act 2011
- Competent authority agreement with Canada, 4 January 2012
- Competent authority agreement with Denmark, 3 November 2011
- Competent authority agreement with Faroe Islands, 3 November 2011
- Competent authority agreement with Finland, 3 November 2011
- Competent authority agreement with Greenland, 3 November 2011
- Competent authority agreement with Iceland, 3 November 2011
- Agreement of mutual understanding with Japan, 16 November 2011
- Competent authority agreement with Norway, 3 November 2011
- Competent authority agreement with South Africa, 1 December 2011
- Competent authority agreement with Sweden, 3 November 2011

