

GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE  
OF INFORMATION FOR TAX PURPOSES

**Peer Review Report**  
**Phase 1**  
**Legal and Regulatory Framework**

**BERMUDA**





# **Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Bermuda 2010**

PHASE 1

September 2010  
(reflecting the legal and regulatory framework  
as at May 2010)



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## *Table of Contents*

<b>About the Global Forum .....</b>	<b>5</b>
<b>Executive Summary .....</b>	<b>7</b>
<b>Introduction.....</b>	<b>9</b>
Information and methodology used for the peer review of Bermuda.....	9
Overview of Bermuda.....	10
Recent developments .....	13
<b>Compliance with the Standards.....</b>	<b>15</b>
<b>A.    Availability of Information .....</b>	<b>15</b>
Overview .....	15
A.1. Ownership and identity information.....	16
A.2. Accounting records.....	35
A.3. Banking information.....	40
<b>B.    Access to Information.....</b>	<b>43</b>
Overview .....	43
B.1. Competent authority’s ability to obtain and provide information.....	43
B.2. Notification requirements and rights and safeguards.....	46
<b>C.    Exchanging Information .....</b>	<b>47</b>
Overview .....	47
C.1. Exchange-of-information mechanisms .....	48
C.2. Exchange-of-information mechanisms with all relevant partners.....	53
C.3. Confidentiality .....	54
C.4. Rights and safeguards of taxpayers and third parties.....	55
C.5. Timeliness of responses to requests for information.....	57
<b>Summary of Determinations and Factors Underlying Recommendations .....</b>	<b>59</b>
<b>Annex 1: Jurisdiction’s Response to the Review Report.....</b>	<b>63</b>
<b>Annex 2: List of All Exchange-of-Information Mechanisms in Force .....</b>	<b>65</b>

<b>Annex 3: List of All Current Negotiations for EOI Agreements .....</b>	<b>67</b>
<b>Annex 4: List of all Laws, Regulations and Other Material Received .....</b>	<b>69</b>

## 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 90 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the 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, which has been incorporated in 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 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](http://www.oecd.org/tax/transparency).





## Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information for tax purposes in Bermuda.

2. The international standard which is set out in the Global Forum's Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information (EOI) partners. While Bermuda has a developed legal and regulatory framework, the report identifies a number of areas where Bermuda could improve its legal infrastructure to more effectively implement the international standard. The report includes recommendations to address these shortcomings.

3. In terms of assessing the framework to ensure the availability of relevant information, Bermuda's legislation reflects a three-pronged approach. First, there are obligations imposed directly on companies, partnerships and trusts to retain certain ownership, identity, accounting and banking information, and in some instances to provide that information to government authorities. This is complemented by obligations imposed through the licensing regime applicable to certain industry sectors in Bermuda, including insurance, investment, trust and banking businesses. Finally, the anti-money laundering regulations which apply to Service Providers create a third layer of requirements to capture relevant information. In most cases these obligations are supported by investigatory powers and monetary sanctions. However, 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. This issue will be examined further in the Phase 2 Peer Review. Finally, in some cases there are currently no penalties for non-compliance with obligations to maintain ownership and identity information in the case of companies and partnerships.

4. In general, the obligations set out in the law are explained in more detail in non-binding texts including Guidance Notes, Statements of Principles and Codes of Conduct which are issued by the Bermuda Monetary Authority. These texts are required to be taken into account by a Court in determining whether an offence against the related law has been committed; or may be considered by the BMA in determining whether there has been a breach of licensing conditions.

5. In respect of access to information, the access powers of Bermuda's competent authority, the Minister of Finance, are based on a comprehensive power to issue notices to the holders of such information. In respect of requests arising under the USA-Bermuda EOI agreement, the competent authority has additional search and seizure powers and Bermuda should consider extending these powers to be available in respect of requests from all EOI partners. Bermuda's powers to access information are not impeded by secrecy provisions in domestic law nor by a requirement for a domestic tax interest in the information sought.

6. Having concluded its first agreement for the exchange of information in 1988, in the last three years Bermuda has rapidly expanded its EOI network which now covers 22 jurisdictions, with many of these agreements already in force. Bermuda is still actively negotiating EOI agreements and should continue with this policy. Whilst generally following the terms of the OECD Model TIEA, there are some variations in Bermuda's EOI agreements and implementing domestic legislation which may prevent information being exchanged to the international standard in all instances. Further, in some instances, additional obligations are imposed on Bermuda's EOI partners to meet the threshold of a valid request. A practical assessment of whether these variations impose an impediment to the exchange of information will be made in the Phase 2 Peer Review of Bermuda.

7. Bermuda's response to the recommendations in this report, as well as the application of the legal framework to the practices of its competent authority will be considered in detail in the Phase 2 Peer Review of Bermuda which is scheduled for the second half of 2012.

## Introduction

### Information and methodology used for the peer review of Bermuda

8. The assessment of the legal and regulatory framework of Bermuda was based on the international standards for transparency and exchange of information as described in the Global Forum's Terms of Reference, and was prepared using the Global Forum's Methodology for Peer Reviews and Non-Member Reviews. The assessment was based on information available to the assessment team including the laws, regulations, and exchange-of-information mechanisms in force or effect as at May 2010, Bermuda's responses to the Phase 1 questionnaire and supplementary questions, information supplied by partner jurisdictions, and other relevant sources such as recent reports on Bermuda by the Caribbean Financial Action Task Force and the International Monetary Fund.

9. 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. This review assesses Bermuda's legal and regulatory framework against these elements and each of the enumerated aspects. 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. A summary of the findings against those elements is set out on page 59 of this report.

10. The assessment was conducted by an assessment team which consisted of two expert assessors: Mr Koki Harada, the Deputy Director of the International Tax Policy Division in the Tax Bureau of Japan's Ministry of Finance; and Dr Antonia Schenk-Geers, Senior Policy Adviser for International Exchange of Information Affairs in the Netherlands Ministry of Finance; as well as one representative of the Global Forum Secretariat, Caroline Malcolm.

11. The report is divided into four main segments. First, the introduction which sets out the governmental, economic and legal context in which Bermuda's exchange of information regime operates. Turning then to the basis of the assessment, the ten essential elements of the international standard are considered, divided into whether information is available, whether it can be accessed by government authorities, and finally the mechanisms for exchanging the information with EOI partners.

## Overview of Bermuda

### *Governance and Economic Context*

12. Bermuda is the oldest continuing self-governing overseas territory of the United Kingdom, located in the North Atlantic Ocean on approximately the same latitude as the state of South Carolina in the USA. As at 2009, the population was estimated at 64 395,<sup>1</sup> of which 79% were born in Bermuda. Bermuda has the third highest per capita income in the world at just over BD 69 000 in 2004 and does not impose any direct or sales tax. The local currency is the Bermudian dollar, fixed at BD1 = USD1 and all amounts referred to in this report are in Bermudian dollars, unless otherwise indicated.

13. Whilst the Bermudian economy has traditionally been supported by a strong tourism industry, this sector has been faced with a significant downturn in the last few years, with a drop of more than 100 000 visitors per year, to 555 162 in 2008. In contrast, Bermuda's banking and financial services sector has experienced continuing strong growth, particularly in the area of insurance, reinsurance and captive insurance, which saw a marked influx of business following the attacks on the World Trade Centre in September 2001, and Hurricane Katrina in 2005. This sector contributed more than 50% of Bermuda's GDP in 2006. The Bermuda Monetary Authority (BMA) has oversight responsibility for the insurance, trust and investment business sectors, as well as collective investment schemes and the local stock exchange (which sees minimal trading activity), and is split into specialised departments including Insurance, Banking, Trusts and Investments.

14. Bermuda has a consumption-based tax system, focused primarily on customs duty, which is supplemented by taxes on wages and government fees (stamp duties, payroll tax, passenger taxes and property tax). Bermuda does not impose any direct taxes. The ratio of total government receipts to GDP was approximately 17.93% in 2007, and 17.64% in 2008.

### *Legal and Regulatory Framework*

15. Bermuda's legal system is based on English common law, and relevant legislation is enacted either from the UK legislature (which must be specifically extended to Bermuda to have effect), and local legislation (enacted by the Bermuda's parliament).

<sup>1</sup> Bermuda's Department of Statistics. The last census in Bermuda was taken in 2000, at which time the population was 62 509. The next census is scheduled to be conducted in May 2010.

16. There are two types of legislation – primary legislation which is enacted by Parliaments, and subordinate legislation which is made by the Ministers or other government bodies under the authority of primary legislation. Types of subordinate legislation include Rules, Regulations and Orders. There is a three tier-court system (Magistrate’s Court, Supreme Court and the Court of Appeal), as well as a further right of appeal to the Privy Council in London. Bermuda’s Constitution Order 1968 established the current parliamentary system, which includes a senate and house of assembly, as well as maintaining Bermuda’s status of internal self-government in all areas apart from defense, internal security and international affairs. Bermuda relies on the UK to extend to it relevant international instruments, including international conventions and UN Security Council Resolutions.

17. With regard to entering into international agreements, specifically TIEAs, Bermuda is entrusted by the UK Foreign Commonwealth Office (FCO) to negotiate and conclude agreements that provide for the exchange of information on tax matters, as well as any ancillary agreements.

18. Bermuda’s entrustment is given on the understanding that the UK remains responsible for the international relations of Bermuda; and on the conditions that the Government of Bermuda supply evidence to the FCO that the jurisdiction is content to conclude such an Agreement directly with the Government of Bermuda, and that the proposed final text of the Agreement be submitted to the FCO in London for approval before signature.

19. The main domestic legislation in respect of Bermuda’s exchange of information relationships is the USA Bermuda Tax Convention Act 1986 and the International Cooperation (Tax Information Exchange Agreements) Act 2005 (International Cooperation Act). Pursuant to these Acts, the Minister of Finance (the Minister) is the Competent Authority, and is supported by a treaty division within the Ministry.

### ***Overview of the financial sector and relevant professions***

20. Bermuda has four licensed banks and one deposit-taking company. The four banks have 15 branches in Bermuda and the two largest banks have 33 overseas subsidiaries. In addition, there is one credit union, with members exclusively from a local labour union. The Bermuda Monetary Authority is responsible for the supervision of the banks and deposit-taking company. All the banks are members of financial groups with affiliates involved in trust business, investment companies, and other financial services.

21. Bermuda is a globally significant insurance centre which includes general insurers, composite insurers, long-term insurance and reinsurance, as well as being the world's second largest captive insurance jurisdiction. The insurance industry is regulated principally by the BMA in accordance with the Insurance Act 1978. The regulation of insurers is based on different classes of license, which relate to the size and lines of business that the insurer will carry on, and the degree of regulation varies according to the risk assessment for each class, whilst minimum capital and surplus requirements also differ for each class.

22. The Bermudian securities market is comprised of investment funds and the Bermuda Stock Exchange. Bermuda has a large and active investment fund and funds services sector. The jurisdiction hosts a number of multinational financial services organizations, and is home to a large number of hedge funds, investment managers, and portfolio managers as well as internationally-active fund administrators. Bermuda has a stock exchange with a limited number of full-service brokerage firms. The Bermuda Stock Exchange (BSX) is a fully electronic offshore securities market that serves as a domestic market for local companies and domestic investment funds, and as a venue for recording trades in internationally-listed companies. The vast bulk of trading volume on the exchange takes place in international issues—the domestic market was less than one per cent of market capitalization in 2007. All trading members must be Bermuda-domiciled companies. The BSX also operates a clearing and settlement system and a depository.

23. In addition Bermuda has a trust business sector which is closely aligned with other regulated sectors and professionals, including the licensed banks, and law and accounting firms. All trustees that are carrying on a trust business must be licensed under the Trust (Regulation of Trust Business) Act 2001 (Trust Regulation Act) unless expressly exempted from licensing provisions under the Trusts (Regulations of Trust Business) Exemption Order 2002 (Trusts Exemption Order). To date, only companies have been licensed and there are 31 licensed trust companies.

24. There is a wide range of Corporate Service Providers (CSPs) carrying on the business of the formation and management of companies and partnerships. Most of the CSPs are owned or controlled by law firms and accounting firms as well as regulated financial institutions. Presently, there are approximately 56 CSPs operating in and from Bermuda. To date, CSPs are not licensed or subject to the AML/ATF regime. Regulation of CSPs has been recommended by Bermuda's National Anti-Money Laundering Committee, with appropriate legislation to bring CSPs within the AML/ATF regime foreshadowed for 2010-2011. However, no company, or limited or exempted partnership can be formed without the approval of the BMA, and the Controller of Foreign Exchange, and only lawyers or accountants who are authorized to practice law or accounting

profession in Bermuda may prepare a memorandum of association for a corporate body. The Companies Act 1981 (Companies Act) and the partnership legislation set out detailed provisions for establishment of a company or partnership and the requirements in respect of ownership, identity and accounting information of those entities.

### ***Exchange of Information for Tax Purposes***

25. Bermuda has participated in the OECD's work on standards for the exchange of information for tax purposes over the last decade. In May 2000, it made an advance commitment to the international standards for transparency and exchange of information, and went on to work as a Participating Partner in the original Global Forum on Taxation established later that year. As an active member of the Working Group on Effective Exchange of Information, Bermuda contributed to the development of the now widely utilised OECD Model TIEA, finalised in 2002. On 8 June 2009, Bermuda was recognised as having concluded agreements with 12 OECD countries allowing for exchange of information for tax purposes to the international standard, a landmark which has been reflected in the OECD Progress Report first published in April 2009.

### **Recent developments**

26. Since the beginning of 2010, Bermuda has concluded and signed EOI agreements with Japan (1 February 2010), Bahrain (22 April 2010), Portugal (10 May 2010) and Canada (14 June 2010). Since April 2009, Bermuda has signed 19 agreements for the exchange of information, bringing the total number of agreements which it has signed to 22.

27. Bermuda continues to work to expand its EOI network, and has concluded negotiations for EOI agreements with Spain, Belgium, India, South Africa, Korea, China, Italy, Brazil and Indonesia. It has also foreshadowed the introduction of legislation in 2010 which will enjoin corporate service providers to the the anti-money laundering/ anti-terrorism financing regime.



## Compliance with the Standards

### A. Availability of Information

#### Overview

28. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders, as well as accounting information on the transactions carried out by entities and arrangements. Such information may be kept for tax, regulatory, commercial or other reasons. If information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested by an EOI partner. This section of the report assesses the adequacy of Bermuda's legal and regulatory framework to ensure the availability of information.

29. In respect of ownership and identity information, the obligations imposed by Bermuda on companies, partnerships and trusts are generally sufficient to meet the international standard. These obligations are imposed directly by legislation governing the formation of these entities, as well as obligations on Service Providers and the licensing requirements for regulated industries (such as insurance and investment businesses). However, 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. The practical significance of this exclusion and of the common law obligations on trustees to maintain this information will be assessed as part of the Phase 2 Peer Review of Bermuda.

30. However in respect of the obligations imposed directly on companies, partnerships and trusts, in some cases there are currently no penalties for non-compliance with obligations to maintain ownership and identity information. These shortcomings may affect the availability of relevant identity and ownership information for the purposes of exchange of information.

31. The existing obligations in respect of accounting records are more inconsistent, with limited specific obligations imposed on entities other than Bermudian companies and exempted partnerships. Even in respect of these entities, there are no specific minimum retention periods for which the relevant accounting records must be kept. Further, any existing references to the retention of accounting records form part of industry guidelines, rather than being contained in legislation itself. Combined with lenient sanctions for non-compliance with obligations, this may affect the reliable availability of accounting information in Bermuda.

32. Finally, in respect of banking information the combination of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (AML/ATF Regulations) and the licensing requirements for financial institutions impose appropriate obligations on banks and deposit companies to ensure that all records pertaining to accounts as well as related financial and transactional information, are available.

### 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.

#### *Companies (ToR<sup>2</sup> A.1.1)*

33. The Companies Act allows three types of companies to be formed:

- Limited liability companies
- Companies limited by guarantee
- Unlimited liability companies

34. In addition, companies may be formed by petition to the Legislature for a private act for incorporation. Companies formed in this way will also be subject to the Companies Act.

35. Companies may also be categorised as follows:

<sup>2</sup> *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information.*

- Bermudian Local companies – 60% or more of voting capital is held by persons who have Bermudian status and at least 60% of directors must have Bermudian status (as defined in the Bermuda Immigration and Protection Act 1956), pursuant to section 114 of the Companies Act. Such companies may carry on business domestically in Bermuda.
- Bermudian Exempted companies – more than 40% of voting capital is held by non-Bermudians, with at least one director resident in Bermuda, or one secretary or resident representative that are “ordinarily resident” in Bermuda. Under sections 129 and 129A of the Companies Act, exempted companies may not carry on business domestically except with the express permission of the Minister of Finance (the Minister) or as provided for in limited circumstances under section 129A(4).
- Permit companies – non-Bermudian companies which are carrying on business in Bermuda must, under section 134, obtain a permit from the Minister.

*Company ownership and identity information required to be provided to government authorities*

### Bermudian companies

36. Section 6 of the Companies Act requires all Bermudian companies to be registered with the Registrar of Companies (Registrar). The information which must be provided to the Registrar when applying for incorporation includes:

- Name of the company;
- Address of the company’s registered office in Bermuda, which shall not be a post-office box (section 62, Companies Act);
- Name of the company’s resident representative (where applicable for certain exempted companies, and which may be a company);
- Names of the company’s owners including beneficial owners.

37. Further, the Minister has the power to direct companies at the time of application for incorporation, to provide such information as the Minister may

require. After incorporation, a company must advise the Registrar of a change of the company's registered office (section 62(3)) however there is no requirement to advise the Registrar of changes to the resident representative or company ownership (except in the case of equity being transferred to non-residents – see paragraph 39 below).

38. All records filed with government authorities are held in perpetuity or for such period as directed by the Department of Archives.

### Companies issuing equity to non-residents

39. A company which is seeking to issue equity to a non-resident, as defined in regulation 3 of the Exchange Control Regulations, must seek permission from the Controller of Foreign Exchange under regulation 12, which involves the vetting of the non-residents including the full disclosure of the chain of ownership of any person owning 5% or more of the company. Changes after incorporation of more than 5% of ownership are required to be approved by the Controller of Foreign Exchange. Under regulation 37 of the Exchange Control Regulations, a person may be exempted from the requirements of the Act, in whole or in part, by direction of the Exchange Controller.

### Foreign companies

40. Companies formed outside of Bermuda which engage in or carry on any trade or business in or from Bermuda, must obtain a permit from the Minister under section 133-134 of the Companies Act. The Minister may seek such information as he requires from a company making a permit application, and this includes the information specified in the prescribed form for foreign companies seeking registration, which requires the disclosure of all beneficial owners (see form 15, Companies (Forms) Rules 1982). The Minister may grant a permit subject to conditions, including a condition that the foreign company "shall have one or more directors ordinarily resident in Bermuda and shall inform the Minister of any change in its beneficial ownership": section 136(1). Bermuda advises that it is the usual practice of the Minister to include a condition that the company must inform the Minister of any change in its beneficial ownership. A permit company is required to appoint and maintain a principal representative in Bermuda, and any change to such principal representative must be notified within 21 days to the Registrar under section 136A.

### *Company ownership and identity information required to be held by companies*

41. Pursuant to section 114 of the Companies Act, local companies must have at least 60% of the directors with Bermudian status, with one or more directors resident in Bermuda. Exempted companies must have at least one director, secretary or “resident representative” who is ordinarily resident in Bermuda under section 130, and that person may be a company.

42. All Bermudian companies are required by section 65-66 of the Companies Act to maintain a shareholder register at the company’s registered office, and which is publicly available. The register must record the name and address of members, and the share capital held. There is no penalty for failure to maintain the shareholder register. The penalty for failure to maintain a registered office, and to advise the Registrar of its address, is BD20 per day in default. There are no express time periods for a company to retain ownership information.

### *Nominee identity information*

43. In some cases, persons acting as nominees will be Service Providers and therefore subject to the obligations imposed by the AML/ATF Regulations set out in paragraph 54. In addition, under regulation 20 of the Exchange Control Regulations, a nominee acting for a non-resident in respect of securities, must obtain permission from the Controller of Foreign Exchange in respect of holding or transferring such securities, which requires the disclosure of information on the beneficial owner of the securities. In other instances, there are no obligations imposed on a nominee in respect of ownership and identity information of the beneficial owner.

### *Bearer shares (ToR A.1.2)*

44. Under section 53 of the Companies Act, bearer shares are not permitted in Bermuda.

### *Licensed entities*

45. In Bermuda, there are a number of sectors which are specifically regulated by imposing a requirement that the business be carried on by a license holder. These licensing regulations impose additional requirements to retain identity and ownership information as a condition of the license. The BMA is the oversight body in respect of each type of license.

46. The licensed sectors in Bermuda are insurance, investment, bank and deposit taking institutions, and trust businesses. The key pieces of legislation for licensed entities include:

- Insurance: Insurance Act 1978
- Investment: Investment Business Act 2003; and the Investment Funds Act 2006
- Banks and deposit-taking institutions: Banks and Deposit Companies Act 1999
- Trusts: Trusts (Regulation of Trust Business) Act 2001

47. These Acts are supplemented by regulations, as well as guidance texts including Statements of Principles, Codes of Conduct and Guidance Notes. Whilst some of the specific obligations vary according to the license types, there are some general themes and obligations which are set out herein.

48. Licensing places “minimum criteria” on applicants and license holders including that they be “fit and proper” persons and that the business be conducted in a “prudent manner”. The BMA is empowered to give directions or impose sanctions (including revocation of licenses) for breaches of the minimum criteria. License regulations require that the license holder:

- Maintains a principal office in Bermuda, and advise the BMA of its location;
- Maintains an approved principal representative in Bermuda, and advise the BMA of the particulars of that representative; and
- Maintain an approved auditor, and advise the BMA of the particulars of that auditor.

49. The licensee must advise the BMA within 14 days of any alteration to these details. In addition, a licensee must advise the BMA in advance, of any changes to the controlling shareholders of the licensed entity (the share proportion point at which a person is said to “control” a licensed entity and therefore when this requirement is triggered, is specific to each type of license). The BMA is empowered to prevent changes of control in certain instances.

50. Further, a failure to comply with industry guidelines issued by the BMA, such as codes of practice or statements of principles, may be taken into

account by the BMA when determining whether an applicant or existing licensee fulfils the minimum criteria for granting or retaining a license.

51. The industry guidelines include specific references to identity and ownership obligations in respect of trust businesses (see paragraph 85 below), and in respect of banks and deposit companies (see paragraph 121 below).

52. In addition, since 1 January 2009 the BMA requires all non-licensed persons (e.g. persons exempt from licensing) who are carrying on financial services businesses to be registered, and all registered persons are subject to the AML/ATF Regulations. Registration includes the provision of the following details:

- Applicant name and address;
- Name of the business, and a description of its nature; and
- Name of the reporting officer for the purposes of the AML/ATF Regulations

53. At this stage there are no other obligations imposed upon such persons specifically as a result of registration.

### ***Service Providers***

54. The regulatory regime applicable to Service Providers is a key element in Bermuda’s regime to maintain identity, ownership and bank information as well as accounting records, which may be relevant to the exchange of information for tax purposes. Most persons conducting business in or from within Bermuda will have some involvement through either a one-off transaction or ongoing business relationship with a Service Provider. In each of those instances, the relevant information obligations on Service Providers will be triggered.

55. The regulation of Service Providers is based on international anti-money laundering and anti-terrorism financing standards, and is applicable to all types of entities and arrangements which provide relevant services. “Service Providers” as referred to herein, are those persons subject to the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (AML/ATF Regulations) which are described in the legislation as “relevant persons” (regulation 4). This includes “independent professionals” and “AML/ATF regulated financial institutions” as defined respectively in regulation

2 of the AML/ATF Regulations and section 2 of the Proceeds of Crime Regulations (Supervision and Enforcement) Act 2008.

56. Service Providers include banks and deposit companies, investment businesses, investment fund administrators, money service businesses, some insurance businesses, persons carrying on licensed trust businesses as well as lawyers and accountants when they are providing certain services. The obligations also extend to the branches and subsidiaries of Service Providers outside of Bermuda.

57. In respect of the insurance sector, insurers, and insurance managers or brokers who carry on or act in connection with “long-term business”, fall within the definition of Service Provider, however it does not cover insurers or reinsurers (or insurance managers or brokers) to the extent they carry on or act in connection with “general business”, “special purpose business” or reinsurance, as these categories are defined in section 1 of the Insurance Act 1978.

58. In circumstances including one-off transactions and ongoing business relationships, the AML/ATF Regulations impose three separate obligations: to undertake customer due diligence; ongoing monitoring; and record keeping. There are some limited exceptions set out in regulation 10 of the AML/ATF Regulations to the requirement to undertake customer due diligence (CDD) measures, whilst “enhanced CDD measures” are required in certain “higher risk” circumstances as set out in regulation 11, such as where the customer is not physically present for identification purposes.

59. “Customer due diligence measures” are defined in regulation 5 as meaning:

*Identifying the customer, and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source;*

*Identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and*

*Obtaining information on the purpose and intended nature of the business relationship.*



60. The AML/ATF Regulations define “beneficial ownership” in regulation 3, based around a concept of being able to control or manage an entity, or the entitlement to control, or ownership of 25% of the capital of the entity. In respect of trusts, the concept of beneficial owner is further extended to “the class of persons in whose main interest the trust is set up or operates” or “any individual who has control over the trust”.

61. Ongoing monitoring includes maintaining up to date customer identity information and monitoring transactions to determine whether they are apposite to the customer’s business and risk profile. The record keeping requirements set out in Part 3 of the AML/ATF Regulations include retaining CDD evidence, and the “supporting evidence and records” in respect of the matters the subject of the CDD measures. Guidance on what specific evidence and records must be kept is set out in the AML/ATF Guidance Notes, which whilst non-binding, must, under regulation 19, be taken into account by a court in determining whether an offence relating to non-compliance with the AML/ATF Regulations has been committed.

62. Under regulation 14, a Service Provider may rely on certain third parties to undertake the required CDD measures as well as ongoing monitoring, however the Service Provider remains liable for any failure to apply such measures. Where a third party is relied on, the obligation to retain records for a period of five years is imposed on the third party, rather than the Service Provider.

63. The AML/ATF Regulations also require Service Providers to apply the CDD measures, ongoing monitoring and record-keeping obligations to their existing clients at appropriate times which will be determined on a risk-sensitive basis.

64. A Service Provider who fails to comply with an obligation imposed by the AML/ATF Regulations is liable under regulation 19 to a fine of BD50 000 on summary conviction, or to either or both a fine of BD750 000 and imprisonment for up to 2 years on indictable conviction.

65. However, persons providing corporate service (CSPs, for example an entity providing registered office services) do not fall within the AML/ATF regulatory regime. However, Bermuda’s National Anti-Money Laundering Committee has directed that CSPs are to be brought within that regime. Bermuda anticipates the required changes will be incorporated into its domestic legislation by December 2010.

### *Partnerships (ToR A.1.3)*

66. Two types of partnerships may be established under Bermudian law: ordinary partnerships, and limited partnerships. Partnerships may also be categorised according to their ownership, as follows:

- Local partnership: A partnership formed under the Partnership Act 1902 (Partnership Act), between two or more Bermudians. It may be an ordinary or limited partnership; or
- Exempted partnership: either (i) at least one individual partner is not Bermudian; or (ii) at least one of the partners is an exempted or foreign-incorporated company. An exempted partnership may only carry on business with persons outside Bermuda, except where it does business in Bermuda, with an exempted company, permit company or exempted partnership, in furtherance of its business carried on outside Bermuda: section 19 of the Exempted Partnerships Act 1992 (Exempted Partnerships Act). It may be an ordinary or limited partnership.

### *Partnership ownership and identity information required to be provided to government authorities*

67. An ordinary local partnership is not under any statutory obligations to register, or file ownership or identity information, with any government authority.

68. The formation of an exempted partnership requires an application to the BMA for review. The application information is then passed to the Registrar prior to registration, and includes:

- Name of the partnership;
- Name of all the partners (where a partner may be a corporate entity or other arrangement);
- For all general partners, chain of ownership information;
- Name and address of the resident representative (which may be a corporate entity or other arrangement); and
- Address of the partnership's registered office in Bermuda, which shall not be a post-office box (section 10(10) Exempted Partnerships Act).

69. Note that where the exempted partnership is also a limited partnership, or is concurrently applying to be a limited partnership, only the names and addresses of the general partners must be provided: Exempted Partnerships Act, section 5(1)(b).

70. Partnership information must be approved by the BMA prior to registration, and any subsequent changes to the general partners must be approved by the BMA, which includes the provision of chain of ownership information on any new general partner. Under sections 10(10) and 11 of the Exempted Partnerships Act, an exempted partnership must maintain a registered office in Bermuda, and must advise the Registrar of its address within 14 days of establishing the office. In addition, at the time of registration, an exempted partnership is requested to provide to the Minister certain information including the details of the beneficial ownership of the general partners.

71. A limited partnership is formed under the Limited Partnership Act 1883 (Limited Partnership Act). Prior to registration, the following details must be provided to the BMA for review, who then provides it to the Registrar of Companies:

- Name of the partnership;
- Names and places of residence of the general partners;
- For all general partners, chain of ownership information; and
- Address of the partnership's registered office in Bermuda, which may not be a post office box (section 3, Limited Partnership Act).

72. Pursuant to section 8B(5) of the Limited Partnership Act, a change to those registered details will not take effect until they are notified to the Registrar. Where there is a failure to notify the Registrar, a Court may make an order upon the petition of the Minister, imposing a fine not exceeding BD5 000 on any general partner or duly authorized person, or dissolving the partnership. Only a person who knowingly and willfully contravened, or caused or permitted the contravention of the obligation to seek the Minister's consent for changes to the general partners will be so liable. In addition, at the time of registration, a limited partnership is requested to provide to the Minister certain information including the details of the beneficial ownership of the general partners. The ownership details of all general partners must be approved by the BMA prior to initial registration or registration of a change to the general partner(s). A limited partnership must maintain a registered office in Bermuda.

73. An overseas partnership, being a partnership formed under the laws of another jurisdiction which engages in or carries on any trade or business in Bermuda, must obtain a permit and register with the Minister pursuant to section 3 (subject to section 3A) of the Overseas Partnerships Act 1995 (Overseas Partnerships Act). The overseas partnership must provide the Minister with the following details, which are registered:

- Name of the partnership
- Names of all of the general partners, and their addresses
- Address of the partnership's registered office in Bermuda, which may not be a post-office box (section 12, Overseas Partnerships Act);
- Name and address of the partnership's resident representative (a resident representative is a requirement imposed on overseas partnerships under section 13), and
- Law governing the partnership.

74. Any change to the registered details of an overseas partnership must be notified to the Registrar within 30 days, and where the change relates to the general partners, may only be made with the prior written consent of the Minister. In addition, at the time of registration an overseas partnership is requested to provide to the Minister certain information including the details of the beneficial ownership of the general partners. Under section 8, a Minister may impose conditions on a permit, including that there shall be at least one or more partner ordinarily resident in Bermuda. An overseas partnership may under section 11 only carry on business with persons outside Bermuda, except where it does business in Bermuda with an exempted company, permit company or exempted partnership, in furtherance of its business carried on outside Bermuda. Further, section 11(5) requires that any banking business conducted in Bermuda by an overseas partnership must be conducted with a bank incorporated in Bermuda.

*Partnership ownership and identity information required to be maintained by the partnership*

75. An ordinary local partnership is not required under Bermudian law to maintain any specific ownership or identity records relating to the partnership.

76. General partners must maintain such information required to comply with their reporting obligations under the Exempted Partnerships Act, the

Limited Partnership Act and the Overseas Partnerships Act, which includes the details of the names and places of residence of all general partners and the address of the partnership's registered office in Bermuda. In addition, section 7 of the Limited Partnership Act requires the general partners of a limited partnership to maintain a register of all limited partners (name, address, and the date of entering and leaving the partnership), where each partner's details must be retained for a minimum period of 6 years after the person ceases to be a partner. There is no penalty for failure to maintain a register of limited partners.

77. Exempted and overseas partnerships (section 17 and section 13 of the respective laws) are required to appoint and maintain a representative resident in Bermuda. Where the resident representative knows, or has reasonable cause to believe that the partnership has not complied with its statutory obligations to advise the Minister of a change to any of the general partners, to the resident representative or to their addresses, then the representative may be liable to a fine of up to BD5 000. However, the resident representative is not under any legislative obligation to know details of the partnership; although they are entitled to receive notice of, attend and receive minutes of all meetings of the partnership.

#### ***Trusts (ToR A.1.4)***

78. In line with the English legal tradition, Bermuda's trust law is largely a product of the common law and accordingly many of the requirements in respect of trusts are not found in statute. Certain aspects concerning the duties, powers and regulation of trustees are codified in the Trustee Act 1975. In addition, the Hague Convention on the Law applicable to trusts and their recognition, 1985 has also been incorporated into domestic law by the Trusts (Special Provisions) Act 1989. These Acts apply regardless of whether it is a trust formed for non-resident beneficiaries, or by non-resident settlors, or where trust assets are located outside Bermuda. The formation of trusts is considered to be part of carrying on the practice of law, and thus any persons providing such services must be registered under the Bermuda Bar Act 1974.

79. Persons carrying on a trust business may be subject to regulation obligations as a consequence of holding a license to conduct a trust business (defined as the provision of the services of a trustee as a business, trade, profession or vocation), and may also be subject to AML/ATF Regulations as Service Providers carrying on trust businesses.

80. Persons who are providing trustee services whilst acting in a private capacity and who are not carrying on a business, as well as private trust companies (PTCs), fall outside the scope of the trust licensing regulations as well

as the AML/ATF Regulations. For example, they will not be subject to provisions which require a trust business to notify the BMA of changes to the control of the trustee; the BMA's code of practice or statement of principles relating to trust businesses; or to retain information on the identity of settlors and beneficiaries. A PTC is defined by clause 3 of the Trusts Exemption Order, and is an entity which only provides trustee services to those trusts specified in its memorandum of association or in the case of foreign trust companies, its permit.

### *Trust ownership and identity information required to be provided to government authorities*

81. Generally, there is no statutory requirement for trusts to be registered or file any information with government authorities, including information relating to the identity of settlors, beneficiaries or trustees. Where the trust is a unit trust, it must be authorized under the Investment Funds Act 2006. Where the trust is a charitable trust seeking to solicit funds in Bermuda, it must be registered to attain charitable status.

82. Where a company is owned by a trust, the company must provide information to the BMA on settlors and beneficiaries of the trust. Such information would be held in perpetuity, or for such period as directed by Bermuda Archives, a government department.

### *Trust ownership and identity information required to be retained by the trust*

83. While all trustees are subject to the common law requirements to have knowledge of all documents pertaining to the formation and management of a trust, the extent of such requirements could not be ascertained during the Phase 1 Peer Review. An in-depth assessment of the effectiveness of this common law regime will be considered as part of the Phase 2 Peer Review of Bermuda.

84. In addition, both licensed trust businesses and trustees exempt from licensing under clause 3 of the Trusts Exemption Order, are subject to the AML/ATF Regulations and must meet the obligations to maintain ownership and identity information set out in paragraph 54. These obligations do not apply to private trust companies or trustees who are not carrying on a trust business.

### *Licensed trust businesses*

85. The general obligations on licensed entities in respect of ownership and identity information are set out at paragraph 45 above, whilst the following

paragraphs provide further details on the specific obligations imposed on licensed trust businesses.

86. Persons carrying on a trust businesses are licensed and regulated in Bermuda pursuant to the Trust Regulation Act with the following exceptions:

- where the relevant trusts are administered outside of Bermuda: Trusts (Regulation of Trust Business) Order 2003 (Trusts Regulation Order); or
- private trust companies: a company that provides trustee services only to trusts specified in its memorandum of association or permit: clause 3 of the Trusts Exemption Order, or
- certain individual trustees: being a member of a recognised professional body or a co-trustee of a trust where at least one other co-trustee is licensed: clauses 4-6 of the Trusts Exemption Order.

87. Trust licenses may be unlimited (issued to companies only) or limited (issued to partnerships and individuals). Limited license holders may under section 11A(2), only hold trust assets of BD30 million unless expressly permitted, and may not act as the sole trustee of any trust. As at April 2010, no limited trust licenses had been issued by the BMA. Control of licensed entities is closely regulated, for instance:

- In respect of an unlimited licence, where a person is to become a controlling shareholder (10% or more, or a majority shareholder) under section 24(1) of the Trust Regulation Act, the BMA must be notified in writing; and
- In respect of a limited licence held by a partnership, where a change in partners involves a person becoming a controlling partner (10% or more, or a majority partner), the BMA must be notified in writing.

88. Licensed trustees are guided by a Code of Practice and Statement of Principles, issued by the BMA, which are non-binding but by section 7(4) of the Trust Regulation Act, trustees are to have regard to the Code in conducting their business. The Code and Statement outline best-practice standards on the maintenance of ownership and identity records. On an annual basis, licensed trustees are also required to complete a prescribed certificate declaring that they have complied with the minimum criteria for licensees, as well as the Code of Practice. A licensee who fails provide such a certificate is liable for a fine of BD10 000 on summary conviction.

89. Of particular relevance are clauses 3 and 5 of the Code which provide:

*3. Licensed undertakings must have procedures in place to ensure that proper due diligence is carried out before a decision is made to act for any new customer.... To ensure compliance with these requirements licensed undertakings should have adequate policies and procedures in place to ensure that they know the identity of each settlor, protector and custodian on an on-going basis and to the fullest extent possible the identity of the beneficiaries. They must also verify the source of all assets introduced, to satisfy themselves that they are not of illicit origin.*

...

*5. When establishing a trust, a licensed undertaking should familiarize itself with the objects of the trust and satisfy itself that the trust is being established for a lawful purpose. It should also ensure that the settlor has access to all appropriate information, including relevant independent professional advice where necessary. In order to adequately perform its fiduciary and other duties, a licensed undertaking must ensure that it has a complete understanding of the trust deed in each case and must seek legal or other advice where necessary. ... Over and above their legal obligations to 'know your customer', undertakings are expected to have a considered and agreed policy on new client engagements or acceptances, having regard to their assessment of the quality, nature and scale of the services involved and the ability of the undertaking to provide the services in question. Undertakings need to ensure that they understand fully the rationale for particular structures and to be comfortable that the business is suitable. These standards also apply mutatis mutandis, in relation to any trust business delegated to the licensed undertaking by another trustee. In such cases, the licensed undertaking must have full knowledge of the trust arrangements, and must retain in its files copies of all the records which would pertain to trust business introduced directly to the trust company by a settlor. A licensed undertaking should not act as agent for others in the management of trust assets unless it is satisfied that the trustee is subject to professional standards equivalent to its own.*

90. Non-compliance with the Code or Statement will also be taken into account by the BMA under sections 7(5) and 12 of the Trust Regulation Act, when determining whether an applicant or existing licensee fulfils the minimum criteria for granting or retaining a trust license. Other than these



recommendations, licensing does not impose on trust businesses any specific obligations to maintain information on the identity or ownership of their clients.

91. Fiduciaries acting in or from Bermuda may act as trustees to trusts formed under foreign law. Where a fiduciary is carrying on a business providing trust services in or from Bermuda then they are required to be licensed pursuant to the Trust Regulation Act. Fiduciaries that are providing trustee services in or from Bermuda whilst acting in a private capacity and who are not carrying on a business fall outside the scope of the trust regulations.

### *Service Providers carrying on trust businesses*

92. A trust business (the provision of the services of a trustee as a business, trade, profession or vocation) is an “AML/ATF regulated financial institution” as defined in regulation 2(2) of the AML/ATF Regulations and is therefore subject to the obligations relating to ownership and identity information on such entities set out at paragraph 54 above. Specifically in respect to trusts, the AML/ATF Guidance Notes provide at paragraph 5.6 that:

*[5.6] Where the customer is a legal person (such as a company) or a legal arrangement (such as a trust), part of the obligation on an institution to identify any beneficial owner of the customer is taking measures to understand the ownership and control structure of the customer.*

93. Further at paragraph 5.33 and 5.36:

*[5.36] ... The obligation to verify the identity of a beneficial owner is for the institution to take risk-based and adequate measures so that it is satisfied that it knows who the beneficial owner is. It is up to each institution whether they make use of records of beneficial owners in the public domain (if any exist), ask their customers for relevant data or obtain the information otherwise. There is no specific requirement to have regard to particular types of evidence.*

...

*[5.36] In some trusts and similar arrangements, instead of being an individual, the beneficial owner is a class of persons who may benefit from the trust (see paragraphs 5.163). Where only a class of persons is required to be identified, it is sufficient for the institution to ascertain the name and the scope of the class, without identifying any members of the class*

***Foundations (ToR A.1.5)***

94. Whilst there may be persons created in or carrying on business in Bermuda who use the term “foundation” in their name, this does not refer to a foundation in the sense of a legal arrangement or relationship. Rather, it refers to the word’s ordinary meaning, being an institution supported by endowments. These “foundations” are predominantly used for charitable purposes and generally takes the legal form of a company limited by guarantee.

95. Under Bermudian law, foundations in the sense of a legal arrangement or relationship are not recognised.

***Other relevant entities and arrangements***

96. Bermuda has not identified any other relevant entities and arrangements which may be formed under its laws.

***Enforcement provisions to ensure availability of information (ToR A.1.6)***

97. The existence of effective measures for the effective supervision and enforcement of obligations to retain identity and ownership information are an important part of an effective legal and regulatory framework. Bermuda uses a combination of oversight, investigatory powers and penal sanctions to support compliance with legal obligations.

98. In addition to the review of the ownership and accounting information which entities are required to submit upon registration, the Minister of Finance also has powers in respect of Bermudian companies in certain instances to investigate and take control of their affairs. Section 110 of the Companies Act (section 132 in respect of exempted companies) empowers the Minister to investigate the affairs of a Bermudian company, which includes the power to require all books of the company and to examine persons under oath in respect of the company’s affairs. An investigation may proceed where, for example the company is thought not to be complying with all of its statutory obligations. In turn, the Minister may require the company to take certain steps to ameliorate its position or to seek the winding up of the company. Under section 18 of the Exempted Partnerships Act, there are similar investigatory powers available to the Minister in respect of exempted partnerships.

99. In respect of penalties, in some cases there are penalties to sanction non-compliance, whilst in other instances there is no applicable penalty. Non-compliance may affect whether Bermuda has the information available to

respond to a request for information by its EOI partners. The penalty provisions which address the key information obligations are set out below:

- A company or exempted partnership (including a limited exempted partnership) which fails to comply with the requirement to maintain a registered office in Bermuda, and to advise the Company Registrar of its address, is liable to a fine of BD20 per day in default in respect of a company (section 62(4), Companies Act), or BD100 per day in respect of an exempted partnership (section 10(12), Exempted Partnerships Act). It is at the registered office that a company is required to keep its register of members, or an exempted partnership is to keep its register of general partners.
- There is no separate penalty available to be imposed on a company or partnership that fails to keep a register of members, or partners as required.
- A company or exempted partnership which fails to keep the required accounting records exposes the company and every officer, or every partner respectively, to liability for a fine not exceeding BD500 under section 83(3) of the Companies Act, and section 14(4) of the Exempted Partnerships Act.
- The Minister may require a company, exempted partnership, or overseas partnership to produce such books or documents as may be required to determine whether such an entity has breached their statutory obligations. A person who fails to produce such information, shall be guilty of an offence and liable to a fine not exceeding BD1 000 in the case of a company (section 276, Companies Act), or BD5 000 in the case of a partnership (section 18, Exempted Partnerships Act; section 16(4), Overseas Partnerships Act).
- A foreign company carrying on business or trade in Bermuda which fails to advise the Registrar of its principal representative in Bermuda within 21 days, is liable to a fine of BD20 per day in default (section 136A, Companies Act).
- Failure to give the resident representative of an exempted or overseas partnership, notice of any partnership meetings, by reason of an accidental omission, does not invalidate any action taken at those meetings pursuant to section 17(6) of the Exempted Partnerships Act, and section 13(3) of the Overseas Partnerships Act.

- A partner of an overseas partnership, who with knowledge or wilful authorization or permission, fails to advise the Registrar of a change to the partnership's registered details (including changes to the partnership name, registered office, resident representative or the general partners), will be liable to a fine of BD20 per day in default under section 24 of the Overseas Partnerships Act.

100. The effectiveness of the enforcement provisions which are in place in Bermuda will be considered as part of the Phase 2 Peer Review.

### Determination and factors underlying recommendations

<b>Determination</b>	
<b>The element is in place, but certain aspects of the legal implementation of the element need improvement</b>	
<b>Factors underlying Recommendations</b>	<b>Recommendations</b>
In some cases there are currently no penalties for non-compliance with obligations to maintain ownership and identity information in the case of companies and partnerships.	In so far as there are no penalties provided, introduce effective sanctions against entities and arrangements where they fail to comply with requirements to maintain and provide ownership and identity information.
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. <sup>3</sup>	Private Trust Companies should be required to maintain relevant identity and ownership information.
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.

<sup>3</sup>

See paragraph 83.

## A.2. Accounting records

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

***General requirements (ToR A.2.1), Underlying documentation (ToR A.2.2), and the 5-year retention standard (ToR A.2.3)***

### *Company accounting records*

101. Every registered company is required by section 83(1) of the Companies Act to keep proper records of accounts which includes a record of:

- (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;*
- (b) all sales and purchases of goods by the company; and*
- (c) the assets and liabilities of the company.*

102. Such records are to be kept at the registered office of the company, or such other place. Where that other place is outside Bermuda, then section 83(2) requires that at the company office in Bermuda such records should be kept which would allow ascertainment “with reasonable accuracy of the financial position of the company at the end of each three month period. There is no requirement that these records are to be kept for a specified period of time.

103. Under section 145 of the Companies Act every “permit company”, being a foreign incorporated company which is engaged in or carrying on a trade or business in or from Bermuda, must 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. Where such records are kept at a place outside Bermuda, then at an office of the company in Bermuda such records shall be kept as will enable the directors to ascertain with reasonable accuracy the financial position of the company at the end of each three month period. There is no express time period for which these records must be retained. In addition, at the time of registration as a permit company, a foreign company must provide to the Minister a copy of its latest audited financial statements (see form 15, Companies (Forms) Rules 1982).

104. All companies shall lay audited financial statements at the general meeting of a company pursuant to section 84, and retain such statements for 6 years thenceforth pursuant to section 273(4). However, if at such a general meeting the statements have not been laid, a Chairman is permitted to adjourn

such a meeting for up to 90 days or such longer period as the members may agree pursuant to section 84. Further, other than for publicly held or licensed financial institutions, the requirement to lay statements may be waived for a specific period of time (such period of time not being limited) under section 88, at the end of which the statements must be laid. There is no requirement to file accounting records with any government authority.

### *Accounting records required to be kept by licensed entities*

105. Licensing requirements are imposed on certain industry sectors (insurance, investment, bank and deposit taking institutions, and trust businesses) as explained in paragraph 45. In addition to identity and ownership information requirements, the licensing conditions also impose additional obligations in respect of accounting information. The Licensing Acts<sup>4</sup> are supplemented by regulations as well as guidance found variously in Statements of Principles, Codes of Conduct and Guidance Notes. Whilst some obligations in respect of accounting information vary according to the license types, there are some general themes and obligations which are set out below.

106. The Licensing Acts place “minimum criteria” on applicants and license holders including that the licensed business be conducted in a “prudent manner”. In respect of accounting information, the minimum criteria provide (or in words to this effect) that:

*A registered person shall not be regarded as conducting its business in a prudent manner unless it maintains or, as the case may be, will maintain adequate accounting and other records of its business and adequate systems of control of its business and records. Those records and systems shall not be regarded as adequate unless they are such as to enable the business of the registered person to be prudently managed and the registered person to comply with the duties imposed on it by or under this Act or other provision of law.*

107. Further clarification of the minimum criteria obligations is set out in industry-specific guidance issued in respect of each of the licensed sectors. For example, in respect of the insurance sector, clause 2.5 of the Statement of Principles to the Insurance Act 1978, provides in respect of the minimum criteria that:

*...the records and systems must be such that the registered person is able to fulfill the various other elements of the*

<sup>4</sup> See the list of key licensing legislation at paragraph 46 above.

*prudent conduct criterion and to identify threats to the interests of policyholders and potential policyholders. They should also be sufficient to enable the registered person to comply with the applicable notification and reporting requirements under the Act. Thus, delays in providing information or inaccuracies in the information provided will call into question the fulfillment of the requirement.*

*The nature and scope of the particular records and systems which a registered person should maintain should be commensurate with its needs and particular circumstances, so that its business can be conducted without endangering its policyholders and potential policyholders. In judging whether an institution's records and systems are adequate, the Authority has regard to its size, to the nature of its business, to the manner in which the business is structured, organized and managed, and to the nature, volume and complexity of its transactions. The requirement applies to all aspects of a registered person's business, whether on or off balance sheet, and whether undertaken as a principal or as an agent.*

### *Accounting records required to be kept by Service Providers*

108. The regulatory regime applicable to Service Providers is a key element in Bermuda's regime requiring the maintenance of reliable accounting records. Most persons conducting business in or from within Bermuda will have some involvement through either a one-off transaction or ongoing business relationship with a Service Provider, and in each of those instances, the relevant accounting record obligations on Service Providers will be triggered. These obligations are placed on all Service Providers regardless of their legal structure (for example, a company or partnership), and they are in respect of all clients regardless of the client's legal structure.

109. The record keeping requirements set out in Part 3 of the AML/ATF Regulations include retaining CDD evidence and the "supporting evidence and records" in respect of the matters the subject of the CDD measures. An indication of the specific evidence and records which are expected to be kept is set out in Chapter 8 of the AML/ATF Guidance Notes, and include in relation to all transactions carried out in respect of a customer, the following underlying documentation:

*"Transaction records in support of entries in the accounts, in whatever form they are used, e.g. credit/debit slips, cheques, should be maintained in a form from which a satisfactory audit*

*trail may be compiled where necessary, and which may establish a financial profile of any suspect account or customer.”*

110. Whilst these Guidance Notes are non-binding, under regulation 19 of the AML/ATF Regulations a Court must take them into account in determining whether a summary or indictable offence under the Regulations has been committed. Whilst significant, it is not clear that in all cases that the “supporting evidence and records” are the same as the records that must be maintained under the standard set out in A2.1 and A2.2 of the Terms of Reference.

111. Service Providers are required by regulation 15(3) of the AML/ATF Regulations to retain records, including accounting records, for a period of 5 years from the end of the business relationship or the date of the transaction.

### *Partnership accounting records*

112. Ordinary partnerships are not subject to any specific statutory requirements to maintain accounting records. In respect of limited partnerships, section 9 of the Limited Partnerships Act provides that “The general partners shall be liable to account to each other and to the limited partners, for their management of the concern, both at law and inequity, as other partners are now liable”.

113. Every exempted partnership is required to keep proper records of accounts under section 14(1) of the Exempted Partnerships Act, at its registered office in Bermuda, or another place. “Proper records” are defined to include records of account with respect to the partnership’s assets, liabilities and capital, cash receipts and disbursements, purchases and sales and income costs and expenses. Where the records are kept at a place outside Bermuda, then section 14(3) requires that at the registered office in Bermuda such records should be kept which would allow ascertainment “with reasonable accuracy” of the partnerships financial position at the end of each three month period. All exempted partnerships shall lay audited financial statements under section 15(1) at intervals prescribed by the partnership agreement. The laying of such statements may be waived with the written agreement of all partners. There is no express time period for which accounting records or financial statements must be retained by the partnership.

114. Every overseas partnership must 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, under section 15. Where such records are kept at some place outside Bermuda, then at the registered office of the partnership in Bermuda, such records shall be kept as will enable all partners to ascertain with



reasonable accuracy the financial position of the company at the end of each three month period. There is no express time period for which such accounting records must be retained by the partnership.

115. Where a partnership forms a business relationship or conducts a one-off transaction with a Service Provider, then records relating to that relationship or transaction are required to be maintained by the Service Provider.

### *Trust accounting records*

116. In respect of accounting records pertaining to trusts, obligations and industry guidelines are imposed under the regimes relating to either Service Providers, or licensed trustees. The accounting record obligations which are applicable to all Service Providers are described at paragraph 108 above. The general requirements imposed on licensed entities in respect of accounting records are described at paragraph 105 above, while the specific obligations on licensed trust business are detailed below.

117. In the Trust Regulation Act there are no provisions which impose obligations on licensed trustees to maintain trust accounting records. However, guidance on the maintenance of financial records by licensed trustees is set out in the Code of Practice and Statement of Principles made pursuant to section 7 and section 6 respectively of the Trusts Regulation Act. The Code of Practice and the Statement of Principles outline best-practice standards on the maintenance of financial records, in particular clause 7.6 of the Code and clause 2.8 of the Statement. Clause 7.6 provides:

*Licensed undertakings must keep and preserve appropriate records in Bermuda which will at least include such records as are appropriate for their functions, as required by any applicable law and as will enable the provision of information, to persons interested in trusts and entitled to the information, on a timely basis. This should include the identity of co-trustees, custodians, the settlor, protector, enforcer and, where appropriate, the principal beneficiaries, their personal circumstances, residence and a copy of the trust instrument, minutes of all decisions taken by trustees, other trust documents and trust accounts or records which would enable trust accounts to be drawn up. .... Financial records must be maintained so as to permit a thorough and satisfactory supervisory activity and to permit the performance of trust audits as pre-arranged.*

118. Whilst non-binding, licensed trustees are required by section 7(4) of the Trust Regulation Act, to have regard to the Code in conducting their business. Further, non-compliance with the Code or Statement will be taken into account by the BMA under section 7(5) and 12 of the Trust Regulation Act when determining whether an applicant or existing licensee fulfils the minimum criteria for granting or retaining a trust license.

119. However, neither the Code nor Statement make specific reference to retention of underlying accounting documentation nor to the retention of accounting records for any specified period of time.

120. Under the common law all trustees are subject to an obligation to ensure that records and accounts are prepared and maintained for a reasonable period of time to ensure that the trust is properly managed.

### *Determination and factors underlying recommendations*

<b>Determination</b>	
<b>The element is in place, but certain aspects of the legal implementation of the element need improvement.</b>	
<b>Factors underlying recommendations</b>	<b>Recommendations</b>
There are currently inconsistent obligations on relevant entities and arrangements to maintain reliable accounting records including underlying documentation, for a minimum 5 year period.	Introduce consistent, binding requirements on all relevant entities and arrangements, to maintain reliable accounting records including underlying documentation for a minimum of 5 years.

### **A.3. Banking information**

Banking information should be available for all account-holders.

#### ***Record-keeping requirements (ToR A.3.1)***

121. Banks and other deposit companies (banking institutions) are subject to both licensing requirements as well as the obligations imposed on Service Providers. The general obligations on licensed entities are discussed at paragraphs 45 and 105. The specific obligations in respect of banking information which are imposed on banking institutions under the licensing regime and AML/ATF Regulations are detailed below.

122. Banking institutions must under section 14 of the Banks and Deposit Companies Act 1999, meet the “minimum criteria” set out in Schedule 2 to that Act. This includes that they be “fit and proper” persons, that minimum net asset thresholds are maintained, that the business is effectively directed by at least two individuals, and that the business be conducted in a “prudent manner”. Clauses 4(7) and 4(8) of the minimum criteria provide that

*(7) An institution shall not be regarded as conducting its business in a prudent manner unless it makes or, as the case may be, will maintain adequate accounting and other records of its business and adequate systems of control of its business and records.*

*(8) Those records and systems shall not be regarded as adequate unless they are such as to enable the business of the institution to be prudently managed.*

123. Guidance on the minimum criteria is set out in the Statement of Principles to the Banks and Deposit Companies Act 1999, which provides inter alia that:

*... the records and systems must be such that the institution is able to fulfill the various other elements of the prudent conduct criterion, and to identify threats to the interests of depositors and potential depositors. .... Thus delays in providing information, or inaccuracies in the information provided, will call into question the fulfillment of the requirement of subparagraphs 4(7) and 4(8).*

*The nature and scope of the particular records and systems which an institution should maintain should be commensurate with its needs and particular circumstances, so that its business can be conducted without endangering its depositors and potential depositors. In judging whether an institution’s records and systems are adequate, the Authority has regard to its size, to the nature of its business, to the manner in which the business is structured, organised and managed, and to the nature, volume and complexity of its transactions. The requirement applies to all aspects of an institution’s business, whether on or off balance sheet, and whether undertaken as a principal or as an agent*

124. Regulation 13 of the AML/ATF Regulations set out certain specific requirements on banking institutions, including that a banking institution:

- Shall not enter into or continue a banking relationship with a shell bank, or knowingly with a bank which permits its accounts to be used by a shell bank (where a shell bank is an institution carrying on banking activities which are unregulated and has no meaningful physical presence in the jurisdiction of its incorporation);
- Shall not set up an anonymous account or pass book for any new or existing customer;
- Shall as soon as possible apply CDD measures and ongoing monitoring of existing anonymous accounts or passbooks.

125. As noted at paragraphs 54 and 108 above, regulation 15 of the AML/ATF Regulations requires the Service Provider to maintain customer identity information as well as supporting evidence and records in respect of business relationships and transactions undertaken by their clients. Chapter 8 of the Guidance Notes on AML/ATF expands on the requirement in regulation 15, and in respect of information relevant to account-holders, provides at clause 8.16 that:

*All transactions carried out on behalf of or with a customer in the course of relevant business must be recorded within the institution's records. Transaction records in support of entries in the accounts, in whatever form they are used, e.g. credit/debit slips, cheques, should be maintained in a form from which a satisfactory audit trail may be compiled where necessary, and which may establish a financial profile of any suspect account or customer.*

126. Under regulation 19 of the AML/ATF Regulations the Guidance Notes must be taken into account by a court in determining whether an offence relating to non-compliance with the AML/ATF Regulations has been committed.

127. The combination of the AML/ATF Regulations as well as the regulatory regime for licensed financial institutions ensures that all records pertaining to accounts as well as related financial and transactional information is available.

### ***Determination and factors underlying recommendations***

<b>Determination</b>
<b>The element is in place.</b>

## **B. Access to Information**

### **Overview**

128. 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. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, and accounting information in respect of all such entities. This section of the report examines whether Bermuda’s legal and regulatory framework gives its competent authority access powers that cover the right types of persons and information, and whether the rights and safeguards that are in place, are compatible with the effective exchange of information.

129. Bermuda’s competent authority has appropriate powers under domestic legislation to obtain relevant information by issuing a notice to the holder of the information. The level of sanctions available for non-compliance may however impact on the effectiveness of those powers, notwithstanding the reputational risk of non-compliance.

130. Whilst an affected person has a right to seek judicial review of a Minister’s decision in respect of an EOI request, Bermudian law does not give a person who is the subject of an EOI request the right to be notified of that request. Therefore, there are unlikely to be any delays in obtaining effective access to or exchanging the requested information.

### **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).

***Ownership and identity information (ToR B.1.1) and Accounting records (ToR B.1.2)***

131. The powers of Bermuda's competent authority to obtain relevant information are consistent regardless of from whom the information is to be obtained, for example a bank, other financial institution, company, trustee or individual; or whether the information to be obtained is ownership, identity, bank or accounting information. There is also no variation of the powers between instances where the information is required to be kept by a person pursuant to a law, or not.

132. The competent authority has a broad power to require by service of notice, the production of information as described at paragraph 134. Only where information is requested under the USA-Bermuda EOI Agreement does the competent authority have the power to search premises and seize records. The USA-Bermuda EOI Agreement should be read to include the confidential Competent Authority Agreement concluded pursuant to Article 3(2) of the USA-Bermuda EOI Agreement. The Competent Authority Agreement between the USA and Bermuda extends the permissible scope of EOI requests beyond tax matters relating solely to tax fraud or tax evasion, to all tax matters.

***Use of information gathering measures absent domestic tax interest (ToR B.1.3)***

133. Bermuda's relevant information gathering powers are contained in legislation which deals solely with implementing Bermuda's obligations pursuant to its EOI agreements: the International Cooperation Act and the USA Bermuda Tax Convention Act. These powers are not curtailed by any requirement that the power may only be exercised where there is a domestic tax interest. Further, in any event there are presently no domestic income taxes imposed by Bermuda.

***Compulsory powers (ToR B.1.4)***

134. The competent authority may obtain information from any person who is in possession or has control of information falling within the scope of the request. This includes information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees.

135. By issuing a notice pursuant to section 5 of the International Cooperation Act, the competent authority can require a person to produce information which is in their possession or control (section 6) within a specified period (usually 28 days). That time period may be extended under section 6(3). A notice may be issued to any person who is in control or possession of the information, regardless of whether

the information concerns ownership of a company, partnership, trust or other relevant entity, or any other relevant matter.

136. It is an offence under section 9(1) and (2) of the International Cooperation Act for the recipient of a notice to fail to provide the information, to tamper or alter the information, or to destroy or damage information which they have been directed to provide. A person convicted of such an offence is liable under section 9(3) to a custodial sentence not exceeding 6 months; a fine not exceeding BD5 000; or both. In addition, where the person convicted of an offence is a licensed Service Provider, this may affect their license where one of the minimum criteria for license-holders is compliance with all Bermudian laws.

137. Bermudian authorities only have powers to search and seize information, with the approval of a judge, when information is requested under the USA-Bermuda EOI Agreement, pursuant to section 6 of the USA Bermuda Tax Convention Act.

### ***Secrecy provisions (ToR B.1.5)***

138. There are no secrecy obligations imposed by statute in Bermuda including in respect of bank information or identity, ownership or accounting information concerning companies, partnerships, trusts or any other entity or arrangement. Where common law obligations of confidentiality apply, a person is protected by way of an absolute defence set out in section 7 of the International Cooperation Act, from any claims arising as a result of acts or omissions done in good faith in responding to a notice to produce information relating to an EOI request.

## **Determination and factors underlying recommendations**

<b>Determination</b>	
<b>The element is in place.</b>	
<b>Factors underlying recommendations</b>	<b>Recommendations</b>
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.

### *Not unduly prevent or delay exchange of information (ToR B.2.1)*

139. Under Bermuda’s law, there is no obligation to notify the subject of a request for information. However, where information is not in the possession of the competent authority, a notice to produce information may be issued to the holder of the information. There is no obligation on the holder not to inform the subject of the request, or any other person.

140. The International Cooperation Act provides in section 8 that once the Minister has obtained information pursuant to a notice, he shall retain that information for a period of 20 days before providing it to the requesting jurisdiction. Only four applications to the Court to review the Minister’s actions in respect of an EOI request have been made in the last 20 years.

141. As noted below at paragraph 178, Bermuda is not required to provide information which falls within the exceptions provided for in the OECD Model TIEA and Article 26 of the OECD Model Tax Convention. The limitations in respect of legal privilege and public policy are also incorporated into Bermuda’s domestic law by section 4 of the International Cooperation Act.

### **Determination and factors underlying recommendations**

<b>Determination</b>
<b>The element is in place.</b>



## C. Exchanging Information

### Overview

142. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In Bermuda, the legal authority to exchange information derives from tax information exchange agreements once these become part of the Bermuda's domestic law. This section of the report examines whether Bermuda has a network of information exchange that would allow it to achieve the effective exchange of information in practice.

143. As it does not have a domestic income tax regime, Bermuda's policy has been to negotiate EOI agreements based on the OECD's Model TIEA rather than double tax conventions. Since April 2009, Bermuda has actively sought to extend its network of exchange of information agreements and has concluded and signed 19 further agreements in that time. These are in addition to its three pre-existing EOI agreements: with the USA, concluded in 1988; with Australia, concluded in 2005; and with the UK, concluded in 2007. Noting the negotiations for additional EOI agreements which have recently been concluded (see Annex 3), once these agreements are signed Bermuda's EOI network will cover a significant number of relevant partners.

144. Bermuda's EOI arrangements are incorporated into domestic law by the USA Bermuda Tax Convention Act 1986 in respect of its EOI agreement with the USA, and under the International Cooperation Act in respect of its EOI agreements with other jurisdictions.

145. A review of Bermuda's EOI agreements indicates that there are some provisions which may limit exchange and are additional to those found in the OECD Model TIEA. In some instances, those provisions create discretion in favour of the requested Party to decline to provide certain information, whilst in others they place additional obligations on the requesting Party. In many instances, such provisions are included in Bermuda's most recently concluded EOI agreements with for example the Nordics, the Netherlands and New Zealand. Whether these provisions create a practical limitation on the EOI relationships with Bermuda's relevant partners will be considered as part of the Phase 2 Peer Review. To the

extent however that Bermuda’s EOI agreements must be considered against the enumerated aspects of essential element C1, the highlighted divergences may create an opportunity for the exchange of information to the international standard to be hampered.

146. The confidentiality of information exchanged with Bermuda is protected by obligations imposed under its EOI agreements as well as domestic legislation. Under Bermuda’s domestic law, there are penalties applicable in the event of a breach of the confidentiality obligations. Bermuda’s EOI agreements also protect the disclosure of certain types of information as permitted by the OECD Model TIEA, including information the subject of attorney client privilege or business and professional secrets.

### C.1. Exchange-of-information mechanisms

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

#### *Foreseeably relevant standard (ToR C.1.1)*

147. 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, set out below:

*The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.*

148. Each of the EOI agreements concluded by Bermuda includes a provision equivalent to Article 1 of the OECD Model TIEA. However, in some cases additional provisions are included which may impact on the effective exchange of information to the international standard. This is also the case for some provisions in the domestic legislation which gives effect to Bermuda’s EOI network. The following paragraphs sets out the key additional provisions.

149. Some EOI agreements<sup>5</sup> create in Article 5 a requirement that the applicant party certify certain information regarding the relevance of the request, as follows:

*Where the applicant party requests information in accordance with this agreement, a senior official of the competent authority of the applicant party shall certify that the request is relevant to, and necessary for, the determination of the tax liability under the laws of the applicant Party. [emphasis added]*

150. Certain agreements<sup>6</sup> also provide that the applicant party must provide information to demonstrate why the requested information “is relevant to the determination of the tax liability of a taxpayer”. The use of the words “tax liability” in these provisions may not cover all the purposes set out in Article 1, for instance information relevant to the collection of tax, or the investigation or prosecution of tax matters. The requirement to “certify” this information is also additional to the requirements of the OECD Model TIEA.

151. It is noted that in some cases<sup>7</sup> a requested party is under no obligation to provide information which relates to a period more than 6 years prior to the tax period under consideration.

152. It should also be noted that whilst prima facie pursuant to Article 3(2), the USA-Bermuda EOI Agreement is restricted to providing assistance “relating to the prevention of tax fraud and the evasion of taxes”, the competent authorities of those jurisdictions have entered into a confidential Competent Authorities Agreement. That agreement extends the exchange of information to tax matters other than those related to fraud and evasion, and therefore meets the international standard by covering both civil and criminal tax matters.

<sup>5</sup> Aruba, Japan, Mexico, the Netherland Antilles, and the Netherlands. There is a similar provision in the EOI agreements between Bermuda and Australia, New Zealand, the Nordics and the USA.

<sup>6</sup> Australia, Germany, Ireland, Japan, Mexico, New Zealand and the United Kingdom.

<sup>7</sup> Aruba, Australia, Canada, Germany, Japan, Mexico, New Zealand, the Nordics, the Netherlands, the Netherland Antilles, and the United Kingdom.

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

153. For exchange of information to be effective it is necessary that a jurisdiction's obligation to provide information is not restricted by the residence or nationality of the person to whom the information relates or by the residence or nationality of the person in possession or control of the information requested. For this reason the international standard for exchange of information envisages that exchange of information mechanisms will provide for exchange of information in respect of all persons.

154. All the EOI agreements concluded by Bermuda contain a provision concerning the jurisdictional scope of the agreement, which is equivalent to Article 2 of the OECD Model TIEA.

155. However, in some of its agreements<sup>8</sup> an additional provision appears to create a further obligation where the request relates to a person who is neither a resident nor national of either the applicant or requested jurisdictions, as follows:

*If information is requested that relates to a person that is not a resident, nor a national, of one or other of the Parties, it also shall be established to the satisfaction of the competent authority of the requested Party that such information is necessary for the proper administration and enforcement of the fiscal laws of the applicant Party*

156. This requirement may narrow the application of the “foreseeably relevant” standard in the OECD Model TIEA for those cases where the request relates to a person who is neither a resident nor national of either the applicant or requested jurisdictions.

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

157. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model Convention and the OECD Model TIEA, which are primary authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

<sup>8</sup> Australia, Germany, Mexico, New Zealand, the Nordics and the USA.

158. None of the EOI agreements concluded by Bermuda 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)***

159. The concept of “domestic tax interest” describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement is not consistent with the international standard. EOI partners must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.

160. All of the EOI agreements concluded by Bermuda allow information to be obtained and exchanged notwithstanding it is not required for domestic tax purposes.

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

161. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to the information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

162. None of the EOI agreements concluded by Bermuda 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)***

163. Information may be requested both for tax administration purposes and for tax prosecution purposes. Information exchange pursuant to the international standard is not limited to criminal tax matters but extends to information requested for tax administration purposes (also referred to as “civil tax matters”).

164. All of the EOI 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)***

165. With two exceptions, all of the EOI agreements concluded by Bermuda allow for information to be provided in the form of depositions of witnesses and authenticated copies of original records, to the extent allowable under the requested jurisdiction's domestic laws. In the case of the Japan-Bermuda and the Mexico-Bermuda EOI agreements, at Article 5(3) they only provide for the applicant party to specifically request that information be provided in the form of authenticated copies of original records.

***In force (ToR C.1.8)***

166. For effective exchange of information a jurisdiction must have exchange of information arrangements in force. Where EOI agreements have been signed the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

167. Bermuda has signed and ratified all of the EOI agreements that it has concluded to date, thereby taking all steps which, for its part, are required to bring those agreements into force. Nine of the 20 EOI agreements concluded by Bermuda are now in force. At least 12 EOI agreements were concluded by Bermuda including those with the seven Nordic jurisdictions, prior to April 2009.

***Be given effect by necessary domestic measures (ToR C.1.9)***

168. For information exchange to be effective the parties to an exchange of information arrangements need to enact any legislation necessary to comply with the terms of the arrangement. The International Cooperation Act appoints the Minister of Finance as the competent authority of Bermuda for the purposes of its EOI agreements, and sets out general provisions regarding the implementation of those agreements. The International Cooperation Act includes two provisions which expand the circumstances, beyond those provided for by the standard, in which the competent authority may decline a request. The competent authority may decline a request where:

- i) Section 4(1): *the requesting party does not agree to pay the costs of providing the assistance, whether incurred by the Minister or any other person; and*
- ii) Section 4(2)(g): *the Minister is not satisfied that the requesting party will keep the information confidential and will not disclose it to any person other than — (i) a person or authority in its own jurisdiction for the purposes of the administration and enforcement of its tax laws; or (ii) a person*

*employed or authorized by the government of the requesting party to oversee data protection.*

169. This provision in Bermuda’s domestic law allows the Minister to decline a request on the basis that the requesting party does not agree to pay costs. This is notwithstanding that in its EOI arrangements, Bermuda has agreed a process with their EOI partners for the allocation of costs arising from EOI requests.

### ***Determination and factors underlying recommendations***

<b>Determination</b>	
The element is in place, but certain aspects of the legal implementation of the element need improvement	
<b>Factors underlying recommendations</b>	<b>Recommendations</b>
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.

170. Bermuda concluded its first EOI agreement in 1988 with the USA. Its next EOI agreement was signed in November 2005 when it concluded an agreement with Australia, followed by an agreement with the UK in 2007. Since then, Bermuda has signed a further 19 agreements, amounting to a total to date of 22 signed EOI agreements. This includes agreements with major economic partners such as the USA, the UK, Mexico, France and Germany. Most recently Bermuda signed EOI agreements with Japan on 1 February 2010, Bahrain on 22 April 2010, Portugal on 10 May 2010 and Canada on 14 June 2010. A full list of the jurisdictions with which Bermuda has concluded EOI agreements including their dates of signing, ratification, and the date they enter into effect can be found in Annex 2.

171. Bermuda continues to expand its EOI network, and has recently concluded negotiations with Spain, India, South Africa, Belgium, Korea, China, Italy, Brazil and Indonesia. A list of the status of those EOI agreements is set out in Annex 3.

172. Comments were sought from the jurisdictions participating in the Global Forum, and in the course of the preparation of this report, no jurisdiction advised the assessment team that it was interested in entering into an EOI agreement with Bermuda but that Bermuda had refused to negotiate or enter into such an agreement with it.

### *Determination and factors underlying recommendations*

<b>Determination</b>	
<b>The element is in place.</b>	
<b>Factors underlying recommendations</b>	<b>Recommendations</b>
	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 C3.1) and all other information exchanged (ToR C.3.2)*

173. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments, countries with tax systems generally impose strict confidentiality requirements on information collected for tax purposes. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.



174. The EOI agreements concluded by Bermuda meet the standards for confidentiality including the limitations on disclosure of information received, and use of the information exchanged, which are reflected in Article 26(2) of the OECD Model Tax Convention, and Article 8 of the OECD Model TIEA.

175. Further, section 8 of the International Cooperation Act requires any information obtained by the competent authority pursuant to a notice issued to a person for the purpose of obtaining information to respond to an EOI request, shall be kept confidential by the Minister.

176. The information provided by a requesting party may be provided to Bermuda's Attorney General, as in respect of every request received, the Minister of Finance as the competent authority, obtains an opinion from the Attorney-General on whether the request is a valid under the terms of the relevant EOI agreement, and whether it also meets the domestic law requirements for requests. The information may also be required to be produced to a Court where an applicant seeks judicial review of the Minister's actions in respect of the request.

177. The original Official Secrets Act 1911 (UK) applies to Bermuda's public servants, and section 2 in particular is a broad provision applying to any person who holds confidential information, which will include all information relating to an EOI request, and creates an offence for the improper communication or retention of that information. The offence is punishable by a fine, imprisonment for up to two years, or both. The scope of information covered by section 2 would include information, in any form, received or exchanged in respect of an EOI request.

### *Determination and factors underlying recommendations*

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

178. The international standard allows requested parties not to supply information in response to a request in certain identified situations. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by the attorney-client

privilege. Attorney – client privilege is a feature of the legal systems of many countries.

179. However, communications between a client and an attorney or other admitted legal representative are, generally, only privileged to the extent that, the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative. Where attorney – client privilege is more broadly defined it does not provide valid grounds on which to decline a request for exchange of information. To the extent, therefore, that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent a company in its business affairs, exchange of information resulting from and relating to any such activity cannot be declined because of the attorney-client privilege rule.

180. The limits on information which can be exchanged that are provided for in the OECD Model TIEA and Article 26 of the OECD Model Tax Convention are included in each of the EOI agreements concluded by Bermuda. That is, information which is subject to legal privilege; which would disclose any trade, business, industrial, commercial or professional secret or trade process; or would be contrary to public policy, is not required to be exchanged. The limitations in respect of legal privilege and public policy are also incorporated into Bermuda’s domestic law, by section 4 of the International Cooperation Act.

181. It should be noted that in Article 7(3) of Bermuda’s EOI agreement with Canada, the definition of attorney-client privilege appears to include information enclosed within a communication between a client and another person who is not a legal advisor which is beyond the exemption for attorney client privilege under the international standard. Article 7(3)(b) of that agreement describes such communications as including:

*(b) are communications between:*

...

*(iii) the client and another person instructed by a professional legal advisor, produced for the purposes of existing or contemplated legal proceedings.*

### ***Determination and factors underlying recommendations***

<b>Determination</b>
<b>The element is in place.</b>

## 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)*

182. There are no specific legal or regulatory requirements in place which would prevent 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. Each of the EOI agreements concluded by Bermuda, except for the recently signed agreement with Portugal, include an obligation to either respond to the request, or provide a status update within 90 days of receipt of the request.

### *Organisational process and resources (ToR C.5.2)*

183. The BMA with the Minister of Finance are the principal bodies responsible for the oversight and regulation of persons holding information which may be relevant to an EOI request, are the repositories of the available information gathering powers, and manage the processing of EOI requests. Whilst there is no separate agency dedicated to providing international assistance in tax matters, together they create a complementary and effective system for maintaining appropriate domestic measures and responding efficiently to requests from Bermuda's EOI partners.

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

184. Other than those matters identified earlier, there are no further conditions which may restrict the provision of exchange of information assistance.

### *Determination and factors underlying recommendations*

#### **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. (ToR A.1.)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	In some cases there are currently no penalties for non-compliance with obligations to maintain ownership and identity information in the case of companies and partnerships.	In so far as there are no penalties provided, introduce effective sanctions against entities and arrangements where they fail to comply with requirements to maintain and provide ownership and identity information.
	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. <sup>9</sup>	Private Trust Companies should be required to maintain relevant identity and ownership information.
	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.
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. (ToR A.2.)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	There are currently inconsistent obligations on relevant entities and arrangements to maintain reliable accounting records including underlying documentation, for a minimum 5 year period.	Introduce consistent, binding requirements on all relevant entities and arrangements, to maintain reliable accounting records including underlying documentation for a minimum of 5 years.

<sup>9</sup> See paragraph 83.

Banking information should be available for all account-holders. (ToR A.3.)		
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). (Tor B.1.)		
The element is in place.		
	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.
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. (ToR B.2.)		
The element is in place.		
Exchange of information mechanisms should allow for effective exchange of information. (ToR C.1.)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	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.
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. (ToR C.2.)		
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. (ToR C.3.)		
The element is in place.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. (ToR C.4.)		
The element is in place.		
The jurisdiction should provide information under its network of agreements in a timely manner. (ToR C.5.)		
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 Review Report\***

The Report was approved by the PRG at the PRG meetings held in Bahamas from July 20-22. Bermuda was the first country to be reviewed under this procedure. Although the process was compressed with tight time lines, Bermuda was satisfied that the report was reflective of Bermuda’s regulatory and legislative regime and accepted the report of the assessors.

One matter which Bermuda recommends the PRG develop further for consistent application to all Global Forum members is the scope of the application of the standards to nominees.

Bermuda is committed to international standards for exchange of tax information and to working with the Global Forum to ensure a mutual understanding of the application of the standards. To this end Bermuda is preparing for Phase 2 and the assessment of Bermuda’s effective implementation of these standards.

- \* 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: List of All Exchange-of-Information Mechanisms in Force

	Jurisdiction	Type of Eol Arrangement	Date Signed	Date Entered Into Force
1	Aruba	TIEA	20.10.2009	Not Yet In Force
2	Australia	TIEA	10.11.2005	20.09.2007
3	Bahrain	TIEA	22.04.2010	Not Yet In Force
4	Canada	TIEA	14.06.2010	Not Yet In Force
5	Denmark	TIEA	16.04.2009	25.12.2009
6	Faroe Islands	TIEA	16.04.2009	Not Yet In Force
7	Finland	TIEA	16.04.2009	31.12.2009
8	France	TIEA	08.10.2009	Not Yet In Force
9	Germany	TIEA	03.07.2009	Not Yet In Force
10	Greenland	TIEA	16.04.2009	Not Yet In Force
11	Iceland	TIEA	16.04.2009	Not Yet In Force
12	Ireland	TIEA	28.07.2009	11.05.2010
13	Japan	TIEA	01.02.2010	Not Yet In Force
14	Mexico	TIEA	15.09.2009	Not Yet In Force
15	Netherlands	TIEA	08.06.2009	01.02.2010
16	Netherlands Antilles	TIEA	28.09.2009	Not Yet In Force
17	New Zealand	TIEA	16.04.2009	23.12.2009
18	Norway	TIEA	16.04.2009	Not Yet In Force
19	Portugal	TIEA	10.05.2010	Not Yet In Force
20	Sweden	TIEA	16.04.2009	25.12.2009
21	United Kingdom	TIEA	05.12.2007	10.11.2008
22	United States	TIEA	02.12.1988	02.12.1988



### **Annex 3: List of All Current Negotiations for EOI Agreements**

	<b><i>Jurisdiction</i></b>	<b><i>Status of negotiations</i></b>
1.	Spain	Negotiations concluded. Bermuda is now in the process of obtaining the necessary approvals for signing.
2.	Belgium	Negotiations concluded. Bermuda has received all necessary approvals for signing and has communicated this to Belgium.
3.	India	Negotiations concluded. Bermuda has received all necessary approvals for signing and has communicated this to India.
4.	South Africa	Negotiations concluded. Bermuda has received all necessary approvals for signing and has communicated this to South Africa.
5.	Korea	Negotiations concluded. Bermuda has received all necessary approvals for signing and has communicated this to Korea.
6.	China	Negotiations concluded. Bermuda has received all necessary approvals for signing and has communicated this to China.
7.	Italy	Negotiations concluded. Bermuda is now in the process of obtaining the necessary approvals for signing.
8.	Brazil	Negotiations concluded. Bermuda is now in the process of obtaining the necessary approvals for signing.
9.	Indonesia	Negotiations concluded. Bermuda is now in the process of obtaining the necessary approvals for signing.



## **Annex 4: List of All Laws, Regulations and Other Material Received**

### ***Information exchange for tax purposes laws***

USA Bermuda Tax Convention Act 1986

International Cooperation (Tax Information Exchange Agreements) Act 2005

Criminal Justice (International Cooperation) (Bermuda) Act 1994

### ***Commercial laws***

Companies Act 1981

Companies (Winding-up) Rules 1982

Segregated Accounts Companies Act 2000

Partnership Act 1902

Limited Partnership Act 1883

Exempted Partnerships Act 1992

Overseas Partnerships Act 1995

Exchange Control Act 1972

Exchange Control Regulations 1973

### ***Regulatory and anti- money laundering/anti-terrorist financing laws***

Bermuda Monetary Authority Act 1981

#### ***Banking Legislation***

Banks and Deposit Companies Act 1999

Banks and Deposit Companies (Exemption) Order 1999

Banks and Deposit Companies (Exemption) Order 2001

Banks and Deposit Companies (Reporting Accountants) (Facts and Matters of Material Significance) Regulations 2006

*Fee Legislation*

Banks and Deposit Companies (Fees) Act 1975

*Credit Union*

Credit Unions Act 1982

Credit Union (Delegation of Minister's Functions) Order 1989

*Investment Funds*

Investment Funds Act 2006

Fund Prospectus Rules 2007

Fund Rules 2007

*Investment Business*

Investment Business Act 2003

Investment Business Regulations 2004

Investment Business (Reporting Accountants) (Fact and Matters of Material Significance) Regulations 2006

Investment Business (Exemptions) Order 2004

The Investment Business (Client Money) Regulations 2004

*Trusts*

Trusts (Regulation of Trust Business) Act 2001

Trust (Regulation of Trust Business) Exemption Order 2002

Trusts (Regulation of Trust Business) Order 2003

Trust Business Appeal Tribunal Regulations 2004

Trusts (Regulation of Trust Business)(Reporting Accountants)(Facts and Matters of Material Significance) Regulations 2006

*Money Services Business*

Money Services Regulations 2007



*Insurance*

Insurance Act 1978

Insurance Prudential Standards (Class 4 Solvency Requirement) Order 2008 (2009 Consolidated)

Insurance Prudential Standards (Class 4 Solvency Requirement) Amendment Order 2009

Insurance Accounts Regulations 1980 (2009 Consolidated)

Insurance Returns and Solvency Regulations 1980

Non-Resident Insurance Undertakings Act 1967

*Professional regulation*

Bermuda Bar Act 1974

Institute of Chartered Accountants Act 1973 and Byelaws

*Anti-Money Laundering – Anti-Terrorist Financing*

Proceeds of Crime Act 1997

Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008

Financial Intelligence Agency Act 2007

Proceeds of Crime (Designated Countries and Territories) Order 1998

Proceeds of Crime Regulations (Supervision and Enforcement) Act 2008

Anti-Terrorism (Financial and Other Measures) Act 2004

Anti-Terrorism (Financial and Other Measures) (Businesses in Regulated Sector) Order 2008

*Non-binding guidance policy**Banks and Deposit Companies*

Banks and Deposit Companies Statement of Principles

Banks and Deposit Companies Act 1999: The Management and Control of Credit Risks and the Implementation of the Statutory Provisions for Large Exposures

Banks and Deposit Companies Act 1999: The Bermuda Monetary Authority's Relationship with Auditors and Reporting Accountants of Banks and Deposit Companies

Banks and Deposit Companies Act 1999: The Management of Operational Risk

Banks and Deposit Companies Act 1999: The Monitoring and Control of Interest Rate Risk

Banks and Deposit Companies Act 1999: The Measurement and Monitoring of Liquidity

Banks and Deposit Companies Act 1999: The Approach to Consolidated Supervision

Banks and Deposit Companies Act 1999: Revised Framework for Regulatory Capital Assessment

Banks and Deposit Companies Act 1999: The Outsourcing of Services or Functions by Institutions Licensed under the Banks and Deposit Companies Act 1999

Guidance on Completion of the Prudential Information Return for Banks  
Liquidity Return Guidance Notes

Foreign Currency Exposure Returns Guidance Notes

Capital Adequacy Return Guidance Notes

### *Insurance*

The Insurance Code of Conduct- Comes in to effect July 1, 2010

Insurance Information Bulletin - Fit and Proper Persons

Insurance Information Bulletin - Special Purpose Insurers

Insurance Guidance Notes 1-20

Insurance Statement of Principles

### *Trusts*

Trusts(Regulation of Trust Business) Act 2001 – Info for Prospectus Applicants

Trust Business Statement of Principles

Trust Business Code of Practice

*Investment Business*

Investment Fund Guidelines

Code of Conduct for Fund Administrators

Fund Administrators - Guidance for Prospective Applicants

Investment Business Statement of Principles

General Business Conduct and Practice - Code of Conduct

Advertising Code of Conduct

The Investment Business Act 2003 - Guidance for Prospective Applicants

*Other*

Money Services Regulations 2006-Information for Prospective Applicants and Guidance Notes

Barristers' Code of Professional Conduct

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The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

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# Global Forum on Transparency and Exchange of Information for Tax Purposes

## PEER REVIEWS, PHASE 1: BERMUDA

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 90 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the 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, which has been incorporated in 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 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 visit [www.oecd.org/tax/transparency](http://www.oecd.org/tax/transparency).

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