

GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE
OF INFORMATION FOR TAX PURPOSES

Peer Review Report
Phase 2
Implementation of the Standard
in Practice

BERMUDA

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Bermuda 2013

PHASE 2:
IMPLEMENTATION OF THE STANDARD IN PRACTICE

November 2013
(reflecting the legal and regulatory framework
as at May 2013)

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Table of Contents

About the Global Forum	5
Executive Summary	7
Introduction	11
Information and methodology used for the peer review of Bermuda	11
Overview of Bermuda	13
Recent developments	17
Compliance with the Standards	19
A. Availability of Information	19
Overview	19
A.1. Ownership and identity information	21
A.2. Accounting records	51
A.3. Banking information	59
B. Access to information	63
Overview	63
B.1. Competent Authority’s ability to obtain and provide information	64
B.2. Notification requirements and rights and safeguards	71
C. Exchanging information	73
Overview	73
C.1. Exchange-of-information mechanisms	75
C.2. Exchange-of-information mechanisms with all relevant partners	84
C.3. Confidentiality	86
C.4. Rights and safeguards of taxpayers and third parties	90
C.5. Timeliness of responses to requests for information	92

Summary of Determinations and Factors Underlying Recommendations. . . .	101
Annex 1: Jurisdiction’s Response to the Review Report	105
Annex 2: List of All Exchange-of-Information Mechanisms.	106
Annex 3: List of All Laws, Regulations and Other Material Received.	108
Annex 4: People Interviewed During On-Site Visit	114

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 120 jurisdictions, which participate in the Global Forum on an equal footing.

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

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

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

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

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

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information for tax purposes in Bermuda as well as the practical implementation of that framework.
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.
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.
4. The legal and regulatory framework of Bermuda ensures that ownership and identity information is available with respect to relevant companies, partnerships and trusts. Legal and regulatory obligations also ensure the availability of accounting information. These obligations are supported by investigatory powers and sanctions although, in practice, the level of the financial penalties and the frequency with which enforcement measures have been exercised are low in relation to a number of key record-keeping obligations. Accordingly, Bermuda is recommended to ensure that all its appropriate monitoring and enforcement powers are sufficiently exercised to support the legal requirements which ensure the availability of ownership, identity and accounting information.

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 ("EOI notices"). In addition, the competent authority has search and seizure powers. 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. The power to issue EOI notices is exercised in all cases in order to obtain information for exchange of information purposes. The preparation and service of EOI notices, as well as the day-to-day administration of all information exchange requests, are conducted by the Treaty Unit of the Ministry of Finance, with input from the Attorney General's Chambers on legal matters. The Bermudian authorities are able to obtain the requested information in an efficient manner through this channel. Furthermore, current policy guidelines issued in April 2013 should ensure that only the minimum necessary amount of information from the relevant EOI request is disclosed in an EOI notice to the holder of the requested information.

6. As a jurisdiction without a domestic income tax system, Bermuda generally only receives requests for information. Although Bermuda's practical experience of exchanging information with a number of EOI partners is relatively new, the procedure for such exchange follows one that is long established. Bermuda's practices to date have also demonstrated a responsive approach. For the three year period under review (1 January 2009 – 31 December 2011), Bermuda received 15 requests from 5 treaty partners. The review notes the limited number of requests that Bermuda received during the review period but that these covered a range of ownership, accounting and bank information. It also notes that the number of EOI requests received by Bermuda is increasing rapidly: the number of EOI requests received in 2012 almost doubled the total number during the review period. Bermuda reported that this increase has not impacted upon the timeframe within which EOI requests are processed. Given the recent entry into force of a number of Bermuda's EOI agreements and the continuous expansion of its EOI network, the number of incoming EOI requests can be expected to further increase.

7. Bermuda has been able to respond to information exchange requests in a timely manner. In the three year period under review (1 January 2009 – 31 December 2011), Bermuda provided the requested information within 90 days in relation to 11 of the EOI requests received, with all answered within 180 days cumulatively. The feedback from peers was generally positive and Bermuda is considered to be a dedicated EOI partner.

8. Having concluded its first agreement for the exchange of information in 1988, in the last six years Bermuda has rapidly expanded its EOI network which now covers 38 jurisdictions, with many of these agreements already in

force. Bermuda's EOI agreements generally allow for exchange of information according to the international standard. In a number of cases, Bermuda has clarified any possible questions of interpretation with its partners. Bermuda is still actively negotiating EOI agreements and should continue with this policy.

9. Bermuda has been assigned a rating¹ for each of the 10 essential elements as well as an overall rating. The ratings for the essential elements are based on the analysis in the text of the report, taking into account the Phase 1 determinations and any recommendations made in respect of Bermuda's legal and regulatory framework and the effectiveness of its exchange of information in practice. On this basis, Bermuda has been assigned the following ratings: Compliant for elements A.3, B.1, B.2, C.1, C.2, C.4 and C.5, and Largely Compliant for elements A.1, A.2 and C.3. In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Bermuda is Largely Compliant.

10. A follow up report on the steps undertaken by Bermuda to answer the recommendations made in this report should be provided to the PRG within twelve months after the adoption of this report.

1. This report reflects the legal and regulatory framework as at the date indicated on page 1 of this publication. Any material changes to the circumstances affecting the ratings may be included in Annex 1 to this report.

Introduction

Information and methodology used for the peer review of Bermuda

11. The peer review of Bermuda has been undertaken across three assessments: the 2010 Phase 1 Report, the supplementary Phase 1 report and the Phase 2 assessment. The assessments of the legal and regulatory framework of Bermuda and the practical implementation and effectiveness of this framework were based on the international standards for transparency and exchange of information as described in the Global Forum's Terms of Reference, and were prepared using the Global Forum's Methodology for Peer Reviews and Non-Member Reviews.

12. The 2010 Phase 1 Report of Bermuda, which was adopted and published by the Global Forum in October 2010, 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.

13. The supplementary Phase 1 report, which followed the 2010 Phase 1 Report of Bermuda, was prepared pursuant to paragraph 58 of the Global Forum's Methodology and was adopted by the Global Forum in March 2012. The supplementary Phase 1 report was based on information available to the assessment team including the laws, regulations, and exchange of information arrangements in force or effect as at November 2011, and information supplied by Bermuda.

14. The Phase 2 assessment was based on the laws, regulations, and exchange of information mechanisms in force or effect as at May 2013, Bermuda's responses to the Phase 2 questionnaire, supplementary questions and other materials supplied by Bermuda, information supplied by exchange of information partners and explanations provided by Bermuda during the on-site visit that took place from 11-12 September 2012 in Hamilton, Bermuda.

During the on-site visit, the assessment team met with officials and representatives of the Ministry of Finance, the Registrar of Companies, the Attorney General's Chambers and the Bermudian Monetary Authority. A list of all those interviewed during the onsite visit is attached to this report at Annex 4.

15. The following analysis reflects the integrated 2010 Phase 1, supplementary Phase 1 and Phase 2 assessments of the legal and regulatory framework of Bermuda in effect as at May 2013 and the practical implementation and effectiveness of this framework in the three-year review period of 1 January 2009 to 31 December 2011.

16. 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 and the implementation and effectiveness of this framework against these elements and each of the enumerated aspects. In respect of each essential element a determination is made regarding Bermuda's legal and regulatory framework that either: *(i)* the element is in place, *(ii)* the element is in place but certain aspects of the legal implementation of the element need improvement, or *(iii)* the element is not in place. These determinations are accompanied by recommendations for improvement where relevant. In addition, to reflect the Phase 2 component, recommendations are made concerning Bermuda's practical application of each of the essential elements and a rating of either: *(i)* compliant, *(ii)* largely compliant, *(iii)* partially compliant, or *(iv)* non-compliant is assigned to each element. An overall rating is also assigned to reflect Bermuda's overall level of compliance with the standards.

17. The assessment presented in the 2010 Phase 1 Report 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. In the supplementary Phase 1 review, Mr Koki Harada and Dr Antonia Schenk-Geers were respectively replaced by Mr Kotaro Yamada, Section Chief, International Tax Policy Division Tax Bureau, Ministry of Finance, Japan; and Ms Sarita de Geus, Senior Policy Advisor, International Tax Law at the Directorate-General for the Tax and Customs Administration of the Netherlands Ministry of Finance as expert assessors.

18. The Phase 2 assessment was conducted by an assessment team which consisted of two expert assessors and two representatives of the Global Forum Secretariat: Mr Junya Toya, Deputy Director, International Operations Division, National Tax Agency, Japan; and Ms Sarita de Geus, Senior Policy

Advisor, International Tax Law at the Directorate-General for Tax and Customs Administration of the Netherlands Ministry of Finance; and Ms Doris King and Mr Mikkel Thunnissen from the Global Forum Secretariat. The assessment teams assessed the legal and regulatory framework and the practical implementation and effectiveness of this framework and relevant EOI arrangements in Bermuda.

19. The ratings assigned in this report were adopted by the Global Forum in November 2013 as part of a comparative exercise designed to ensure the consistency of the results. An expert team of assessors was selected to propose ratings for a representative subset of 50 jurisdictions. Consequently, the assessment teams that carried out the Phase 1 and Phase 2 reviews were not involved in the assignment of ratings. These ratings have been compared with the ratings assigned to other jurisdictions for each of the essential elements to ensure a consistent and comprehensive approach. The assignment of ratings was also conducted at a different time from those reviews, and the circumstances may have changed in the meantime. Readers should consult Annex 1 for information on changes that have occurred.

Overview of Bermuda

Governance and Economic Context

20. 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 2011, the population was estimated at 64 700², of which 71% were born in Bermuda. Bermuda has the third highest per capita income in the world at just over BD 85 996 in 2011 and does not impose any direct or sales tax. The local currency is the Bermudian dollar, fixed at BD 1 = USD 1 and all amounts referred to in this report are in Bermudian dollars, unless otherwise indicated.

21. 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. As of 2011, the tourism industry contributed 5.7% to Bermuda's GDP, compared with 6.1% as at the peak of the industry in 2006. 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 47% of Bermuda's GDP in 2011. The Bermuda Monetary Authority (BMA) has oversight responsibility for the banks, money service providers, insurance, trust

2. Bermuda's Department of Statistics.

and investment business sectors, as well as investment funds and the local stock exchange (which sees minimal trading activity), and is split into specialised departments including Insurance, Banking, Trusts and Investments.

22. Bermuda has a consumption-based tax system, focused primarily on payroll tax and customs duty, which are supplemented by 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 15.9% in 2010 and 17.8% in 2011.

Legal and Regulatory Framework

23. 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).

24. 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.

25. The development and interpretation of Bermuda's laws are heavily influenced by English common law and precedents set by the English courts. The Supreme Court Act 1905 provides that the common law, the doctrines of equity and the Acts of Parliament of England of general application which were in force in England on 11 July 1612 are in force in Bermuda to the extent that they are not otherwise altered by Bermudian primary legislation (s. 15). Furthermore, when interpreting or construing statutory provisions, except where expressly provided by primary legislation, Bermudian courts and public authorities must "apply as nearly as practicable the rules for interpretation and construction of provisions of law for the time being binding upon the Supreme Court of Judicature of England" (Interpretation Act 1951, s. 10). In construing non-statutory law (such as common law rights and obligations), case law from other common law jurisdictions would have persuasive value in the courts of Bermuda, with the case law from English courts generally bearing the greatest weight.

26. 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.

27. 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.

28. 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.

29. 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

30. Bermuda has four licensed banks. The four banks have 15 branches in Bermuda and the two largest banks have 33 overseas subsidiaries. The total value of deposits held by these banks was over BD 22 billion in 2011. In addition, there is one credit union, with members exclusively from a local labour union. The Bermuda Monetary Authority (BMA) 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.

31. 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 largest captive insurance jurisdiction. The total value of assets held by insurers in Bermuda amounted to BD 524.6 billion as at the end of 2010. 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.

32. 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 organisations, and is home to a large number of hedge funds, investment managers, and portfolio managers as well as

internationally-active fund administrators. The total net asset value of investment funds in Bermuda amounted to BD 159.5 billion as at the fourth quarter of 2011. Bermuda has a stock exchange with a limited number of full-service brokerage firms. The Bermuda Stock Exchange (BSX) is a fully electronic 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 total trading volume on the BSX in 2011 was 6.5 million shares with a corresponding value of BD 25.5 million. The vast bulk of trading volume on the exchange takes place in international issues. The total market capitalisation of the BSX as at 31 December 2011 (excluding funds listings) stood at over BD 341 billion with the domestic market comprising less than one percent of that market capitalisation (at BD 1.4 billion). All trading members must be Bermuda-domiciled companies. The BSX also operates a clearing and settlement system and a depository.

33. 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 33 licensed trust companies managing, in total, trust assets of BD 49.85 billion in 2011.

34. 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 100 CSPs operating in and from Bermuda. The Corporate Service Provider Business Act 2012 (CSPBA 2012) brought in a new licensing regime for CSPs and placed them under AML/ATF requirements. Although the CSPBA 2012 came into effect from 1 January 2013, the licensing regime is currently in transition and persons who provided corporate services prior to the commencement of the CSPBA 2012 can continue to do so without applying for a licence until the end of 2013. No licences have yet been issued to date and it is anticipated that the BMA will start to grant licences to CSPs from the start of the second half of 2013. No company, or limited or exempted partnership can be formed without the approval of the BMA, and the Controller of Foreign Exchange except where they are formed by licensed CSPs. Only lawyers or accountants who are authorised 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

35. 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.

36. In respect of its network for the exchange of information for tax purposes, Bermuda currently exchanges information pursuant to bilateral mechanisms, comprising of 35 TIEAs and 3 DTAs. A complete list of the EOI agreements under which Bermuda has agreed to exchange information for tax purposes is set out in Annex 2.

Recent developments

37. Since the commencement of its Phase 1 peer review in April 2009, Bermuda has signed a further 15 agreements for the exchange of information for tax purposes, bringing the total number of agreements signed to 38 (see further Annex 2). This includes the most recent agreements with Brazil and Singapore in October 2012. In addition, Bermuda signed a TIEA with Belgium on 23 May 2013.

38. Bermuda passed the Specified Business Amendment Legislation Act 2012 on 13 July 2012 which was targeted at addressing the recommendations previously issued by the Global Forum in relation to Bermuda's legal and regulatory framework.

39. The CSPBA 2012, which came into effect on 1 January 2013, places CSPs under licensing requirements and the AML/AFT regime. However, a transition period of one year is provided under the legislation in which existing CSPs can continue to provide corporate services without a licence. No CSPs have yet been licensed to date. It is anticipated that the BMA will start granting licences to CSPs from the start of the second half of 2013.

Compliance with the Standards

A. Availability of Information

Overview

40. 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. It also assesses the implementation and effectiveness of this framework.

41. 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). In particular, a new licensing regime is introduced for corporate services providers (CSPs) under the CSPBA 2012. However, this licensing regime is currently in transition and persons who provided corporate services prior to the commencement of the CSPBA 2012 can continue to do so without applying for a licence until the end of 2013.

42. Bermudian Local and Bermuda Exempted companies (i.e. Bermudian companies) are required to maintain a shareholder register in Bermuda. The Registrar is provided with ownership information upon the initial registration of Bermudian companies. Since October 2012, permit companies are required to report to the Exchange Controller the identity of persons who beneficially own 10% or more of their capital, unless their shares are listed on a recognised stock exchange or they have appointed a licensed CSP as their principal representative.

43. With respect to partnerships, the Registrar obtains identity information on general partners of exempted partnerships, limited partnerships and overseas partnerships upon initial registration of the partnerships. Changes in the general partners of such partnerships must also be reported to the Registrar. General partners of limited partnerships formed under Bermudian law, including exempted limited partnerships, are statutorily required to maintain a register of limited partners.

44. Finally, all professional trustees are required to maintain identity information on the beneficiaries, trustees and settlors of the trust(s) which they manage. The obligations on exempted trustees to keep such information, were introduced in July 2012 and have not been tested in practice.

45. Enforcement provisions are in place to support the obligations which ensure the availability of ownership and identity information on companies, partnerships and trusts. However, the level of the financial penalties and the frequency with which enforcement measures have been exercised are low in many cases. Accordingly, Bermuda should ensure that it exercises all its appropriate monitoring and enforcement powers in support of legal requirements which ensure the availability of ownership, identity and accounting information in respect of all relevant entities.

46. Some of the legal requirements that ensure the availability of ownership and identity information have only been recently introduced. This is in particular the case with respect to the licensing regime for CSPs, which is still under transition, and obligations on permit companies and exempted trustees. It is recommended that Bermuda closely monitors the practical implementation of these recently introduced obligations.

47. Requirements are in place, mainly through statutory obligations, for all relevant entities and arrangements to maintain accounting records, including underlying documentation, for a minimum period of five years. However, the statutory obligations in relation to permit companies, ordinary partnerships, overseas partnerships and professionally managed trusts only recently entered into force in 2012. Accordingly, the effectiveness of these provisions in practice could not be assessed during the period under review. Therefore,

the impact of these new provisions on effective EOI should be monitored by Bermuda.

48. 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.

49. Between 1 January 2009 and 31 December 2011, Bermuda's EOI partners have predominantly requested information in relation to companies (10 requests), although requests were also received in relation to partnerships. The main type of information requested by Bermuda's EOI partners was ownership and identity information (11 requests) but accounting information and banking information have also been requested. No EOI partner indicated that a particular type of ownership, accounting or banking information (in relation to any type of entity) was unavailable in Bermuda.

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 3 A.1.1)

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

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

51. 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.

52. Companies may also be categorised as follows:

- 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

3. *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information.*

Companies Act. Such companies may carry on business domestically in Bermuda. There are currently 3 286 Bermudian Local companies registered 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). There are currently 11 467 Bermudian Exempted companies registered in Bermuda.
- Permit companies – non-Bermudian companies which are carrying on business in Bermuda must, under section 134, obtain a permit from the Minister. There are currently 423 registered permit companies operating in Bermuda.

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

Bermudian companies

53. 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 registering a company includes name of the company and address of the company’s registered office in Bermuda, which shall not be a post-office box (section 62, Companies Act). Companies are not expressly required to provide the Registrar with the names of its owners upon registration. Instead, beneficial ownership information is provided to the BMA for consideration and approval (see below).

54. 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)).

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

56. As a matter of practice, the BMA is provided with the beneficial ownership information of all Bermudian local and exempted companies for approval prior to their registration by the Registrar. Identity information on all owners in the full ownership chain must be disclosed to the BMA under Form 1 of the Company (Forms) Rules 1982. Through this, identity

information on direct, intermediate and ultimate owners are provided to the BMA, thereby looking through any “corporate veil”. The identity information provided includes the name, address and nationality (for natural persons) or place of incorporation (for legal persons). However, this procedure only provides Bermudian authorities with beneficial ownership information upon the formation of a Bermudian registered company; subsequent changes of ownership are not required to be vetted by the BMA.

57. Up-to-date ownership information is required to be maintained by the Bermudian companies themselves in a shareholder register kept at their office. The legal and regulatory requirements in relation to this are discussed in *Company ownership and identity information required to be held by companies* below and the monitoring and enforcement of this obligation in practice are discussed in A.1.6.

Companies issuing equity to non-residents

58. 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. Such exemption has been provided in relation to the transfer of shares of Bermudian companies that are publicly listed on a stock exchange. In addition, no permission will be required from the Exchange Controller for the transfer of shares of a company which engages a licensed CSP (Exchange Control Regulations, s. 25A).

Foreign companies

59. 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). However, it is not standard practice for the Minister to impose as a condition that a permit 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.

60. Under the Exchange Control Regulations (as amended with effect from October 2012), a permit company that neither appoints a licensed CSP as its principal representative nor has its shares listed on a recognised stock exchange⁴ is statutorily required to report a change of 10% or more in its beneficial ownership to the Exchange Controller (section 13A). The Bermudian authorities indicated that, in practice, the beneficial owner(s) will be identified when the 10% shareholding threshold is first reached, either as a result of an initial acquisition or increase to shareholding that initially fell below the 10% threshold. Any subsequent increase to this shareholding will not trigger further identification requirements.

61. A permit company that has appointed a licensed CSP as its principal representative is not subject to the above reporting requirement. However, the licensed CSP is subject to AML obligations to conduct customer due diligence (CDD) on its client (i.e. the permit company for which it acts) and to identify the beneficial owners holding 10% or more of the capital of its client and to retain such identity information for a minimum period of five years (regulations 2(2)(c), 3(2)(a) & (11), 5(b) and 15, AML/ATF Regulations – see *Service Providers* below). Accordingly, there are sufficient legal requirements to ensure the availability of ownership information in relation to all permit companies. As no licences to CSPs have yet been granted, all permit companies (except those with shares listed on a recognised stock exchange) are currently subject to the reporting requirement described in the paragraph above.

62. Due to the recent introduction of both section 13A of the Exchange Control Regulations (in October 2012) and the CSPBA 2012 which places licensed CSPs under AML/ATF obligations (in January 2013), it has not been possible to assess the practical impact of these measures during the course of the review. Bermuda should therefore monitor its practical implementation. There may, in practice, be a gap in the availability of ownership information of permit companies in Bermuda for periods prior to 2012.

4. It is recognised, and explicated stated in Article 5(4) of the Model TIEA, that the international standard does not require a requested jurisdiction to obtain or provide ownership information with respect to publicly traded companies unless such information can be obtained without giving rise to disproportionate difficulties.

Company ownership and identity information required to be held by companies

63. 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.

64. 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. The penalty for failure to maintain the shareholder register is BD75 per day in default (section 66A, Companies Act). 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

65. Professional nominees are considered to be carrying on a “corporate service provider business” under CSPBA 2012, and are expressly subject to the obligations imposed by the AML/ATF Regulations (sections 2(2), 8 and Schedule 2, para. 7). Under these regulations, professional nominees are required to conduct CDD, which includes identifying their clients. Accordingly, the CDD obligations entail that the professional nominee must collect and maintain identity information on the person on whose behalf it is holding the shares.

66. 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 Exchange Controller in respect of holding or transferring such securities, which requires the disclosure of information on the beneficial owner of the securities. In other instances, for example, where a person acts as a nominee in a private capacity (i.e. not by way of business) and are not acting for a non-resident, there are no obligations imposed on a nominee in respect of ownership and identity information of the beneficial owner. However, the Bermudian authorities indicate that most nominees operate by way of business in Bermuda; they further confirmed that there will be only exceptional cases where nominees are not acting by way of business and therefore they represent a very small proportion of all nominees acting in Bermuda. During the review period, Bermuda received five EOI requests for ownership information where there was involvement of

nominees in the ownership structure. Of the EOI partners that provided peer input, none indicated any problems requesting ownership information related to companies with nominees.

Conclusion and practice

67. In general, the legal framework of company and licensing laws and AML/ATF regulations ensure that ownership and identity information is available in relation to Bermudian registered and permit companies. Bermudian registered companies are required to maintain a shareholder register in Bermuda. The Registrar is provided with ownership information upon the initial registration of Bermudian companies. Permit companies are required to report to the Exchange Controller the identity of their beneficial owners who hold 10% or more of their capital, unless it has appointed a licensed CSP as its principal representative. No licences have yet been granted to CSPs to date. However, once the licensed CSP regime becomes operational, licensed CSPs appointed by companies will collect and retain beneficial ownership information on the companies regarding 10% or greater shareholdings.

68. Professional nominees are under AML obligations to maintain identity information on clients for whom they hold shares. However the CSPBA 2012, which places professional nominees under such AML obligations, as well as the reporting obligation on permit companies under the Exchange Control Regulation (described above), were only recently introduced in 2012. Therefore, the effectiveness of these provisions in practice was not yet tested during the period under review. Accordingly, the impact of these new obligations on effective EOI should be monitored by Bermuda.

69. In the three-year period under review, Bermuda received ten requests in relation to ownership information regarding companies. Bermuda fully responded to six requests within 90 days, three requests within 180 days and the remaining request was cancelled by the requesting jurisdiction. Information was requested from banks in three instances, service providers in five instances, a government authority in one instance and from companies in Bermuda in three instances. Information is sometimes requested from multiple sources in order to respond to one EOI request.

Bearer shares (ToR A.1.2)

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

Licensed entities

71. 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.

72. The licensed sectors in Bermuda are insurance, investment, bank and deposit taking institutions, and trust businesses. With effect from January 2013, CSPs are also subject to licensing requirements under the CSPBA 2012 and fall under the supervision of the BMA. As at the end of 2011, there were 1230 registered insurers, 872 registered investment funds, 33 licensed trust businesses and 4 licensed banks in Bermuda. 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
- CSPs: Corporate Service Provider Business Act 2012

73. 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.

74. 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 the imposition of fines and the revocation of licenses) for breaches of the minimum criteria. License regulations generally require that the license holder maintains a physical presence in Bermuda (which is stated in the licence); and maintains an approved auditor. More stringent requirements apply for insurers which must maintain a principal office and a principal representative in Bermuda.

75. 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.

76. 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.

77. The industry guidelines include specific references to identity and ownership obligations in respect of trust businesses (see *Licensed trust businesses* below), and in respect of banks and deposit companies (see A.3 below).

78. In addition, 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.

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

Service Providers

80. 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.

81. 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 (Anti-money Laundering and Anti-terrorist Financing Supervision and Enforcement) Act 2008.

82. 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. By virtue of the CSPBA 2012, licensed CSPs are also considered to be Service Providers. Corporate services include acting as agent for the formation/establishment of a company or partnership, acting as nominee, providing administrative or secretarial services to companies or partnerships, and acting as a resident representative of a company or partnership in Bermuda. The Bermudian authorities expect over 100 CSPs to be licensed under the CSPBA 2012 to provide a range of company services. The obligations on Service Providers also extend to their branches and subsidiaries outside of Bermuda.

83. 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.

84. 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.

85. “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.

86. 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 all contexts except those concerning the obligations of licensed CSPs). In the context of licensed CSPs, which were brought within the AML/ATF regime in January 2013, the concept of “beneficial ownership” reflects that described above except that the threshold of ownership is 10%, rather than 25%, of the capital of the entity (regulation 3(11)). 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”.

87. 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.

88. 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.

89. 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.

90. 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.

Practice

91. BMA representatives indicated that the BMA has a close working relationship with service providers involved in the set-up and registration of legal entities in Bermuda (such as lawyers and accountants). This facilitates the obtaining of information, as necessary, through formal and informal channels, by the BMA from the service providers. Since 2013, these service providers are subject to the licensing regime under the CSPBA 2012.

92. For AML/ATF purposes, the BMA is the supervisory and enforcement body in relation to “AML/ATF regulated financial institutions” which includes banks, investment funds, insurance business, licensed trustees and, since 2013, CSPs. Lawyers and accountants (defined as “independent professionals”) are supervised by a joint body, the Barristers and Accountants AML/ATF Board, for AML purposes. The monitoring and enforcement of AML obligations by the BMA in practice are discussed in A.1.6 below.

93. Independent professionals were brought within the ambit of the AML regulations by the Proceeds of Crime Regulations (Supervision and Enforcement) Amendment Act 2010 which came into force in August 2010. However, no monitoring actions and spot-checks have as yet taken place. Nevertheless, the Bermudian authorities indicated that they had, in the past three years, undertaken extensive consultation, training and outreach prior to the introduction of the legislation to ensure that independent professionals were adequately aware of their new obligations under the AML regulations. Furthermore, due to the prior involvement of a significant number of independent professionals in the provision of corporate services, in which there is a tradition of comprehensive review of beneficial ownership information (as discussed in A.1.1 above), the Bermudian authorities are of the view that the new customer due diligence obligations under the AML regime in practice only represent an extension in scope, rather than an imposition of new responsibilities, upon the independent professionals. During the three-year review period, the Bermudian competent authority collected information from service providers in seven cases to respond to EOI requests.

Partnerships (ToR A.1.3)

94. 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. There are currently 781 exempted partnerships registered in Bermuda.

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

95. An ordinary local partnership is not under any statutory obligations to register, or file ownership or identity information, with the Registrar. However, under the Payroll Tax Act 1995 (PTA), all partners of a partnership which is carrying on business in Bermuda, or for a gain in Bermuda, are deemed employees of that partnership if they render services to the partnership and participate in the income or profits of that partnership (s. 6(a)). All partners of a local ordinary partnership, as general partners, would normally fall in this category. A local ordinary partnership, as deemed employer of the partners under the PTA, must register with the Tax Commissioner and tax has to be paid on the (deemed) remuneration paid to the partners. The names, address and telephone numbers of all the partners are provided to the Tax Commissioner upon registration of the partnership, as a payroll taxpayer, through the payroll tax employer registration form (Form P1). Any changes in the status of the partnership (as a payroll taxpayer), including a change in ownership and the identity of its partners, are required to be reported to the Tax Commissioner. Therefore, the Tax Commissioner will have ownership information on general partnerships available in his/her administration.

96. The formation of an exempted partnership requires an application to the BMA for review, except where such formation is carried out by a licensed CSP (Exempted Partnerships Act, s. 9(1A)). 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).

97. 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).

98. Where the services of a licensed CSP have not been engaged, 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 the Registrar is provided with certain information including the details of the beneficial ownership of the general partners by the BMA or, once the licensed CSP regime becomes operational, the appointed licensed CSP. Subsequent changes to the general partners must be reported to the Registrar (Exempted Partnerships Act, s. 13(5)).

99. A limited partnership is formed under the Limited Partnership Act 1883 (Limited Partnership Act). There are currently 963 such limited partnerships registered in Bermuda. Prior to registration, the following details must be provided to the BMA for review. Once the licensed CSP regime becomes operation, the review will be conducted by the appointed licensed CSP instead of the BMA. The BMA or the licensed CSP, as relevant, would then provide these details 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).

100. 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 authorised 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, which has not appointed a licensed CSP, is requested to provide to the Minister certain information including the details of the beneficial ownership of the general partners. Such 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) (Limited Partnerships Act, s. 8B(3A) and (3B)). Where a limited partnership has appointed a licensed CSP, such approval is not required from the BMA but the CSP would be required to conduct CDD in relation to the partnership (see *Partnership ownership and identity information required to be maintained by CSPs*). A limited partnership must maintain a registered office in Bermuda.

101. 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). There are currently 70 overseas partnerships registered in Bermuda. 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.

102. 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

103. An ordinary local partnership is not required under Bermudian law to maintain any specific ownership or identity records relating to the partnership. However, the Tax Commissioner can request an ordinary local partnership, as a payroll taxpayer, to provide identity information of its partners under its general powers to obtain evidence and review records of taxpayers (section 13, Taxes Management Act).

104. 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. This requirement applies equally to limited partnerships that are also exempted partnerships (Exempted Partnerships Act, s.24).

105. 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.

Partnership ownership and identity information required to be maintained by CSPs

106. Where a licensed CSP is appointed by a partnership, the CSP will be required to conduct CDD in relation to the partnership. Under the AML/ATF regulations, partners who are “beneficial owners” of the partnership will be identified through CDD. A “beneficial owner” in the context of a partnership is defined as (i) any individual who is ultimately entitled to 10% or more of the profits, capital or voting rights in the partnership; or (ii) any individual who otherwise exercises control over the management of the partnership (AML/ATF regulations, s.3(2) & (11)). Therefore, it is considered that as a minimum, pursuant to AML/ATF obligations, the licensed CSPs will hold identity information on all general partners of a partnership (as persons who exercise control over the management of the partnership), and any limited partners whose entitlement exceeds the 10% threshold (see further discussion in *Service Providers* above).

Conclusion and practice

107. In general, there are comprehensive registration and record keeping requirements to ensure the availability of information in relation to partnerships under Bermudian law. The Registrar retains identity information on general partners of exempted, overseas and limited partnerships, as well as other information identifying such partnerships (such as the address of their registered office and/or resident representative). The CA representatives indicated that the information maintained by the Registrar has, in practice, facilitated the initiation of the process for responding to EOI requests in a number of cases.

108. Through vetting requirements, identity information on general partners of limited partnerships and exempted partnerships is also held by the BMA, where such entities have not appointed a licensed CSP. The Exchange Controller collects identity information on the general partners of overseas partnerships. Information collected by the BMA and Exchange Controller is kept, for an indefinite period, in electronic format since 2009, and in paper format prior to that date.

109. Identity information on limited partners is not maintained by the Registrar. General partners of limited partnerships formed under Bermudian law, including exempted limited partnerships, are required to maintain a register of limited partners.

110. Identity information on partners of a local ordinary partnership would be available through payroll tax registration information filed by the partnership with the Tax Commissioner. In practice, the registration information is kept in hard copy only in the taxpayer file held by the Office of the Tax Commissioner. The Bermudian authorities are of the view that ordinary local partnerships are not commonly used since the preferred structure for conducting business is by way of a company.

111. In the three-year period under review, Bermuda received one request in relation to identity information regarding partnerships. The requested information was obtained from a service provider and a bank and the request was fully responded to by Bermuda within 61 days.

Trusts (ToR A.1.4)

112. 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.

113. 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.

114. 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

115. 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 authorised 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.

116. Where a Bermudian company is owned by a trust, the company must provide information to the BMA, or its licensed CSP (if applicable), on settlors and beneficiaries of the trust. Information maintained by the BMA 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

117. 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 Bermudian authorities confirmed that English common law relating to trusts and the fiduciary duties of the trustee is followed in Bermuda. Pursuant to English common law requirements, there are a number of duties that trustees must fulfil which would require trustees to maintain ownership and identity information regarding the trust. Firstly, the trustee is obligated to administer the trust solely in the interests of the beneficiaries and therefore the beneficiaries will have to be made clearly identifiable in the trust deed. Secondly, the trustee owes a duty to manage the trust in accordance with the instructions of the settlor, meaning that the settlor will also have to be clearly identifiable in the trust deed.

118. Pursuant to English common law, trustees have a duty to account to the beneficiaries and must be able to provide a beneficiary with information concerning the operation and transactions of the trust. Such information will extend to maintaining accounting information, the trust deed, documents relating to transfers of property made by the settlor and all other documents required in order to ensure that the trustee's duty to the beneficiaries is carried out (see also discussion at A.2).

119. In the event of non-compliance with these duties by the trustee, beneficiaries have the right to enforce the trust (*Beswick v Beswick* [1968] AC 58) and the settlor or beneficiaries can commence legal proceedings against the trustee. Where a trustee is found to be in breach of his/her duties, s/he is required to compensate a party who has suffered loss resulting from the breach. It is not solely beneficiaries of the trust who could have standing (*locus standi*) for bringing such an action against the trustee; although in practice, beneficiaries may be in the easiest position to demonstrate such standing. In general, any person that can establish that his/her rights are either being infringed or are threatened with infringement by the defendant may have standing to bring such private law proceedings⁵.

120. Under common law principles, a person could be liable for legal and equitable damages to another if his/her wrongful act caused the damage complained of by the other. The injured party is then to be put in the same position as s/he would have been in if s/he had not sustained the wrong for which s/he is now getting his/her compensation or reparation⁶. In addition, a trustee who misapplies the trust funds in breach of his/her fiduciary duty cannot profit from such misapplication. Where a trustee is induced to breach

5. *Hall v Hubbard and Boden and Ryan*, 1996 Civil Jur. No. 181, [1996] Bda LR 70.

6. *Target Holdings Ltd v Redferns (a firm)*, [1996] AC 421.

his/her fiduciary duty on the basis of a bribe, the bribe property and any increase in the value thereof would be accountable to the person(s) to whom s/he owed the breached fiduciary duty⁷.

121. In addition, licensed trust businesses are subject to the AML/ATF Regulations and must meet the obligations to maintain ownership and identity information set out in *Service Providers*. These obligations do not apply to private trust companies (PTCs) or trustees who are not carrying on a trust business.

122. Trustees that are exempt from licensing by virtue of being a PTC, a bare trustee, a registered pension fund, or investment fund, are required to retain identification information in respect of the trustees, settlors and beneficiaries of the trust(s) for which they act (section 13B(1) and (2)(a), Trustee Act). Trustees which are exempted by virtue of being a co-trustee of a trust which is also managed by a licensed trustee are required to ensure there is retained in Bermuda the above-mentioned identity information (section 13B(2)(b), Trustee Act).

Licensed trust businesses

123. The general obligations on licensed entities in respect of ownership and identity information are set out at *Licensed entities* above, whilst the following paragraphs provide further details on the specific obligations imposed on licensed trust businesses. As at 31 December 2011, there were 33 licensed trust entities operating in Bermuda which, in total, managed trust assets of BD 49.85 billion.

124. Persons carrying on a trust business in Bermuda 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.

7. A-G for Hong Kong v Reid, [1994] 1 AC 324 (Privy Council).

125. 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.

126. 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 to provide such a certificate is liable for a fine of BD10 000 on summary conviction.

127. 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 familiarise 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.

128. 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.

129. 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

130. A licensed 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 *Service Providers* 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.

131. Further at paragraph 5.33 and 5.36:

[5.33]... 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

Conclusion and practice

132. Trustees who act by way of business, whether licensed or exempted from licensing, are subject to legal and regulatory requirements which sufficiently ensure that identity information with respect to trustees, settlors and beneficiaries is maintained. The obligations on licensed trustees to ensure the availability of relevant identity information are contained in the Code of Conduct and Statement of Practice, as well as the AML/ATF regulations.

133. The obligation on exempted trustees to maintain relevant identity information was only introduced in July 2012 and, therefore, the effectiveness of this provision was not yet tested during the review period. Bermuda should monitor its practical implementation.

134. Where a person does not provide trust services “by way of business” then obligations regarding the maintenance of identity information under the Code of Practice, Statements of Principles and the Trust Act would not apply. Record-keeping obligations derived from common law duties will apply to

such trustees. It is also conceivable that a trust could be created which has no connection with Bermuda other than that the settlor chooses that the trust will be governed by the laws of Bermuda. In that event, there may be no information about the trust available in Bermuda. Bermuda did not receive any requests in relation to trusts in the three year period under review (1 January 2009 – 31 December 2011), although it received one request for information regarding the beneficiary of a trust in 2012 which it fully responded to within 90 days. Of the EOI partners that provided peer input, none indicated any issues with regard to the availability of identity and ownership information in relation to trusts.

Foundations (ToR A.1.5)

135. 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.

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

Other relevant entities and arrangements

137. 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)

138. 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.

139. Ownership information is provided to, and maintained by, the Bermudian authorities as at the time of the registration or permit application of a company. Bermudian local and exempted companies provide ownership information to the Registrar upon registration and permit companies are required to provide ownership information to the Minister upon application for a permit. In practice, the function of reviewing this registration information is carried out by the BMA on behalf of the Minister of Business Development and Tourism.

140. With respect to monitoring and enforcement of obligations on entities to maintain ownership and identity information, 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 and section 146 in respect of permit companies) empowers the Minister to investigate the affairs of a Bermudian company (or a permit 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. There are similar investigatory powers available to the Minister in respect of exempted partnerships and overseas partnerships (section 18 of the Exempted Partnerships Act and section 16 of the Overseas Partnerships Act). The Minister's investigatory functions, both in relation to companies and partnerships, have been divested to the Ministry of Business Development and Tourism and are, in practice, carried out by the Director of Business Development. The Registrar also has investigatory and enforcement powers in relation to the safeguarding of the reputation of Bermuda.

141. There are penalties in place to sanction non-compliance with the legal obligations related to ensuring the availability of ownership and identity information in Bermuda. 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 in relation to companies and partnerships 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.
- Since June 2011, a Bermudian company which fails to maintain a shareholder register at its registered office is liable, on summary conviction, to a fine of BD75 per day. The penalty also applies to any officer of the company who knowingly contravenes, or permits or authorises the contravention (section 66A, Companies Act).
- Since July 2012, any general partner of a limited partnership who knowingly contravenes, permits or authorises the failure to keep a

register of limited partners as required is liable, on summary conviction, to a fine of BD75 per day (section 7(8), Limited Partnership Act).

- 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.
- An overseas partnership as well as any general partner of such partnership who with knowledge contravenes, permits or authorises a failure 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 each be liable to a fine of BD75 per day in default (sections 22(6) and 22(7) of the Overseas Partnerships Act).
- Failure to inform the Controller of a change of 10% or more in the beneficial ownership of a permit company, where required, is considered an offence under the Exchange Control Regulations. The directors of such company may be fined a maximum of BD 2 000 or imprisoned for a maximum term of three months upon summary conviction; or fined BD 10 000 or imprisoned for a maximum term of two years upon indictment (sections 50 and 51).

- Licensed CSPs are subject to CDD requirements under the AML/ATF regime (section 67 and paragraph 6 of Schedule 2, CSPBA 2012). A licensed CSP that fails to comply with an obligation imposed by the AML/ATF Regulations can be subjected to civil or criminal sanctions – these are further discussed under *Monitoring and Enforcement by the BMA*.

142. It is noted that some of the sanctions in the above list only apply in the event of wilful and/or knowing contravention by the relevant person. Representatives of the Bermudian Attorney General’s Chambers (“the AG”) confirmed that in accordance with common law principles, ignorance of the law cannot constitute a valid defence for a non-compliant act or omission. Furthermore, where an act or omission of non-compliance occurred as a matter of negligence in the first instance, the non-compliance would nevertheless be considered to have been committed “knowingly” and/or “wilfully” (and accordingly the above penalties would apply) where the non-compliant entity or person has received notification of their default and continues to leave the situation unrectified.

143. In addition to the penalty provisions listed above, those persons who are regulated by the BMA such as insurers, banks, professional trustees, investment funds and CSPs must meet the relevant minimum criteria for licensing (see *Licensed Entities*). The minimum criteria of each licensing act require that the regulated person must conduct business in a prudent manner. In determining whether business is being conducted in a prudent manner the BMA will take into account whether there has been any failure to comply with the provisions of the principal licensing act, other provisions of law and any code of conduct. Where the BMA considers that the minimum criteria for licensing has been breached by reason of non compliance with a law or code of conduct then it has recourse to the enforcement options available to it under the relevant licensing act. Such options may include revocation of licence or the imposition of a civil penalty (see *Monitoring and Enforcement by the BMA* below).

Monitoring and enforcement in relation to companies in practice

144. In practice, Bermudian authorities confirmed that the Director of Business Development and the Registrar only exercise their investigatory and enforcement powers in the event of receiving a complaint or notification of suspicion of a breach of record keeping obligations. However, Bermudian authorities indicated that they had rarely received complaints (only two cases since 1989) regarding the unavailability of the shareholder register at the office of a Bermudian registered company. Between 1996 and 2007, there were seven cases in which an inspector was appointed to investigate the affairs of companies, of which three were initiated to protect the reputation of

Bermuda. In one of these cases, enforcement measures were taken as a result of the investigation. The Registrar has the power to strike off companies from the register if they fail to pay their annual fees (pursuant to s. 121 Companies Act). In the context of the number of companies registered in Bermuda (over 12 000 companies), it is noted that the number of cases in which investigatory and enforcement actions have been taken is low. Bermuda should ensure that all its appropriate monitoring and enforcement powers are sufficiently exercised in practice to support the legal requirements which ensure the availability of ownership and identity information of relevant companies.

145. The obligations and corresponding enforcement provisions introduced under the Exchange Control Regulations, with respect to permit companies were only recently introduced. Furthermore, no CSPs have yet been licensed under the CSPBA 2012 which came into effect in January 2013. Accordingly, it was not possible to assess the effectiveness of these provisions in practice during the review.

Monitoring and enforcement in relation to partnerships in practice

146. As with the monitoring of companies, the Director of Business Development and the Registrar only exercise their investigatory powers in relation to exempted or overseas partnerships in the event of receipt of a complaint or on notification of suspicion. No such complaints or notification of suspicion have been reported. Therefore, there have been no reported cases of enforcement actions being taken against a partner of a limited, exempted or overseas partnership for knowingly and wilfully contravening the requirement to notify the Registrar of changes to the general partners in their partnership. It is noted that the penalty in relation to failure of a general partner of a limited partnership to maintain a register of limited partners was only recently introduced in 2012 and, therefore, was not yet tested in during the review period.

147. As discussed in A.1.3, identity information in relation to partners is reported to the Tax Commissioner through payroll tax registration. Such information should also be kept for payroll tax audit purposes. Under section 13 of the Taxes Management Act, the Tax Commissioner has power to obtain evidence and review the book and records of the taxpayer, including identity information in relation to partners. In the fiscal year 2012-13, the Office of the Tax Commissioner conducted 22 audits, across the range of payroll taxpayers. Financial penalties were applied in cases of non-compliance during this period, amounting to a total of BD 271 000.

Monitoring and enforcement by the BMA

148. To the extent that the above entities engage in a business relationship with an AML/ATF regulated financial institution (such as banks, insurers, licensed trustees and, most recently, licensed CSPs), the institution would have to conduct CDD on the entity through which ownership information would be collected and maintained (see discussion above on *Service Providers*).

149. The BMA, as the supervisory authority of AML/ATF regulated financial institutions under the AML/ATF regime has the power to impose sanctions: failure to comply with an AML/ATF obligation, including the conduct of CDD and on-going monitoring, can attract an administrative fine of up to BD500 000 (section 20, AML/ATF Supervision and Enforcement Act 2008). Criminal sanctions of BD50 000 on summary conviction or BD750 000 and/or imprisonment of up to 2 years on indictment may also apply (regulation 19, AML/ATF Regulations). Furthermore, the BMA has investigatory powers including the power to conduct on-site visits, require the production of information and documents and obtain a warrant for entry onto premises in order to carry out their supervision of AML/ATF regulated financial institutions (sections 16–18, AML/ATF Supervision and Enforcement Act).

150. BMA representatives indicated that the four-person on-site team has been conducting around 20 such visits a year. As at the end of 2011, there were 1230 registered insurers, 872 registered investment funds, 33 licensed trust entities and 4 licensed banks in Bermuda under the AML/ATF supervision of the BMA. Entities are selected for on-site visits based on a risk-analysis (taking into account number of personnel, number of accounts and the general risk profile of the industry). During the last three years, three AML investigations had led to the imposition of penalties in these cases, ranging from BD 25 000 to BD 100 000, as it was found that the licensed entities did not have adequate systems in place to meet their AML obligations. No licences have yet been revoked for the failure of the licensed entity to meet the minimum criteria, by reason of breach of its legal record-keeping obligations.

Enforcement provisions to ensure the availability of trust information

151. Licensed trustees are obligated under the Code of Conduct, Statement of Practice, as well as the AML/ATF regime to maintain identity information on trustees, settlors and beneficiaries of the trusts for which they act. Failure of licensed trustees to submit a policy and demonstrate they have a structure in place to comply with their obligations under the Code of Conduct

and Statement of Practice is considered a serious breach by the Bermudian authorities. Penalties were imposed in the one case where there was found to be a serious breach. In less serious cases the relevant entity is subjected to enhanced supervisory oversight, including the use of specific powers such as imposition of regular reporting obligations, until the breach is fully remedied. This occurred in two instances during the period under review.

152. In relation to the AML/ATF regime, as mentioned in *Monitoring and enforcement by the BMA* above, the BMA has investigatory powers as well as powers to impose penalties for non-compliance with AML/ATF obligations. The trust industry is considered a high priority sector by the BMA and significant resources have been devoted to its monitoring in recent years. In the past two years, 85% of licensed trustees have been subjected to on-site visits and desk based reviews of policies issued by the private sector have been conducted. 79% of those reviewed, either during on-sites or in desk-based reviews, were found to be compliant. Licensed trustees whose policies were found to be incomplete must put in place a remedial plan and may be subjected to enhanced supervision. The Bermudian authorities indicated that there have been two cases in which an inspector has been appointed to undertake investigation into licensed trust entities due to concerns regarding the robustness of internal AML and prudential operations. Remedial workstreams to correct both AML/ATF and prudential issues were put in place as a result, but no financial penalties have been imposed.

153. In addition, in the last two and a half years, the BMA has undertaken outreach programmes to the trusts and investment sector, including soliciting input from the private sector to develop models for ensuring AML compliance that is tailored to the licensed trust industry and providing workshops to promote better understanding of licensed trustees' AML and licensing obligations.

154. In relation to trusts managed by exempted trustees, the requirement to maintain relevant identity information for exempted trusts is set out in the Trustee Act (section 13B(2)(b)). A exempted trustee who knowingly and wilfully contravenes the requirement to retain or cause to be retained identification information on the trustees, beneficiaries and settlors of the trust for which it acts will be liable, upon summary conviction, to a fine of BD75 per day in default (section 13B(3), Trustee Act). As this penalty was recently introduced, it was not possible to assess the effectiveness of this enforcement provision in practice during the review.

155. Finally, with respect to the common law obligations on trustees, a court has the discretionary power to remove a trustee from his/her function where this is necessary for safeguarding the welfare of the trust, even

where such removal has not been expressly requested by the parties⁸. The Bermudian authorities indicated that the failure of the trustee to keep records as required would be an impediment on the welfare of the trust.

Conclusion

156. Enforcement provisions are in place to support the obligations which ensure the availability of ownership and identity information on companies, partnerships and trusts.

157. The penalties for failure to report on changes in ownership of permit companies (under the Exchange Control Regulations), to maintain identity information on limited partners (under the Limited Partnership Act) and on trustees, beneficiaries and settlors of exempt trusts (under the Trustee Act) have only been recently introduced by legislative amendments. Furthermore, CSPs were only brought under the AML/ATF regulations by the CSPBA 2012. Therefore, due to their recent introduction, it was not possible to assess the effectiveness of these provisions in practice during the review. Accordingly, Bermuda should monitor the impact of these enforcement provisions on effective EOI in practice on an on-going basis.

158. Furthermore, the levels of some of the financial penalties are relatively low, between BD20 and BD100 per day in default, in particular taking into account the GDP per capita of Bermuda. In addition, the exercise of monitoring and investigatory powers by the Registrar and the Director of Business Development has been limited (as opposed to the exercise of these powers by the BMA), in the context of the number of registered entities in Bermuda (see *Monitoring and enforcement in relation to companies in practice* above). Bermuda should ensure that all its appropriate monitoring and enforcement powers are exercised in practice to support the legal requirements which ensure the availability of ownership and identity information in all cases.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

8. *Wrightson, Re, Wrightson v Cooke*, [1908] 1 Ch 789.

Phase 2 rating	
Largely Compliant.	
Factors underlying Recommendations	Recommendations
The level of fines applicable to violations by companies and partnerships of their record keeping and registration requirements are relatively low in practice. In addition, the Registrar and the Director of Business Development have only exercised their monitoring and enforcement powers in relation to such entities in a limited number of cases upon receipt of a notification of suspicion or complaint.	Bermuda should ensure that all its monitoring and enforcement powers are appropriately exercised in practice to support the legal requirements which ensure the availability of ownership and identity information in all cases.
The licensed CSP regime, amendment to the Exchange Control Regulations and other provisions through which the availability of ownership and identity information is ensured, in particular with respect to permit companies, exempted trusts and all entities that appoint a licensed CSP, were only recently introduced in 2012 following the three-year review period.	Bermuda should closely monitor the practical implementation of the licensed CSP regime and the other recently introduced obligations in ensuring the availability of ownership and identity information with respect to the relevant entities and arrangements in accordance with the standard.

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

159. Every registered company and, since July 2012, every “permit company” (being a foreign incorporated company which is engaged in or carrying on a trade or business in or from Bermuda), is required by section 83(1) and section 145(1) of the Companies Act, respectively, 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.

160. 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 it is required 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” (sections 83(2) and 145(2)). Since June 2011, it was clarified that Bermudian registered companies must keep accounting records and underlying documentation for a minimum period of five years from the date which they were prepared (section 83(5)). In addition, a penalty was introduced such that any company and any officer of the company who knowingly contravenes, permits or authorises non-compliance with such obligations is liable, on summary conviction, to penalties of BD7 500 (section 83(6)). These provisions were also introduced with respect to permit companies from July 2012 (sections 145(3) and (4)). In addition, at the time of registration as a permit company, the foreign company must provide to the Minister a copy of its latest audited financial statements (see form 15, Companies (Forms) Rules 1982).

161. 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, although certain licensed Service Providers are required to submit annual accounts to the BMA as their regulator (see below).

Accounting records required to be kept by licensed entities

162. Licensing requirements are imposed on certain industry sectors (insurance, investment, bank and deposit taking institutions, and trust businesses) as explained in *Licensed entities*. In addition to identity and ownership information requirements, the licensing conditions also impose additional

obligations in respect of accounting information. The Licensing Acts⁹ 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.

163. 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.

164. 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 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

9. See the list of key licensing legislation in *Licensed Entities* above.

business is structured, organised 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.

165. Banks, insurance firms, investment businesses and licensed trust businesses are required to file annual financial statements with the BMA (s. 47(3), Bank and Deposit Companies Act (BDCA); s. 17(3) Insurance Act; s. 38(5) Investment Business Act (IBA); and s. 43(5) Trust (Regulation of Trust Business) Act (TRTBA)). They are also required to appoint an approved auditor to audit their financial statements (s. 46(1) BDCA, s. 16 Insurance Act; s. 40(1) IBA; and s. 44 TRTBA). These auditors have a statutory obligation to report any matters of concern to the BMA (s. 46(4) BDCA; s. 16A(1) Insurance Act; s. 42(2A) IBA; and s. 45(2A) TRTBA).

Accounting records required to be kept by Service Providers

166. 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.

167. 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.”

168. 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.

169. 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.

170. Administrative fines, of up to BD500 000, are imposed for failure to comply with requirements under the AML regulations, including for failure to comply with record-keeping obligations (section 20, AML/AFT Supervision and Enforcement Act).

Partnership accounting records

171. All partnerships, i.e. all exempted partnerships, limited partnerships, ordinary partnerships and overseas partnerships, are subjected to the same accounting and bookkeeping requirements under their respective governing legislation. However, it is noted that the obligations as described below were only introduced in relation to limited partnerships and ordinary partnerships from June 2011 and in relation to overseas partnerships, from July 2012. Every partnership is required to keep proper records of accounts at its registered office in Bermuda, or another place (section 29A(1) and(2) of the Partnerships Act, section 14(1) of the Exempted Partnerships Act, section 9A(1) of the Limited Partnership Act and section 15(1) of the Overseas Partnership Act, respectively). “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, the relevant partnership is required to keep at the registered office in Bermuda such records which would allow ascertainment “with reasonable accuracy” of the partnership’s financial position at the end of each three month period (section 29A(3), Partnerships Act; section 14(3), Exempted Partnerships Act and, section 9A(3), Limited Partnership Act and section 15(1), Overseas Partnership Act). 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.

172. Legislative amendments made in June 2011 clarified that all partnerships are required to keep records of accounts for five years (section 29A(4), Partnerships Act; section 14(6), Exempted Partnerships Act, section 9A(4), Limited Partnerships Act and section 15(2), Overseas Partnership Act).

173. Since June 2011, in respect of exempted partnerships, ordinary partnerships and overseas partnerships, any partner who knowingly contravenes,

permits or authorised the contravention with this obligation is guilty of an offence and liable to a fine of BD7 500 on conviction (section 14(7), Exempted Partnerships Act; section 29A(5)(b), Partnerships Act; and section 15(3), Overseas Partnerships Act, respectively). The same penalty applied to the general partner of a limited partnership who does not keep records of account for a period of at least five years (section 9A(5)(b), Limited Partnerships Act).

174. 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

175. In respect of accounting records pertaining to trusts, section 13A of the Trustee Act 1975, as amended in July 2012, provides that professional trustees (whether licensed or exempt) are required to keep or caused to be kept accurate trust accounts and records (including underlying documentation) including records of accounts with respect to the trust's assets; liabilities; additions to trust and distributions, purchases and sales; and income and expenses (section 13A(1)). Records of accounts are required to be kept for five years (section 13A(2)). Any trustee who knowingly and wilfully contravenes, permits or authorises the contravention with this obligation is guilty of an offence and liable to a fine of BD7500 on conviction (section 13A(3)).

176. Obligations and industry guidelines are also 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 *Accounting records required to be kept by Service Providers* above. The general requirements imposed on licensed entities in respect of accounting records are described at *Accounting records required to be kept by licensed entities* above, while the specific obligations on licensed trust business are detailed below.

177. 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.

178. 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. 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.

179. 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. The Bermudian authorities confirmed that the common law requirements are those principles as set out under English common law. It is a well established principle of English common law that it is the “duty of a trustee to keep clear and distinct accounts of the property he administers, and to be constantly ready with his accounts”.¹⁰ Such accounts should be open for inspection at all times by the beneficiary and should trustees default in rendering such accounts, the beneficiary is entitled to have the accounts seized by the court. In such instances trustees would be held liable for paying the costs of such an order and in certain cases may also be removed. Furthermore where trustees are found guilty of active breaches of trust or wilful default or omission, they may be held personally liable for any loss.¹¹ Bermudian law being based heavily upon English law mean these principles of English common law apply equally to any trustees of a trust governed by Bermudian law.

10. The Trustee must allow a beneficiary to inspect the trust accounts and all documents relating to the trust. See *Halsburys Laws of England* Vol 48 4th Edition para 961 and 962.

11. Lewin on Trusts 17th Edition, p. 627, 1198 and 1199.

Conclusion and practice

180. The legal and regulatory framework for ensuring the availability of accounting records and underlying documentation is in place in Bermuda. However, a number of these statutory obligations, such as those in relation to permit companies, overseas partnerships and professionally managed trusts only recently entered into force in July 2012. Accordingly, the effectiveness of these provisions in practice could not be assessed during the period under review. Therefore, the impact of these new provisions on effective EOI should be monitored by Bermuda.

181. The Bermudian authorities indicated that the ROC does not carry out spot-checks, or have in place any other system of monitoring, with regard to the maintenance of accounting records and underlying documentation by entities in practice. Investigations may be undertaken in light of reported suspicion. No fines have been imposed in the period under review for failure to comply with account record keeping obligations.

182. Service Providers that are licensed and regulated by the BMA (i.e. banks, insurance firms, investment businesses and licensed trust businesses) are required to submit audited annual accounts. The BMA generally relies upon the review of the licencees' auditors to confirm the quality of their accounting records. The BMA could examine financial records in its on-site inspection of the regulated entities, which is described in A.1.6 above. However, such licensed entities only form a limited sub-set of all commercially registered companies and partnerships in Bermuda, which totals over 16 000 entities. In comparison, as at the end of 2011, there were 1230 registered insurers, 872 registered investment funds, 33 licensed trust businesses and 4 licensed banks in Bermuda. Accordingly, Bermuda should ensure that all its appropriate monitoring and enforcement powers are sufficiently exercised in practice to support the legal requirements which ensure the availability of accounting information in all cases.

183. Although not initiated on the basis of suspected non-compliance with accounting record-keeping obligations, nevertheless representatives of the Financial Intelligence Agency and the Financial Crime Unit indicated that where in the course of their investigations (which have been carried out with increasing frequency since 2009) requests were made to entities for accounting records and underlying documentation, such documentation and records have generally been found to be available. The Registrar indicated that it has experienced some delays in relation to its request for accounting records, although none of the cases were of sufficient gravity as to warrant enforcement actions. Furthermore, the Institute of Chartered Accountants Bermuda indicated that generally underlying documentation is found to be held by entities that are subject to auditing, although some issues are experienced in terms of record keeping by smaller scale, local, entities.

184. In the three-year period under review, Bermuda received six EOI requests in relation to accounting information relating to companies only. In at least one case, underlying documentation as well as accounting records was sought. In almost all cases, the requested information was obtained from a company’s corporate service provider in Bermuda. Bermuda responded to four requests within 90 days, one request within 180 days, and the remaining request was cancelled by the requesting jurisdiction.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place.	
Phase 2 rating	
Largely Compliant.	
Factors underlying recommendations	Recommendations
Except for those entities that are subject to licensing with the BMA, no system of monitoring of compliance with accounting record keeping requirements is in place, which may cause the legal obligations to keep accounting records to be difficult to enforce. In addition, a number of provisions relating to accounting record keeping have only been introduced recently and are therefore untested in practice.	Bermuda should ensure that all its appropriate monitoring and enforcement powers are sufficiently exercised in practice to support the legal requirements which ensure the availability of accounting information in all cases.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

185. 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 in *Licensed entities and Accounting records required to be kept by licensed entities*. 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. Banks are under the supervision of the BMA both in relation to their AML/ATF obligations and for licensing purposes.

186. 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.

187. 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.

188. 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.

189. As noted in *Service Providers and Accounting records required to be kept by Service Providers* 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.

190. 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.

191. 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.

192. The Bank and Deposit Companies Act provides for administrative fines of up to BD500 000 per fault on every person who fails to comply with any requirements under this Act (section 49A). Failure to satisfy the minimum criteria for licensing could also lead to a restriction or revocation of a bank's license (sections 17 and 18). Furthermore, non-compliance with AML regulations in relation to the conduct of CDD and retention of records are subjected to sanctions as described in *Enforcement provisions under AML and licensing laws* under A.1.6 above.

Conclusion and practice

193. The legal and regulatory framework ensuring the availability of banking information is in place in relation to banking entities in Bermuda.

194. Representatives of the BMA indicated that the banking sector is an area of high priority for conduct of on-sites as well as consultation and outreach activities. There are currently four licensed banks, with a total of 15 branches, in Bermuda. On-site inspections under the prudential regime are conducted on these banks on a two-year cycle, during which compliance with AML/ATF obligations is also assessed. These inspections include a review of randomly selected samples of bank account files to check for compliance with proper due diligence and transaction record keeping requirements. During the three-year period under review, there was one case of non-compliance by a bank and fines were imposed.

195. During the three-year period under review, Bermuda received six EOI requests relating to bank information. In one case, information requested included banking records, deposit forms, bank statements and documents detailing wire transfers. In all cases mentioned, the Bermudian competent authority requested information from the banks to respond to the EOI requests. Bermuda responded to five requests within 90 days and to one request within 180 days. Of the EOI partners that provided peer input, none indicated any concerns regarding the provision of bank information by Bermuda.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.
Phase 2 rating
Compliant.

B. Access to information

Overview

196. 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. It also assesses the effectiveness of this framework in practice.

197. Bermuda’s competent authority has appropriate powers under domestic legislation to obtain relevant information by issuing a notice (an “EOI notice”) to the holder of the information (the “notified person”). The powers to issue EOI notices to obtain information are supported by sanctions for non-compliance, although no sanctions had to be applied in practice in the period under review.

198. As Bermuda does not impose direct taxes, the information necessary for responding to EOI requests is generally held by third parties rather than the Bermudian authorities. In each case, the Bermudian authorities have to issue an EOI notice to obtain such information. In practice, all but one of the 15 EOI requests received by Bermuda between 1 January 2009 and 31 December 2011 were answered with information obtained from banks, services providers and other third parties, with only one instance where the requested information was obtained from another government authority.

199. Current policy guidelines issued in April 2013 should ensure that only the minimum necessary amount of information from the relevant EOI request is provided to the notified person. Flexibility is provided for Bermuda

to determine in conjunction with its EOI partner what the minimum necessary amount of information is in each case.

200. 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. In practice, no judicial review proceedings had been brought against the Bermudian authorities in the three-year review period.

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)

201. 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.

202. The competent authority has a broad power to require by service of notice, the production of information as described in B.1.4. In the three-year period under review, EOI notices were issued to obtain information from banks in seven cases, from service providers in seven cases, from other third parties in three cases and from a government authority in one instance. In relation to some EOI requests, EOI notices are issued to more than one party to obtain the requested information. In addition, the competent authority has the power to search premises and seize records with respect to information requested under any EOI agreement entered into by Bermuda.

203. 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)

204. 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)

205. 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. The powers of the Minister, as Bermuda’s competent authority, to obtain information for EOI purposes are set out in section 5 of the USA-Bermuda Tax Convention Act and section 5 of the International Cooperation Act.

206. Under the USA-Bermuda Tax Convention Act, the Minister can issue an EOI notice to obtain information to assist with an EOI request, pursuant to section 5, where the EOI request meets the requirements set out in section 4. Amongst other things, section 4(3) provides that an EOI request must contain details indicating:

- (i) that by the request the U.S. Government seeks information identified in the request;
- (ii) that the information is in Bermuda or that a person in Bermuda has or may have the information in his possession, custody or control;
- (iii) that the information relates to the carrying out of the laws of the United States mentioned in Article 5;
- (iv) that the information relates to the affairs of a person in respect of whom the request has been made under the Agreement (“the taxpayer”);
- (v) where the request was made pursuant to the first sentence of article 5, that the information sought by the U.S. Government is relevant to the determination of the liability of the taxpayer;
- (vi) whether or not the taxpayer is a resident of Bermuda or of the United States; and

- (vii) that the request relates to an examination of the taxpayer in relation to a taxable period of the taxpayer, being a period specified in the request, but so that, where a request, in seeking information relating to a taxable period so specified, also seeks information relating to a time outside that period, the request must establish the connection between that period and that time.

207. The specificity required under the domestic legislation empowering the Minister to assist with EOI requests from the USA, as described above, has been a reason for Bermuda's request for clarification in two instances (see further details in *C.5 – Clarifications on EOI requests*). However, the clarifications sought in both instances were resolved within a day and did not lead to any delay in the processing of the EOI requests.

208. It is noted that the International Cooperation Act, which provides the Minister with power to assist with EOI requests made under Bermuda's other EOI agreements, does not contain any similar wording specifying the details that must be included in an EOI request.

209. By issuing a notice pursuant to section 5 of the International Cooperation Act or section 5 of the USA Bermuda Tax Convention Act (as applicable), the competent authority can require a person to produce information which is in their possession or control (section 6 and section 5(7), respectively) within a specified period (usually 28 days). That time period may be extended under section 6(3) and section 5(9), respectively. 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.

Issuing EOI notices in practice

210. The Bermudian authorities indicated that in almost all cases, generally they would first issue an EOI notice to request information from a third party. In instances where the requesting jurisdiction has indicated that the case to which the EOI request relates is sensitive, the Bermudian competent authority may first approach another Bermudian authority (such as the BMA or the immigration department) to seek the requested information, prior to requesting the information from such third party. In the three-year period under review (1 January 2009 – 31 December 2011), seven EOI notices were issued to service providers, seven were issued to banks, three were issued to other third parties and one was issued to a government authority. As noted above, more than one person may be served with an EOI notice in some cases to obtain the necessary information to respond to an EOI request.

211. It is standard practice that every draft EOI notice is reviewed by the Crown Counsel of the AG for legal correctness, taking into consideration the

terms of the relevant EOI agreement and the requirements under Bermudian domestic law. The Ministry of Finance has also issued policy guidance regarding the content of EOI notices: the most recent version of this guidance was issued in April 2013 (further details of the previous policy guidance are set out in C.3 – *Content of EOI notices*). According to the current policy, EOI notices should only include from the relevant EOI request: (i) the list of the requested information and (ii) the identity of the requesting jurisdiction. The Bermudian authorities confirmed that where an EOI request includes information from a number of sources, only the portion of the list of requested information to be obtained from a particular information holder will be included in the EOI notice issued to him/her. The revised policy notes also that the taxable period to which the request is related may be included in an EOI notice.

212. The policy guidance states that an EOI notice must not include:

- (i) the identity of the EOI partner's competent authority who signed the EOI request;
- (ii) the identity of the EOI partner's taxpayer; nor
- (iii) information on the notified person's relationship to that taxpayer.

213. However, the policy further states that where the Bermudian competent authority has first consulted with, and obtained the prior approval of, the requesting jurisdiction, additional information from the EOI request (as agreed with the requesting jurisdiction) may be included in the EOI notice. Therefore, the default position is that the Bermudian competent authority would only disclose the list of requested information and the identity of the requesting jurisdiction in its EOI notice, provided the requesting partner has not indicated that it wishes for its identity to be kept confidential. Where the Bermudian competent authority assessed that further information is required to be disclosed to the notified person in order to obtain the requested information, it would communicate this to the requesting partner and seek its agreement. This should ensure that only the minimum amount of information necessary, as agreeable to the EOI partner, is disclosed from the EOI request to the notified person to enable that person to locate or produce the requested information.

Response timeframe and enforcement measures

214. The USA Bermuda Tax Convention Act provides, as default, that a 28-day timeframe for response be specified in an EOI notice (section 5(6)). In practice, a 28-day response timeframe is stated in all EOI notices, whether issued under the International Cooperation Act or the USA Bermuda Tax Convention Act. Bermudian authorities also indicated that in practice, the Minister would be advised against the grant of any extension of time to

the 28-day response period in order to ensure that EOI requests may be responded to within 90 days. In many instances, the notified persons in fact provide the relevant information in advance of the 28-day deadline. If an extension is sought by the notified person, he/she would have to provide justification and evidence as to why such extension of time is necessary. The Bermudian competent authority does not consider the holding of the information outside of Bermuda as a valid reason for failing to provide the requested information within the 28-day timeframe. No extension was granted upon request by a notified person during the three-year period under review. However, in two instances, extra time was given to the notified person to respond to an EOI notice where the notice was amended as a result of clarification from the requesting jurisdiction and where the requested information related to an extended period of time.

215. 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 BD10 000; or both. Similar sanctions are contained under the USA Bermuda Tax Convention Act, but with a lower level of maximum imposable fine of BD5 000 (section 9(4)). 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. The Bermudian authorities confirmed that any such breach would be informed on behalf of the Minister to the BMA.

216. Failure to comply with an EOI notice is a criminal offence, accordingly, prosecution could be initiated by the Bermudian authorities against the non-compliant person. In such instance, the Bermudian competent authority would, together with the Financial Crime Unit and the AG, prepare a criminal complaint which would be considered and brought by the Department of Public Prosecution (DPP). Where prosecution proceedings are initiated, it is expected that these would generally be concluded within six months of the raising of a formal complaint by the Bermudian competent authority. In practice, no person has failed to comply with an EOI notice, therefore no prosecutions have been registered or fines imposed in the period under review. However, prosecution had been threatened in four cases and preparatory steps for potential prosecution were taken in one instance. In all cases, the matter was ultimately resolved without the need for prosecution.

217. Bermudian authorities have powers to search and seize information, with the approval of a judge, when information is requested under any of Bermuda's EOI agreements, pursuant to section 6 of the USA Bermuda Tax Convention Act (in relation to information requested under the USA-Bermuda EOI Agreement)

or pursuant to section 6A of the International Cooperation Act (in relation to information requested under any of Bermuda’s other EOI agreements). Bermuda has not needed to exercise this power during the period under review.

Secrecy provisions (ToR B.1.5)

218. 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 and section 5(10) of the USA Bermuda Tax Convention 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.

219. With respect to the legal profession, the scope of confidentiality or legal professional privilege in Bermuda is primarily based upon English common law principles and encompasses both advice privilege and litigation privilege. Advice privilege applies to confidential communication between a lawyer in his/her professional capacity with his/her client which is made for the purposes of seeking or giving legal advice. The advice given must be directly related to the lawyer’s performance of his/her professional duty as the client’s legal adviser rather than just as a “man of business” (*Three Rivers DC v Bank of England (No.6)*, [2005] 1 AC 610). Litigation privilege applies to all confidential documents created primarily for the purpose of ongoing or anticipated litigation.

220. Although section 7 of the International Cooperation Act and section 5(10) of the USA Bermuda Tax Convention Act provide an absolute defence against any claims for a person who acted in compliance with an EOI notice, Bermuda could, in accordance with the international standard, decline a request for information under its information exchange agreements where certain rights and safeguards apply (see C.4). The possibility to decline a request on the basis of the information being protected by legal professional privilege is also included in section 4(2)(d) of the International Cooperation Act. In this regard, the AG, in reviewing a draft EOI notice, conducts a preliminary analysis of whether the information requested would fall within the scope of legal professional privilege under Bermudian law. To the extent that the AG considers the information requested to be clearly within the scope of legal privilege, the AG would advise the Bermudian competent authority against the issuance of an EOI notice. The AG cited as an example of such clearly protected information, the case of a legal opinion from the advocate to his/her client. On receipt of such advice from the AG, the CA representatives would alert the requesting jurisdiction to the advice, that potential litigation costs may arise. In all cases, Bermuda generally bears litigation costs incurred in the lower courts.

Where proceedings in the court of appeal or Privy Council will occur, the burden of costs would be further discussed with the requesting jurisdiction. In any event, the CA representatives confirmed that they would proceed to obtain such information on behalf of the EOI partner, despite the AG's advice.

221. During the three-year review period, the CA representatives have not needed to revert to any EOI partner on this issue in practice. Nevertheless, a concern is raised by the above practice as it is considered that the AG is not in a position to assess with certainty whether legal professional privilege may be validly claimed in a particular instance. A crucial element to a legitimate claim of legal professional privilege under common law is that the communication for which privilege is claimed must be confidential. Confidentiality is lost if there is any disclosure of the information contained therein to any third person. In this regard, only the persons involved (i.e. the client and the lawyer) would know whether and to whom they may or may not have provided the information contained in their confidential communications and, therefore, whether a claim of legal privilege could be made. The AG, who is not privy to a particular client-attorney relationship, would not possess the information to enable it to evaluate whether a piece of communication containing the information requested by the Minister is confidential or otherwise. Therefore, the AG is advising against the issuance of an EOI notice at a stage when it is not known whether legal professional privilege could in fact be validly claimed by the relevant parties. Accordingly, caution should be taken with respect to the manner in which such advice is relayed to the requesting jurisdiction to ensure that this does not discourage the requesting jurisdiction from pursuing the request due to the prospect of potential litigation costs, as it is not known whether such costs would actually arise.

222. In the three year period under review, the Bermudian competent authority has served notices (pursuant to the International Cooperation Act and the USA Bermuda Tax Convention Act) on legal professionals. In all of these cases the AG had determined that there was a limited or no risk that legal professional privilege would be claimed, and the Bermudian authorities did not experience any obstructions in these cases in relation to such privilege in accessing the information for EOI purposes.

Determination and factors underling recommendations

Phase 1 determination
The element is in place.
Phase 2 rating
Compliant.

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)

223. 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.

224. 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 ten days before providing it to the requesting jurisdiction (section 8(a)). Where information was obtained by the Bermudian competent authority by entry to premises under a warrant, the retention period is 20 days (section 8(b)). Similar provisions are set out in the USA Bermuda Tax Convention Act where the retention period is 20 days in all cases (section 7). The Bermudian authorities indicated that the provision of such retention period, prior to the release of the information to the requesting jurisdiction, is a safeguard to allow an opportunity for the relevant parties to apply for judicial review (a remedy which is contemplated in section 8A of the International Cooperation Act and section 12 of the USA Bermuda Tax Convention Act). It is noted that 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, all of which were made prior to the three-year period under review. No information is available on the timeframes for the processing of these cases. However, none of Bermuda’s peers raised any issues regarding delays in processing of EOI requests by Bermuda due to judicial review proceedings.

225. Where a judicial review challenge is brought against the Bermudian competent authority with respect to the issuance of an EOI notice, the Bermudian authorities indicated that the process from initiation of proceedings to conclusion of Court hearing could take between one and a half months to a year, dependent upon the issues at stake and the schedule of the court. The initiation of judicial review proceedings would suspend the Bermudian authorities’ ability to transfer the requested information until the conclusion of the proceedings.

226. Finally, as noted below at C.4.1, 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

Phase 1 determination
The element is in place.
Phase 2 rating
Compliant.

C. Exchanging information

Overview

227. 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.

228. As it does not have a domestic income tax regime, Bermuda's policy has generally been to negotiate EOI agreements based on the OECD's Model TIEA rather than double tax agreements (DTAs) although DTAs have been concluded by Bermuda with Bahrain, Qatar and the Seychelles. Since April 2009, Bermuda has actively sought to extend its network of exchange of information agreements and has concluded and signed 35 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.

229. 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.

230. Bermuda's DTAs with Bahrain and Qatar allow for EOI to the international standard. However, the DTA with the Seychelles contains an additional obligation on the requesting Party which could limit exchange of information. A review of Bermuda's TIEAs 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 TIEAs

concluded in 2009 with for example the Nordics, the Netherlands and New Zealand. Bermuda has signed CAAs that supplement its TIEAs with Canada, Germany, Japan the Nordic countries (Denmark, Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden), South Africa and the United Kingdom; in addition, Bermuda has unilaterally provided commitment letters to some of its other EOI partners. Both these forms of documents seek to clarify any possible questions of interpretation. Recent EOI agreements signed by Bermuda are also in line with the standard and generally follow the Model TIEA. In general, peer inputs have not indicated significant issues arising from the variations in the non-standard wording included in some of Bermuda's EOI agreements.

231. 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 Tax Convention and the OECD Model TIEA, including information the subject of attorney client privilege or business and professional secrets. In the three-year period under review, the amount and type of information set out in EOI notices issued by Bermuda to obtain requested information gave rise to concerns with regard to the protection of the confidentiality of incoming EOI requests. Bermuda revised its policy with effect from January 2013 (and the policy was further updated in April 2013) to ensure that only the minimum information from an EOI request, as is necessary for it to disclose to obtain the requested information, is provided to the notified person.

232. In the three-year period under review (1 January 2009 – 31 December 2011), Bermuda received 15 EOI requests from five EOI partners. Although the number is relatively limited, the EOI requests covered a range of ownership, accounting and bank information. It is noted that the number of EOI requests received by Bermuda in 2012 is almost double the total figure from the three-year review period. However, Bermudian authorities have reported that this increase has not impacted upon the timeframe within which EOI requests are processed. The instruments used in practice are TIEAs. Of the EOI partners that provided peer input, none indicated that there are any types of information for which, or circumstances in which, they would not request information from Bermuda because they do not consider that they would receive a positive response to the request. Although Bermuda's practical experience of exchanging information with a number of EOI partners is relatively new, the procedure for such exchange follows one that is already long established with at least one partner.

233. Bermuda’s practices to date have demonstrated a responsive approach. Bermuda responded to all its EOI requests within 180 days, with 11 of these EOI requests responded to within 90 days. Bermuda’s EOI partners indicated that progress updates were usually provided where their requests were not answered within 90 days. Bermuda’s peers have generally been positive in their comments regarding the timeliness of response by Bermuda and the level of cooperation shown by Bermuda. This reflects a view that Bermuda is a dedicated EOI partner which provides timely assistance to EOI requests.

C.1. Exchange-of-information mechanisms

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

234. The responsibility for negotiating international agreements within Bermuda lies with the Ministry of Finance, Treaty Unit. Members of the Treaty Unit currently performing the Unit’s duties include the Assistant Finance Minister and the Research Officer who is also the Acting Treaty Advisor. The Treaty Unit takes on board requests from other Bermudian governmental departments in determining its international agreements policy and negotiates and concludes agreements with countries within the scope of the letter of entrustment from the United Kingdom Foreign and Commonwealth Office (FCO). Once these agreements are agreed at the officials’ level, the Treaty Unit then coordinates with the Minister of Finance on the signing of the agreements by the Minister.

235. The negotiation of exchange of information agreements is a high priority in Bermuda and this is evidenced by the rapid expansion of their treaty network over the past few years. Generally treaty negotiations are conducted at Bermuda’s initiative, through physical meetings, via email and by postal correspondence. Of the 38 EOI instruments signed, three are in the form of a Double Tax Arrangement (DTA) with an EOI provision. All other agreements are TIEAs.

236. Bermuda engages in exchange of information on request.

Foreseeably relevant standard (ToR C.1.1)

237. 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 26(1) of the Model Tax Convention and Article 1 of the OECD Model TIEA:

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.

238. Bermuda’s DTAs reflect the Model Tax Convention regarding the scope of information that can be exchanged. Bermuda’s DTA with Qatar uses the term “relevant” in lieu of “foreseeably relevant”. The term “relevant” is recognised in the commentary to Article 26 of the Model Tax Convention to allow for the same scope of exchange as does the term “foreseeably relevant”. Bermudian authorities confirmed that they adhere to the commentary in their interpretation of Bermuda’s DTAs.

239. However, the DTA with the Seychelles contains an annexed “Mode of Application” which provides, amongst other things that “the identity and, to the extent known, address of any person which the applicant State believes to be in possession of the requested information” in order to demonstrate the foreseeably relevance of the information to the request. The requirement for the requesting jurisdiction to provide information in relation to the identity of the person believed to be in possession of the information in all cases, and not only to the extent known, is different from the wording in Article 5(5) of the Model TIEA. Subparagraph (e) of Article 5(5) only mentions providing “to the extent known, the name and address of any person believed to be in the possession of the requested information”. It is accepted that in practice, in most cases, the description of the requested information in an EOI request might in itself also provide indication of the person that is believed to be in possession of it. However, there could remain circumstances where such indication is not obvious. Even if this “identity” information does not have to be in the form of his/her name or address, the addition of this reference could give rise to the possibility of a restrictive interpretation of the term and could restrict effective exchange of information in some circumstances.

240. The practical application of this provision has not been tested to date. The Bermudian authorities confirmed that they do not interpret “identity” in the above context as requiring the provision of the name of the person. Furthermore, the Bermudian authorities assert that they would be willing to assist with an EOI request even where identity information relating to the person believed to be in possession of the requested information is not provided. Although the practice described by the Bermudian authorities should ensure that Bermuda can exchange information to the standard under this EOI agreement, nevertheless, it is recommended that Bermuda and the Seychelles work together to ensure that the possibility of such restrictive interpretation is removed.

241. Each of the TIEAs 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.

242. Some TIEAs¹² 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]

243. Certain agreements¹³ 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.

12. 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.

13. Australia, Germany, Ireland, Japan, Mexico, New Zealand and the United Kingdom.

244. It is noted that under some of Bermuda's TIEAs¹⁴ 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. Bermuda has signed Competent Authority Agreements (CAAs) with its EOI partners to ensure that its agreements are interpreted consistently with the standard in line with the intention of the parties. In addition to clarifying questions of interpretation, certain of the CAAs also include templates for requests for information and address the allocation of costs between the requested and requested parties. Accordingly, it is understood (through provisions set out in the respective CAAs) that in relation to its EOI agreements with Japan and the Nordic countries, the term "senior official" refers to every person with Competent Authority status. Furthermore, the CAA with Japan clarifies that the term "tax liability" as used in the EOI agreement also includes information relevant to the collection of taxation, investigation or prosecution of tax matter. The CAAs with Canada, Japan and the Nordic countries also clarifies that the period a request state should provide information for extends beyond the 6 years prior to the tax period under consideration, if information is still in the possession and /or control of a person in Bermuda.

245. Where a CAA has not yet been concluded between Bermuda and an EOI partner, the Minister has unilaterally undertaken, in the form of a commitment letter, to adhere to interpret certain non-standard provisions in the relevant TIEA so as to allow for exchange of information in accordance with the international standard¹⁵. Therefore, through either CAAs or commitment letters provided by Bermuda, it has been confirmed by Bermuda that where the information requested extends beyond the six years prior to the tax period under consideration, such information would be provided by Bermuda where the information is still in the possession and/or control of a person in Bermuda.

246. 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.

14. Aruba, Australia, Canada, Germany, Japan, Mexico, New Zealand, the Nordics, the Netherlands, the Netherland Antilles, and the United Kingdom.

15. Such letter has been sent by Bermuda to Aruba, Australia, Curacao, France, Ireland, Mexico, the Netherlands, New Zealand and Sint Maarten.

247. In practice, in cases where a request is unclear or incomplete, the Bermudian authorities indicate that they would seek clarification or additional information from the requesting jurisdiction before considering whether to decline a request. Bermuda sought clarification from its EOI partner in relation to 9 out of the 15 EOI requests received in the three-year period under review (see C.5 for further details). Bermuda’s EOI partners confirmed that Bermuda has not declined any request for information received over the last three years, on the basis that the requested information was not foreseeably relevant. However, it is noted that Bermuda requested one peer to clarify the categorisation of the case to which its EOI request related, which resulted in a delay in the processing of the EOI request by ten weeks. The requirement to indicate such categorisation is required under some of Bermuda’s TIEAs, although not in relation to the relevant EOI agreement in this particular instance. Bermuda should give due and appropriate consideration, in its handling of EOI requests in practice, to the variations in the treaty requirements applicable to each of its EOI arrangements to ensure that effective EOI is not impeded.

In respect of all persons (ToR C.1.2)

248. 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.

249. All DTAs concluded by Bermuda provide for exchange of information with respect to all persons.

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

251. Both the USA Bermuda Tax Convention Act and the International Cooperation Act specify that “control” in the context of “information in the possession or control of a person” is to be construed as meaning control of information whether it is located in, or outside of Bermuda. This is in accordance with the international standard; the commentary to the Model TIEA, Article 2 which requires that the term “possession or control” be broadly construed.

252. In practice, no issue has arisen in relation to the type of person requested to provide information. The Bermudian authorities indicated that they have not experienced any attempts by persons to claim that due to the location of the requested information outside of Bermuda, the information

could not be considered as being under their control. It is noted that any possible ambiguity in interpretation is now clarified by the amendments to express definitions of “control” under the USA Bermuda Tax Convention Act and the International Cooperation Act (as discussed in the paragraph above).

253. However, in some of its agreements¹⁶ 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

254. 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)

255. 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.

256. 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.

257. In the three-year period under review, two EOI partners requested banking information from Bermuda in a total of six cases. In all cases, Bermuda responded to the requests and no issues were raised by the respective EOI partners.

16. Australia, Germany, Mexico, New Zealand, the Nordics and the USA.

Absence of domestic tax interest (ToR C.I.4)

258. 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.

259. All of the EOI agreements concluded by Bermuda allow information to be obtained and exchanged notwithstanding it is not required for domestic tax purposes. There are presently no domestic income taxes imposed by Bermuda. The domestic legislation which grants the Minister power to issue notices to request information from third parties for EOI purposes is set out in section 5 of the USA Bermuda Tax Convention Act and the International Cooperation Act, respectively. In practice, no issue linked to domestic tax interest has arisen.

Absence of dual criminality principles (ToR C.I.5)

260. 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.

261. None of the EOI agreements concluded by Bermuda apply the dual criminality principle to restrict the exchange of information and in practice, no issue linked to dual criminality has arisen.

Exchange of information in both civil and criminal tax matters (ToR C.I.6)

262. 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”).

263. All of the EOI agreements concluded by Bermuda provide for the exchange of information in both civil and criminal tax matters. In practice, EOI requests have been made to Bermuda in relation to both civil and criminal matters.

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

264. 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.

265. Bermuda's competent authority can provide information in the specific form requested to the extent permitted under Bermudian law and administrative practice. Such power is expressly provided for in Bermuda's domestic legislation (section 8, International Cooperation Act; section 10, USA Bermuda Tax Convention Act) and has been used in practice.¹⁷ In relation to the three-year period under review, no EOI partner has indicated that Bermuda has not been able to respond to such requests.

In force (ToR C.1.8)

266. 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.

267. Bermuda has taken all steps necessary for its part to bring into force all agreements it has signed with the exception of 1 EOI agreement. Of the 38 EOI agreements signed by Bermuda, 28 are now in force (see Annex 2).

268. In practice, once treaty negotiations have been concluded, the Bermudian authorities must provide the draft treaty text to the Foreign and Commonwealth Office (FCO) in London for legal review prior to signing; the Bermudian authorities indicated that this process takes on average between three to four weeks. Following legal review, the FCO would notify the Bermudian authorities by letter that the signing can take place.

269. EOI agreements signed by the Minister generally come into force 30 days after signing by both Bermuda and its treaty partner. The power for giving effect to EOI agreements under Bermudian domestic law is set out in the International Cooperation Act. The Minister is not required to table EOI agreements before Parliament prior to their ratification.

17. Cf. Lewis & Ness v Minister of Finance, [2004] Bda LR 66.

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

270. 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 authorised by the government of the requesting party to oversee data protection.

271. 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. In many cases, the CAAs now concluded by Bermuda address the apportionment of costs relating to EOI requests, as between the requested and requesting parties. To date, Bermuda has not declined to assist with an EOI request on the basis of cost.

Conclusion

272. In the 2010 Report, some legal and regulatory framework issues were identified under element C1 in respect of Bermuda’s mechanisms for the effective exchange of information. These are minor issues that did not warrant a downgrade of the determination to “not in place” at the time of the 2010 report. Since then, with respect to 12 of the EOI relationships referred to therein, Bermuda has signed CAAs with its EOI partners. Where a CAA has not yet been concluded between Bermuda and an EOI partner, the Minister has unilaterally undertaken, in the form of a commitment letter, to adhere to interpret certain non-standard provisions in the relevant TIEA so as to allow for exchange of information in accordance with the international standard. These steps ensure that Bermuda’s EOI agreements are interpreted to allow

for exchange of information in line with the international standard. However, Bermuda should give due and appropriate consideration, in its handling of EOI requests in practice, to the variations in the treaty requirements applicable to each of its EOI arrangements to ensure that effective EOI is not impeded.

273. Since the 2010 Report was made, the Global Forum’s view of the legal and regulatory framework issues raised under element C1 of the 2010 Report has evolved, and the subsequent reports adopted by the Global Forum regarding Bermuda’s EOI partners have not consistently raised the same issues.

274. In practice, none of Bermuda’s EOI partners have raised any issues regarding Bermuda’s ability to provide requested information in accordance with the terms of their EOI mechanisms. Bermuda’s EOI partners also confirmed that Bermuda has not declined any request for information received over the last three years, on the basis that the requested information was not foreseeably relevant. In cases where a request is unclear or incomplete, the Bermudian authorities will routinely seek clarification or additional information from the requesting jurisdiction before considering whether to decline a request. Further information regarding the clarifications sought by Bermuda is set out under C.5.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.
Phase 2 rating
Compliant.

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

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

275. 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 35 agreements, amounting to a total to date of 38 signed EOI agreements. This includes agreements with major economic partners such as the USA, the UK, Mexico, France and Germany. 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.

276. The letter of entrustment issued by the United Kingdom to Bermuda sets out the parameters within which Bermuda possesses power to conclude EOI agreements; this includes specifying the jurisdictions with which Bermuda may conclude an EOI agreement (namely, OECD, EU and G20 member jurisdictions, as well as jurisdictions that were identified as having substantially implemented the international standard). To the extent that Bermuda wishes to enter into an EOI agreement with a jurisdiction which does not fall within the scope of the letter of entrustment, then Bermuda is required to request a separate letter of entrustment from the UK in relation to that particular EOI agreement.

277. Bermuda continues to expand its EOI network, demonstrating its commitment to the international standard in this regard. 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

Phase 1 determination	
The element is in place.	
Factors underlying recommendations	Recommendations
	Bermuda should continue to develop its EOI network with all relevant partners.
Phase 2 rating	
Compliant.	

C.3. Confidentiality

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

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

278. 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.

279. 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.

280. Further, section 8 of the International Cooperation Act and section 7 of the USA Bermuda Tax Convention Act require 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.

281. 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.

282. 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.

Ensuring confidentiality in practice

Handling and storage of EOI requests and related information

283. As a jurisdiction that does not impose direct taxes, Bermuda's role in EOI relationships is as a provider, rather than a recipient, of requested information. EOI requests and related materials, if received via regular mail, are immediately directed to the CA representatives. Hard copies of the EOI requests and related materials are kept by the CA representatives in a locked cabinet within their offices in the Ministry of Finance to which only the CA representatives hold the keys. Access to the offices of the Ministry of Finance is restricted to those with security passes only. The CA representatives operate a "clean desk" policy: all hard copy files are returned to the filing cabinet and locked every evening. Received documents are all scanned and kept only on the hard drive of the CA representative who is responsible for the day-to-day management of the EOI files; access to information stored on this hard drive is password protected and known only to that CA representative. The Bermudian authorities indicated that as yet there has been no need to send EOI materials off-site for archive.

284. Where EOI related materials are sent to the Crown Counsel of the AG for review, the materials are sent via the internal email system which is security protected. A unique password, known only to each individual employee, is required to access the AG's computer and email system. In general, all government employees are subject to security vetting by the police prior to employment.

Content of EOI notices

285. In almost all cases, the Bermudian competent authority requires information from third parties in order to respond to EOI requests through the issuance of EOI notices (see part B above). Prior to December 2012, certain information from incoming EOI requests that was not necessary for the holder of the information to know in order for him/her to locate this information, was generally included in such EOI notices. A particular concern raised by Bermuda's practice was the inclusion of the name and title of the competent authority signing the request on behalf of the EOI partner in EOI notices issued.

286. The Model TIEA and the Model Convention, upon which the EOI agreements of Bermuda are patterned, state as the basic position that any information received by a jurisdiction under EOI must be treated as

confidential or secret, and “may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or judicial decisions.” Under Article 8 of the Model TIEA, disclosure of this information for other purposes may be permitted where the other Contracting Party so consents. The commentary to the Model TIEA explains that the wording of Article 8 permits the communication of the information to the taxpayer, his proxy or to a witness. It is noted that this permission does not include the communication of the information to a third party (even if he/she is the holder of the requested information).

287. As a matter of practicality, it is generally accepted that a requested jurisdiction needs to disclose the minimum information contained in an EOI request as necessary for the requested jurisdiction to obtain or provide the requested information to the requesting jurisdiction. In that context, Bermuda’s practice of providing the name and title of the competent authority signing the request on behalf of the EOI partner is not considered apt. This information is generally only available between government authorities and is not necessary for the notified person to locate the information sought. In terms of other information contained in an EOI request, the relevance (and therefore acceptability) of disclosure of such information depends on the circumstances of each case, including, for example, the type or form of information requested or from whom the information is sought. Therefore, the acceptable amount of information disclosed could differ on a case-by-case basis.

288. The Bermudian authorities revised its policy on disclosure of information in EOI notices with effect from January 2013 and the revised policy was further updated in April 2013. The revised policy states that EOI notices should only include from the relevant EOI request: (i) the list of the requested information and (ii) the identity of the requesting jurisdiction. The Bermudian authorities confirmed that where an EOI request includes information from a number of sources, only the portion of the list of requested information to be obtained from a particular information holder will be included in the EOI notice issued to him/her. The revised policy also notes that the taxable period to which the request is related may be included in an EOI notice.

289. The revised policy also provides that, unless otherwise agreed with the requesting jurisdiction, an EOI notice must not include:

- (i) the identity of the EOI partner’s competent authority who signed the EOI request;

- (ii) the identity of the EOI partner’s taxpayer; nor
- (iii) information on the notified person’s relationship to that taxpayer.

290. In the policy update of April 2013, it was clarified further that where the Bermudian competent authority first consults with, and obtains the prior approval of, the requesting jurisdiction, additional information from the EOI request (as agreed with the requesting jurisdiction) may be included in the EOI notice.

291. A reduced amount of information is provided under the revised policy. In particular, the identity of the relevant competent authority is now stated as non-disclosable. Whilst addressing confidentiality concerns, the revised policy (as updated in April 2013) also appears to allow sufficient flexibility, where the requesting jurisdiction so agrees, for the Bermudian competent authority to direct the notified person towards locating or producing the requested information.

292. As mentioned above, the relevance and acceptability of the disclosure of information from an EOI request depends on the circumstances of each case. However, it is clear that confidentiality had been unintentionally breached in the three-year period under review where the identity of the EOI partner’s competent authority was disclosed. Although the revised policy seems to have resolved this issue from January 2013 onwards, Bermuda should monitor the effective implementation of this revised policy in practice.

Provision of requested information to EOI partners

293. In relation to providing requested information to EOI partners, the CA representatives indicate that under their present policy, materials are only sent via courier service, tracked mail or, more recently, encrypted emails. One of Bermuda’s peers indicated during the review that it experienced confidentiality issues in relation to the provision of information via regular mail by Bermuda. However, the issue was in part caused by miscommunication between the jurisdictions and the peer noted that similar issues have not recurred since the matter was clarified between the competent authorities. In recent years, communication between these competent authorities has been conducted via encrypted emails rather than regular mail which has further minimised the risk of recurrence of the incident.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

Phase 2 rating	
Largely Compliant.	
Factors underlying Recommendations	Recommendations
During the three-year period under review, Bermuda disclosed information not necessary to obtain the information requested to the information holder; in particular the disclosure of the identity of its EOI partner’s competent authority to the information holder gave rise to confidentiality concerns. Bermuda has revised its policy in relation to the content of EOI notices such that the identity of its EOI partner’s competent authority is no longer disclosed.	Bermuda should monitor the implementation of the revised policy on disclosure of information in EOI notices to ensure that it is compatible with effective exchange of information in practice.

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

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

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

294. 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.

295. 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.

296. 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.

297. 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.

298. Both Bermuda and Canada have confirmed that they interpret the definition of attorney-client privilege used in their EOI agreement in line with the international standard.

299. The Bermuda competent authority has so far never relied upon the above-mentioned provisions in its EOI agreements to decline the provision of assistance to an EOI request. Input from Bermuda's peers confirm that no issues concerning the application of rights and safeguards in Bermuda have been experienced in EOI practice during the period under review.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.
Phase 2 rating
Compliant.

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)

300. 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 TIEAs with Portugal, Indonesia and South Africa and the DTAs with Bahrain, Qatar and the Seychelles) include an obligation to either respond to the request, or provide a status update within 90 days of receipt of the request. Bermuda's agreements with Indonesia and South Africa require that the parties shall acknowledge receipt of the request and use their best endeavours to forward the requested information with "the least reasonable delay".

301. During the three-year period of 1 January 2009 to 31 December 2011, Bermuda received 15 requests for information from 5 different jurisdictions. The statistics show that the number of requests remained at similar levels throughout the three year period. It is noted that Bermuda has a long established procedure for exchanging information with one treaty partner. Although Bermuda's practical experience of exchanging information with a number of its other EOI partners is relatively new, the procedure for such exchange follows that already established. Bermuda's practices to date have also demonstrated a responsive approach. Bermuda only received a limited number of EOI requests during the review period (of 15 requests) although the number of EOI requests received by Bermuda in 2012 is almost double the total figure from the three-year review period. However, Bermudian authorities have reported that this increase has not impacted upon the timeframe within which EOI requests are processed.

302. During the review period, requested information was provided on average within 72 days upon receipt of the request, with the fastest being 38 days and the longest 126 days. 11 requests were answered within 90 days of receipt of the request and 3 requests were answered within 180 days. This information is presented in the table below. Generally, where response time has taken longer, this was as a result of the need for further clarification from the requesting party or as a result of the requested information relating to an extended time period. The overall quick response time applied whether ownership, accounting or banking information was requested and in all cases but one, the Bermudian competent authority had to approach a third party to obtain the information. In addition, a number of EOI requests sought a range of different types of information which the Bermudian competent authority obtained from different persons.

Response times for requests received during 3 year review period

	2009		2010		2011		Total	Average	
	nr.	%	nr.	%	nr.	%	nr.	%	
Total number of requests received** (a+b+c+d+e)	6	100	2	100	7	100	15	100	
Full response*: ≤90 days	4	66.67	2	100	5	71.4	11	73.33	
≤180 days (cumulative)	6	100	2	100	6	85.7	14	93.33	
≤1 year (cumulative)	(a)	6	100	2	100	6	85.7	14	93.33
1 year+	(b)	0	0	0	0	0	0	0	
Request withdrawn by EOI partner	(c)	0	0	0	0	1	14.3	1	6.67
Failure to obtain and provide information requested	(d)	0	0	0	0	0	0	0	
Requests still pending at date of review	(e)	0	0	0	0	0	0	0	

*The time periods in this table are counted from the date of receipt of the request and the date on which the final and complete response was issued.

**Bermuda counts each written request from an EOI partner as one EOI request even where more than one person is the subject of an inquiry and/or more than one piece of information is requested.

303. It is Bermuda's policy to commence calculating its response time to an EOI request from the date of receipt of the request. Where an initial request is withdrawn and replaced by a subsequent request, the response time is calculated as commencing from the date of receipt of the replacement request; a clarification in itself is not considered a new request. Any time taken for clarification following receipt of a request is included within the calculation of the response time.

304. It is common practice in Bermuda to send an acknowledgement of receipt to the requesting jurisdiction within seven days of receipt of the request. In the three cases during the three-year review period where Bermuda was not able to provide the requested information within 90 days, Bermuda provided a progress update to the requesting jurisdiction in all cases.

Clarifications on EOI requests

305. Bermuda sought clarification from the requesting jurisdiction in relation to 9 out of the 15 EOI requests received in the three year review period. In relation to some EOI requests, clarification was sought on multiple matters. The matters on which Bermuda requested further clarification included the meaning of the abbreviated terms used by the requesting jurisdiction in the EOI request, the identity of the entities mentioned in the EOI request (as they were not registered in Bermuda, or its name was possibly incorrectly

stated), whether the request related to a civil or criminal tax matter (see also C.1.1), and confirmation that the person who had signed the EOI request on behalf of the requesting jurisdiction possessed the appropriate authority to do so (as this person had changed in the requesting jurisdiction following the signing of the TIEA).

306. The CA representatives confirmed that in these cases they continued to process the EOI request and gather the requested information, where possible, whilst awaiting clarification from the requesting jurisdiction. This was to ensure that Bermuda responded to EOI requests as expeditiously as possible. Although the percentage of cases in which clarification was sought by Bermuda appears high, the response times in the three-year period under review – with 12 of the EOI requests answered within 90 days and the remaining answered within 180 days – demonstrate that this has not impeded Bermuda’s ability to respond to EOI requests in a timely manner.

Organisational process and resources (ToR C.5.2)

307. Under Bermuda’s information exchange mechanisms, the Minister of Finance or his/her authorised representatives are designated as the Competent Authority. In practice, the Minister’s authorised representatives responsible for the day-to-day handling of EOI cases are two members of the Treaty Unit within the Ministry of Finance (the “CA representatives”). The BMA is the principal body responsible for the oversight and regulation of persons holding information which may be relevant to an EOI request. Together they create a complementary and effective system for maintaining appropriate domestic measures and responding efficiently to requests from Bermuda’s EOI partners. The contact details of Bermuda’s Competent Authority, and a list of persons authorised to send communications on behalf of Bermuda in response to an EOI request, are provided through electronic communications to Bermuda’s EOI partners.

Resources

308. In practice, all inbound EOI requests to Bermuda are currently handled by two persons, the CA representatives, one of whom is responsible for the day-to-day management of the EOI case files under the supervision of the other, senior official. The CA representatives are authorised to provide acknowledgement receipts and cover letters to requesting jurisdictions. However, EOI notices, CAAs and EOI agreements must be signed by the Minister himself/herself. The CA representatives indicated that the handling of EOI requests and related activities represent around 50% of their workload, with the other 50% comprised of treaty negotiation and EOI-related legislative activities. As mentioned in C.3, in respect of every request received an

opinion from the AG as to the validity of the request under the terms of the relevant EOI agreement and domestic law. In practice, the Crown Counsel of the AG is designated specifically to this task (in addition to her other duties); however, other staff are available in the AG for the task if the Crown Counsel is out of office. For EOI requests on criminal matters, the CA representatives enlist the assistance of the Financial Crime Unit (FCU) which is located within the Bermudian police. The FCU can also draw upon the resources of the police department to assist with criminal EOI requests, where necessary.

309. With respect to the period under review, the number of personnel has been sufficient to service the volume of EOI requests to Bermuda and the record of Bermuda's response times to EOI requests supports this position. It is noted that the number of EOI requests has significantly increased in 2012, but the Bermudian authorities indicated that they continue to be able to respond to the EOI requests within a similar timeframe to those previous years under review. Furthermore, the Bermudian authorities indicated that as regulatory activities (including EOI activities) form a crucial part of the maintenance of Bermuda's economy, the funding of these activities will be prioritised by the Minister.

310. Training of the CA representatives is mostly conducted "on the job". The senior CA representative has been involved in the handling of EOI requests since 2003 and the junior CA representative has been in his position since 2009. In all instances, the junior CA representative will consult with the senior CA representative, before the EOI requests are acted upon, for processing or for reverting to the requesting jurisdiction for further clarification. Members of the AG are encouraged to attend Global Forum assessor training seminars to familiarise themselves with the requirements of the Global Forum's Terms of Reference.

311. In terms of written materials, a step-by-step guide to handling an EOI request has been produced for initiating newcomers to the procedure. In addition, the computerised spreadsheet contains prompts with regard to milestones upon which the CA representative should take action – such as, the end date of the 90-day period from which Bermuda received the EOI request; the date the 28-day period in respect of an EOI notice ends; and the start and end date of the statutory holding period (which is 10 days in relation to information obtained through EOI notices issued under the International Cooperation Tax Act and 20 days for those issued under the USA-Bermuda Tax Convention Act). The CA representatives also refer to the OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes (in particular the legal module and the EOI on request module) for guidance.

312. The majority of Bermuda’s EOI agreements do not specify the language to be used in EOI requests. However, all EOI requests received by Bermuda to date have been in English and translation has not been necessary.

313. The CA representatives have been active in promoting understanding of EOI in Bermuda. Presentations explaining TIEAs and their relevance to Bermuda’s industry are given to key law firms. The CA representatives have also appeared on radio and television to explain TIEAs to the wider Bermudian public audience. Other organisations have also been active in disseminating EOI information in Bermuda: for example, the National Anti-Money Laundering Committee newsletters provide updates on TIEAs which have been recently negotiated by Bermuda.

314. In the international context, either one or both of the CA representatives attend Global Forum meetings. As mentioned above, the CA representatives are also responsible for treaty negotiations on behalf of Bermuda. The junior CA has, in particular, been instrumental in the program of signing of CAAs. This comprehensive involvement of the CA representatives in all aspects of EOI supplements their practical knowledge and experience in the handling of EOI requests.

Organisational process

315. The procedure followed by the CA representatives for handling incoming EOI requests is set out in the document “Treaty Unit – Processing of EOI requests”. The date of receipt of the EOI request is marked on the document. The CA representatives then check the signatory of the EOI request against the competent authority contact details provided by relevant EOI partner to ensure that he/she is duly authorised. Acknowledgement of receipt is sent to the requesting jurisdiction, by secure mail, email or fax, within seven days of receipt of the EOI request.

316. In relation to Bermudian registered entities, the CA representatives will verify the name of the entity against the records of the Registrar to check that the entity is in fact registered in Bermuda and to obtain details (such as the name and address of the entity’s service provider) which would assist the CA representatives to seek the requested information. This is a quick procedure (it takes a matter of hours for the Registrar to process such request) facilitated by the fact that the CA representatives and the Registrar are located within the same building.

317. The CA representatives would revert to the requesting jurisdiction to request additional clarification, as necessary, for example, if the entity does not appear on the Registrar’s records. This has occurred on two occasions and the clarification has taken around one to two weeks. The CA representatives indicated that it is their policy to continue with the processing of an

EOI request, insofar as possible, during the period in which they are awaiting further clarification, to ensure that the requested information can be provided to their EOI partner as quickly as possible.

318. In almost all cases, information must be obtained from third parties in order to respond to an EOI request. The process for obtaining information is the same whether ownership, accounting or banking information is required and involves a single process of issuing an EOI notice to the information holder by the CA representatives directly. As discussed in Part B, the request to obtain information from a third party is made through the issuance of an EOI notice signed by the Minister. The junior CA representative generally drafts the EOI notice under the supervision of the senior CA representative; in practice, this process takes on average around two weeks and can take place concurrently with seeking of additional clarification from the requesting jurisdiction.

319. Every draft EOI notice is reviewed by the Crown Counsel of the AG for legal correctness, taking into consideration the terms of the relevant EOI agreement and the requirements under Bermudian domestic law. The Bermudian authorities indicated that this takes on average no more than two days. The EOI notice is then submitted to the Minister for signing, following which one or both of the CA representatives will serve the EOI notice, in person, to the information holder; these steps all generally take place within the same day.

320. As a matter of practice, a person served with an EOI notice has 28 days to provide the requested information unless an extension of time is granted. In the three-year period under review, only two extensions of time were granted. In one case, the extension was granted as a result of clarifications required on the part of the requesting jurisdiction rather than on the request of the information holder. In the other case, an extension was granted due to the requirement for accessing information which spanned an extended period of time, and some of which was held in archive.

321. Once the CA representatives receive the information requested under the EOI notice, they verify the information against the EOI request. This process generally takes one to two days. The CA representatives will request the information holder to provide further information if it appears that the information received does not adequately address the EOI request.

322. Both the International Cooperation Act and the USA Bermuda Tax Convention Act stipulate a holding period prior to the sending of the information to the requesting jurisdiction. As discussed in B.2 above, the holding period under the International Cooperation Act in relation to information obtained through an EOI notice is ten days. In relation to EOI notices issued pursuant to the USA Bermuda Tax Convention Act, the holding period is 20

days. The Bermudian authorities indicated that any application for an injunction or legal challenge to the Bermudian competent authority's actions would have to be mounted within 38 days of the receipt of the EOI notice since, in practice, the information would be sent to the requesting jurisdiction as soon as the holding period expires.

323. Following the expiration of the holding period, the CA representatives would send the requested information to the requesting jurisdiction together with a letter. This is sent to the requesting jurisdiction either by encrypted email, courier or tracked postal mail.

324. Throughout the process of handling an EOI request, the CA representatives register the relevant key dates, deadlines and progress on a computerised spreadsheet. The junior CA representative sets computerised reminders for the key dates on which action must be taken in relation to each EOI request in progress (for example, the expiry of the 28-day EOI notice period; the 90th day since the receipt of the EOI request). It is noted that 11 of the 15 EOI requests received by Bermuda were answered within 90 days. In the three cases where Bermuda was not able to provide the requested information within 90 days, Bermuda provided a progress update to the requesting jurisdiction in three cases.

Conclusion

325. The CA representatives handle all incoming EOI requests in practice. Preliminary checks for information are carried out with the Registrar and sometimes the Exchange Controller but in almost all cases information is collected from third parties for responding to EOI requests. The manner for collecting all types of information involves only a single process: the CA representatives directly issue an EOI notice to the information holder. Bermuda has provided responses to its EOI partners across a range of ownership, accounting and bank information (or sometimes a combination of these types of information) by using this single process. During the review period, Bermuda responded to all EOI requests within 180 days and 11 of these were responded to within 90 days. The information received from Bermuda's exchange of information partners confirms that Bermuda has been able to respond to information exchange requests in a timely manner.

326. Bermuda has sufficient staff with relevant experience working on exchange of information and has indicated that it will continue to commit any resources necessary for effective EOI. It also has a long established procedure for exchanging information which was developed through its EOI relationship with one treaty partner. This procedure has been extended to provide assistance to a larger number of EOI partners during the review period. It is further noted that the Bermudian industry is a relatively small community;

the industry members have experience of the Bermudian authorities' process for obtaining information and of working with the Bermudian authorities. As a result of all of the above, it is considered that Bermuda has appropriate organisational processes and resources in place to ensure timely responses.

327. It is noted that there has been a significant increase in the number of EOI requests received by Bermuda in 2012. A number of Bermuda's EOI agreements have also recently entered into force. Both of these indicate a potential trend for an increase in the number of EOI requests to be received Bermuda in the future. In light of this, and whilst acknowledging Bermuda has provided responses in a timely manner under current organisational procedures, Bermuda is encouraged to monitor for such future trends in incoming EOI requests to ensure that its EOI resources and procedures continue to remain adequate to support effective exchange of information.

Unreasonable, disproportionate or unduly restrictive conditions on exchange of information (ToR C.5.3)

328. 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

Phase 1 determination
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.
Phase 2 rating
Compliant.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. <i>(ToR A.1)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Largely Compliant.	The level of fines applicable to violations by companies and partnerships of their record keeping and registration requirements are relatively low in practice. In addition, the Registrar and the Director of Business Development have only exercised their monitoring and enforcement powers in relation to such entities in a limited number of cases upon receipt of a notification of suspicion or complaint.	Bermuda should ensure that all its monitoring and enforcement powers are appropriately exercised in practice to support the legal requirements which ensure the availability of ownership and identity information in all cases.
	The licensed CSP regime, amendment to the Exchange Control Regulations and other provisions through which the availability of ownership and identity information is ensured, in particular with respect to permit companies, exempted trusts and all entities that appoint a licensed CSP, were only recently introduced in 2012 following the review period.	Bermuda should closely monitor the practical implementation of the licensed CSP regime and the other recently introduced obligations in ensuring the availability of ownership and identity information with respect to the relevant entities and arrangements in accordance with the standard.

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. <i>(ToR A.2)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Largely Compliant.	Except for those entities that are subject to licensing with the BMA, no system of monitoring of compliance with accounting record keeping requirements is in place, which may cause the legal obligations to keep accounting records to be difficult to enforce. In addition, a number of provisions relating to accounting record keeping have only been introduced recently and are therefore untested in practice.	Bermuda should ensure that all its appropriate monitoring and enforcement powers are sufficiently exercised in practice to support the legal requirements which ensure the availability of accounting information in all cases.
Banking information should be available for all account-holders. <i>(ToR A.3)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). <i>(Tor B.1)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. <i>(ToR B.2)</i>		
Phase 1 determination: The element is in place.		

Determination	Factors underlying recommendations	Recommendations
Phase 2 rating: Compliant.		
Exchange of information mechanisms should allow for effective exchange of information. <i>(ToR C.1)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. <i>(ToR C.2)</i>		
Phase 1 determination: The element is in place.		Bermuda should continue to develop its EOI network with all relevant partners.
Phase 2 rating: Compliant.		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. <i>(ToR C.3)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Largely Compliant.	During the three-year period under review, Bermuda disclosed information not necessary to obtain the information requested to the information holder; in particular the disclosure of the identity of its EOI partner's competent authority to the information holder gave rise to confidentiality concerns. Bermuda has revised its policy in relation to the content of EOI notices such that the identity of its EOI partner's competent authority is no longer disclosed.	Bermuda should monitor the implementation of the revised policy on disclosure of information in EOI notices to ensure that it is compatible with effective exchange of information in practice.

Determination	Factors underlying recommendations	Recommendations
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. <i>(ToR C.4)</i>		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
The jurisdiction should provide information under its network of agreements in a timely manner. <i>(ToR C.5)</i>		
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.		
Phase 2 rating: Compliant.		

Annex 1: Jurisdiction’s Response to the Review Report¹⁸

This annex is left blank because Bermuda has chosen not to provide any material to include in it.

18. 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

	Jurisdiction	Type of Eol arrangement	Date signed	Date entered into force
1	Argentina	TIEA	22.08.2011	14.10.2011
2	Aruba	TIEA	20.10.2009	01.12.2011
3	Australia	TIEA	10.11.2005	20.09.2007
4	Bahrain	DTA	22.04.2010	29.01.2012
5	Brazil	TIEA	29.10.2012	Not Yet In Force
6	Canada	TIEA	14.06.2010	01.07.2011
7	China	TIEA	02.12.2010	03.11.2011
8	Curaçao (formerly Netherlands Antilles)	TIEA	28.09.2009	Not Yet In Force
9	Czech Republic	TIEA	15.08.2011	Not Yet In Force
10	Denmark	TIEA	16.04.2009	25.12.2009
11	Faroe Islands	TIEA	16.04.2009	09.09.2010
12	Finland	TIEA	16.04.2009	31.12.2009
13	France	TIEA	08.10.2009	28.10.2010
14	Germany	TIEA	03.07.2009	06.12.2012
15	Greenland	TIEA	16.04.2009	22.03.2012
16	Iceland	TIEA	16.04.2009	02.04.2011
17	India	TIEA	07.10.2010	03.11.2010
18	Indonesia	TIEA	22.06.2011	Not Yet In Force
19	Ireland	TIEA	28.07.2009	11.05.2010
20	Italy	TIEA	23.04.2012	Not Yet In Force
21	Japan	TIEA	01.02.2010	01.08.2010
22	Korea, Republic of	TIEA	23.01.2012	Not Yet In Force
23	Malaysia	TIEA	23.04.2012	28.12.2012
24	Malta	TIEA	02.11.2011	05.11.2012

	Jurisdiction	Type of Eol arrangement	Date signed	Date entered into force
25	Mexico	TIEA	15.09.2009	09.09.2010
26	Netherlands	TIEA	08.06.2009	01.02.2010
27	New Zealand	TIEA	16.04.2009	23.12.2009
28	Norway	TIEA	16.04.2009	22.01.2010
29	Portugal	TIEA	10.05.2010	16.03.2011
30	Qatar	DTA	10.05.2012	Not Yet In Force
31	Seychelles	DTA	21.06.2012	Not Yet In Force
32	Singapore	TIEA	29.10.2012	06.12.2012
33	Sint Maarten (formerly Netherlands Antilles)	TIEA	28.09.2009	Not Yet In Force
34	South Africa	TIEA	06.09.2011	08.02.2012
35	Sweden	TIEA	16.04.2009	25.12.2009
36	Turkey	TIEA	23.01.2012	Not Yet In Force
37	United Kingdom	TIEA	05.12.2007	10.11.2008
38	United States	TIEA	02.12.1988	02.12.1988

Annex 3: 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
Exchange Control Amendment Regulations 2012

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 Amendment Act 2012

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 Amendment Act 2012
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
Trusts (Regulation of Trust Business) Amendment Act 2012
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 Amendment Act 2012

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 (Anti-money Laundering and Anti-terrorist Financing 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

Payroll Tax Act 1995

Barristers' Code of Professional Conduct

Corporate Service Provider Business Act 2012

Specified Business Legislation Amendment Act 2011

Specified Business Legislation Amendment Act 2012

Competent authority agreement with Canada, 4 January 2012

Competent authority agreement with Denmark, 3 November 2011

Competent authority agreement with Faroe Islands, 3 November 2011

Competent authority agreement with Finland, 3 November 2011

Competent authority agreement with Germany, 8 March 2012

Competent authority agreement with Greenland, 3 November 2011

Competent authority agreement with Iceland, 3 November 2011

Agreement of mutual understanding with Japan, 16 November 2011

Competent authority agreement with Norway, 3 November 2011

Competent authority agreement with South Africa, 1 December 2011

Competent authority agreement with Sweden, 3 November 2011

Competent authority agreement with the United Kingdom, 27 April 2012

Annex 4: People Interviewed During On-Site Visit

Ministry of Finance

Assistant Finance Secretary: Treaty Unit

Research Officer: Treaty Unit

Tax Commissioner

Assistant Tax Commissioner

Ministry of Business Development and Tourism

Director of Business Development

Attorney General's Chambers

Senior Crown Counsel

Deputy Chief Parliamentary Counsel

Bermuda Monetary Authority

Director of Legal Enforcement

Legal Counsel

Assistant Director, Licensing Insurance Supervision

Principal, AML/ATF Unit

Financial Intelligence Agency

Bermuda Police

Inspector

Director of Public Prosecution

Crown Counsel

The Registrar of Companies

Registrar of Companies

Assistant Registrar of Companies

National Anti-Money Laundering Committee (NAMLC)

Chair of NAMLC

Bermuda Bar Association

Chartered Accountants of Bermuda

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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 2: BERMUDA

This report contains a “Phase 2: Implementation of the Standard in Practice” review, as well as revised version of the “Phase 1: Legal and Regulatory Framework” review already released for this jurisdiction.

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 120 jurisdictions, which participate in the Global Forum on an equal footing.

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

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

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

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

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