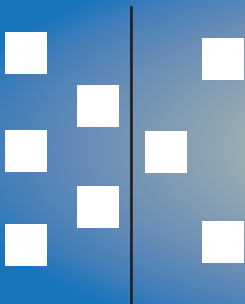


SECOND  
EDITION

# Towards a Level Playing Field

## Regulating Corporate Vehicles in Cross-Border Transactions



A review commissioned by the  
International Trade and Investment Organisation  
and  
The Society of Trust and Estate Practitioners

Conducted by

**STIKEMAN ELLIOTT**



Society of Trust and  
Estate Practitioners

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## ***INTERNATIONAL TRADE AND INVESTMENT ORGANISATION***

The **International Trade and Investment Organisation** (ITIO) works for a **level playing field in the trade in services**, particularly in the development and implementation of new regulatory standards. This entails engaging with a wide range of international bodies.

Established in March 2001, the ITIO comprises sixteen small and developing states across **Europe** (Isle of Man), the **Caribbean** (Anguilla, Antigua & Barbuda, Bahamas, Barbados, Belize, British Virgin Islands, Cayman Islands, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Turks & Caicos), **Latin America** (Panama), **Pacific** (Cook Islands, Vanuatu) and **Asia** (Labuan – Malaysia).

The Commonwealth Secretariat, Pacific Islands Forum Secretariat, CARICOM Secretariat, Caribbean Development Bank and Eastern Caribbean Central Bank have Observer status.

The ITIO is unique among organisations of small and developing economies in that its core activities are funded entirely by members. It takes account of all members' varying needs and stages of development, working on approaches that are of benefit to all.

The ITIO seeks opportunities to work in partnership with the private sector where appropriate.

*Note: ITIO originally stood for International **Tax** and Investment Organisation, but members felt the name should better reflect the focus on all aspects of the trade in services, not just on taxation matters.*

## ***SOCIETY OF TRUST AND ESTATE PRACTITIONERS (STEP)***

The Society of Trust and Estate Practitioners (STEP) is the professional body for the trust and estate profession worldwide.

STEP Members come from the legal, accountancy, corporate trust, banking, insurance and related professions, and are involved at all levels in the planning, creation and management of, and accounting for, trusts and estates, executorship, administration and related taxes.

STEP has over 9,500 Members. STEP is well established internationally, with substantial numbers of Members based throughout the world. Members from other jurisdictions are welcome if they meet the qualification requirements.

STEP has branches in the following jurisdictions:

Anguilla	Australia	The Bahamas
Barbados	Bermuda	British Virgin Islands
Canada	Cayman Islands	Cyprus
England & Wales	France	Gibraltar
Guernsey	Hong Kong	Ireland
Isle of Man	Israel	Italy
Jersey	Liechtenstein	Mauritius
Monaco	Scotland	Singapore
South Africa	Switzerland	Turks & Caicos Islands
United States of America		

Those closely involved in this review were:

Clare Colacicchi, STEP Chairman  
Colin Sharp, STEP Vice President  
David Harvey, STEP Chief Executive  
Keith Johnston, STEP Policy and Communications Manager

Thanks also to members of the STEP International Committee and a number of individual STEP members for their comments.

## ***STIKEMAN ELLIOTT***

Stikeman Elliott is a Canadian law firm with offices in North America, Asia, Australia and Europe. Stikeman Elliott conducts a broad corporate and commercial law practice including government and private sector consultancy on international taxation, banking and securities regulation.

The Private Capital Group in the London Office specialises in cross-border estate planning and commercial aspects of international private banking. The Group has advised governments, financial institutions and private clients on the financial regulation initiatives arising from the OECD, FATF, IMF, FSF and EU.

Members of the Stikeman Elliott team involved in this review were:

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*Leigh Nicoll*, admitted to practice in New Zealand;  
*Robert Reymond*, Associate admitted to practice in Quebec; and  
*Heather Tibbo*, Associate admitted to practice in Jersey and in England & Wales.

## PREFACE

*By Glenroy A Forbes, Chairman, International Trade and Investment Organisation (ITIO)*

When the ITIO and STEP asked Stikeman Elliot to undertake this report, *Towards a Level Playing Field*, we hardly expected it to be a bestseller. But demand has far outstripped supply and we are delighted to be republishing it.

The report's popularity is not hard to understand. Small countries with offshore finance centres, as well as numerous practitioners, have long been concerned at the way that large, developed countries and multilateral groupings such as the Organisation for Economic Cooperation and Development (OECD), Financial Action Task Force, European Union and International Monetary Fund seek to dictate terms to small jurisdictions while treating lightly or simply overlooking offshore centres in "developed" countries such as Switzerland, Luxembourg, Hong Kong, Singapore and Delaware and Nevada in the USA. There is a pent-up demand for facts with which to challenge what can often seem old-fashioned protectionism.

*Towards a Level Playing Field* was undertaken as a direct response to an OECD publication, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (OECD, November 2001). Despite manifest weaknesses (such as its anecdotal approach and lack of self-analysis or benchmarking), the OECD's report, which carries severe implications for personal financial privacy, was endorsed by G7 finance ministers.

There is a genuine need to combat the abuse of corporate vehicles by the ethically challenged. The ever-present threat of terrorism and the ongoing exposure of corporate scandals demonstrate as much.

But action should be taken on the basis of facts, not prejudice. Hence the decision of the ITIO, which represents countries, and STEP, which represents industry, to come together to put some facts on the table. We believe this government-industry partnership sets an example for the future.

*Towards a Level Playing Field* provides for the first time directly comparable information on the regulation of corporations, trusts and limited partnerships in fifteen OECD and non-OECD countries. The results may come as a surprise to those who think big countries have nothing to learn from small ones.

The report reveals, for example, that corporate service providers are better regulated in a number of non-OECD jurisdictions than in OECD member countries. It exposes how, even while seeking tighter regulation of corporate vehicles in small countries, the OECD has been excusing large OECD corporate domiciles such as Delaware and Nevada in the USA from compliance with new rules to regulate service providers and track beneficial ownership.

The ITIO works for a level playing field in the trade in services. We believe it is not just unfair but foolish for large countries to try and impose new standards on smaller ones, particularly when small countries are already ahead of larger ones in some areas. We can all learn from each other.

If international wrongdoers and fraudsters are to be tackled effectively, international financial regulation must proceed on the basis of non-discrimination and a level playing field. All countries should be involved equally in developing the new rules. And the rules must be implemented by all countries in the same way and at the same time, not some more or earlier and others less or never.

This second edition of *Towards a Level Playing Field* enables a new set of readers to have the facts about the regulation of corporate vehicles at their fingertips. I hope you find it helpful.

**Glenroy A Forbes**

Chairman, ITIO and Financial Secretary, British Virgin Islands

## FOREWORD

*By Clare Colacicchi, Chairman, Society of Trust and Estate Practitioners (STEP)*

We are delighted to be publishing this second edition of *Towards A Level Playing Field*. Our aim is to encourage effective and reasonable global measures to catch international criminals.

This report takes forward the debate on how to effectively combat international crime, particularly criminal tax evasion. The need to create an effective system to identify and prosecute international criminals should be balanced against the need to encourage legitimate trade and uphold the individuals right to privacy.

Major international bodies like the Organisation for Economic Co-operation and Development (OECD), the European Union, and the Financial Action Task Force (FATF) have taken the initiative and suggested rules to encourage change and catch the criminals. But the pressure to implement new rules has not been applied universally, leaving gaping holes through which unscrupulous individuals will continue to evade tax.

We argue that, unless change is applied universally, we will all fail in our aim of catching criminal tax evaders. The trade in non-resident financial services is global, and 80% is located in OECD member states. To work, any agreement has to be worldwide, and include all major Finance Centres, including those in the various states in the U.S., Europe, the Caribbean and the Far East. A “level playing field” is required. Catching cross-border tax evaders will not be effective if confined only to OECD Member states, or indeed only to non-Members.

Simply put, the “level playing field” approach means all Finance Centres should be involved equally in developing new principles. All Finance Centres must implement rules in the same way and at the same time.

In this publication we compare the ability to collect and share information

on corporations, trusts, limited partnerships and foundations in OECD and non-OECD member states. This provides examples in the form of case studies on corporate vehicles available in OECD Member countries which are perceived to be vulnerable to abuse.

Sadly, where the level playing field approach has not been followed the results are predictable. For example the 2003 compromise on the EU Savings Tax Directive did not achieve the sought after common approach to the taxation of non-resident savings. Without a level playing field the Savings Tax Directive will only succeed in increasing compliance costs and undermining privacy whilst allowing criminal tax evaders to escape.

This is because in the final political compromise the EU agreed that Switzerland, the U.S. and other Finance Centres could be excused from effective compliance. To date the U.S. has not implemented rules to ensure its banks report interest paid to non-residents for onward information exchange.

We know that attempts to identify criminals behind Delaware, Nevada and other U.S. state corporations are frustrated because there is no effective beneficial ownership information. Corporate service providers in Wyoming still offer nominee bank accounts designed to disguise genuine ownership.

Nevertheless, as the tables show, many smaller Finance Centres have already made far-reaching changes to business law, culture and regulation. These facts show just how much has changed. Many Finance Centres are also committed to the OECD's information exchange process on the basis of a level playing field. Despite this, much of the legitimate business in these same international financial centres continues to be characterized as suspect.

To facilitate further change, it must be in the interests of OECD secretariat

and members to give credit to those who have already made changes. Yet legislators and journalists in developed countries continue to denigrate their competitors. Moreover, criminal tax evasion and legitimate and legal tax avoidance are confused. The message is simple and seductive: “Offshore” Finance Centres are all the same. They are all “tax havens” engaging in criminal tax evasion.

But by reading this booklet you will know better. Times have changed. The vast majority of Finance Centres have an effective regulator, and aided by constructive STEP professionals, have made enormous strides in enforcing regulatory regimes with modern competitive commercial frameworks. A tiny number of rogues have not.

STEP is in a unique position to comment on the effectiveness of regulation and to help alienate the rogues. We condemn money launderers, criminal tax evaders and terrorist financing. The professional standing of STEP members depends upon them abiding by the fiscal laws of their jurisdiction.

Moreover, STEP members enforce due diligence, deny access to criminal tax evaders and report suspicious transactions to the authorities. This experience has been used to good effect over the past year in constructive dialogue with the Financial Action Task Force (FATF) and the beginnings of dialogue with OECD.

OECD acknowledges that the trust is an “important, useful, and legitimate vehicle for the transfer and management of assets”. Trusts are used to facilitate control and management of assets held for the benefit of minors and individuals who are incapacitated, for charitable purposes, for tax and estate planning and for supporting corporate transactions. STEP believes the legitimate trade in cross-border financial services should continue.

The EU Savings Tax Directive has stymied progress toward a level playing

field. But the need to stop criminal tax evaders remains. All Finance Centres have a stake in seeing this through. Of course legitimate clients must be allowed to ply their trade and maintain a right to privacy. The criminal has no such right and tax information should be exchanged to assist their prosecution.

We welcome regulation that is:

- practicable;
- effective;
- fair;
- proportionate; and
- does not infringe human rights, particularly that of client privacy.

We also welcome those jurisdictions which have made progress towards that goal and look to more inclusive ways of working together with all Finance Centres and international bodies towards a level playing field.

**Clare Colacicchi is Chairman of STEP Worldwide**

# TOWARDS A LEVEL PLAYING FIELD

## REGULATING CORPORATE VEHICLES IN CROSS-BORDER TRANSACTIONS

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## TOWARDS A LEVEL PLAYING FIELD

### REGULATING CORPORATE VEHICLES IN CROSS-BORDER TRANSACTIONS

*No quality financial centre- or professional firm- wants to be involved with terrorism, money laundering or serious crime. ITIO and STEP seek a broadly inclusive dialogue leading to universal application of appropriate and reasonable regulation to all international financial centres to ensure interdiction of such criminal activity. Consumers, professionals and international financial centres should accept regulation that permits reasonable transparency for law enforcement purposes, provided such regulation respects legitimate privacy and the entitlement of all jurisdictions to offer financial services on a competitive basis.*

#### EXECUTIVE SUMMARY

New rules are being formulated to facilitate the cross-border exchange of financial information. These new rules are being developed with a mixed agenda which includes combatting transnational "crime". Such rules have the potential to distort trade patterns and may fail in their stated aims of reducing illegal activity if they are applied unevenly to the jurisdictions facilitating cross-border financial transactions.

These new rules fuel concerns that information is being collected and exchanged without regard for financial privacy and human rights. Public scepticism is rife concerning the ability of governments to prevent unauthorised access to information and to resist the temptation to access such information for political, economic or other purposes. There is, by definition, no opportunity to monitor unauthorized access.

Global sharing of information means that criminal access can occur at the weakest point of entry, multiplying the risks associated with unauthorized disclosure. There are also concerns that information is being collected in an indiscriminate, rather than risk-based, manner.

To date, these new rules are being shaped solely by developed countries, more specifically, Members of the Organisation for Economic Co-operation and

Development (OECD) which seek to maintain control over this segment of the global economy. International financial centres which are not members of the OECD (“Non-OECD IFCs”), small and developing economies (“SDEs”) and trust and estate professionals have been relegated to a subordinate role in the formulation of these rules.

This review documents the reasons for unease about a process for change controlled by the dominant participants in the global market for financial services. In particular, a flawed process premised on a restricted perspective will lead to flawed conclusions and fail to achieve the stated objectives of all parties. Business will simply migrate to jurisdictions overlooked or excused from full compliance with the new rules. This review calls for new regulation premised on a truly level playing field, one in which all countries conducting cross-border financial services participate on an equal basis in setting the new standards which will affect them.

The trade in services is a rapidly expanding component of global trade. Many of the smaller jurisdictions competing with the OECD Member countries in the provision of international financial services already have regulatory environments which meet or exceed standards extant in OECD Member countries, as can be seen from the comparative matrices in the appendices to this review. The design of global rules for the conduct of trade in more universal fora such as the World Trade Organization (WTO) utilises processes developed to lessen inequities being imposed on smaller and developing countries.<sup>1</sup>

The thesis of this review is that the design of new rules to facilitate cross-border exchange of information necessary to combat transnational crime must be created through a legitimate process, including the following elements:

- establishment of a level playing field (i.e. all countries must be subject to the same rules for any given activity, implemented on the same timetable with the same consequences for non-co-operation);
- discussion of policy in a universal forum;
- appropriate regard to competing considerations, such as reasonable privacy; and
- regulations which are proportionate to the risk and benefits associated with the activity being regulated.

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<sup>1</sup> *Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO* – Kyle Bagness & Robert W. Staiger, Department of Economics Columbia University Discussion Paper Series

## PART 1

### 1. INTRODUCTION

#### 1.1 Purpose and Structure of this Review

1. International financial centres which are not members of the OECD (“Non-OECD IFCs”) and small and developing economies (“SDEs”) are being excluded from effective participation in the formulation of new rules designed to facilitate the cross-border exchange of financial information. Trust and estate planning professionals are similarly concerned with a process for change in which they are denied effective participation.

2. SDEs are concerned that OECD proposals will effectively create non-tariff barriers to the trade in international financial services. Trust and estate professionals in non-OECD states are concerned that they will be placed at a competitive disadvantage by working in a regulatory environment which is more onerous than OECD states. Professionals in OECD states are also concerned that OECD Governments which commit to the principle of a level playing field may be obliged to adopt elements of inappropriate regulation projected onto others.

3. OECD membership is dominated by wealthy, developed nations. The dominant states in that group are the principal participants in the market for cross-border financial services. At the same time, these states control the process for regulatory reform. The OECD claims to seek a level playing field for the regulation of all jurisdictions.<sup>1</sup> However, the OECD is unlikely to be an impartial referee in regulating a market where its Member countries have a significant commercial interest. The US Government’s position, for example, is articulated in a recent US Treasury report on corporate inversions as follows:

Our overarching goal must be to maintain the position of the United States as the most desirable location in the world for place of incorporation, location of headquarters, and transaction of business.<sup>2</sup>

4. Any jurisdiction, quite understandably, will seek to protect its commercial interests in redrawing the rules. Hence there is unease with a process for change controlled by a subset of market participants.

5. Despite reservations over the current approach, STEP and ITIO share many of the OECD’s goals and seek to contribute constructively to the evolving rules

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<sup>1</sup> See discussion of this point below.

<sup>2</sup> *Corporate Inversion Transactions: Tax Policy Implications*, May 2002, at page 30.

for financial regulation. Work on this review commenced with a broad-based survey to establish an empirical foundation for consideration of issues. This survey is summarised in charts reviewed by leading counsel and appearing in Appendices C-E. The survey adopts the OECD's criteria and reviews the current regulation of "corporate vehicles" (broadly defined by OECD to include corporations, partnerships, trusts and foundations). Both OECD and non-OECD jurisdictions are considered. Using this empirical data this paper assesses the validity of the substantive assumptions, scope and conclusions of the OECD Report entitled, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, released on 27 November 2001 (the "OECD Report").

6. Part 1 of this Level Playing Field Review summarises the purpose and background to this review including an overview of the supranational organisations and a summary of the process undertaken by the OECD in the preparation of the OECD Report.

7. Part 2 examines the OECD's focus on non-OECD IFCs in the context of the misuse of corporate vehicles, addressing the dangers inherent in this narrow focus and outlines other key concerns with the OECD Report. Issues reviewed include the validity of the assumptions underlying the OECD's focus on "offshore centres" resulting in exclusion of OECD Member countries from consideration, and the consequences of this restricted focus in light of the goals of the exercise. Other issues covered include the composition of the OECD experts group and implications of the approach for a level playing field. Economic competition issues are also considered.

8. Part 3 contains an analysis of the results from our benchmarking survey of fifteen countries concerning regulation, access to beneficial ownership and financial information. The ability to share such information on corporations, trusts, limited partnerships and foundations in each jurisdiction is considered. This part provides examples in the form of case studies on corporate vehicles available in OECD Member countries which are perceived to be vulnerable to abuse.

9. Finally, Part 4 contains recommendations and conclusions based on the findings of the benchmarking research.

10. Matrices, including detailed footnotes setting out the results of the benchmarking review of regimes for regulation of corporations, trusts and limited partnerships in the countries considered, are annexed to this Review.<sup>3</sup>

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<sup>3</sup> No comparison with the OECD Report was possible as the OECD Report did not provide this type of fundamental factual information.

## 1.2 Background

### (a) OECD Report on Using Corporate Entities for Illicit Purposes

11. The increasing globalisation of the financial services sector has given rise to new requirements for wide-ranging agreements covering the cross-border trade in such services. The majority of multilateral processes in this regard are being conducted in international fora such as the World Trade Organisation and in the context of regional trade arrangements.

12. The major developed nations in the world are engaged in wide ranging reviews of the global market for financial services as a particularly important segment of the overall trade in services. These reviews involve multilateral organisations such as the Organisation for Economic Co-operation and Development (OECD), the Financial Action Task Force (FATF), and the Financial Stability Forum (FSF) which derive funding and membership exclusively from developed economies. The FSF, established by representatives of these same member states to look at particular aspects of the cross-border trade in financial services, is also participating as is the International Monetary Fund (IMF) at the behest of the same constituency. The IMF has broad membership, but voting rights are dominated by a handful of large states. Appendix A to this review summarises supranational membership data in chart form.

13. The OECD authored and tabled a report entitled *Report on the Misuse of Corporate Vehicles for Illicit Purposes* in May 2001. The Report calls on government authorities to ensure they are able to obtain information on the beneficial ownership and control of “corporate vehicles” in order to combat their misuse for illicit purposes.<sup>4</sup> The report utilised a largely anecdotal, non-introspective and non-benchmarked approach rather than any form of scholarly research methodology. It was endorsed by the Finance Ministers of G-7 countries, a subset of OECD membership, in July 2001. It was re-released on 27 November 2001 under the title *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*.

14. The OECD Report adopts a focus on corporate vehicles established in a limited group of competitor “offshore” jurisdictions, none of which are members of the OECD. The OECD proposes to rely on its report for its own policy formulation and notes interest in the report from closely related organizations such as the FATF, FSF and the European Union (EU) as a foundation for their further work in regulating financial markets. These organisations have

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<sup>4</sup> [www.oecd.org](http://www.oecd.org)

overlapping membership including a handful of countries which already dominate the global market for cross-border financial services. As these countries seek to vigorously promote their interests and policies through the fora they dominate, the OECD Report has potentially significant implications for various initiatives affecting many jurisdictions, institutions and clients involved in financial services. If fully implemented, the OECD Report also foreshadows profound changes in the norms for personal financial privacy.

*(b) Proposals in the OECD Report*

15. The OECD calls for adherence to three fundamental objectives, as follows:

- beneficial ownership and control information must be obtained or be obtainable by the authorities;
- there must be proper oversight and high integrity of any system for maintaining or obtaining beneficial ownership and control information; and
- non-public information on beneficial ownership and control must be able to be shared with other regulators/supervisors and law enforcement authorities, both domestically and internationally, for the purpose of investigating illicit activities and fulfilling their regulatory/supervisory functions respecting each jurisdiction's own fundamental legal principles.

16. The OECD Report proposes that the misuse of corporate vehicles be combatted by maintaining and sharing information on beneficial ownership and control through alternative mechanisms (with differing compliance burdens) as follows:

- "upfront" disclosure to public authorities;
- the holding of information by intermediaries; or
- the use of an investigative system to obtain information when, or if, needed.

17. The OECD Report suggests that the regulatory mechanism, and thus the compliance burden considered appropriate, for a particular jurisdiction should be related to a subjective assessment of the quality of the legal infrastructure in the jurisdiction concerned and the history of enforcement and co-operation.

18. Non-OECD Member States support the perceived need to prevent the misuse of corporate vehicles. However, such states are concerned that the

approach proposed in the OECD Report may be ineffective to achieve OECD goals as trade migrates to poorly regulated jurisdictions insulated from pressure for change. The proposed “triple track” approach may also pave the way for prescribing different and more onerous non-tariff trade rules for SDEs which do not enjoy a substantive role in the process for change. Thus, the subjective approach suggested in the OECD Report could be used to justify the creation of non-tariff barriers to the trade in financial services, disguised as regulatory standards specific to Non-OECD IFCs. Adoption of such standards could effectively disable participation by small states in the global market for services including the market for mobile and tax-neutral financial services.

19. These concerns are not abstract; the process is already underway. On 30 May 2002 the FATF, an organisation closely related to the OECD, released a consultation paper which imports significant aspects of the OECD Report’s analysis into the money laundering and anti-terrorism context. In addition, the OECD Steering Group on Corporate Governance plans to release a follow-up to the OECD Report. This follow-up aims to concretise the menu of policy options in the OECD Report by developing a subjective template that would facilitate the determination of which of the three regulatory options would apply to certain countries and how effective their implementation has been in practice.<sup>5</sup>

(c) *Recognition of the OECD’s Reasonable Concerns*

20. Non-OECD IFCs’ financial services professionals and SDEs support the OECD call for suppressing the misuse of corporate vehicles. Non-OECD IFCs agree that all countries offering platforms for the conduct of cross-border financial services carry an obligation to adopt effective regulation to interdict financial crimes and other illicit activities including money laundering and the financing of terrorism.<sup>6</sup>

21. The need to provide information to support cross-border enforcement of tax liabilities is less self-evident. There is no precedent in international law for the imposition of unilateral obligations on one country to assist another in its efforts to collect tax. Proposals for changing practices in the tax information exchange area are accordingly novel, and require careful consideration. Non-OECD IFCs acknowledge that conventional rules for information exchange for tax purposes are evolving, and small and developing countries seek to participate in the process of setting new policy and standards.

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<sup>5</sup> Note by the FSF Secretariat regarding “Ongoing and Recent Work Relevant to Sound Financial Systems” (25-26 March 2002 FSF Meeting).

<sup>6</sup> The OECD purports to aim to combat the use of corporate vehicles for illicit purposes which includes “money laundering, bribery/corruption, hiding and shielding assets from creditors, illicit tax practices, self-dealing/defrauding assets/diversion of assets, market fraud and circumvention of disclosure requirements, and other forms of illicit behaviour” (OECD Report at page 7).

22. Non-OECD IFCs agree that in order to effectively combat transnational crime, information on beneficial ownership and control must be obtainable by authorities within the jurisdiction in which corporate vehicles are established, through means appropriate within the particular jurisdictional context. Non-OECD IFCs concur that this information must be subject to exchange in agreed circumstances. However, the design of new rules to facilitate cross-border exchange of information must evolve through a consensual process including the following elements:

- establishment of a level playing field (i.e. all countries must be subject to the same rules for the same activities, implemented on the same timetable and with the same consequences for non-co-operation);
- discussion of issues in a universal forum which includes all jurisdictions offering facilities that may be affected by the outcome;
- appropriate regard to competing considerations, such as reasonable financial privacy; and
- the adoption of regulations which are proportionate and risk-based so that the restrictions on legitimate commerce are appropriately balanced against the harm sought to be curtailed.

### 1.3 *Supranational Organisations*

23. Membership of the relevant supranational organisations described below are set out in Appendix A.

#### *(a) Organisation for Economic Co-operation and Development (OECD)*

24. The OECD is an organisation with 30 Member countries, including all members of the G7 and EU, sharing a stated commitment to democratic government and the market economy.<sup>7</sup> The OECD assists member governments to address the economic, social and governance challenges of a globalised economy.<sup>8</sup> It is also an organisation designed, and mandated to promote the interests of its Member States.<sup>9</sup>

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<sup>7</sup> [www.oecd.org](http://www.oecd.org).

<sup>8</sup> Historically the research units within the OECD have made significant contributions particularly in the area of economics. It appears that neither these research units nor the sound methodology which they normally adopt, were involved in the production of the OECD Report.

<sup>9</sup> The Convention on the Organisation for Economic Co-operation and Development, Paris, 14 December 1960 at Article 1 (a) states:

(b) *Financial Action Task Force (FATF)*

25. The FATF, a G7 chartered agency housed in the OECD's offices in Paris, and sharing the same letterhead as the OECD, was established in 1989. The FATF has 28 Member countries largely overlapping with that of the OECD.<sup>10</sup> Its primary role has been to establish standards relating to money laundering laws and practices and to work to implement these standards throughout the world. The FATF has assumed a broadened mandate to combat terrorism following the attacks in the U.S.

26. Like the OECD, the FATF has restricted membership. Regional bodies such as the Caribbean Financial Action Task Force<sup>11</sup> support the work of the FATF. Although such regional bodies facilitate input from non-FATF members at a lower level, these groupings are "junior partners" in the processes undertaken by the FATF.

(c) *Financial Stability Forum (FSF)*

27. The FSF is a recently formed organisation which, like the FATF, was also established pursuant to a G7 initiative. At its inaugural meeting on 14 April 1999, the FSF established a so called "OFC" (Offshore Finance Centre) working group. The purpose of this group was to consider any potential role of financial institutions in non-OECD countries, in the stability of the world's financial system.

28. The FSF is primarily made up of OECD states and includes in its membership Australia, Canada, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Singapore, the United Kingdom and the United States. The FSF's focus in regard to non-OECD IFCs is now being continued at the behest of the G7 by the International Monetary Fund (IMF).<sup>12</sup>

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The aims of the Organisation for Economic Co-operation and Development shall be to promote policies designed to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy.

<sup>10</sup> For a full list of FATF Member countries see Appendix A.

<sup>11</sup> Members of Caribbean Financial Action Task Force comprise Anguilla, Antigua and Barbuda, Aruba, The Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, The Cayman Islands, Costa Rica, Dominican Republic, Dominica, Grenada, Jamaica, Montserrat, Netherlands, Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Turks and Caicos Islands and Venezuela.

<sup>12</sup> In relation to its principal mandate the FSF concluded that there was no evidence that non-OECD IFCs had played any role in global financial instability (FSF, *Report of the Working Group on Offshore Centres*, 5 April 2000 at page 19).

*(d) International Monetary Fund (IMF)*

29. The IMF is an organisation of 183 countries, established to promote international monetary co-operation, exchange stability, and orderly exchange agreements; to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance of payments adjustment.<sup>13</sup> The voting rights of the G7, OECD and other members of the IMF, which are set by economic contribution to the IMF, are set out in Appendix A. The IMF is now conducting assessments of non-OECD IFCs, in part using discriminatory assessment criteria in the sensitive area of corporate and trust service providers, which the IMF does not apply to assessments of OECD States.

*(e) Links between Supranational Organisations*

30. As can be seen from Appendix A there is significant commonality of membership of supranational organisations seeking to control the regulation of international financial services. Essentially, with the exception of the ITIO which is composed of, and funded by, small and developing economies, the organisations are the same developed countries operating in different forms.

31. The similarity of composition and the complementary interlocking programmes of these organisations are perceived by SDEs as suggesting a single agenda, that of the major developed countries. Accordingly, when one supranational body provides a recommendation or suggested course of action, endorsement from another organisation is, in substance, endorsement by the same states. It is not an impartial validation as the process may imply to those unfamiliar with the overlapping memberships between such organisations.

#### **1.4 Methodology Adopted in Conducting this Review**

32. The OECD Report does not base policy formation on a transparent comparison of the regulatory systems in market participants. This is an essential premise in a highly competitive market. In order to better consider the factual foundation for the OECD's proposals and the validity of the assumptions set out in the OECD Report, Stikeman Elliott commenced work on this Review with an extensive benchmarking exercise conducted with reference to the OECD's stated concerns regarding the potential misuse of corporate vehicles.

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<sup>13</sup> [www.imf.org](http://www.imf.org).

33. The benchmarking in this Review surveys the existing legislation and regulatory framework in a broad cross section of fifteen countries representative of the jurisdictional participants in the provision of cross-border financial services, including both so called “onshore” and “offshore”, civil and common law, large and small, OECD Member and non-OECD Member countries. The fifteen jurisdictions reviewed were The Bahamas, Bermuda, British Virgin Islands, Canada, Cayman Islands, Hong Kong, Ireland, Isle of Man, Jersey, Luxembourg, New Zealand, Singapore, Switzerland, the United Kingdom (or England and Wales, as appropriate) and the United States (focusing on the state of Delaware).

34. This Level Playing Field Review also draws upon existing analytical and statistical work on the formation and regulation of corporate vehicles, including work conducted by the European Union (EU), the United States General Accounting Office (GAO), the US Senate and Treasury, the Bank for International Settlements (BIS), the FATF and the OECD. The authors gratefully acknowledge the contribution of leading professional firms (noted in Appendix B) from the fifteen jurisdictions examined which were consulted, to review and comment on the matrices in Appendices C-E.

## PART 2

### 2. KEY CONCERNS WITH THE OECD REPORT

#### 2.1 Summary of Issues

35. The main concerns that Non-OECD IFCs have with the OECD Report are: (i) the OECD Report focuses on Non-OECD IFCs to the exclusion of the OECD's own members, which account for 80 per cent of the global trade in financial services; (ii) the proposals in the OECD Report were developed in a process controlled by a subset of market participants; and (iii) the dangers of compromising individuals' privacy are not sufficiently considered.

##### (a) Primary Focus on Non-OECD IFCs

36. As noted, the OECD adopted an express focus on vehicles established in "offshore" jurisdictions which are not OECD Member States. This limits the utility of the report as OECD Member countries already control 80 per cent of the global "offshore" market - i.e., the trade by jurisdictions in financial services provided to non-residents.<sup>14</sup> The restricted focus is curious, particularly as the initial report of the FSF acknowledged difficulty in distinguishing so-called "offshore activity" within the major developed states from that in smaller and developing states.<sup>15</sup> There are well documented concerns relating to vehicles established or administered in OECD Member States, discussed below.

37. The OECD justifies the focus on non-OECD IFCs, as follows:

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<sup>14</sup> See the following article for discussion of the distribution of the provision of cross-border financial services in both OECD and non-OECD Member States: Biswas, R., "Introduction: Globalisation, Tax Competition and Economic Development" in *International Tax Competition: Globalisation and Fiscal Sovereignty*, 2002.

<sup>15</sup> The FSF defined "offshore" in their *Report of the Working Group on Offshore Centres*, 5 April 2000, as follows:

An OFC is not easily defined. Any jurisdiction can be considered "offshore" to the extent that it is perceived as having a more favourable economic regime than another, e.g., low corporate tax rates, light regulation, special facilities for company incorporation, or highly protective secrecy laws. While OFCs are commonly perceived to be small island states, a number of advanced countries have succeeded in attracting very large concentrations of non-resident business by offering economic incentives either throughout their jurisdiction or in special economic zones.

Switzerland, which is an OECD and FATF Member, criticised the final outcome of the FSF process on the basis that:

the (FSF) list was drawn up in a non-transparent manner and does not list several financial centres with a high proportion of international financial business (e.g. New York, London) as Offshore Financial Centres. (Swiss Federal Department of Finance, *Swiss Financial Centre: A Documentation*, July 2001 at page 8).

- some non-OECD IFCs are perceived to provide “excessive secrecy” and “create a favourable environment” for the misuse of such vehicles;
- a disproportionate share of companies in the “offshore” world are shell companies; and
- recent improvements in some non-OECD IFC regimes may provide models for other non-OECD IFCs.<sup>16</sup>

38. As the material which follows shows, the first two concerns are clearly not confined to structures established in non-OECD Member States and the third rationale could also apply to non-OECD IFC regimes providing more rigorous models for some OECD IFC regimes.

39. The adoption of a perspective limited to offshore centres mars the OECD Report, undermining its objectivity and limiting the value of its conclusions. Non-OECD IFCs perceive mixed motives in the OECD’s process and proposals.

*(b) Disproportionate Regulatory Burdens*

40. Regulation consumes resources in the form of direct financial costs and the transaction friction occasioned by satisfaction of compliance obligations. Appropriate regulation is generally accepted to be proportionate to the risks and benefits associated with the activity being regulated. Disproportionate and excessive regulation applied selectively to particular market participants burdens those participants with a competitive disadvantage. In an efficient market, unevenly applied regulatory burdens shift demand from one service provider (or jurisdiction) to another, as users search for a cost-efficient, low friction service. Regulatory limitations on services offered (i.e. financial privacy) also shift demand.

41. States controlling the design process have the opportunity to assert their objections to particular forms of increased regulation at the design stage, in the non-transparent policy formulation process, and work out a rationale for self-exemption (or “outsider-burdening”) before proposals are formally tabled. Non-OECD jurisdictions find themselves portrayed as unco-operative by those controlling the process when excluded jurisdictions object to an opaque process.

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<sup>16</sup> The OECD Report at page 17.

(c) *Erosion of Privacy*

42. The complete record of an individual's financial transactions- now sought on a global basis - forms a revealing insight into the intimate details of one's personal life. The collection and sharing of such information, and the linkage of databases through the use of electronic tools, poses many concerns for the privacy of individuals and vehicles treated as corporate by the OECD Report.

43. The UN Declaration of Human Rights recognises and protects privacy as a basic human right.<sup>17</sup> The OECD also accepts that individuals and vehicles treated as corporate by the OECD Report have legitimate expectations of privacy and business confidentiality in their affairs. The OECD notes that "corporate entities, in particular, have a valid right not to have their affairs disclosed to competitors, customers, and suppliers among other things".<sup>18</sup>

44. The OECD report on *Improving Access to Bank Information for Tax Purposes*, released on 24 March 2000 contains informative insights into the scope of existing financial disclosure in OECD Member States. France, for example, requires financial institutions managing stocks, bonds or cash to report to the Government on a monthly basis regarding the opening, modifications and closings of accounts of all kinds. This information is stored in a central computerised database which is used by French authorities for research, control and collection purposes. Four other OECD countries also maintain centralised databases, namely Hungary, Korea, Norway and Spain.<sup>19</sup>

45. Public skepticism is rife concerning the ability of governments to maintain data security<sup>20</sup> or to resist the temptation to access information for political,

<sup>17</sup> *The UN Declaration of Human Rights 1948* provides as follows in Article 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks.

<sup>18</sup> The OECD Report at page 47.

<sup>19</sup> Appendix, Section 3.1.2 of report on *Improving Access to Bank Information for Tax Purposes*.

<sup>20</sup> The UK Inland Revenue internet self-assessment service was suspended in May 2002 following security breaches. Users found they could examine other people's tax data on the UK Inland Revenue website. ("Revenue Offline" *Financial Times*, 11 June 2002 and "No Date for Return at Online Revenue Service", *Financial Times*, 6 June 2002).

The US IRS has also been admonished for its failure to adequately secure access to its electronic filing systems and the electronically transmitted tax return data those systems contain. In a report dated February 2001 titled *Information Security: IRS Electronic Filing Systems* the US General Accounting Office states at page 2:

We demonstrated that unauthorised individuals, both internal and external to IRS, could have gained access to IRS' electronic filing systems and viewed and modified taxpayer data contained in those systems during the 2000 tax filing season. We were able to gain such access because the IRS at that time had not (1) effectively restricted external access

economic or other purposes, particularly as there is, by definition, no opportunity to monitor unauthorized access. Affluent taxpayers in at least one major OECD member country also fear that tax data is routinely sold to criminal gangs seeking targets for kidnapping, common in that state.<sup>21</sup>

46. Global sharing of information means that criminal access can occur at the weakest point of entry, multiplying the risks associated with unauthorized disclosure.<sup>22</sup>

47. The risks to personal privacy arising from the collection of financial information are disconcerting, even while apparently sophisticated governments maintain control of the information and apparatus. The prospect of abuse where these vast and globally converged pools of information fall into the wrong hands en masse or through ad hoc unauthorised access is truly frightening. This is particularly so for the many families with direct experience of repressive or corrupt governments.

48. Flaws in existing information exchange programs and those proposed have insufficient safeguards to ensure that information obtained and shared is safeguarded against inappropriate use, including human rights violations. A report by the US based Task Force on Information Exchange and Financial Privacy identifies the danger that information may be provided to countries which have one or more of the following characteristics: major corruption problems; hostility to the West; or past sponsorship of terrorism.<sup>23</sup>

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to computers supporting the *e-file* program, (2) securely configured the operating systems of its electronic filing systems, (3) implemented adequate password management and user account practices, (4) sufficiently restricted access to computer files and directories containing tax return and other system data, or (5) used encryption to protect tax return on *e-file* systems. Further, these weaknesses jeopardised the security of sensitive business, financial and taxpayer data on other critical IRS systems that were connected to *e-file* computers through its servicewide network.

<sup>21</sup> The US State Department warns of widespread kidnapping in Mexico in the following terms:

Kidnapping, including the kidnapping of non-Mexicans, continues at alarming rates. So-called "express" kidnappings, an attempt to get quick cash in exchange for the release of an individual, have occurred in almost all the large cities in Mexico and appear to target not only the wealthy, but also middle class persons.

<sup>22</sup> A UN Report published in 1998 notes, alarmingly, that in a part of the former Soviet Union (not an OECD member), criminal gangs bought banks in order to determine which families had bank accounts large enough to make kidnapping worthwhile. United Nations Office for Drug Control and Crime Prevention (UNODCCP), *Financial Havens, Banking Secrecy and Money Laundering*, Double issue 34 and 35 of the Crime Prevention and Criminal Justice Newsletter, and Issue 8 of the UNDCP Technical Services, 1998 at page 68.

<sup>23</sup> Task Force on Information Exchange and Financial Privacy, *Report on Financial Privacy, Law Enforcement and Terrorism*, 25 March 2002.

49. It is essential to ensure that the countries receiving information have safeguards in place in order to protect human rights and to ensure that information is not used for purposes (e.g. political or commercial gain) other than that which the information was originally provided for.

50. Legal systems throughout the world have different penalties for tax evasion, money laundering and other financial crimes. China, for example, recently sentenced an individual to death for tax evasion.<sup>24</sup> Information exchange programs must take such differences into account to permit countries to choose whether they will provide a jurisdiction with information that may lead to a cruel and unusual punishment.

## 2.2 Weaknesses in OECD Process

### (a) Lack of Universal Forum

51. Basic equity and effective long-term implementation require that the concerns and interests of all stakeholders should be taken into consideration in the development of standards. The OECD claims to seek, in principle, a more inclusive forum. Jeffrey Owens, OECD Head of Fiscal Affairs puts the position as follows:

The important thing is that as many people as possible have a seat at the table in setting what the rules would be. I see that as a general trend in a lot of our work. We must be opening up; we must become more inclusive; we must not just be inviting the countries to come and listen to what we have to say, but we've got to be inviting them and saying, "You are here as partners. We're interested in what your views are, and your views will shape things that come out of the OECD".<sup>25</sup>

52. Many small and developing jurisdictions, including non-OECD IFCs, would welcome such a universally accessible process for policy formulation. However they perceive that the current reality does not reflect this proposed change in direction. The exclusive use of expert representatives from OECD Member States to assess the rules of non-member states, discussed below, illustrates the concerns.<sup>26</sup>

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<sup>24</sup> [www.amnesty.org.il/urgent/5201PRC.html](http://www.amnesty.org.il/urgent/5201PRC.html), August 2001.

<sup>25</sup> Scott, C., "A Conversation with OECD's Jeffrey Owens on the Environment, E-Commerce, and Falling Tax Rates", *Tax Notes International* 28 May 2001.

<sup>26</sup> For example with regards to the OECD Harmful Tax Practices initiative, the classification of jurisdictions as tax havens was effected by the OECD without reference to those targeted. Subsequently, the acceptability or otherwise of a commitment demanded by the OECD and given by any of those jurisdictions was determined exclusively by the OECD. Only after such a commitment is deemed acceptable is that jurisdiction invited to join the Global Forum which will

(b) *Lack of Expert Advice Outside OECD*

53. In drafting the OECD Report, the OECD Steering Group on Corporate Governance established an ad hoc group consisting of persons from twelve OECD *Member countries*. Despite this expertise, the OECD focused their review on *non-OECD* jurisdictions with only cursory comments on their own members' regimes.

54. The provision of cross-border financial services is a highly competitive and lucrative business. It is important to the OECD Member States and vital to the development plans of many small and developing countries which lack natural resources and other opportunities. In such a competitive environment, policy formulation must be premised on transparent comparison of the regulatory systems in market participants. This was not done in the OECD Report.

(c) *Uneven Playing Field*

55. Effective achievement of OECD objectives requires that a level playing field applies to the regulation of *all* jurisdictions providing facilities for mobile financial service activities. Without this goal, business will simply migrate to those jurisdictions overlooked or excused from compliance with the new rules. In such circumstances, it will also be difficult to secure the trust and co-operation of the many jurisdictions which need to work together to reform the regulation of the international financial system. The OECD has expressed a commitment to a level playing field in the context of its Harmful Tax Practices project,<sup>27</sup> though this commitment has not yet translated into a process which is likely to realise this goal. Some member states of the OECD have acknowledged that non-OECD jurisdictions should not be required to implement access to information processes which one or more of the OECD member states are not willing to implement<sup>28</sup>.

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determine the implementation plans and the form of exchange of information agreements to be utilised by all those jurisdictions going forward.

<sup>27</sup> In *Towards World Tax Cooperation*, *OECD Observer*, 27 June 2000 Jeffrey Owens, OECD Head of Fiscal Affairs reviewed the OECD's demands for transparency in the Harmful Tax Competition initiative and stated:

And let me emphasise that the same standards will apply to all [OECD] Member countries and non-Member countries.

<sup>28</sup> UK Treasury, *Exchange of Information and the Draft Directive on Taxation of Savings*, February 2000 states at 4.7:

Countries identified by the OECD as tax havens will quite properly expect EU and other OECD Member countries to meet at least the same standards of effective exchange of information including access to, and exchange of bank information for, tax purposes, as they themselves are expected to meet under the Harmful Tax Practices Initiative.

56. In the context of the Harmful Tax Practices Initiative the OECD showed inappropriate reluctance to permit the implementation of commitments by non-OECD Member States to be conditioned on the implementation of equivalent commitments by all OECD Member States, including Switzerland and Luxembourg. The OECD's response that their reports on that initiative are already endorsed by member countries is unconvincing while Switzerland and Luxembourg continue to abstain from the 1998 Report on Harmful Tax Practices.<sup>29</sup> In the OECD 2001 Progress Report on the project, Switzerland and Luxembourg were joined in their abstentions by Portugal and Belgium.<sup>30</sup> At this point over 10% of OECD members have refrained from endorsing the OECD's latest report on this matter. Further, state governments within the US are ignoring principles in the commitment given by the US federal government.

57. Establishment of a level playing field requires that all affected countries make identical, specifically enumerated commitments to change regulations in a functionally equivalent manner, on the same timetable, and subject to the same consequences for non-performance. Until the OECD has effective commitments from their own Member States, it cannot reasonably seek commitments from jurisdictions excluded from both OECD membership and participation in the process of setting regulatory standards.

58. The OECD's choice to focus on non-OECD IFCs or non-Member countries in the OECD Report undermines the confidence of objective observers that the OECD genuinely seeks a level playing field. For the OECD to effectively achieve their goals relating to transparency and information exchange it is essential that *all* countries, both "onshore" and "offshore", OECD Member states and non-OECD Member states are part of the process and "buy in" at the same time, and so support the project through co-operation and co-ordinated effort. Without this, small and developing countries will continue to perceive the OECD as intending to use the camouflage of a regulatory thrust to implement non-tariff barriers to the trade in services and so undermine their competitive position.

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<sup>29</sup> *Harmful Tax Competition: An Emerging Global Issue*, 27 April 1998.

<sup>30</sup> *OECD's Project on Harmful Tax Practices: The 2001 Progress Report*, 14 November 2001.

## PART 3

### 3. BENCHMARKING THE OECD'S CONCLUSIONS

#### 3.1 Corporations

59. A corporation is the primary legal entity through which business activity is carried out in most market-based economies. Corporations are ubiquitous, accounting for a large percentage of investment and employment in OECD Member countries.<sup>31</sup>

60. In the international financial services context corporations and other vehicles assimilated to corporate vehicles by the OECD Report are used to facilitate many legitimate objectives, including the following:

- cross-border investment by multinationals;
- the establishment and administration of mutual fund companies and trusts;
- structured debt and special purpose vehicles to support capital markets transactions;
- structures for the management of political and personal risk;
- special purpose vehicles for securitisations;
- insurance and reinsurance products;
- international employee stock option plans;
- deferred compensation and pension plans;
- international tax and estate planning; and
- shipping and aircraft financing structures.

61. The OECD also acknowledges many legitimate commercial activities undertaken by corporations in the "offshore" context including "holding intellectual property, engaging in international trading activities, legally obtaining the benefits of tax treaties, and serving as a holding company".<sup>32</sup>

62. The OECD suggests that the corporation is open to misuse due to its separate legal personality and the ability to obscure the identity of the beneficial owner. International Business Companies (IBCs) and exempt companies are

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<sup>31</sup> The OECD Report at page 22.

<sup>32</sup> The OECD Report at page 24.

singled out for attack on the alleged basis that their combination of effective anonymity and little or no supervision makes them more susceptible to misuse.<sup>33</sup> Only passing mention is given to functionally equivalent commercial vehicles in OECD Member countries raising similar concerns. For example, the OECD notes without comment a study conducted by the Performance and Innovation Unit of the UK Cabinet Office which indicated that UK shell companies have been involved in almost all complex UK money laundering schemes.<sup>34</sup>

63. Further indicia that the focus on non-OECD IFCs is inappropriate are evidenced by the benchmarking conducted for the Level Playing Field Review, the results of which are discussed below.

(a) *Bearer Shares*

64. The OECD notes that “[t]he ability to obscure identity is crucial for perpetrators desiring to commit illicit activity through the use of corporate vehicles”.<sup>35</sup> The OECD indicates that the primary instruments used to achieve anonymity are bearer shares, “corporate” directors and chains of corporate vehicles.<sup>36</sup>

65. For the purposes of the current benchmarking exercise we examined whether bearer shares and corporate directors were permitted in the fifteen countries reviewed. In the fifteen OECD Member States and OECD non-Member States surveyed in the Level Playing Field Review bearer shares and “corporate” directors were permitted in more OECD countries than non-OECD countries studied. Bearer shares were permitted in six out of seven OECD countries but only four out of eight non-OECD countries (Hong Kong and Singapore which are FATF Members included).

66. Although the issuance of what are styled as “bearer shares” is technically permitted in several non-OECD IFC jurisdictions, in the Cayman Islands bearer shares are not permitted unless they are subject to custodial arrangements with a recognised international custodian or licensed Cayman Island entity. In the British Virgin Islands the government has made a public commitment to amend the *International Business Companies Act* to “immobilise” bearer shares. Such immobilised shares are not transferable by delivery and the owner is centrally tracked by the custodian. For owner identification purposes this puts such shares on the same footing as registered securities.

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<sup>33</sup> The OECD Report at page 22.

<sup>34</sup> United Kingdom Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime*, June 2000.

<sup>35</sup> The OECD Report at page 29.

<sup>36</sup> The OECD Report at pages 29 to 32.

(b) *Disclosure of Beneficial Ownership*

67. Disclosure of beneficial ownership information refers to those rules which are aimed at identifying the physical persons who are either entitled to the assets of the vehicle or are actually in control of the structure and its activities.

68. Once again, the OECD's focus on non-OECD IFCs is not helpful in the context of the availability of information on beneficial ownership. An October 2001 report financed by the European Commission concerning transparency and money laundering in EU member states ("the Transcrime Report") identifies corporations in EU Member States as structures susceptible to being used in money laundering operations. The report notes:

The main obstacle [to anti-money laundering co-operation in EU member states] is the lack of regulation requiring full information on the real beneficial owner of a public or private limited company, especially when a legal structure is a shareholder or director, or the issuance of bearer shares is permitted. Furthermore, some problems seem to arise from the fact that, in some EU Member countries, the regulation allows for nominee shareholders and directors.<sup>37</sup>

69. Benchmarking research in the area confirms these EU concerns. While some basic shareholder information was available in most OECD Member countries benchmarked, the wide availability of bearer shares in most of the OECD Member States surveyed made discovery of the real beneficial owner next to impossible in these states. In the Delaware context, basic records of shareholders in private companies and related vehicles are not required to be kept by the state (see the discussion of Delaware, below).

(c) *Filing/Auditing of Accounts*

70. Public companies, in both OECD and non-OECD Member States, are generally required to file accounts with a regulator or the companies registry and to have their accounts audited. Private companies are frequently exempt from requirements to file accounts with the corporate registry or from having accounts audited. Where a filing requirement does exist for a private company it may require the lodging of abbreviated accounts only. For example, in England and Wales both "small" and "medium sized" private companies are exempt from the requirement to file full accounts and unless a company's turnover exceeds

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<sup>37</sup> Research Centre on Transnational Crime – University of Trento, *Transparency and Money Laundering: Study of the Regulation and its Implementation in the EU Member States, that obstruct Anti-Money Laundering International Co-operation*, October 2001 at page 8.

£350,000 there is no requirement to appoint an auditor<sup>38</sup>. In Ireland small private companies are required to provide an abridged balance sheet. New Zealand companies are not required to file accounts with the corporate registry, unless they qualify as a “non exempt” company.<sup>39</sup>

(d) *Regulation of Service Providers*

71. One of the reasons advanced for the focus in the OECD Report on non-OECD IFCs was that such countries allegedly have weak supervisory and regulatory regimes.<sup>40</sup> In order to test this view we examined whether service providers were regulated in each of the 15 jurisdictions surveyed.

72. In general, the so called “offshore centres” reviewed had a body or bodies responsible for regulating corporate service providers while the “onshore” jurisdictions surveyed (including Hong Kong and Singapore) do not generally regulate such service providers. This was also noted by the IMF in its Progress Report on the offshore financial centre program as follows:

It should, however, be emphasized that the oversight of company service providers does not occur outside of OFCs, and there are no accepted standards on whether and, if so, how, they should be regulated.<sup>41</sup>

73. Our results evidenced significant recent advances in the regulation of service providers in most of the non-OECD IFCs, which now have expansive regimes for such regulation. For example, the Cayman Islands Monetary Authority and the Financial Services Commission in the British Virgin Islands are responsible for the supervision of financial services and regulate and supervise banking, collective investment, insurance business, investment business and trust and company service providers, as is also the case with the Jersey Financial Services Commission.

74. The benchmarking process reported here demonstrates that the examined financial services sectors within OECD countries are often relatively unregulated or poorly controlled when compared to those now extant in the principal non-OECD IFCs. The UK Treasury apparently shares this conclusion following recent comparisons of corporate regulation in certain offshore centres with that in the UK.<sup>42</sup> Case studies illustrating the position in other OECD jurisdictions are set out below.

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<sup>38</sup>Section 242 of the Companies Act 1985 and Part VII of the Companies Act 1985.

<sup>39</sup> Countries which have 25% or more foreign shareholding.

<sup>40</sup> The OECD Report at page 17.

<sup>41</sup> IMF, *Offshore Financial Centre Program: A Progress Report*, 28 March 2002 at footnote 10.

<sup>42</sup> The UK Treasury paper entitled *Regulatory Impact Analysis Disclosure of Beneficial Ownership of Unlisted Companies*, July 2002 at 3.11.9. notes as follows:

(e) *Case Study: Delaware LLCs and Corporations*

75. The United States of America is home to the largest financial services markets in the world. It is a well regulated jurisdiction with a long history of leadership in the regulation of financial services, and is a model for other jurisdictions. However, state governments within the US are not parties to agreements struck by the federal government with the OECD and other supranational agencies. States within the US facilitate establishment of corporate entities which do not meet regulatory standards established by these agencies.

76. The potential for non-tariff trade barriers has promoted unease among clients of financial centres established in SDEs. Some states within the OECD, including the US, have created and then exploited this uncertainty in promoting their own anonymous tax-free facilities which compete directly with those in non-OECD "offshore centres".<sup>43</sup> The case study below refers to Delaware by way of illustration, though limited liability companies are available in virtually every state within the US. Typical regimes provide for shareholder anonymity and no requirement for filing financial data. As the case study below shows, such data is also unlikely to be available on investigation.

77. Corporate services activities are big business in the United States. By way of example, Delaware alone earns \$400m per year from the government franchise and other fees for locally established corporations. Delaware professionals and corporate service providers earn a multiple of this amount for the provision of support services. Restrictions on the provision of such financial services are a politically sensitive issue in Delaware, as the issue would be in any state.

78. The single member Delaware LLC competes directly with an International Business Company (IBC) and is ubiquitous in the "offshore" world. There are more than 300,000 corporations established in Delaware.<sup>44</sup> Where the LLC is established by a non-US person for non-US activity, it is free from any US tax

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Whilst the UK regime has been praised for its business friendliness and pragmatism in attracting foreign companies to establish themselves here, it also has its critics at home and abroad. Indeed, centres once considered disreputable by UK standards now have stricter company regulation, in certain respects, than the UK (see, e.g. the Jersey and Bermudan laws on beneficial ownership). Thus the current system raises issues of how to balance the interests of the national economy and international leadership.

<sup>43</sup> For example, in an article promoting tax-free trusts established in the US entitled "Trust US" appearing in the FT Expat the author states that:

The US has considerable advantages over traditional offshore financial centres as a trust jurisdiction. Unlike traditional "tax havens" and offshore financial centres, the US is above suspicion by European tax authorities.

<sup>44</sup> [www.state.de.us/corp](http://www.state.de.us/corp)

reporting, exposures or filing requirements. No changes increasing the regulation applicable to this vehicle paralleling those now applicable and proposed for IBCs are in prospect for Delaware corporations. Delaware law does not require the local corporate service provider to obtain beneficial ownership information on establishment of the company; only the name of the person requesting the company is required. In many cases, the “customer” requesting the company will be a wholesaler of corporate shells located in another country so no data will be collected on the beneficial owners.

79. Delaware LLCs can be formed in two hours for less than US \$100. The Delaware Government staffs its corporate registry until midnight. The anonymity conferred by a Delaware LLC is widely touted by the private sector, including to non-US clients.<sup>45</sup> The website for the Secretary of State for Delaware describes the jurisdiction as *The Incorporating Capital of the World*.<sup>46</sup>

80. Concerns arising from the use of Delaware corporations in the offshore market were authoritatively documented by the US General Accounting Office in a report tabled in October 2000 entitled *Suspicious Banking Activities: Possible Money Laundering by U.S. Corporations Formed for Russian Entities* (the “GAO Report”). The report was commissioned by Senator Carl Levin as background research for the US Senate Commission on Suspicious Banking Activity. That Commission published a Report on Correspondent Banking in February 2001 to focus public concern on the dangers posed by poorly regulated *offshore* companies and banks.<sup>47</sup>

81. The GAO Report detailed the establishment of Delaware corporations for thirty to fifty Moscow-based brokers of corporate shells. The service provider, Euro-American Corporate Services Inc., sourced its business through a Russian shareholder and director. The GAO noted that this individual “had a close relationship with companies associated with members of the former Soviet Union’s intelligence agency”.<sup>48</sup> This Russian individual was also a director of a US bank, Commercial Bank of San Francisco. This US financial institution opened bank accounts for the Delaware corporations established by Euro-American without any independent due diligence.<sup>49</sup>

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<sup>45</sup> [www.delcorp.com/ydecorp.htm](http://www.delcorp.com/ydecorp.htm) and [www.delawareinc.com/llcintro.html](http://www.delawareinc.com/llcintro.html).

<sup>46</sup> [www.state.de.us/us/sos/corp.htm](http://www.state.de.us/us/sos/corp.htm). Delaware also has considerable appeal to US and other OECD based incorporators as well. Enron, for example, established 675 of its 2000 corporate vehicles in the state (see “Delaware and Enron” by Brian Naylor, National Public Radio, 7 March, 2002.) Enron’s use of non-US companies has attracted much adverse media comment, though its numerous incorporations in Delaware appear to have largely escaped notice or comment.

<sup>47</sup> Minority Staff of the Permanent Subcommittee on Investigations, *Report on Correspondent Banking: A Gateway for Money Laundering*, 5 February 2001.

<sup>48</sup> GAO Report at page 10.

<sup>49</sup> GAO Report at page 11.

82. The GAO documented the establishment of more than 2000 Delaware companies for Russians over the period from 1997 to 2000. The companies were formed in blocks of 10 to 20 at a time, and sold to Russian corporate brokers, who sometimes sold the shell companies to others who, according to the GAO Report, may also have sold them again.<sup>50</sup> (There is no way of knowing for certain).

83. The GAO notes that a Euro-American employee indicated that “Euro-American conducted no due diligence with respect to any company it incorporated because state law does not require it”.<sup>51</sup> Delaware law requires no filing of financial information as a corporate matter, nor is any required for tax purposes, where companies are not subject to US tax.

84. Euro-American rented an office in Delaware although no one physically occupied the premises. Telephone calls and mail were forwarded to an office of Euro-American outside the state. Despite a presence in the state described by Euro-American as a mere “formality”<sup>52</sup>, the GAO was advised by an official of Delaware’s Division of Corporations that the virtual presence complied with Euro-American’s obligations as a Delaware registered incorporation agent.<sup>53</sup>

85. Two US banks opened a total of 236 bank accounts for these companies with no due diligence beyond Euro-American’s assurances that it had investigated the companies. On investigation the GAO was informed that the bank accounts were used to “move money out of Russia”.<sup>54</sup> The GAO tracked \$1.4 billion wire transferred to such accounts, usually from outside the US. Most of the funds were transferred out shortly after receipt to other foreign accounts. The GAO concluded that “[t]hese banking activities raise questions about whether the US banks were used to launder money”.<sup>55</sup>

86. No information of any kind was obtained about the shareholders of the Delaware companies, and there was no requirement to provide financial information. There was no apparent prospect of retrieving such data by an investigative system or in any other fashion, since the chain of resellers and the ultimate user of the company would be unknown to Euro-American in its capacity as the Delaware service provider. In any event, Euro-American maintained no substantive presence in the State and was not apparently amenable to effective supervision.

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<sup>50</sup> GAO Report at page 6.

<sup>51</sup> GAO Report at page 7.

<sup>52</sup> GAO Report at page 7.

<sup>53</sup> GAO Report at page 7.

<sup>54</sup> GAO Report at page 7.

<sup>55</sup> GAO Report at page 2.

87. The absence of any of the elements of information which the OECD insists must be available in Non-OECD IFCs is standard practice under Delaware's current regime for incorporation.

88. The GAO summarised their report on the Delaware companies in question as follows:

It is relatively easy for foreign individuals or entities to hide their identities while forming shell corporations that can be used for the purpose of laundering money.<sup>56</sup>

89. The US Senate Commission report on suspicious banking activity tabled in February 2001 made no reference to the GAO report, despite having requested the Report and receiving it in October 2000.

90. Given the GAO's conclusion and that the OECD's expert group was presumably aware of the GAO Report, two alternative explanations exist for why the OECD did not choose to comment substantively on Delaware LLCs in the OECD Report. The first is that the assumptions in the OECD Report are wrong and that therefore the OECD judged that the risk of illegal activities using standards exemplified by the existing regulatory regime for Delaware LLCs does not justify increasing the regulatory burden for Delaware LLC's when to do so might undermine the competitive position of Delaware LLCs as the vehicle of choice for the large market share of international business now held by Delaware. The second alternative is that the assumptions in the OECD Report are correct but that multiple standards are being advanced by the OECD with non-OECD jurisdictions being expected to bear more onerous burdens in order to displace the relatively small amount of international financial services business which these jurisdictions currently provide.

*(f) Case Study – Luxembourg 1929 Holding Companies*

91. Luxembourg is an OECD Member with a long established and very large international finance centre which competes directly with many non-OECD IFCs. Luxembourg has a corporate regime to encourage the incorporation of companies that hold and manage shareholdings in other companies. These companies are prohibited from carrying on industrial or commercial activities, establishing offices open to the public and holding real estate. As of January 1998 there were 13,700 such companies with subscribed capital of approximately EUR

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<sup>56</sup> GAO Report at page 11.

31 billion.<sup>57</sup> Given that this amount reflects only subscribed capital, the total value of these companies is no doubt significantly higher.

92. A 1929 Holding Company is exempt from all corporate taxes in Luxembourg, except for a 1% tax on subscribed share capital and an annual subscription duty of 0.2% on the par value of the company's shares. There is no withholding tax on dividends paid by the company and no tax in Luxembourg on liquidation.

93. Although a 1929 Holding Company must have a registered office in Luxembourg and file abridged audited financial statements (which do not contain details of the composition of the portfolios held by the company), there is limited public information available on 1929 Holding Companies. The founding shareholders are identified in the Articles of Incorporation of the company which are registered with the "Administration de l'Enregistrement" and filed with the Companies' Registrar. Nominee shareholders are permitted, as there is no obligation to file beneficial ownership information. Furthermore, a 1929 Holding Company can issue bearer shares which are freely transferable by the physical transfer of a share certificate. Thus, after incorporation it may become difficult if not impossible to identify the beneficial owner(s) of the company.

94. 1929 Holding Companies may have nominee directors as well as corporate directors and a corporate secretary. There is no requirement for directors to be resident in Luxembourg. There is accordingly, little information readily available to the Luxembourg authorities on beneficial ownership and control of 1929 Holding Companies.

95. Luxembourg has fiscal and banking secrecy laws. In the international fiscal context, the Luxembourg judicial authorities can only assist foreign tax authorities on matters relating to tax fraud but not civil or administrative tax matters.

96. The OECD Report notes that vehicles are subject to misuse where they enable individuals to hide their identity behind corporate forms and where "the capacity of the authorities to obtain and share information on beneficial ownership and control for regulatory/supervisory and law enforcement purposes" is constrained.<sup>58</sup> The OECD Report does not address concerns regarding the susceptibility of the Luxembourg 1929 Holding Company to misuse.

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<sup>57</sup> The Luxembourg "1929" Holding Company and the "Société de Participation Financière", published by KPMG Financial Engineering, Luxembourg, 2000 at page 4.

<sup>58</sup> The OECD Report at page 13.

97. As was the case in regard to the absence of substantive comment in the OECD Report regarding the Delaware LLC, two conclusions are possible in respect of Luxembourg 1929 holding companies. The first is that the regulatory regime in Luxembourg is appropriate to the risk and benefits associated with this segment of the financial services industry generally and that therefore the assumptions in the OECD Report are wrong. The second is that the OECD employs multiple standards in the OECD Report depending upon whether the relevant regulatory regime for a particular segment of trade in services is within an OECD Member State or in a competitor of OECD Member States.

### 3.2 *Trusts*

#### (a) *Uses of Trusts*

98. The OECD acknowledges that the trust – treated as a corporate vehicle for purposes of the OECD Report - is an “important, useful, and legitimate vehicle for the transfer and management of assets”.<sup>59</sup> Trusts are used to facilitate control and management of assets held for the benefit of minors and individuals who are incapacitated, for charitable purposes, for tax and estate planning and for supporting corporate transactions. The preservation of family assets through generations is key for many individual settlors, particularly those with experience of repressive governments.

99. In the personal context trusts are used for the following:

- inter vivos and testamentary family trusts;
- trusts arising under wills and intestacies;
- estates under administration; and
- charitable trusts.

100. As the global financial environment has become more complex there has been extensive use of trusts for commercial purposes. The following types of commercial trusts are noted and described in a report prepared for The Association of Corporate Trustees (TACT) entitled *Economic and Financial Analysis of Commercial and Private Trusts in the United Kingdom, Companion Volume to the Hayton Report on Trusts and Their Commercial Counterparts in Continental Europe*:

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<sup>59</sup> The OECD Report at page 25.

- Pension trusts – these involve the funding of pensions for retired employees with the added security of having the fund separate from the employer;
- Unit trusts – these are collective investment vehicles in which the value of the units is directly dependent on the value of the segregated assets held by the trustee. This provides a direct relationship between assets held and value of a unit, with the advantages of collective investment schemes;
- Employee benefit trusts – these are arrangements under which a company's shares are held in a trust allocated, or ready for allocation, to certain employees. As well as providing an incentive for the employees and, in effect, a source of funding for the company, the trust provides a market for shares in the company, thereby increasing the liquidity of the company's shares. This may be important for companies which are not listed on an exchange;
- Loan capital trusts – these are used to look after the interests of a collection of lenders where the borrower has provided security for their loan. A corporate trustee holds such security on trust for the lenders and can act as a buffer between the borrowers and lenders. Loan capital trusts are collective security trusts for holders of bonds or debenture stock, syndicated loan trusts and securitisation trusts of special purpose vehicles;
- Subordination trusts – these involve a creditor (the junior creditor) agreeing to be paid only after another creditor (the senior creditor) has been paid. The debtor pays money to the trustee who then distributes first to the senior creditor and then to the junior creditor. This avoids the rules requiring equal treatment in payment of creditors if the debtor becomes insolvent, thereby giving the senior creditor greater security. This flexibility allows the debtor to provide better incentives for a supplier or financier to become a creditor which could be beneficial for the debtor's business, for example, with an improved cashflow;
- Securitisation trusts of special purpose vehicles – a portfolio of assets, the purchase of which is financed by a bond issue, is held in a company called a special purpose vehicle (SPV). The shares in the SPV and the portfolio are held in trust so that the SPV's debt does not show up on the owner's balance sheet. It also allows certain assets to be ring-fenced so that certain grade bonds (e.g. AAA) can be issued where there is a shortage in that grade of bond;

- Project financing and future income streams – cash from a particular source or the income stream of a borrower of finance is held, when received, on trust for the lender. This makes it easier for the borrower to receive money based on future income streams;
- Quistclose trusts – these are used when a creditor puts money into a trust for the purpose of benefiting another party for a specified purpose. Once the money has been paid to the other party, that party becomes a debtor. The reason for using the trust is to increase security as the creditor can retrieve money that has not been used by the other party if the other party becomes insolvent. The use of the trust therefore aids the transaction process by increasing security to the creditor. Without this, the potential creditor may be unwilling to take part in the transaction;
- Client accounts – when a business or professional (eg a solicitor) holds clients' money in a client bank account separate from that of the business or profession, then the money is held on trust for the clients. Again, this gives security against insolvency of the business/profession;
- Building contracts: retention trusts – a percentage of a fee to a builder is held in trust until an architect's certificate of completion is given, thereby helping ensure proper completion and that the builder has protection against the insolvency of the employer;
- Sinking fund trusts – money can be paid into a trust to ensure that enough money is available in the future for a particular purpose;
- Trusts of shares to separate control from ownership of the company – shares of a company can be held in trust by responsible trustees where public interest laws do not allow those owning the economic value to have control over the company;
- Custodian trusts in the financial or securities markets – these trusts allow the custodian to hold shares on behalf of a number of clients who have a proportionate equitable co-ownership share in the pool of securities legally owned by the custodian. This enables quick and inexpensive dealings in the stocks held by the custodian as a transfer of shares to another party by a client does not require any formal signed transfer, only a computer entry indicating that the party receives a co-ownership interest in the securities of which the custodian remains the legal owner; and
- Pledges of bills of lading – holding these on trust allows the buyer to receive the documents in order to obtain goods from the

shipping company. The lender is thereby deemed to possess the document so that the pledge remains valid, which otherwise would not be the case.

(b) *The Nature of a Trust*

101. The OECD Report reviews trusts on the premise that the trust is a “corporate vehicle”. This description is no doubt adopted for convenience, though it implies confusion over the fundamental nature of the trust concept.

102. Trusts provide for a distinction between legal and equitable ownership. A trust has been defined as follows:

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any of whom may enforce the obligation.”<sup>60</sup>

103. An Anglo-Saxon trust is a relationship, not a contractual agreement as the OECD indicates.<sup>61</sup> It is not an entity or vehicle, as it is not a legal person.

104. The OECD Report notes the use of trusts primarily in common law jurisdictions,<sup>62</sup> overlooking the increasing recognition of the use of trusts in civil law jurisdictions. Whilst such countries may not have their own trust laws yet, some, such as Switzerland, actively conduct the administration of foreign law trusts. Countries which undertake such administration must therefore by definition be included in any analysis and should likewise be part of the process of setting the international standards.

105. The Hague Convention on the Law Applicable to Trusts and Their Recognition (1985) has been ratified by most jurisdictions with significant financial services sectors. Article II provides as follows:

For the purposes of this Convention, the term “trust” refers to the legal relationships created...by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

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<sup>60</sup> Underhill and Hayton’s Law of Trusts and Trustees, Fifteenth edition, p.3. As they note, these sentences were expressly approved by Romer LJ in *Green v Russell* [1959] 2 QB 226 at 241, though they have been criticised as not being exhaustive. For example, developments in trusts in recent years are such that this definition may now be seen as too narrow; it does not include, for example, non-charitable purpose trusts.

<sup>61</sup> The OECD Report, page 45

<sup>62</sup> The OECD Report, page 25.

106. A trust has the following characteristics:

- (a) the assets constitute a separate fund and are not part of the trustee's own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

107. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

108. The settlor's ability to choose to retain significant rights over assets transferred to a trust is, accordingly, widely accepted. The OECD Report states that "settlors attempting to evade taxes may transfer assets into a trust and then falsely claim that they have relinquished control over the assets"<sup>63</sup>. If a settlor retains excessive control or a trust is not administered in accordance with its terms and its governing law, the trust is subject to challenge as invalid, or a sham. Trustees are aware of the risks of acting as the settlor's stooge and few will run the risk of a suit for breach of trust by disgruntled beneficiaries.

(c) *Types of Trust*

(i) Discretionary Trusts

109. The OECD Report appears to be directed primarily at the discretionary trust. Such a trust provides the trustees, formally, with absolute discretion in disposing of the trust property to beneficiaries. To guide the trustees in exercising their discretion, a letter of wishes is generally prepared by the settlor. Contrary to the OECD's comments,<sup>64</sup> such letters do not direct the trustees to accept "instructions" from the settlor or a third party; the letter is not binding on the trustees and is merely guidance to assist them when making their decisions.

110. Trustees of a trust established to benefit a family will require as much background information as possible on the settlor, his family, his reasons for setting up the trust and how he would like the family to benefit from the assets.

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<sup>63</sup> The OECD Report, at page 26.

<sup>64</sup> The OECD Report, at page 26.

111. This information will generally be set out in a letter of wishes or trustee memorandum. Without such guidance, the trustees will find it difficult to carry out their duties. Although the letter of wishes is referred to in the OECD Report as a mechanism for retaining control, it is more accurately described as a means of providing a channel for input and non-binding influence. Trustees who blindly follow a letter of wishes without independent consideration of the issues do so, under general law, at their peril.

112. A beneficiary's interest in a discretionary trust is a mere right to be considered by the trustees from time to time as a recipient of a distribution from the trust fund. Beneficiaries of a discretionary trust do not have an absolute right to any of the trust property nor do they have any control over the same.

(ii) Purpose Trusts

113. Trusts are normally established for individuals, though trusts for charitable objects have long been permitted. A purpose trust is a trust which is established for a specific goal or goals. Often this will include trusts which would not otherwise be exclusively charitable (e.g. a trust to promote and maintain urban green spaces in the capital cities of the world). Such trusts may confer power on specified persons to add beneficiaries at a later time. An enforcer must generally be appointed in order to enforce the trust against the trustees, in the same way that the beneficiaries of an ordinary trust for persons would. Information on any existing beneficiaries - and persons entitled to add beneficiaries - will be available in trustee files in the same way as it would be in the case of trusts established purely for the benefit of beneficiaries.

(d) *Anomalies in the OECD Report*

114. The OECD Report notes several characteristics of trusts which warrant clarification:

(i) Settlement/Declaration of Trust

115. Trusts may be established by way of a declaration by the trustees that they hold such property in trust for third parties. In common with any other unilateral document, this declaration bears only the name of the party executing the document (i.e. the trustee). The principal difference between a "declaration of trust" and a "settlement" is that the former is established by unilateral declaration by the trustees whereas in the latter the document is executed by both the trustees and the settlor. However, the trust relationship is the same and there is an economic settlor for every declaration of trust. Each time property is added to a trust, whether a settlement or a declaration, there is by definition a

contributor of that property. The establishment of trusts by unilateral declaration is a common facility in most (if not all) common law jurisdictions – i.e. “onshore” or “offshore”.

(ii) Fixed Terms

116. Notwithstanding the emphasis on discretionary trusts, the OECD Report notes, correctly, that traditionally the terms of a trust have been fixed.<sup>65</sup> Even in such cases trust instruments often confer power on trustees to amend the instrument.

117. This flexibility is similar to the conventional regimes for corporations, the memorandum and articles of which can generally be changed. Modern practice values flexibility reflecting the mobile and dynamic nature of personal and commercial circumstances. This is achieved in two principal ways: by providing the trustees with broad powers including the power to confer all of the benefit of the trust fund on a range of beneficiaries, and through provisions allowing the amendment of the trust deed. General trust law dictates that such powers must in any event be exercised in the best interests of the beneficiaries. There is substantial commercial value in the flexibility of the trust concept for settlors wishing to dispose of property. This is reflected in the commercial context and so gives rise to the array of applications noted above. Loss of this flexibility would severely prejudice and compromise the commercial value of an important format for ongoing ownership of property.

(iii) Irrevocable/Revocable

118. A settlor may be permitted to revoke a trust, and call for a return of property previously transferred to it. The choice of a revocable or an irrevocable trust is a conventional facility in trust law, wherever the trust is being established. Thus, such flexibility is conventional in both OECD and non-OECD Member States.

(iv) Duration of a Trust

119. There is considerable variation between jurisdictions in the maximum periods of permitted duration of a trust. Examples are given in the OECD Report of the Cook Islands and St Kitts and Nevis as “offshore” jurisdictions where trusts may have unlimited duration. Facilities for unlimited duration are not confined to the non-OECD member world, as a number of the states in the U.S. provide no limit on trust life, as does the Province of Manitoba, in Canada.

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<sup>65</sup> The OECD Report at page 25.

However, most non-OECD jurisdictions with IFCs such as Jersey and the Cayman Islands have restrictions on the duration of a trust for persons, which are very similar to those in OECD states which have large trust services industries.

(v) Protectors

120. The OECD Report notes that a trust may provide for a “protector” to ensure that the trustee acts in accordance with the trust deed and the letter of wishes.<sup>66</sup> The latter assertion is incorrect; the protector is not appointed to ensure the trustee acts in accordance with the letter of wishes, for the reasons set out above. The role may vary, depending on the wishes of the parties establishing the trust. The protector is generally appointed with power to veto but not generally to initiate action, except for the replacement of trustees. Generally, a settlor will want a protector where he has yet to establish a longstanding relationship with the trustees.

121. The increased administration and costs incurred in the appointment of a protector of a trust mean that many settlors establish trusts without protectors. They rely instead upon the integrity of the trustees and the regulation to which they are subject in the relevant jurisdiction.

(vi) Removal of Trustees

122. The OECD Report states that the protector of a trust may replace the trustee for any reason and at any time and “trustees that do not adhere to the trust deed and the letter of wishes can be quickly replaced”.<sup>67</sup> The protector will only have the powers which are conferred on him under the terms of the trust deed. Where the protector is permitted to replace the trustee, a trustee concerned that it is being replaced by another to facilitate a breach of trust, should apply to the court for directions.

(vii) Flee Clauses

123. Flee clauses permit (or require) change in the jurisdiction of control of the trust in the event of defined emergencies, including political instability in the jurisdiction of administration. For example, common triggers are the unlawful killing of a head of state or if the jurisdiction were invaded. The OECD focuses on flee clauses which take effect upon the service of process or inquiry by the authorities.<sup>68</sup> Flee clauses are not as popular as they once were; depending upon

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<sup>66</sup> The OECD Report, at page 26.

<sup>67</sup> The OECD Report, at page 26.

<sup>68</sup> The OECD Report, at page 26, 45 and 87.

their terms, they can pose significant problems and simply not work. It is usual practice now to provide for the power to change the proper law and the place of administration of a trust at the discretion of the trustees. Most jurisdictions either expressly or impliedly permit such provisions. In today's global environment, flexibility and the ability for a person's assets to move is taken for granted.<sup>69</sup> Trusts should not be subject to discriminatory treatment in this regard.

(viii) Power to Add/Remove Beneficiaries

124. Trusts require certainty of objects, i.e. the beneficiaries. In any event, no trustee would be able to discharge its fiduciary functions without being able to identify the beneficiaries of a trust. Most discretionary trusts also provide for the addition and removal of beneficiaries. The Report proposes that jurisdictions should review the regulatory framework for trusts in order to avoid trustees being able to change beneficiaries or name new beneficiaries in a non-transparent manner.<sup>70</sup> It is not clear why the OECD thinks this is done in a "non-transparent manner"; in all the non-OECD countries reviewed the trustees have information about the settlor and the beneficiaries on file. If and when beneficiaries change, this information will be held by the trustees; it is they who will generally be exercising their powers to effect the changes.

(ix) "Beneficial Ownership"

125. The OECD Report confuses "beneficial ownership" as it relates to corporations, with "beneficiaries" of a trust. The Report notes that a trust may create difficulties for authorities attempting to obtain beneficial ownership information as "the beneficial owner may be able to hide behind the "cover" provided by the legal owner".<sup>71</sup> This implies that the true controllers of a trust are the beneficiaries who are somehow "masked" by the trustees. This is incorrect. The beneficiaries of a trust do not, by virtue of their position, control the trust. The trustees are the legal owners of trust property and the beneficiaries are just that.

(x) Regulation of Trusts

126. The OECD Report states that virtually all jurisdictions recognising trusts have purposely chosen not to regulate trusts "like other corporate vehicles" because of the private nature of trusts and the fact that a trust is essentially a contractual agreement between two private persons.<sup>72</sup> The characterisation of a

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<sup>69</sup> Note that many jurisdictions also allow re-domiciliation of companies.

<sup>70</sup> The OECD Report at page 87.

<sup>71</sup> The OECD Report at page 45.

<sup>72</sup> The OECD Report at page 25.

trust as a contract is incorrect and misleading; a trust is a relationship, not a contractual agreement. Contractual agreements, whether private or public are, in any event, not corporate vehicles.

127. No financial centre of any standing wants to be involved with terrorism or money laundering, nor to assist others whose motivation is the commission of such offences. OECD Member countries and non-Member countries are thus aligned in achieving the same objectives of ensuring the business they are conducting falls within acceptable international standards. Whilst these objectives must remain in focus at all times, it is important in developing these international standards, to ensure that practical and workable provisions are adopted. Such standards must restrict or inhibit commercial activity in a manner proportionate to the actual harm envisaged.

128. As can be seen from the benchmarking review, the results of which are discussed below, all the non-OECD Member countries already have identification procedures, including for the most part, thorough anti-money laundering provisions. Trustees in virtually all those jurisdictions are also licensed or regulated. This does not include Hong Kong (which although not a member of the OECD, is a member of the FATF and the FSF). Such regulation is rare in OECD Member countries. For example, trustees are not regulated as such in the U.S., Switzerland, England and Wales, Ireland, or New Zealand. Investigation upon request should be an effective method of obtaining information about settlors and beneficiaries in non-OECD Member countries with such identification procedures; some OECD countries would require changes in law to achieve the transparency now available in most non-OECD jurisdictions.

(e) *Benchmarking Review*

129. The OECD Member countries generally lag regulatory developments in the non-OECD Member countries reviewed:

(i) Regulation of Service Providers

130. As noted above in the review of companies, one of the reasons given for the OECD's focus on Non-OECD IFCs was that such countries allegedly had weak supervisory and regulatory systems. Our findings concerning the regulation of trustees, summarized in Appendix D, indicate that this allegation is incorrect, as it was also in the corporate service provider context.

131. Trust services providers are licensed or regulated, in all of the non-OECD jurisdictions reviewed with the exception of the Isle of Man, which is due to

introduce regulation of trustees shortly. By contrast, most of the OECD jurisdictions do not regulate or license their trustees. The Transcrime Report confirms this in relation to Ireland:

There is some opacity in the management of the trust as well;  
there is no authority that supervises the activity of trustees.<sup>73</sup>

132. OECD jurisdictions are thus for the most part unable to regulate or control the quality or fitness to practice of trustees based or operating within such states, and lack the power to impose, monitor and importantly, enforce standards of competence and probity on those trustees.

133. Our research indicates that the non-OECD IFCs examined have extensive legislation regulating trustees, and in some cases, such legislation has been in place for some considerable time. The non-OECD IFCs are clearly well advanced compared to the majority of OECD countries. Non-OECD IFCs note that the OECD has acknowledged that non-OECD IFC regulatory and supervisory regimes would serve as useful models for “onshore” jurisdictions seeking to improve their regulatory or supervisory regimes.

134. Despite this high level of regulation in non-OECD Member countries, and the dominant portion of the financial services industry operated by corporate and trust service providers in OECD Member countries - or perhaps because of these considerations - the IMF is not assessing OECD Member countries’ regulatory regimes for corporate or trust service providers as part of their Financial Services Assessment Programme. Yet the IMF has been mandated by jurisdictions with no regulation of such providers to assess non-OECD OFCs against what it acknowledges as arbitrary criteria in the absence of international standards.

135. There are two explanations for this apparent anomaly. The first is that for some reason not yet articulated by the IMF the risks and rewards associated with trust and corporate service providers activities is somehow different for OECD Member States than it is for non-OECD jurisdictions. The second is that non-uniform standards are being applied for reasons distinct from regulation.

(ii) Filing/Auditing of Accounts

136. Trusts do not derive their existence from a state charter. Accordingly, trusts are historically less regulated. In none of the countries surveyed is financial information for trusts currently filed with a public agency or audited as a

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<sup>73</sup>Transcrime Report at page 106.

requirement of trust law. This is in keeping with other private arrangements, such as those concluded by contract. Although trust accounts are not filed pursuant to trust law, settlors and beneficiaries generally seek to ensure that the trustees account for the trust fund managed by them. In practice, most trustees in non-OECD IFCs do prepare financial statements for review by the settlor and the beneficiaries.

137. An obligation to audit the financial statements of all trusts would be both unreasonable and impractical. It is common for there to be provision within the terms of a discretionary trust to permit the trustees to have the financial statements audited. Trustees of private trusts generally do not seek an audit, particularly where the trust holds passive investments and the settlor and beneficiaries are satisfied that the trustees have been acting properly. If the trustees have kept the settlor and beneficiaries informed as to the value of the assets in the trust fund, the costs of administering it, and the amount and value of distributions made, the settlor and beneficiaries will generally consider the preparation of accounts to be sufficient.

(iii) Availability/Filing of Settlor and Beneficiary Information

138. Generally, information on settlors and beneficiaries should be available in each jurisdiction from any trustee properly performing its fiduciary duties (i.e. it would be difficult for a service provider to properly conduct its duties without knowing the economic settlor and the beneficiaries). This applies equally to both OECD and non-OECD countries. In all the non-OECD countries reviewed, settlor and beneficiary information will be available on the trustee's file, as in most cases the recording of such information, at least in respect of the settlor, is mandatory under the provisions of the anti-money laundering legislation in those jurisdictions. Some OECD Member countries, notably the United States in the case of Delaware and Ireland, lack such provisions.

(f) Case Study – Trusts Administered in Switzerland

139. Switzerland, an OECD and FATF Member State, has a long established and highly regarded international financial services centre. It is commonly regarded as holding approximately one third of the world's private wealth held in cross-border structures, significantly greater than the wealth held in any non-OECD IFC. Switzerland, like the US, is a significant player in the world's cross-border financial services industry.

140. Switzerland does not have its own trust law. However, it is common for foreign law trusts to be administered in Switzerland. The provision of such trust services competes with the provision of trustee services in other OECD and non-

OECD countries. It may be argued that such trusts are not Swiss, as they are governed under foreign law. However, they are controlled by Swiss entities and there is often no other trustee (including in the jurisdiction of governing law) with responsibility for the trust or with information on the settlors or beneficiaries of the trust. Accordingly, as a practical matter Switzerland is the relevant jurisdiction for any necessary regulation of service providers for such trusts.

141. Certain cantonal revenue authorities permit, by way of administrative concession, the tax free administration of trusts which earn non-Swiss income of a passive nature, provided the settlor and beneficiaries of a trust do not reside in Switzerland. Thus, a trust can earn income and gains, and make distributions to non-Swiss beneficiaries, without incurring any tax in Switzerland.

142. Swiss trustees are not regulated in the discharge of fiduciary functions as such. Any person can incorporate a company in Switzerland and begin acting as trustee. Thus, the tax neutral platform of choice for many trustees wishing to administer a trust in a setting with no public sector regulation of fiduciary activities is also found in the OECD Member State of Switzerland. In contrast to Switzerland, most non-OECD jurisdictions with IFCs including the Bahamas, the Cayman Islands, Bermuda, the British Virgin Islands, Jersey and Guernsey regulate trustees as such.

143. There are again two possible explanations for the absence of comment in the OECD Report regarding the operation of trusts in Switzerland. The first is that the assumptions in the OECD Report are wrong and that the lack of regulation of trust service providers is appropriate to the risk and benefit offered by these structures. The second is that the OECD has deferred to the commercial sensitivities of a Member State, supporting the use of differential regulatory standards where such differentials provide a competitive advantage to Member States in the trade in services.

(g) *Case Study: Delaware Trusts*

144. As previously noted, the regulation of financial services in the United States serves as a model throughout the world. The trust industry in the US is highly developed, highly competitive, very lucrative and widely emulated.

145. Trusts established in the US State of Delaware, by way of one non-unique example, compete directly with trusts established in both OECD and non-OECD jurisdictions and are regulated to a degree deemed appropriate by the relevant governmental agencies in that OECD Member State. A non-U.S. person is able to establish a trust administered in the U.S., including the State of Delaware,

without any tax or reporting requirements in the U.S., provided a non-U.S. person (such as a protector) retains elements of ultimate control over the trust. Delaware law trusts have many features which an objective observer, adopting the reasoning of the OECD as set out in the OECD Report, might regard as rendering it vulnerable to misuse for illicit purposes.

146. The Delaware trust is promoted as a means of providing significant creditor protection and allows for “spendthrift trusts”. With such trusts the settlor is able to reclaim assets he puts into the trust, though he is still protected in significant ways from the claims of creditors. A spendthrift trust must be irrevocable but the settlor can nevertheless retain significant rights without the trust being deemed revocable, namely:

- (i) a veto right on distributions;
- (ii) a special testamentary power of appointment;
- (iii) a right to income and principal in the sole discretion of the trustee who is not the transferor nor a related or subordinate party within the meaning of Internal Revenue Code section 672(c)9; and
- (iv) a right to the income only of a trust or the income and principal of the trust on the basis of an ascertainable standard.<sup>74</sup>

147. Delaware is promoted by some service providers as “guarding your privacy” because trusts in Delaware:

- do not have public filings or recordings;
- do not require accountings or accountings can be easily waived; and
- trustees do not need to notify future beneficiaries of their interest in the trust.<sup>75</sup>

148. Delaware law allows a trust to have perpetual existence with the effect that a Delaware trust can conceivably run forever. Alaska, Idaho, Illinois, South Dakota and Wisconsin have also eliminated their states’ “rule against perpetuities”. As was the case with trusts administered in Switzerland, there are two alternatives for why the OECD Report did not target trust structures based in Member States.

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<sup>74</sup> 12 Del. C. section 2570(9)(b).

<sup>75</sup> Capital Trust at [www.ctcdelaware.com](http://www.ctcdelaware.com).

### 3.3 *Foundations*

149. The OECD Report notes that foundations are found among civil law jurisdictions such as Austria, Germany, Greece, Italy, Liechtenstein, the Netherlands Antilles, Panama and Switzerland. The risks and benefits of these vehicles parallel those of other corporate vehicles and the regulatory regimes for these vehicles compete with the regulatory regimes of companies and trusts as outlined above. To the extent that these vehicles are not regulated within the OECD Member States it may be assumed that the OECD has determined that such regulation is not required or is not desirable from a competition perspective in either OECD or non-OECD jurisdictions.

### 3.4 *Limited Partnerships*

150. The OECD also identified limited and limited liability partnerships as being corporate vehicles which are vulnerable to misuse, principally for the reason they are less regulated than corporations. However, the OECD places less emphasis on partnerships than other corporate vehicles stating “[i]n general, partnerships do not appear to be misused to the same extent as other corporate vehicles”<sup>76</sup>.

151. In a limited partnership at least one partner must have unlimited liability for the obligations of the partnership. Limited liability partnerships, where all the partners have limited liability, have been introduced in various jurisdictions recently including the UK and the US. For the purposes of this Level Playing Field Review we have focused on the more common limited partnership.

#### (a) *Registration*

152. As noted in the OECD Report, limited partnerships must generally be registered on establishment in order for the limited partners to benefit from limited liability. The results of our survey of 15 jurisdictions further revealed that generally most “onshore” and all “offshore” jurisdictions require a limited partnership to maintain a registered office in the jurisdiction in which it is established. This did not however, extend to a formal requirement for a local partner in the jurisdiction of establishment in most of the countries surveyed.

#### (b) *Filing/Auditing of Accounts*

153. None of the countries surveyed imposed a requirement to either file or audit accounts of the limited partnership with a central authority responsible for such partnerships. However, in several of the countries surveyed individual or

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<sup>76</sup> The OECD Report at page 28.

corporate partners are required to append the financial statements of the partnership or abridged versions of these to their individual or corporate tax return.

(c) *Beneficial Ownership Information*

154. The OECD noted that “While many jurisdictions require limited and general partners of a limited partnership to be registered, other jurisdictions require the registration of general partners only”.<sup>77</sup> The benchmarking research has confirmed this observation in the cases of both OECD and non-OECD Member countries.

**3.5. *Ability to Exchange Information Internationally***

155. For the purposes of our benchmarking review, we determined whether the countries surveyed are members of the Egmont Group of Financial Intelligence Units (the “Egmont Group”) on the basis that membership of this group is a reliable indicator of whether provisions for international exchange of information exist in any particular jurisdiction.

156. The Egmont Group now comprises 69 member countries which maintain operational financial intelligence units (“FIU”s). An FIU is a specialised government agency which has been created as part of a country’s systems for dealing with the problem of money laundering. These entities facilitate the collation and exchange of information for the interdiction of money laundering between financial institutions and law enforcement/ prosecutorial authorities within individual countries, as well as between jurisdictions.

157. Of the 15 jurisdictions reviewed all are members of the Egmont Group.

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<sup>77</sup> The OECD Report at page 28.

## PART 4

### 4. RECOMMENDATIONS AND CONCLUSIONS

158. The findings set out above illustrate four components which are required in a legitimate and effective process for enhancing financial services regulation:

#### 4.1 *A Level Playing Field*

159. Individual jurisdictions, as well as special interest groups and cartels made up of like jurisdictions, will naturally seek to protect and maintain their economic competitiveness when providing cross-border financial services.

160. Accordingly, progress must be premised on the basis that uniform rules, developed in an inclusive process are implemented by all states, on the same time frame, with the same consequences for those states which do not co-operate. This is a fundamental objective, and essential to effectively achieving an equitable result.

161. The imposition of more onerous “compliance requirements” exclusively on non-OECD Member countries is not acceptable. Efforts to minimise the misuse of corporate vehicles should not be used as a guise for undermining the competitive position of those jurisdictions which have limited input into the standards’ design process. To allow this misuse would be to compound the non-tariff barriers to the trade in services arising in other initiatives.

162. Individual sovereign jurisdictions should have the opportunity to develop their own methods to ensure the timely access to corporate ownership information and the exchange of such information which is consistent with their own legal and social environment. As long as such information is available on a timely basis and subject to exchange in terms and circumstances agreed by consensus, the means through which this is achieved should be left to the individual states concerned.

#### 4.2 *Universal Forum*

163. Any country will be more inclined to co-operate in implementing regulations which it has had a part in developing. This is a cornerstone of any legitimate process. All jurisdictions which will be affected by a process must have genuine and substantial participation in setting the agenda which defines the concerns, assisting in the design of solutions, and determining the ultimate outcome of the process if obligations are to apply to them.

164. The ultimate form which such a universal forum should take will need to be determined by all of the affected jurisdictions. One proposal is that special interest groups with a demonstrated interest and capacity in regard to financial services regulation policy formulation such as the OECD, ITIO and STEP, could join together with a multilateral organization such as the IMF to establish an international dialogue on financial services regulation. As part of this process, broad benchmarking studies could be performed and new regulatory frameworks developed which would take into consideration the interests of both developed and developing countries and ensure that processes parallel to those used in the context of the WTO were utilised to minimize unfair trade distortion.

#### **4.3 *Balancing Competing Considerations - Privacy***

165. It is essential that privacy considerations are also taken into account in any development of new rules and regulations. It is dangerously inappropriate to seek law enforcement objectives to the exclusion of other considerations in civil society. Privacy is a basic human right and accordingly, any implications which may concern privacy need to be seriously considered by all the countries concerned.

#### **4.4 *Proportionate and Risk-Based Regulation***

166. Appropriate regulation must strike a balance between law enforcement objectives and the reasonable needs of legitimate commerce. Accordingly the regulations must be proportionate to the risks and benefits associated with the activity being regulated.

167. A regulatory regime should focus attention and resources on those customers, accounts and transactions that are most vulnerable to money laundering and terrorist financing. An approach which does not permit a meaningful differentiation among customers, accounts and transactions will result in a misallocation of resources and reduce effective deterrence and prevention.

168. In conclusion, ITIO and STEP reiterate their concurrence with the OECD's stated objective of minimising the misuse of corporate vehicles on a global basis. This can best be achieved if the design and implementation of the rules for achieving this end take account of the views of all affected parties and competing considerations, including the reasonable protection of financial privacy. Simply put, the object in the design of financial services regulation should be a legitimate

process aimed at a fair result which neither distorts the trade in services away from small and developing countries, nor ignores the legitimate requirements of personal privacy and commerce. ITIO and STEP look forward to working with other supranational and international organisations in designing and implementing fair rules for enhancing the regulation of financial services.

# **APPENDICES**

Comparison of the regulatory regimes of corporations,  
trusts and limited partnerships.

APPENDIX A  
MEMBERSHIP OF  
**SUPRANATIONAL ORGANISATIONS**

	<b>G7</b>	<b>OECD</b>	<b>FATF</b>	<b>FSF</b>	<b>IMF Percentage of Total Votes</b>
<b>G7</b>					
Canada	X	X	X	X	2.95
France	X	X	X	X	4.97
Germany	X	X	X	X	6.02
Italy	X	X	X	X	3.27
Japan	X	X	X	X	6.16
United Kingdom	X	X	X	X	4.97
United States	X	X	X	X	17.16
<b>OECD</b>					
Australia		X	X	X	1.51
Austria		X	X		0.88
Belgium		X	X		2.14
Czech Republic		X			0.39
Denmark		X	X		0.77
Finland		X	X		0.59
Greece		X	X		0.39
Hungary		X			0.49
Iceland		X	X		0.07
Ireland		X	X		0.4
Korea		X			0.77
Luxembourg		X	X		0.14
Mexico		X	X		1.2
Netherlands		X	X	X	2.39
New Zealand		X	X		0.42
Norway		X	X		0.78
Poland		X			0.64
Portugal		X	X		0.41
Slovak Republic		X			0.18
Spain		X	X		1.42
Sweden		X	X		1.12
Switzerland		X	X		1.61
Turkey		X	X		0.46

*As at 22 April, 2002*

	G7	OECD	FATF	FSF	IMF Percentage of Total Votes
<b>Non OECD Member Countries</b>					
Andorra					
Anguilla					
Antigua and Barbuda					0.02
Aruba					
The Bahamas					0.07
Bahrain					0.07
Barbados					0.04
Belize					0.02
Bermuda					
British Virgin Islands					
Cayman Islands					
Cook Islands					
Costa Rica					0.09
Cyprus					0.08
Dominica					0.02
Gibraltar					
Grenada					0.02
Guernsey					
Hong Kong SAR			X	X	
Isle of Man					
Jersey					
Labuan (Malaysia)					
Lebanon					0.11
Liberia					0.04
Liechtenstein					
Macau SAR					
Maldives					0.02
Malta					0.06
Marshall Islands					0.01
Mauritius					0.06
Monaco					
Montserrat					
Nauru					
Netherlands Antilles					
Niue					
Panama					0.11
St Kitts and Nevis					0.02
St Lucia					0.02
St Vincent & the Grenadines					0.02
Samoa					0.02
San Marino					0.02
Seychelles					0.02
Singapore			X	X	0.41
Tonga					0.01
Turks & Caicos					
US Virgin Islands					
Vanuatu					0.02

## Appendix B

### Professional Firms Participating in Benchmarking Charts

Stikeman Elliott's London team comprised Richard Hay, Jeffrey Keey, Leigh Nicoll, Robert Reymond and Heather Tibbo.

We gratefully acknowledge the assistance received from leading law firms in the jurisdictions surveyed as part of the benchmarking review. We note that counsel detailed below have reviewed the attached charts. These firms did not review the main report including the case studies. Accordingly, responsibility for errors or omissions, as well as editorial comment, rests with the main authors and contributors. We are grateful for the assistance provided by:

- The Bahamas: Higgs & Johnson, John Delaney
- Bermuda: Appleby Spurling & Kempe, Alison MacKrill
- British Virgin Islands: Harney Westwood & Riegels, Richard Peters
- Canada: Stikeman Elliott, Toronto, Philip Henderson
- Cayman Islands: Maples & Calder, Anthony Travers
- England & Wales/UK re: corporations and limited partnerships: Stikeman Elliott, London, Jeffrey Keey
- England & Wales re: trusts: Allen & Overy, Ceris Gardner
- Hong Kong: Stikeman Elliott, Hong Kong, Clifford Ng
- Isle of Man: Cains, Andrew Corlett
- Jersey: Ogier & Le Masurier, Steven Meiklejohn
- Luxembourg: Le\_Goueff@vocats.com, Stéphan Le Goueff
- New Zealand: John Hart, Barrister
- Singapore: Khattar Wong & Partners, Gurbachan Singh
- Switzerland: Lenz & Staehelin, Richard Pease
- USA: Shutts & Bowen, Stephen Gray

APPENDIX C  
CORPORATIONS

	REGULATION OF SERVICE PROVIDERS	BEARER SHARES	"CORPORATE" DIRECTORS	REQUIREMENT FOR ANNUAL RETURN	FILING OF ACCOUNTS IN CORPORATE REGISTRY	AUDITING OF ACCOUNTS	BENEFICIAL OWNERSHIP INFORMATION AVAILABLE?	INFORMATION EXCHANGE (EGMONT GROUP MEMBER)
<b>OECD COUNTRIES</b>								
CANADA <sup>1</sup>	No	No <sup>2</sup>	No <sup>3</sup>	Yes <sup>4</sup>	Public company - yes Private company - no <sup>5</sup> Yes <sup>10</sup>	Public company - yes Private company - No <sup>6</sup> Yes <sup>11</sup>	Yes <sup>7</sup>	Yes
ENGLAND & WALES <sup>8</sup>	No <sup>9</sup>	Yes <sup>10</sup>	Yes <sup>11</sup>	Yes <sup>12</sup>	Yes <sup>13</sup>	Yes <sup>14</sup>	No <sup>15</sup>	Yes
IRELAND	No <sup>16</sup>	Yes <sup>17</sup>	No <sup>18</sup>	Yes <sup>19</sup>	Yes <sup>20</sup>	Yes <sup>21</sup>	Yes <sup>22</sup>	Yes
LUXEMBOURG 1929 HOLDING COMPANY <sup>23</sup>	No <sup>24</sup>	Yes <sup>25</sup>	Yes	Yes	Yes <sup>26</sup>	Yes <sup>27</sup>	No <sup>28</sup>	Yes
NEW ZEALAND	No <sup>29</sup>	Yes	No <sup>30</sup>	Yes <sup>31</sup>	No <sup>32</sup>	No <sup>33</sup>	No <sup>34</sup>	Yes
SWITZERLAND	No <sup>35</sup>	Yes	No <sup>36</sup>	Yes	No <sup>37</sup>	Yes <sup>38</sup>	No <sup>39</sup>	Yes
U.S. (DELAWARE) (LIMITED LIABILITY COMPANY) <sup>40</sup>	No <sup>41</sup>	Yes	Not applicable <sup>42</sup>	No	No	No	No <sup>43</sup>	Yes
<b>NON-OECD COUNTRIES</b>								
THE BAHAMAS	Yes <sup>44</sup>	No <sup>45</sup>	Yes	Limited company-yes IBC-no	No <sup>46</sup>	Public company-yes IBC-no <sup>47</sup>	Yes <sup>48</sup>	Yes
BERMUDA	Yes <sup>49</sup>	No	No	Only for local companies <sup>50</sup>	No <sup>51</sup>	Yes <sup>52</sup>	Yes <sup>53</sup>	Yes
BRITISH VIRGIN ISLANDS	Yes <sup>54</sup>	Yes <sup>55</sup>	Yes <sup>56</sup>	Local company-yes IBC-no <sup>57</sup>	Public company-yes Private company-no <sup>58</sup>	Local company public- yes Private company-no <sup>59</sup>	No <sup>60</sup>	Yes
CAYMAN ISLANDS	Yes <sup>61</sup>	Yes, but immobilised <sup>62</sup>	Yes	Yes <sup>63</sup>	Yes <sup>64</sup>	No <sup>65</sup>	Yes <sup>66</sup>	Yes
HONG KONG	No <sup>67</sup>	Yes <sup>68</sup>	Yes <sup>69</sup>	Yes <sup>70</sup>	Public company-yes Private company-no <sup>71</sup>	Yes <sup>72</sup>	No <sup>73</sup>	Yes
ISLE OF MAN	Yes <sup>74</sup>	Yes <sup>75</sup>	No	Yes	Public company-yes Private company-no <sup>76</sup>	Yes <sup>77</sup>	Yes <sup>78</sup>	Yes
JERSEY	Yes <sup>79</sup>	No	No <sup>80</sup>	Yes <sup>81</sup>	Public company-yes Private company-no <sup>82</sup>	Public company-yes Private company-no <sup>83</sup>	Yes <sup>84</sup>	Yes
SINGAPORE	No <sup>85</sup>	No	No <sup>86</sup>	Yes	Yes <sup>87</sup>	Yes	No <sup>88</sup>	Yes

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## CANADA

<sup>1</sup> All references are to federal provisions unless otherwise stated.

<sup>2</sup> Pursuant to subsection 24(1) of the Canada Business Corporations Act, R.S.C. 1985, as amended ("CBCA"), shares of a corporation must be in registered form. As such, bearer shares are not permitted. However, bearer shares are permitted in Quebec (certificat au porteur) under the Companies Act, R.S.Q., c.C-38, although their use is limited.

<sup>3</sup> Paragraph 105(1)(c) of the CBCA indicates that a director of a corporation cannot be a person who is not an individual.

<sup>4</sup> All corporations formed pursuant to the CBCA must file an annual return (i.e., Form 22 - Annual Return, CBCA Regulations, Schedule I)

<sup>5</sup> In Ontario, corporations whose securities are publicly traded must file audited financial statements with the applicable securities regulatory authorities and also must post their financial statements for public viewing on SEDAR.com (the "System for Electronic Document Retrieval and Analysis"). All companies must file financial statements (not required to be audited) with the applicable income tax authorities.

<sup>6</sup> Corporations whose securities are publicly traded are required to have their financial statements audited. Pursuant to subsection 163(1) of the CBCA, shareholders of a private corporation may resolve to not have the corporation's financial statements audited.

<sup>7</sup> The directors of a corporation, pursuant to subsection 133(1) of the CBCA, must call an annual meeting of shareholders no later than 15 months after the last preceding annual meeting and no later than 6 months after the end of the corporation's preceding financial year. Solicitation of proxies is mandatory pursuant to s. 149 of the CBCA, unless a corporation has 50 or fewer shareholders and is not a distributing corporation. Pursuant to ss. 57(j) of the CBCA Regulations, a management proxy circular must contain information about the name of each person who, to the knowledge of the directors or officers of the corporation, beneficially owns, directly or indirectly, or exercises control or direction over, shares carrying more than 10% of the votes attached to any class of shares entitled to vote in connection with any matters being proposed for consideration at the meeting. Pursuant s. 235 of the CBCA, the Director of the CBCA may inquire into the ownership and control of a corporation's security in certain circumstances.

## ENGLAND & WALES

<sup>8</sup> Companies incorporated under the Companies Act 1985, with or without limited liability.

<sup>9</sup> Save to the extent the services provided comprise regulated activities for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, in which case the service provider must be authorised by the Financial Services Authority under section 19 of the Financial Services and Markets Act 2000.

<sup>10</sup> Section 188 Companies Act 1985 - a company limited by shares may, if authorised by its articles, issue for fully paid shares a share warrant entitling the bearer to the shares specified in it which are transferred by delivery of the warrant.

<sup>11</sup> Section 289(2) Companies Act 1985 - corporate directors are permitted, but details of corporate name and registered or principal office must appear in the register of directors required to be maintained by each company. Those details must also be provided within 14 days of appointment to the Registrar of Companies (section 288(2) Companies Act 1985) and are available for public inspection.

<sup>12</sup> Sections 363(1) and 709 Companies Act 1985 - every company is required to make an annual return to Companies House which is available for public inspection. This confirms information including its registered office and place where its shareholding registers are kept,

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its type and business activities, details (including names and addresses) of its directors, secretary and shareholders and details of its authorised and issued share capital (sections 364 and 364A Companies Act 1985).

<sup>13</sup> Section 242 Companies Act 1985 - certain “small” and “medium-sized” companies are eligible for exemption from the requirement to prepare and file with the Registrar of Companies full audited accounts (Chapter II, Part VII Companies Act 1985). Accounts filed with the Registrar of Companies are available for public inspection (section 704, Companies Act 1985). Unlimited companies need not prepare or file accounts if not a subsidiary of, controlled by or a parent of a limited undertaking (section 254, Companies Act 1985).

<sup>14</sup> Part VII Companies Act 1985 - all companies are required to have their accounts audited, save for certain small or dormant companies.

<sup>15</sup> There is no legal procedure for compelling disclosure of beneficial interests in shares in a private company or in respect of non-voting shares. However, nominee shareholders must be disclosed, pursuant to a requirement that the name and address of, and class and number of shares held by, each member of a company must be maintained in the statutory register of members maintained by each company (section 352, Companies Act 1985) and shown in the annual return which every company is required to make. In the case of a nominee shareholding of voting shares in a company incorporated as a public limited company, disclosure of material interests in shares representing more than 3% of the share capital is required (section 198 Companies Act 1985) and the company may also require the identity of a beneficial owner of its shares be disclosed (section 212 Companies Act 1985). Non-disclosure can result in freezing of transfer, voting and distribution rights (section 216 Companies Act 1985).

## IRELAND

<sup>16</sup> Corporate service providers are not generally regulated, although certain types of service providers are regulated. These include investment companies, insurance intermediaries and credit institutions, insurance companies and mortgage providers.

<sup>17</sup> Although permitted, bearer shares are unusual – the general view is that private companies may not issue them without imperiling their private status.

<sup>18</sup> Section 176 Companies Act 1963.

<sup>19</sup> Sections 125 – 129 Companies Act 1963 – returns must be submitted annually in Companies Registration Office. Mutual funds are exempt.

<sup>20</sup> Every company is obliged to submit an annual return to the Registrar of Companies. The annual return must have the following annexed: balance sheet; profit and loss account; director’s report and a copy of the auditor’s report, where the company is audited. However, small private companies are exempted from the requirement to annex a copy of its profit and loss account and the director’s report to the return but must provide an abridged balance sheet. A medium sized company is required to give an abridged balance sheet and short-form profit and loss account.

<sup>21</sup> Section 160 Companies Act 1963 - all companies, with a de minimis exception for small private companies, are required to appoint an auditor. Companies are generally obliged by law to submit their accounts at least once a year for scrutiny by an independent professional auditor. A non-charitable company can be exempted from the requirement to have an annual audit provided that it complies with certain conditions which are set out in Part III of the Companies (Amendment) (No. 2) Act 1999.

<sup>22</sup> A list of shareholders must be contained in the annual return. In the case of a nominee shareholder there are certain disclosure rules concerning beneficial ownership where the beneficial owner attains a 5% or greater interest in the voting capital in a public company. In the case of private companies certain interested parties may apply to the court for an order compelling disclosure of beneficial ownership, but there is no general obligation of disclosure for this type of company.

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## LUXEMBOURG 1929 HOLDING COMPANY

<sup>23</sup> Luxembourg holding companies are usually incorporated as a *société anonyme* which permits shareholders to retain a high level of confidentiality through the use of bearer shares. Due to the overwhelming recourse to the *société anonyme* form for holding companies, only this form of incorporation will be discussed herein. A holding company can also be incorporated under the form of a S.a.r.l., A Senc, an Seca, or a Sc.

<sup>24</sup> There is no specific organisation for the regulation of service providers.

<sup>25</sup> Once the shares are fully paid up, and provided that there is no provision to the contrary in the articles of association, the shares of a Luxembourg company may be in bearer form (and so transferable by the physical transfer of the related certificates).

<sup>26</sup> 1929 holding companies are obliged to file and publish abridged annual accounts.

<sup>27</sup> The commercial company law provides that companies are obliged to use the services of a “*réviseur d’entreprises*” (i.e., an independent auditor) for the control of their accounts if two of the following criteria are met: a total balance sheet is in excess of EUR 2,305,410; the net turnover of the company exceeds EUR 4,610,820; the number of personal employed full time during the fiscal year exceeds 50 employees.

<sup>28</sup> No disclosure of the beneficial owner to the authorities is required.

## NEW ZEALAND

<sup>29</sup> The Registrar of Companies is responsible for administration of the Companies Act 1993, though, there is no regulation of corporate service providers.

<sup>30</sup> Section 51 Companies Act 1993.

<sup>31</sup> Section 208 and 214 Companies Act 1993. See also the 4<sup>th</sup> Schedule, Companies Act 1993 “Information to be contained in Annual Return”.

<sup>32</sup> While there is a requirement to file an annual return with the Registrar of Companies, this only involves very basic information concerning the identity and addresses of the directors and shareholders, and the existence of any changes. There is no obligation to file accounts, except in relation to “non exempt” companies. These are companies which have 25% or more foreign shareholding as described in footnote 35. In other words, there is both an account filing and audit requirement for such non-exempt companies. Those companies which have taxable income are required to file an abridged summary of income/expenses etc to enable computation of the income tax liability to the tax authorities.

<sup>33</sup> Section 196 Companies Act 1993 - an appointment of an auditor is normally required but some companies may unanimously resolve not to appoint an auditor. (This exception does not apply to a subsidiary of a company or body corporate incorporated outside of New Zealand or New Zealand companies owned as to 25% or more by an overseas entity or to “issuers” within the meaning of Section 4 of the Financial Reporting Act 1993.

<sup>34</sup> Section 87 Companies Act 1993 - every company must keep a register of its shareholders. Shareholder information must be filed with the Registrar of Companies on an annual basis. There is no requirement to disclose beneficial ownership where parties are holding shares as nominees, except in relation to listed companies.

## SWITZERLAND

<sup>35</sup> Corporate service providers are not generally regulated, although the Federal Banking Commission acts as the supervisory authority for the entities that are subject to the Federal Law on Banks or that are securities dealers under the Federal Stock Exchange Act. Corporations used as investment vehicles and which do not fall within the above categories are not subject to any specific supervision.

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<sup>36</sup> Corporations may however be represented by nominee directors. A majority of the directors must be Swiss nationals.

<sup>37</sup> No requirement to file accounts with any registry, but banks, deposit-taking finance companies etc must fulfil special filing requirements. Accounts, must however, be filed with the federal tax administration not later than seven months after the end of the company's accounting period.

<sup>38</sup> Auditing is required for Swiss corporations (« Aktiengesellschaft » / « société anonyme »). Auditing is not required for other forms of companies, e.g. limited liability companies (« Gesellschaft mit beschränkter Haftung » / « Société à responsabilité limitée »).

<sup>39</sup> The Trade Registry contains no information as to the shareholders / beneficial owners of a corporation. In the case of a limited liability company, the Trade Registry discloses the identity of the holders of the shares in the limited liability company. There is however no requirement that the holder of the share be the ultimate beneficial owner. Should a corporation open a bank account, the bank must comply with the Swiss Know Your Customer rules which imply the identification of the beneficial owner for example whenever the account holder is a company with no commercial activities of its own, i.e. a domiciliary company.

## **U.S. (DELAWARE)**

<sup>40</sup> A limited liability company, commonly referred to as an "LLC" is an entity which has characteristics of both a corporation and a partnership. It is similar to a partnership as the LLC is not a separate taxable entity and also like a corporation in that all LLC owners are protected from personal liability for business debts and claims.

<sup>41</sup> Corporate service providers/administrators are neither licensed nor regulated.

<sup>42</sup> There is no distinction between shareholders and directors since management of the company is vested in the members of the company.

<sup>43</sup> LLCs are not required to disclose beneficial ownership. There is no administrative procedure for compelling a nominee to disclose the identity of the beneficial owner.

## **THE BAHAMAS**

<sup>44</sup> An international business company (IBC) may only be incorporated by licensed bank and trust companies and licensed financial and corporate service providers. An IBC incorporated by a licensed bank or trust company is regulated by the Inspector of Banks and Trust Companies and an IBC incorporated by a licensed financial and corporate service provider is regulated by the Inspector of Financial and Corporate Services. Furthermore, The Bahamas Compliance Commission, under the Financial Transactions Reporting Act, is responsible for the regulation of financial institutions which includes banks and trust companies licensed under the Banks and Trust Companies Regulation Act 2000.

<sup>45</sup> An IBC may issue registered shares but not shares issued to bearer (section 10(a) International Business Companies Act 2000). An IBC shall keep a share register at its registered office which contains such information as the names and addresses of persons who hold registered shares in the company, the number of shares of each class and series of registered shares held by each person and the date the name of each person was entered in the share register.

<sup>46</sup> Companies are not required to file accounts with the Companies Registry. However, in the case of a public company, the Registrar may, at any time, request in writing a copy of the annual financial returns. Furthermore, public companies, banks and insurance companies (subject to de minimis exceptions), must file accounts with the relevant authorities.

<sup>47</sup> Public companies are obliged to have accounts audited – sections 123-128 Companies Act 1992. Financial statements of an IBC are not required to be audited unless required by the

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IBC's Articles of Association. IBCs are not required to appoint an auditor and members of a private company may resolve not to appoint an auditor (section 130 Companies Act 1992).

<sup>48</sup> There is no legal requirement to publicly file the list of shareholders for an IBC. Other companies are required to include a list of shareholders in their annual return. There is no legal procedure for compelling a nominee holding shares in any company to disclose identity of the beneficial owner except where money laundering is suspected. A company licensed under the Financial and Corporate Service Providers Act 2000 ("FCSPA") must keep a record in respect of each client, including the name and address of the beneficial owners of all IBCs incorporated and or existing under the International Business Companies Act 2000 (section 14(3) FCSPA).

## **BERMUDA**

<sup>49</sup> Service providers are regulated by the Bermuda Monetary Authority and the Bermuda Registrar of Companies.

<sup>50</sup> However, exempted companies must provide an annual Declaration of Business confirming the assessable capital and business of that company.

<sup>51</sup> However, insurance companies are required to file audited financials and a financial return annually with the Bermuda Monetary Authority.

<sup>52</sup> Companies are required to appoint auditors and accountants, but the appointment of an auditor and the laying of audited financial statements before a company in general meeting can be waived. However, if the production of audited financial statements is waived, a company must still maintain accounts sufficient for the directors and resident representative of that company to ascertain with reasonable accuracy the financial position of a company in any 3 month period.

<sup>53</sup> Every company is required to keep a register of its shareholders which is open to inspection by the public. Every person that intends to hold 5% or more of the authorised share capital of a company must provide certain further information to the Bermuda Monetary Authority, whose consent is required to issue or transfer shares to any person who will hold 5% or more of a company's authorised share capital. There is no disclosure of the beneficial ownership of a proposed shareholder of a Bermuda company in the case of companies whose shares are listed on an Appointed Stock Exchange (as are prescribed by the Minister of Finance). Nominee shareholding is permitted however disclosure of the beneficial owner to the Bermuda Monetary Authority is required on a confidential basis, however the Bermuda Monetary Authority and, in the case of insurance companies, the Insurance Division of the Registrar of Companies may disclose information to a regulator with similar responsibilities if there is reciprocity.

## **BRITISH VIRGIN ISLANDS**

<sup>54</sup>In January 2002, the government established the Financial Services Commission, an independent body which is responsible for supervision of corporate service providers. However, the Financial Services Commission is not yet responsible for regulating investment business.

<sup>55</sup> Government has made a public commitment to amend the International Business Companies (IBC) Act to "immobilize" bearer shares. The process of immobilization is under consideration. Bearer shares are not permitted for companies carrying on certain regulated activities in the BVI.

<sup>56</sup> Non-BVI corporate directors are not permitted for managers or administrators licensed under the Mutual Funds Act, 1996.

<sup>57</sup> Public companies incorporated under the Companies Act must submit an annual audited balance sheet to the Registrar of Companies, banks, trust companies and management companies must submit annual audited accounts to the Head of Banking and Fiduciary at the

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Financial Services Commission; public funds registered under the Mutual Funds Act 1996 must keep annual audited financial statements and insurance companies must submit to the Insurance Supervisor annual audited accounts. Government has made a public commitment to amend the IBC Act to require names and addresses of directors of IBCs to be filed at the Registry of Companies.

<sup>58</sup> Public companies under the local Companies Act must file audited financial statements with the Registrar of Companies. Private companies are not required to file accounts of any type with the Registrar of Companies. However, companies incorporated under the local Companies Act must file an income tax return which would almost always be supported by financial statements.

<sup>59</sup> Public companies, banks and trust companies, insurance companies, public mutual funds and company management companies and mutual funds managers and administrators are required to appoint auditors. Public companies must file an auditor's report on annual accounts.

<sup>60</sup> On establishment the Memorandum of Association which includes names, addresses and descriptions of subscribers must be delivered to the Registrar of Companies. Local companies are required to submit shareholder information in their annual return. Discovery of the identity of the beneficial owner of a nominee shareholding is achieved by application of evidence rules generally in criminal and civil matters. The Anti-Money Laundering Code of Practice requires registered agents of IBCs to maintain records of identity in respect of new clients, except in circumstances where the client has been introduced by a similarly regulated entity from another jurisdiction. These records need not be retained in the BVI as long as they are available on request of the registered agent.

#### **CAYMAN ISLANDS**

<sup>61</sup> Service Providers are regulated by the Cayman Monetary Authority.

<sup>62</sup> Bearer shares are not permitted unless they are subject to custodial arrangements with a recognised international custodian or licensed Cayman Islands entity.

<sup>63</sup> An annual return must be filed for every company with the Registrar of Companies in prescribed form.

<sup>64</sup> Regulated entities must file accounts. No requirement to file accounts with the Registrar of Companies but banks, trust companies, mutual funds, mutual funds administrators, insurance companies and company management companies must prepare and file audited financial statements and reports in accordance with the relevant laws and any special terms and conditions imposed by the Cayman Islands Monetary Authority at the time of the granting of each individual licence. Financial statements must be maintained by all companies but only the entities designated must file audited financial statements with the Cayman Island Monetary Authority.

<sup>65</sup> Company financial statements must be prepared but need not be audited.

<sup>66</sup> On incorporation the Memorandum of Association which includes the names and addresses of subscribers must be delivered to the Registrar of Companies. The records are not available for public inspection. The Money Laundering Regulations and Guidance Notes contain specific provisions dealing with the obligation of any financial service provider to obtain specified details on the beneficial owners. This information is available to the Cayman Island Monetary Authority.

#### **HONG KONG**

<sup>67</sup> However, banks, restricted licenced banks and deposit-taking companies are regulated by the Hong Kong Monetary Authority and securities dealers, investment advisors, commodity dealers and securities margin financiers, together with investment products are regulated by the Securities and Futures Commission.

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<sup>68</sup> A company may issue warrants to bearer if so authorised by its articles.

<sup>69</sup> However, corporate directors are not permitted in the case of a public company or a private company which is a member of a group of companies including a listed company.

<sup>70</sup> Submitted annually to the Registrar of Companies.

<sup>71</sup> Public companies are required to file financial accounts with the Companies Registrar (as part of the company's annual information return) and with the Inland Revenue Department (as part of the company's profit tax return). Private companies are not required to file financial accounts with the Companies Registrar but are required to file financial accounts with the Inland Revenue Department (as part of the company's profit tax return).

<sup>72</sup> All companies are required to have their financial statements audited by a certified public accounting firm in Hong Kong.

<sup>73</sup> The registers of members of both public and private companies are available for inspection by members and any other person at the registered office of the company. The register shows the registered owner, not the beneficial owner. There is no legal procedure for compelling a nominee holding shares in a private company to disclose the identity of the beneficial owner. For listed companies, disclosure is required if the beneficial owner is a director of the company or a substantial shareholder. There is no specific provision in any other legislation regarding identifying the beneficial owner of shares but the courts have a general power to make orders against a person in a specific case and there are investigative orders that may be granted by a court in the case of the investigation of organised and serious crime.

#### **ISLE OF MAN**

<sup>74</sup> Under the Corporate Service Providers Act 2000, only those licensed as corporate service providers (CSPs) by the Financial Supervision Commission are now permitted to incorporate and administer companies. The Commission is also responsible for the regulation and supervision of CSPs.

<sup>75</sup> Warrants to bearer are permitted but as part of the Isle of Man's OECD commitment the legislation permitting warrants to bearer will be repealed.

<sup>76</sup> Only public companies are required to deliver accounts to the Companies Registry. However, as part of the Isle of Man's OECD commitment, a company will either have to file accounts with the taxation authorities or prepare audited accounts which must be available for production to the taxation authorities on request.

<sup>77</sup> An audit is required unless the company is private and is either dormant or tax exempt pursuant to, principally, the Income Tax (Exempt Companies) Act 1984 and all its members have passed a resolution to dispense with the appointment of an auditor. This audit exemption is currently under review as part of the Isle of Man's OECD commitment.

<sup>78</sup> The name and address of, and class and number of shares held by each member of a limited company must be shown in the annual return. The beneficial owners of companies are required to be known to and verified by the relevant corporate service provider and available on request to the Commission as part of its compliance procedures function or be produced to third parties by court order.

#### **JERSEY**

<sup>79</sup> Service providers are regulated by the Jersey Financial Services Commission.

<sup>80</sup> Article 73(2)(d) Companies (Jersey) Law 1991.

<sup>81</sup> Article 71 Companies (Jersey) Law 1991.

<sup>82</sup> Article 106 Companies (Jersey) Law 1991 - accounts for public companies must be filed with the Registrar of Companies and are open for public inspection. There are no requirements for private companies to file financial accounts with any central registry nor to submit accounts to any local tax authority.

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<sup>83</sup> Public companies are required to prepare and file audited accounts annually. Article 109(1) and 110 Companies (Jersey) Law 1991- a private company only need prepare an audit if the articles of the company so require or if a resolution in a general meeting so requires.

<sup>84</sup> All companies must disclose beneficial ownership information to the Jersey Financial Services Commission (JFSC) on incorporation. In the case of an exempt company or an IBC, any changes in beneficial ownership must be reported to the JFSC when it occurs. (Control of Borrowing (Jersey) Order 1958).

## SINGAPORE

<sup>85</sup> There is no specific organisation which regulates corporate service providers in their capacity as such. However, corporate service providers (lawyers and accountants) are regulated by their respective professional bodies. The Monetary Authority of Singapore supervises the banking, insurance, securities and futures industries.

<sup>86</sup> Section 145 Companies Act Chapter 50, 1994 Revised Edition.

<sup>87</sup> Annual accounts must be filed with the Registry of Companies and Business. However, "private exempt companies", which are defined as a company, with less than 20 shareholders all of whom are individuals are permitted to file a directors' report and accounts with the registrar.

<sup>88</sup> The name, and address of, and class and number of shares held by, each member of a limited company must be shown in the annual return. No administrative procedure exists for compelling a nominee holding shares in a private company (or non-voting shares in a publicly listed company) to disclose the identity of the beneficial owner. A substantial shareholder has the obligation to state whether he holds voting shares as beneficial owner or otherwise.

APPENDIX D  
**TRUSTS**

	LICENSED OR REGULATED TRUSTEES	CENTRAL REGISTRY FOR CONSTITUTING DOCUMENTS	REQUIREMENT TO FILE FINANCIAL STATEMENTS	REQUIREMENT TO AUDIT FINANCIAL STATEMENTS	SETTLOR AND BENEFICIARY INFORMATION AVAILABLE OR FILED <sup>1</sup>	EXCHANGE OF INFORMATION - MEMBER OF THE EGMONT GROUP
<b>OECD COUNTRIES</b>						
CANADA (ONTARIO)	Yes <sup>2</sup>	No	No	No	Yes <sup>3</sup>	Yes
ENGLAND & WALES	No <sup>4</sup>	No <sup>5</sup>	No <sup>6</sup>	No <sup>7</sup>	Yes <sup>8</sup>	Yes
IRELAND	No <sup>9</sup>	No	No	No	No <sup>10</sup>	Yes
NEW ZEALAND	No <sup>11</sup>	No	No	No	Yes <sup>12</sup>	Yes
SWITZERLAND	No	No	No	No	Yes <sup>13</sup>	Yes
U.S. (DELAWARE)	No <sup>14</sup>	No <sup>15</sup>	No	No	No <sup>16</sup>	Yes
<b>NON-OECD COUNTRIES</b>						
THE BAHAMAS	Yes <sup>17</sup>	No <sup>18</sup>	No	No	Yes <sup>19</sup>	Yes
BERMUDA	Yes <sup>20</sup>	No	No	No	Yes <sup>21</sup>	Yes
BRITISH VIRGIN ISLANDS	Yes <sup>22</sup>	No <sup>23</sup>	No	No	Yes <sup>24</sup>	Yes
CAYMAN ISLANDS	Yes <sup>25</sup>	No	No <sup>26</sup>	No	Yes <sup>27</sup>	Yes
HONG KONG	No <sup>28</sup>	No	No	No	Yes <sup>29</sup>	Yes
ISLE OF MAN	No <sup>30</sup>	No <sup>31</sup>	No <sup>32</sup>	No <sup>33</sup>	Yes <sup>34</sup>	Yes
JERSEY	Yes <sup>35</sup>	No	No	No	Yes <sup>36</sup>	Yes
SINGAPORE	Yes <sup>37</sup>	No <sup>38</sup>	No	No	Yes <sup>39</sup>	Yes

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<sup>1</sup> ie can be elicited through an administrative as opposed to judicial process

## CANADA

<sup>2</sup> The *Loan and Trust Corporations Act (Ontario) ("LTCA")*, R.S.O. 1990, c. L-25 regulates loan and trust corporations carrying on business in Ontario.

<sup>3</sup> The LTCA does not contain any requirement to file settlor and beneficiary information with the Superintendent (who is appointed under the *Financial Services Commission of Ontario Act, 1997*). However, the *Proceeds of Crime (Money Laundering) Act, 1991*, c. 26, establishes strict record-keeping requirements including for banks and trust corporations and the identity of potential clients. New record-keeping requirements are expected to be implemented in 2002 pursuant to the regulations under the new legislation entitled the *Proceeds of Crime (Money Laundering) Act and Terrorist Financing Act, 2000*, c. 17.

## ENGLAND & WALES

<sup>4</sup> Trust companies (which must be distinguished from "trust corporations" which have a statutory definition and are required to comply with specific statutory conditions) are not regulated (other than having to comply with the Companies Act or Charities Acts (if appropriate)). The Financial Services and Markets Act 2000 (the "Act") will apply if such a company is concerned with making or trading in investments or giving investment advice. However, subject to any contrary indication in the trust instrument, trustees have statutory powers to invest funds as if they were absolutely entitled to the trust assets and thus should not be within the terms of the Act.

<sup>5</sup> There is no central registry for trusts although certain information must be provided to Companies House and to the Charity Commission in respect of charitable trusts.

<sup>6</sup> Other than the submission of annual tax returns to the Inland Revenue, there is no requirement for trustees to file financial statements. Subject to certain exceptions, charities are required to file their annual accounts with the Charity Commission.

<sup>7</sup> There is no requirement to audit financial statements, save that charities with an annual income of at least £250,000 are obliged to have their accounts audited.

<sup>8</sup> On the creation of a trust, trustees are required to submit a Form 41G (Trust) to the Inland Revenue which requires information about the trustees, the settlor and the assets settled. Certain other events, depending on the type of trust, will also prompt a requirement for further forms to be completed. Money laundering laws apply to trustees and advisers. The laws require client identification procedures to be adopted and information retained on file.

## IRELAND

<sup>9</sup> Trust companies are regulated by the Central Bank of Ireland only in the context of mutual funds.

<sup>10</sup> The trustees of private trusts do not have to identify the settlors and all the beneficiaries of either existing or new trusts. Any relevant information is kept by the trustees on file as there is no regulatory register.

## NEW ZEALAND

<sup>11</sup> There is no regulation of trust companies, although there is regulation in relation to trusteeship of deceased estates and the performance of a "statutory supervisor" function under the Securities Act 1978 which broadly relates to trusteeship/supervision of publicly offered securities.

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<sup>12</sup> Pursuant to the Financial Transactions Reporting Act 1996, financial institutions, which include any person “whose business consists of acting as trustee in respect of funds of other persons” have imposed on them obligations, which include the verification of the identity of persons. There is no disclosure or central filing obligation as such; just a requirement to make inquiries and hold materials on file.

#### **SWITZERLAND**

<sup>13</sup> A Swiss trustee qualifies as a financial intermediary under the Swiss Money Laundering Act (“MLA”) and is subject to the applicable supervision (official authority or self-regulating body). Information about the settlor and beneficiary must be known by the trustees and kept on file pursuant to the MLA, however this does not need to be filed with any central registry nor is it publicly available. However, should the trustee open a bank account, the bank will be obliged to identify the settlor and beneficial owner under the applicable know your customer rules.

#### **U.S. (DELAWARE)**

<sup>14</sup> There is no requirement that a trustee be licensed and there is no regulation as such (individuals can be trustees). The trustee must have a Delaware address.

<sup>15</sup> Business trusts have the opportunity to register a certificate of trust, but it is not required.

<sup>16</sup> The identities of the settlor and beneficiaries need not be disclosed.

#### **THE BAHAMAS**

<sup>17</sup> Trust companies conducting business in The Bahamas have been required to be licensed since 1962. The Banks and Trust Companies Regulation Act, 2000 (“BTCRA”) expands these provisions.

<sup>18</sup> Section 94 of the Trustee Act provides that “Notwithstanding any provisions of the Registration of Records Act, any deed creating a trust, all deeds of appointment made pursuant to the terms of a trust and all other deeds (but not including conveyances of Bahamian real property or personalty) executed by the trustees, settlors, beneficiaries or protectors of a trust pursuant to the powers and discretions specified in the trust instrument, are exempt from registration under the provisions of the Registration of Records Act.”

<sup>19</sup> Pursuant to the Financial Transactions Reporting Act, 2000 (“FTRA”) and the Financial Transactions Reporting Regulations, 2000 (“FTRR”), a financial institution (inclusive of a bank or trust company licensed under the BTCRA) is required to verify the identity of both existing and new facility holders (including the beneficial owner of the facility (if different from the facility holder)). In the case of a trust, the settlor’s identity must be verified as a facility holder. A financial institution is also required to verify the identity of beneficiaries of a trust with a vested interest. There is no requirement to verify the identity of potential beneficiaries ie persons who do not have a vested interest. Identification verification information must be retained by a financial institution for a minimum period of 5 years after the end of the relationship with a facility holder (section 24 FTRA).

#### **BERMUDA**

<sup>20</sup> The Trusts (Regulation of Trust Business) Act 2001 requires that persons carrying on trust business in or from within Bermuda are licensed undertakings. Private trust companies which have been incorporated specifically to act as trustees for private family trusts or a group of related trusts are not regulated by the Act.

<sup>21</sup> Trustees are regulated under two separate areas of legislation; the proceeds of crime legislation (The Proceeds of Crime Act 1997, the Proceeds of Crime (Money Laundering)

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Regulations 1998 and the Guidance Notes on the Prevention of Money Laundering) and the trusts regulation legislation (the Trusts (Regulation of Trust Business) Act 2001 (now in force) and the Statement of Principles and Code of Practice thereunder (expected to be in force later 2002)). Under the former, verification of the settlor and, where appropriate, the principal beneficiaries, is required. This information is held on file. Although there were grandfathering provisions, any addition to the trust fund will trigger the verification procedure so in most cases verification has occurred even if the trust was an existing trust in 1997. Under the latter, the Code provides that the trustees must be able to satisfy the proceeds of crime legislation and, in addition, they are required to have adequate information relating to the beneficiaries (identity and their needs) so that the trustees are in a position to carry out their responsibilities and fiduciary obligations.

### **BRITISH VIRGIN ISLANDS**

<sup>22</sup> The Banks and Trust Companies Act, 1990 requires all trust companies (no matter where they are incorporated) which carry on “trust business” within the BVI and all BVI-incorporated companies carrying on trust business (whether in the Territory or outside the Territory) to be licensed under that Act. Foreign incorporated trust companies operating in the BVI, which are in the business of providing trustee or other specified services must also be licensed under the Banks and Trust Companies Act 1990.

<sup>23</sup> The Trustee (Amendment) Act 1993 exempts all deeds creating trusts, all deeds of appointment pursuant to the terms of a trust and all other deeds executed by trustees, settlors and beneficiaries pursuant to the powers and discretions in the instrument creating the trust, from registration and filing save for trust deeds relating to unit trusts which are public funds under the Mutual Funds Act, 1996.

<sup>24</sup> Records of identity of new clients must be maintained by registered agents and other registered entities pursuant to the Anti-Money Laundering Code of Practice, save where the client has been introduced by a similarly regulated entity in another jurisdiction. Provided that the BVI trustee is satisfied the records are maintained and are readily accessible, there is no requirement for them to be kept within the BVI. Thus the BVI trustee will have information about the settlor available on file. Information about the beneficiaries is not required by statute, but for best practice, BVI trustees should maintain this.

### **CAYMAN ISLANDS**

<sup>25</sup> All companies acting as trustees must be licensed and regulated under The Banks and Trust Companies Law.

<sup>26</sup> There are no public filing requirements for inter vivos trusts, unless the trust is to be registered as an exempted trust.

<sup>27</sup> As a matter of trust law the trustees are under an obligation to know the identities of the settlor and beneficiaries. Furthermore, verification of the identity of the settlor and all due diligence with regard to source of funds is required by the Money Laundering Regulations (and as further detailed in the guidance notes), which are of necessary application to all licensed trust companies in the Cayman Islands.

### **HONG KONG**

<sup>28</sup> A Hong Kong incorporated company may apply to be registered as a trust company by the Registrar of Companies under the Trustee Ordinance (Section 77(1)). Registered trust companies and trustees are subject to the provisions of the Trustee Ordinance. A company that is not registered as a trust company can act as trustee and may not be subject to regulation (unless it is regulated as a bank, insurance company, securities dealer, etc. under another law). However, a company cannot act as executor of a will, apply for probate or

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letters of administration, nor be appointed by a court as a trustee, unless it is registered as a trust company.

<sup>29</sup> Trustees of private trusts do not have to identify the settlors and beneficiaries of a trust (absent a court order) pursuant to any statutory provisions. However, as a matter of trust law the trustees will need to identify the settlor and beneficiaries. The information would be kept only on the trustee's file.

#### **ISLE OF MAN**

<sup>30</sup> Providers of administration services to companies are regulated under the Corporate Service Providers Act 2000. There is no equivalent legislation for trustees, although the Isle of Man Government has announced its intention to introduce such legislation in the short term.

<sup>31</sup> There is no central registry for constituting documents, but charitable purpose trusts are required under the Charities Registration Act 1989 to register with the Charities Registry.

<sup>32</sup> There is no requirement to file financial statements, save that charitable purpose trusts are required to file audited financial statements.

<sup>33</sup> There is no requirement to audit financial statements, save that charitable purpose trusts are required to file audited financial statements.

<sup>34</sup> Under the anti-money laundering know your customer requirements, a trustee must know and verify the identities of the real settlor, the protector (if any) and to the extent possible under the form of trust, the beneficiaries. In addition, the trustee has to satisfy himself as to the source of funds forming the corpus of the trust and the underlying identity of all those who have remitted such funds.

#### **JERSEY**

<sup>35</sup> The Financial Services (Jersey) Law 1998 regulates the carrying on of "trust company business" both in or from within the Island and if carried out by a company incorporated in the Island, anywhere in the world.

<sup>36</sup> A Jersey trustee of a Jersey law trust will know the identities of the settlor and beneficiaries of the trust.

#### **SINGAPORE**

<sup>37</sup> Service providers are regulated pursuant to the Trust Companies Act (1985).

<sup>38</sup> Private trusts are not required to be registered. The Charities Act provides for mandatory registration with the Commissioner of Charities of charitable trusts established in Singapore.

<sup>39</sup> Apart from income tax returns on distributions of income or deemed income and company law requirements as to substantial shareholders, there is no requirement by the trustees to register or file information on the settlor or beneficiaries of a trust. In addition, at present, trustees of private trusts do not have to identify the settlors and all the beneficiaries of both existing and new trusts under any statute. As a matter of general trust law however, the trustee will have to identify the settlor and beneficiaries.

APPENDIX E  
LIMITED PARTNERSHIPS\*

	REGISTRATION OF PARTNERSHIP ON ESTABLISHMENT	REQUIREMENT FOR LOCAL PARTNER	REQUIREMENT FOR REGISTERED OFFICE IN JURISDICTION	ANNUAL REPORTING REQUIREMENTS	FILING OF ACCOUNTS IN CENTRAL REGISTRY	AUDITING OF ACCOUNTS	FILING OF OWNERSHIP INFORMATION	INFORMATION EXCHANGE (EGMONT GROUP MEMBER)
<b>OECD COUNTRIES</b>								
CANADA (ONTARIO)	Yes <sup>1</sup>	No	No <sup>2</sup>	No	No <sup>3</sup>	No <sup>4</sup>	Yes <sup>5</sup>	Yes
IRELAND	Yes <sup>6</sup>	No	Yes <sup>7</sup>	No	No <sup>8</sup>	No <sup>9</sup>	Yes <sup>10</sup>	Yes
LUXEMBOURG <sup>11</sup>	Yes	No	Yes	Yes	No <sup>12</sup>	Yes <sup>13</sup>	General partner-yes <sup>14</sup> Limited partner-no	Yes
NEW ZEALAND (SPECIAL PARTNERSHIP) <sup>15</sup>	Yes <sup>16</sup>	Generally not required	Yes	No	No <sup>17</sup>	No	Yes <sup>18</sup>	Yes
SWITZERLAND	The legal form of a limited partnership is available but very rarely used.							
UNITED KINGDOM <sup>19</sup>	Yes <sup>20</sup>	No	Yes <sup>21</sup>	No	No <sup>22</sup>	No	Yes <sup>23</sup>	Yes
U.S. (DELAWARE)	Yes <sup>24</sup>	Yes	No <sup>25</sup>	No	No	Only for public limited partnerships	General partner-yes Limited partner-no <sup>26</sup>	Yes
<b>NON-OECD COUNTRIES</b>								
THE BAHAMAS (EXEMPTED LIMITED PARTNERSHIP)	Yes <sup>27</sup>	Yes <sup>28</sup>	Yes <sup>29</sup>	Yes <sup>30</sup>	No	No	General partner-yes Limited partner-no <sup>31</sup>	Yes
BERMUDA (EXEMPTED LIMITED PARTNERSHIP)	Yes <sup>32</sup>	No <sup>33</sup>	Yes <sup>34</sup>	Yes <sup>35</sup>	No	No <sup>36</sup>	General partner-yes Limited partner-no <sup>37</sup>	Yes
BRITISH VIRGIN ISLANDS (INTERNATIONAL LIMITED PARTNERSHIP)	Yes <sup>38</sup>	No <sup>39</sup>	Yes <sup>40</sup>	No	No <sup>41</sup>	No <sup>42</sup>	General partner-yes Limited partner-no <sup>43</sup>	Yes
CAYMAN ISLANDS (EXEMPTED LIMITED PARTNERSHIP)	Yes <sup>44</sup>	Yes <sup>45</sup>	Yes <sup>46</sup>	Yes <sup>47</sup>	No	No	General partner-yes Limited partner-no <sup>48</sup>	Yes
HONG KONG	Yes <sup>49</sup>	No	No <sup>50</sup>	No	No <sup>51</sup>	No	Yes <sup>52</sup>	Yes
ISLE OF MAN	Yes <sup>53</sup>	No <sup>54</sup>	Yes <sup>55</sup>	Yes <sup>56</sup>	No <sup>57</sup>	No	Yes <sup>58</sup>	Yes
JERSEY	Yes <sup>59</sup>	Generally not required	Yes <sup>60</sup>	No	No <sup>61</sup>	No <sup>62</sup>	General partner-yes Limited partner-no <sup>63</sup>	Yes
SINGAPORE	Limited partnership not available.							

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\* For the purposes of this exercise, only limited partnerships have been reviewed. This does not include limited liability partnerships.

## CANADA (ONTARIO)

<sup>1</sup> Under the *Limited Partnership Act* (Ontario) (“LPA”), R.S.O. 1990, c. L-16, as amended, and regulations made under the LPA (“LPA Regulations”), a written declaration signed by all of the general partners must be filed with the registrar appointed under the *Business Names Act*, R.S.O. 1990, c. B-17 (“BNA”). The general partner will be deemed to be carrying on business in Ontario through the limited partnership. Pursuant to the LPA Regulations, included among the prescribed information to be filed with the registrar is a statement of a partner’s contribution to the limited partnership and the general nature of the business. A record of limited partners, pursuant to ss. 4(1) of the LPA, must be kept at the limited partnership’s principal place of business in Ontario. No person associated in a limited partnership may carry on business or identify himself or herself to the public unless the name of the partnership has been registered by all partners or by a designated partner under the LPA.

<sup>2</sup> However, pursuant to subsection 33(1) of the LPA, every limited partnership shall keep certain information at its principal place of business in Ontario, including a copy of the partnership agreement, a copy of the declaration and a copy of each declaration of change amending the declaration. Pursuant to subsection 33(2) of the LPA, where an extra-provincial limited partnership (“EPLP”) does not have a principal place of business in Ontario, the documents referred to in the foregoing sentence shall be kept by the EPLP’s attorney and representative in Ontario.

<sup>3</sup> Financial statements of the limited partnership are not required to be filed with the registrar. However, such information is required to be submitted to the applicable income tax authorities.

<sup>4</sup> Although a limited partnership’s financial information would not normally be audited, the general partner’s financials might be.

<sup>5</sup> Ownership information of a limited partnership must be filed with the registrar pursuant to the regulations made under the LPA. Pursuant to subsection 19(2) of the LPA, a declaration of change must be filed for the admission of a new general partner, but not for a new limited partner (also see section 17 of the LPA). As stated above, however, a record of limited partners must be kept at the limited partnership’s principal place of business in Ontario.

## IRELAND

<sup>6</sup> Section 5 of the Limited Partnership Act 1907 – a statement signed by all the partners which includes the full name of the partners must be sent to the Registrar of Companies.

<sup>7</sup> Section 8 Limited Partnership Act 1907 – principal place of business must be in the Republic of Ireland.

<sup>8</sup> It is not necessary to file financial accounts as at least one general partner has unlimited liability for the liabilities of the partnership. However, if all of the partners effectively have limited liability, then regulation 6 of the European Community (Accounts) Regulation 1993 applies and accounts must be filed. Furthermore, a limited partnership is required to file tax returns with the Irish Revenue Commissioners and the Revenue Commissioners look for financial statements to support tax computations.

<sup>9</sup> However, with regards to Investment Limited Partnerships, the Central Bank is the regulator and may require audits of the partnership.

<sup>10</sup> Registration of Business Names Act 1963 - a full list of partners must be filed with the Registrar of Companies on establishment and when changes occur.

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## LUXEMBOURG

<sup>11</sup> We have reviewed the ordinary limited partnership (i.e., *le Société en Commandite Simple*).

<sup>12</sup> Except for limited partnerships where all their general partners are financing companies.

<sup>13</sup> The commercial company law provides that companies are obliged to use the services of a “*reviseur d’entreprises*” (i.e., an independent auditor) for the control of their accounts if two of the following criteria are met: a total balance sheet is in excess of EUR 2,305,410; the net turnover of the company exceeds EUR 4,610,820; the number of personal employed full time during the fiscal year exceeds 50 employees.

<sup>14</sup> The commercial company law provides that a limited partnership must be formed under a business name which must comprise the name of one or more general partners. In addition, general partners’ names must be filed on establishment and when changes occur. There are no such requirements for limited partners.

## NEW ZEALAND (SPECIAL PARTNERSHIP)

<sup>15</sup> Section 50 Partnership Act 1908 – “[a] partnership may consist of general partners, who shall be jointly and severally responsible as general partners ... [and] special [limited] partners, who shall contribute to the common stock specific sums in money as capital, beyond which they shall not be responsible for any debt of the partnership” except in certain cases.

<sup>16</sup> Section 51 Partnership Act 1908 – all the partners must sign a certificate containing the information set out in Section 51 which includes the names and addresses of all the partners. This certificate must be acknowledged by each partner before a Justice of the Peace and registered in the office of the High Court of New Zealand (Section 54).

<sup>17</sup> Limited partnerships are not required to file financial accounts with any central registry. However, the income of a partnership and the partners’ shares in the partnership are disclosed to the Commissioner of Inland Revenue in a joint return. This information is confidential to the Commissioner.

<sup>18</sup> Partners’ names and home addresses are filed at the High Court Registry on formation. It is common practice for changes of limited partners to be dealt with by way of contract, utilising a so called “*deed of accession*”. There is no strict statutory requirement for such changes of ownership to be recorded in the High Court, although this would usually occur at the time of renewal of a special partnership after the expiry of its initial term (which has a maximum term of 7 years). Accordingly, the public record may not be current in identifying beneficial owners.

## UNITED KINGDOM

<sup>19</sup> Limited partnerships formed under the Limited Partnership Act 1907 (the “LPA”) but not limited liability partnerships formed under the Limited Liability Partnership Act 2000.

<sup>20</sup> Section 8 of the LPA - a statement as to the firm’s name, business, principal place of business, partners, terms and date of commencement and contribution of the limited partners must be filed with the Registrar of Companies in that part of the U.K. in which the firm’s principal place of business is situated. Failure renders the firm a general partnership (section 5 of the LPA). Statements so filed are available for public inspection (section 16 of the LPA).

<sup>21</sup> Section 8 of the LPA - the principal place of business must be situated or proposed to be situated in the United Kingdom.

<sup>22</sup> However, when the firm is within the scope of the Partnerships and Unlimited (Accounts) Regulations 1993 because each of its members is a limited company or an unlimited company, or a Scots firm, each of whose members is a limited company (wherever those entities are formed) the local corporate partner must under those Regulations append the partnership

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return to its own return- unless the firm is consolidated in group accounts prepared by an EU member state member (or parent of such member).

<sup>23</sup> Sections 8 and 9 of the LPA - all of the partners' names, the contributions of limited partners and whether in cash or otherwise must be filed with the relevant Registrar of Companies on establishment of the partnership and within 7 days of any changes.

### **U.S. (DELAWARE)**

<sup>24</sup> A certificate of limited partnership must be filed with the Delaware Secretary of State.

<sup>25</sup> There is a requirement of a local registered agent. There is no requirement of a local place of business.

<sup>26</sup> For all limited partnerships, the certificate of partnership, which lists the general partners only, is a public record. The identities of limited partners are not disclosed or public.

### **THE BAHAMAS (EXEMPTED LIMITED PARTNERSHIP)**

<sup>27</sup> Section 9, Exempted Limited Partnerships Act 1995 (the "ELPA") - a statement signed by or on behalf of the general partners which includes the general nature of the business, the address in The Bahamas of the registered office of the exempted limited partnership and the full name and address of each of the general partners must be filed with the Registrar of Exempted Limited Partnerships.

<sup>28</sup> At least one general partner must be a Bahamian resident, an international business company existing under the International Business Companies Act 2000, a company incorporated under the Companies Act 1992 or a foreign company registered in The Bahamas under the Companies Act 1992.

<sup>29</sup> Section 6(4) of the ELPA - exempted limited partnerships must have a registered office in The Bahamas for the service of process and delivery of notices and other communications.

<sup>30</sup> Section 19(1) of the ELPA - an exempted limited partnership is required to file an annual return with the Companies Registry. Section 10(1) of the ELPA - additionally, any changes in the registered particulars of the statement of the exempted limited partnership must also be filed at the Companies Registry.

<sup>31</sup> The names and addresses of each general partner must be filed with the Registrar on establishment of the partnership and the information must be updated if any changes occur. Further, pursuant to section 14(3) of the Financial and Corporate Service Providers Act 2000 (the "FCSPA"), a company licensed under the FCSPA should keep a record in respect of each client, including the name and address of all partners registered under the ELPA.

### **BERMUDA (EXEMPTED LIMITED PARTNERSHIP)**

<sup>32</sup> Certificate of Particulars of Limited Partnership, Certificate of Particulars of Exempted Partnership together with fully executed partnership articles, must be filed with the Registrar of Companies. (n.b. when articles of partnership are amended the revised articles are not required to be registered.)

<sup>33</sup> However, section 17 of the Exempted Partnerships Act 1992 (as amended 1999) (the "EPA") - an exempted partnership shall maintain a resident representative in Bermuda, this person is frequently provided by the local service providers but also a Bermuda exempted company that has appropriate objects can act as Resident Representative.

<sup>34</sup> Section 10(10) of the EPA.

<sup>35</sup> Section 12(1) of the EPA - the partnership must send to the Registrar a declaration stating the general nature of the business transacted by the exempted partnership each year.

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<sup>36</sup> Section 16 of the EPA – If in respect of a particular interval all the partners including limited partners agree in writing that no financial statements or auditors report needs to be prepared, there is no obligation to cause a financial statement or auditor’s report to be prepared for that interval.

<sup>37</sup> During the course of application for consent for an Exempted Partnership details of the beneficial ownership of the General Partners must be disclosed to the Bermuda Monetary Authority – this information is not available to the public. The Certificate of Particulars of Exempted Partnership must include the name and address of the General Partner - section 5 of the EPA. In the case of a Limited Partnership the register of limited partners must be maintained at the Registered Office of the Partnership and is available to be inspected by the public – section 7 and 8 of the Limited Partnership Act 1883.

#### **BRITISH VIRGIN ISLANDS (INTERNATIONAL LIMITED PARTNERSHIP)**

<sup>38</sup> A memorandum which includes the names of all general partners must be submitted to the Registrar for registration. (The articles only have to be submitted to the registered agent of the limited partnership.)

<sup>39</sup> However, must maintain a registered agent in the British Virgin Islands.

<sup>40</sup> Section 82 The Partnership Act 1996.

<sup>41</sup> Not required unless it is a public fund registered under the Mutual Funds Act 1996, in which case annual audited financial statements must be kept available for examination by the Registrar of Mutual Funds and all investors of the public fund at the fund’s place of business or registered office in the British Virgin Islands. Managers and administrators of mutual funds are also required to appoint an auditor.

<sup>42</sup> See footnote 40 above.

<sup>43</sup> A memorandum which includes the names of all general partners is required to be filed at the Registry on establishment. An amendment to this memorandum is necessary to effect the admission of additional general partners. Additional limited partners are admitted by making an amendment to the articles which need not be filed at the Registry. The Anti-Money Laundering Code of Practice requires service providers to maintain records of identity in respect of new clients except in circumstances where the client has been introduced by a similarly regulated entity from another jurisdiction. These records need not be in the BVI as long as they are accessible and the service provider is satisfied that they are being mentioned.

#### **CAYMAN ISLANDS (EXEMPTED LIMITED PARTNERSHIP)**

<sup>44</sup> Section 9(1) The Exempted Limited Partnership Law (2001 Revision) (the “ELPL”) - An exempted limited partnership must be registered with the Registrar of Exempted Limited Partnerships. It comes into existence on completion of the partnership document but does not obtain the benefit of limited liability until registered.

<sup>45</sup> At least one general partner must be an individual resident in the Cayman Islands or a company registered under the Companies Law or registered under Part IX of the Companies Law or a partnership registered under the ELPL.

<sup>46</sup> Section 6(4) of ELPL.

<sup>47</sup> Section 19 of the ELPL - an exempted partnership must file with the registrar each year a return certifying that the exempted partnership has complied with section 10(1) (notification of any changes) and there has been no breach of the declaration under section 9(1) (f) (not undertake business with the public in the Island).

<sup>48</sup> Partner information which must be filed is set out in some detail in section 9(1)(d) of the ELPL. Changes in general partners must also be filed under section 10. A Register of Limited Partners is maintained at the registered office and is available for public inspection.

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## HONG KONG

<sup>49</sup> Section 4 of the Limited Partnerships Ordinance – limited partnerships must be registered with the Companies Registry.

<sup>50</sup> There are no statutory requirements for a registered office in Hong Kong; however, a limited partnership must carry on business in Hong Kong to take advantage of the Limited Partnerships Ordinance.

<sup>51</sup> A limited partnership is not required to file its financial accounts with a central registry. However, a limited partnership must provide supporting information for its profits tax return which is filed with the Inland Revenue Department. The Inland Revenue Department has broad authority to require information to be provided to it by a taxpayer.

<sup>52</sup> On the establishment of a partnership a statement which includes the names of all the partners, including limited partners must be filed with the Registry. Any change to the information in the statement must be filed.

## ISLE OF MAN

<sup>53</sup> Section 48(1) of the Partnership Act 1909. The Corporate Service Providers Act 2000 requires that any administration services to a limited partnership is a licensable activity. Under the terms of the corporate service provider regulatory codes and the AML Code, a corporate service provider is required to apply full KYC due diligence on the limited partnership including its constituent parties and partnership assets.

<sup>54</sup> However, there is a requirement for a local partner if a tax exemption is required.

<sup>55</sup> Sub-section 48A(1), The Partnership Act 1909 - Limited partnership must have a place of business on the Isle of Man.

<sup>56</sup> Sub-sections 51(1A) and 51(1B) The Partnership Act 1909 – An annual statement containing the firm name; the general nature of the business; the principal place of business; the name and address of each partner; the name and address of each person who has ceased to be a partner since the last annual statement or, if there has been no previous statement, since the registration of the partnership; and a description of every limited partner or former limited partner.

<sup>57</sup> Filing of accounts not normally required unless the partnership is licensed, eg under the Investment Business Act 1991.

<sup>58</sup> The full name of all partners and their home addresses must be filed with the Registry on establishment and when changes occur. In addition see note 52 above for KYC due diligence by the corporate service provider.

## JERSEY

<sup>59</sup> Article 4 of the Limited Partnerships (Jersey) Law 1994 - in order to form a limited partnership under the Limited Partnerships (Jersey) Law 1994, a declaration must be filed with the Registrar of Limited Partnerships in Jersey stating the name of the partnership, its registered office in Jersey and details of the general partner, the duration of the partnership and such other particulars as may be prescribed.

<sup>60</sup> Article 8(1) Limited Partnerships (Jersey) Law 1994 - the partnership must have a registered office in Jersey, notice of which (and any change in which) must be given to the Registrar of Limited Partnerships.

<sup>61</sup> There is no requirement for a limited partnership to file its financial accounts with any central registry nor any tax authority.

<sup>62</sup> Article 9(2) Limited Partnerships (Jersey) Law 1994 – Unless the partnership agreement provides otherwise, it is not necessary for a limited partnership to appoint an auditor or have its accounts audited.

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<sup>63</sup> Articles 4 and 5 Limited Partnerships (Jersey) Law 1994 - general partners' names must be filed on establishment and when changes occur. Article 8(4) - a register of limited partners must be held at the registered office but need not be filed.

Controversial initiatives by the OECD to facilitate the cross-border exchange of financial information have the potential to create selective barriers to the global trade in financial services; weaken financial privacy; and hand a competitive advantage to some OECD Members over other international financial centres.

Financial crime is a global phenomenon and only a global approach can effectively tackle the problem. Failing that, business will simply migrate to jurisdictions overlooked or excused from full compliance with the new rules. Meanwhile, individual privacy and legitimate business is threatened by an approach to regulation which suggests a 'show me your papers, please' attitude rather than an approach which would properly balance competing considerations in civil society.

This review surveys prevailing standards of regulation of corporate vehicles in 15 OECD and non-OECD Member countries, and proposes that the design of any new rules be created through a process that includes the following elements:

- establishment of a level playing field (i.e. all countries must be subject to the same rules for any given activity, implemented on the same timetable with the same consequences for non-cooperation);
- discussion and decision on policy in a *universal* forum;
- appropriate regard to competing considerations, such as reasonable privacy; and
- regulatory approaches that are proportionate to the risk and benefits associated with the activity being regulated.

By including important empirical information and a perspective hitherto overlooked, this review seeks to add constructively to the current debate on new standards for cross-border activity for corporate vehicles.