GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report
Phase 1
Legal and Regulatory Framework

VANUATU

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Vanuatu 2011

PHASE 1

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About the Global Forum

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

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

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

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

All review reports are published once adopted by the Global Forum.

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

Executive Summary

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

2. Located in the Pacific Ocean off the coast of Australia, Vanuatu is a group of 83 small islands with approximately 240 000 inhabitants. Formerly ruled by both France and the United Kingdom, Vanuatu achieved its independence in 1980. Since that time, Vanuatu has developed an offshore financial centre, a main component of which has traditionally been offshore banking. However, when Vanuatu instituted a physical presence requirement for offshore banks in the early 2000's, its offshore banking sector quickly dissipated and is now very small. Vanuatu continues to actively encourage and allow for the formation of companies, including international companies.

3. Vanuatu has committed to the international standards of transparency and effective exchange of information. The report shows that Vanuatu has the legal framework for the availability of information in place, but certain aspects of the legal implementation need improvement. Ownership and identity information, including in the case of shares held by nominees, is available for all companies and companies are required to register and maintain shareholder registers. In addition, all companies must have a registered office in Vanuatu. Penalties are generally in place to enforce most requirements. Ownership and identity information is available in the case of all partnerships in Vanuatu.

4. Although bearer shares may be issued by international companies, such shares must be immobilised and held by a custodian, and therefore ownership and identity information for the owner of a bearer share is available.

5. Vanuatu has strong anti-money laundering (AML) laws that cover all relevant entities and arrangements. These laws provide for the retention of records of transactions for banks to the international standard. However, in the case of trusts, the AML laws do not require a trustee to maintain ownership and identity information to the standard.

6. Requirements to maintain accounting records to the international standard do not exist in Vanuatu for all entities. These requirements are specifically

lacking in the case of partnerships, international companies and trusts, with the exception of unit trusts. In no case are underlying documents expressly required to be maintained and the requirement to maintain accounting records for a minimum of five years is only in place for companies doing business in Vanuatu and for foundations.

7. In respect of access to information Vanuatu has no powers in its domestic laws that would allow its authorities to obtain information for exchange purposes. This report also highlights substantial weaknesses in Vanuatu's legal and regulatory framework in the field of exchange of information.

8. Vanuatu has been actively negotiating agreements, and recently signed its 12th tax information exchange agreement (TIEA). All of its TIEAs are the same as the OECD Model TIEA in all relevant respects. However, due to the absence of any powers necessary to give effect to the agreements, Vanuatu's TIEAs cannot be considered to provide for effective exchange of information, and for this reason Vanuatu has no agreements to the international standard.

9. A number of elements which are crucial to achieving effective exchange of information are not yet in place in Vanuatu, it is therefore recommended that Vanuatu not move to a Phase 2 Review until it has acted on the factors highlighted in this report and improved its legal and regulatory framework. Many of these improvements could be achieved by simply enacting legislation to provide for access powers pursuant to an exchange of information request, which Vanuatu has advised it has taken steps to complete. A follow up report on the steps undertaken by Vanuatu to answer the recommendations made in this report should be provided to the PRG within six months after the adoption of this report, at which time the question of moving to a Phase 2 review will be reconsidered.

Introduction

Information and methodology used for the peer review of Vanuatu

10. The assessment of the legal and regulatory framework of Vanuatu was based on the international standards for transparency and exchange of information as described in the Global Forum's *Terms of Reference*, and was prepared using the Global Forum's *Methodology for Peer reviews and Non-Member Reviews*. The assessment was based on the laws, regulations, and exchange-of-information mechanisms in force or effect prior to the adoption of this report, other materials supplied by Vanuatu, and information supplied by partner jurisdictions.

11. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Vanuatu's legal and regulatory framework against these elements and each of the enumerated aspects. In respect of each essential element, a determination is made that either (i) the element is in place, (ii) the element is in place but certain aspects of the legal implementation of the element need improvement, or (iii) the element is not in place. These determinations are accompanied by recommendations on how certain aspects of the system could be strengthened (see pages 61-63).

12. The assessment was conducted by a team which consisted of three assessors and a representative of the Global Forum Secretariat: Mr. Kamlesh Chandra Varshney, Director (Foreign Tax & Tax Research), Ministry of Finance, Government of India; Mr. Bhaskar Goswami, Additional Director of Income Tax (Transfer Pricing), Income Tax Department, Government of India; Mr. Luigi Petese, 2nd Department, General Headquarters of the Guardia di Finanza, Government of Italy; and Ms. Amy O'Donnell of the Global Forum Secretariat. The assessment team examined the legal and regulatory framework for transparency and exchange of information and relevant exchange-of-information mechanisms in Vanuatu.

Overview of Vanuatu

13. The Republic of Vanuatu is a Y-shaped archipelago of approximately 83 islands situated in the Southwestern Pacific Ocean, lying approximately 1 750 kilometres east of Australia. The total land area is approximately 12 200 square kilometres.

14. The population of Vanuatu is 234 023 according to the 2009 Census, an increase of 3.5% over the previous Census in 1999. Approximately 95% of the population is indigenous, known as "Ni-Vanuatu". Over 20% live in the two largest cities of Port Vila and Luganville.

15. Vanuatu's people speak over 100 indigenous languages, but English, French and Bislama are the country's official languages.

16. Vanuatu's economy is based mainly on fishing and subsistence or small scale agriculture, which is the source of employment for 2/3 of its population. Its main crops include coconuts, bananas, coffee and yams. In addition, cattle are raised on coconut plantations and large cattle ranches. Tourism has become increasingly important to Vanuatu's economy and for the past decade the government has boosted tourism by airport improvements, resort development and cruise ship facilities. GDP in 2010 was estimated at USD 1.47 billion.

17. The official currency in Vanuatu is the Vatu (VUV), with one US dollar equal to 88.8 VUV as at 23 May 2011.

General information on the legal and taxation systems

18. Vanuatu was previously known as New Hebrides. After 74 years of joint "condominium" rule between France and the United Kingdom, Vanuatu gained its independence on 30 July 1980.

19. The Republic of Vanuatu is an independent parliamentary democracy. Its 52 members of Parliament are chosen in general elections held every four years. The head of state is the President of the Republic, who is elected for a period of five years by an electoral college consisting of Members of Parliament and the presidents of the Provincial Councils.[1] The Prime Minister is elected by the members of Parliament and he appoints the Council of Ministers on which he sits. The 12 co-members of the council of ministers oversee the administration of Vanuatu's 13 government ministries.

20. Vanuatu's Constitution provides for executive and legislative branches of government as well as the judiciary. The Judiciary consists of the Supreme

1. In 1994, the 11 Local Government Councils were changed into six provinces, giving them more autonomy, although still under the rule of the national government.

Court with a Chief Justice as well as a Magistrates Court. The Chief Justice is appointed by the President, on the advice of the Judicial Service Commission.

21. The legal system in Vanuatu is based on the English Common law, while also borrowing from the French Civil system. The Constitution is the supreme law of the Republic of Vanuatu. It provides that the British and French laws in force or applied in Vanuatu immediately before its independence continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu (Constitution of the Republic of Vanuatu, Sec. 95(2)). It also provides that treaties negotiated by the Government must be presented to Parliament for ratification when they concern international organisations, peace or trade; commit the expenditure of public funds; affect the status of people; require amendment of Vanuatu's laws; or provide for the transfer, exchange or annexing of territory. If a treaty conflicts with a law, the law is superior to the treaty. However, all proposed treaties are reviewed during the negotiation stage for compliance with the laws of the land.

22. Vanuatu has no direct taxes, and indirect taxes and fees are minimal. The government derives most of its revenue from customs duties and a value added tax. The VAT is imposed on all goods and services supplied in Vanuatu and is administered by the Director of Customs & Inland Revenue. Vanuatu has a Stamp Duties Act pursuant to which a fee is levied on certain transfers, including marketable securities, transfers on sale, leases, and transfers of shares.

Overview of commercial laws and other relevant factors for exchange of information

23. Companies in Vanuatu can be local, exempted, overseas or international. The two primary statutes for companies law in Vanuatu are the Companies Act and the International Companies Act (ICA). As of the first quarter of 2011, there were 1 701 local companies in Vanuatu, 71 exempted companies,[2] 35 overseas companies and 1 631 international companies.

24. Previously, both local and exempted companies could be formed under the Companies Act. In addition, overseas companies, meaning companies formed in another jurisdiction that wish to register to do business in Vanuatu are subject to the Companies Act. International Companies (IC) can be formed under the ICA. In 2010, the ICA was amended in order to phase out exempted companies and create one structure for international companies, which is the IC.

2. Exempted companies are essentially companies that do not carry on business inside Vanuatu.

25. Partnerships are governed by the Partnership Act and encompass all business relationships not otherwise covered by the Companies Act. Under the Partnership Act, partnerships can be general or limited. Offshore limited partnerships (OLPs) can also be formed pursuant to the Offshore Limited Partnership Act (OLPA), which was enacted in 2009 and has not yet been implemented. There are no OLPs currently registered in Vanuatu. Aside from the law providing for the creation of unit trusts, there is no trust law in Vanuatu, but the government instead relies on the UK common law in regard to trusts.

26. Relevant agencies for exchange of information purposes include the Ministry of Finance, Economic and Public Administration; the Reserve Bank of Vanuatu; the Vanuatu Financial Services Commission; the Vanuatu Financial Intelligence Unit; and the Attorney General's office. In the early 2000s the government created the Vanuatu Financial Sector Assessment Group (VFSAG), which consists of the above-mentioned agencies, in order to better organise its efforts to meet international standards for anti-money laundering. This group navigated the FATF review process, including implementing all of the FATF recommendations and is likely to be involved in coordinating Vanuatu's exchange of information efforts and participation in the Global Forum.

27. The competent authority for exchange of information purposes is the Ministry of Finance, Economic and Public Administration. Within the Ministry there are three departments: the Department of Finance, Department of Customs and Inland Revenue and the National Statistics Office.

28. Vanuatu declared its commitment to the international standards in 2003. Despite its limited resources, Vanuatu has been working to implement the international standards although progress has been slow.

29. Vanuatu has quickly developed a network of tax information exchange agreements (TIEAs) and now has 12 signed TIEAs, two of which are currently in force.

Overview of the financial sector and other relevant professions

30. Vanuatu commenced its development as an offshore tax centre in the 1970s and has developed regimes for banking, insurance, trust management and shipping. The finance sector in Vanuatu, consisting of banks and insurance providers, contributes about 7% to Vanuatu's GDP annually.[3] The government created the Vanuatu Investment Promotion Authority (VIPA) with the primary role of the promotion of foreign direct investment into Vanuatu.

3. Vanuatu Financial Services Commission website: *www.vfsc.vu*, accessed 21 June 2011

31. Vanuatu's offshore regime was expanded by the passage of the International Companies Act (ICA) in 1993. In addition, foreigners may conduct business in Vanuatu by setting up a local company through the Companies Act.

32. Vanuatu has both domestic and offshore banks and insurance companies as well as trust companies. Domestic banks are governed by the Financial Institutions Act (FIA) and offshore banks by the International Banking Act (IBA). Domestic, offshore and captive insurance companies are governed by the Insurance Act. The banking sector is relatively small in Vanuatu, consisting of only five domestic banks. While there were previously up to 150 offshore banks in Vanuatu, there are currently only three. This is due to amendments to the IBA that now requires offshore banks to have a physical presence in Vanuatu.

33. The company management business is dominated by lawyers and accountants who render registered agent and company formation services for international companies. There are currently 11 trust service providers operating in Vanuatu. These are licensed as companies with the VFSC and, although not specifically regulated in Vanuatu, they are subject to Vanuatu's AML laws. Vanuatu's Parliament recently passed a Trust Companies and Service Providers Act which would regulate service providers, however the Act has engendered controversy in Vanuatu and the President has not signed it into law.

34. Accountants are required to have professional accounting qualifications recognised in any other Commonwealth jurisdiction before they can operate in Vanuatu. However, there is no agency that specifically regulates the accounting industry in Vanuatu.

35. Lawyers in Vanuatu must be registered with the Law Council in order to practice and must hold a law degree by an institution recognised by the Law Council, be resident in Vanuatu and either be a Ni-Vanuatu citizen admitted as a barrister and/or solicitor in a Commonwealth jurisdiction, or if not a Ni-Vanuatu citizen admitted in a Commonwealth jurisdiction, have at least 2 years supervised practical, legal experience acceptable to the Law Council. Lawyers were brought under the AML regime under amendments to the Financial Transactions Reporting Act (FTRA) in 2000, but only to the extent that a lawyer receives funds in the course of his business for the purpose of deposit or investment.

36. The Reserve Bank of Vanuatu (RBV) oversees the country's monetary policy and is also the regulatory authority for its domestic and international banking and insurance sectors. The Vanuatu Financial Services Commission (VFSC) is responsible for both regulating companies and developing the financial services industry in Vanuatu. The Vanuatu Financial Intelligence

Unit (VFIU) is located in the State Law Office and is the regulatory authority for Vanuatu's AML/CFT regime. The Attorney General is the coordinating body for requests for information pursuant to Vanuatu's Mutual Assistance in Criminal Matters Act (MACMA). The VFIU and the RBV also have a Memorandum of Understanding for AML purposes, under which they share responsibilities in such activities as onsite visits and sharing of compliance information.

Recent developments

37. The government has recently undertaken to draft legislation to give effect to Vanuatu's tax information exchange agreements (TIEAs). To this end, both the VFSC and the Ministry of Finance have committed funds to hire a consultant to draft this legislation.

38. Vanuatu continues to negotiate and sign exchange of information agreements, most recently signing TIEAs with San Marino and Ireland. In addition, Vanuatu is currently negotiating TIEAs with Portugal, Germany, Italy, Spain, Mexico and Greece. It has completed negotiations on TIEAs with South Korea, Canada, and Belgium and those treaties are awaiting the completion of internal processes on the part of treaty partners before they are signed.

Compliance with the Standards

A. Availability of information

Overview

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

40. In Vanuatu, a company can take the form of a local, exempted, overseas, or international company as well as a protected cell company or incorporated cell company. Ownership and identity information, including in the case of shares held by nominees, is available for all companies and companies are required to register and maintain shareholder registers. In addition, all companies must have a registered office in Vanuatu. Although bearer shares are possible for international companies, such shares must be immobilised and held by a custodian, and therefore ownership and identity information for the owner of a bearer share is available.

41. Partnerships can be general, limited or offshore limited partnerships. Offshore limited partnerships and limited partnerships are required to register with the VFSC, and in the case of limited partnerships this registration includes ownership and identity information. An offshore limited partnership

must retain a list of all partners at its registered office. A general partnership must register its business name with the VFSC and this application requires identification of all partners.

42. Unit trusts can be created by statute in Vanuatu and require registration with the VFSC. Trusts are also recognised in Vanuatu pursuant to UK common law, however there are no statutory trust provisions in its domestic laws. Trustees of trusts and unit trusts are subject to the AML regime in almost all cases, however, the FTRA does not specifically require the trustee to know the identity of the settlors and beneficiaries. Therefore, this information may not be available in Vanuatu.

43. Foundations can be created in Vanuatu pursuant to the Foundations Act, which also requires them to register with the VFSC. The founder, councillors, guardian and secretary are subject to the AML laws and therefore have a duty to have ownership and identity information on the foundation.

44. Clear requirements to retain records of account to the standard do not exist for all entities in Vanuatu. Even for those entities where requirements do exist, there is no requirement to retain underlying documents. Records of account that are required to be kept must be maintained for a minimum of five years only in the case of companies subject to the Companies Act and foundations.

A.1. Ownership and identity information

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

Companies (ToR A.1.1)

Types of Companies

45. The two primary statutes for companies law are the Companies Act and the International Companies Act (ICA). The Companies Act governs local companies, which can either have share capital or not, and overseas companies. The ICA governs international companies (ICs). In addition, protected cell companies (PCCs) can be formed pursuant to the Protected Cell Company Act (PCCA) as well as incorporated cell companies (ICCs) pursuant to the Incorporated Cell Company Act (ICCA).

46. Previously, exempted companies, which were essentially international companies that only carried on business outside Vanuatu, could be formed under the Companies Act. However, in 2010, the ICA was amended to create one structure for international companies, the IC, and phased out exempted companies. Exempted companies existing under the Companies Act, were

granted a provisional certificate of continuation to continue under the ICA, and simultaneously cease to be subject to the Companies Act. A provisional certificate of continuation is valid for five years from the effective date. At the end of five years, a company can apply for continuation as an IC or cease to exist.[4]

47. International Companies are formed in Vanuatu by filing the company's constitution with the Vanuatu Financial Services Commission (VFSC). An IC cannot carry on business in Vanuatu (including banking, trust company, insurance or company management business) or own an interest in immovable property in Vanuatu. An IC can be an international bank or an international insurance company, but must be licensed under the IBA and the Insurance Act respectively in order to do so. The ICA also provides that an IC cannot carry on a trust or company management business unless it is licensed under the Companies and Trust Service Providers Act (Sec. 10, ICA). However, this Act has not yet become law and therefore an IC could not be a trust or company management service provider under the Act.

48. A PCC is a single legal entity with separate and distinct cells within it, created to segregate the company assets. Assets and liabilities of one cell are segregated from those of the other cell; however each cell is not a separate legal entity. For these reasons, the directors of a PCC must keep cellular assets separate and separately identifiable from non-cellular assets, and cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells. There is currently one PCC registered in Vanuatu. ICCs are entities where each incorporated cell is a separate and distinct corporate entity from the ICC itself. There are currently no ICCs registered in Vanuatu.

49. A PCC or an ICC can only be a captive insurance company within the meaning of the Insurance Act, a mutual fund within the meaning of the Mutual Funds Act or a unit trust within the meaning of the Unit Trusts Act (see Trusts section below).

50. A PCC may create and issue shares in any of its cells (Sec. 7). Assets in a PCC can be both cellular and non-cellular, with non-cellular assets being the assets of the company not attributable to the company's cells, also known as the core (Sec. 4(7), PCCA).

51. Both PCCs and ICCs are also subject to the Companies Act (Sec. 2(3), PCCA and Sec. 7, ICCA) and therefore there are ownership and identity requirements for both, although the Companies Act does not refer to either entity specifically.[5]

4. Guidelines were issued by the VFSC to further explain these changes (Practice Note No. 2 of 2011).
5. The Companies Act was enacted approximately 15 years before either the ICC Act or PCC Act.

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

Companies Act

52. A company that wishes to do business in Vanuatu is incorporated by application to the VFSC. The application must include the full names, addresses and nationalities of all the applicants, the nature and place of the business, and the address of its registered office. This application must be accompanied by the company's memorandum and/or articles of association. Before granting a permit, the Minister may require further information regarding the company or any persons having an interest in the company (Sec. 4, Companies Act).

53. Companies must have a registered office in Vanuatu. Any change to the registered office must be provided to the registrar within 14 days of the change. Any book or account required to be kept by the company that is not kept at the registered office, must have a duplicate kept somewhere within Vanuatu (Sec. 112, Companies Act).

54. At least seven persons in the case of a public company or two persons in the case of a private company must subscribe their names to the company in its memorandum, which must be filed with the application. It must include:

- the full names, addresses and nationalities of the subscribers
- the name of the company
- whether it is a local or exempted company
- the part of Vanuatu where its registered office will be situated; and
- the names of the first directors of the company.

55. To amend its memorandum, a company must apply to a court and deliver this to the registrar within 21 days (Sec. 8).

56. Companies must submit an annual return. In the case of a company not having share capital, it must still make an annual return stating the address of the registered office of the company, the address of the place where the share register is kept (if other than at the registered office), among other things. Public companies and private local companies with a "turnover in excess of VUV 20 000 (approximately USD 225) in any year", as well as regulated entities (banks, trust companies and insurance companies), must attach a balance sheet certified by a director and the secretary of the company and an auditor's report. The requirement to submit an annual return is in force for overseas companies as well (Sec. 127, Companies Act).

57. As described above, exempted companies are being phased out in order to have one form of international company. However, annual reporting

continues to be required for these companies. They are required to forward to the Commission a return in the prescribed form, on each anniversary of its registration under the Companies Act (Sec. 95C, ICA). The return must include the address of the registered office, the nominal share capital, a list of present members (including address, nationality, number of shares held and the amount paid) and a list of the directors and secretaries (including their address and nationality) (Schedule 2, ICA Regulation Order No. 34 of 2011). In the case of exempted private companies (as opposed to exempted public companies) that are not banks, trust companies, insurance companies or securities dealers (also called "Schedule 3 companies" pursuant to the Companies Act), the annual return does not have to include the names of members or directors, but must set forth whether, to the best of the director and secretary's knowledge, any member of the company is acting or has at any time during the period to which the return relates acted as agent or nominee. If a member has so acted, the return must set forth the full name (or former name), residential address (or address of the registered office of a corporation), and for an individual, the occupation of the person for whom each member has acted as a nominee (Schedule 1, ICA Regulation Order No. 34 of 2011).

International Companies Act

58. An international company (IC) can be formed in Vanuatu by filing with the VFSC the company's constitution. The constitution must state the name of the company, the address in Vanuatu of the company's registered office, the name and address within Vanuatu of its registered agent and the purpose for which it is incorporated (Sec. 3). It may state the names of the directors, but does not have to.

59. If an IC wishes to amend its constitution it must file a resolution with the VFSC within 14 days of such change. The resolution must be certified by the lawyer advising the company as well as its registered agent (Sec. 7).

60. An IC must have a registered office and a registered agent in Vanuatu at all times (Sections 34 and 35, ICA). The directors must notify the VFSC in writing within 14 days of any change to either. ICs are not required to file an annual return or to submit audited financial statements.

Company ownership and identity information required to be held by companies

Companies Act

61. Every company subject to the Companies Act, except an overseas company, must keep a register of its members which includes the names and addresses of the members, the shares held by each member, distinguishing

each share by number and the amount paid on the share and the date at which each person became and/or ceased, to be a member. This is equivalent to an ongoing requirement to update the register. The register must be kept at the registered office, although, if the work in creating it is done at another office of the company it may be kept there as long as it is within Vanuatu. However, every company must notify the register of the place where its register of members is kept and any change to that place (Sec. 114, Companies Act).

62. The Companies Act defines the term "member" as the subscribers of the company, who are deemed to have agreed to become members of the company and on its registration are entered in its register of members and "every other person who agrees to be a member of the company and whose name is entered in its register of members."

63. A company having share capital may also keep in any country outside Vanuatu a branch register of its members resident in that country (Sec. 123, Companies Act). The company must give the VFSC notice of the office where any branch register is kept and give notice of any change within 14 days of such change. A branch register is deemed to be part of the company's register and must be kept in the same manner as the principal register (Sec. 124, Companies Act). The company must send a copy of every entry in its branch register to its registered office as soon as possible after the entry is made and must keep a duplicate of the branch register at the location of the principal register and update it "from time to time".

64. A company with more than 50 members must also keep an index of the names of members of the company and must make any necessary changes within 14 days (Sec. 115). This must be kept in the same place as the register of members.

65. The ICC Act expressly provides that Section 114 of the Companies Act, which requires a company to keep a register of members, applies and that an ICC must keep a register of members. In addition, an ICC must keep a register of the members of each of its incorporated cells (Sec. 19, ICCA). There is no similar provision in the PCC Act. However, a PCC is also subject to the Companies Act (Sec. 2(3), PCCA), and is therefore required to keep a register of members. Because the PCC Act does not define the term "member", and does not expressly require a separate register for each cell, it is not entirely clear whether the register of members would include all the holders of interests in the cells of a PCC. However, the directors of a PCC are required to keep cellular assets separate and identifiable from non-cellular assets. They must also keep cellular assets attributable to each cell separately and they must be separately identifiable (Sec. 4(3), PCCA). Implicit in all of this is a requirement to keep details of cells and the owners of cellular assets. In addition, because a PCC must be an insurance company, mutual fund or unit trust, it would be regulated by the VFSC. Moreover, as there is currently

only one PCC in Vanuatu and it is an insurance company, the materiality of the issue is minor. It is nonetheless recommended that Vanuatu clarify its laws to expressly require that PCCs keep a register of all cells of a PCC and its owners.

66. Every company must also keep at its registered office a register of its directors and secretaries, including the full name, residential address, nationality, occupation and any other directorships held by that person. In the case of a corporation, it must include the corporate name and registered or principal office (Sec. 209, Companies Act).

67. Pursuant to the Stamp Duties Act, any transfer of shares cannot be registered, recorded or entered into the books of a corporation unless the instrument of transfer is duly stamped and the transfer is not valid until it is stamped (Sec. 34). This includes bearer shares (see Bearer Shares section below).

International Companies Act

68. An IC must keep a register of members containing the names and addresses of persons who hold registered shares in the company, the number and class of each share and the date on which the name was entered in the register (Sec. 58). In the case of bearer shares, the total number of each class and series of bearer shares must be recorded. Recent amendments to the ICA regarding bearer shares also added the requirement that, in the case of bearer shares, the share register must also list the name and address of the custodian (see Bearer Shares section below). This register must be kept at the registered office of the company.

69. If there is unreasonable delay in entering information into the register of members, or information is omitted or inaccurate, a member may apply to the court for an order that the register be rectified (Sec. 61, ICA). Taken together with the requirement that the ICA specifically states that the IC must "cause to be kept" the register of members and it must include when a person becomes or ceases to be a member, the result is that this is equivalent to an ongoing requirement to keep the share register up to date.

70. The IC must also keep minutes of all meetings and copies of all resolutions assented to by directors, members and committees (Sec. 63(2)). It must also keep a register of its directors, containing the director's name, address and citizenship, and in the case of a company, its full name and registered office address in its country of legal existence.

Foreign Companies

71. Foreign incorporated companies may do business in Vanuatu pursuant to the Companies Act and are considered "overseas companies". An

overseas company must apply to the Minister for a permit before establishing a place of business in Vanuatu. The application must be made in writing and signed by the director or secretary. It must be accompanied by a certified copy of the charter, statutes and articles of the company, the names and addresses of at least two natural persons resident in Vanuatu who are the authorised agents of the company and a statement of the nature and place of business of the company (Sec. 359, Companies Act). Registration must also include full names, residential address, nationality and occupation of each director and the name and residential address of each secretary. When an application is approved by the minister it is then recorded in the Registrar of companies. If any change is made to the information provided to the Registrar, the company must deliver a return containing the details of the change within one month (Sec. 360).

72. While an overseas company is not required to maintain a share register, the authorised agents of the company, who must be residents of Vanuatu, would be subject to the FTRA, as a person who provides a registered office, a business address or accommodation, correspondence or an administrative address for a company is considered a "financial institution" and therefore subject to the requirements of the AML laws. The authorised agents would therefore have a duty to verify the identity of the owners of the company as well as an ongoing duty to keep this information up to date (Sec. 10A, FTRA). Therefore ownership and identity information on an overseas company is available in Vanuatu.

Regulated Entities

73. The Financial Institutions Act (FIA) is the primary statute for domestic and international banks (or foreign licensees). Pursuant to the FIA, only bodies corporate may carry on a banking business in Vanuatu and the Companies Act applies to entities licensed under the FIA, although if there is any conflict in the provisions the FIA prevails.

74. The International Banking Act (IBA) governs offshore banks, defined as banking business that is conducted in a currency other than the Vatu and with a person who is not a resident of Vanuatu. Prior to the passage of the IBA in 2002, offshore banks were "exempted banks" under the Banking Act, and subsequently the FIA. As of 2003, any exempted bank was deemed to have been issued a license to carry on the international banking business under the IBA and is now governed by the IBA. The IBA requires that an international bank obtain a license, by application to the Reserve Bank. Such registration must be accompanied by a statement disclosing the ultimate and intermediate, if any, beneficial ownership of the applicant (Sec. 7(2), IBA). There is no requirement to update this information, however offshore banks are also subject to the ICA and therefore required to keep

an updated share register, although in situations where there is a conflict between requirements of the IBA and the ICA, the IBA prevails (Sec. 3, IBA).

75. An important aspect of the IBA is that an offshore bank must have a physical presence in Vanuatu (Sec. 20). This requires that a bank have physical premise in Vanuatu within 30 days of licensure at a fixed address in Vanuatu from where the licensee carries on its business. In addition, the licensee must maintain operating records, including financial statements, at this location and its employees must operate full time from there. The Act defines records as: accounting records; books, registers, documents and vouchers; securities and financial instruments; and any record of information or date (Section 1, IBA). Therefore, this would include ownership information since the ICA requires that any IC keep a register of members. At least one of these employees must have a day to day knowledge of the international banking business with authority to participate in the management of that business. A licensee cannot change the address of its premises without written approval from the RBV.

76. Insurance companies are governed by the Insurance Act and regulated by the RBV. A person must not act as an insurer unless he or she possesses a license. A licensee must maintain a principal office in Vanuatu where its books and records are kept (Sec. 22). Currently there are 61 insurance companies in Vanuatu. An international insurer, meaning an insurance company incorporated in Vanuatu that does not provide domestic insurance products in Vanuatu must have its head office in Vanuatu or appoint a licensed insurance manager in Vanuatu to represent the international insurer. Similarly, a captive insurer must appoint a licensed insurance manager in Vanuatu to represent the captive insurer (Sec. 14).

Other Relevant Entities

77. Mutual Funds may be formed in Vanuatu pursuant to the Mutual Funds Act of 2005. A mutual fund administrator must be a company incorporated in Vanuatu, an overseas company, a limited partnership under the Partnership Act or a partnership constituted for the sole purpose of undertaking the administration of mutual funds. An administrator must apply to the VFSC for a license and is covered by the AML laws (see AML section below). There is currently one licensed mutual fund administrator in Vanuatu.

Nominees

78. A person acting as (or arranging for another person to act as) a nominee shareholder for another person, is considered to be a financial institution under Vanuatu's AML laws, and is therefore required to know the owner of a share in all cases (see AML section below). Thus, ownership and identity information on shares held by a nominee is available in Vanuatu.

AML

79. Vanuatu's AML regime is mainly derived from the Proceeds of Crime Act (POCA) and the Financial Transactions Reporting Act (FTRA). The FTRA was most recently amended in 2005 just before Vanuatu's FATF mutual evaluation. In addition, the Vanuatu Financial Intelligence Unit (VFIU) issued guidelines to provide a practical interpretation of the FTRA and to give examples of good practices, although the Guidelines do not have the force of law in Vanuatu.

80. The FTRA applies to financial institutions, defined by the Act to include (among other things):

- the Reserve Bank of Vanuatu
- all banks and credit unions, including offshore banks
- a person carrying on a business of administering or managing funds on behalf of an international company within the meaning of the International Companies Act
- a person carrying on a business as a trustee in respect of funds of other persons or as a trustee or manager of a unit trust.
- a person carrying on the business of an insurer, insurance intermediary, securities dealer or futures broker
- a lawyer, notary or accountant when providing services to a client relating to any or all of the following: (i) buying or selling real estate or business entities; (ii) managing money, securities or other assets; (iii) managing bank, savings or securities accounts; (iv) organising contributions for the creation, operation or management of companies; or (v) creating, operating or managing legal persons or arrangements.
- a person (whether or not the person is a trust or company service provider) providing all or any of the following services: (i) forming or managing legal persons; (ii) acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; (iii) providing a registered office, a business address or accommodation, correspondence or an administrative address for a company, a partnership or any other legal person or arrangement; (iv) acting as (or arranging for another person to act as) a trustee of a trust; (v) acting as (or arranging for another person to act as) a nominee shareholder for another person.
- securities broker/dealers and mutual fund managers

81. A financial institution must verify a customer's identity when he or she opens an account with the financial institution or engages its services or enters into a business relationship with it. It must also verify a person's identity if a person conducts or attempts to conduct a transaction through or by using the financial institution and the financial institution has reasonable grounds to believe that the person is undertaking the transaction on behalf of another person. In that case, in addition to verifying the identity of the customer, it must also verify the identity of the person for whom, or for whose ultimate benefit, the transaction is being conducted (Sec. 10). For purposes of the FTRA, a transaction means any deposit, withdrawal, exchange or transfer of funds and includes the opening of an account and the beginning of a fiduciary relationship (Sec. 3).

82. A financial institution must also identify and verify the identity of a customer if it carries out an electronic funds transfer for the customer, it suspects the customer is involved in a money laundering offence or a financing of terrorism offence, or it has doubts about the veracity or adequacy of the information it had previously obtained (Sec. 10A).

83. The only exceptions to the verification requirement are: when the person conducting the transaction is a financial institution subject to prudential regulation by the RBV or the VFSC; if the transaction is part of an established business relationship and the person has already produced satisfactory evidence of identity (unless the financial institution suspects the transaction is suspicious or unusual); or if the transaction is an occasional transaction not exceeding VUV 1 million (approximately USD 11 000) other than an electronic funds transfer, unless the financial institution suspects the transaction is suspicious or unusual.

84. If the customer is an individual, the covered institution must adequately identify and verify his identity, including obtaining information relating to: the individual's name, address and occupation and the national identity card or passport or other applicable official identifying document. If the customer is a legal entity, the financial institution must adequately verify its legal existence and structure, including: the customer's name, legal form, address and its directors; the principal owners, beneficiaries and control structure; the authorisation of any person purporting to act on behalf of the customer; and, when entering into a business relationship, information on the purpose and intended nature of the business relationship (Sec. 10C).

85. The FTRA requires that financial institutions keep records of evidence of a person's identity and a record of all correspondence between the identified person and the financial institution for a period of six years after the evidence was obtained or the date of the correspondence, as the case requires. The FTRA does not provide for where records must be kept – whether within or outside Vanuatu.

Bearer shares (ToR A.1.2)

86. The ICA allows for the issuance of bearer shares. Recent amendments to the ICA now provide that bearer shares must be immobilised and held by a custodian no later than December 2012.

87. Any bearer share issued by an IC may receive dividends and enjoy any other rights of a shareholder provided in the constitution. The coupons or rights to dividends may be divided from any other rights attaching to the share (Sec. 22). A bearer share is transferable by delivery of the share certificate (Sec. 26).

88. The total number of each class and series of shares issued to bearer must be recorded in an IC's register of members (Sec. 58, ICA). Upon the issuance or conversion of a bearer share, the IC must enter into the register of members that fact of the issue of the bearer share or conversion of a registered share and the date of its issue or conversion. When a bearer share is surrendered, that date must also be entered into the register.

89. Pursuant to the Stamp Duties Act, a bearer share must be stamped before being issued (Sec. 38) and a transfer of shares cannot be registered unless stamped (Sec. 34).

90. In 2010, Vanuatu enacted an amendment to the ICA which provides the legal framework for the immobilisation of bearer shares and requires that bearer shares be held under custodial arrangements. A company having bearer shares on the date of commencement of the Act has until 31 December 2012 to place their bearer shares with a custodian and immobilise them. A bearer share in an IC becomes disabled unless it is held by a custodian, and during the period in which it remains disabled, the share ceases to carry any of its entitlements and rights.

91. The Minister of Finance also issued Regulations (Order No. 64, Custody of Bearer Shares Regulations or CBS Regulations) to provide further guidance on bearer shares and to facilitate a smooth transition to the new regime. This Regulation specifically details the approval and recognition of custodians by the VFSC, and rules governing custodians.

92. There are two categories of custodians in Vanuatu: "authorised" and "recognised". Entities eligible to apply for authorised custodian status are trust companies licensed under the Trust Companies Act, as well as bodies corporate carrying on trust business that are: incorporated outside Vanuatu, and are not resident in Vanuatu and do not have a place of business in Vanuatu. All applicants seeking approval as authorised custodians must

satisfy the Commission that they meet the Commission's "fit and proper" test,[6] and they have the necessary systems in place for the safe custody of bearer shares. The VFSC is currently conducting staff training on the implementation of this new regulation and at this time have not yet approved any custodians. Although the timeframe for implementation is long (almost two years), it is clear that Vanuatu is taking steps to implement the rule. It is nonetheless recommended that Vanuatu quickly implement the process for the approval of custodians in order to give effect to the immobilisation of bearer shares.

93. A recognised custodian may be an investment exchange or clearing organisation that operates securities clearance or settlement systems in a jurisdiction which is a member of the Financial Action Task Force and that the Commission identifies and publishes in the Gazette (Sections 5(2) and (3), CBS Regulations).

94. In the case of an authorised custodian, when a bearer share is delivered to him/her, the person depositing it (either another authorised custodian, a company or the person depositing the share) must tell the authorised custodian the full name of the beneficial owner of the share and the name of any other person having an interest in that share (Sec. 6, CBS Regulations). The authorised custodian cannot accept a bearer share without this information. An authorised custodian is required to give notice to the registered agent of the IC[7] that he/she is the holder of the bearer share within 14 days of its receipt (Sec. 7, CBS Regulations). The authorised custodian is required to keep the notice containing the name of the beneficial owner and any other person having an interest in the share, a notice containing the name and address of any person registered as having a right to any entitlements under the share, and a record of the location of the bearer share either at its principle office in Vanuatu or at an office approved by the commission in writing.

95. In the case of a recognised custodian, when a bearer share is delivered to or deposited with him/her, the IC that delivers the share or the person

6. The fit and proper test seeks to assess the honesty and integrity, competence and financial soundness of approved persons to fulfil their duties and responsibilities as authorised custodians. To assess honesty and integrity, the Commission will consider, among other things, the following: criminal records; financial position; civil actions against individuals to pursue personal debts; refusal of admission to, or expulsion from, professional bodies; sanctions applied by regulators of other similar industries; and previous questionable business practices. For bodies corporate incorporated and operating outside Vanuatu, the Commission will also consider the prudential regulation and anti-money laundering obligations with which the bodies have to comply.
7. An IC must have a registered agent in Vanuatu at all times (see paragraph 61).

depositing it must, within 14 days from the date the share is delivered, give the registered agent of the IC proof of the delivery or deposit of the share and notice containing the full name of the beneficial owner of the bearer share and the name of any other person having any interest in the share (Sec. 6(3), CBS Regulations). This is different from the case of an authorised custodian, where the duty is on the custodian to provide this information to the registered agent.

96. A transfer of the beneficial ownership or interest in a bearer share held by either a recognised or authorised custodian is not effective until written notice is given to the respective custodian. Such notice would include the full name of the beneficial owner of the share and anyone who has an interest in that share (Sec. 12, CBS Regulations). It is not clear whether this would then trigger a requirement to inform the registered agent of the change in ownership; however it is clear that the custodian (either recognised or authorised) would have this information. Additionally, pursuant to the FTRA a registered agent must conduct "ongoing due diligence on its relationship" with the customer (Sec. 9D).

97. If an authorised custodian fails to comply with the regulations, the VFSC may revoke its approval of the person as an authorised custodian. The VFSC may also cease to recognise a person as a recognised custodian. Both revocations must be published in the Gazette and in a newspaper in Vanuatu. The custodian must then, for each bearer share in the company the custodian holds, give notice to the registered agent of the company, the beneficial owner of the share and any other person who has an interest in the share. The person must then cease to be the custodian of a bearer share within 14 days and deliver the share, original notices and notices sent on the ownership of the share to the registered agent of the company (Section 11). In addition, under the FTRA if the registered agent does not comply with requirements to verify the identity of a client or fails to retain the records it collects of a person's identity, the registered agent is guilty of an offence punishable on conviction: in the case of an individual – by a fine not exceeding VUV 2.5 million (approximately USD 27 500) or imprisonment for a term not exceeding 2 years, or both; or in the case of a body corporate – by a fine not exceeding VUV 10 million (approximately USD 110 000).

98. The rules on bearer shares result in a registered agent always knowing either who the beneficial owner of the bearer share is (in the case of a recognised custodian) or who the custodian of the share is (in the case of an authorised custodian).

99. Neither the ICA nor the Custody of Bearer Shares Regulations expressly require an authorised custodian to inform the company or the registered agent who the owner of the bearer share is when there is a transfer in ownership. However, because the registered agent is covered by the AML laws

and therefore required to know the ownership and identity information on shareholders, including an ongoing duty to conduct customer due diligence, the registered agent would have this information. In addition, because he/she knows who the custodian of the immobilised bearer share is he/she would be able to get it. This would be the case even if the custodian is located outside Vanuatu. Further review of the implementation of this law and how it works in practice will be the subject of further analysis in the Phase 2 Review of Vanuatu.

Partnerships (ToR A.1.3)

100. Partnerships can be general, limited or offshore limited partnerships. Offshore limited partnerships (OLPs) are new to Vanuatu and were first allowed in the Offshore Limited Partnerships Act (OLPA) of 2009. There are currently no OLPs registered in Vanuatu.

101. General partnerships are not required to register with the VFSC; however, any partnership carrying on business in Vanuatu must be registered under the Business Names Act.

102. Limited partnerships (LPs) may consist of 20 or less people, with at least one person being a general partner who is liable for all debts and obligations of the firm and one or more limited partners. A body corporate may be a limited partner.

103. Offshore Limited Partnerships (OLPs) can be either offshore professional partnerships or offshore general partnerships (Sec. 3). An offshore professional partnership must be made up of individuals and may only practice in accounting, actuarial science, engineering, law or another field determined by the VFSC. By contrast, an offshore general partnership may be made up of both individuals and bodies corporate.

Ownership and identity information required to be provided to government authorities

104. Under the Business Names Act, a general partnership doing business in Vanuatu must register its name with the VFSC. Registration requires a general partnership to state the name and principal place of business, postal address, and the full name, address, occupation and nationality of every partner (Schedule 2). If a partner is a corporation, it must state the name of the corporation, address of registered office and the country and date of incorporation. A general partnership must also notify the registrar of "any change in the particulars registered" within one month or longer if the registrar allows (Sec. 10). The registration expires no more than one year from the date of

registration, with its duration depending on the date of registration[8] (Sec. 7). Registration must be renewed within one month of expiration (Sec. 8).

105. A limited partnership must be registered with the registrar of companies before it commences any business or undertaking. If it does not so register it will be deemed to be a general partnership (Sec. 48). Registration is effected by delivering to the registrar a statement signed by the partners containing:

- the firm's name;
- the general nature of the business;
- the principal place of the business;
- the full name of each of the partners;
- the term of the partnership;
- a statement that the partnership is limited and the description of every limited partner as such; and
- the sum contributed by each limited partner (Sec. 51, Partnership Act).

106. Any change to the above must be delivered to the registrar and signed by the firm within seven days of any such change (Sec. 52, Partnership Act).

107. The registrar must file any statement received and must keep at his office a register and index of all LPs registered and the statements in relation to such partnerships. Any person may inspect the statement by payment of a fee.

108. OLPs may not carry on any business that an IC would be restricted from carrying out, which includes banking and trust company services.

109. OLPs must register annually with the VFSC which must maintain a register of OLPs. The application must state the name of the OLP, the address of its registered office, the name and address of each general partner, the place of incorporation and registered office(if the general partner is a body corporate), as well as the term of the partnership and the nature of business to be carried out. The application must include a copy of the partnership agreement and a certificate by a general partner of the partnership stating that one of the partners is: (i) a registered international company; (ii) a trust company

8. The Act states that in the case of a name registered on or before 29 September of any year the registration expires on 30 September of that same year. Where the registration takes place after 30 September in any year, it expires on 30 September of the following year (Sec. 7).

acting as trustee or nominee of a non-resident; or (iii) a non-resident. A trust company acting as a trustee for a non-resident is deemed to be a non-resident.

110. If there is a change in any of these matters, the offshore limited partnership must file with the Commission a notice signed by a general partner within 30 days of the change, setting out the change (Sec. 7).

111. An OLP must have its registered office in Vanuatu at the registered office of a trust company. An OLP that changes the address of its registered office must give the Commission written notice of the new address within seven days of the change (Sec. 9).

Ownership and identity information held by the partnership

112. The Partnership Act does not specifically require that partnerships, whether general or limited, maintain a register of members. However, in the case of LPs, they must provide this information upon registration and update it when there is any change, therefore presumably the LP would retain a record of this.

113. An OLP must keep at its registered office the full name and address of each limited partner who is an individual or, for a body corporate, its full name, the place where it is incorporated and its registered or principal office. Where the participation by limited partners is defined by percentage interests or by the number of units or other similar rights held by them, the OLP must keep a record of the percentage interest or the number and class of units or other rights held. It must also keep a copy of the partnership agreement and each change made to it, a statement of the amount of any contributions agreed to be made by limited partners and when the contributions are to be made, the amount of money and the nature and value of any other property contributed by and/or returned to each limited partner and the date of each. The OLP must ensure that this information and documents are amended within 30 days after any change (Sec. 9, OLPA).

Conclusion

114. Ownership and identity information is available in the case of all partnerships in Vanuatu.

Trusts *(ToR A.1.4)*

115. The Unit Trusts Act of 2005 allows for the creation of unit trusts in Vanuatu. Apart from the Unit Trust Act, there is no trust law in Vanuatu, but the authorities instead rely on the common law of the UK.

116. Apart from unit trusts, trusts are not registered, although there is a stamp duty payable on the instrument constituting them (Stamp Duties Act). Unit trusts must be registered with the VFSC, the manager of the scheme must be licensed under the Act and the trustee must be a licensed trust company under the Trust Companies Act (Sec. 2). There are currently eight registered unit trusts in Vanuatu.

117. According to the Trust Companies Act, trustees of a trust (other than a unit trust) can be either trust companies or non-trust companies. Trust companies must be licensed by the VFSC. A trust company can have its head office or its registered office outside Vanuatu, however, it must notify the Minister of its principal office in Vanuatu, the name of one of its officers resident in Vanuatu who is the authorised agent of the company, and the name of another officer resident in Vanuatu who, in the absence of the other named officer, is to be the authorised agent of the company. A trust company must notify the Minister in writing of any change to its principal office in Vanuatu or either or both of the officers (Section 3, Trust Companies Act).

118. Because a trust (other than a unit trust) is not required to be registered in Vanuatu, the VFSC would not necessarily know about its existence. However, anyone carrying on a business as a trustee in respect of funds of another person, whether a trust company or not, or simply acting as (or arranging for another person to act as) a trustee is considered a financial institution under the FTRA and therefore subject to the AML regime. A financial institution is required to retain ownership and identity information on the trust (Sec. 10, FTRA) although, this is limited by the fact that the FTRA does not expressly require that the financial institution obtain information on the identity of the settlor and beneficiaries of the trust. The FTRA does require identification of the beneficiaries of a legal entity, however a trust is not considered a legal entity in Vanuatu and therefore this would not apply. This is a gap in the law that could impede the availability of information on trusts and Vanuatu should amend its laws to ensure that information on the identity of the settlor and beneficiaries of a trust is available.

119. Although Vanuatu's Parliament recently passed a Trust and Companies Service Providers Act, which Vanuatu advises would regulate trust and company service providers and require that they retain identity information, the bill has not been signed by the President and is being delayed by political considerations. In addition, Vanuatu recently sought technical assistance in creating a Trustee Act. The Vanuatu authorities advise that they would like to enact both of laws as soon as possible.

Conclusion

120. The AML laws cover both trust companies and non-trust company trustees, without regard to whether a trustee is acting by way of business or not. Therefore, trustees are required by the FTRA to retain identity and ownership information on the customer. However, there is no express requirement that a trustee in Vanuatu know the identity of the settlor or beneficiaries, in line with the standard.

Foundations (ToR A.1.5)

121. Vanuatu enacted the Foundations Act in 2009, providing for the establishment, regulation and operation of foundations in Vanuatu. A foundation is a separate legal entity, incorporated under the Act, into which property is transferred by a founder for a specific purpose, which may be any lawful purpose in Vanuatu. Foundations may be either public or private (Sec. 3, Foundation Act). According to Vanuatu, there are currently approximately 50 foundations registered in Vanuatu.

122. A foundation is established and incorporated by registering the charter of the foundation with the VFSC (Sec. 5, Foundation Act). Registration must be in writing and include the original charter of the foundation; whether the foundation is to be private or public; the foundation's name; the details of the initial assets to be transferred; the name and address of the secretary of the foundation; the address of the registered office in Vanuatu; and must be signed by or on behalf of the founder (Sec. 6, Foundation Act).

123. A foundation must file an annual return with the VFSC. The annual return must be signed by the foundation's secretary and contain the following information: the foundation's name and registered address; the full name and address of each councillor who is an individual; and for a councillor that is a body corporate, its full name, the place where it is incorporated and the address of its registered office. For a public foundation, it must include the audited accounts for the previous financial year and a statement that the information in the return is current as at the date of the return. The foundation must also file a copy of the return in the foundation's register. Registration information does not include the identity of the beneficiaries (Sec. 52, Foundation Act).

124. A foundation must have a founder, who is the individual or body corporate that subscribes to the charter establishing the foundation and irrevocably transfers, or agrees to transfer, the initial assets, if any, to the foundation. A foundation may have more than one founder (Sec. 4, Foundation Act). Although the Foundation Act provides that the person who acts for a founder must be a licensed trust or company service provider in Vanuatu (Sec. 6(3), Foundation Act), the Trust and Company Service Provider Act is not yet law, and therefore it would not be possible for a founder to be licensed under the Act.

125. A foundation must keep a register of its councillors, guardian and secretary at its registered office. The register must contain the following information: for a natural person, the person's full name and any former names, business or usual residential address, nationality, business occupation, and date of birth. For a body corporate: its name and any former names; and the address of its registered office. The foundation must ensure that the register is available for inspection during business hours by the VFSC, founder, councillors, guardian and secretary of the foundation.

126. The FTRA defines a financial institution to include a person (whether or not a trust or company service provider) who forms or manages legal persons or acts as or arranges for others to act as a director or secretary of a company or a similar position in relation to other legal persons. This would include the secretary of the foundation. The secretary would therefore have a duty to perform customer due diligence on the "customer", which would be the foundation, and a legal entity in Vanuatu. The FTRA requires that due diligence on a legal entity includes knowing the beneficiaries of the foundation and therefore this information would be available in Vanuatu (Sec. 10C, FTRA).

Conclusion

127. A foundation is required to maintain and file with the VFSC information about the founders, councillors, guardian and secretary. In addition, pursuant to the FTRA, secretary is required to know the identity of the foundation's beneficiaries.

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

128. Jurisdictions should have in place effective enforcement provisions to ensure the availability of information, one such possibility among others being sufficiently strong compulsory powers.

Companies

129. Under the Companies Act, the penalty for failure to keep a share register or to keep it at the registered office of the company is a default fine (Sec. 114(4)). The same penalty applies for failure to keep an index of members (Sec. 115(4)). Similarly, if a company fails to file an annual return, the company and every officer of the company who is in default is liable to a default fine (Sec. 127(3)).

130. The Companies Act requires that every company notify the registrar of where it will keep its share register. A company that violates this provision is subject to a fine of VUV 1 000 (approximately USD 11)(Sec. 114).

131. Under the Companies Act, any person who knowingly makes a statement which is false or which he does not believe to be true for purposes of obtaining a permit is liable on conviction to a fine not exceeding VUV 200 000 (approximately USD 2 200) and/or imprisonment for up to 12 months (Sec. 24). The same penalty applies for any person, who without lawful authority, makes any material alteration to the company memorandum after the Minister has granted approval.

132. A director or secretary who signs a declaration as part of its required annual report which contains any wilfully false statement or which wilfully omits to state any material fact commits an offense and is liable on conviction to imprisonment for up to six months and/or a fine of up to VUV 100 000 (approximately USD 1 100).

133. Under the ICA, any company that fails to register any change in its constitution results in a daily default fine of VUV 1 000 (approximately USD 11). The VFSC is currently undertaking to change this provision so that penalties will be automatic (able to be instituted without a court order) and with a steeper fine.

134. An IC that wilfully fails to notify the VFSC of any change in its registered office or registered agent is liable to a daily fine of USD 25. The same fine applies to a director who knowingly permits the failure to notify.

135. Under the ICA, if there is unreasonable delay in entering information into the register of members, or information is omitted or inaccurate, a member may apply to the court for an order that the register be rectified. There is no specific penalty for failure to keep an accurate share register, however ownership and identity information is nonetheless available because the registered agent of an IC is subject to the FTRA and is therefore required to identify and verify the identity of its customer, including a duty to conduct ongoing customer due diligence (Sec. 9D). Although identity and ownership information would be available from another source, it is recommended that Vanuatu implement penalties to enforce the requirement that an IC maintain an up-to-date share register.

AML

136. Under the FTRA, if a financial institution contravenes the record keeping requirement, does not comply with requirements to verify the identity of a client, or verify the identity of a customer in cases when a customer carries out an electronic funds transfer or where the financial institution suspects the customer may be engaged in money laundering, or fails to retain the records it collects of a person's identity, including any correspondence with that person the financial institution is guilty of an offence punishable on conviction: in the case of an individual – by a fine not exceeding

VUV 2.5 million (approximately USD 27 500) or imprisonment for a term not exceeding 2 years, or both; or in the case of a body corporate – by a fine not exceeding VUV 10 million (approximately USD 110 000).

Partnerships

137. Under the Partnership Act, any failure to register a limited partnership or to update registration renders each of the partners, upon conviction, liable to a fine of VUV 1 000 (approximately USD 11) for each day the default continues.

138. If an OLP fails to comply with registration requirements, each general partner is guilty of an offence punishable, on conviction, by a fine not exceeding VUV 50 000 (approximately USD 550). For each day on which the offence continues a VUV 1 000 (approximately USD 11) fine applies.

139. If an OLP fails to comply with requirements to maintain a registered office and maintain ownership information, the partnership and each general partner is guilty of an offence punishable, on conviction, by a fine not exceeding VUV 100 000 (approximately USD 1 100) together with VUV 1 000 (approximately USD 11) for each day the offence continues.

Foundations

140. A foundation and each councillor of the foundation that contravenes a requirement to keep information is guilty of an offence punishable, on conviction, by a fine not exceeding VUV 1 million (approximately USD 11 000), together with VUV 1 000 (approximately USD 11) for each day during which the offence continues. Although the Commissioner has the power to implement regulations with expanded penalties, he has not yet done so.

Regulated Entities

141. Any body corporate that carries on a banking business without a license under the FIA is punishable on conviction by a fine not exceeding VUV 10 000 000 (approximately USD 110 000)(Sec. 7(3)). Any entity that fails to comply with the requirements of the FIA and its regulations or aids, abets, counsels or procures any person to commit an offence under the FIA for which penalty is not expressly provided is guilty of an offence punishable on conviction by a fine not exceeding VUV 250 000 (approximately USD 2 800).

142. An applicant for a license under the FIA who furnishes information that is false or misleading is guilty of an offence punishable on conviction by: for an individual – a fine not exceeding VUV 2 000 000 (approximately USD 22 000) and/or imprisonment for up to 2 years; in any other case, by a fine not exceeding VUV 6 000 000 (approximately USD 66 000).

143. A licensee under the FIA who makes any change to its memorandum or articles and fails to inform the RBV is guilty of an offence punishable on conviction by a fine of up to VUV 500 000 (approximately USD 5 600).

144. An applicant for a license under the IBA must not furnish information that is false or misleading in any material way in connection with an application. An applicant who does so is guilty of an offence punishable on conviction by a fine of up to USD 250 000.

145. A offshore bank that that fails to notify the RBV of change in premises, establish a premises in Vanuatu or appoint appropriate employees in relation to the scale of the business is guilty of an offense, punishable on conviction by a fine not exceeding USD 250 000.

146. Pursuant to the Trust Companies Act, any person who carries on a trust business in Vanuatu without a valid license is subject to a fine of up to VUV 50 000 (approximately USD 560) for each day the offence continues.

Stamp Duties Act

147. Pursuant to the Stamp Duties Act, a transfer of shares cannot be registered unless duly stamped (Sec. 34). The penalty for registering any such transfer without doing so is, on conviction, a fine of up to VUV 300 000 and/or imprisonment for up to 2 years.

148. The Act also requires that bearer shares be stamped before being issued (Sec. 38). If a bearer share is issued without being stamped, the corporation issuing it as well as the managing director, secretary or other principal officer at the time it was issued is subject, on conviction to a fine of up to VUV 60 000 and/or imprisonment of up to 12 months.

Determination and factors underlying recommendations

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	**Recommendations**
Although Vanuatu's AML laws cover most trustees and require a trustee to know the identity of the "customer", there is no express requirement that the trustee know the settlor or beneficiaries of the trust.	Vanuatu should ensure that information is available to their competent authority that identifies the settlor and beneficiaries of a trust.

A.2. Accounting records

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

General requirements (ToR A.2.1)

149. The Terms of Reference sets out the standards for the maintenance of reliable accounting records and the necessary accounting record retention period. It provides that reliable accounting records should be kept for all relevant entities and arrangements. To be reliable, accounting records should; (i) correctly explain all transactions, (ii) enable the financial position of the entity or arrangement to be determined with reasonable accuracy at any time; and (iii) allow financial statements to be prepared. Accounting records should further include underlying documentation, such as invoices, contracts, *etc*. and need to be kept for a minimum of five years.

150. Clear accounting requirements do not exist in Vanuatu for all entities. Specifically, for trusts, partnerships and offshore limited partnerships these requirements are either non-existent or not to the standard.

151. The Companies Act contains clear record keeping requirements for local, exempted, and overseas companies and clear requirements can be found in the Foundations Act as well. Companies doing business in Vanuatu are also subject to an annual independent audit. However, although international companies are required to keep records of accounts, these records are not sufficient to explain the transactions of the company and therefore this requirement is not to the standard.

152. There are no underlying document requirements in the laws that require records of account to be kept and only companies doing business in Vanuatu and foundations are required to keep records for at least five years in line with the standard.

Companies

153. Every company doing business in Vanuatu must keep "proper books of account with respect to (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; (b) all sales and purchases of goods by the company; (c) the assets and liabilities of the company" (Sec. 148, Companies Act). These books must give a true and fair view of the state of the company's affairs and explain its transactions. Any director who fails to take all reasonable steps to ensure compliance by the company with the accounting requirements or has by his own wilful act been the cause of any default by the company in this

regard, is liable to imprisonment for up to six months and/or a fine of up to VUV 100 000 (approximately USD 110).

154. The Companies Act requires that books must be kept at the registered office of the company or at such other place as the directors see fit and must at all times be open to inspection by the directors. If the books are kept outside Vanuatu, there must be books available at all times at a place in Vanuatu that would disclose with reasonable accuracy the financial position of the business at intervals not exceeding 12 months and that would enable the company to prepare a balance sheet, profit and loss account or income and expenditure account.

155. In addition, a company doing business in Vanuatu must be audited annually by an independent auditor.

156. An IC must keep "such accounts and records as are necessary in order to reflect its financial position" (Sec. 63, ICA). However, it is not clear that these records would be sufficient to explain transactions of the company, in line with the international standard. In addition, the requirement to keep such accounts "as are necessary" is subject to interpretation and therefore it is not clear what is required.

157. Accounts and records must be kept at the registered office of the IC or at such other place as the directors may determine. An IC that wilfully contravenes this requirement is liable on conviction to a daily fine of USD 25, with the same fine for an officer who knowingly permits the contravention of this provision.

Regulated Entities

158. The IBA requires that offshore banks maintain accounting records that are necessary to disclose with reasonable accuracy the financial position of the offshore bank at intervals not exceeding three months. The penalty for failure to do so is, on conviction, a fine of up to USD 250 000 (Sec. 23). The act defines accounting records to include the working papers and any other documents as are necessary to explain the methods and calculations by which financial statements are made (Sec. 1, IBA). The IBA also requires that the offshore bank keep operating records and financial statements at its office in Vanuatu, although there is no express requirement that accounting records be kept there.

159. There is no similar requirement for domestic banks in the FIA, however these banks are subject to an annual audit and their financial statements are made public. The Insurance Act requires licensees to maintain full and proper accounting records on a continual basis, which must be brought up to date quarterly. It must also prepare annual financial statements reflecting the

financial position of the business as at the last day of the year and the results of the operations and cash flow information for the financial year (Sec. 45(1)). These financial statements must be audited. The financial statements must be prepared in conformity with International Accounting Standards, must fairly represent the state of affairs of the licensee's business. The company must also maintain records of money and assets held on behalf of customers and file a report by its auditor stating the amount of money and assets held on behalf of customers and whether they were kept separate from the money and assets of the licensee's business throughout the year.

Partnerships

160. Section 28 of the Partnership Act provides that partnerships are bound to render true and full information of all things affecting the partnership to any partner or his/her legal representative. This applies to both general and limited partnerships. The Partnership Act does not specify where accounting records must be kept.

161. There is no requirement in the OLPA for an offshore limited partnership to prepare or maintain accounting information.

Trusts

162. There are no accounting requirements for trustees in Vanuatu. While the FTRA applies to both trust companies and any person acting as a trustee in Vanuatu and would require that the person or entity retain records of all transactions involving the trust, this is not equivalent to an express requirement to retain records of accounts in line with the international standard.

163. Pursuant to the Unit Trust Act, a manager of a unit trust scheme must keep an up to date register of unit holders and publish the buying and selling prices of all units at least on a monthly basis (Sec. 13, Unit Trust Act). In addition, the manager of a unit trust must file an annual report with the VFSC within three months from the closing of accounts in every year. This report must include the manager's investment report, a statement of assets and liabilities, a statement of income and distribution, a copy of the audited accounts and the auditor's report, and details of the fees paid to the manager and trustee during the period covered by the report (Sec. 15). Therefore, from the annual reporting requirement we can conclude that a manager of a unit trust scheme is required to keep records of account in line with the international standard.

Foundations

164. A foundation must keep proper accounts showing: all sums of money received, expended and distributed by the foundation and the purposes of the

receipt, expenditure and distribution; all sales and purchases by the foundation; and the assets and liabilities of the foundation.

165. The accounts of a foundation must be kept at the registered office of the foundation or at another place in Vanuatu agreed by the councillors. These must at all times be available for inspection by the councillors, the guardian and the auditor.

166. A councillor of a foundation who fails to take all reasonable steps to ensure the foundation complies with the accounting requirements in the Act, or has by his or her own wilful act been the cause of a failure by the foundation to comply, is guilty of an offence punishable on conviction by a fine not exceeding VUV 1 million (approximately USD 11 000).

167. In addition, the accounts of a public foundation must be audited by an auditor appointed by the councillors. The accounts of a private foundation need not be audited unless this is required by the charter or by-laws.

Underlying documentation (ToR A.2.2)

168. There is no requirement in either the Companies Act or the ICA for companies to retain underlying documents such as invoices, contracts, etc. with regard to accounts. In the case of certain companies that are required to be audited, underlying documents would presumably be necessary to complete an audit, however there is no express provision that requires this.

169. Neither the Partnership Act nor the OLPA specify the types of accounts that must be kept or whether they include underlying documents.

170. The Foundations Act does not require that foundations retain underlying documents with regard to accounts. A public foundation is required to be audited annually, and underlying documents would presumably be necessary to complete an audit; however there is no express requirement to retain underlying documents.

Document retention (ToR A.2.3)

171. The Companies Act requires companies to keep records for a period not less than five years from the date they were made. There is no requirement in the ICA to keep records for a minimum period of five years.

172. Neither the Partnership Act nor the OLPA specify a retention period for accounting records. There is no requirement in Vanuatu's laws for a trustee of a trust or a manager of a unit trust to maintain records for a minimum of five years.

173. The Foundations Act requires that accounting records be retained for seven years from the date on which they are made.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
There are no clear requirements in Vanuatu's laws that require partnerships (general, limited and offshore limited partnerships), international companies or trusts that are not unit trusts to maintain accounting records in line with the Terms of Reference.	Vanuatu should establish clear accounting requirements for all relevant entities in line with the Terms of Reference.
Obligations to maintain underlying documents are not consistently in place for entities in Vanuatu.	Introduce consistent obligations on all types of entities to retain relevant accounting records, including underlying documentation for a minimum period of five years.
In the case of international companies, partnerships (general, limited and offshore) and trusts, there is no requirement to maintain documents for a minimum of five years in line with the Terms of Reference.	Vanuatu should establish clear requirements that all relevant entities maintain accounting records for a minimum of five years, in line with the Terms of Reference.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

174. The record-keeping requirements for banks can be found in Vanuatu's AML laws, namely the Financial Transactions Reporting Act (FTRA).

175. The FTRA requires that covered institutions keep records of every transaction that is conducted through the financial institution as are reasonably necessary to enable the transaction to be readily reconstructed at any time by the FIU. The records must contain:

- the nature of the transaction and the date on which it was conducted;

- the amount of the transaction and the currency in which it was denominated;
- the name, address and occupation, business or principal activity, as the case requires, of each person conducting the transaction;
- for whom, or for whose ultimate benefit, the transaction is being conducted, if the financial institution has reasonable grounds to believe that the person is undertaking the transaction on behalf of any other person;
- the type and identifying number of any account with the financial institution involved in the transaction;
- if the transaction involves a negotiable instrument other than currency: the drawer of the instrument; the name of the institution on which it is drawn; the name of the payee (if any); the amount and date of the instrument; the number (if any) of the instrument and details of any endorsements appearing on the instrument; the name and address of the financial institution, and of each officer, employee or agent of the financial institution who prepared the relevant record or a part of the record; and such other information as may be prescribed.

176. A financial institution must keep the records for a period of six years after the completion of the transaction.

177. In addition, the Financial Institutions Act (FIA), which applies to domestic and foreign banks doing business in Vanuatu, requires that any licensee under the act must retain all cheques and bank drafts drawn on the licensee and that are in its possession; and all bills of exchange and promissory notes made payable at the licensee and that are in its possession for six years from the date of the instrument or the due date of the bank draft, bill of exchange or promissory note. There is no similar requirement in the IBA for offshore banks, although offshore banks are covered by the FTRA and therefore would be required to maintain transaction records.

Determination and factors underlying recommendations

Determination
The element is in place.

B. Access to information

Overview

178. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Vanuatu's legal and regulatory framework gives the authorities access powers that cover the right types of persons and information and whether rights and safeguards would be compatible with effective exchange of information.

179. Vanuatu's domestic laws do not allow for access to any information with regard to any entity pursuant to an exchange of information request under its TIEAs. Because there are no access powers, and therefore no corresponding rights and safeguards, it was not possible to evaluate whether element B.2. is in place, as there is no basis on which to make this determination.

180. Vanuatu's authorities can access information pursuant to its Mutual Assistance in Criminal Matters Act (MACMA), but this information would be limited to criminal information and would not include information requested pursuant to a tax treaty. Vanuatu's domestic laws do allow for access to ownership and identity information; however these powers cannot be employed in response to a request from a treaty partner under a TIEA.

181. Vanuatu advises that the VFSC and the Ministry of Finance have both committed budget funds to hire a consultant to assist with drafting a law that would give its authorities powers to access information pursuant to its TIEAs. Vanuatu further advises that they would like to have the legislation in place as soon as possible.

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

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

Ownership and identity information (ToR B.1.1); Accounting records (ToR B.1.2); and Use of information gathering measures absent domestic tax interest (ToR B.1.3)

182. Competent authorities should have the power to obtain and provide information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees, as well as information regarding the ownership of companies, partnerships, trusts, foundations, and other relevant entities including, to the extent that it is held by the jurisdiction's authorities or is within the possession or control of persons within the jurisdiction's territorial jurisdiction, ownership information on all such persons in an ownership chain.[9] Competent authorities should also have the power to obtain and provide accounting records for all relevant entities and arrangements.[10]

183. Vanuatu's domestic laws do not give Vanuatu's authorities the power to access information for exchange purposes under its treaties. While its regulatory authorities do have powers to access information in most cases for their own domestic purposes, these powers cannot be used to obtain information pursuant to an EOI request.

184. The Mutual Assistance in Criminal Matters Act (MACMA) enables the authorities in Vanuatu to obtain and provide information to foreign authorities in relation to criminal investigations and proceedings. However, the situations where this would be possible for tax purposes would be extremely limited. Furthermore, requests for international assistance are made to the Attorney General or a person authorised by the Attorney General to receive such requests and the Attorney General has broad authority to refuse a request. The MACMA provides that requests will be refused, for example, if they relate to the prosecution or punishment of a political offence or to a person's race or religion. However, more broadly they may also be refused at the discretion of the Attorney General.

9. See OECD Model TIEA Article 5(4).
10. See JAHGA Report paragraphs 6 and 22.

Compulsory powers (ToR B.1.4)

185. Vanuatu's authorities do not have compulsory powers to obtain information in response to a request for information under its TIEAs.

Secrecy provisions (ToR B.1.5)

186. Jurisdictions should not decline on the basis of its secrecy provisions (*e.g.* bank secrecy, corporate secrecy) to respond to a request for information made pursuant to an exchange of information mechanism. While Vanuatu's laws contain secrecy provisions to protect confidential information, if a law giving effect to its TIEAs were in place, these provisions would not impede disclosure of information pursuant to a TIEA because they can be overridden by other laws.

187. The International Banking Act (IBA), which governs offshore banks, prohibits the disclosure of "protected information" or any other information relating to the international banking business of a licensee or a depositor or other customer of the licensee (Sec. 39). "Protected information" is defined as: the fact of whether a person has an account with a licensee, the name in which the account of a depositor or other customer stands, the balance of any such account or the amount of any individual transaction undertaken by any licensee for a depositor or other customer of the licensee. This prohibition does not apply if the disclosure is required or authorised by a court, if it is made to discharge a duty under the act, if it is part of a suspicious transaction report under the FTRA, or it is made to the RBV or a law enforcement authority in Vanuatu. In addition, the information can be disclosed if it is required under any law of Vanuatu.

188. A person who contravenes this provision is guilty of an offense and punishable on conviction by a fine of up to USD 50 000 and/or imprisonment up to 2 years for an individual or a fine of up to USD 250 000 for a body corporate.

189. In addition, the FIA, which governs banks doing business in Vanuatu, contains a prohibition on disclosure wherein any statement, return or information provided by a licensee to the RBV must be regarded as confidential by the recipient (Sec. 55(1)). The RBV and its employees must not disclose any information acquired in the performance of its duties that is relevant to the affairs or conditions of the licensee or of any clients of a licensee without a court order, or if it is required by any law of Vanuatu or is required for performance of his or her duties. An employee would also be permitted to disclose such information if required under the MACMA or the Proceeds of Crime Act or if it is made to a supervisory authority in any country other than Vanuatu for the purpose of the exercise of functions by the supervisory authority corresponding to or similar to those conferred on the RBV by the Act.

190. The Trust Companies Act also contains a confidentiality provision. It provides that no person shall disclose to any other person any information entrusted to him in confidence, or acquired by him in his capacity or in the course of his duties as a public officer, employee, agent, etc. or in a professional or similar fiduciary relationship, whether while employed or acting in such capacity or relationship or after he has ceased to be employed or to act in such capacity or relationship. Exceptions to this apply when lawfully required to do so by a court or under the provisions of a law in Vanuatu, or for the purpose of performance of a public officer's duties under the Act. Any person who contravenes this provision is guilty of an offence and liable on conviction to a fine not to exceed VUV 100 000 (approximately USD 1 100) or to imprisonment for a term not exceeding six months or both.

Conclusion

191. Authorities in Vanuatu do not have any powers to access information for exchange purposes pursuant to a TIEA.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Vanuatu's authorities do not have the power to obtain and provide information that is the subject of a request under an exchange of information agreement from any person.	Vanuatu should enact legislation that would give the government powers to access information pursuant to a request from a treaty partner.

B.2. Notification requirements and rights and safeguards

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

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

192. Rights and safeguards should not unduly prevent or delay effective exchange of information.[11] For instance, notification rules should permit exceptions from prior notification (*e.g.* in cases in which the information request is

11. See OECD Model TIEA Article 1.

of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction).

193. There are no powers to access information pursuant to a tax treaty in Vanuatu's domestic laws (see section B.1. above). Consequently, there are also no notification rules or rights and safeguards. Therefore, it is not possible to assess whether this element is in place, as there is no basis upon which to make this determination. When Vanuatu chooses to implement access powers in its domestic laws, any rights and safeguards included should be evaluated at that time.

Determination and factors underlying recommendations

Determination
The assessment team is not in a position to evaluate whether this element is in place, as there is no basis upon which to make this determination.

C. Exchanging information

Overview

194. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. This section of the report examines whether Vanuatu has a network of information exchange that would allow it to achieve effective exchange of information in practice.

195. Vanuatu committed to the international standards for exchange of information in 2003. It signed its first TIEA in late 2009[12], signed nine more TIEAs in 2010[13] and two so far in 2011[14]. Only two of these TIEAs are currently in force: with France and Finland.

196. The process for ratification of a TIEA is for the Minister to sign it, and then it is signed by the President and published in the Gazette. All of Vanuatu's TIEAs have now been ratified by Vanuatu's government, with the exception of its most recent TIEAs with San Marino and Ireland. Any remaining steps for bringing these TIEAs into force now rest on their treaty partners.

197. Vanuatu's TIEAs are based on the OECD Model TIEA and, with few immaterial exceptions, are identical to it. However, as discussed in Part B, there is no law that gives Vanuatu's authorities power to comply with its TIEAs. Therefore, Vanuatu in almost all instances cannot comply with the terms of its treaties.

12. France.
13. These include TIEAs with Australia, Denmark, Faroe Islands, Finland, Greenland, Iceland, New Zealand, Sweden and Norway.
14. San Marino and Ireland.

C.1. Exchange-of-information mechanisms

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

Foreseeably relevant standard (ToR C.1.1)

198. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless, it does not allow for "fishing expeditions", *i.e.* speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of "foreseeable relevance" which is included in paragraph 1 of Article 26 of the OECD Model Tax Convention set out below:

> *The competent authorities of the contracting states shall exchange such information as is foreseeably relevant to the carrying out of the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the contracting states or their political subdivisions or local authorities in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.*

199. All of Vanuatu's TIEAs contain provisions equivalent to Article 1 of the OECD Model TIEA. Therefore, the terms of its TIEAs allow for the exchange of information that is foreseeably relevant.

In respect of all persons (ToR C.1.2)

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

201. All of Vanuatu's TIEAs contain a provision identical to Article 2 of the OECD Model TIEA regarding jurisdictional scope. Therefore, the terms of Vanuatu's TIEAs meet the international standard in this regard.

Obligation to exchange all types of information (ToR C.1.3)

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

203. Vanuatu's TIEAs all contain Article 5(4)(a) and (b) from the Model TIEA which provides that information held by banks, financial institutions, agents and fiduciaries must be exchanged as well as information regarding ownership. The terms of its TIEAs, therefore, meet the international standard in this regard.

Absence of domestic tax interest (ToR C.1.4)

204. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. An inability to provide information based on a domestic tax interest requirement is not consistent with the international standard. Contracting parties must use their information gathering measures even though invoked solely to obtain and provide information to the other contracting party.

205. The terms of all of the exchange of information agreements concluded by Vanuatu provide for information to be obtained and exchanged notwithstanding that it is not required for any domestic tax purpose. Vanuatu's domestic laws do not provide for access to information pursuant to an exchange of information request.

Absence of dual criminality principles (ToR C.1.5)

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

207. None of the exchange of information agreements concluded by Vanuatu apply the dual criminality principle to restrict the exchange of information.

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

208. Information exchange may be requested both for tax administration purposes and for tax prosecution purposes. The international standard is not limited to information exchange in criminal tax matters but extends to information requested for tax administration purposes (also referred to as "civil tax matters"). All of the exchange of information agreements concluded by Vanuatu provide for the exchange of information in both civil and criminal tax matters.

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

209. All of Vanuatu's TIEAs follow Article 5(3) of the Model, providing that the requested party, to the extent allowable under its domestic laws, shall provide information in the form of depositions of witnesses and authenticated copies of original documents, to the extent allowable under its domestic laws.

In force (ToR C.1.8)

210. Exchange of information cannot take place unless a jurisdiction has exchange of information arrangements in force. Where exchange of information agreements have been signed the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

211. Only 2 of Vanuatu's 12 TIEAs are currently in force. Vanuatu advises that, with the exception of its two most recently signed TIEAs (with San Marino and Ireland), it has completed all of the necessary procedures to bring its TIEAs into force, and is awaiting the completion of internal procedures on the part of its treaty partners. However, one TIEA partner advises that they sent notification to Vanuatu in November 2010 and that they have not yet received a reverse note from Vanuatu.

In effect (ToR C.1.9)

212. For information exchange to be effective the parties to an exchange of information arrangement need to enact any legislation necessary to comply with the terms of the arrangement.

213. Vanuatu has not enacted legislation that would allow it to carry out its obligations under its TIEAs. Although the Mutual Assistance in Criminal Matters Act (MACM) does provide for some access powers, these powers are very limited and do not allow for exchange of information to the international

standard (see Part B). Therefore, Vanuatu's exchange of information agreements cannot be considered to be in effect.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Although Vanuatu's TIEAs are nearly identical to the Model TIEA, it has not enacted legislation necessary to comply with the terms of its TIEAs, in particular, it has no access powers, and therefore they do not provide for effective exchange of information.	Vanuatu should enact legislation that would make its TIEAs effective.

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

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

214. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws it may indicate a lack of commitment to implement the standards.

215. Vanuatu currently has 12 exchange of information agreements, including with the Nordic countries, France, Australia, San Marino, Ireland and New Zealand. Vanuatu continues to actively negotiate treaties and has concluded negotiations with South Korea, Canada, Ireland and Belgium. These treaties are awaiting the completion of internal procedures by the treaty partner prior to signing. In addition, Vanuatu is currently in the process of negotiating treaties with Portugal, Germany, Italy, Spain, Mexico and Greece.

216. In the course of this review, comments were sought from the jurisdictions participating in the Global Forum, and no jurisdiction advised that Vanuatu had refused to negotiate or enter into an agreement.

217. However, because Vanuatu does not have the powers to access information, none of its TIEAs are effective (see sections B.1 and C.1). Therefore, Vanuatu does not have a network of information exchange mechanisms covering all relevant partners.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Because Vanuatu does not have the power to access information pursuant to an EOI request, none of its TIEAs are effective.	Vanuatu should enact legislation that would make its TIEAs effective.
	Vanuatu should continue to develop its EOI network with all relevant partners.

C.3. Confidentiality

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

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

218. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments countries with tax systems generally impose strict confidentiality requirements on information collected for tax purposes.

219. The text of Article 26(2) of the OECD Model Tax Convention reads:

> *Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination*

of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

220. The confidentiality provisions in Vanuatu's agreements do not draw a distinction between information received in response to requests and information forming part of the requests themselves. As such, these provisions would apply equally to all requests for such information, background documents to such requests and any other document reflecting such information.

221. In Vanuatu's domestic laws, the Official Secrets Act would prevent any government employee from revealing any confidential material or information lodged or registered in accordance with any law. Such persons are also required to take reasonable care of such information and ensure the safety of any confidential information in his control. It is considered an offense for a person to, without lawful authority, obtain, collect, record, publish or have in his possession any classified material, to communicate this to any person outside of his duties, to retain the information or to permit any person to have possession of any classified material for his use alone. Every person in government service is required to sign a declaration to this effect.

222. The penalty for any offence under the Official Secrets Act includes a fine of up to VUV 60 000 (approximately USD 675) and/or imprisonment for up to three years (Sec. 13).

Determination and factors underlying recommendations

Determination
The element is in place.

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

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

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

223. The international standard allows requested parties not to supply information in response to a request in certain identified situations where an issue of trade, business or other legitimate secret may arise. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by the attorney-client privilege. Attorney-client privilege is a feature of the legal systems of many countries.

224. Each of Vanuatu's TIEAs contains a provision similar to Article 7 of the Model TIEA, providing that a jurisdiction can refuse to exchange information in certain instances. This includes the possibility of declining a request if it would reveal confidential communications between a client and an attorney.

Determination and factors underlying recommendations

Determination
The element is in place.

C.5. Timeliness of responses to requests for information

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

Responses within 90 days (ToR C.5.1)

225. In order for exchange of information to be effective it needs to be provided in a timeframe which allows tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant lapse of time the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area must be of sufficient importance to warrant making a request.

226. All of Vanuatu's TIEAs contain a provision similar or identical to Article 5(6)(a) and (b) of the OECD Model TIEA, and therefore require a response within 90 days. Whether Vanuatu has systems in place to meet the 90 day response in practice will be considered in the Phase 2 peer review of Vanuatu.

Organisational process and resources (ToR C.5.2)

227. It is important that a jurisdiction have appropriate organisational processes and resources in place to ensure a timely response. A review of the practical application of these processes and the resources available will be conducted in the context of Vanuatu's Phase 2 review.

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

228. Exchange of information should not be subject to unreasonable, disproportionate or unduly restrictive conditions. There are no provisions in Vanuatu's TIEAs which apply conditions to the exchange of information above those in accordance with the Model TIEA.

Determination and factors underlying recommendations

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

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities (A.1.)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	Although Vanuatu's AML laws cover most trustees and require a trustee to know the identity of the "customer", there is no express requirement that the trustee know the settlor or beneficiaries of the trust.	Vanuatu should ensure that information is available to their competent authority that identifies the settlor and beneficiaries of a trust.
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements (A.2.)		
The element is not in place.	There are no clear requirements in Vanuatu's laws that require partnerships (general, limited and offshore limited partnerships), international companies or trusts that are not unit trusts to maintain accounting records in line with the Terms of Reference.	Vanuatu should establish clear accounting requirements for all relevant entities in line with the Terms of Reference.
	Obligations to maintain underlying documents are not consistently in place for entities in Vanuatu.	Introduce consistent obligations on all types of entities to retain relevant accounting records, including underlying documentation for a minimum period of five years.
	In the case of international companies, partnerships (general, limited and offshore) and trusts, there is no requirement to maintain documents for a minimum of five years in line with the Terms of Reference.	Vanuatu should establish clear requirements that all relevant entities maintain accounting records for a minimum of five years, in line with the Terms of Reference.

Determination	Factors underlying recommendations	Recommendations
Banking information should be available for all account-holders (A.3.)		
The element is in place.		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) (B.1.)		
The element is not in place.	Vanuatu's authorities do not have the power to obtain and provide information that is the subject of a request under an exchange of information agreement from any person.	Vanuatu should enact legislation that would give the government powers to access information pursuant to a request from a treaty partner.
The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information (B.2.)		
The assessment team is not in a position to evaluate whether this element is in place, as there is no basis upon which to make this determination.		
Exchange of information mechanisms should allow for effective exchange of information (C.1.)		
The element is not in place.	Although Vanuatu's TIEAs are nearly identical to the Model TIEA, it has not enacted legislation necessary to comply with the terms of its TIEAs, in particular, it has not access powers, and therefore they do not provide for effective exchange of information.	Vanuatu should enact legislation that would make its TIEAs effective.

Determination	Factors underlying recommendations	Recommendations
The jurisdictions' network of information exchange mechanisms should cover all relevant partners (C.2.)		
The element is not in place.	Because Vanuatu does not have the power to access information pursuant to an EOI request, none of its TIEAs are effective.	Vanuatu should enact legislation that would make its TIEAs effective.
		Vanuatu should continue to develop its EOI network with all relevant partners.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received (C.3.)		
The element is in place.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties (C.4.)		
The element is in place.		
The jurisdiction should provide information under its network of agreements in a timely manner (C.5.)		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.		

Annex 1: Jurisdiction's Response to the Review Report[15]

Vanuatu agrees to the facts and conclusions in this report and wishes to reiterate its commitment to the Global Forum on Transparency and Exchange of Information for Tax Purposes. It has now signed 12 tax information exchange agreements and continues to negotiate agreements with other jurisdictions.

We have recently undertaken to amend our laws, as reflected in the report, including implementing regulations to immobilize bearer shares. We continue to work to bring our laws up to the international standards. To this end, we have committed funds to draft legislation to make our TIEAs effective and have introduced legislation regulating trustees.

Vanuatu will continue its commitment to the international standards for exchange of information and we look forward to reporting to the Global Forum on steps taken to bring Vanuatu's legal and regulatory system in line with standard in the near future.

15. This Annex presents the jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

Annex 2: List of all Exchange-of-Information Mechanisms in Force

	Jurisdiction	Type of EoI Arrangement	Date Signed	Date Entered Into Force
1	Australia	TIEA	21 April 2010	N/A
2	Denmark	TIEA	13 October 2010	N/A
3	Faroe Islands	TIEA	13 October 2010	N/A
4	Finland	TIEA	13 October 2010	8 March 2011
5	Greenland	TIEA	13 October 2010	N/A
6	Iceland	TIEA	13 October 2010	N/A
7	New Zealand	TIEA	4 August 2010	N/A
8	Norway	TIEA	13 October 2010	N/A
9	Sweden	TIEA	13 October 2010	N/A
10	France	TIEA	31 December 2009	7 January 2011
11	Ireland	TIEA	7 April 2011	N/A
12	San Marino	TIEA	19 May 2011	N/A

Annex 3: List of all Laws, Regulations and Other Relevant Material

Constitution of Vanuatu

Companies Act No. 12 of 1986

International Companies Act (ICA) No. 11 of 2010 (as amended)

Partnership Act

Offshore Limited Partnership Act (OLPA)

Trust Companies Act No. 10 of 1988

Unit Trust Act No. 36 of 2005

Financial Institutions Act (FIA) No. 21 of 2002 (Revised Edition)

International Bank Act (IBA) No. 4 of 2002

Financial Transactions Reporting Act (FTRA)

Custody of Bearer Shares Regulation Order No. 64 of 2010

Protected Cell Companies Act No. 32 of 2009

Incorporated Cell Companies Act No. 25 of 2009

Insurance Act No. 54 of 2005

Mutual Assistance in Criminal Matters Act No. 14 of 2002

Official Secrets Act of 1988

Central Bank of Vanuatu Act No. 1 of 1988 (Revised Edition)

Mutual Funds Act No. 38 of 2005

VFSC Practice Note No. 1 of 2011 – Immobilisation of Bearer Shares

Business Licence Act No. 1 of 2006

Business Licence Rule (Published Gazette No. 26 of 2002)

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Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, PHASE 1: VANUATU

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

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

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

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

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

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

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