GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report
Phase 1
Legal and Regulatory Framework

MARSHALL ISLANDS

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Marshall Islands 2012

PHASE 1

October 2012
(reflecting the legal and regulatory framework
as at May 2012)

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Please cite this publication as:
OECD (2012), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Marshall Islands 2012: Phase 1: Legal and Regulatory Framework*, OECD Publishing.
http://dx.doi.org/10.1787/9789264181519-en

ISBN 978-92-64-18150-2 (print)
ISBN 978-92-64-18151-9 (PDF)

Series: Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews
ISSN 2219-4681 (print)
ISSN 2219-469X (online)

Corrigenda to OECD publications may be found on line at: *www.oecd.org/publishing/corrigenda*.

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

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

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

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information in the Republic of the Marshall Islands (Marshall Islands). The international standard which is set out in the Global Forum's *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information*, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information partners.

2. The Marshall Islands is a nation composed of 5 islands and a number of atolls in the central Pacific Ocean. Politically it is organised as a parliamentary democracy. The Marshall Islands has been under a compact of free association with the United States (US) since 1986. The Marshallese economy relies primarily on government employment and US funding. The Marshall Islands operates a large ship registry, the size of which has increased markedly over the past 10 years.

3. Relevant entities include companies, partnerships and trusts. The Marshall Island's legal framework for companies ensures the availability of ownership information only for domestic corporations and foreign corporations that are required to obtain a business license. There is no express obligation to maintain ownership and identity information relating to resident LLCs or non-resident LLCs. Moreover, bearer shares may be issued by non-resident domestic corporations and mechanisms to identify the owners of such bearer shares are insufficient. Nominee shareholders are not required to keep ownership information when they act as a legal owner on behalf of any other person as long as they are not a financial institution or a cash dealer.

4. For general partnerships, information on all partners is required to be filed with the Registrar annually. This requirement, however, does not apply to non-resident domestic partnerships since they are not required to file an annual report. For limited partnerships, information on general partners is generally filed with the Registrar at the point of formation; however, information on limited partners is not required to be filed. With regard to trusts,

information about beneficiaries must be kept by the trustees of a domestic trust; however there is no express requirement for information to be kept relating to settlors by the trustees. Trustees of foreign trusts are under no express obligation to keep information on beneficiaries and settlor(s).

5. The legal framework of the Marshall Islands contains legal obligations to keep reliable accounting records for domestic corporations and domestic trusts. There is no express obligation for foreign corporations, foreign maritime entities, LLCs, partnerships and foreign trusts managed in the Marshall Islands to maintain reliable accounts. There is no express requirement for any entity or legal arrangement to keep underlying documentation and those are not obliged to retain accounting records for at least five years.

6. The Marshall Islands' competent authority's powers to obtain information for EOI purposes contains some aspects that require improvements. Secrecy provisions in trust laws may hinder exchange of information. The powers of the Secretary of Finance to obtain information for EOI purposes in the absence of a domestic tax interest are also subject to some doubt. The scope of professional privilege in the Marshall Islands is broad and there are no exceptions for requests made under an EOI agreement.

7. The Marshall Islands has signed 14 Tax Information Exchange Agreements (TIEAs), of which 5 are in force. All of the TIEAs allow the Marshall Islands to exchange information according to the international standard. The Marshall Islands is currently in the process of negotiating a number of other TIEAs, all of which will incorporate provisions that allow the Marshall Islands to exchange information according to the international standard. The Marshall Islands' legal framework does not provide for the possibility of exchanging information under DTCs.

8. As elements which are crucial to achieving effective exchange of information are not yet in place in the Marshall Islands, it is recommended that the Marshall Islands not move to a Phase 2 Review until it has acted on the recommendations contained in the Summary of Determinations and Underlying Recommendations to improve its legal and regulatory framework. A follow-up report on the steps undertaken by the Marshall Islands to answer the recommendations made in this report should be provided to the Peer Review Group within six months after the adoption of this report. In addition, the Marshall Islands should provide a detailed written report to the Peer Review Group within 12 months of the adoption of this report.

Introduction

Information and methodology used for the peer review of the Marshall Islands

9. The assessment of the legal and regulatory framework of the Republic of the Marshall Islands (the Marshall Islands) was based on the international standards for transparency and exchange of information as described in the Global Forum's *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes*, 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 as of May 2012; other materials supplied by the Marshall Islands; and information supplied by partner jurisdictions.

10. The Terms of Reference breaks 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) exchange of information. This review assesses the Marshall Islands' 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 for improvement where relevant.

11. The assessment was conducted by an assessment team which comprised two expert assessors: Ms. Jasmine Wade, Legal & Research Officer, Financial Services Regulatory Commission, Antigua and Barbuda; Ms. Su-won Kim, International Investigation Division, National Tax Service of Korea; and representatives of the Global Forum Secretariat Mr. Sanjeev Sharma, Mr. Guozhi Foo and Mr. David Moussali. The assessment team assessed the legal and regulatory framework for transparency and exchange of information and relevant exchange of information mechanisms in the Marshall Islands.

Overview of the Marshall Islands

12. The Marshall Islands is a nation of about 60 000 people living on 29 coral atolls and 5 low-lying islands in the central Pacific, mid-way between Hawaii and Indonesia. 24 of the atolls and islands are inhabited. Majuro is the capital and is located on the Majuro atoll. The official languages are Marshallese and English and the official currency is the United States Dollar (USD).

13. The Marshall Islands entered into a compact of free association with the United States (US) in 1986. Under this agreement, the Marshall Islands has sovereignty in domestic and foreign affairs, while the US is responsible for defence.

14. The Marshall Islands economy relies primarily on government employment and US funding, but has seen growth in its maritime registry, commercial and small-scale fisheries, aquaculture, agriculture, traditional crafts manufacturing and tourism. Its GDP is approximately USD 162 million as of 2010. The Marshall Islands' main trading partners are Japan, US and Australia.[1]

15. The Marshall Islands operates a large ship registry, the size of which has increased markedly over the past 10 years. As of June 2012, the Registry had a fleet size of 2 694 vessels with 83.6 million gross tons. While the largest share of the Registry's tonnage is from the US, Greece, Germany and Norway, markets in Italy, Turkey, Japan and other areas in Asia have been opening up. The Registry has 25 offices including Hong Kong, Singapore, Dubai, Germany, Turkey, and UK, among others. A total of 35 Marshall Islands corporations are now publicly traded on the New York Stock Exchange (NYSE) and National Association of Securities Dealers Automated Quotations (NASDAQ), as well as other smaller exchanges.

Legal system

16. In 1979, the Government of the Marshall Islands was officially established and the country became self-governing. In 1986, the Marshall Islands achieved full sovereignty and entered into the Compact of Free Association with the US. The independence procedure was formally completed under international law in 1990, when the United Nations (UN) officially ended the trusteeship status.

17. The Marshall Islands is a parliamentary democracy. The parliamentary system comprises two legislative chambers – (i) the Council of Iroij, which is comprised of 12 tribal chiefs, serves as an advisor to the Presidential Cabinet

1. Sources: *www.rmiembassyus.org/index.htm*, *www.state.gov/r/pa/ei/bgn/26551.htm* and CIA Fact book retrieved 21 March 2012

and reviews legislation affecting customary law or any traditional practice; and (ii) the Nitijela, which is comprised of 33 senators elected by 24 electoral districts, and elects the President from among its members for a four-year term. In turn, the President appoints a Cabinet of 6 to 10 members with the approval of the Nitijela, and serves both as chief of state and head of government.

18. The legal system of the Marshall Islands was based originally on the former Trust Territory laws, established by the UN and administered by the US, but has subsequently been modified by common law, municipal bodies, customary law, and legislation embodied in the Marshall Islands Revised Code (MIRC). The 1979 Constitution is the supreme law of the land, and any law or treaty that contradicts it is void. The Nitijela has the power to repeal, revoke, amend, or make any law it considers necessary for carrying out its power under the Constitution. While the Cabinet is responsible for conducting the foreign affairs of the Marshall Islands, no international treaty will come into force until it has been approved by the Nitijela. The hierarchy of laws in the Marshall Islands is as follows: the Constitution is the supreme law of the land with international treaties and Acts of the Nitijela superseding any local ordinance, but any law or treaty is void if it is inconsistent with the Constitution.

19. The judiciary in the Marshall Islands is divided into four tiers: the Supreme Court, the High Court, the District and Community Courts and the Traditional Rights Courts. The Supreme Court is a superior constitutional court. The High Court has original jurisdiction over cases filed with it, appellate jurisdiction over cases originally filed in subordinate courts, and jurisdiction to review the legality of any final decision of a government agency. Tax cases are heard before the High Court. The Traditional Rights Courts are of limited jurisdiction, restricted to cases that involve title or land rights and disputes that arise from customary law and traditional practice. The Marshall Islands also has 24 Community Courts, which generally hear civil cases where the amount involved does not exceed USD 200. The Community Courts also hear criminal cases involving offences for which the maximum penalty does not exceed a fine of USD 400 or imprisonment for a term not exceeding six months, or both.

20. Generally, an international treaty comes into effect after approval by the Nitijela, which is signified by resolution. However, the Nitijela can pass legislation providing the Cabinet with the authority to enter into international agreements that, upon execution, will have the force of law. As an example, in the 2010 Tax Information Exchange Agreement Act, the Nitijela delegated to the Minister of Finance the authority to "execute and implement any and all Agreements as approved by the Cabinet pursuant to this Act." Consequently, once the Minister signs a TIEA, no further steps are required to be taken in the Marshall Islands for the agreement to enter into force.

Tax system

21. The Marshall Islands raises its revenue through the collection of taxes from various sources, including taxes on personal income, gross revenue of business entities, and import of foreign goods. These taxes are levied at the national level and administered by the Ministry of Finance. The laws governing the imposition of income tax and import duties in the Marshall Islands are the Income Tax Act 1989 and the Import Duties Act 1989, respectively. There are also a number of other smaller taxes, such as the hotel and resort tax and immovable property tax.

22. Tax on gross revenue is imposed on persons who carry out business within the Marshall Islands. Under the Income Tax Act 1989, a person means an individual, firm, partnership, company or corporation, whether incorporated or unincorporated. The Marshall Islands operates a territorial system of taxation and only gross revenue generated from activities carried on within the Marshall Islands is subject to income tax. The tax rate is a gross revenue tax of USD 80 per year on the first USD 10 000 of gross revenue and 3% on amounts above that threshold.

23. Non-residents pay a non-resident tax of 10% on the gross income earned from services provided or performed by such person relating to any client in the Marshall Islands. Such tax must be deducted and paid to the Government by the client.

24. With regard to personal income tax, tax is assessed, levied and collected on wages and salaries received by employees. Employees are assessed on their gross income from wages and salaries less an exemption per year. The rate is 8% per annum on the first USD 10 400 of taxable income received by the employee and 12% thereafter. There is no capital gains tax, net wealth or net worth taxes and no national tax on goods and services.

25. At the local level, the governments of Majuro and Kwajalein atolls also impose and collect sales tax. Social security contributions are required to be made to the retirement and health funds and are collected by the Marshall Islands Social Security Administration.

26. Several persons, entities and businesses are exempted from some of these taxes, including the Marshall Islands government, public utility companies, businesses operating solely for charitable, scientific educational or religious purposes, and non-resident domestic business entities.

27. In addition, the Marshall Islands government offers tax incentives for investments in selected sectors. Such incentives are equally available to both non-citizen and citizen investors and can be applied by submitting an application to the Minister of Finance. Revenue from the following export-oriented sectors may be exempted from income tax for a five-year period:

offshore or deep sea fishing; manufacturing for export; agriculture; and hotel and resort facilities. In order to qualify for the tax incentives, an investor must make an investment of at least USD 1 million and/or provide employment and wages in excess of USD 150 000 per annum to local Marshallese citizens. Tax incentives are also available for seabed hard mineral mining in the Marshall Islands' exclusive economic zone. In order to qualify for the exemption, investors must pay the government a royalty, production charge or combination of production charge and a share of net proceeds accruing from the mining activity.[2]

The Marshall Islands' commercial laws and financial sector

28. The Marshall Islands' financial sector is small, comprising only two commercial banks[3], three insurance companies, two foreign exchange providers (which are part of the two commercial banks), three money transmitters, three finance companies, and one retirement fund. The total asset size of the banking sector is USD 133 million as of 2010.

29. All financial institutions are regulated by the Marshall Islands Banking Commission. The Banking Commission has the authority to both implement preventative measures under the Banking Act and the revised Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) Regulations (2010), and to exercise investigative powers. The Marshall Islands is in the process of updating the Standard Operating Procedures (SOPs) for its Domestic Financial Intelligence Unit (DFIU).[4] The SOPs currently in place, as of October 2000, formally establish the make-up of the DFIU, the government agency resources at its disposal, and receipt of and response to Suspicious Activity Reports or Currency Transaction Reports, including the creation of electronic databases, analysis of the original report, and the ability to obtain, where necessary, additional information from financial institutions or cash dealers. The procedures also set how the DFIU will handle non-cooperating financial institutions or cash dealers, and the method for handling requests for information from foreign jurisdictions and local jurisdictions.

30. The Marshall Islands Associations Law is contained in Title 52 of the MIRC. The Associations Law includes the Business Corporations Act (BCA) (governing corporations), the Revised Partnership Act, the Limited

2. Source: IBFD, retrieved 21 March 2012.
3. The Bank of the Marshall Islands has branches on Majuro and Ebeye. The Bank of Guam has a branch on Majuro. The Bank of Guam has one ATM located on Majuro.
4. These procedures were created with the assistance of the Asia Pacific Group (APG) on Money Laundering's Secretariat following an APG organised in-country Strategic Implementation Planning Workshop.

Partnership Act and the Limited Liability Company Act. These statutes provide the forms and regulations for the establishment and operation of all resident domestic and non-resident domestic legal entities. Under the BCA, corporations may be classified as resident domestic corporations, non-resident domestic corporations; foreign corporations authorised to do business in the Marshall Islands, or foreign maritime entities (FME). Resident domestic corporations are those doing business in the Marshall Islands, while non-resident domestic corporations are those not doing business in the Marshall Islands. Foreign corporations that are incorporated in another jurisdiction can register either to do business in the Marshall Islands or as a Foreign Maritime Entity (FME) for the purpose of vessel ownership.

31. There are two Registrars of Corporations responsible for the registration of Marshall Islands legal entities: (1) The Attorney General is the Registrar of Corporations for resident domestic and authorised foreign corporations, resident partnerships, resident limited partnerships and resident limited liability companies (LLCs); (2) The Trust Company of the Marshall Islands, Inc. is the Registrar of Corporations for non-resident domestic corporations, non-resident partnerships, non-resident limited partnerships, non-resident LLCs, and foreign maritime entities (FMEs).

32. The Marshall Islands provides for the formation and administration of trusts under the Trust Act of 1994, the Trust Companies Act of 1994, and the Trustee Licensing Act of 1994. The creation of trusts is under the exclusive control and at the discretion of Majuro International Trust Company (MITC). While MITC has the authority to accept or deny any trust application, it is currently inactive. Due to the fact that MITC has not accepted any trust applications to date, there are currently no trusts or licensed trustee companies in existence in the Marshall Islands.

33. Other service providers include company formation agents, lawyers, accountants, and company service providers. Once accredited, service providers are not supervised or regulated by the Banking Commission. Lawyers in the Marshall Islands are regulated by the Marshall Islands Bar Association, which has adopted the American Bar Association's Model Rules of Professional Conduct.

Recent developments

34. The Marshall Islands committed to the international standard for transparency and exchange of information in 2007. It renewed its commitment in 2009 and since then has rapidly built up its network of EOI agreements. As of 21 March 2012 it had concluded EOI agreements with a total of 14 jurisdictions, of which five have been brought into force. The Marshall Islands is currently in negotiations to sign TIEAs with both Mexico and France.

Compliance with the Standards

A. Availability of Information

Overview

35. 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 the Marshall Islands' legal and regulatory framework on availability of information.

36. The Marshall Islands' legal framework for companies ensures the availability of the ownership information in relation to domestic corporations and foreign corporations that are required to obtain a business license under the Foreign Investment Business License Act (FIBLA). Domestic LLCs are also required to make available all such information upon request by a member, including accounting records and membership information, however, this requirement does not ensure availability of ownership and identity information on LLCs. The availability of ownership information on FMEs is also not ensured. The Anti-Money Laundering and Countering the Financing of Terrorism Regulations (AML/CFT Regulations) and its corresponding customer due diligence (CDD) requirements are applicable only to *financial institutions* and *cash dealers*. Other intermediaries such as

lawyers, accountants, or formation specialists are not subject to AML/CFT Regulations and are not required under the Marshall Islands' law to obtain and maintain ownership information of their clients. Nominees that are not *financial institutions* or *cash dealers* are also not required under the Marshall Islands' law to obtain and maintain ownership information. Non-resident domestic corporations can issue bearer shares; however, insufficient mechanisms are in place to identify owners of bearer shares.

37. For a resident domestic general partnership, information on all partners is required to be filed with the Registrar of Corporation annually. For limited partnerships, information on general partners is generally filed with the Registrar at the point of formation of the limited partnership. However, information on limited partners is not required to be filed with the Registrar at the point of formation of the limited partnership. Resident domestic limited partnerships are also required to file information on its general partners with the Registrar annually. There is no express obligation for either general partnerships or limited partnerships to maintain records of their partners. For foreign partnerships carrying on business in the Marshall Islands, information on partners is available as it is required to be filed with the Secretary of Finance under the FIBLA.

38. The Marshall Islands recognises the concept of trust and a Marshall Islands trust may be formed under the Trust Act (TA). Trusts in the Marshall Islands must be registered, under the provision of the TA. The statutory Registrar for trusts in the Marshall Islands is Majuro International Trust Company (MITC), which is inactive. Accordingly, no trust has ever been formed in the Marshall Islands and the Marshall Islands trust program is effectively non-existent.

39. The Marshall Islands also recognises a foreign trust established under the law of a foreign jurisdiction under the TA. For a Marshall Islands trust, information about beneficiaries must be kept by the trustee. For foreign trusts there is no express obligation in the TA or Trust Companies Act (TCA) for the information relating to the beneficiaries and settlor(s) to be maintained. The AML Regulations will apply in certain circumstances when the trust uses the services of a service provider that is a *financial institution* or a *cash dealer*.

40. Commercial law obliges all resident and non-resident domestic corporations to maintain correct and complete books and records of account. However, it is uncertain that these requirements ensure keeping of accounting records consistent with the standard. Additionally, the laws of the Marshall Islands do not contain explicit obligation for all other entities to keep accounting records. There is no express obligation to maintain underlying documentation in all cases and obligations do not exist for the retention of accounting records for a minimum period of five years.

41. AML/CFT Regulations are in place in the Marshall Islands and they apply to all financial institutions and cash dealers. Banking information including records pertaining to accounts as well as to the related financial and transactional information is required to be kept under the AML/CFT Regulations.

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 entities

42. There are two types of companies in the Marshall Islands – Corporations and Limited Liability Companies (LLCs). Corporations can further be classified as (1) resident domestic corporations, (2) non-resident domestic corporations, (3) foreign corporations authorised to do business in the Marshall Islands (foreign corporation), or (4) foreign maritime entities (FME). LLCs can further be classified as (1) resident domestic LLCs, (2) non-resident domestic LLCs, or (3) foreign LLCs. Corporations are governed by the Business Corporations Act (BCA) whereas LLCs are governed by the Limited Liability Company Act (LLCA). In addition, a foreign entity, which has power to own or operate vessels and has the capacity to sue or be sued in its State of creation, can apply to the Registrar of the Republic to be registered as a foreign maritime entity (FME). This registration grants the FME corporate personality in the Marshall Islands and consequently, the power to own and operate vessels.

43. The Marshall Islands authorities advised that there were approximately 622 resident domestic companies (including corporations, LLCs, general and limited partnerships) and 30 000 active non-resident domestic entities (including corporations, LLCs, general and limited partnerships) registered with the Registrar as of September 2010. The Marshall Islands authorities have also advised that Marshall Islands receive approximately 5 000 to 6 000 new registrations each year with the majority of the entities registered in the maritime sector or linked to the ship registry. The Marshall Islands has not provided an updated breakdown of the above mentioned entities.

Corporations

44. Under the BCA, corporations are classified as (1) resident domestic corporations; (2) non-resident domestic corporations; (3) foreign corporations authorised to do business in the Marshall Islands (foreign corporations); or (4) FMEs. The terms *"resident domestic corporations"* and *"non-resident domestic corporations"* mean corporations doing business in Marshall Islands and corporations not doing business in the Marshall Islands, respectively. Foreign corporations that are incorporated in another jurisdiction may carry out business operations in the Marshall Islands by applying with the Registrar of Corporation to be a foreign corporation or an FME. An FME's activities are restricted to the owning and operation of vessels and may not conduct business in the Marshall Islands.

45. Any person, partnership, association or corporation, singly or jointly with others, and without regard to his or their residence, domicile, or jurisdiction of incorporation, may incorporate or organise a corporation under the BCA.

Limited Liability Companies

46. Under the LLCA, LLCs are classified as (1) resident domestic LLCs; (2) non-resident domestic LLCs; or (3) foreign LLCs. The terms *"resident domestic LLCs"* and *"non-resident domestic LLCs"* mean LLCs doing business in Marshall Islands and LLCs not doing business in the Marshall Islands, respectively. Foreign LLCs that are established in another jurisdiction may carry out business operations in the Marshall Islands by submitting an application to the Registrar of Corporations.

Ownership information provided to government authorities

Corporations

47. There are two Registrars of Corporations in Marshall Islands – the Attorney General and The Trust Company of Marshall Islands (TCMI). The Attorney General acts as the Registrar for (1) resident domestic corporations and (2) foreign corporations and TCMI acts as the Registrar for (1) non-resident domestic corporations and (2) FMEs.

48. In order for a resident or non-resident domestic corporation to incorporate, Articles of Incorporation must be filed with the respective Registrar (*i.e.* Attorney General or TCMI). There is no requirement to include ownership information in the Articles of Incorporation. Both resident and non-resident domestic corporations are also not required to notify the Registrar when shares are transferred. Nevertheless, the Marshall Islands authorities indicate that the filing of the names of shareholders or beneficial owners of non-resident domestic corporations may be made on a voluntary basis.

Foreign Maritime Entities

49. A foreign entity, which has power to own or operate vessels and has the capacity to sue or be sued in its State of creation, can apply to the Registrar to be registered as a FME. The FME, in addition to other information, needs to provide the full names and address of the persons vested under the law with management of the entity to the Registrar in the application, but there is no express requirement to submit ownership information (s. 119, BCA) in the FME application. Provisions of FIBLA (discussed below) do not apply to FMEs. Form Reg-11 must be completed to register a vessel with the Marshall Islands Maritime Registry, and this form asks that the name of the beneficial owner be provided as part of the vessel registration process, though it is not clear whether this will include the identity of all owners of the FME or the conditions under which changes of ownership are recorded. A registered FME has the power to own and operate vessels registered under the Laws of the Marshall Islands provided all requirements of the Maritime Law of the Marshall Islands are met. They are allowed to conduct the business of ownership and operation of Marshall Islands flag vessels and for that purpose can have one or more offices in the Marshall Islands (s. 120, BCA).

Tax law

50. Marshall Islands levies tax on income based on the gross revenues earned by every business[5] from activities carried on within the Republic. Every business must also pay tax quarterly and file information on revenues as required by Secretary of Finance. No ownership information is required to be filed with the tax authority by any corporations (*i.e.* resident and non-resident domestic corporations, foreign corporations and FMEs) under the Income Tax Act 1989.

51. Section 12 of the BCA provides that a non-resident domestic corporations, foreign corporations, non-resident domestic partnerships, foreign trusts, non-resident domestic LLCs and foreign LLCs are exempt from any corporate profit tax, income tax, withholding tax and tax reporting requirements. These provisions override any provisions of the Income Tax Act of 1989 or any other law or regulation imposing taxes or fees in effect or enacted afterwards.

5. Section 102(a) of the Income Tax Act defines business as any profession, trade, manufacture or other undertaking and includes all activities whether personal, professional, unincorporated or incorporated carried on within the Republic of Marshall Islands.

Limited Liability Companies (LLCs)

52. Similar to corporations, there are two Registrars of Corporations for LLCs in the Marshall Islands – the Attorney General and TCMI. The Attorney General acts as the Registrar for resident domestic LLCs and foreign LLCs and TCMI acts as the Registrar for non-resident domestic LLCs.

53. Division 2, Sections 9 to 23 of the LLCA deals with formation and members of the LLCs. To form a LLC in the Marshall Islands, a Certificate of Formation, executed by one or more authorised persons, must be filed with the respective Registrar (*i.e.* Attorney General or TCMI). However, there is no requirement under the LLCA for a resident or non-resident domestic LLC to include details of its members in the Certificate of Formation. There is also no express requirement under the LLCA for resident and non-resident domestic LLCs to notify the Registrar whenever there is a change in its members. Further, other than certificate of formation no other documents are required to be filed (s. 9, LLCA).

54. The certificate of formation must contain the name and address of the registered agent for service of process. Section 5 of the LLCA requires that every domestic LLC or foreign LLC authorised to do business in the Marshall Islands must designate a registered agent in the Marshall Islands upon whom any process or notice against such LLC can be issued. The registered agent for a LLC having a place of business in the Marshall Islands must be a resident domestic corporation or a natural person, resident of and having a business address in the Marshall Islands. The registered agent for a domestic or foreign LLC not having a place of business is TCMI.

Tax law

55. Businesses pay tax calculated on the basis of gross revenues earned from activities carried out in the Marshall Islands. The Income Tax Act provides the same basis of taxation for all types of persons whether incorporated or unincorporated. The taxes are payable at entity level and entities are obliged to file tax returns disclosing the gross revenue earned and tax paid. The taxation provisions for LLCs are similar to those of Corporations discussed above (s. 109, ITA). No information on members is required to be filed with the tax authority by any type of LLCs (resident and non-resident domestic LLCs and foreign LLCs) under the Income Tax Act 1989.

Foreign Companies

56. All foreign entities must obtain an authorisation from the Registrar of Corporations for doing any business in the Marshall Islands (Division 12, BCA). An application has to be submitted to the Registrar (s. 109, BCA).

While there is no express requirement to submit ownership information in the application to the Registrar, any foreign entity applying for authority to do business in the Republic must also comply with the provisions of the Foreign Investment Business License Act 1990 (FIBLA).

57. The FIBLA requires that non-citizens must obtain a foreign investment business license to do business in the Marshall Islands. A non-citizen includes a person who is not a citizen of the Marshall Islands or any corporation, joint venture, partnership, association, or other legal entity in which a person or persons who are not citizens of the Republic own an equity interest. Section 205 of the FIBLA requires every non-citizen to submit an application for business license to the Secretary of Finance which must include among other things the names, addresses, and citizenship of the initial owners and managers and proposed form of the business organisation, including the ownership and management structure. Section 207 of the FIBLA requires the Registrar to maintain a register of foreign investments, which is a public document. A license holder must advise the Registrar of any changes in circumstances that necessitates a change to the data contained in the register. Schedule 3 of the Foreign Investment Business License Regulations provides the details which must be entered in the Register of Foreign Investment which among other things include name, address, contact details, and citizenship of business owner. A license can be suspended or revoked if the application is found to contain false or fraudulent information. Further, the violations of any provisions of the FIBLA is sanctionable with a penalty of USD 10 000.

Ownership information held by companies

Corporations

58. Under Section 80(2) of the BCA, both resident and non-resident domestic corporations are required to keep records containing the names and addresses of all registered shareholders, the number and class of shares held by each, and the dates the shareholders became the owner of the shares. For resident domestic corporations, such records have to be kept in the Marshall Islands.

59. There is no express obligation in the BCA for foreign corporations to maintain information on shareholders. However, Section 115 of the BCA allows a resident of Marshall Islands who has been a shareholder for more than 6 months to demand the inspection of the record of shareholders. If the foreign corporation does not provide the information to the requesting shareholder, the shareholder may apply to the High Court to compel the foreign corporation to furnish the information. This requirement indirectly implies that ownership information has to be kept by the foreign corporation. However, this requirement is not absolute. Where the foreign corporation

does not have a shareholder that is resident in Marshall Islands or is not resident in the Marshall Islands for more than 6 months; there is technically nothing in the BCA to require a foreign corporation to maintain ownership information. This requirement in any case is not equivalent to having an express obligation to maintain ownership records.

Limited Liability Companies

60. There is no express requirement for resident and non-resident domestic LLCs to maintain records of its members under the LLCA. However, Section 18 of the LLCA concerning admission of members state that a person acquiring a limited liability interest is admitted as a member of the LLC either at (a) the formation of a LLC or (b) when the person's admission is reflected in the records of the LLC. Further, Section 22(1) (b) of the LLCA prescribes the rights of each member of a LLC to obtain from the LLC a current list of the names and the last known business, residence, or mailing address of its members. The right to obtain the information may be enforced by a High Court order if the LLC fails to provide the information to the requesting member (s. 22 (6), LLCA). These requirements indirectly imply that information relating to members is kept by the LLC. This requirement in any case is not equivalent to having an express obligation to maintain ownership records.

Ownership information held by financial institution and cash dealer

61. Financial institutions and cash dealers are subject to the Anti-Money Laundering and Countering the Financing of Terrorism Regulations (AML/CFT Regulations) issued pursuant to Section 180 of the Banking Act. The terms "financial institution" and "cash dealer" are defined in the Banking Act.

62. Section 102(n) of the Banking Act defines a *"financial institution"* to mean any person who carries on a business of:

- Acceptance of deposits and other repayable funds from the public;
- Lending, including consumer credit, mortgage credit, factoring (with or without recourse), and financing of commercial transactions;
- Financial leasing;
- Money transmission services;
- Issuing and administering means of payment (such as credit cards, travellers' checks, and bankers' draft); guarantees and commitments; trading for own account or for account of customers in money market instruments (such as checks, bills, certificates of deposit), foreign

exchange, financial futures and options, exchange and interest rate instruments, and transferable securities; underwriting share issues and participation in such issues; money-brokering; portfolio management and advice; safekeeping and administration of securities; credit reference services; and safe custody services.

63. Section 102(e) of the Banking Act defines a *"cash dealer"* to mean:

- A person who carries on business as an insurer, an insurance broker or intermediary, a securities dealer or futures broker;
- A person who carries on a business of dealing in bullion; of issuing, selling or redeeming travellers' checks, money orders, or similar instruments, or of collecting, holding, and delivering cash as part of a business of providing payroll services;
- An operator of a gambling house, casino, or lottery;
- A person carrying on the business of currency dealer or exchanger.

64. To the extent that a corporation or an LLC uses the service of a service provider that is a *financial institution* or a *cash dealer*, the AML/CFT Regulations would apply to the corporation or LLC as customers and the service provider would be required under the AML/CFT Regulations to perform customer due diligence (CDD) and identify and determine the beneficial owner of the corporation or LLC (ss.3B and 3C, AML/CFT Regulations). For instance, under Section 3C.5 of the AML/CFT Regulations, *financial institutions* and *cash dealers* are required to identify each natural person that (1) owns directly or indirectly[6] 10 percent or more of the vote or value of an equity interest in; <u>and</u> (2) exercise management of a company. This requirement will however not apply if there is no natural person owning directly or indirectly 10 percent or more of the vote or value of an equity interest in the company or where the natural person does not exercise management of the company.

Ownership information held by other service providers

65. Pursuant to the policy of the Corporate Registrar for non-domestic entities, end users are prohibited from forming corporations and LLCs directly, and only *"qualified intermediaries"* (*i.e.* lawyers, accountants, bankers or formation specialists that have been vetted by the Registrar) are permitted to submit an application for the formation of non-resident domestic corporations/LLCs. A *qualified intermediary* must demonstrate that he or she is subject to customer due diligence requirements. The content of the customer

6. Section 3C.7 of the AML/CFT Regulations set out the scope and practical application of the term *"indirect"*.

due diligence requirements would vary depending on the particular *qualified intermediary,* and in particular depending on the laws in the jurisdiction where they are resident. It is noted that, in the case of a *qualified intermediary* that is a Marshall Islands resident, the AML/CFT Regulations are only applicable to *financial institutions* and *cash dealers*. Other types of service providers/intermediaries which are not *financial institutions* or *cash dealers,* such as lawyers, accountants, bankers or formation specialists are not subject to the AML/CFT Regulations.

66. The formation of resident domestic entities is restricted to citizens of the Marshall Islands, and is generally performed through local attorneys. Lawyers and attorneys in the Marshall Islands who act as *qualified intermediaries* are also regulated by the Marshall Islands Bar. The Marshall Islands has adopted the American Bar Associations Model Rules of Professional Conduct. However, there is no CDD requirement prescribed in the American Bar Associations Model Rules of Professional Conduct.

Nominees

67. The Marshall Islands recognises the concept of nominee ownership. For example, Section 74 of the BCA refers to shares held by a trustee which may be voted by him, either in person or by proxies, only after the shares have been transferred into his name as trustee or into the name of his nominee. To the extent that the nominee is a *financial institution* or a *cash dealer*, the AML/CFT Regulations and the corresponding CDD requirements in the AML/CFT Regulations would be applicable to the nominee. Other than the AML/CFT Regulations, there are no other legislations or regulations that regulate the conduct of persons acting as nominee. However, the Marshall Islands authorities indicate that there is currently only one law firm in the Marshall Islands providing nominee services, and it is the policy of that firm to maintain ownership information on all clients. However, legal basis of these requirements is not clear.

Conclusion

68. The Marshall Islands' legal framework ensures the availability of the ownership information in relation to registered shareholders of resident and non-resident domestic corporations (s. 80 BCA) and foreign corporations doing business in the Marshall Islands (ss. 205(2)(d) and (e) FIBLA). Nominees that are not subject to AML/CFT requirements are not required under the Marshall Islands' law to obtain and maintain ownership information. There is no express legal requirement for LLCs to maintain ownership information.

Bearer shares *(ToR A.1.2)*

69. Section 42 provides that shares can be issued in registered or bearer form. The shares in bearer form can be issued provided the articles of incorporation prescribes the manner in which any required notice to be given to shareholders of such shares is in conformity with section 11 of the BCA. Resident domestic corporations are not allowed to issue shares in bearer form (s. 42(2), BCA).

70. Notice for meetings of shareholders must be given to bearer shareholders which should include a statement of the conditions under which shareholders may attend the meetings and exercise their right to vote (s. 65, BCA). Section 11 of the BCA requires that any notice requiring a shareholder to take action for securing a right or privilege must be published in time to allow a reasonable opportunity for action to be taken.

71. A list of registered shareholders and of holders of bearer shares who as of the record date have qualified for voting, certified by the corporate officer responsible for its preparation or by a transfer agent, must be produced at any meeting of shareholders upon request of any shareholder at the meeting or prior to such meeting (s. 73, BCA).

72. Pursuant to Section 80(2) of the BCA, any corporation which has issued bearer shares must maintain a record of all certificates issued in bearer form, including the number, class, and dates of issuance of such certificates.

73. None of the above mechanisms ensure identification of owners of bearer shares and availability of such information in all cases.

74. The Marshall Islands' authorities have indicated that records are not available for the number or percentage of Marshall Islands non-resident domestic corporations which have issued bearer shares.

Partnerships *(ToR A.1.3)*

Types of partnerships

75. There are two types of partnerships provided under Marshall Islands' law – General partnerships and limited partnerships. General partnerships are governed by the Revised Partnership Act (RPA) and limited partnerships are governed by the Limited Partnership Act (LPA). General partnerships can be further classified as (1) resident domestic partnerships or (2) non-resident domestic partnerships. Limited partnerships can be further classified as (1) resident domestic limited partnerships or (2) non-resident domestic limited partnerships.

76. Similar to corporations and LLCs, both general and limited partnerships can be further classified as resident domestic partnerships, resident domestic limited partnerships, non-resident domestic partnerships, and non-resident domestic limited partnerships. The terms *"resident domestic"* and *"non-resident domestic"* mean partnerships doing business in Marshall Islands and partnerships not doing business in the Marshall Islands, respectively.

Ownership information provided to government authorities

General partnerships

77. To form a general partnership under the RPA, a Certificate of Partnership Existence must be filed with the respective Registrar (*i.e.* Attorney General or TCMI). Under Section 29(1) of the RPA, there is no express requirement to include information identifying all the partners in the Certificate of Partnership Existence. Section 29(2) of the RPA provides the option to include information on the partner(s) authorised to bind the partnership to be included in the Certificate of Partnership Existence.

78. Under the Corporate Regulations of 1995 (CR), there is a requirement for resident domestic partnerships to file an annual report containing the names, residence, and citizenship of all partners with the Registrar (s. 1A10(1), CR). As the Partnership Act has been repealed and substituted by the RPA, the applicability of the CR is uncertain with regard to partnerships. However, the Marshall Islands' authorities have indicated that the CR is still in force and being applied by the Registrar for resident domestic partnerships. As the CR was issued to implement the provisions of the Partnership Act which was repealed in 2005, the Marshall Islands is encouraged to clarify that the provisions of the old regulation continues to apply in respect of the RPA.

79. The provisions of the CR are not applicable to non-resident domestic partnerships.

Tax law

80. General partnerships which carry out business within the Marshall Islands are chargeable to tax. Partnership are taxed at the entity level in the same manner as corporations. No information on partners is required to be filed with the tax authority by resident and non-resident domestic partnerships under the Income Tax Act.

Limited partnerships

81. To form a limited partnership under the LPA, one or more persons (including each of the general partners) must execute a Certificate of Limited Partnership which must be filed with the respective Registrar (*i.e.* Attorney General or TCMI). Under Section 10(1)(c) of the LPA, there is an express requirement to include the name and business, residence, or mailing address of each general partner in the Certificate of Limited Partnership. However, there is no express requirement to include information relating to limited partners in the Certificate of Limited Partnership under the LPA.

82. Under the CR, there is a requirement for resident domestic limited partnerships to file an annual report containing the names, residence, and citizenship of all general partners with the Registrar. There is no express requirement to include information on the limited partners in the annual report. Non-resident domestic limited partnerships are not required to file an annual report, but are required to amend its Certificate of Limited Partnership upon any change amongst the general partners. Similarly, the applicability of the CR is uncertain with regard to partnerships and Marshall Islands is encouraged to clarify that the provisions of the old regulation continues to apply in respect of the RPA.

Tax law

83. Limited partnerships are taxed at the partnership level and tax provisions are similar to those of Corporations. No information on partners (*i.e.* limited and general) is required to be filed with the tax authority by either resident or non-resident domestic partnership/limited partnership under the Income Tax Act 1989.

Ownership information held by partnerships

General partnerships

84. A person may become a partner only with the consent of all of the other partners and each partner has equal rights in the management and conduct of the partnership business and affairs (s. 35, RPA). Under the RPA, each partner and the partnership is required to provide to all partners, former partners, and legal representatives for deceased or disabled partners access to the books and records of the partnership (s. 37(1), RPA). These records include a current list of the names and last known business or residential mailing addresses of the partners (s. 37(1)(c), RPA).

85. Action can be brought in the High Court with regard to enforcing any right of a partner. Section 37(5) of the RPA specifically deals with the

enforcement of rights of partners for accessing the information on each partner by the High Court. The demanding partner must satisfy the Court that the information is related to the partner's interest as a partner in the partnership. However, the rights of a partner to obtain information may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all partners (s. 37(6), RPA).

Limited partnerships

86. There is no express requirement under the LPA for the limited partnership to maintain information on its partners. Each limited partner however, has the right to obtain from the general partners a current list of the names and last known business, residential, or mailing addresses of each partner (s. 32(1)(c), LPA). These rights of limited partners are enforceable by the High Court similar to general partnerships. However, the rights of a limited partner to obtain information may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all partners (s. 32(6), LPA). This requirement in any case is not equivalent to having an express obligation to maintain ownership records.

Ownership information held by financial institution and cash dealer

87. As explained in the section relating to corporations and LLCs, to the extent that a general partnership or a limited partnership uses the service of a service provider that is a *financial institution* or a *cash dealer*, the AML/CFT Regulations would apply to the general partnership or limited partnership as customers and the service providers would be required under the AML/CFT Regulations to perform CDD and identify and determine the beneficial owner of the general partnership or limited partnership (ss.3B and 3C, AML/CFT Regulations). For instance, under Section 3C.5 of the AML/CFT Regulations, *financial institutions* and *cash dealers* are required to identify each natural person that (1) owns directly or indirectly 10 percent or more of the vote or value of an equity interest in; and (2) exercise management of a limited partnership or similar arrangement. This requirement will however not apply if there is no natural person owning directly or indirectly 10 percent or more of the vote or value of an equity interest in the limited partnership or similar arrangement or where the natural person does not exercise management of the limited partnership or similar arrangement.

Ownership information held by other service providers

88. Pursuant to the policy of the Corporate Registrar for Non-domestic entities, end users are prohibited from forming general partnerships or limited partnerships; only *"qualified intermediaries"* (*i.e.* lawyers, accountants,

bankers, or formation specialists that have been vetted by the Registrar) are permitted to submit an application for the formation of non-resident domestic general or limited partnerships. A *qualified intermediary* must demonstrate that he or she is subject to customer due diligence requirements. The content of the customer due diligence requirements would vary depending on the particular *qualified intermediary,* and in particular on the laws in the jurisdiction where they are resident. It is noted that, in the case of a *qualified intermediary* that is a Marshall Islands resident, the AML/CFT Regulations are only applicable to *financial institutions* and *cash dealers*. Other types of service providers/intermediaries which are not *financial institutions* or *cash dealers*, such as lawyers, accountants, bankers or formation specialists are not subject to the AML/CFT Regulations. The formation of all resident domestic entities is restricted to citizens of the Marshall Islands, and is generally performed through local attorneys. However, legal basis of these requirements is not clear.

Foreign partnerships

89. A foreign partnership established under the laws of a foreign jurisdiction may carry out business operation in the Marshall Islands by submitting an application to the appropriate Registrar (*i.e.* Attorney General). Once the foreign partnership is registered, it is subject to the same reporting and regulatory requirement as a foreign corporation.

Conclusion

90. For general partnerships, information on the partners is maintained by the partnership. For limited partnerships, information on general partners is filed with the Registrar at the point of formation of the limited partnership and for resident domestic limited partnerships, information on general partners may be filed in the annual report if the CR is still applicable. Non-resident domestic limited partnerships are not required to file an annual report, but are required to amend its Certificate of Limited Partnership upon any change amongst the general partners. Information on limited partners is not required to be filed with the Registrar. Each limited partner has the right to obtain from the general partners a current list of the names and last known business, residential, or mailing addresses of each partner (s. 32(1)(c), LPA). These rights of limited partners are enforceable by the High Court similar to general partnerships. However, these requirements do not ensure information on all the partners of limited partnerships. For foreign partnerships, information on partners is available as it would be filed with the Secretary of Finance under Section 109 of BCA and Sections 205(d) & (e) of the FIBLA.

Trusts *(ToR A.1.4)*

91. The Marshall Islands Revised Code (MIRC) provides for the formation and administration of Trusts under the Trust Act of 1994 (TA), the Trust Companies Act of 1994 (TCA), and the Trustee Licensing Act of 1994 (TLA). The creation of Trusts is under the exclusive control and at the discretion of the Registrar of Trusts, the Majuro International Trust Company (MITC). The MITC is currently inactive and has not accepted any trust applications. In this regard, there are currently no Marshall Islands trusts, licensed trust companies or licensed trustees in existence in the Marshall Islands.

92. A trust may come into existence in any manner including, but not limited to:

- an oral declaration; or
- an instrument in writing (including a will or codicil) ; or
- by conduct.

Ownership information provided to government authorities

Marshall Islands trusts

93. To register a trust, either of the following must be filed with the Registrar of Trusts (s. 161TA):

- a certificate from the trustee that:
  - the trust upon registration will be a Marshall Islands trust[7];
  - a notice of the establishment of the trust; and
  - a notice listing the address of the registered office of the trust; or
- a copy of the trust instrument along with a notice listing the address of the registered office of the trust.

94. All Marshall Islands trusts must be registered with the Register of Trusts. The office of a Marshall Islands trustee is the registered office of the trust (ss. 160 and 164, TA). A Certificate of Registration issued by the

7. Section 101A(1)(i) of the Trust Act defines a Marshall Islands trust as a trust which is registered under the provisions of the Trust Act and in respect of which at least one of the trustee is licensed in the Republic and is either a foreign corporation registered in the Republic, a Marshall Islands corporation, or a trustee company and the beneficiaries are non-resident and whose proper law is the law of the Marshall Islands.

Registrar is valid for one year and an application for renewal of registration in the prescribed form must be made and an annual fee be paid (s. 162, TA).

95. Information of the beneficiaries[8] and the settlor(s) is likely to be included in the trust instrument, if filed with the Registrar.

Foreign trusts

96. Foreign trusts are also recognized under the laws of the Marshall Islands by virtue of section 137 of the TA. The Trust Act (TA) defines a foreign trust as a trust whose proper law is the law of some jurisdiction other than the Republic of Marshall Islands. Section 138 of the TA deals with governing law of the trust and it must be the law of the jurisdiction: expressed by the terms of the trust as the proper law; or failing that, intended by the settlor as the proper law; or failing either, with which the trust had closest connection at the time of creation. There is no express requirement relating to the filing of information relating to the beneficiaries and settlors of a foreign trust established outside of the Marshall Islands with the Registrar under the TA.

Ownership information held by trustee

Marshall Islands trusts

97. All trustees administering a Marshall Islands trust and residing or conducting business in the Republic must be licensed under the Trustee Licensing Act (TLA) or the Trust Companies Act (TCA) (s. 302, TLA). The Commissioner of Trust Companies, who is the Commissioner of Banking, is the licensing authority. A foreign trust company can also be licensed under the TCA to conduct trust business. If any person transacts a trust business[9] without a license, he is considered guilty of an offence and on conviction is liable to pay fine. To become a Trustee, an applicant has to be licensed under the TLA or qualify under the provisions of the TCA. There is no express requirement in the TLA or TCA which requires the Trustee to maintain information relating to the beneficiaries or the settlor(s) or provide such information to any authority. However, a trustee is required to "keep accurate accounts and records of his trusteeship." (s. 114(5), TA). There are strict requirements to keep and maintain financial records for the trust companies

8. A settlor or a trustee may also be a beneficiary of the trust (s. 106,TA)
9. Section 202 of the Trust Companies Act defines trust business as, "business of acting for the benefit of another in a fiduciary capacity whether as a trustee, executor, administrator or any similar capacity".

and these can be inspected by the Commissioner but no express requirements to keep information on the clients.

98. Section 106 of the TA states that any beneficiary of a trust must be identifiable by (i) name or (ii) ascertainable by reference to a class or a relationship to some person whether or not living at the time of the creation of the trust or at the time which under the terms of the trust is the time by reference to which members of a class are to be determined. A trust is invalid if it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose. A trustee must exercise his powers only in the interests of the beneficiaries and in accordance with the terms of the trust. From this requirement, it implies that a trustee needs to maintain information relating to the beneficiaries of the trust. There is no express requirement in the TA for the trustee to maintain information of the settlor(s).

99. Duties of trustee are stated in Section 114 of the TA, which among other things require him to keep accurate accounts and records of his trusteeship.

Foreign trusts

100. There is no legislation that prohibits any person in Marshall Islands from administering (*e.g.* acting as trustee or trust protector) a foreign trust established outside Marshall Islands. If the person is carrying on a trust business, there is a requirement for the person to incorporate the business and obtain a license under Section 205 of the TCA. The TLA is not relevant for foreign trusts because it is only applicable to a trustee of a Marshall Islands trust (s. 302, TLA).

101. While the TCA provides for the licensing of the trustee, there is no express CDD requirement in the TCA which requires the Trustee to maintain information relating to the beneficiaries or the settlor(s). There is also no express requirement in the TA for the trustee to maintain information relating to beneficiaries or the settlor(s) of a foreign trust. However, the obligation to keep accurate accounts and records of trusteeship apply to trustee.

Ownership information held by financial institution and cash dealer

102. As explained previously, to the extent that a trust uses the service of a service provider that is a *financial institution* or a *cash dealer*, the AML/CFT Regulations would apply to the trust as customers and the service providers would be required under the AML/CFT Regulations to perform CDD and identify and determine the beneficial owner of the trust (Section 3B and 3C, AML/CFT Regulations). For instance, under Section 3C.6 of the AML/CFT Regulation, *financial institutions* and *cash dealers* are required to identify the settlor(s), trustee(s), and beneficiaries whose vested interest is 10 percent

or more of the value of the trust corpus. This requirement will however not apply if the settlor(s), trustee(s), and beneficiaries vested interest in the trust corpus is less than 10%.

Conclusion

103. For a Marshall Islands trust, the beneficiaries must be identifiable by name or ascertainable (s. 106, TA). All trustees are required to keep accurate accounts and records of his trusteeship. It is reasonable to expect that the trustee must have information on settlor(s) and beneficiaries; however there are no express obligations on the trustee. For foreign trusts there is no express requirement in the TA or TCA for the information relating to the beneficiaries and settlor(s) to be maintained. The AML/CFT Regulations will apply in certain circumstances when the trust uses the services of a service provider that is a *financial institution* or a *cash dealer.*

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

104. There is no provision under the laws of the Marshall Islands which provides for the establishment of foundations.

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

Corporations and LLCs

105. Availability of ownership information in case of domestic corporations is ensured through records of shareholders. However, there is no express sanction for failure to keep a share register by domestic corporations. All shareholders have the right to inspect or make copies or extracts of the share register (s. 81, BCA). Similarly the members of the LLC can demand information on current members (s. 22 (1)(c), LLCA). Similar access to records is available to qualified shareholders of a foreign corporation (s. 115, BCA). If the information is not furnished to the shareholder/member, the shareholder/member may apply to the High Court to compel the corporation/LLC to provide the ownership records. If the corporation/LLC does not comply with the court order, it may be charged with contempt and is liable for penalties as the judge may determine proper.

Partnerships

106. Section 1A12(2) of the CR sets out the sanction for failure by resident domestic partnerships and resident domestic limited partnerships to file an annual report with the Registrar. The Registrar may dissolve the partnership

if it does not file the annual report. The sanction under Section 1A12(2) of the CR however does not apply to non-resident domestic partnerships and non-resident domestic limited partnerships. Similarly, the applicability of the CR is uncertain and Marshall Islands is encouraged to clarify that the provisions of the old regulation continues to apply in respect of the RPA. There are no sanctions in the RPA or the LPA for failure to file ownership information with the Registrar.

107. There is no express sanction for failure to maintain records of partners by general partnerships or limited partnerships. However, where rights are given to a qualified partner of a partnership (s. 37, RPA) and a limited partnership (s. 32, LPA) to inspect the records of the partnership and if the information is not furnished to the requesting partner, the partner may apply to High Court to compel the partnership/limited partnership to provide the records of partners. If the partnership/limited partnership does not comply with the court order, it may be charged with contempt and is liable to penalties as the judge may determine proper.

Trusts

108. A trustee is liable for a breach of trust on duties imposed on him under the Trust Act (ss.114 and 123, TA). There is no express requirement on the trustee to provide any information on the settlor(s) and beneficiaries of the trust to government authorities.

109. A trustee license can be suspended by the Commissioner if he is satisfied that the licensed trustee has failed to comply with the terms and conditions of the issued license. Any person transacting trust business without a license is guilty of an offence and upon conviction he is liable to a fine.

Service providers subject to AML/CFT Regulations – Financial institutions and cash dealers

110. The AML/CFT Regulations require that financial institutions and cash dealers make available to the Banking Commissioner upon request all of the customer and transaction records the AML/CFT Regulations require them to maintain. In the event that a financial institution or cash dealer violates the requirements of the AML/CFT Regulations, that institution or dealer will be liable for a civil penalty of up to USD 10 000 per violation for wilful violations or USD 500 per violation for negligent violations (s. 7, AML/CFT Regulations).

Determination and factors underlying recommendations

Phase 1 determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Bearer shares can be issued by non-resident domestic corporations in the Marshall Islands. Appropriate mechanisms to allow identification of owners of bearer shares are not in place.	The Marshall Islands should ensure that appropriate mechanisms to identify owners of bearer shares are in place.
Ownership and identity information for resident and non-resident domestic LLCs, Foreign Maritime Entities, nominee shareholdings and limited partnerships, Marshall Islands' trusts and foreign trusts is not available in all circumstances.	The Marshall Islands should ensure that ownership and identity information is available for all entities.
There are no sanctions for not maintaining ownership and identity information under Marshall Islands law.	The Marshall Islands should introduce effective sanctions against entities and arrangements where they fail to comply with requirements to maintain ownership and identity information.

A.2. Accounting records

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

111. 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*. Accounting records need to be kept for a minimum of five years.

General requirements *(ToR A.2.1)*

Record keeping requirements under the various Acts

Business Corporations Act

112. Under the BCA, all resident and non-resident domestic corporations are required to maintain correct and complete books and records of account, minutes of all shareholder and board of director's meetings, actions taken by the shareholders or board of directors, and the minutes of any executive committee meetings (s. 80, BCA). For resident domestic corporations, these records are required to be maintained in the Marshall Islands.

113. The nature of accounting records as well as the scope of "complete books" is not specified in the law. Section 129.5 of the BCA authorises the Registrar of Corporations to prescribe rules and regulations deemed necessary to carry into effect the provisions of the BCA, however, no rules or regulations concerning keeping of accounting records appear to have been issued. Therefore, the extent to which these rules ensure the availability of accounting information to the standard is not clear.

114. In absence of the explicit requirement to keep books and records by non-resident domestic corporations in the Marshall Islands, it is uncertain that such records would be available to authorities in a timely manner.

115. Foreign corporations are not subject to the requirements in Section 80 of the BCA (s. 117, BCA), therefore, foreign companies doing business in the Marshall Islands is not subject to any explicit record keeping requirements. Similarly, record keeping obligations prescribed under section 80 of the BCA do not apply to FMEs. Their accounting obligations therefore follow only from the jurisdiction under which they are originally incorporated.

Limited Liability Company Act

116. There is no express requirement in the LLCA that requires domestic or foreign LLCs to maintain correct and complete books and records of accounts. Nevertheless, Section 22 of the LLCA gives each member and manager of a Marshall Islands LLC the right to obtain from the LLC true and full information regarding the status of the business and financial condition of the LLC which implies that accounting records must be kept.

117. Section 32 of the LLCA provides that the profits and losses of a LLC must be allocated among the members in the manner provided in the limited liability company agreement. This provision indicates that profits or losses of the company must be determined.

118. However, the above requirements do not ensure that accounting records consistent with the standard will be maintained by LLCs or foreign LLCs.

Revised Partnership Act

119. There is no express requirement in the RPA that requires partnerships to maintain correct and complete books and records of accounts. Nevertheless, Section 37 of the RPA gives each partner of the partnership the right of access to books and records of the partnership. This includes the true and full information regarding the status of the business and financial condition of the partnership, as well as financial statements and tax filing of the partnership which implies that accounting records have to be kept. This is however not equivalent to having an express obligation to maintain accounting records.

Limited Partnership Act

120. There is no express requirement in the LPA that requires partnerships to maintain correct and complete books and records of account. Nevertheless, Section 32 of the LPA gives limited partners the right to request from general partners, true and full information regarding the status of the business and financial condition of the limited partnership, as well as financial statement or income tax returns which implies that accounting records have to be kept. This is again not equivalent to having an express obligation to maintain accounting records.

Trust Act

121. Section 114(5) of the TA provides that trustees are required to keep accurate accounts and records of their trusteeship. The High Court of the Marshall Islands has the authority, upon the request of the trustee, Attorney General, beneficiary, or any other person given leave by the Court, to make an order for the submission of accounts (s. 155(2)(a)(ii), TA).

Banking Act

122. All licensed banks are required to publish a balance sheet and a profit and loss account for a year in the local press as prescribed by the Commissioner (s. 132, Banking Act). All licensed banks must also appoint annually an independent financial auditor to audit the financial statements of the bank (s. 134, Banking Act). A bank licensed to do offshore banking business may be required by the Commissioner of Banking to maintain in the Republic such books, minutes, accounts, documents, vouchers or such other documents as determined by him (s. 128, Banking Act). The Marshall Islands authorities indicate that there are no offshore banks operating in the Marshall Islands.

Income Tax Act

123. There are no explicit accounting obligations for corporations stipulated by the tax law. However, corporations must be able to substantiate information provided to the tax administration. Section 12 of the BCA specifically exempts all non-resident entities and foreign corporation from Income Tax. Further, entities carrying specified business are exempt from gross revenue tax (s. 121, ITA). The tax holiday is available to any incorporated or unincorporated business engaged in carrying on one or more of the following businesses: off-shore or deep sea fishing; manufacturing industry for export or for both export and local use; agriculture; and hotel and resort facilities. Section 122 exempts some other entities from the gross revenue tax. Businesses pay tax based on gross revenues, therefore, there is no requirement to compute the income and accordingly information on expenses need not be kept for tax purposes.

124. All resident domestic entities are obliged to file income tax returns, regardless of whether they are taxable or not. Domestic entities pay tax determined on the basis of gross revenue and this may not ensure information of the expenses incurred by the entities. Therefore, filing of tax return does not ensure keeping of complete and reliable accounting records by these entities.

Conclusion

125. The laws of the Marshall Islands only provide for express obligation to maintain correct and complete books and records of account for resident and non-resident domestic corporations and Marshall Islands trusts. However, the scope of books and records is not explicitly stated therefore keeping of reliable accounting records consistent with the TOR A.2.1 is not ensured for these entities. There is no express obligation for foreign corporations, FMEs, all LLCs and all partnerships to maintain correct and complete books and records of account.

126. No sanctions have been established under the BCA, LLCA, or the ITA for failure to keep accounting records. The High Court may direct the concerned persons to permit inspection of records to the authorised persons; if so ordered, failure to comply could result in contempt of court charges.

Underlying documentation *(ToR A.2.2)*

127. The laws of the Marshall Islands, namely the BCA, LLCA, RPA, LLP, Trust Act, or the ITA, do not contain explicit obligations with regard to underlying documentation that has to be kept.

Document retention (ToR A.2.3)

128. There is no express requirement in the BCA, LLCA, RPA, LLP, or TA that stipulates a minimum retention period for accounting records. However, the Marshall Islands authorities indicate that the provisions of the LLCA, RPA, LLP and TA can be read to require retention of records for the life of the entity.

129. Section 4(e) of the AML/CFT Regulations establishes that financial institutions and cash dealers are required to retain records of all transactions for a period of six years from the date the transaction was completed. These records include the nature of the transaction, the accounts involved, the currency/negotiable instrument involved (s. 4(c), AML/CFT Regulations).

Determination and factors underlying recommendations

Phase 1 determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
All resident and non-resident domestic corporations and Marshall Islands trusts are required to maintain correct and complete books and records of account. However, it is uncertain that these requirements ensure keeping of accounting records consistent with the standard. Additionally, the laws of the Marshall Islands do not contain explicit obligation for foreign corporations, FMEs, LLCs and partnerships to keep accounting records.	The Marshall Islands should ensure that its laws explicitly require all entities to keep full accounting records that would allow the entity to correctly explain all transactions, enable financial position of the entity to be determined with reasonable accuracy at any time and allow financial statements to be prepared.
The laws of the Marshall Islands do not contain explicit obligations requiring all types of entities to keep underlying documentation consistent with the standard.	The Marshall Islands should ensure that its laws explicitly require all entities to keep full underlying documentation consistent with the standard.
The laws of the Marshall Islands do not explicitly stipulate a retention period for accounting records and underlying documentation in respect of all entities.	The Marshall Islands should ensure that its laws explicitly require all entities to keep accounting records and underlying documentation for at least five years.

Phase 1 determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
The commercial and tax laws of the Marshall Islands do not contain any sanctions for not keeping accounting records.	The Marshall Islands should ensure that its laws prescribe appropriate sanctions against entities and arrangements for their failure to keep reliable accounting records consistent with the standard.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

130. All financial institutions in the Marshall Islands are regulated under the Banking Act. The term "financial institution" is defined under the Banking Act to mean any person who carries on a business of:

- acceptance of deposits and other repayable funds from the public;
- lending, including consumer credit, mortgage credit, factoring (with or without recourse), and financing of commercial transactions;
- financial leasing;
- money transmission services;
- issuing and administering means of payment (such as credit cards, travellers' checks and bankers' drafts); guarantees and commitments;
- trading for own account or for account of customers in money market instruments (such as checks, bills, certificates of deposit), foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities;
- underwriting share issues and participation in such issues;
- money-brokering;
- portfolio management and advice;
- safekeeping and administration of securities; or
- credit reference services; safe/custody services.

131. All financial institutions are required to maintain accounts in the name of the account holder and are prohibited from opening or keeping

anonymous accounts or accounts which are in fictitious or incorrect names. They must record and verify the identity, domicile, legal capacity, occupation or business purpose, as well as other identifying information of all clients, through the use of documents providing evidence of their legal existence and the powers of their legal representative, or any other official or private documents. Such identification and verification must be done when opening new accounts or passbooks or renting safe deposit boxes (s. 168, Banking Act).

132. Financial institutions must retain records for all transactions relating to an account for six years after the account has been closed. These records must contain details sufficient to identify in respect of each transaction the following (s. 169, Banking Act):

- name, address and occupation (or where appropriate business or principal activity) of each person: (i) conducting the transaction; or (ii) if known, on whose behalf the transaction is being conducted as well as the method used by the financial institution or cash dealer to verify the identity of each such person;
- nature and date of the transaction;
- type and amount of currency involved;
- the type and identifying number of any account with the financial institution or cash dealer involved in the transaction;
- if the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was 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 the officer, employee or agent of the financial institution who prepared the report.

133. Financial institutions (including its employees, officers or directors) that wilfully violate the record keeping requirements are liable to a fine of not more than USD 2 000 000 or imprisonment for not more than 20 years, or both (s. 170, Banking Act). Financial institutions that do not conduct the necessary customer due diligence for account holders are liable to a fine not exceeding USD 10 000 for each offence (s. 181, Banking Act).

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

B. Access to Information

Overview

134. A variety of information may be needed in respect of the administration and enforcement of relevant tax laws and jurisdictions should have the authority to access all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership and accounts of relevant entities and arrangements. This section of the report examines whether the Marshall Islands' legal and regulatory framework gives its competent authority access powers that cover all relevant persons and information, and whether the rights and safeguards that are in place are compatible with effective exchange of information.

135. The Marshall Islands' EOI agreements are given legal effect through the Tax Information Exchange Agreement (Execution and Implementation) Act 2010 (TIEA Act 2010) and the Tax Information Exchange Agreement (Implementation) Act (TIEA USA Act 1989). The TIEA USA Act gives legal effect to the Marshall Islands' TIEA with the US (US TIEA), while the TIEA Act 2010 gives legal effect to the other TIEAs signed by the Marshall Islands. The US TIEA specifies the Minister for Finance as the competent authority while the other TIEAs specify the Secretary for Finance as the competent authority. Both the Secretary and the Minister, as the case may be, may designate other persons to perform the functions of the competent authority.

136. The TIEA USA Act 1989 provides powers to the competent authority to obtain information from all persons for EOI purposes. These powers may be exercised regardless of whether there is a domestic tax interest in the Marshall Islands. Non-compliance with a request for information by the competent authority is an offence and sanctions are applicable. The TIEA Act 2010, on the other hand, provides power to the competent authority through the Income Tax Act and it is uncertain as to whether the exercise of these powers by the competent authorities is restricted by domestic tax interest in the Marshall Islands.

137. It is unclear whether the tax authorities can provide information to a foreign authority (other than the United States) in view of the confidentiality provisions in the ITA. The secrecy provisions in the Trust Act can be overcome through a Court order. The Marshall Islands authorities have compulsory powers to compel the production of information. The scope of professional privilege in the Marshall Islands is broader than the standard.

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

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

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

138. The competent authority's powers to obtain and exchange information pursuant to the Marshall Islands' EOI agreements are found in Title 41, Compact of Free Association (TIEA USA Act 1989) and Title 48, Taxation, Income Tax Act 1989 and TIEA Act 2010 ("Income Tax Act" and "TIEA Act 2010" respectively), which give effect to US TIEA and other TIEAs respectively. The Marshall Islands' legal framework does not provide for the possibility of exchanging information under DTCs and the Marshall Islands has not signed any DTC to date.

139. The TIEA USA Act 1989 and TIEA Act 2010 assign the information gathering powers to the Minister of Finance. In respect of the TIEAs where the Secretary of Finance is the designated competent authority, the Secretary of Finance's power to obtain and exchange information is derived through a Ministerial delegation Order under Title 1, section 510 of the Marshall Islands Revised Code. All TIEAs of the Marshall Islands are signed by the Minister of Finance and designate the Secretary of Finance as the competent authority. This constitutes a delegation order pursuant to Title 1, section 510 of the Marshall Islands Revised Code.

140. The access powers under the TIEA USA Act 1989 and the TIEA Act 2010 are different and are considered separately.

TIEA USA Act

141. Under the TIEA USA Act, the competent authority has powers to access information to respond to an EOI request by directly issuing notices to the holders of information to produce the information; or using search

and seizure warrants (ss. 405 and 406, TIEA USA Act 1989). These powers are applicable regardless of the type of information sought (*i.e.* whether it is ownership, bank, or accounting information) or the person from whom the information is sought (*i.e.* bank, company, individual, etc). These powers may also be exercised independently of where the information is held, as long as it is in the possession or control of a person within the Marshall Islands' territorial jurisdiction.

142. Every valid request must be in writing and must contain, among other particulars, information indicating that (a) a person in the Marshall Islands has or may have the information in his possession, custody or control, (b) the information relates to the carrying out of the laws of the US covered in the US TIEA, (c) the information relates to the affairs of a taxpayer in respect of whom the request is made, (d) the US has a valid tax purpose in making the request, (e) and whether the taxpayer is a resident of the US or Marshall Islands (s. 404, TIEA USA Act 1989).

143. Upon the receipt of a valid request, the competent authority will issue a notice requiring the person who has been identified as having possession or control of the information to deliver the requested information to the competent authority (s. 405, TIEA USA Act 1989). The notice must specify the information sought and the timeframe in which the information must be delivered. The default deadline is 28 days, and may be extended at the competent authority's discretion.

TIEA Act 2010

144. The information gathering powers of the Minister of Finance under the TIEA Act 2010 are spelt out under Section 403 of the Act and reads as follows: "The Minister of Finance shall

(1) execute and implement any and all Agreements as approved by the Cabinet pursuant to this Act;

(2) pursuant to the terms of any Agreement executed under this Act;

  (a) use all relevant information gathering measures, to the extent allowable under the laws of the Republic of the Marshall Islands, to provide any and all information requested under the authority of any Agreement executed pursuant to this Act; and

  (b) obtain and provide upon request information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees; and information regarding the ownership of companies, partnerships, limited liability companies and other entities, and information on any and all persons in an ownership chain."

145. Marshall Islands authorities have indicated that Section 403(2)(a) of the TIEA Act 2010 gives the Minister of Finance the authority to *"use all relevant information gathering measures"*, and provides the Minister an extensive network of information gathering techniques when responding to an EOI request. In this regard, they are of the view that the Minister of Finance can use, among others, information gathering powers available under the Banking Act, the Income Tax Act, and the Mutual Assistance in Criminal Matters Act. When the Minister receives an EOI request, he will assess which authority would be most effective for obtaining the information requested. The access powers under the various Acts are examined in the following paragraphs.

Access Powers under the Banking Act

146. Section 138 of the Banking Act provides that the Banking Commissioner has powers to obtain information and conduct inspection for the purposes of determining that a licensed bank is in sound financial condition and that the requirements of the law have been complied with in the conduct of its business. The banks on being specified must provide all books, minutes, accounts, cash, securities, documents and vouchers relating to its business for inspection. However, it is uncertain whether the access powers may be used for EOI purposes as the Banking Act does not specifically provide for the usage.

147. Section 167 of the Banking Act gives the Commissioner of Banking the authority and ability to obtain information for the purpose of combating money laundering, notwithstanding any secrecy or other restrictions on disclosure of information imposed by the Banking Act. This authority includes the ability to enter the premises of any financial institution or cash dealer and inspect any record, ask any question relating to the record and makes notes or copies of the whole or any part of the records. The Commissioner's authority under section 167 also allows him/her to request additional information if there are reasonable grounds for believing that the information is necessary to discovering money laundering, proceeds of crime and/or the financing of terrorism. However, it is uncertain whether the access powers of the Banking Commissioner may be used for EOI purposes as the Banking Act does not specifically provide for the usage especially when the TIEA Act 2010 uses the phase that the access powers may only be used *"to the extent allowable under the laws of the Republic of the Marshall Islands"*.

148. The Marshall Islands authorities explained that the tax authorities obtain information through the Banking Commissioner which in turn obtains the required information from the Banks under section 167(1)(d) of the Banking Act. Section 167(1)(d) of the Banking Act provides *"The Commissioner shall send to the appropriate law enforcement authorities,*

any information derived from an inspection carried out pursuant to subsection (1)(c) of this Section, if it gives the Commissioner reasonable grounds to suspect that a transaction involves proceeds of a crime.". While the Banking Commissioner may share the appropriate information with other law enforcement authorities, it is uncertain whether the information may be used by the tax authorities in the absence of a crime (*i.e.* for tax administration purposes) or for purpose of fulfilling an EOI request.

Access Powers under the Income Tax Act

149. Section 129(1) of the Income Tax Act 1989 provides that the Secretary of Finance has, for the purpose of (a) ascertaining the correctness of any return; (b) making a return where none has been made; (c) determining the liability of *any person for any tax or the liability at law or in equity of any transferee of any person in respect of any tax* (emphasis added)*;* or (d) collecting any such liability, the authority to:

- examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under the oath, as may be relevant or material to such inquiry;
- take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry; and
- inspect all daily sales records and to obtain correct copies of such records.

150. Section 129(2) of the Income Tax Act 1989 further empowers the Secretary of Finance to use his information gathering powers also for the purpose of inquiring into any offence connected to the administration or the enforcement of the tax laws. In this regard, it should be noted that the TIEA Act 2010 (authorising the Secretary of Finance to use appropriate information gathering powers) and the Income Tax Act 1989 (setting out information gathering powers for tax purposes) are integrated into the Marshall Islands Revised Code under Title 48 (Taxation), which gathers all taxation laws of the Marshall Islands. Consequently, the powers to obtain information would apply regardless of whether the person is liable to Marshall Islands tax (including those entities exempt from Marshall Islands taxes, see para. 51).

151. While these powers to obtain information under the Income Tax Act are worded very broadly it is uncertain as to whether the term *"any tax"* can be interpreted to cover foreign taxes. A contextual interpretation of the term *"any tax"* would suggest that the term is limited to taxes imposed under the Income Tax Act (*e.g.* tax on wages and salaries, tax on gross revenue and tax on immovable properties) and probably other taxes imposed in the Marshall Islands. In this regard, the access power of the Secretary of Finance to obtain information under Section 129 of the Income Tax Act 1989 for EOI purposes may be constrained by domestic tax interest notwithstanding express provision obliging the Minister of Finance to use his information gathering powers in the absence of domestic tax interest as provided in the TIEAs. On the other hand, the integration of the TIEA Act 2010 within Title 48 of the MIRC implies that it should be considered one of the tax laws of the Marshall Islands and so the power to obtain information in respect of "*any tax"* (section 129(1)) or for the purposes of offences related to the administration and enforcement "*the tax laws*" (section 129(2)), this should include a foreign tax as provided for in the TIEAs of the Marshall Islands.

Access Powers under the Mutual Assistance in Criminal Matters Act

152. The Marshall Islands authorities have indicated that the Mutual Assistance in Criminal Matters Act (MACMA) enables the Marshall Islands *"to cooperate with foreign countries in criminal investigations and proceedings."* MACMA applies to the Marshall Islands and any foreign jurisdiction which may request assistance in criminal matters on a reciprocal basis. The Marshall Islands authorities explained that upon receiving a request from a foreign State, the Attorney General can apply to the High Court for a search warrant or an evidence-gathering order, which the court will grant if the foreign state has provided a statement to the effect that a serious offense has or may have been committed against it. An evidence-gathering order gives the Attorney General the authority to *"require any person named therein to make a record from data or make a copy of a record; attend court to give evidence on oath…;* [*and*] *produce to the High Court or any person designated by the Court, anything, including any document…"*. The Marshall Islands authorities have explained that if the basis for an EOI request was a criminal proceeding in the requesting country, MACMA provides extensive access to information in the Marshall Islands. The scope of the MACMA only covers criminal matters and it does not allow Marshall Islands to access information in the absence of a crime.

Access Powers under the TIEA Act 2010

153. The Marshall Islands authorities further advise that where any information is not captured under Section 403(2)(a) of the TIEA Act 2010, section 403(2)(b) of the TIEA Act 2010 provides supplementary powers to

the competent authority to obtain information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees; and information regarding the ownership of companies, partnerships, limited liability companies and other entities, and information on any and all persons in an ownership chain. It is noted that a literal reading of section 403(2)(b) of the TIEA Act 2010 would suggest that this section merely creates the obligation for the Minister of Finance to obtain and provide the requested information to the requesting state. It does not explicitly grant any access powers to the Minister of Finance. Even if this section does grant the Minister of Finance access powers, these powers do not include the powers to obtain accounting information.

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

TIEA USA Act

154. The information gathering powers of the competent authority under the TIEA USA Act 1989 are not subject to the Marshall Islands requiring such information for its own tax purposes. The TIEA USA Act 1989 specifically empowers the competent authority to obtain and exchange information pursuant to a request from the US (s. 403, TIEA USA Act 1989).

TIEA Act 2010

155. The TIEA Act 2010 does not expressly state whether the competent authority can use his information gathering powers in the absence of domestic tax interest. It simply provides that any agreement executed pursuant to the Act shall have the force of law in the Marshall Islands and that the competent authority shall execute and implement any agreement as approved by the Cabinet pursuant to the Act.

156. All the TIEAs signed by the Marshall Islands contain an express provision obliging the competent authorities to use their information gathering powers in the absence of domestic tax interest, and the TIEA Act 2010 makes reference to the implementation of these agreements. However, this power is only granted *"to the extent allowable under the laws of the Republic of the Marshall Islands"*. As explained above under B.1.2, the Secretary of Finance possesses the powers to obtain information under section 129 of the Income Tax Act. As described above, the question of whether these access powers can be used for EOI purposes depends on the interpretation and scope of the terms "tax laws" and "any tax" under the Income Tax Act. There are good reasons to consider that they should be read to include a foreign tax given the intent of the legislation, the broad scope of its wording and the integration of

the TIEA Act 2010 into Title 48 of the MIRC. The powers under the Banking Act and the MACMA are also employed by the Secretary of Finance. In the case of these laws, their use is more limited. In particular, the access powers under the Banking Act relate to the investigation of anti-money laundering offences. Under MACMA access relates to criminal investigations and proceedings. Finally, the TIEA Act 2010 also requires the Secretary of Finance to "obtain and provide" specified types of information for EOI purposes (although not accounting information).

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

TIEA USA Act

157. The TIEA USA Act provides that every person served with a notice to produce information must do so within the timeframe specified in the notice.

158. The competent authority may, through an officer from the Department of Public Safety, make an application to a judge for an entry warrant to any premises. If the judge is satisfied that there is reasonable ground for suspecting that an offense against the TIEA USA Act has been, is being or is about to be committed by reason of which the supply of information sought by the competent authority is endangered, he may issue such a warrant. An officer that enters any premises pursuant to such a warrant is entitled to seize any material that may contain information sought by the request (s. 406, TIEA USA Act 1989).

159. The TIEA USA Act establishes offences where a person having been required to produce any information which is in his possession or under his control (s. 409, TIEA USA Act 1989):

- contravenes a notice issued by the competent authority for the production of the information;
- wilfully obstructs an officer executing an entry warrant issued under the Act;
- wilfully tampers with or alters the information such that it is false when received by the competent authority;
- without reasonable excuse destroys or damages any information which he knows that the competent authority has directed should be provided to the competent authority.

160. Offenders are liable, upon conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding USD 5 000 or both.

TIEA Act 2010

161. The TIEA Act 2010 does not contain any provision laying out the compulsory powers available to the competent authority. Accordingly, the competent authority's power to compel the production of information depends on the law being used.

162. Under the Income Tax Act, any person that does not produce the information required by the Secretary of Finance commits an offence and may be charged with contempt and is liable to penalties as the judge may determine proper, not inconsistent with the law for the punishment of contempt in the Marshall Islands. Article 140 of the ITA provides that upon conviction a fine not exceeding USD 1 000 or in case of a natural person, a term of imprisonment not exceeding one year, or both can be imposed. In such a case, the Attorney General may apply to the District Court or to the High Court for an attachment against him as for contempt. It is not clear how these provisions work in practice. The Income Tax Act does not spell out any specific procedure for obtaining information. As noted above, the Marshall Islands' authorities indicate that information may also be compelled pursuant to powers contained in the Banking Act or under MACMA. In the case of a request for information under MACMA, a person that refuses to provide information as requested is liable for contempt (MACMA, s. 410). Under the Banking Act a bank that fails to provide information pursuant to a request by the Banking Commissioner shall be guilty of an offense and upon conviction is liable to a fine not exceeding USD 10 000 (BA s. 138).

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

Financial institutions

163. Banking confidentiality is governed by the Banking Act. The Banking Act stipulates that all officers and employees of all licensed banks must maintain the confidentiality of all matters relating to the affairs of the bank and its clients and must not reveal such matters except when required to do so: by a customer to whom such matters relate to; by a court of law in the Republic; in circumstances where in the interest of the bank it is necessary to reveal such information and in order to comply with the provisions of any other written law. Accordingly, banks will provide information to tax authorities pursuant to an inquiry made under the Income Tax Act 1989. This is relevant for the TIEA Act 2010, which utilises the access powers under the Income Tax Act to obtain and exchange information pursuant to EOI requests.

164. In respect of the TIEA USA Act, section 403(2) states that the competent authority, in performing his functions under the Act, is not restricted by

any law or rule of law relating to confidentiality of information held by any person, except as expressly provided in the US TIEA (professional and trade secrets, legal privilege and information the disclosure of which is contrary to public policy). Additionally, section 405(7) of the TIEA USA Act states that any person who follows the direction of a notice issued under the TIEA USA Act is an absolute defence to any claim brought against him.

165. Banking confidentiality therefore does not have an impact on effective EOI in the Marshall Islands.

166. Section 122 of the Trust Act provides that a trustee shall not be required to disclose to any person, government or agency thereof, any document which relates to or forms part of the accounts of the trust. He may disclose the information only if the terms of the trust so provides or by order of the Court. As the trustee is prohibited to disclose information, he may not provide any information to the tax authorities in absence of a Court order. It is an offence for a person to divulge or communicate to any person other than authorised by the Trust Act information relating to establishment, constitution, business undertaking or affairs of a Marshall Islands trust.

167. To obtain a court order, the party seeking the order (whether government authority or private individual) must apply directly to the High Court, presenting the basis for the request and the relief being sought. Marshall Islands authorities have indicated that there are currently no trustees licensed in the Marshall Islands and consequently, they do not know the exact time it would take to obtain information from a trustee. Whether the procedure of obtaining a court order has potential to undermine the effectiveness of the EOI will be an issue of Phase 2 review.

Professional privileges

168. There are several privileges contained in the Evidence Act. Rule 502 of the Evidence Act provides that communications made within any of a number of relationships are privileged against disclosure. The relationships covered include accountant-client and attorney-client.[10] The rules regarding attorney-client privilege apply to confidential communications provide to a legal advisor for the purpose of obtaining legal advice or in connection with litigation. This is consistent with the standard. The same privilege extends to accountants in respect of obtaining financial advice. The Marshall Islands' authorities are of the view that this privilege would not impede effective exchange of information because the privilege is contained in the Evidence Act, and therefore only of relevance to a proceeding in the courts of the

10. The other relationships covered include Husband-Wife, Parent-Child, Physician-Patient, Psychotherapist-Patient, Government, and Penitent-Priest.

Marshall Islands. Nevertheless, the privilege for accounting is broad and the access powers described in connection with the TIEA Act 2010 do not expressly override conflicting confidentiality rules.

Tax Secrecy

169. The Income Tax Act requires the Secretary of Finance and every employee of the Department of Finance to *"maintain the secrecy of all information concerning individual taxpayers related to the Income Tax Act which comes to their knowledge and not communicate such information to any person except for the purpose of giving effect to the Act, the Social Security Act, or any other enactment imposing taxes or duties payable to the Government of the Marshall Islands and only with the express prior permission of the Secretary of Finance"* (s. 132, ITA). It further states that *"an authorised person who uses or discloses any information obtained under the Act other than for the purposes of the Act or the administration of any other tax administered by the Minister of Finance commits an offense unless the use or disclosure is with written consent of the person from whom the information is obtained or is for the purpose of legal proceedings arising out of the administration of the Act or that other tax"* (s. 136, ITA). A person who commits an offense is liable to a fine of up to USD 500 and or imprisonment for up to six months

170. There is no express provision allowing the disclosure of confidential tax information to foreign tax authorities pursuant to an EOI request. However, the TIEA Act 2010 expressly empowers the Minister of Finance to provide information pursuant to a request for information. The TIEA Act 2010 forms part of Title 48 (Taxation) of the MIRC, and therefore is part of the "tax laws" of the Marshall Islands. Consequently, the use and disclosure to a foreign tax authority of such information for EOI purposes may be regarded as for the purposes of the "administration of any other tax administered by the Minister of Finance". Furthermore, as the TIEA Act 2010 is later in time than the Income Tax Act 1989, the Marshall Islands'authorities indicate that its provisions would govern in the case of a conflict. Therefore, even if it were concluded that the disclosure of information pursuant to the TIEA Act 2010 is not included within the exceptions to secrecy contained in the Income Tax Act, there is a presumption that the disclosure authorised by the TIEA Act 2010 itself would prevail. Nevertheless, it is recommended that the Marshall Islands clarify its laws to ensure that the Income Tax Act allows the disclosure of confidential information pursuant to an EOI agreement.

Conclusion

171. Secrecy provisions in the Income Tax Act may conflict with the requirement to provide information to a foreign tax authority under the TIEA Act 2010, although there is a sound basis to conclude that exceptions to the secrecy apply, and, in any event, the latter appears to take precedence. Secrecy provisions in the Trust Act may also hinder effective exchange of information. Additionally, the scope of professional privilege relating to accountants in the Marshall Islands is broad and there are no exceptions for requests made under an EOI agreement.

172. The position with respect to a domestic tax interest in the Marshall Islands legislation is complex. For the TIEA with the US, there is no domestic tax interest. For the Marshall Islands' other TIEAs, the provision of the TIEA Act 2010 authorising the Secretary of Finance to use information gathering measures is broadly worded and clearly intended to give effect to these agreements. The information gathering measures themselves are contained in other laws, in particular the Income Tax Act 1989, but also the Banking Act and MACMA. The powers under the Income Tax Act are subject to some ambiguity about their scope. If the powers under the Income Tax Act are not subject to a domestic tax interest, they would appear to be broad enough to cover any information that may be requested under an EOI agreement. However, the Marshall Islands' authorities indicate that bank information is only obtained by the intermediation of the Banking Commissioner utilising powers under the Banking Act. In this case, the powers under that Act do not appear to be available for EOI in tax matters. Marshall Islands' authorities rely on the fact that the TIEA Act 2010 authorises the Secretary to use *all* information gathering measures available under the Marshall Islands' laws, including the Banking Act. This, however, is limited by the condition that the use must be "*to the extent allowable under the laws of the Republic of the Marshall Islands*". As the Banking Act does not allow access for EOI purposes or for tax matters generally, this throws doubt on the extent to which these powers are available. Similarly, access under the MACMA relates to criminal matters, consequently its use in the context of a request for information in a civil tax matter is not clear. Finally, the TIEA Act 2010 requires the Secretary to "obtain and provide" information, which is intended to act as a back-up access power in respect of information that is not otherwise covered by Marshall Islands' laws. As noted above, there is some limitation on this provision, but there is no question of a domestic tax interest, as it is expressly conceived for EOI purposes.

173. Overall, there are a number of questions that arise in connection with the application of the Marshall Islands' access powers, but there is no doubt that TIEA Act 2010 is intended to give effect to the Marshall Islands' obligation to exchange information under its international agreements. The

Marshall Islands' authorities read the provisions broadly and are confident that they are effective and comprehensive. The access powers tied to its agreement with its most significant partner are not at issue. Moreover, the Marshall Islands' authorities indicate that the powers described above have been used in practice without any difficulty or impediment to exchange of information, both in respect of the US TIEA but also other, more recent TIEAs.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	**Recommendations**
The access powers of the Secretary of Finance to obtain information for EOI purposes may be constrained by a domestic tax interest.	The Marshall Islands should clarify its laws to ensure that its competent authority has the power to obtain information for EOI purposes in all cases.
The scope of professional privilege in the Marshall Islands extends to accountants and its impact on effective exchange of information is unclear.	The Marshall Islands should ensure that domestic provisions on professional privileges relating to accountants allow exchange of information in line with the standard.

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)

174. The competent authority is not required to notify taxpayers or other interested parties upon the receipt of an EOI request. However, the notice issued to the person, who has or may have requested information in his possession, custody or control (information holder) can be challenged by such holder of information under the provisions of the TIEA USA Act as discussed below.

175. With regard to appeal rights, the TIEA USA Act provides that where the Minister obtains any information pursuant to an issued notice, he is obliged to keep the information confidential for 20 days. The 20 days holding

period can be shortened if the Minister is of the opinion that the information is needed by the US government before the expiration of the 20 days period and the "interest of justice requires the speedy transmission of the requested information." Where the holder of information receives a notice, he may within 20 days of the receipt, challenge the notice on any appropriate basis recognised by any law or rule or law (s. 405(8), TIEA USA Act 1989). However, the fact that information was received in a confidential relationship (other than the ones described in the TIEA) is not an appropriate basis for failing to produce information pursuant to a notice. Additionally, any person aggrieved by the action of the Minister or any other person performing a function under the TIEA USA Act may challenge the performance of that function, insofar as it affects him, by seeking a review of it by the High Court (s. 411, TIEA USA Act 1989). There is no timeframe specified for the resolution of any challenge. The practical impact of the review process will be examined in the course of the Marshall Islands' Phase 2 review.

176. The TIEA Act 2010, which applies to the Marshall Islands' other TIEAs, does not spell out any appeal rights for taxpayers and interested parties. It is however understood that taxpayers and interested parties nonetheless retain the right to seek a judicial review of any of the competent authority's actions. The practical impact of this will be examined in the course of the Marshall Islands' Phase 2 review.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

C. Exchanging Information

Overview

177. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In the Marshall Islands, the legal authority to exchange information is derived from its EOI agreements as well as from domestic law. This section examines whether the Marshall Islands has a network of information exchange that would allow it to achieve effective EOI in practice.

178. Pursuant to the Marshall Islands' EOI agreements, the competent authority for international exchange of information in tax matters is either the Secretary of Finance or the Minister for Finance (in respect of the US TIEA). They may designate other persons to carry out the functions of the competent authority.

179. As of 20 March 2012, the Marshall Islands has signed 14 EOI agreements (all TIEAs), of which 5 are in force (see Annex 2). Marshall Islands has taken all the necessary steps to bring all the remaining agreements into force. All of the Marshall Islands' EOI agreements allow the Marshall Islands to exchange information according to the international standard; however, the deficiencies in the powers of the authorities may affect the effective exchange of information. The Marshall Islands is currently in the process of negotiating a number of other EOI agreements, all of which will incorporate provisions that allow the Marshall Islands to exchange information according to the international standard. The Marshall Islands' legal framework does not provide for the possibility of exchanging information under DTCs and the Marshall Islands has not signed any DTC to date.

180. The Marshall Islands' network of EOI agreements covers most of its major trading partners and other major OECD jurisdictions.

181. All of the Marshall Islands' TIEAs contain confidentiality provisions to ensure that the information exchanged will be disclosed only to authorised persons. They also ensure that the contracting parties are not obliged to

provide information which would disclose trade, business, industrial, commercial or professional secrets or information which is the subject of legal professional privilege or to make disclosures which would be contrary to public policy.

182. There are no legal restrictions on the ability of the Marshall Islands' competent authority to respond to requests within 90 days of receipt by providing the information requested or by providing an update on the status of the request.

C.1. Exchange of information mechanisms

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

Foreseeably relevant standard (ToR C.1.1)

183. The international standard for exchange of information envisages information exchange on request to the widest possible extent, but does not allow 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." It does not allow "fishing expeditions."

184. All of the Marshall Islands' TIEAs provide for the exchange of information that is "foreseeably relevant" to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered in the TIEAs. This scope is set out in Article 1 of all of the Marshall Islands' TIEAs.

In respect of all persons (ToR C.1.2)

185. 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 EOI mechanisms will provide for exchange of information in respect of all persons.

186. All of the Marshall Islands' TIEAs provide for EOI in respect of all persons.

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

187. 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. The international standard stipulates that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

188. All of the Marshall Islands' TIEAs provide for the exchange of information held by financial institutions, nominees, and agents. All provide for the exchange of ownership and identity information.

Absence of domestic tax interest (ToR C.1.4)

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

190. All of the Marshall Islands' TIEAs contain provisions similar to the Article 5(2) of the 2002 Model Agreement on EOI for Tax Matters[11], which obliges the Contracting Parties to use their information gathering measures to obtain and provide information to the requesting jurisdiction even in cases where the requested Party does not have a domestic interest in the requested information. However, the presence of a possible domestic tax interest requirement in the Marshall Islands laws, as discussed in paragraph 156 of the report, may affect the effective exchange of information.

11. Article 5(2) of the 2002 Model Agreement reads "*If the information in possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for it owns tax purposes.*"

Absence of dual criminality principles (ToR C.1.5)

191. The principle 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 jurisdiction if it had occurred in the requested jurisdiction. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

192. All of the Marshall Islands' TIEAs contain provisions similar to Article 5(1) of the 2002 Model Agreement on EOI for Tax Matters[12], which obliges Contracting Parties to exchange information without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Contracting Party.

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

193. 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").

194. All of the Marshall Islands' TIEAs provide for exchange of information in both civil and criminal tax matters.

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

195. All of the Marshall Islands' TIEAs contain provisions similar to Article 5(3) of the 2002 Model Agreement on EOI for Tax Matters, which obliges Contracting Parties to provide, on request, information in the form of dispositions of witnesses and authenticated copies of original records to the extent allowable under domestic law.

196. This is reinforced under TIEA (USA) Act, which empowers the Marshall Islands competent authority to obtain information in any form, including dispositions of witnesses and copies of documents.[13]

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12. Article 5(1) of the 2002 Model Agreement reads "*The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.*"
13. Section 410 of the TIEA (USA) Act.

In force (ToR C.1.8)

197. Exchange of information cannot take place unless a jurisdiction has exchange of information agreements in force. The international standard requires that jurisdictions take all steps necessary to bring information agreements that have been signed into force expeditiously.

198. Section 3 of the TIEA Act 2010 provides that the Minister of Finance must execute and implement agreements approved by the Cabinet. The Marshall Islands authorities have indicated that no additional legislation is required for bringing the agreement into force from its side and it notifies the date of signature by the Minister of Finance to its partner jurisdiction. The agreement comes into force after internal ratification procedure is completed in the partner jurisdiction. The agreements signed by the Marshall Islands have come into force within reasonable time. The time taken to bring an EOI agreement into force generally ranges between 12 and 18 months. The Marshall Island has completed all the steps necessary on its part to bring all its EOI agreements into force. Out of the 14 EOI agreements that the Marshall Islands has concluded, 5 are in force as of 20 March 2012.[14] In respect of the other 9 agreements, the Marshall Islands is awaiting its EOI partners to complete their procedures to bring the agreements into force.

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

199. The EOI agreements signed by the Marshall Islands are given effect through the TIEA Act 2010.

200. The US TIEA is given effect through the TIEA USA Act, which states under section 403 that it "has effect for the purpose of enforcing the giving of assistance by persons in the Republic of the Marshall Islands in connection with the performance of the obligations assumed by the Government of the Republic of the Marshall Islands under the Agreement (US TIEA)."

201. As discussed in Part B.1 of this report, there are ambiguities in the Marshall Islands authorities' powers to obtain necessary information and accordingly the Marshall Islands should clarify its laws to ensure that its competent authority has the power to obtain information for EOI purposes in all cases.

14. The agreements that have been brought into force are the agreements with Australia, Denmark, Netherlands, Norway, and the USA.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
The access powers of the Secretary of Finance to obtain information for EOI purposes may be constrained by a domestic tax interest.	The Marshall Islands should clarify its laws to ensure that its competent authority has the power to obtain information for EOI purposes in all cases.

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

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

202. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those 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.

203. The Marshall Islands has rapidly built up its EOI network since 2009 and currently has EOI agreements with 14 jurisdictions (5 of which are in force). Out of the 14:

- 12 are OECD countries;
- 4 are G20 countries; and
- 12 are Global Forum members.

204. The Marshall Islands' EOI network covers most of its biggest trading partners, including the US and Australia.

205. Comments were sought from the jurisdictions participating in the Global Forum in the course of the preparation of this report, and no jurisdiction advised the assessment team that the Marshall Islands had refused to negotiate or conclude an EOI agreement with it.

Determination and factors underlying recommendations

Phase 1 determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
	The Marshall Islands should continue to develop its exchange of information 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)

206. 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, jurisdictions with tax systems generally impose strict confidentiality requirements on information collected for tax purposes.

207. All the Marshall Islands' EOI agreements have confidentiality provisions that contain all of the essential aspects of Article 8 of the OECD Model TIEA, which ensures that the information exchanged will be disclosed only to persons authorised by the agreements. Domestic tax laws of the Marshall Islands contain provisions concerning confidentiality of tax information and such provisions do not allow the provision of information to authorities other than for the purpose of enforcing tax laws, including the TIEAs to which the Marshall Islands is a party.

*All other information exchanged (*ToR C.3.2*)*

208. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.

209. All of the Marshall Islands' EOI agreements contain confidentiality provisions similar to Article 8 of the OECD Model TIEA, which specify that

the confidentiality rules spelt out in the EOI agreement apply to all information received under the agreement.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

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

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

210. 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 secret may arise, or where the disclosure of information would be contrary to public policy. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by legal professional privilege.

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

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

212. All of the Marshall Islands' TIEAs ensure that the Contracting Parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret, information which is subject to legal professional privilege, or information the disclosure of which would be contrary to public policy. The provisions of professional secrecy in the domestic laws of Marshall Islands are broad, but these would not affect effective exchange of information, as the provisions of TIEA have priority over domestic law.

213. The scope of attorney-client privilege is defined in all of the Marshall Islands' EOI agreements and the definitions included therein are fully consistent with the international standard.

Determination and factors underlying recommendations

Phase 1 determination
The element is in place.

C.5. Timeliness of responses to requests for information

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

Responses within 90 days (ToR C.5.1)

214. There appears to be no legal restrictions on the Marshall Islands tax authorities' ability to respond to EOI requests within 90 days of receipt by providing the information requested or providing an update on the status of the request. All of the Marshall Islands' TIEAs contain provisions similar to Article 5(6) of the 2002 Model Agreement on EOI on Tax Matters, which obliges Contracting Parties to forward the requested information as promptly as possible to the applicant party.[15]

215. A review of the Marshall Islands' ability to respond to requests in a timely manner will be conducted in the course of its Phase 2 review.

Organisational process and resources (ToR C.5.2)

216. The Marshall Islands' competent authority for its EOI agreements is defined under its EOI agreements and is either the Secretary for Finance or the Minister of Finance (in respect of the US TIEA). The Secretary or Minister may designate other persons to carry out the functions of the competent authority.

217. A review of the Marshall Islands' organisational process and resources will be conducted in the context of the Marshall Islands' Phase 2 review.

15. Under this Article, Contracting Parties are required to confirm receipt of a request in writing to the applicant Party and notify the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request. The requested Party is also required to inform the applicant Party if it is unable to obtain and provide the information within 90 days of receipt of the request, and explain the reasons behind the delay.

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

218. Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions.

219. There are no aspects of the Marshall Islands' domestic laws that appear to impose additional restrictive conditions on exchange of information.

Determination and factors underlying recommendations

Phase 1 determination
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. *(ToR A.1)*		
The element is not in place.	Bearer shares can be issued by non-resident domestic corporations in the Marshall Islands. Appropriate mechanisms to allow identification of owners of bearer shares are not in place.	The Marshall Islands should ensure that appropriate mechanisms to identify owners of bearer shares are in place.
	Ownership and identity information for resident and non-resident domestic LLCs, Foreign Maritime Entities, nominee shareholdings and limited partnerships, Marshall Islands' trusts and foreign trusts is not available in all circumstances.	The Marshall Islands should ensure that ownership and identity information is available for all entities.
	There are no sanctions for not maintaining ownership and identity information under Marshall Islands law.	The Marshall Islands should introduce effective sanctions against entities and arrangements where they fail to comply with requirements to maintain ownership and identity information.

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. *(ToR A.2)*		
The element is not in place.	All resident and non-resident domestic corporations and Marshall Islands trusts are required to maintain correct and complete books and records of account. However, it is uncertain that these requirements ensure keeping of accounting records consistent with the standard. Additionally, the laws of the Marshall Islands do not contain explicit obligation for foreign corporations, FMEs, LLCs and partnerships to keep accounting records.	The Marshall Islands should ensure that its laws explicitly require all entities to keep full accounting records that would allow the entity to correctly explain all transactions, enable financial position of the entity to be determined with reasonable accuracy at any time and allow financial statements to be prepared.
	The laws of the Marshall Islands do not contain explicit obligations requiring all types of entities to keep underlying documentation consistent with the standard.	The Marshall Islands should ensure its laws explicitly require all entities to keep full underlying documentation consistent with the standard.
	The laws of the Marshall Islands do not explicitly stipulate a retention period for accounting records and underlying documentation in respect of all entities.	The Marshall Islands should ensure that its laws explicitly require all entities to keep accounting records and underlying documentation for at least five years.
	The commercial and tax laws of the Marshall Islands do not contain any sanctions for not keeping accounting records.	The Marshall Islands should ensure that its laws prescribe appropriate sanctions against entities and arrangements for their failure to keep reliable accounting records consistent with the standard.
Banking information should be available for all account-holders. *(ToR A.3)*		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). *(ToR B.1)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	The access powers of the Secretary of Finance to obtain information for EOI purposes may be constrained by a domestic tax interest.	The Marshall Islands should clarify its laws to ensure that its competent authority has the power to obtain information for EOI purposes in all cases.
	The scope of professional privilege in the Marshall Islands extends to accountants and its impact on effective exchange of information is unclear.	The Marshall Islands should ensure that domestic provisions on professional privileges relating to accountants allow exchange of information in line with the standard.
The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. *(ToR B.2)*		
The element is in place.		
Exchange of information mechanisms should allow for effective exchange of information. *(ToR C.1)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	The access powers of the Secretary of Finance to obtain information for EOI purposes may be constrained by a domestic tax interest.	The Marshall Islands should clarify its laws to ensure that its competent authority has the power to obtain information for EOI purposes in all cases.
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. *(ToR C.2)*		
The element is in place.		The Marshall Islands should continue to develop its exchange of information network with all relevant partners.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. *(ToR C.3)*		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. *(ToR C.4)*		
The element is in place.		
The jurisdiction should provide information under its network of agreements in a timely manner. *(ToR C.5)*		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.		

Annex 1: Jurisdiction's Response to the Review Report[16]

The Republic of the Marshall Islands ("RMI") would like to thank the Assessment Team and the Peer Review Group ("PRG") for their time and effort during the Phase 1 assessment of the RMI legal framework and the drafting of the Phase 1 Peer Review Report ("Report").

Overall, the RMI accepts the Report that was adopted by the PRG. Although the Report in part provides an accurate presentation of the current legal structure in the RMI, it also raises several questions regarding this structure and the ability of the Secretary of Finance to use the legal framework to access information for exchange of information ("EOI") purposes. In response to these questions, the RMI wishes to clarify and confirm the legal framework currently in place in the RMI, which provides the basis for EOI in accordance with the RMI's commitment to transparency and exchange of information for tax purposes.

The RMI Tax Code, which includes both the Income Tax Act and the Tax Information Exchange Act, 2010 ("TIEA Act"), provides the Secretary of Finance, as the competent authority, access to all information which might be requested under an EOI request, regardless of whether there is a domestic tax interest. As the foundation of the EOI legal framework, the TIEA Act provides direct access to information through its own provisions, as well as indirect access to information through the provisions of other RMI legislation, including the Income Tax Act.

Under the TIEA Act, the Secretary of Finance has the authority to access to all information held by banks, other financial institutions, and any other person acting in an agency or fiduciary capacity including nominees and trustees. This access is very broad, and includes not only accounting information, but also ownership information up to and including the ultimate beneficial owner.

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

The TIEA Act also provides access to information under the Income Tax Act, which grants the Secretary of Finance information gathering powers for the purpose of determining the liability of any person for any tax, regardless of whether the tax is domestic or foreign. The information gathering powers are to be used for the purpose of administering and enforcing the tax laws of the RMI, which includes administering any EOI request made pursuant to the TIEA Act. Consequently, the Secretary of Finance's ability to obtain information for EOI purposes is in no way constrained by a domestic tax interest. Similarly, the secrecy provision of the Income Tax Act expressly does not apply when information that has been gathered is used to give effect to the tax laws, which includes exchanging information pursuant to the TIEA Act. In short, there are no restrictions that would prevent the Secretary of Finance from exchanging information in response to an EOI request.

In addition to the Income Tax Act, the authority granted by the TIEA Act to the Secretary of Finance to utilise any information gathering technique provided in other RMI legislation extends to all RMI laws, including the Banking Act and the Mutual Assistance in Criminal Matters Act.

The Report also questions whether the accountant-client privilege contained in the RMI Evidence Act would impact the Secretary of Finance's ability to provide information in response to an EOI request. The privilege contained in the Evidence Act is an evidentiary privilege of very limited scope, which only applies to the admissibility of evidence before an RMI court. The privilege has no bearing on the Secretary of Finance's information gathering powers for the purpose of exchanging information, and similarly has no impact on the admissibility of evidence before the court of a foreign jurisdiction.

While the RMI disagrees that the access powers of the Secretary of Finance are constrained in any way under the RMI legal framework, the RMI accepts the recommendations contained in the Report and will work to address them in the near future. The RMI is committed to the effective and efficient exchange of information in furtherance of tax transparency and appreciates the efforts of the Assessment Team and the PRG to assist the RMI in fulfilling that commitment.

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

	Jurisdiction	Type of EOI arrangement	Date signed	Date in force
1	Australia	Taxation information exchange agreement (TIEA)	12-May-2010	25-Nov-2011
2	Denmark	TIEA	28-Sep-2010	3-Dec-2011
3	Faroe Islands	TIEA	28-Sep-2010	
4	Finland	TIEA	28-Sep-2010	
5	Greenland	TIEA	28-Sep-2010	
6	Iceland	TIEA	28-Sep-2010	
7	Ireland	TIEA	2-Sep-2010	
8	South Korea	TIEA	31-May-2011	
9	Netherlands	TIEA	14-May-2010	8-Nov-2011
10	New Zealand	TIEA	6-Aug-2010	
11	Norway	TIEA	28-Sep-2010	19-Jun-2011
12	Sweden	TIEA	28-Sep-2010	
13	UK	TIEA	20-Mar-2012	
14	US	TIEA	14-Mar-1991	14-Mar-1991

Annex 3: List of All Laws, Regulations and Other Material Received

Anti-Money Laundering Laws

Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) Regulations

Banking Laws

Banking Act

Financial Management Act

Commercial Laws

Business Corporations Act

Foreign Investment Business License Act

Limited Partnership Act

Limited Liability Company Act

Republic of the Marshall Islands Corporate Regulations 1995

Revised Partnership Act

Trust Act

Trust Companies Act

Trustee Licensing Act

Taxation Laws

Income Tax Act

Tax Information Exchange (Execution and Implementation) Act 2010 (TIEA Act 2010).

Tax Information Exchange Agreement (Implementation) Act 1989 (TIEA USA Act 1989)

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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

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OECD PUBLISHING, 2, rue André-Pascal, 75775 PARIS CEDEX 16
(23 2012 31 1 P) ISBN 978-92-64-18150-2 – No. 60277 2012

Global Forum on Transparency and Exchange of Information for Tax Purpose

PEER REVIEWS, PHASE 1: MARSHALL ISLANDS

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.

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Please cite this publication as:

OECD (2012), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Marshall Islands 2012: Phase 1: Legal and Regulatory Framework*, OECD Publishing. ***http://dx.doi.org/10.1787/9789264181519-en***

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ISBN 978-92-64-18150-2
23 2012 31 1 P

9 789264 181502