LOSS OF CONFIDENTIALITY IN EXCHANGE FOR GREATER INTERNATIONAL CONFIDENCE: The Erosion of Bank Secrecy

1. A jurisdiction that sought to attract wealthy persons who were seeking to establish structures for the purpose of protecting their assets from possible liability and to reduce their tax liability ensured that the laws of the jurisdiction provided for the protection of the confidentiality of their affairs. It is, no doubt, in part if not in whole, for this reason that jurisdictions such as The Bahamas, Switzerland, Luxembourg and Austria enacted legislation making provisions for bank secrecy which took this idea of confidentiality to a much higher level, to the extent that criminal sanctions were visited on those who violated the principle.

2. Clients of banks were assured that the bank would not pass their records to any outsider who requested the same and in particular not to the tax authorities of their home country.
The United States was opposed to bank secrecy from the inception of this principle and has for many years pressed for international arrangements whereby foreign banks were compelled to provide client records to the United States authorities. They did so first under the heading of combating drug trafficking and money laundering and more recently anti-terrorism. This strategy has paid

off handsomely as they have succeeded in securing a number of treaties and agreements in this connection.

3. In more recent times, the United States has been joined by other countries in pressing for the abandonment of bank secrecy as a part of the regime of financial services in the various jurisdictions where it obtained. In particular the Organization for Economic Cooperation and Development (OECD) and the Financial Action Task Force (FATF) have in recent times resorted to naming and shaming those jurisdictions that failed to implement the internationally agreed standards of information sharing. The black list is reserved for those countries that are considered to have failed in taking any adequate steps to meet the required standards.

4. In 2000 The Bahamas was placed on the black list by the FATF which had a devastating effect on the financial services industry in this country. In response to this action and in recognition of the fact that there were deficiencies in our regulatory structure, the government enacted a compendium of legislation design to address this problem. The net effect of these new laws was to considerably weaken the regime of bank secrecy in this jurisdiction. The regulatory structure of the financial services industry was expanded and strengthened to the extent that there are presently six regulatory agencies, namely; The Central

Bank of The Bahamas, the Securities Commission of The Bahamas, the Inspector of Financial and Corporate Services, the Registrar of Insurance Companies, the Compliance Commission and the Gaming Board.

5. The legislation which governs the aforementioned regulatory agencies all enable them to share information with their foreign counterparts that are in conformity with international best practices. The information which is shared in accordance with the foregoing include:

a. Information on the existence of regulatory status of a financial service provider in the jurisdiction.

b. Information on the legal and regulatory regime in The Bahamas.

c. Information related to the regulatory standing of the licensees.

d. Information related to the operation and financial condition of the licensees.

e. Information in a report of Examination on the licensee

f. Information on past, current or potential regulatory actions.

g. Information on beneficial owners, directors and other controllers of licensees; and,

h. Other regulatory information as determined relevant by the regulator concerned.

6. Bahamian regulators are entitled to disclose information to their foreign counterparts to enable them to exercise their regulatory functions including conducting investigations and proceedings to enforce laws, regulations and other rules which they administer. Where the information requested cannot be provided by the regulator to whom the request is made and it is determined that the information may be provided by another regulator the request will be sent on to that other regulator, and the foreign regulator is notified of such transfer.

7. When a request for information is made the Bahamian regulator may take into consideration whether the inquiries relate to:

(i) the breach of a law or other requirements which have no parallel or similarity in The Bahamas, or involve the assumption by the foreign authorities of a jurisdiction not recognized in The Bahamas,

(ii) the seriousness of the matter to which the request relates and the importance of the information sought on such matter,

(iii) the cost of providing the information. The Bahamian regulator may decline to provide the information unless the foreign regulator undertakes to make at least a contribution to the costs involved in providing such information.

8. Prior to the enactment of the compendium of legislation mentioned above, The Bahamas had entered into Mutual Legal Assistance Treaties in Criminal Matters with the U.S.A. on 12th June 1987, with the United Kingdom on 28th June 1988, and with Canada on 13th March 1990. Under these treaties The Bahamas agreed to provide to the other contracting parties, inter alia, evidence to be used in criminal proceedings in courts of such states.

9. Subsequent to the enactment of the compendium of legislation on the 25th January 2002, The Bahamas entered into a Tax Information Exchange Agreement with the U.S.A. To date, however, no such agreement has been entered into with any other on-shore jurisdiction.

10. The G20 has set as a benchmark for transparency and information exchange by countries that offer financial services, that they enter into Tax Information Exchange Agreements

(TIEA'S) with a minimum of 12 OECD member countries. This yardstick was used in the preparation of the list that the accompanied the progress report on the adherence to global standards on the exchange of tax information on which The Bahamas was placed on the grey list with 37 other countries, which it was said, failed to substantially implement the internationally agreed tax standard.

11. The Bahamas committed in 2002 to the internationally agreed tax standard, which was developed by the OECD in connection with non-OECD countries. The standard requires "exchange of information on request on all tax matters for the administration and enforcement of domestic law without regard to a domestic tax interest requirement or bank secrecy for tax purposes, it also provides for extensive safeguard to protect the confidentiality of the information exchanged."

12. The position of the government of The Bahamas has been clearly articulated by the Prime Minister in a statement issued on 25th March 2009 which states as follows:

"The Bahamas reaffirms its commitment recorded in a March 2002 agreement between the Bahamas and the OECD. The Bahamas recognizes significant advances in commitment to broader application of OECD standards of transparency. The

Bahamas is ready to negotiate and conclude appropriate arrangements to accommodate those OECD standards."

13. As I have indicated above, financial transparency in The Bahamas is required by legislation, which provide for access by Bahamian regulators and law enforcement authorities to financial information for all companies, trusts and other structures. The rules also provide for access to beneficial ownership information in respect of all client relationships and structures maintained in The Bahamas.

14. It is plain therefore, that the Bahamas' only area of deficiency with regard to the current OECD standard is the fact that it has entered into TIEA with only one OECD country so far.

15. The Bahamas, together with other regional territories such as Bermuda, Cayman Islands and the British Virgin Islands have tried for decades to remove the stigma of being places of refuge for money laundering and tax evasion. Charles Intriago, a former U.S federal prosecutor and money laundering expert said recently, "*If it was not for bank secrecy, the offshore havens in the Caribbean would be fishing communities again. You've got to be Houdini to get out from the clutches of the iron-clad secrecy that these*

offshore centers provide to their customers. It is an outrage that these facilities are allowed to exist."

16. Plainly this is an exaggeration and does not represent the true current situation of any of the Caribbean financial centers, certainly not of the Bahamas, as I have endeavoured to show. Unfortunately, Mr. Intriago is not alone in this view. Mr. Jeffrey Owens of the OECD's Centre for Tax Policy Administration said recently, "*a level playing field where financial centers around the globe compete in the same regulatory environment, luring customers based on services they offer, not the level of secrecy*." He went on to say "*The tolerance level for non-compliance is substantially reduced*" and urged financial centers to help lift the lid on tax avoidance.

17. It is ironic that a functionary of the OECD would speak of leveling of the playing field in this context, given that this has been for years the mantra of the offshore centers in their protest against the pressure being applied by the OECD. The complaint is that the same rules that the offshore centers are being forced to observe are not being observed by the OECD countries or by the U.S.A. Eduardo D'Angelo Silva, Chairman of the Cayman Islands Financial Services Association, said that the OECD is playing a "*shell game*" in which offshore financial centers are accused of

wrongdoing while some banks in industrialized nations get a free pass. He said "*The greatest offenders are in the major financial centers of the U.S. and U.K.*". He singled out the U.S. states of Nevada, Delaware and Wyoming as places where banks put a huge premium on secrecy.

18. Be that all as it may, the G 20 nations have endorsed the initiatives of the OECD and approved their list issued in April and have declared an end to bank secrecy. In addition, the action of the U.S.A. in pursuing an action against UBS for disclosure of information regarding accounts held by American citizens, and the pressure being exerted on the Swiss government to modify its bank secrecy laws, is further evidence of the intention of the G20 nations to stop at nothing to eradicate this policy. These developments, more than anything else in my view, have resulted in most offshore jurisdictions rushing to bring themselves in compliance with the OECD requirements. The most recent progress report reveals that Uruguay which was one of the four jurisdictions which was listed as having not complied with the requirements has since endorsed the international policy of transparency and information exchange

19. The present global financial crisis gives the G20 and the OECD the opportunity to once and for all put the final nail in the

coffin of bank secrecy, if not in that of tax havens. The statement of the G20 issued in London at the end of their summit is very significant in this regard "*We agree to take action against non-cooperating jurisdictions including tax havens. We stand ready to deploy sanctions to protect our public financial systems. The era of banking secrecy is over*." President Obama issued his own personal salvo by saying "*We'll identify jurisdictions that fail to cooperate, including tax havens and take actions to defend our financial systems*."

20. In these circumstances it seems foolhardy to seek to resist compliance and this is clearly the conclusion that has been reached by the majority of offshore centers. It behooves us to seek to negotiate for our selves the most favourable position that can be achieved in the present atmosphere. As in all other aspects of human endeavour there is strength in numbers, and so it is desirable that the inter-American region negotiates as a block with the G20 and the OECD on behalf of all of the affected nations in this region. That appears to be the only reasonable way forward.