

Regulatory Cooperation Standards and Practices in the Samoa Offshore Financial Center

ERNA VA'AI

1. Introduction

- 1.1. This chapter describes the experience of the Samoa offshore financial center (OFC) with cross-border cooperation and exchange of information.
- 1.2. The financial center was established in October 1988 following the enactment of various laws—namely,
the International Companies Act, 1987;
the Offshore Banking Act, 1987;
the International Trusts Act, 1987;
the Trustee Companies Act, 1987; and
the International Insurance Act, 1988.
- 1.3. Since then, the types of products offered by the Samoa jurisdiction have been expanded with a series of changes to these laws. For example, in response to the increased popularity of Samoan international companies, the International Companies Act was amended, over the years, to introduce limited liability companies (LLCs), companies limited by guarantee, and hybrids of these company types. With offshore banks and insurance companies, the enabling licensing legislation was amended in the light of international standards of best practice on supervision.
- 1.4. A particularly important development in 1998 was the introduction of gateway provisions to facilitate information exchange between the

Samoan authorities and their foreign counterparts for supervisory purposes only.

- 1.5. The current experience of the Samoan jurisdiction with cross-border cooperation and exchange of information cannot be seen in isolation. This is because it is part of an emerging global process stemming from concerns about significant gaps in the global system in relation to financial supervision and money laundering. We are experiencing, therefore, the unfolding of various global initiatives from international bodies like the Financial Stability Forum (FSF) and the IMF, and from the Financial Action Task Force (FATF) on anti-money laundering (AML) and combating the financing of terrorism (CFT). These initiatives promote standards of best practice in financial supervision and AML/CFT measures.

2. Striking the Balance Between Confidentiality and Measures to Deter Abuse

- 2.1. A common thread running through these international initiatives is the demand for cross-border cooperation and information exchange. As an offshore financial center, Samoa has taken the demand for cross-border cooperation and information exchange very seriously.
- 2.2. Like many other OFCs, Samoa views secrecy or confidentiality in financial matters as an essential ingredient in the offshore industry that deserves to be protected. Unlike other jurisdictions that rely on common law to protect confidentiality, there are explicit strict secrecy provisions enshrined in all the Samoan offshore legislation.
- 2.3. The strictness of the confidentiality provisions is reflected in the severe penalties for unauthorized disclosures ensconced in each of the acts that underlie the Samoan offshore financial center. Although offshore secrecy or confidentiality has justifiably come under vigilant attack, there are still legitimate reasons behind the concept. Such reasons include, for example, trade secrets and the genuine need for privacy of investors residing in countries where kidnapping and security issues are highly relevant. In addition to the need for privacy under the alarming circumstances of the latter, there is also a need for family privacy in relation to probate or succession issues.
- 2.4. In Samoa, secrecy or confidentiality is not absolute, however, and confidential information can be disclosed under compulsion by law. There are clear exceptions to the secrecy provisions, especially where there is

an element of public interest in preventing abuse of the financial system, when fighting crime, or when providing for proper supervision of financial institutions. For example, the Money Laundering Prevention Act, 2000 overrides secrecy provisions in any of Samoa's laws including the offshore regime.

- 2.5. This involves a delicate balancing act between individuals' rights to privacy in the conduct of their business and commercial affairs, and the public interest in crime prevention and proper financial regulation. Maintaining the correct balance is a major challenge that OFCs such as Samoa will continue to face in the future.

3. Experience of Samoa

- 3.1. Let me now describe Samoa's experience with cross-border cooperation and exchange of information.
- 3.2. In general, a combination of local laws and prudent practice allows exchange of information in Samoa between client and professional service providers, between professionals and industry regulators, and between regulators and foreign counterparts. The focus of this chapter is on regulatory exchanges of information.
- 3.3. Samoa has not, to date, entered into exchange of information agreements or treaties with any jurisdiction.
- 3.4. Exchange of information has, to date, occurred on three levels:
 - 3.4.1. informal;
 - 3.4.2. formal requests for legal assistance; and
 - 3.4.3. statutory regulator-to-regulator provisions for exchange of information.

Informal Exchanges of Information

- 3.5. Most of the exchange of information experienced in Samoa before the introduction of legislative gateway provisions was via informal means—for example, by telephone or discussion at supervisory meetings. For informal exchanges of information to occur, it is essential that the regulator establishes trust and understanding with not only his peers but also the financial services industry.
- 3.6. Trust can be cultivated and fostered only where supervisors know each other, and forums and peer groups such as the Offshore Group

of Insurance Supervisors (OGIS) and the Offshore Group of Banking Supervisors (OGBS) can play a pivotal role in its establishment. As a member of the OGIS and an observer of the OGBS, Samoa shares in cooperative efforts to comply with and keep abreast of international standards on supervision, which involve a high level of exchange of information. Other informal exchanges between regulators occur when conducting due diligence on prospective licensees, especially if the applicants are licensed in another jurisdiction. The networking in regulatory peer groups greatly assists inquiries in the licensing and ongoing monitoring of regulated entities. The information exchanged between regulators may include both supervisory and nonpublic information and depends largely on the law and, to some extent, the relationships between regulators.

- 3.7. In relation to the industry, the regulated entities (e.g., trustee companies, offshore banks, and insurance companies) must keep all their records in Samoa. They are also obligated by law to provide audited accounts and annual reports to the regulator and additional information as it may direct from time to time. A high level of information exchange informally occurs at this level (not only between the regulator and the industry but also among the service providers themselves), which is enhanced by the existence of the Trustee Company Association.

Formal Requests for Assistance

- 3.8. In practice, information was exchanged between the Samoan authorities and foreign regulators pursuant to formal requests for legal assistance even before passage of the gateway provisions or the Money Laundering Prevention Act, 2000. For example, in 1994, a request was received by the Samoan Government from the Treasury of the Netherlands for information on a defunct Samoan international company being investigated for laundering proceeds of drug activities. The request for information was granted by the minister of finance (who is the ultimate authority in the offshore sector), given that the company had been deregistered and was deemed not to be entitled to privileges of tax exemption and confidentiality. Moreover, an exemption to the secrecy provisions allowed the initial disclosure by the trustee company to the minister, in what was believed to be in the interests of upholding the integrity of Samoa.
- 3.9. Subsequent to the passage of new legislation, there have been provisions for statutory regulator-to-regulator exchanges of information.

- 3.10. The gateway provisions in the legislation dictate what information can be disclosed and under what conditions. These provisions were introduced under the Offshore Banking Amendment Act, 1998 and the International Insurance Amendment Act, 1998 to allow exchanges of information between regulators, provided three (3) conditions are met:
- 3.11. The regulator is satisfied that the intended recipient authority is subject to adequate legal restrictions on further disclosures, including provision of an undertaking. The phrase “adequate legal restrictions” primarily means that the requesting regulator in receipt of information must have a duty to protect the information provided, which is confirmed by an undertaking given by the requesting regulator that information provided will not be disclosed to a third party without the express consent of the Samoan authorities;
- 3.12. Information provided by the regulator does not contain any names of clients; and
- 3.13. Information is required for supervisory purposes only and is not related (either directly or indirectly) to tax matters or enforcement of exchange controls.
- 3.14. The restrictions on information that can be provided (i.e., relative to names of clients and tax or exchange controls enforcement) are in line with the overall scheme of the legislation as it was formulated back in 1998. Additionally, the new proposed International Banking Bill, 2004 ([which was] envisaged to be enacted in the first quarter of 2005) will expand the scope of information exchange to include information required for purposes of prevention and suppression of terrorism or enforcement of the Money Laundering Prevention Act, 2000.
- 3.15. Samoa also has draft legislation—namely, the International Financial Services Cooperation Bill, 2004. This bill provides for international cooperation between the Samoan authorities and foreign regulatory, law-enforcement, and tax authorities.
- 3.16. As a regulator, I have made several exchanges, pursuant to the statutory gateways, with other regulatory authorities, particularly when conducting due diligence for licensing purposes with, for example, the British Virgin Islands, Vanuatu, Guernsey, Labuan, and the Cayman Islands.
- 3.17. Throughout my limited experience in the exchange of information, there have been some underlying problems.

- 3.17.1. There is a need to understand other jurisdictions' systems (particularly by developing personal contacts), since different countries do things differently—for example, in respect of the structure of supervision and the division of responsibilities between federal and state authorities.
- 3.17.2. Some jurisdictions may not have legal gateway provisions in their legislation to allow the exchange of information and may therefore find that information obtained informally may be held inadmissible in court proceedings.
- 3.17.3. There is a need for a model memorandum of understanding (MoU) to facilitate information exchange. Samoa does not, at present, have an MoU with any other jurisdiction.
- 3.17.4. There is a need to understand the scope and reasons for the request. The regulator making the request should make a full and open disclosure.

4. Future Developments on Exchange of Information in Samoa

- 4.1. In light of the present global climate, it seems highly likely that mechanisms facilitating the exchange of information in Samoa will continue to expand. There is now a trend among offshore financial centers that is being promoted by supranational organizations like the Financial Action Task Force (FATF) to extend existing gateways to law-enforcement agencies.
- 4.2. To this end, Samoa has prepared new draft legislation called the International Financial Services Cooperation Bill, 2004. This bill will provide for international cooperation with foreign regulatory and law-enforcement agencies and designated competent authorities under exchange of information (EOI) treaties and agreements. The draft law is based on similar legislation in the British Virgin Islands (BVI) called the Financial Services Act, 2000 and Part IV of their Financial Services Commission Act, 2001.

This page intentionally left blank