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### Regulatory Effectiveness in Onshore & Offshore Financial Centers

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**SCHOOL OF LAW**

**Regulatory Effectiveness in Onshore &  
Offshore Financial Centers**

Andrew P. Morriss  
Clifford C. Henson

*Working Paper*

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REGULATORY EFFECTIVENESS IN ONSHORE & OFFSHORE  
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# Regulatory Effectiveness & Offshore Financial Centers

Andrew P. Morriss\* & Clifford C. Henson\*\*

## ABSTRACT

*Onshore jurisdictions, such as the United States, United Kingdom, France and Germany, are critical of offshore financial centers (OFCs), such as Bermuda, the Cayman Islands, and the Channel Islands. Arguments against OFCs include claims that their regulatory oversight is lax, allowing fraud and criminal activity. In this article, we present cross-jurisdictional data, showing that OFCs are not lax. We also provide qualitative analyses of regulatory effectiveness, demonstrating that input-based measures of regulation are inappropriate metrics for comparing jurisdictions. Based on both quantitative input measures and a qualitative assessment, we reject the onshore critique of OFCs as bastions of laxity.*

Offshore financial centers (OFCs) provide significant levels of regulatory and tax competition for onshore jurisdictions.<sup>1</sup> This competition takes many forms, with the various OFCs providing different tax and regulatory regimes and stricter confidentiality rules than are available in onshore jurisdictions.<sup>2</sup> Illustrating this competition, a Citibank official noted that

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<sup>1</sup> Prior to the 1960s, some offshore jurisdictions existed but the level of competition they provided was relatively low and competition grew more intense during the 1960s. *See* Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Flexibility in Offshore Financial Intermediation: The Creation, Collapse, and Return of Curacao and the Netherlands Antilles*, 45 *TX. INT'L L. J.* 377, 404-406 (2009).

<sup>2</sup> While criticism of OFCs often focuses on tax issues, OFCs also innovate in the creation of business structures unavailable onshore, such as the segregated cell or structured portfolio company which is often used in the insurance business. These business structures are available in Guernsey, Cayman, Bermuda, Mauritius, St. Vincent and The Grenadines, and BVI. *See* The Protected Cell Companies (Amendment) Ordinance, 1998 (Guernsey); The Companies (Amendment) (Segregated Portfolio Companies) Law (1998) (Cayman Islands); The Protected Cell Companies Act of 1999 (Mauritius); International Insurance (Amendments and Consolidation) Act of 1998 (St. Vincent and The Grenadines); the BVI Business Companies Act 2004 (BVI) and Insurance Act (1994) (BVI). They allow a single legal entity to manage separate “cells” without a claim against one cell resulting in a loss of assets by another cell. This reduces transactions costs in providing captive insurance services. Innovation in financial services is a relatively recent phenomenon. *See* YOUSSEF CASSIS, *CAPITALS OF CAPITAL: A HISTORY OF INTERNATIONAL FINANCIAL CENTRES, 1780-2005* 248 (2006) (“The almost constant arrival of new financial products since the mid-

leading international financial institutions, such as Citi, have become essentially agnostic with respect to where their primary place of business is. Citi is well established in financial centers throughout the world--wherever the regulatory system is, in our view, sufficiently developed to protect our interests and to foster investor confidence. We no longer have a built-in preference for New York or Zurich or Frankfurt or London, and our institutional clients are prepared to invest billions of dollars in companies listed only in Hong Kong, or Brazil, or Western Europe. If it is preferable, for whatever reason, to securitize English mortgages in the United States, the transaction will be executed there. If London is the better place to execute a complex over-the-counter derivative transaction with a U.S. counterparty, the transaction will be executed there. Because of the general improvement in global regulatory quality, business considerations rather than physical location increasingly delineate where we execute transactions.<sup>3</sup>

Onshore governments often tolerate, and sometimes even welcome, such competition. They do so in part because they recognize that they operate tax and other regimes in specific areas that are qualitatively indistinguishable from those offered by OFCs.<sup>4</sup> They also do so because of the benefits to onshore economies from OFCs' activities.<sup>5</sup> However, a more common reaction to competition from OFCs has been criticism of OFCs as "tax havens," "regulation havens," or as engaged in "unfair" competition in taxes and regulation.<sup>6</sup> For example, the staff of the U.S. Senate Permanent Subcommittee on Investigations produced two reports critical of offshore jurisdictions in recent years, one each under Republican and Democrat leaderships.<sup>7</sup>

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seventies has been an unprecedented phenomenon in financial history. Until then, practices, services and activity, without being entirely static, had not fundamentally changed from one generation to the next.") Perhaps coincidentally, the rise in innovation paralleled the rise of the offshore financial world in the 1970s. See Boise & Morriss, *supra* note 1.

<sup>3</sup> Edward F. Greene, *Modernizing U.S. Regulation of Capital Markets*, PLI Seventh Annual Institute on Securities Regulation in Europe: A Contrast in EU and US Provisions 379, 382 (2008)

<sup>4</sup> See notes 27 - 31 *infra*.

<sup>5</sup> See Boise & Morriss, *supra* note 1 (describing how the United States benefited from access to the Eurodollar bond market using Netherlands Antilles vehicles); William P. Elliott, *Trends In International Tax Law Leading Lawyers On Analyzing Global Changes, Evaluating Risks, And Complying With Enforcement Programs Doing Business On A Global Scale: Challenges And Strategies In Today's Market*, ASPATORE (March 2011) ("the National Foreign Trade Council believes it is important for policymakers to carefully evaluate legislative proposals that are intended to combat offshore tax avoidance. Without careful evaluation, such proposals may in fact undermine the international competitiveness of legitimate US businesses organized in low-tax jurisdictions without achieving the desired goal of combating abusive offshore tax avoidance.").

<sup>6</sup> See Review of Financial Regulation in the Crown Dependencies - Part 1, available at <http://www.archive.official-documents.co.uk/document/cm41/4109/a-chp02b.htm> at 2.14.2 (summarizing criticism of OFCs as including tax, secrecy, and "poor *regulation*, which enables financial institutions to build businesses on the back of low standards, with considerable risks to clients.").

<sup>7</sup> U.S. Senate Permanent Subcommittee on Investigations, Staff Report on Tax Haven Banks and U.S. Tax Compliance (July 17, 2008) 1 available at [http://hsgac.senate.gov/public\\_files/071708PSIReport.pdf](http://hsgac.senate.gov/public_files/071708PSIReport.pdf) ("Each year, the United States loses an estimated \$100 billion in tax revenues due to offshore tax abuses."); U.S. Senate, Permanent Subcommittee on Investigations, Minority and Majority Staff Report, Tax Haven Abuses: The Enablers, the Tools and Secrecy (August 1, 2006) at 1 available at <http://levin.senate.gov/newsroom/supporting/2006/PSI.taxhavenabuses.080106.pdf> ("While [offshore jurisdictions] claim to offer clients financial privacy, limited regulation, and low or no taxes, too often these jurisdictions have instead become havens for tax evasion, financial fraud, and money laundering.") 24 and 25 on havens meetings

Similarly, during the 2008 presidential campaign, President Barack Obama referred to Ugland House, the registered headquarters for approximately 18,000 companies domiciled in the Cayman Islands and the offices of the law firm of Maples & Calder, as “the biggest building in the world or the biggest tax scam in the world”<sup>8</sup> and has made similar criticisms since taking office.<sup>9</sup> While in office, former U.K. Prime Minister Gordon Brown repeatedly criticized OFCs,<sup>10</sup> and after losing his re-election campaign, declared that “the old tax havens have no place in this world,” and “[w]e want the whole of the world to take action. That will mean action against regulatory and tax havens in parts of the world which have escaped the regulatory attention they need.”<sup>11</sup> Recently, Republican presidential candidate Mitt Romney’s use of Cayman Islands entities in his retirement accounts drew criticism<sup>12</sup> and French Socialist Presidential candidate (and, as of this writing, likely election winner) Francois Hollande declared war on the “world of finance,”<sup>13</sup> referring in part to OFCs; French and German politicians routinely criticize OFCs.<sup>14</sup>

Onshore regulators have taken advantage of public anger over the financial crisis to attack OFCs.<sup>15</sup> These attacks include efforts through the Organization for Economic Co-operation and Development (“OECD”) to make a coordinated push to undermine OFCs’ competitive position by pressuring them to agree to measures restricting competition.<sup>16</sup>

<sup>8</sup> Landon Thomas, *Offshore Haven Considers a Heresy: Taxation*, N.Y. TIMES, Oct. 3, 2009, [http://www.nytimes.com/2009/10/04/business/global/04cayman.html?\\_r=1](http://www.nytimes.com/2009/10/04/business/global/04cayman.html?_r=1)

<sup>9</sup> See, e.g. *Remarks by the President on International Tax Policy Reform*, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-The-President-On-International-Tax-Policy-Reform](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-International-Tax-Policy-Reform) (May 4, 2009).

<sup>10</sup> See, e.g. Aaron Day, *Switzerland Targeted by Gordon Brown in Offshore Tax Haven Crackdown*, OffshoreNet (Feb. 19, 2009) available at <http://www.offshoren.net/2009/02/switzerland-targeted-by-gordon.php>.

<sup>11</sup> *Brown urges tax haven regulation*, BBC News (Mar. 6, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/7927084.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/7927084.stm); James Kirkup, *Gordon Brown says world must ‘take action’ on tax havens*, THE TELEGRAPH, Feb. 19, 2009, available at [www.telegraph.co.uk/finance/personalfinance/consumertips/tax/4695513/Gordon-Brown-says-world-must-take-action-on-tax-havens.html](http://www.telegraph.co.uk/finance/personalfinance/consumertips/tax/4695513/Gordon-Brown-says-world-must-take-action-on-tax-havens.html).

<sup>12</sup> *Cayman rebukes ABC News*, CNS BUSINESS (20 Jan. 2012) available at <http://cnsbusiness.com/content/cayman-rebukes-abc-news#comments>.

<sup>13</sup> *French poll puts City in firing line*, THE TIMES (London) (Jan. 27, 2012); Barbara Kollmeyer, *France’s Hollande declares war on world of finance*, MARKET WATCH (Jan. 23, 2012) available at <http://www.marketwatch.com/story/frances-hollande-declares-war-on-world-of-finance-2012-01-23>.

<sup>14</sup> See Hubert Zimmerman, *Varieties of global financial governance? British and German approaches to financial regulation*, in GLOBAL FINANCE IN CRISIS: THE POLITICS OF INTERNATIONAL REGULATORY CHANGE 129 (Eric Helleiner, et. al., eds. 2010); Klaus C. Engelen, *War of the Worlds*, INTERNATIONAL ECONOMY 34, 36-38 (Summer 2009) available at [http://www.international-economy.com/TIE\\_Su09\\_Engelen.pdf](http://www.international-economy.com/TIE_Su09_Engelen.pdf). Somewhat ironically, French and German criticism extends to London’s role as a finance center – one that is certainly both literally and jurisdictionally “offshore” with respect to their economies. See, e.g., *London Mayor says ‘bonjour’ to banks fleeing French tax*, THE TELEGRAPH (Feb. 7, 2012).

<sup>15</sup> Phil Taylor, *Asia’s Wealth of Secrets*, IBA GLOBAL INSIGHT 21-22 (June 2011) available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=d0787eaf-e8cb-43b0-809e-09bd29d33128> (last visited November 12, 2012) (“Most experts agree that the 2009 move by the IRS, and many of the similar efforts by its counterparts in other Western countries around the same time, was a symptom of the new, post-financial crisis zeitgeist. The public mood had turned against big banking, and bank secrecy was an obvious political target.”).

<sup>16</sup> Organization for Economic Co-operation and Development, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*, Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, 2000, at [www.oecd.org/daf/fa/harm\\_tax/Report\\_En.pdf](http://www.oecd.org/daf/fa/harm_tax/Report_En.pdf) On

Nongovernmental organizations such as Oxfam and Christian Aid have also been critical of tax and regulatory competition, arguing that diminishing revenue for governments handicaps antipoverty efforts.<sup>17</sup> Other multinational institutions, from the European Union to the OECD's Financial Action Task Force, have promoted measures to restrict competition from OFCs, generally by "leveling the playing field" in a manner that disadvantages the offshore jurisdictions relative to their onshore competitors.<sup>18</sup>

To justify competition-restricting measures, onshore regulators, interest groups, and politicians often suggest that OFCs' regulatory efforts are inadequate to prevent fraud or other malfeasance.<sup>19</sup> The widely publicized difficulties of several small OFCs with money laundering

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the OECD's campaign, see Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign Against 'Harmful Tax Competition'*, (2011) working paper available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1950627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950627).

<sup>17</sup> See, e.g., Oxfam, *Tax Havens: Releasing the Hidden Billions for Poverty Eradication* (2000) ("Developing countries could be missing out on tax revenues of at least US\$50 billion a year; roughly equivalent to the global aid budget. This severely limits the capacity of developing country governments to finance economic development and provide vital social services. Recouping even some of this revenue could make a significant contribution to the internationally agreed target of halving world poverty by 2015."). See also RONALD LABONTE, ET AL., *FATAL INDIFFERENCE: THE G8, AFRICA, AND GLOBAL HEALTH* (2004) (critical of use of offshore financial centers as costing developing country governments tax revenue); Christian Aid, *Death and taxes: the true toll of tax dodging* (May 2008) available at <http://www.christianaid.org.uk/images/deathandtaxes.pdf>.

<sup>18</sup> Some onshore governments have also taken unilateral actions that impose significant costs on foreign competitors. The United States' efforts to force non-U.S. banks to act as surrogate enforcement agents for the U.S. government, for example, has created a regulatory quagmire for non-U.S. banks. Taylor, *supra* note 15, at 22-23 (quoting prominent lawyer describing "one-two punch" of FATCA and IRS' voluntary disclosure provisions and noting that noting that US approach creates "stark choices" for foreign banks to "comply and face the difficulties and costs of doing so, do not comply and accept the 30 per cent tax, or disgorge any US-person clients or US investments (although banks doing this may still face US tax hits under pass-through rules when doing business with American institutions)"). For example, one tax attorney noted that even a bank attempting to exclude American customers might find itself unwittingly with a U.S. connection if a foreign citizen customer had a US-person child or grandchild who invests into the United States. *Id.* Similarly, individuals who have never lived in the United States but are entitled to automatic U.S. citizenship can trigger banks' obligations.

Consider the situation of a US citizen who lives in the US until she is 25, marries a Chinese citizen resident in Hong Kong and moves back to Hong Kong with him. They then have two children who are born in Hong Kong and live there, not speaking English and never visiting the United States. 'Both of those children are US citizens and are as American as Barack Obama or Sarah Palin,' says [tax attorney Joseph] Field. 'They have no requirements to confirm or validate their US nationality.' If those people are unaware of their status and do not renounce their US citizenship between the ages of 18 and 18 1/2, they remain liable to US tax until they do so. 'If they don't know that they are American citizens, how is their bank going to be able to tell? If you're a bank you have to worry about all those unintended US beneficiaries,' Field says.

*Id.* Some of this criticism is motivated by policy concerns over tax revenue losses, some is motivated by policy differences on matters such as financial privacy, and some is simply an effort to obtain an advantage in the competition for financial services business. See YOUSSEF CASSIS, *CAPITALS OF CAPITAL: A HISTORY OF INTERNATIONAL FINANCIAL CENTRES, 1780-2005* 1 (2006) ("The extent to which defending and promoting [onshore or international financial] centres has reached today reflects the importance of these stakes, which are far from solely the concern of pressure groups from the financial sector."). See also Steven M. Davidoff, *Paradigm Shift: Federal Securities Regulation in the New Millennium*, 2 *BROOK. J. CORP. FIN. & COM. L.* 339 (2008) (describing internationalization and increased competitiveness in global capital markets).

<sup>19</sup> See Richard K. Gordon, *On The Use And Abuse Of Standards For Law: Global Governance And Offshore Financial Centers*, 88 *N.C. L. REV.* 501, 541 (2010) (citing Luca Errico & Alberto Musalem, *Offshore Banking: An Analysis of Micro- and Macro-Prudential Issues* 10-11 (IMF, Working Paper No. 99/5, 1999), available at



and corruption are used to support onshore regulators and politicians' claims that greater regulatory effectiveness is needed offshore.<sup>20</sup> After all, onshore jurisdictions' regulators argue, OFCs often have large numbers of companies, trusts, hedge funds, insurance companies, and other entities but relatively small regulatory agencies.<sup>21</sup> They contend that this combination must yield excessively lax regulation.<sup>22</sup> Further, because the vast majority of financial activity in OFCs is outward directed, and so without direct impact on the citizens of the offshore jurisdiction, onshore regulators suggest that there is a lack of incentives for vigorous regulation together with the possibility of regulatory capture in OFCs.<sup>23</sup> As a result, onshore jurisdictions argue, there is insufficient regulatory oversight taking place within OFCs and so multinational "standards" and "best practices" are needed.<sup>24</sup>

For an example of the problems with focusing on inputs, consider the IMF's assessment of Bermuda's banking regulatory efforts. Although the IMF's assessment found that "[i]n practice, all Bermudian banks are operating at capital adequacy levels well in excess of required limits", it nonetheless suggested that a new, more standard system for assessing risk be developed.<sup>25</sup> This focus on inputs ignores the success of the Bermudian banking regulatory system, suggesting measures that would appear to accomplish little beyond decreasing its cost efficiency.

The onshore critique of OFCs incorporates a clever sleight of hand. There is no question that the development of multinational standards and best practices is an important part of the development of international capital markets, although it is rarely acknowledged that OFCs have

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<http://ssrn.com/abstract=880532>, at 1-7; Financial Stability Forum, Report of the Working Group on Offshore Centres 1-2 (2000), [http://www.financialstabilityboard.org/publications/r\\_0004b.pdf](http://www.financialstabilityboard.org/publications/r_0004b.pdf).) See also IMF, *Offshore Financial Centers: IMF Background Paper* Table 2 (2000) (listing jurisdictions considered to have "a low quality of supervision" and those whose "actual performance falls below international standards"); John Christensen, *The Secret World of Offshore Banking* 41, 57 in *A GAME AS OLD AS EMPIRE* (Steven Hiatt, ed. 2007) (criticizing Jersey's regulators in 1987 as lacking "experience staff and "politically controlled" and claiming problems persist "to the present day.").

<sup>20</sup> See notes 77, *infra*.

<sup>21</sup> See e.g. IMF, *Liechtenstein: Assessment of the Supervision and Regulation of the Financial Sector Volume I—Review of Financial Sector Regulation and Supervision*, IMF Country Report No. 03.289 (Sept. 2003) <http://www.imf.org/external/pubs/ft/scr/2003/cr03289.pdf> at 6-8.

<sup>22</sup> See IMF, *Offshore Financial Center Program: A Progress Report*, (March 28, 2002) available at <http://www.imf.org/external/np/mae/oshore/2002/eng/032802.pdf> at 14 (finding that "Insufficient supervision of market conduct resulted from a lack of rules or codes of conduct, failure to oversee insurance brokers, and a lack of resources for monitoring;"

<sup>23</sup> See generally, Dale Murphy, *Interjurisdictional Competition and Regulatory Advantage*, 8 J. INT'L ECON. L. 891 (2005); Alain Deneault, *OFFSHORE TAX HAVENS AND THE ROLE OF GLOBAL CRIME* vii-ix (2011) (money offshore has "no bank supervision, no stock market framework, no real control over all kinds of trafficking, no knowledge on the part of the directors of private companies, and of course, no taxation."); Christensen, *supra* note 19, at 59 ("Lacking in comparative advantage and politically weak, small island economies can be politically captured by major banks and accounting firms looking for suitable junk states to serve their needs.").

<sup>24</sup> See IMF, *Offshore Financial Centers: IMF Background Paper*, (June 23, 2000), Table 3 available at <http://www.imf.org/external/np/mae/oshore/2000/eng/back.htm#III> (listing 15 organizations and initiatives aimed at altering OFC behavior).

<sup>25</sup> IMF, *Bermuda: Assessment of the Supervision and Regulation of the Financial Sector—Volume I—Review of Financial Sector Regulation and Supervision*, at 23. Note that Bermuda's banks serve the local market; the jurisdiction does not have an offshore banking sector.

taken important steps toward developing and implementing such standards and best practices.<sup>26</sup> (Indeed, some assessments of regulatory practices in OFCs find that they sometimes lead in these areas.<sup>27</sup>) The sleight of hand in OECD and other onshore jurisdictions' argument is that the onshore jurisdictions rely on standards and best practices *they* develop rather than seeking ones developed through a process involving all interested parties.<sup>28</sup> The bias this introduces can be clearly seen in the OECD's anti-ring-fencing tax campaign. In its 1998 report, the OECD defined the presence of ring-fencing<sup>29</sup> as an element in "harmful" tax competition.<sup>30</sup> Yet it also specifically excluded consideration of the taxation of interest earned by cross-border savings instruments, an area in which the United States, among others, exempts outbound interest flows from withholding and other income taxation.<sup>31</sup> OFC behavior was thus labeled "harmful", while conceptually indistinguishable onshore behavior was not. Similarly, onshore jurisdictions complain loudly about "secrecy", despite their own provision of secrecy. For example, both Nevada (the home state of Senate Majority Leader Harry Reid) and Delaware (the home state of Vice President Joe Biden) are major "secrecy" jurisdictions, giving U.S. demands for information from other nations more than a whiff of hypocrisy.<sup>32</sup>

Established OFCs have offered several defenses of their jurisdictions' regulatory effectiveness. First, OFCs are thoroughly reviewed by the International Monetary Fund (IMF) for adequate regulatory capacity and many score highly in the IMF's review process.<sup>33</sup> Indeed,

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<sup>26</sup> See Stikeman Elliott, *TOWARDS A LEVEL PLAYING FIELD: REGULATING CORPORATE VEHICLES IN CROSS-BORDER TRANSACTIONS* (2002) (describing such efforts).

<sup>27</sup> See, e.g., *Crown Dependencies*, *supra* note 6 ("The offshore centres may also be able to lead the way in certain areas of regulation.").

<sup>28</sup> Morriss & Moberg, *supra* note 16, at 47-50.

<sup>29</sup> A "ring-fencing" regime provides separate tax regimes for businesses or persons legally located in a jurisdiction but doing business outside the jurisdiction and those doing business within the jurisdiction. See Boise & Morriss, *supra* note 1.

<sup>30</sup> OECD, *Harmful Tax Competition: an Emerging Global Issue* 26-28 (1998), available at <http://www.oecd.org/dataoecd/33/0/1904176.pdf>.

<sup>31</sup> Internal Revenue Code § 871(h). See Craig M. Boise, *Regulating International Tax Competition in Offshore Financial Centers*, Case Western Reserve Law School Working Paper (2008) (discussing differential treatment of areas where OECD countries engage in similar behavior). This is recognized in literature sympathetic to offshore centers. See, e.g., Hoyt Barber, *TAX HAVENS TODAY* 20 (2007) ("Curiously, the *United States is also the biggest tax haven in the world*, as it provides many tax incentives to foreign investment.") and Jonathan Chait, *Rogue State: The Case Against Delaware*, *THE NEW REPUBLIC* (August 2002) ("Who needs the Cayman Islands when there's a tiny, secretive corporate haven on U.S. soil?"). It thus could hardly be considered a surprise to onshore governments that they are engaged in hypocritical behavior.

<sup>32</sup> See Brian Grow and Kelly Carr, *Special Report: Nevada's Big Bet on Secrecy*, Reuters (Sept. 26, 2011) available at <http://www.reuters.com/article/2011/09/26/us-shell-games-nevada-idUSTRE78P1Y020110926> ("Nevada has spawned a thriving industry of consultants who aid companies seeking to avoid liability and disclosure, at a time when Washington is calling on other nations to enforce greater transparency of financial flows"); Chait, *supra* note 31, at 20 (Delaware "is a rapacious parasite state with a long history of disloyalty and avarice" due to its corporate and banking laws); Deneault, *supra* note 23, at 86-94 (Delaware "an offshore state within the United States ... behaves like any other tax haven. ... [and has] created a paradoxical legal system that returns us to the state of nature."). Canada is also sometimes attacked as an offshore jurisdiction. See Deneault, *supra*, at 74-77. Britain also is regularly criticized for tax haven behavior. See *id.* at 114 (quoting David Serrenay that "England is in practice one of the least cooperative countries, in tax matters as well as in matters of financial crime").

<sup>33</sup> The IMF found Cayman's regulatory staffing levels sufficient in a 2009 review, for example.

OFCs regularly meet or exceed benchmarks that onshore jurisdictions do not themselves meet.<sup>34</sup> Second, OFCs use a different approach to regulation of the financial services sector: one that is at least as appropriate as onshore jurisdictions' choice of regulatory methods, but which is implemented differently and thus makes different demands on regulators. In particular, many OFCs focus their regulatory efforts on ensuring that regulated entities do not present systemic risks, compared to onshore jurisdictions' regulatory focus on retail transactions.<sup>35</sup> Third, OFCs often have cooperative relationships between regulators and the financial industry rather than the adversarial relationship that exists in many onshore jurisdictions between regulators and the financial industry. Combined with broader regulatory powers than many onshore regulators possess, this allows offshore regulators to regulate indirectly in some areas.

Further, the policy debate fails to take into account important differences among OFCs. Well-established OFCs, such as Bermuda, Cayman, the Channel Islands, the Isle of Man and others, are not operating in the shadows of the world economy as onshore critics like to suggest. Neither are some of the newer OFCs, such as Dubai. Indeed, several are among the most important world financial centers in particular industries: Bermuda is by some accounts today the third largest insurance market in the world,<sup>36</sup> the Cayman Islands are the world's fifth largest financial center measured by banking assets and liabilities;<sup>37</sup> and, during the 1970s and early

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Current levels of staff are considered adequate by CIMA but the implementation of the mission's recommendations may call for additional resources. CIMA needs to review periodically the adequacy and quality of its human resources to facilitate the effective implementation of risk-based consolidated supervision. CIMA has emphasized its own commitment and that of the government to providing the resources needed. This is highly encouraging.

International Monetary Fund, *Cayman Islands: Off-Shore Financial Center Assessment Update—Assessment of Financial Sector Supervision and Regulation* (December 2009) at 5. The Financial Action Task Force found that Jersey and Guernsey met more of its recommendations than did the U.S. or the U.K., while the IMF found both jurisdictions were in the top tier internationally with respect to “anti-money laundering provisions, supervision and enforcement.” Robert Milner, *Offshore standards start to outclass onshore critics*, LEGALWEEK (1 Feb 2011) available at <http://www.legalweek.com/legal-week/opinion/2023825/offshore-standards-start-outclass-onshore-critics>.

<sup>34</sup> See IMF, *Offshore Financial Centers: a Report on the Assessment Program and proposal for Integration with the Financial Sector Assessment Program 25-28* (May 8, 2008), available at <http://www.imf.org/external/np/pp/eng/2008/050808.pdf>, (noting that high-income OFCs out-perform high-income non-OFCs on several measures of compliance with Basel Core Principles, International Association of Insurance Supervisors Principles, International Organization of Securities Commissions Objectives and Principles, and Financial Action Task Force Recommendations).

<sup>35</sup> Systemic risk is “the risk that (i) an economic shock such as market or institutional failure triggers (through a panic or otherwise) either (X) the failure of a chain of markets or institutions or (Y) a chain of significant losses to financial institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility.” Steven L. Schwarcz, *Systemic Risk*, 97 GEORGETOWN L. J. 193, 204 (2008).

<sup>36</sup> J. David Cummins, *The Bermuda Insurance Market: An Economic Analysis* (2008), at ii (<http://www.bermuda-insurance.org/pdf-downloads/CumminsReport08.pdf>) (noting that Bermuda is behind only North America and Europe as a major reinsurance market, and more of the top 40 reinsurance firms are domiciled there than any country in the world).

<sup>37</sup> *The Banking Industry: The Cayman Islands*, LAWYER MONTHLY 34, 34 (Sept. 2011) available at <http://content.yudu.com/A1ttzf/LM0911/resources/34.htm>.

1980s, the Netherlands Antilles was the jurisdictional location of hundreds of millions of dollars in Eurobond offerings by U.S. corporations' finance subsidiaries.<sup>38</sup>

As we noted, critics contend that these jurisdictions owe their successes to “unfair” or “shady” business practices. But an alternative explanation for these OFCs' success is the major substantive differences between their legal regimes and onshore jurisdictions - differences which lower transactions costs.<sup>39</sup> These lower transactions costs both allow considerable investment to flow into onshore economies through vehicles that safeguard foreign investors and provide regulatory competition that drives both onshore and offshore jurisdictions to innovate in further reducing transactions costs.<sup>40</sup> A key factor in OFCs' ability to provide effective competition is their ability to regulate their financial industries using methods that differ from those used by onshore jurisdictions. Simply identifying a difference does not justify the conclusion that the difference reflects laxness toward criminal activity, money laundering, terror finance, or tax evasion. A closer examination of OFC regulatory efforts is necessary before we can distinguish between the onshore jurisdictions' portrayal of them as rogue actors in the global financial system and alternative explanations.

This Article examines the issue of the regulatory capability of the major offshore financial centers by comparing them to their peers and to onshore jurisdictions' financial regulators, providing the first effort at a comparative assessment of regulatory resources. This comparison yields three important conclusions. First, offshore financial centers' regulatory efforts are substantial when measured against onshore jurisdictions' efforts even if we limit our comparison to regulatory inputs. Second, comparing regulatory effectiveness based on inputs is a difficult task and requires considerable effort; it cannot be done through press releases. Unfortunately, onshore regulators have largely prevailed in convincing international bodies like the IMF to adopt assessment methods that do not adequately describe offshore regulators because their methods focus on regulatory *inputs* rather than regulatory *outputs*. This Article serves as a first step in constructing a comparison across jurisdictions. Further research in this area is needed to enhance the preliminary calculations presented here. Third, a more productive approach to assessing both offshore and onshore regulatory effectiveness would be to shift attention away from input-based measures and focus instead on outputs. We conclude by proposing a focus on well-defined regulatory effectiveness as a more appropriate means of comparison across jurisdictions.

Part I examines some of the qualitative differences among jurisdictions that affect regulatory effectiveness and argues that accurate comparative assessment of jurisdictions requires closer attention to the nuances of institutions than current efforts include. Part II examines the numbers of regulators and regulated entities in some of the major areas in which offshore financial centers compete with onshore jurisdictions and concludes that levels of regulatory effectiveness are closer than the current debate suggests. Part III suggests how the

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<sup>38</sup> Boise & Morriss, *supra* note 1, at 380 (at text accompanying notes 9-10 valuing the “market value of U.S. finance subsidiaries' Eurobond offerings through the Netherlands Antilles at \$20-25 billion in 1981.”)

<sup>39</sup> Andrew P. Morriss, *Changing the Rules of the Game: Offshore Financial Centers, Regulatory Competition & Financial Crises*, 15 NEXUS: CHAP. JOURNAL OF LAW & POLICY 15, 18 (2010). *See also* Anna Manasco Dionne & Jonathan R. Macey, *Offshore Finance & Onshore Markets: Racing to the Bottom or Moving Toward Efficient?* in OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION (Andrew P. Morriss, ed. 2010).

<sup>40</sup> Boise & Morriss, *supra* note 1, at 378.

debate over the role of offshore financial centers should change to take into account the analysis in this Article.

## I. Qualitative Differences Among Jurisdictions

We can distinguish the regulatory philosophies and approaches applied by different regulators to financial services in several dimensions. These differences matter for comparing regulatory effectiveness across jurisdictions because they affect the effectiveness of the application of regulatory resources to the financial industry. This section surveys these differences.

### A. Regulatory Goals

Regulators' goals differ and these differences affect comparisons across regulators. Some jurisdictions follow a philosophy of enforcing disclosure requirements on those offering financial products with the goal of ensuring that investors who might purchase the products have the information available to make informed judgments about them.<sup>41</sup> Often these jurisdictions focus on protecting retail investors. For example, the U.S. Securities and Exchange Commission (SEC) has focused heavily on protecting retail investors by requiring those offering most investment products in the U.S. retail market to provide extensive disclosures in a standard format.<sup>42</sup> In theory, this allows the retail investor, should he or she choose to do so, to compare various possible investments and make a well-informed choice among them. In practice, it is unclear how much such disclosures benefit individual investors.<sup>43</sup> Such an approach has considerable costs, since it both increases the transactions costs of creating investment products in the U.S. market and inhibits innovation in governance of investment entities.<sup>44</sup>

Moreover, the benefits of structuring regulation around protecting retail investors depend on particular assumptions about investor behavior; these assumptions are not always warranted.<sup>45</sup>

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<sup>41</sup> See Janis Sarra, *Disclosure as a Public Policy Instrument in Global Capital Markets*, 42 TEX. J. INT'L L. 875 (2007).

<sup>42</sup> Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Market*, 95 VA. L. REV. 1025, 1025 (2009) ("The Securities and Exchange Commission thinks of itself as the investors' advocate, by which it means retail investors – individuals and households – as opposed to institutional investors.")

<sup>43</sup> See Roberta Romano, *Empowering Investors: a Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2373-2381 (1998) (finding little evidence of benefits of federal securities regulation for investors and concluding "a fair reading of the empirical literature on the effects of the federal securities laws points to an expansive regulatory apparatus with no empirical validation for its most fundamental objectives.").

<sup>44</sup> See, e.g., *Securities Regulation in Low Tier Listing Venues: The Rise of the Alternative Listing Market*, 13 FORDHAM J. CORP. & FIN. L. 257, 259-260 (2008) (summarizing literature on regulatory costs); Houman B. Shadab, *The Law and Economics of Hedge Funds: Financial Innovation and Investor Protection*, 6 BERKELEY BUS. L. J. 3 (2009) (arguing that "financial innovation by hedge funds typically has the result of protecting investors from general market downturns."); Houman B. Shadab, *Innovation and Corporate Governance: The Impact of Sarbanes Oxley*, 10 U. PA. J. BUS. & EMP. L. (2008) (arguing that Sarbanes-Oxley legislation inhibits innovation in business structure).

<sup>45</sup> See, e.g., Ann Morales Olazabal & Howard Marmorstein, *Structured Products for the Retail Market: The Regulatory Implications of Investor Innumeration and Consumer Information Processing*, 52 ARIZ. L. REV. 623 (2010) (arguing that disclosures used in structured financial products mislead by taking advantage of investor innumeration); Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 2 (2003) (describing evidence that "investors' decisions are influenced by systematic biases that impair their abilities to maximize their investment returns."). Such biases can apply across many types of financial markets. See Olli Castren, Chiara Osbad & Matthia Sydow, *What Drives Investors' Behavior in Different FX Market Segments*, European Central Bank

For example, the risk of a particular investment for an investor depends only in part on the characteristics of the investment itself but also depends on the other risks to which the investor is exposed. An investor's total portfolio risk is determined not by the sum of the individual risks but depends on the interaction of the risks of the financial instruments within the portfolio. As a result, assessing the "riskiness" of a particular investment can provide only an input into an investor's own risk assessment. Consider an investor contemplating an investment in Apple stock. Standing alone, the investor is at risk that Apple will do poorly in the future, that the technology sector as a whole will do poorly, that stocks generally will decline, and that Apple management will engage in fraud that lowers the stock price. By purchasing financial instruments that would rise in value with a general technology sector decline or general stock market decline, the investor can hedge some of the risks involved in the investment in Apple stock, narrowing her exposure to Apple-specific risk. Unfortunately, regulators have no way of knowing whether any particular investor (or even most investors in Apple stock) also invest in such instruments and so they have no way to determine whether they need to take steps to ensure that investors in Apple stock are aware of general market risks and general technology sector risks, as well as Apple-specific risks. Regulation thus proceeds in a general framework of ignorance about important facts that are crucial to understanding the effectiveness and the cost-benefit balance of the regulatory activity.

The retail-investor-oriented regulatory approach taken by the United States addresses risk by requiring extensive disclosures by those offering securities to the public.<sup>46</sup> This is a costly measure, and changes to regulations are one of the main drivers of this cost. Securities firms in 2004 spent over \$23 billion on costs of regulatory compliance – doubling to tripling their expenditures as a result of additional compliance costs added by Sarbanes-Oxley.<sup>47</sup> More recently, the Dodd-Frank regulations dramatically increased compliance costs across the financial services sector. The new requirements for capital plans, stress testing, and resolution plans alone are estimated by Federal regulators to require 420,000 man-hours in initial compliance and more than 860,000 additional man-hours each year.<sup>48</sup>

Even the basic disclosure requirements are of questionable value. For example, to ensure retail investors are protected, the SEC requires considerable disclosures by companies about the

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Working Paper Series No. 706 (December 2006) 22 available at <http://www.ecb.int/pub/pdf/scpwps/ecbwp706.pdf> ("It turns out that the behaviour of investors [in foreign exchange markets] in the different asset categories can differ quite substantially from each other, and also from the behaviour of institutional investors that have been considered in the earlier literature.").

<sup>46</sup> Indeed, the United States regulatory approach *generally* embraces a mandatory-disclosure regime in a range of activities as a means of consumer protection. *See generally* Omri ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L.REV. 647 (2011).

<sup>47</sup> Securities Industry Association, *The Costs of Compliance in the U.S. Securities Industry: Survey Report 2* (Feb. 2006) available at [http://www.sifma.org/uploadedfiles/research/surveys/costofcompliancesurveyreport\(1\).pdf](http://www.sifma.org/uploadedfiles/research/surveys/costofcompliancesurveyreport(1).pdf) (securities industry spent \$23.2 billion on compliance activities in 2004).

<sup>48</sup> *See Proposed Rules: Capital Plans*, 76 Fed. Reg. 35351, 35358 (June 17, 2011) (estimating regulations would require 862,364 man-hours annually and initial compliance efforts of 420,000 man-hours). *See also* U.S. House of Representatives, Financial Services Committee, *One Year Later: The Consequences of the Dodd-Frank Act* 13 (2010) available at <http://financialservices.house.gov/UploadedFiles/FinancialServices-DoddFrank-REPORT.pdf> (estimating over 2.2 million man-hours required to comply with just first set of rules issued under Dodd-Frank based on agency estimates of compliance costs; these rules make up just 10% of total number of rules to be issued).

risks they face in their annual filings of Form 10-K.<sup>49</sup> Consider Apple's disclosures about the market risks it faced. In its 2007 10-K, Apple disclosed to investors that

The Company competes in global markets that are highly competitive and characterized by aggressive price cutting, with its resulting downward pressure on gross margins, frequent introduction of new products and products, short product life cycles, evolving industry standards, continual improvement in product price/performance characteristics, rapid adoption of technological and product advancements by competitors, and price sensitivity on the part of consumers.<sup>50</sup>

Similarly informative disclosures filled nearly ten pages of Apple's 122-page 10-K filing in 2007,<sup>51</sup> 11 pages of its 96-page 10-K filing in 2008,<sup>52</sup> 11 pages of its 107-page 10-K filing in 2009,<sup>53</sup> 10 pages of its 117-page 10-K filing in 2010,<sup>54</sup> and 11 pages of its 114-page 10-K filing in 2011.<sup>55</sup> Yet no minimally aware observer of technology markets could have been ignorant of the content of these disclosures even if Apple had never written a word about them.

Are the costs of these regulations justified? Since dispersed equity ownership is uncommon<sup>56</sup> and institutional investors hold the majority of stock,<sup>57</sup> the retail investor focus of SEC regulation provides many investors with comparatively little benefit.<sup>58</sup> Because the SEC uses an expansive definition of "security,"<sup>59</sup> it cannot tailor its regulatory efforts to prevent imposing the retail-oriented protections on investment products aimed solely at institutional investors. U.S. federal securities regulation thus suffers from a problem of over-breadth even if these regulations are effective at warning retail investors about risks they would not otherwise identify. Yet comparisons of OFCs to the U.S. financial regulatory system assume that

<sup>49</sup> Securities Act § 13, 15 U.S.C.A. § 78m (1934).

<sup>50</sup> Apple Inc., Form 10-K, November 15, 2007, at 14 available at [http://www.sec.gov/Archives/edgar/data/320193/000104746907009340/a2181030z10-k.htm#toc\\_jc19701\\_1](http://www.sec.gov/Archives/edgar/data/320193/000104746907009340/a2181030z10-k.htm#toc_jc19701_1).

<sup>51</sup> Apple 10-K, *supra* note 50, at 13-23.

<sup>52</sup> Apple Inc., Form 10-K, November 5, 2008, at 14-24 available at <http://files.shareholder.com/downloads/AAPL/1567963261x0xS1193125-08-224958/320193/filing.pdf>

<sup>53</sup> Apple Inc., Form 10-K, October 27, 2009, at 13-24 available at <http://files.shareholder.com/downloads/AAPL/1567963261x0xS1193125-09-214859/320193/filing.pdf>

<sup>54</sup> Apple Inc., Form 10-K, October 27, 2010, at 10-21 available at <http://files.shareholder.com/downloads/AAPL/1567963261x0xS1193125-10-238044/320193/filing.pdf>

<sup>55</sup> Apple Inc., Form 10-K, October 26, 2011, at 9-20 available at <http://investor.apple.com/secfiling.cfm?filingID=1193125-11-282113&CIK=320193>

<sup>56</sup> See Julian Franks & Colin Mayer, *Corporate Ownership and Control in the UK, France, and Germany*, 9 J. APP. CORP. FIN. 30 (1997); Julian Franks, et al., *Capital Markets and Corporate Control: A Study of France, Germany and the UK*, 5 Econ. Pol'y 191 (1992); R. La Porta, et al., *Corporate Ownership Around the World*, 54 J. FINANCE 471 (1999); Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 J. FIN. STUD. 1377 (2009).

<sup>57</sup> See John C. Bogle, *Reflections on "Toward Common Sense and Common Ground"*, 33 J. CORP. L. 31, 31 (2007) (institutional investors hold 76% of U.S. stocks).

<sup>58</sup> See Romano, *supra* note 43, at 2381 (arguing that active disclosure has no effect on price) and at 2413 (noting that "the possibility of a divergence between institutional and retail investors' preferred securities regime is remote").

<sup>59</sup> See SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (test for coverage under securities laws was "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.").

protections for retail investors are the appropriate benchmark. As we have suggested, these protections are irrelevant for many investors.

In contrast, the market for hedge fund investments has been comparatively unregulated, even within the United States.<sup>60</sup> Indeed, a common definition of a hedge fund is that it is an investment vehicle unregulated under the major U.S. financial regulatory statutes.<sup>61</sup> Both as a result of the need to fit within the exceptions to these regulatory statutes and because of the nature of many hedge fund investments, investors in hedge funds are a combination of institutions and high net worth individuals who do not need the sort of retail-investor-oriented disclosure requirements used by the SEC in regulating securities markets.<sup>62</sup> Avoiding these requirements saves the investment managers the considerable transactions cost of complying with these regulations and thus enables them to offer a higher rate of return to their investors.<sup>63</sup> Financial services firms in many OFCs either do not offer retail investment products or are able to segregate their retail products and non-retail products from one another,<sup>64</sup> so financial regulators in offshore jurisdictions focus their attention elsewhere. This difference in focus is

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<sup>60</sup> Geoffrey Poitras, VALUATION OF EQUITY SECURITIES: HISTORY, THEORY AND APPLICATION 244 (2010) (“defining characteristic” of hedge funds is “pooled investment vehicles that are not registered under federal securities laws.”).

<sup>61</sup> Although this was originally an unintended consequence of earlier regulatory efforts, its continuation is a deliberate policy of U.S. regulators. See Steven M. Davidoff, *Black Market Capital*, 2008 COLUM. BUS. L. REV. 172, 177-178 (2008).

<sup>62</sup> Anne Riviere, *The Future of Hedge Fund Regulation: A Comparative Approach*, 10 RICHMOND J. GLOBAL L. & BUS. 263, 300-301 (2011).

<sup>63</sup> Franklin R. Edwards, *Hedge Funds and the Collapse of Long-Term Capital Management*, 13 J. ECON. PERSP. 189, 191 (1999) (“hedge funds are to a large extent the creation of the legal restrictions imposed on mutual funds and other institutional fund managers. Their advantage is that they can pursue investment and speculative strategies that are not open to other institutional fund managers, they can avoid the costs associated with regulatory oversight....”). See also Wulf A. Kaal, *Hedge Fund Regulation via Basel III*, 44 VANDERBILT J. TRANS. L. 389, 395 (2011) (advocate of regulation noting that regulations will “limit hedge funds’ ability to provide above average returns to their investors.”) Not all costly regulations drive financial firms away. Some investment managers redomiciled funds into the European Union despite the cost of compliance with the new Alternative Investment Fund Managers directive because EU regulations made compliance a necessary step to accessing EU investors. DIRECTIVE 2011/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2011, on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, (July 1, 2011) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>. Clear Path Analysis, *Re-Domiciling & Co-Domiciling for Fund Managers* (Jan. 2012) available at <http://www.clearpathanalysis.com/wp-content/uploads/downloads/2012/01/V9-Re-Domiciling-and-Co-Domiciling-for-Fund-Managers.pdf> (examining impact of AIFM, suggesting funds with European investors will be forced to move into EU while funds aimed outside of EU will shift out of EU); KPMG, *Alternative options: Hedge fund redomiciliation trends in emerging markets* 18-19 (2011) (noting that funds redomiciling into EU because of need to comply with AIFM if seeking European investors). See also *Analysis: Channel Islands entering golden period*, Private Equity Manager (May 30, 2011) available at <http://www.privateequitymanager.com/Article.aspx?aID=0&article=61258> (quoting Gavin Farrell of Mourant Ozannes that “No one has a fund structure based in the EU now unless they absolutely have to for EU marketing or regulatory reasons.”); Helia Ebrahimi, *Ditch the Directive: MEPs begin three-point campaign to force changes to EU draft*, THE TELEGRAPH (17 Oct. 2009) (describing financial industry complaints during drafting of directive); *The AIFM Directive: Another European Mess*, THE ECONOMIST (May 18, 2010) available at <http://www.economist.com/node/16156357> (describing problems in draft rules).

<sup>64</sup> For example, offshore financial centers generally issue two classes of licenses for banks, insurance companies, and other financial services firms. Holders of licenses permitting doing retail business can then be subjected to different regulatory requirements than holders of licenses permitting only offshore business, avoiding the problem of over-inclusion faced by regulators like the SEC.



appropriate given the differences in investment products for sale in the two markets and the types of investors most likely to seek those products, even if U.S.-style retail investor regulatory strategies are appropriate in the United States.

Moreover, a focus on U.S.-style disclosure oriented regulation represents a policy choice that jurisdictions need not make. An alternative for intervening in financial contracts among consenting individuals or firms is to ensure parties realize that they are responsible for their choices. Such an approach has much to recommend it. British investors in the failed Icelandic internet bank Icesave, including local governments, charities, and individuals, reported to the post-crash inquiry that they did no investigation into Icesave's soundness or legal status before risking millions of pounds.<sup>65</sup> Creating a general atmosphere of responsibility for investment choices would positively affect such transactions and might do so better than the alternatives. Which approach is better is a choice to be made by individual jurisdictions, not one that the United States or European Union should be imposing on others.

A different focus does not mean that OFCs do not regulate. In fact, OFC governments have three important interests that require regulation. First, OFCs are engaged in competition for business with one another and with the financial centers in onshore jurisdictions.<sup>66</sup> Many institutional investors require the presence of certain regulatory measures before considering investments. For example, many pension funds will only invest in investment vehicles listed on a recognized stock exchange.<sup>67</sup> OFCs engaged in regulatory competition to attract these pension funds. Several created stock exchanges in the past decade, and then sought recognition of those stock exchanges by onshore regulators to improve the marketability of investment products offered in the offshore financial centers. Thus, the Cayman Islands Stock Exchange (CSX) began operations in 1997, was listed with the London Stock Exchange in 1999, joined the Intermarket Surveillance Group (an association of stock exchanges) in 2001, became an affiliate member of the International Organization of Securities Commissions (IOSCO) in 2003, and was granted "recognized stock exchange" status by the U.K.'s Inland Revenue in 2004.<sup>68</sup> Each of

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<sup>65</sup> Audit Commission [UK], *Risk and Return: English Local Authorities and the Icelandic Banks* 30 (March 2009) available at <http://www.audit-commission.gov.uk/SiteCollectionDocuments/AuditCommissionReports/NationalStudies/26032009riskandreturn2.pdf>; Birgir Petursson & Andrew P. Morriss, *Global Economies, Regulatory Failure, & Loose Money: Lessons for Regulating the Finance Sector from Iceland's Financial Crisis*, ALA. L. REV. (forthcoming 2012).

<sup>66</sup> Dionne & Macey, *supra* note 39, at 64 ("OFCs are important competitors with onshore jurisdictions,").

<sup>67</sup> See, e.g., all Nigerian pension funds (National Pension Commission, Regulation on Investment of Pension Fund Assets 4 (December 7, 2006), available at [http://www.pencom.gov.ng/download/regulation/Regulation\\_on\\_Investment\\_of\\_Pension\\_Funds\[3\].pdf](http://www.pencom.gov.ng/download/regulation/Regulation_on_Investment_of_Pension_Funds[3].pdf)); UK Individual Savings Accounts (Her Majesty's Revenue & Customs, Recognized stock exchanges, <http://www.hmrc.gov.uk/fid/rse.htm>, last gathered 02/15/2012) and tax-deferred pension funds (Clifford Chad Henson, An overview of Caribbean securities exchanges, 21 Cayman Fin. Rev. 88 (Oct. 2010), available at <http://www.compasscayman.com/cfr/2010/10/05/An-overview-of-Caribbean-securities-exchanges/>); and the Alaskan pension fund (Alaska Retirement Management Board, Resolution 2011-21 Relating to Investment Guidelines for Domestic and International Equities § B.5 (December 2011), available at <http://www.dor.alaska.gov/treasury/programs/documentviewer/viewer.aspx?870f>).

<sup>68</sup> See Cayman Islands Stock Exchange, Recognitions, Affiliations and Memberships, <http://www.csx.com.ky/>.

these steps required CSX to meet standards and each enhanced CSX's ability to secure listings, thus aligning financial incentives and good governance.<sup>69</sup>

Second, offshore jurisdictions are vulnerable to loss of investor confidence in the jurisdiction. The offshore jurisdictions must therefore regulate to maintain the integrity of their legal, financial, and political systems.<sup>70</sup> For example, Aruba's difficulties led to what one commentator termed "the world's first independent mafia state";<sup>71</sup> the Turks and Caicos Islands saw two ministers arrested in 1985 in Miami over drug trafficking charges and a Commission of Enquiry appointed in 2008 to examine additional charges of official corruption;<sup>72</sup> and Antigua's reputation suffered from the collapse of R. Allen Stanford's Ponzi scheme.<sup>73</sup> In each of these cases, the offshore government's errors dramatically affected its economy and damaged its reputation as a reputable financial center.

Avoiding such problems is critical to a successful offshore financial sector. Moreover, it is not simply the fear of intervention by an associated state that motivates offshore jurisdictions to avoid corruption, money laundering, and illegal activities; even independent jurisdictions are vulnerable to the loss of investor confidence. The classic example was the flight of offshore businesses from the Bahamas to the Cayman Islands when the Bahamian government restricted access to work permits in the early 1970s.<sup>74</sup> Particularly where the stream of potential future income from financial business is large, as it is in the more established offshore financial centers, the jurisdictions have a considerable financial incentive to effectively regulate to protect the integrity of their "brands" in the financial market by controlling money laundering and other criminal activities.

Third, offshore financial centers have a similarly strong interest in avoiding spectacular failures that might cause a loss of confidence, like the Bear Stearns, Enron, Madoff, Parmalat, or

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<sup>69</sup> E.g. endorsement by a full Ordinary member for Affiliate Membership in IOSCO (<http://www.iosco.org/about/index.cfm?section=membership>), See also Bermuda (celebrating recognition at <http://www.bsx.com/NewsArticle.asp?articleID=1100792056>).

<sup>70</sup> See, e.g., Goldman Sachs, *Effective Regulation: Part 2: Local Rules, Global Markets* (2009) ("Good regulatory systems not only monitor and control financial activity, but also attract it. Hosting financial markets provides economic gains, but – just as importantly, if not more so – allows for better control of risk.") Christensen claims the incentive is to "see no evil, hear no evil, and speak no evil." Christensen, *supra* note 19, at 58. Such an approach might work until someone else notices some "evil", but it does not appear to us to be sustainable.

<sup>71</sup> Jan Rogozinski, *A BRIEF HISTORY OF THE CARIBBEAN* (1999) at 282 (quoting Claire Sterling).

<sup>72</sup> David Tapfer, *Turks and Caicos Governor Appoints Commission of Enquiry*, Caribbean Net News (July 10, 2008) available at <http://www.caribbeanetnews.com/breaknews-9063--37-37---breaknews.html>; Turks and Caicos Islands Commission of Inquiry 2008-2009, Interim Report of the Commissioner The Right Honorable Sir Robin Auld, 10, available at <http://www.tci-inquiry.org/Report/InterimReport28Feb09.pdf> (noting "high probability of ... systemic venality" and "clear signs of political amorality and immaturity and of general administrative incompetence"); Turks and Caicos Islands Commission of Inquiry 2008-2009, Report of the Commissioner the Right Honorable Sir Robin Auld, (2009)

<sup>73</sup> Robert Hoffman, *SIR ALLEN & ME: AN INSIDER'S LOOK AT R. ALLEN STANFORD AND THE ISLAND OF ANTIGUA* 144-45 (2009) ("Antigua has a lot of work to do in repairing its reputation [after Stanford International Bank scandal], which wasn't all that good even before Stanford arrived on the island. And Sir Allen could never have pulled off what he did without the almost total compliance of the authorities.").

<sup>74</sup> Michael Craton, *A HISTORY OF THE BAHAMAS* 284 (3<sup>rd</sup> ed. 1986); Michael Craton, *PINDLING: THE LIFE AND TIMES OF THE FIRST PRIME MINISTER OF THE BAHAMAS 1930-2000* 161 (2002) ("Many companies transferred all or part of their operations to what were seen as more favorable locations, bringing the first surge of prosperity to the Cayman Islands and reinforcing the longer-established financial industry of Bermuda.").

WorldCom financial fiascos in onshore jurisdictions. The New York and London capital markets are sufficiently large and important that even such substantial events are not catastrophic, although major financial markets may suffer large losses in relative market shares from scandals or from regulatory overreach in response to scandals.<sup>75</sup> For smaller financial markets competing for specialized business, even one such failure can prove disastrous, as the Stanford scandal has for Antigua's financial sector. Offshore financial regulators thus have strong incentives to control risks to their financial systems as a whole. Crucially for our purposes, the differences between those jurisdictions that successfully implement such controls and those which fail to do so are *not* primarily differences of inputs into the regulatory process, but relate to execution and regulatory design. For example, Allen Stanford's deep involvement in Antigua's financial regulatory sector undermined its ability to prevent his fraudulent activity.<sup>76</sup>

Yet assessments of offshore jurisdictions often focus on formal measures that fail to account for such factors. For example, the IMF was critical of the BVI's onsite supervision of banking, insurance and securities sectors:

There is a weakness with respect to onsite supervision of banking, insurance, and securities sectors. While there is often detailed and well-executed off-site inspection of relevant documents in the course of granting both initial licenses and license renewal (as well as on an *ad hoc* basis), there is currently no regular and comprehensive examination and compliance program in operation, and no on-site inspections of regulated entities/providers (regulated persons) other than trust and company service providers.<sup>77</sup>

Such an input-focused analysis neglects the issue of whether or not the informal ("ad hoc") inspection system *worked* within the context of the BVI, applying a regulatory model based upon systems used in larger jurisdictions with different approaches to key regulatory structure issues.

## B. Rules vs. Principles

A second important difference in regulatory methods is the distinction between reliance on rules and reliance on principles. This difference can be seen within the onshore financial sector, where the U.K. is the classic example of a principles-based financial regulatory system<sup>78</sup> while the United States has followed more of a rules-based approach to financial regulation.<sup>79</sup>

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<sup>75</sup> See Joseph D. Piotroski & Suraj Srinivasan, *Regulation & Bonding: The Sarbanes-Oxley Act and the Flow of International Listings* (2008) available at <http://ssrn.com/abstract=956987> (finding strong evidence that U.S. stock markets have experienced a decrease in the frequency of non-U.S. smaller firm listings post-Sarbanes-Oxley).

<sup>76</sup> Hoffman, *supra* note 73, at 144-45.

<sup>77</sup> IMF, British Virgin Islands – Overseas Territory of the United Kingdom: Assessment of the Supervision and Regulation of the Financial Sector Volume I—Review of Financial Sector Regulation and Supervision, at 8, <http://www.imf.org/external/pubs/ft/scr/2004/cr0492.pdf>

<sup>78</sup> See Julia Black, Martyn Hopper, & Christa Band, *Making a Success of Principles-Based Regulation*, 1 L. & FIN. MARKETS (2007) (describing principles based approach).

<sup>79</sup> Press Release, North American Securities Administrators Association, *NASAA Outlines Core Principles for Regulatory Reform in Financial Services* (Nov. 19, 2008), available at [http://www.nasaa.org/NASAA\\_Newsroom/Current\\_NASAA\\_Headlines/9781.cfm#](http://www.nasaa.org/NASAA_Newsroom/Current_NASAA_Headlines/9781.cfm#) (arguing that prescriptive rules should be preferred to principles-based approaches to regulation and that "prescriptive rules. Broadly

Indeed, Britain touts this difference as a reason for firms to make use of London's financial industry rather than New York's.<sup>80</sup> Despite minor departures from this philosophy in the regulation of hedge funds<sup>81</sup> and high-impact entities in the wake of the global financial crisis, Britain continues to advertise itself as a principles-based regulatory jurisdiction.<sup>82</sup>

This difference in approach has a significant impact on the level of inputs necessary to conduct regulation of financial services firms. For example, in 2007 Britain's Financial Services Authority ("FSA") regulated approximately 30,000 firms - approximately the same amount of "banks, securities firms, investment companies, advisory firms and insurance companies" regulated by federal regulators in the United States, with roughly 13% of the number of employees of U.S. regulators.<sup>83</sup> While other factors likely also play a role in this difference in inputs, including the division of regulatory authority over banks in the United States among four different federal agencies while regulatory authority in the U.K. is consolidated into a single agency,<sup>84</sup> this more-than-seven-fold difference certainly also reflects differences in the demands of different regulatory approaches.

Thus the point is not that one regulatory approach is superior to another, but rather that differences in regulatory approaches affect the level and type of inputs necessary to implement regulations. A rules-based approach requires regulatory inputs to draft and enforce detailed rules. In contrast, a principles-based approach requires relatively fewer inputs at this stage because of the lack of complexity in the broad principles on which it relies. For example, the U.K. FSA's eleven principles are only 194 words long, while just the preamble to virtually any single U.S. financial services regulations alone is considerably longer.<sup>85</sup> However, regulators need higher-quality inputs to implement a principles-based approach than to implement a rules-based system.<sup>86</sup> The type of resources required by a regulator's approach as well as the amount

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framed standards of conduct can serve as helpful guides for industry as well as useful enforcement tools for regulators, but standing alone, they leave too much room for abuse.").

<sup>80</sup> See, e.g., U.K. Financial Services Authority, *Principles-Based Regulation: Focusing on the Outcomes That Matter 2* (2007), available online: <http://www.fsa.gov.uk/pubs/other/principles.pdf> (offering businesses "increased flexibility" and "a closer fit between meeting their business objectives and meeting regulatory requirements."

<sup>81</sup> Symposium (J.W. Verret speaking), *The Regulation of Investment Funds*, 16 FORDHAM J. CORP. & FIN. L. 1, 35 (2011) (noting that while the UK has passed a number of new rules regulating hedge funds, if it were to regulate as heavily as the rest of Europe the United States may gain "a competitive opportunity to make sure we become the lighter regulatory regime and we continue to be the great international competitive forum for these types of [...] very important funds and assets.")

<sup>82</sup> U.K. Financial Services Authority, *The FSA's Supervisory Enhancement Programme, in Response to the Internal Audit Report on Supervision of Northern Rock 1* (2008), (hereinafter "Supervisory Enhancement Programme") available at <http://www.fsa.gov.uk/pubs/other/enhancement.pdf> (promising to "continue to [...] operate a 'principles and outcome-based philosophy'").

<sup>83</sup> Peter J. Wallison, *Fad or Reform: Can Principles-Based Regulation Work in the United States*, AEI Paper (June 2007) at 5.

<sup>84</sup> Wallison, *supra* note 83, at 5.

<sup>85</sup> See, e.g., Final Rule Release No. 33-9287 at 3-6 (2011), available at <http://www.sec.gov/rules/final/2011/33-9287.pdf> (with a four-page "Background and Summary" section to a 48-page rule amending the definition of "accredited investor" to exclude a person's primary residence from the net worth requirement).

<sup>86</sup> At the 2007 Duke Global Capital Markets Roundtable, the participants concluded that

[a]n important component of a heavier emphasis on principles is that regulated entities should move more of their compliance efforts to higher levels in the organizations, in order for senior management and even the board of directors to engage in substantive regulatory issues. Efforts,

of resources can thus vary significantly depending on how the regulator conceptualizes its task. This should be taken into account when assessing regulatory inputs.

### C. Institutional Constraints

The political and constitutional environments in which financial regulators operate have important impacts on the resources necessary to accomplish regulatory goals. For example, some jurisdictions provide financial services regulators with independent status, while others make the regulator part of departments responsible to political appointees. The major offshore financial centers all utilize independent regulatory bodies and federal level financial regulators in the United States are independent. By contrast, the leading U.S. jurisdictions for corporate charters (Delaware), LLCs (Nevada), and captive insurance (Vermont) all have regulatory bodies headed by individuals either appointed by and responsible to the state's governor or independently elected to office.<sup>87</sup> A significant advantage of an independent regulator is the reduction in political pressure to divert regulatory activity to benefit the non-independent regulator's political patron.<sup>88</sup>

Regulators have a wide range of constraints imposed on them by the overall political and legal systems within which they operate. For example, the United States has a complex system of overlapping regulatory agencies at both the state and federal levels. This structure tends to raise regulatory costs, since regulated entities must potentially deal with multiple regulators and because regulators must negotiate or otherwise share jurisdiction.<sup>89</sup> Indeed, Peter Wallison suggests that the structure of American government precludes a principles-based approach to financial services regulation in the United States.<sup>90</sup> Competition among multiple regulators has both benefits and costs: it may provide a valuable check on regulatory efforts but also produce rent-seeking among agencies competing for power.<sup>91</sup> The United States has a vigorous internal market for corporate charters and other financial products, made more complex by the division

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however, must also occur at the regulatory body. A more prudential approach requires the regulator's staff to know more about the business of the regulated entities and to be able to deal substantively with greater complexity. This shift necessarily involves serious upgrading of the regulator's staff.

James D. Cox & Edward F. Greene, *Financial Regulation in a Global Market Place: Report of the Duke Global Capital Markets Roundtable*, 18 DUKE J. COMP. & INT'L L. 239, 243-244 (2007). Indeed, the United Kingdom's departure from an outcome-focused and principles-based regulatory approach for high-impact firms in response to the recent financial crisis – where the FSA has implemented “Intensive Supervision” – is responsible for an increase in staff size. U.K. Financial Services Authority, *A Regulatory Response to the Global Banking Crisis* 20-21, 188 (2009), available at [http://www.fsa.gov.uk/pubs/discussion/dp09\\_02.pdf](http://www.fsa.gov.uk/pubs/discussion/dp09_02.pdf) (promising the appointment of 200 additional supervisors to enact its Supervisory Enhancement Programme – an upwards revision from its previous estimate of 100 in “Supervisory Enhancement Program” at 2-3).

<sup>87</sup> Delaware's Secretary of State is appointed by the governor; the Nevada Secretary of State is elected; and the head of the Vermont Department of Banking, Insurance, Securities and Health Care Administration is appointed by the governor. Del. C. Ann. Const., Art. 3, § 10 (Delaware); Nev. Const. Art. 5, § 19 (Nevada); V.S.A. 263 (Vermont).

<sup>88</sup> See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000) (discussing benefits of independent agencies.)

<sup>89</sup> Dan Awrey, *The FSA, Integrated Regulation, and the Curious Case of OTC Derivatives*, 13 U. PA. J. BUS. L. 1, 13 (2010).

<sup>90</sup> Wallison, *supra* note 83, at 4 (“The civil liability and regulatory regimes in the United States create significant obstacles to the adoption of principles-based accounting and regulatory systems.”)

<sup>91</sup> See Erin O'Hara & Larry E. Ribstein, *THE LAW MARKET* (2008).

of authority within levels of government under separation of powers principles.<sup>92</sup> U.S. regulators also are affected by the constitutional requirements of the due process clause and political competition between the branches and levels of government.<sup>93</sup> The United Kingdom, on the other hand, has a unified financial services regulator, no separation of powers, a single level of government addressing financial services regulation, and fewer constitutional restraints on government action than U.S. governments.<sup>94</sup> As a result, one might expect that exerting regulatory authority would be less expensive in the United Kingdom than in the United States in terms of the resource cost and the political cost, yielding greater regulation per unit of resources expended. While distinctions are likely to be critical in determining the effectiveness of a given unit of regulatory resources, there is little discussion of how to incorporate such differences into regulatory assessments. These differences reflect historical differences as well as differences in balancing regulatory goals and competing values. In general, regulatory assessments of *onshore* jurisdictions tend to take such structural features as a given while assessments of *offshore* jurisdictions see structural safeguards against government abuses as obstacles to effective regulation rather than as safeguards against abuse.<sup>95</sup>

Regulators also differ in the scope of their mandates. For example, the Delaware Department of State is responsible not only for issuance of corporate charters and banking regulation but also for operating Delaware's archives; operating a Division of the Arts which has the responsibility of "nurturing and supporting the arts to enhance the quality of life for all Delawareans"; operating the state heritage commission; running conference centers; operating a government information center; veterans affairs, including operation of a long term care facility for veterans; "promot[ing] amicable relationships among the various racial and cultural groups within the State"; operating the state civil service; supporting public libraries; licensing notaries; overseeing pardons for criminal offenses; regulating nearly fifty categories of professionals and other entities, ranging from accountants and adult entertainment establishments to river pilots and veterinarians; regulating public utilities; overseeing the state ethics law for the executive branch; enforcing collective bargaining laws for public employees; and operating a state commission on women.<sup>96</sup> An agency with such a broad set of regulatory missions differs

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<sup>92</sup> O'Hara & Ribstein, *supra* note 91 (market for corporate charters is "the most pervasive example of a law market").

<sup>93</sup> On the multiple agencies issue, see Elizabeth F. Brown, *The Tyranny of the Multitude is a Multiplied Tyranny: Is the United States Financial Regulatory Structure Undermining U.S. Competitiveness?* 2 BROOK. J. CORP. FIN. & COM. L. 369 (2008) ("The United States has over 115 different state and federal agencies that regulate some aspect of the financial services industry. Each of these agencies generates regulations to govern its sphere of influence. Unfortunately, these spheres of influence overlap.").

<sup>94</sup> For a critical assessment of the U.K. model see Joseph J. Norton, *Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience—A Critical Reappraisal*, 39 INT'L LAW. 15 (2005).

<sup>95</sup> See, e.g., IMF, *Cayman Islands: Assessment of the Supervision and Regulation of the Financial Sector—Volume I—Review of Financial Sector Regulation and Supervision*, at 8, available at <http://www.imf.org/External/Pubs/FT/SCR/2005/cr0591.pdf> ("authorities should consider removing the requirements that nonroutine information be shared only following consultation with the Attorney General and the Financial Secretary. CIMA should have the authority to use its own judgment in sharing information with foreign supervisors. The need to consult has the potential for interference and delays.")

<sup>96</sup> See Harriett Smith Windsor, *Secretary's Letter* (2008) describing duties of office, available at <http://web.archive.org/web/20070701164443/http://sos.delaware.gov/director.shtml>.

substantively from a regulator with more focused responsibilities on financial services, since the former will be subject to a different set of political pressures than the latter will be.

Political pressures also differ across jurisdictions, with implications for regulators' effectiveness. For example, the Irish financial regulator ignored bank reports of book-fiddling with respect to insider loans at Anglo-Irish Bank, in part because of the political dynamics involved in preserving an independent banking sector in a country where nationalist sentiment is significant and in part because of the political connections of the banks.<sup>97</sup>

The size of a government and a jurisdiction also has an impact. Large countries with complex governance structures, such as the United States, tend to have more complex regulatory frameworks than smaller jurisdictions. In particular, offshore jurisdictions generally have less elaborate governmental structures, due in part to their much smaller sizes.<sup>98</sup> This can be both an advantage and a disadvantage. The Commission of Inquiry into corruption in the Turks and Caicos concluded that part of the corruption problem there was due to the small size of the electorate.<sup>99</sup> Smaller societies may also help control corruption, as corrupt officials have fewer options for enjoying the fruits of their illicit activities when their neighbors can readily observe their levels of consumption. Thus smaller jurisdictions may be able to afford to impose fewer formal safeguards on governmental misconduct because public awareness of government officials' behavior through personal observation serves as a more significant check than it could in larger jurisdictions.<sup>100</sup> This tends to reduce the transactions costs of operating a regulatory agency, enabling a higher proportion of regulatory resources to be devoted to accomplishing substantive goals than is possible within larger jurisdictions. Consider, for example, this account by one of the Cayman Islands' chief financial regulators, the Financial Secretary, of an interview he conducted in the 1970s with a banker accused by other bankers of involvement in problematic activities: "I called [the banker] to my office, locked the door behind him, and seriously questioned his involvement [in the activities], while reminding him of his moral and official

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<sup>97</sup> See Simon Carswell, *ANGLO REPUBLIC* 245-247 (2011) (describing maneuvers to keep information about insider loans from becoming public). As an example of how larger political contexts affect regulatory action, consider Ireland's disastrous failure to properly regulate its banking sector in the 2000s. Then-Anglo Irish Bank Chair Sean Fitzpatrick played on Irish nationalism to divert attention away from the bank's problems. For example, in the midst of a struggle to keep control of the bank, Fitzpatrick told Irish economic writer David McWilliams that

No fucking Protestant is going to take my bank. No fucking Protestant is coming near us. Those establishment fuckers and Bank of Ireland have been running our country before we came along and those fuckers are not going to bring me down. We are the outsiders and this is our moment and those fuckers don't own us anymore.

David McWilliams, *FOLLOW THE MONEY* 132 (2009). This theme proved useful to Fitzpatrick in delaying and weakening regulatory oversight. *Id.*

<sup>98</sup> See, e.g., *Crown Dependencies*, *supra* note 6, at 5.10.2 ("In small communities, the requirement to avoid, and be seen to avoid, these abuses is no less compelling than in larger countries. But such communities are unlikely to have sufficient reserves of skilled and able people to replicate entirely the separation of functions found in larger countries.")

<sup>99</sup> Sir Robin Auld, *Turks and Caicos Islands Commission of Inquiry 2008-2009 into possible corruption or other serious dishonesty in relation to past and present elected members of the Legislature in recent years* 55, available at <http://turksandcaicosislands.fco.gov.uk/resources/en/pdf/2011/commission-of-inquiry/inquiry-report.pdf>.

<sup>100</sup> See, e.g., *Crown Dependencies*, *supra* note 6, at 5.10.8 ("An informal public policing of conflicts of interest is also highly developed in the [Channel] Islands and, in my opinion, highly effective. As in other small communities, commercial and professional interests are not easily hidden. People in the Islands know much more about what their neighbours are doing than would normally be the case on the mainland.")

obligations in the community as a Class A banker.” After the banker offered an explanation, the Financial Secretary concluded that “[h]is side of the story had merits and I accepted it. However, before unlocking my door for his exit, I impressed on him the fact that if at any time he should slip out of his bounds as a banker and hurt people or the local banking community, I would see him behind bars.”<sup>101</sup> It is virtually impossible to imagine such an interview between, for example, the U.S. Secretary of the Treasury and the head of an American bank without the presence of a herd of lawyers on both sides, an absence of such frank discussion, and a press conference on the Treasury steps at which the aggrieved banker and his lawyers denounced the heavy-handed efforts of the Treasury. These differences are not given sufficient weight in most discussions of OFCs. For example, the IMF’s review of the Bermuda Monetary Authority noted that while the agency had considerable formal legal powers, in practice it “seeks remedial action through informal means, principally through the use of moral suasion.”<sup>102</sup> Yet the assessment concluded that even though *informal* means are the primary means used to regulate, the most important issue identified by the assessment is the need for additional *formal* legal tools.

The point is not that the United States should emulate the Caymanian, BVI, or Bermudan systems or vice versa, but rather that such different societies will naturally have different political and governmental institutions and that these differences must be taken into account in comparing their regulatory efforts. Moreover, smaller societies, such as most of the offshore financial centers, are unlikely to need all of the expensive and cumbersome features designed to limit governmental abuses in larger societies, since in a society of 25,000 people informal constraints will be more effective than they would be in a society of 250,000,000 people.

In addition, there are institutional constraints unrelated to size, which simple comparisons of numbers do not illuminate. For example, the U.S. Securities and Exchange Commission has substantially more resources than the offshore Antigua Financial Services Regulatory Commission. Both agencies faced problems dealing with Ponzi schemes during the 2000s. The SEC failed to uncover Bernard Madoff’s \$65 billion scheme (possibly the largest in U.S. history) that stretched from the 1970s to Madoff’s confession in 2008, despite a private sector whistleblower’s repeated provision of detailed documentation of the scheme to the agency. Remarkably, not a single SEC employee lost his or her job as a result, only relatively minor sanctions were imposed on just eight employees (ten others left the agency before the disciplinary process concluded).<sup>103</sup> The Antigua regulator (and onshore regulators in the dozens of countries where Stanford operated) failed to catch Allen Stanford’s \$8 billion Ponzi scheme that operated from the 1980s to its collapse in 2009.<sup>104</sup> Unlike the SEC employees, however, Antigua’s regulator lost his job (and was arrested).<sup>105</sup> Of course, the Antigua regulator was

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<sup>101</sup> VASSEL JOHNSON, AS I SEE IT: HOW CAYMAN BECAME A LEADING FINANCIAL SECTOR 159-160 (2001). The banker, Jean Doucet, eventually did end up behind bars on an unrelated matter. *Id.* at 163-164.

<sup>102</sup> IMF, Bermuda: Assessment of the Supervision and Regulation of the Financial Sector—Volume I—Review of Financial Sector Regulation and Supervision, at 24-25, <http://www.imf.org/External/Pubs/FT/SCR/2005/cr0598.PDF>

<sup>103</sup> Some of those who left landed lucrative post-SEC employment with law firms. *See SEC Officials During Time of Madoff Swindle Now Have Lucrative BigLaw Jobs*, ABA Journal

<sup>104</sup> *An \$8 billion scandal goes a long way*, The Economist (Feb. 26, 2009) available at <http://www.economist.com/node/13185500>.

<sup>105</sup> *Antigua names new regulator after Stanford scandal*, Reuters (Sept. 1, 2009) available at <http://www.reuters.com/article/2009/09/01/antigua-regulator-idUSN0149599520090901>.



accused of taking bribes, a more serious offense (in terms of criminal law if not the total impact of the dereliction of duty) than simply missing the largest financial scam in U.S. history. Interestingly, the SEC also missed the Stanford scheme, despite being warned twice: lawsuits filed in American courts by whistleblowers as early as 2006 included allegations that Stanford was running a Ponzi scheme and its own examiners identified his operation as a serious risk in 1997.<sup>106</sup>

Finally, institutions may constrain regulators in different ways with respect to the methods by which they can implement their missions. For example, the European Union has a commitment to four economic freedoms derived from the Treaty of Rome (as amended): the free movement of goods, persons, services and capital.<sup>107</sup> The EU has approached the implementation of this goal not by seeking the maximum liberalization of financial services, but by focusing on harmonization of regulation across member nations.<sup>108</sup> Similarly, growing integration of securities markets across national boundaries have produced calls for increased harmonization of regulation. Efforts at harmonization may demand a higher level of regulatory inputs without affecting regulatory outputs.

#### D. Product-based Differences in Regulatory Effectiveness

Different financial products require different levels of regulatory effectiveness because the financial products themselves incorporate different safeguards for investors. For example, stock ownership presents a classic principal-agent problem because the separation of ownership and control creates opportunities for the agent (company management) to use the principal's resources (the capital invested in the company) for the agent's benefit rather than for the principal's.<sup>109</sup> The diffuse nature of ownership in a publicly traded corporation shapes the

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<sup>106</sup> Randy Shain, *How Stanford is worse than Madoff*, CNN Money (May 19, 2010) available at <http://money.cnn.com/2010/05/19/news/newsmakers/madoff.stanford.prison.fortune/>; Office of Inspector General, Securities and Exchange Commission, Report of Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme (March 31, 2010).

<sup>107</sup> Title III of the Treaty on the Functioning of the European Union. Andrea M. Corcoran and Terry L. Hart, *The Regulation of Cross-Border Financial Services in the EU Internal Market* 8 COLUM. J. EUR. L. 221, 225 (2002) ("Negative covenants in the EC Treaty by implication create four fundamental economic freedoms. These covenants prohibit the Member States from imposing charges, or from maintaining or adopting legislation or other measures that would impair the free movement of goods, persons, services and capital.").

<sup>108</sup> Corcoran and Hart, both officials in the Office of International Affairs of the U.S. Commodities Futures Trading Commission at the time they wrote their article, take a relatively benign view of this approach, concluding that

Given the various kinds of financial institutions, intermediaries, and markets engaged in business within the Community and the variations in the legislative and regulatory regimes of the Member States, this policy objective prompted the Community to pursue a functional approach to financial services regulation; that is, the EU institutions concluded that a harmonized, functional approach to financial services regulation was the means most conducive to achieving equivalent conditions of competition among financial service providers and financial markets within the Community. The goal of this approach is that all financial services providers that engage in the same kinds of activities in the same kinds of financial instruments and in the same kinds of financial markets be regulated in an essentially equivalent way in each respective Member State.

Corcoran and Hart, *supra* note 107, at 231.

<sup>109</sup> John Armour, et al., *Agency Problems and Legal Strategies*, in Reiner Kraakman, et al., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 35-37 (2009).

solutions to this problem provided by corporate law.<sup>110</sup> Close corporations rely on quite different solutions to this problem, however. Because close corporations lack the easy exit feature of publicly traded securities, the law in many jurisdictions imposes greater responsibilities on those who might act to harm a principal's interests.<sup>111</sup> But because publicly traded stocks can be readily disposed of if opportunistic behavior is uncovered, the law relies more heavily on exit than on imposition of fiduciary obligations with respect to them.<sup>112</sup>

There is a parallel situation with respect to comparing offshore financial products with onshore financial products. Some offshore products' structures vary from onshore equivalents' structures in ways that reduce the need for direct regulatory oversight. For example, hedge funds in the Cayman Islands have boards of directors with responsibilities to oversee the fund manager's actions; the directors can be held liable for failure to exercise proper oversight.<sup>113</sup> BVI VISTA trusts are designed to facilitate satisfying the settlor's wishes in a particularly context, where the trust holds stock but is not intended to actively manage the entity in which the stock is held (e.g. a family enterprise).<sup>114</sup> This structure requires less regulatory oversight since it incorporates features designed to internally control the potential conflict between the trustee and the settlor over whether the trustee is complying with the settlor's intent by reallocating management rights. Similarly, Jersey offers an entity not available in most other jurisdictions, the "incorporated limited partnership." This hybrid of a partnership and a corporation uses Jersey corporate insolvency law and allows the entity to contract, hold property, and sue in its own name rather than through its general partner.<sup>115</sup> Regulating entities and products that have been structured to avoid particular problems may require less regulatory effectiveness to the extent that the structuring is successful. More generally, the availability of financial products capable of a greater degree of customization should reduce the demand for regulatory effectiveness, since investors are more able to protect themselves through demanding built-in protections.

## E. Impacts on Regulatory Effectiveness

These differences, and this is surely not an exhaustive list, matter in comparing regulatory efforts in financial services because they influence both the demands of the regulatory

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<sup>110</sup> Id. at 52.

<sup>111</sup> Douglas K. Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841, 846-850 (2003).

<sup>112</sup> Alan R. Palmiter, *Public Corporation as Private Constitution*, 6 ICFAI J. CORP. & SEC. L. 5-19, 17-18 (2009) ("Public corporations are built on, and defined by, exit rights.").

<sup>113</sup> *Weaving Macro Fixed Investment Fund Ltd. (In Liquidation) v. Peterson*, Cause No. FSD 113 of 2010, Grand Court of the Cayman Islands (available at [http://www.opalesque.com/files/20110826\\_Weaving\\_Judgement.PDF](http://www.opalesque.com/files/20110826_Weaving_Judgement.PDF)) (Aug. 26, 2011). The significance of *Weaving* is discussed at Jeremy Walton, *Weaving case flags issues for independent directors*, Hedge Funds Review (Oct. 31, 2011) available at <http://www.hedgefundsreview.com/hedge-funds-review/news/2118534/weaving-flags-issues-independent-directors> ("directors need to satisfy themselves on a continuing basis that the various service providers are performing their functions under the terms of their contracts and that no managerial and/or administrative functions that ought to be performed are left undone.").

<sup>114</sup> Christopher McKenzie & John Glasson, *VISTA Trusts*, available at [www.bvibarassociation.com/articles/BVI-VistaTrusts.pdf](http://www.bvibarassociation.com/articles/BVI-VistaTrusts.pdf). See also Robert Wiegand II & Christina Couch, *BVI VISTA Trusts and Preserving the Family Enterprise*, Probate and Property (March/April 2011) ("Especially for closely held and family businesses, the elimination or modification of these rules will improve the chances that the settlor's wishes will be followed.").

<sup>115</sup> *Analysis: Channel Islands entering golden period*, Private Equity Manager (May 30, 2011) available at <http://www.privateequitymanager.com/Article.aspx?aID=0&article=61258>.

process on the government and the effectiveness of resource expenditures. Although at this point it is not possible to quantify their impacts on the regulatory effectiveness of offshore and onshore governments, it is possible to suggest the direction each has on the quantitative measures reported below.

- Jurisdictions focused on retail investor protection generally require more regulatory inputs than jurisdictions serving institutional investors or high net worth individuals.
- Jurisdictions with principles-based regulatory regimes generally require fewer inputs for the same regulatory outputs than jurisdictions with rules-based regulatory regimes.
- Larger jurisdictions with more complex governance structures require greater numbers of regulatory inputs to produce equivalent regulatory outputs.
- Financial services sectors providing products capable of greater customization require fewer regulatory inputs than those providing less customized products.

We now turn to examining the input-based approach.

## II. Calculating Regulatory Effectiveness

Calculating regulatory effectiveness is difficult without taking into account more than regulatory inputs. For example, compare the British Virgin Islands (“BVI”) and Delaware with respect to business entities, markets in which they are the dominant offshore and onshore jurisdictions, respectively. The BVI have 457,876 business companies and limited partnerships registered, while Delaware’s 850,000 entities include over half of all publicly traded companies in the United States and sixty percent of the Fortune 500,<sup>116</sup> making the entities registered there generally larger and often more complex than those registered in the BVI. A simple comparison of BVI and Delaware based on their comparative staff sizes in their corporate regulators would thus miss an important distinction between the two jurisdictions.

Even within a single category of regulator, however, input-based measures are problematic. For example, the world’s largest bank, HSBC, is headquartered in London. According to the bank’s website, HSBC has over 7500 offices in over 80 countries, is listed on the London, New York, Hong Kong, Paris, and Bermuda stock exchanges, and has shareholders in 127 countries.<sup>117</sup> How would the appropriateness of regulation of HSBC’s activities in different countries be measured? It would be ridiculous for each jurisdiction where HSBC operates to regulate the company’s world-wide activities. But which regulator is responsible for overseeing the company-wide risks? How are the inputs to regulating HSBC to be counted? Focusing on inputs ignores these crucial definitional issues.

Despite the problematic nature of regulatory input-based assessment, it remains the dominant method of assessing the adequacy of regulatory regimes. For example, in its 2003 assessment of the Cayman Islands Monetary Authority (CIMA), the IMF observed that Cayman’s

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<sup>116</sup> British Virgin Islands, Financial Services Commission, Statistical Bulletin (September 2011), available at <http://www.bvifsc.vg/Default.aspx?tabid=200>; State of Delaware, Department of State, Division of Corporations website, <http://www.corp.delaware.gov/aboutagency.shtml>

<sup>117</sup> HSBC Group, Inc., *Who is HSBC?*, available at <http://www.hsbc.com/1/2/about>

laws, rules, and statements of guidance governing prudential supervision are up-to-date and generally meet international standards. The licensing process for new entrants is sound and comprehensive. Off-site monitoring and onsite inspection are well developed and integrated.<sup>118</sup>

Yet the agency also complained that

Although CIMA is staffed with qualified and experienced personnel who are granted regular training opportunities to enhance the supervisory functions of CIMA, the BSD with over 300 banks under its jurisdiction and with only 26 positions the banking supervisory function seems to be understaffed.<sup>119</sup>

In the same vein, the IMF assessment noted that although “CIMA’s supervision complies well with the standards considered”, the “main vulnerability is a serious lack of staff in all supervisory divisions.”<sup>120</sup> In its assessment of the British Virgin Islands’ Attorney General’s Chambers, IMF assessment suggested that more staff was needed to handle a hypothetical increase in prosecutions, even though the review concluded that existing staff were “well versed to handle complex matters” and the legal infrastructure was compliant with international norms.<sup>121</sup> The UK’s review of financial regulation in the Crown Dependencies of the Isle of Man and Channel Islands made similar statements, while suggesting that just one or two more staff members were necessary to improve regulatory efforts.<sup>122</sup> These statements illustrate the problems with an input-based approach to assessment: if the regulator has “qualified and experienced staff,” “up-to-date” laws and regulations, and a “sound and comprehensive” licensing process, and its regulatory actions comply “well” with the standards for regulators, the number of staff would appear to be irrelevant. Indeed, an inputs-based assessment process risks punishing efficiency, creating a perverse incentive for regulators. Setting aside these problems, input-based assessment processes remain in use but rarely include serious efforts to compare inputs across jurisdictions. Rather, assessments simply assert that particular jurisdictions lack sufficient staff or other

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<sup>118</sup> IMF, Cayman Islands, *supra* note 95, at 22. The notion that statutes and regulations ought to be “up-to-date” has not penetrated the onshore world. The major U.S. financial regulatory statutes and regulations are updated far less frequently than the equivalent offshore statutes and regulations.

<sup>119</sup> IMF, Cayman Islands, *supra* note 95, at 26.

<sup>120</sup> *Id.* at 21-22. The IMF also noted that the “laws, rules, and statements of guidance guiding prudential supervision are up-to-date and generally meet international standards,” the “licensing process for new entrants is sound and comprehensive,” and “off-site monitoring and onsite inspection are well developed and integrated.” *Id.* at 21-22. This is a common theme in IMF assessments, as the agency acknowledged in its review of the Bahamas. IMF, *The Bahamas: Assessment of the Supervision and Regulation of the Financial Sector—Review of Financial Sector Regulation and Supervision*, at 39-40, available at

<http://internationalmonetaryfund.com/external/pubs/ft/scr/2004/cr04318.pdf> (“throughout the regulatory agencies there is a shortage of staff with the appropriate depth of skills, although the CBB appears to be better placed than the others. This pressure on resources is common among jurisdictions.”) *See also* IMF, Bermuda, *supra* note 102, at 6.

<sup>121</sup> *See, e.g.*, IMF, British Virgin Islands, *supra* note 77, at 27.

<sup>122</sup> *Crown Dependencies*, *supra* note 6, at 8.13.1. Such precise measurements of additional inputs’ efficacy are hard to take seriously – for an outside evaluator to be able to more accurately gauge the impact of a single additional staff member (as well as the tradeoffs in priorities necessary to determine where resources should be allocated) than the government of the jurisdiction is somewhat implausible. *See, e.g.*, IMF, British Virgin Islands, *supra* note 77, at 26 (“This assessment accepts that the FSC needs to balance the benefits that any additional regulatory burdens might bring to the safety and soundness of the system with the detriments caused by increased compliance costs. Detriments might include subsidiary or branch closings and fewer banking services for BVI residents.”).

resources. In this section, this Article compares the inputs used to cover the universe of regulated entities to develop a comparative view of inputs.

Of course, simply measuring inputs is not a substitute for an in-depth examination of the qualifications, skill sets, and effort levels of the regulators being compared. A comparison of inputs measured against regulated entities can nonetheless be a useful step towards an assessment of regulatory effectiveness for two reasons. First, the political and policy debates over OFCs rarely address differences in skill levels or qualifications of regulators as the reason for onshore jurisdictions' hostility. Further, IMF and other reviews often comment favorably on offshore regulators' abilities and skills. This suggests that comparing staff levels can serve as at least an initial proxy for regulatory effectiveness. Second, many OFCs - particularly the well-established ones in the Channel Islands, Isle of Man, Liechtenstein, Bahamas, Cayman Islands, and Bermuda - have sophisticated regulators, who draw on an international pool of financial experts as regulators. For example, the seven-member board of the Cayman Islands Monetary Authority (CIMA) includes a CPA who is the former Financial Secretary (a Cabinet member), a chartered accountant, a banker with more than forty years experience, a lawyer with experience in the UK, the dean of the University of Edinburgh School of Law, and an experienced business executive.<sup>123</sup> Similarly, the seven-member board of the Guernsey Financial Services Commission includes a British lawyer with over forty years experience in banking and insurance, a former Bank of England banking regulator with over thirty years experience, a senior accountant, a former British Member of Parliament with over thirty years private sector banking experience internationally, a banker with over forty years experience, including in New York and London, an experienced Dutch insurance executive, and a former senior British civil servant with experience regulating the insurance industry.<sup>124</sup>

By comparison, U.S. regulators' resumes are less impressive. For example, Delaware's Secretary of State serves as the head of the agency regulating the corporate charter business. Yet the political appointee currently heading the agency, Jeffrey Bullock, had prior experience not in financial services or corporate law but as chief of staff to a governor and chief administrative officer for a Delaware county.<sup>125</sup> His predecessor, Harriett Windsor held a doctorate in English and had prior work experience teaching English at a community college and as a high school English teacher.<sup>126</sup> Secretaries Bullock and Windsor may be exemplary public servants, but their credentials do not inspire confidence in Delaware's regulatory capacity – nor would they be likely to pass unnoticed in an assessment of an OFC.

Federal regulators have better financial industry credentials, but there appears to be greater emphasis on academic and civil service experience over industry experience in the selection of U.S. regulators than in OFCs. Thus the SEC's five-member board has three members whose primary prior experience was with the SEC or another U.S. regulatory agency, one law professor, and just one member whose primary experience prior to the agency was in industry.<sup>127</sup>

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<sup>123</sup> See CIMA, Directors and Management, [http://www.cimoney.com.ky/about\\_cima/about\\_ra.aspx?id=128](http://www.cimoney.com.ky/about_cima/about_ra.aspx?id=128).

<sup>124</sup> See Guernsey Financial Services Commission, *Commissioners*, available at <http://www.gfsc.gg/The-Commission/About-Us/Pages/Commissioners.aspx>.

<sup>125</sup> <http://sos.delaware.gov/jwbbio.shtml>

<sup>126</sup> See Dr. Harriett Windsor Smith, Secretary of State, *Biography*, previously available at <http://sos.delaware.gov/hswbio.shtml>, copy on file with authors and available via the Wayback Machine at <http://web.archive.org/web/20070614230235/http://sos.delaware.gov/hswbio.shtml>.

<sup>127</sup> See *Current SEC Commissioners*, <http://www.sec.gov/about/commissioner.shtml>.

All five are individually well-qualified to participate in financial regulatory efforts, here the problem is the lack of diversity in their collective experience. Compared to the cumulative private sector experience of its counterparts in either Guernsey or the Cayman Islands, the SEC lacks equivalent cumulative private sector experience. Moreover, none of the current SEC commissioners has any significant international experience, a marked contrast to both Guernsey and the Cayman Islands. Whether this reflects the larger domestic talent pool in a bigger country or American parochialism, it constitutes a significant gap in expertise for regulators in a global economy. This regulatory capacity gap is rarely, if ever, commented on in the growing literature critical of OFCs (except, of course, when it reflects badly on an offshore center).<sup>128</sup>

To make the comparison, we selected four major onshore jurisdictions and ten major OFCs and examined the financial services sector and the regulators overseeing financial services in each jurisdiction. The onshore jurisdictions are the three American states that have the most important significant financial services sectors with products and services comparable to offshore financial centers (Delaware, Nevada, and Vermont)<sup>129</sup> and the UK FSA, the primary regulator for the London financial market as well as for financial services in Britain generally.<sup>130</sup> The OFCs included are the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, Dubai, Guernsey, Hong Kong, the Isle of Man, Jersey, and Singapore. These are among the most important OFCs in a variety of product markets (e.g. Bermuda in insurance in North America, Cayman in hedge funds, BVI in international business companies, the Crown Dependencies in European financial products) and geographical markets (e.g. Hong Kong in Asia, Dubai in the Middle East). All but Dubai are well-established jurisdictions with mature regulatory regimes and Dubai has invested considerable resources in creating its financial markets, allowing it to reach a high level of development in a comparatively short time.<sup>131</sup>

As an initial basis for comparison, we begin with an examination of the relevant universes of regulated entities and the staff of the various regulatory agencies involved.<sup>132</sup> Table 1 lists the number of staff at the primary regulatory agencies (or departments within larger agencies responsible for regulation and enforcement) in each category of financial services: banking, insurance, and securities. While by itself the number of regulators is a poor measure of comparison, the raw numbers do suggest that the OFCs are at least roughly comparable, and in many instances significantly more highly-staffed, than the leading onshore jurisdictions.

<sup>128</sup> See, e.g., IMF, Bermuda, *supra* note 102, at 8 (“Additional staff training is required to enhance technical skills, especially in the areas of inspections and oversight of BSX functions.”); IMF, The Bahamas, *supra* note 120, at 24 (“The CBB has had trouble recruiting and retaining skilled employees primarily because of competition from the private sector. This is particularly true with respect to the recruitment of senior officials, and the CBB must continue its efforts to ensure that remuneration packages are competitive.”).

<sup>129</sup> New York State was not included because the main regulatory authorities for the New York financial markets are not state regulatory bodies.

<sup>130</sup> One might object that we should also include the SEC and other federal regulators in the counts for U.S. states. But if so, then the People’s Republic of China central regulators should be counted for Hong Kong and Britain’s for the overseas territories and Crown Dependencies. We think the closest thing to an apples-to-apples comparison is OFC-to-U.S.-states.

<sup>131</sup> See Nalem Qadir, *Dubai—the making of a financial centre*, CAYMAN FINANCIAL REVIEW (April 12, 2011) <http://www.compasscayman.com/cfr/2011/04/05/Dubai—the-making-of-a-financial-centre/> (noting investment of billions of dollars in creating financial center).

<sup>132</sup> The numbers are derived from information available on agency web sites and through phone and email interviews conducted in the summer of 2011.

Particularly when one considers the UK FSA's broader regulatory mandate, which includes securities regulation and some responsibility for oversight of financial centers in several associated jurisdictions, there are only small differences between the OFC regulators and the onshore regulators.

A more careful comparison requires examining the regulators' responsibilities as well as the number of staff. Table 2 lists banking entities in the various jurisdictions.<sup>133</sup> It includes both entities doing retail business within the jurisdictions and "offshore" entities, i.e. those primarily or exclusively doing business outside the jurisdictions. Because these jurisdictions do not report statistics in a common format, some judgment calls were necessary in allocating regulated entities into different categories.<sup>134</sup> The Bahamas provides an example that illustrates the difficulty in determining the regulated universe. The Central Bank of The Bahamas provides a list of "Banks and Trust Companies Licensed in The Bahamas" on its website.<sup>135</sup> The 298 entities listed are classified as "resident" (38) or "non-resident" (260) and are broken down into the following categories: bank, bank & trust, trust, and nominee trust. One hundred fifty-five are "restricted" licensees, allowed only to carry on business for specific persons. The Central Bank also distinguishes among Authorized Agents (10), Authorized Dealers (8), Other Public Licensees (98), and Non-Active Licensees (7). Without more information on the size of the regulated entities' businesses, it is difficult to determine whether particular businesses are unusually small and so should not be counted, or are of significant size despite nominal restrictions. One step that could materially advance international comparisons would be for jurisdictions engaged in financial services to develop a mutually-agreeable set of reporting standards. While differences and nuances will persist, creating a shared set of definitions for reporting information would facilitate comparisons that could aid in the development of international best practices. We suspect that the resistance to a multilateral consensus on such standards would be more likely to come from onshore jurisdictions than OFCs, but even a coordinated effort among OFCs would enhance informed discussion of regulatory efforts.

Despite these difficulties in establishing a basis for comparison, we can learn something from the comparison of regulated entities across jurisdictions. First, and not surprisingly given their relatively small size in terms of population, OFCs have much smaller "onshore" banking and finance sectors serving their resident populations. Since regulators do not report staffing separately for onshore and offshore regulatory functions, we cannot correct for this directly when examining the relative inputs. But the logical implication of the smaller size of the domestic banking and finance sector is that OFCs should be expected to have smaller regulatory staffs than onshore jurisdictions because of the reduced need to devote resources to regulating domestic retail financial institutions.

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<sup>133</sup> Over 2500 banking entities in the United States, representing over 75% of U.S. commercial banking assets, are federally regulated rather than state regulated. Office of the Comptroller of the Currency, Annual Report: Fiscal Year 2011 [inside cover] (2011), available at <http://www.occ.treas.gov/publications/publications-by-type/annual-reports/2011AnnualReport.pdf>. For a description of the dual state-federal banking system in the United States and the changes to the balance of federal and state responsibilities by the Dodd-Frank Act, see generally Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893 (2011).

<sup>134</sup> Dubai is omitted from the tables as detailed information was not available from the Dubai government.

<sup>135</sup> See Central Bank of the Bahamas, *List of Banks and Trust Companies Licensed Under the Banks and Trust Companies Regulation Act, 2000 as at 21st December, 2011* (2012), available at [http://www.centralbankbahamas.com/legal\\_notes.php?cat=Regulated+Entities](http://www.centralbankbahamas.com/legal_notes.php?cat=Regulated+Entities)

Second, there are clear differences across jurisdictions related to the relative market strengths of particular jurisdictions. The Bahamas, the Cayman Islands, and Delaware all have significant offshore banking sectors while many of the other jurisdictions considered here do not. The relevant comparisons with respect to regulatory effectiveness of banking and finance companies are those that compare similar jurisdictions with similar mixes of domestic and foreign regulated entities. International benchmarking thus needs ensure that benchmarks are set using jurisdictions that are sufficiently similar in their banking sectors to have similar regulatory needs.

Third, the Cayman Islands and Delaware both provide staff levels for banking regulation, allowing a more detailed comparison of the two jurisdictions. Delaware regulates 637 entities with a staff of 34, while Cayman regulates 515 entities with a staff of 28. If we divide the number of staff by the number of regulated entities, the respective ratios are 18.7 and 18.3, suggesting that, on average, Caymanian banking and finance regulators are responsible for slightly fewer regulated entities than are their Delaware counterparts. This is a crude adjustment of numbers that undoubtedly conceals considerable variation between jurisdictions due to different definitions. But it does illustrate an important point that input-based assessment of the relative strengths of financial regulation need to take into account. The additional responsibility Delaware's regulator has for consumer protection<sup>136</sup> – unlikely a significant concern for OFC jurisdictions where banks are not dealing with unsophisticated retail customers – means that Delaware would be less well-equipped than Cayman to address issues related to prudential regulation and financial supervision even if staffing levels were equal.

Next consider the insurance sector. OFCs' small domestic markets mean that the majority of insurance-related entities are offshore entities such as captives or reinsurers serving onshore clients. In contrast, the onshore jurisdictions have considerably larger domestic markets for insurance than most OFCs. Even tiny Vermont, the "onshore" leader in captive insurance, has more insurance entities doing business in Vermont than does Bermuda, the largest OFC insurance jurisdiction. And the total number of regulated insurance entities in each onshore jurisdiction is larger than the total number of regulated insurance entities in any of the offshore jurisdictions examined except Bermuda, which has overtaken Vermont in total insurers regulated within the past three years. (Table 3 lists the number of onshore and offshore licensed insurance entities for each jurisdiction.)

Table 2 provides similar numbers for investment products such as investment funds and investment advisor services. As with the earlier examples, the raw numbers obscure important differences across jurisdictions. Mutual funds and other investment vehicles targeted to the retail market are quite different products from hedge funds aimed at institutional investors with minimum investment levels measured in the millions of dollars.<sup>137</sup> Regulation of the latter would presumably require significantly fewer resources than regulating a retail mutual fund since

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<sup>136</sup> See Office of the State Bank Commissioner, *Annual Report for the Year Ended December 31, 2010* at 7 (2011), available at <http://banking.delaware.gov/information/annualrpt/Annual%20Report%202010.pdf> (acknowledging that the Office of the State Bank Commissioner received over 5000 telephone inquiries and resolved over 1500 written complaints).

<sup>137</sup> See The Bank of New York & Casey Quirk, *The Hedge Fund of Tomorrow: Building an Enduring Firm* 5 (April 2009) available at <http://www.bnymellon.com/foresight/pdf/hedgefundoftomorrow.pdf> (describing how high net worth individuals and institutions make up most of hedge fund customers).



the regulator would not need to be concerned with the soundness of the investment strategy - something the investors could judge for themselves.

As a final measure of comparison, we examine the human resources a country expends on financial market regulation relative to available resources. While no measure can capture this perfectly, regulators per capita is a serviceable proxy because it (1) avoids many of the problems of budget comparison across countries (e.g. fluctuation in currency, off-budget expenditures, etc.) and (2) reflects the opportunity cost of diverted labor. Table 4 reports the populations, total regulators, and regulators per 1000 members of the population for each jurisdiction. Of those countries examined, over half of the offshore jurisdictions have at least one financial regulator per 1000 members of the population, and all of the Caribbean-region jurisdictions devote substantially more of their national resources to financial market regulation than any of the onshore jurisdictions. At the two extremes, financial regulators are nearly 120 times as common in the British Virgin Islands as in Nevada. This gives substantial credence to the argument that monitoring costs are lower and informal mechanisms for control more powerful in many OFCs<sup>138</sup>: it is more difficult to avoid detection by a larger portion of the population than a smaller one and moral suasion is more powerful when information about misdeeds can be quickly disseminated throughout the population than when those who would engage in that moral suasion are relatively isolated.

These first efforts to compare regulatory effectiveness across jurisdictions yield three conclusions. First, despite the recent torrent of complaints about offshore jurisdictions' lack of regulatory efforts, onshore and the mature offshore jurisdictions appear to be devoting roughly comparable levels of inputs into regulating their financial sectors. When the differences in financial sectors, government structures, and other factors are considered, mature OFCs are at least as likely to be exerting *more* regulatory effort than their onshore competitors as they are to be exerting less. It is difficult under such circumstances to see the onshore efforts at "leveling the playing field" as anything more than an attempt to gain a competitive advantage against their offshore rivals.<sup>139</sup> Going beyond comparing inputs will require developing measures of effectiveness that do not currently exist. Even some of the literature critical of OFCs acknowledges that onshore jurisdictions formal regulatory apparatus often is a Ptomekin village.<sup>140</sup>

Second, if regulatory inputs are going to be used as a means of assessment of jurisdictions' efforts, establishing a series of benchmarks across *both* onshore and offshore jurisdictions is vital to making the process fair to all. Without such benchmarks, those being assessed will almost inevitably be told after an assessment that more inputs are needed, since it is always possible to apply more resources to a problem. The OECD is in an excellent position to disclose its members' regulatory inputs in a sophisticated way and should do so as a first step to allowing meaningful international comparisons. Such disclosures should include the number of staff engaged in various regulatory functions and their qualifications. The benchmarks cannot be

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<sup>138</sup> See *infra* at Part I.C.

<sup>139</sup> See, e.g., Eric J. Pan, *A European Solution to the Regulation of Cross-Border Markets*, 2 BROOK. J. CORP. FIN. & COM. L. 133 (2007) (describing how SEC regulations protected US securities markets from foreign competition).

<sup>140</sup> See, e.g., Christensen, *supra* note 19, at 45 ("In practice, compliance officers [in developed countries] privately confirmed to me that 'know-your-client' checks are frequently conducted on a check-box basis and that no attention is paid to whether the customer is evading taxes.").

the product of the OECD (or any other group) alone, however. A serious, multilateral effort at developing benchmarks for evaluating regulatory efforts across jurisdiction is impossible without broad representation. This is not simply because it is “unfair” not to include OFCs (although it is) but because OFCs exceed onshore jurisdictions’ regulatory capabilities in important areas. As we noted earlier, OFC regulators are often better equipped to analyze transnational regulatory issues since they have more experience in such transactions than onshore regulators. Moreover, OFC regulatory bodies often compare favorably to onshore regulators in the degree of private sector experience they bring to the table. Rather than IMF or onshore assessments (as with the UK’s assessment of the Crown Dependencies), both onshore and offshore regulators should be involved in assessments of both onshore and offshore jurisdictions’ regulatory efforts. Thus BVI and Guernsey should participate in reviews of Delaware and France as well as vice versa. This is beginning to happen, as OFCs are now participating in some regulatory assessments.

Third, regulatory efforts must take into account the numbers and types of regulated entities to make reasonable and useful comparisons. Regulating a hedge fund that accepts only \$100 million or more in investments from institutional investors is a different enterprise from regulating a mutual fund seeking retail investors. Comparing only inputs in assessing regulators of such different products does not provide enough information for understanding comparative regulatory effectiveness.

### III. Conclusion

The debate within onshore jurisdictions over the role of offshore financial centers is once again heating up, fueled by disclosures to a variety of national tax authorities of internal documents stolen from a Liechtenstein bank<sup>141</sup> and by dodgy estimates of the amount of revenue that tax authorities could collect if only the offshore jurisdictions would cooperate more.<sup>142</sup> The

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<sup>141</sup> See note 7 *supra*. There is curiously little discussion of the apparent violation of Liechtenstein law by the informant or the appropriateness of the payments made by various tax authorities to the informant in exchange for the stolen information.

<sup>142</sup> The Oxfam report is a particularly striking example of such an overly optimistic view. For example, it concludes that lower capital taxation in developing countries is the result of competition, not policy differences, and that if OECD level taxes on capital were applied in developing countries that “their revenues would be at least US\$50 billion higher.” Oxfam, *Tax Havens: Releasing the Hidden Billions for Poverty Eradication* 2 (2008). This neglects the supply side effect of changes in relative tax rates and completely ignores the poor competitive position of developing countries in attracting capital.

These optimistic estimates then replicate in the literature, with relatively little empirical support. For example, *Fatal Indifference*, a report from the International Development Research Centre, cites the Oxfam estimate and then goes on to argue that

[t]he line between ‘legitimate’ diversification of household and corporate investments from tax avoidance and tax evasion is not always clearly visible. It is clear, however, that the general erosion of barriers to capital mobility – a trend to which the rise of offshore finance clearly contributes (cf. Naylor, 1987) – offers abundant opportunities for small, propertied minorities to protect assets against the redistributive consequences of national and sub-national taxation. One recent estimate is that an astounding one-quarter of the world’s financial assets are being managed from or through offshore financial centres (Levin, 2003); another places the value at roughly US\$8 trillion, which, if subjected to a ‘freeloader levy’ of just 3.5 per cent, would generate US\$280 billion annually (Gates, 2002: 21)

Ronald Labonte, et al., *FATAL INDIFFERENCE: THE G8, AFRICA AND GLOBAL HEALTH* (2004) at 32. The sources for this analysis, however, are a popular press account (R.T. NAYLOR, *HOT MONEY: PEEKABOO FINANCE AND THE POLITICS OF DEBT* (2007)), a leftist newsletter (J. Gates, *21 Ways Neoliberalism is Redistributing Wealth Worldwide*,

debate is likely to be particularly shrill among onshore jurisdictions like the U.K. and the U.S., which are anxious to prevent attention being paid to their own significant offshore financial industries. In the United States, Sen. Carl Levin continues to promote his “Stop Tax Haven Abuse Act,”<sup>143</sup> and the “Cut Unjustified Tax Loopholes Act”<sup>144</sup> while in the European Union there are efforts to increase the stringency of the Savings Directive after its disappointing debut.<sup>145</sup> While the UK’s post-financial crisis report, *The Turner Review*, acknowledged that OFCs were not responsible for the recent global financial downturn, it did express particular concern that the incentives for regulatory arbitrage were likely to increase and that, “Global agreement on regulatory priorities should therefore include the principle that offshore centers must be brought within the ambit of internationally agreed financial regulation (whether relating to banking, insurance or any other financial sector).”<sup>146</sup> The Tax Justice Network provides lists of dozens of articles blaming OFCs for contributing to the global financial crisis.<sup>147</sup> Even academic researchers are piling on, claiming against the empirical evidence that OFCs eschew cooperation and promote money laundering through strict secrecy laws<sup>148</sup> and that the competitiveness of OFCs depends on lax regulation.<sup>149</sup>

International discussions of financial regulation often mix tax and other regulatory concerns. But tax issues are far more complex than OFC critics suggest and this mixture sometimes serves to mask the real matters in dispute between jurisdictions. Every jurisdiction is free to set its tax policy to serve its own objectives, but that freedom is limited by the reciprocal freedom of other jurisdictions to set their own policies as well. As a result, some policy choices are costly when a government has also chosen to participate in global capital markets. When governments are reluctant to pay the price for the benefits they receive from global capital markets, they sometimes seek to use indirect means to “have their cake and eat it too.”<sup>150</sup> We

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8 THE CCPA MONITOR 19 (2002)) and a magazine article (M. Gates, *Outlook for OFCs*, 8 OFFSHORE FINANCE CANADA 52 (2002).) Similarly, Christensen claims “there is no clear-cut distinction between tax evasion and tax avoidance.” Christensen, *supra* note 19, at 53. We think the difference between “illegal” and “legal” is relatively clear-cut conceptually. If what Christensen means is that tax rules are so opaque that it is hard to know where the line is, we agree – but that reflects a problem with tax law drafting.

<sup>143</sup> S. 1346, 112th Cong. (2011).

<sup>144</sup> S. 2075, 112th Cong. (2012). “The portion of the bill aimed at closing offshore tax havens is based primarily on the earlier Stop Tax Haven Abuse Act[.]” Michael Cohn, Senators Introduce Bill to Close Tax Loopholes, ACCOUNTING TODAY, Feb. 8, 2012, available at <http://www.accountingtoday.com/news/Senators-Introduce-Bill-Cut-Tax-Loopholes-61681-1.html?CMP=OTC-RSS>.

<sup>145</sup> Bruce Zagaris, *Offshore Planning in 2011: Clients, Fiduciaries, and Practitioners Increasingly Caught Between Overlapping and Conflicting Laws and Ethics*, ST012 ALI-ABA 159 at V.I. (2011)

<sup>146</sup> UK Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, 73-4 (March 2009) available at [http://www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf).

<sup>147</sup> Tax Justice Network, *Economic Crisis + Offshore*, [http://www.taxjustice.net/cms/front\\_content.php?idcat=136](http://www.taxjustice.net/cms/front_content.php?idcat=136), retrieved 02/15/2012.

<sup>148</sup> See Chris Brummer, *How International Financial Law Works (and How it Doesn't)*, 99 GEO. L.J. 257, 295-296 (2011).

<sup>149</sup> See Pierre-Hughes Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 55, 92 (2011)

<sup>150</sup> See Morriss & Moberg, *supra* note 16 (discussing OECD countries efforts). Deneault proposes that countries “Declare null and void a transaction whose source and destination cannot be determined” and give “international legal bodies access to data recorded in international clearinghouses on trades of securities and assets around the world.”) Deneault, *supra* note 23, at 186. Such measures would, we believe, be costly in money and privacy terms. They would certainly increase transactions costs considerably and so reduce cross-border financial transactions.

think the appropriate measure to address such questions is through the normal interactions among jurisdictions in international fora where all are represented or through bilateral negotiations in the context of settled international law principles, not by pretending the issue is something else than what it is.

Ideally any discussion of regulatory effectiveness in different jurisdictions would focus on outcomes rather than inputs. In particular, it seems logical that the focus would be on how regulation in jurisdictions with known inadequacies could be improved. As most of the highest profile financial problems of recent years have occurred in onshore jurisdictions (e.g. Enron, Parmalat, AIG, Bear Stearns, Madoff), this is an unlikely framework for a debate that onshore politicians wish to focus elsewhere. Nonetheless it is a crucial debate. As a Goldman Sachs study concluded in 2009, simply focusing on creating new rules after a crisis is a recipe for failure: “Rules that force activity to flee often have the unfortunate effect of reducing oversight without reducing risk, leaving regulators to clean up a mess that originated elsewhere, often with limited ability to address the root problem directly.” Instead, regulators need to focus on measures such as “transparency; legal clarity (especially regarding bankruptcy and financial counterparties); reliable accounting standards; and regulators with the desire to help markets succeed” while avoiding “legal uncertainty, politically motivated regulators or courts, and harsh tax treatment [which] tend to drive activity away.”<sup>151</sup> International efforts need to focus on systemic risks that are shared across jurisdictions, not efforts to coerce one jurisdiction to facilitate another’s policy preferences.

Given the seeming inevitability of an inputs-based debate over regulatory adequacy, there is a need for development of standards of comparison independent of the particular interests of competitors. Allowing special interest coalitions of onshore economies like the OECD to define the parameters of debate is thus particularly inappropriate. Consider, for example, the IMF’s conclusion about Bermuda’s anti-terror financing efforts. The assessment concluded that Bermuda’s efforts to combat money laundering and financing of terrorism seem to be “generally adequate” and “relatively well-developed” but nonetheless insisted that more legislation, more resources, and more personnel were necessary.<sup>152</sup> Similarly, anti-money-laundering efforts have grown to include “considerable emphasis ... on the practical benefits to be derived from asset sharing among states which have contributed to a successful confiscation.”<sup>153</sup> Far better is reliance on emerging best practices from organizations such as the International Organization of

<sup>151</sup> Goldman Sachs, *supra* note 70, at 1.

<sup>152</sup> IMF, Bermuda, *supra* note 102, at 19 (recommending “that more substantial legislation against FT should be introduced, and that the FIU will need to be strengthened in terms of resources and personnel if it is to carry out its investigative and intelligence responsibilities more effectively. The framework for introduced business and insurance oversight was felt to be in need of further refinement and development to minimize the risk of potential abuse.”) Note that the review of Bermuda’s regulatory structure found generally that “Prudential regulations and powers are strong and the supervisory process, in general, is effective. This opinion is supported by the fact that all core principles were considered to be compliant or largely compliant.” *Id.* at 22.

<sup>153</sup> William C. Gilmore, *DIRTY MONEY* 60 (4<sup>th</sup> ed. 2011). Gilmore quotes Colombian Hector Charry Samper that “the question of asset recovery, among other issues ... would serve as an indicator of the political will to join forces in order to protect the common good.” *Id.* at 69-70. Reliance on symbolic evidence of “political will” is a sign that adequate analysis of substantive measures is absent. On the impact of the financial incentives for law enforcement involved in asset sharing, see Brent D. Mast & Bruce L. Benson, *Entrepreneurial Police and Drug Enforcement Policy*, 104 *PUBLIC CHOICE* 1573 (2004). On the FATF’s attempts at extension of asset forfeiture laws see Gilmore, *supra*, at 95-96 (describing how key FATF recommendations went beyond the 1988 Vienna Convention they purported to implement).

Securities Commissions (IOSCO), which helps develop standards for regulators out of its members' best practices. Numbers of staff, of course, are merely a crude proxy for regulatory resources and comparisons should adjust for the experience and technical expertise of regulatory staff. Moreover, any comparison of inputs must take into account the significant differences among regulators' missions.

There is a legitimate place for discussion of relative regulatory effectiveness in discussions of the global financial system. But it is critical that the discussion be in the context of the relative success of jurisdictions in achieving the goals of regulation, not the means they use to do so. As the UK's 1998 review of financial regulation in the Crown dependencies noted, "[a]ll financial centres, onshore and offshore, have problems. All have their critics."<sup>154</sup> The sooner the onshore/offshore distinction is abandoned and there is an even-handed approach to understanding different regulatory regimes, the sooner there will be improvements in both onshore and offshore regulatory efforts. It is important to remember that regulation of financial activity is not an end in itself, but merely a means to the end of a system of vibrant world-wide financial markets that facilitate the creation of wealth. Once that is recognized, the experience of the mature offshore financial centers may well hold lessons for how onshore regulators on how to improve their efforts to avoid the next Enron, Bear Stearns, Madoff, or Parmalat. Reorienting the discussion to focus on the best means for accomplishing the common goal of healthy financial markets is a necessary step.

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<sup>154</sup> *Crown Dependencies*, *supra* note 6, at 3.2.2.

**Table 1: Regulatory Staff by Jurisdiction**

Jurisdiction	Total Staff	Banking Staff	Insurance Staff	Investments Staff	Enforcement Staff
Bahamas <sup>155</sup>	198	68	19	67	N/A
Bermuda <sup>156</sup>	172	9	51	11	3
British Virgin Islands <sup>157</sup>	138	14	11	17	10
Cayman <sup>158</sup>	160	32	20	35	11
Dubai <sup>159</sup>	121				
Guernsey <sup>160</sup>	100	24	18	31	14
Hong Kong <sup>161</sup>	845	139	122	544	41
Isle of Man <sup>162</sup>	64	13	14	10	7
Jersey <sup>163</sup>	114	27	11	34	7

<sup>155</sup> Banking staff reflects Bank Supervision Department at the Central Bank of the Bahamas per E-mail from Karen Rolle, Examiner V, Bank Supervision Department, Central Bank of the Bahamas, to Clifford Chad Henson, Adjunct Instructor, University of Illinois College of Law [hereinafter “Henson”] (March 8, 2011) (on file with author). Insurance information per Telephone Interview with Tiffany Marrs, Insurance Commission of the Bahamas (July 13, 2011). Investments staff from Securities Commission of the Bahamas, Securities Commission of The Bahamas Organisational Chart, [http://www.scb.gov.bs/org\\_chart.html](http://www.scb.gov.bs/org_chart.html) (last accessed July 19, 2011).

<sup>156</sup> Banking staff information per E-mail from Marcia Woolridge-Allwood, Director, Banking, Trust & Investment, Bermuda Monetary Authority to Henson (July 25, 2011). Total differs from sum of listed staff because it includes support services such as actuarial services, human resources, and risk analytics.

<sup>157</sup> Data reflects staff of British Virgin Islands Financial Services Commission per E-mail from Carleen Penn, Deputy Director, Human Resources, Financial Services Commission, to Henson (July 12, 2011) (on file with author).

<sup>158</sup> Data reflects staff of Cayman Islands Monetary Authority per E-mail from Kamaal D. Connolly, Public Relations Assistant, Cayman Islands Monetary Authority, to Henson (February 1, 2011) (on file with author).

<sup>159</sup> Dubai Financial Services Authority, Ann. Rep. 2010 69 (2010). Disaggregated information refused in E-mail from Stephen Glynn, Senior Director, Head of Enforcement, Dubai Financial Services Authority, to Henson (July 19, 2011) (on file with author).

<sup>160</sup> Guernsey Financial Services Commission Annual Report & Financial Statements for the Year Ended 31 December 2010 45. Departmental totals from Guernsey Financial Services Commission, *Organogram*, <http://www.gfsc.gg/Banking/Pages/Organogram.aspx> (Banking), <http://www.gfsc.gg/Fiduciary/Pages/Organogram.aspx> (Fiduciary), <http://www.gfsc.gg/Insurance/Pages/Organogram.aspx> (Insurance), and <http://www.gfsc.gg/Investment/Pages/Organogram.aspx> (Investments) (last accessed July 19, 2011).

<sup>161</sup> Insurance information per E-mail from KM Chan, Senior Executive Officer, Office of the Commissioner of Insurance, Hong Kong SAR, to Henson (February 11, 2011) (on file with author). Investments information from Hong Kong Securities and Futures Commission, Revitalisation: Ann. Rep. 2010-2011 77 (2011). Banking and Enforcement information from Hong Kong Monetary Authority, Ann. Rep. 2010 109-110 (2011).

<sup>162</sup> Totals for banking, enforcement, and investments from Financial Supervision Commission, Our Structure, <http://www.gov.im/fsc/about/structure> (last accessed July 19, 2011). Total for Insurance per E-mail from Catherine Douglas, Executive Secretary, Isle of Man Insurance and Pensions Authority, to Henson (March 8, 2011) (on file with author).

<sup>163</sup> E-mail from Chris Renault, Commission Secretary, Jersey Financial Services Commission, to Henson (February 11, 2011) (on file with author).

Singapore <sup>164</sup>					
United Kingdom <sup>165</sup>	3458	412	241	501	349
Nevada <sup>166</sup>	127	37	75	15	N/A
Delaware <sup>167</sup>	112	34	78		N/A
Vermont <sup>168</sup>	92	15	54	5	N/A

**Table 2: Regulated Entities by Jurisdiction**

Jurisdiction	Banking Entities	Insurance Entities	Investment Entities
Bahamas <sup>169</sup>	276	70	1215
Bermuda <sup>170</sup>	24	1316	956
British Virgin Islands <sup>171</sup>	239	255	565

<sup>164</sup> Refused to provide data in E-mail from Xiu Si, Webmaster, Monetary Authority of Singapore, to Henson (July 14, 2011) (on file with author).

<sup>165</sup> United Kingdom Financial Services Authority, Ann. Rep. 2010/11 100 (2011); E-mail from Mrs. S. Spies, Information Access Team, Financial Services Authority to Henson (July 22, 2011) (on file with author).

<sup>166</sup> Banking staff per Telephone Interview with Paul Ashworth, Supervisory Examiner, Financial Institutions Division, Nevada Department of Business & Industry (July 14, 2011). Insurance information per E-mail from Jake Sunderland, Public Information Officer, Nevada Division of Insurance, to Henson (July 14, 2011) (on file with author). Telephone Interview with [employee requesting anonymity], Nevada Secretary of State, Securities Division (July 12, 2011).

<sup>167</sup> Banking, Delaware Department of State: Office of the State Bank Commissioner, *Our Staff*, <http://www.banking.delaware.gov/information/ourstaff.shtml> (last accessed July 19, 2011). Delaware Department of Insurance, *Contact Us*, <http://delawareinsurance.gov/contact.shtml>. Delaware refused to provide information on their securities staff and entities. E-mail from Peter Jamison, Securities Commissioner, Delaware Department of Justice, to Henson (July 16, 2011) (on file with author), citing the “need to make use of our office’s resources in a way that enables us to most effectively provide relief to persons in Delaware who have been taken advantage of in investment scams.”

<sup>168</sup> Department of Banking, Insurance, Securities & Health Care Administration, BISHCA Recommended Budget, <http://www.bishca.state.vt.us/sites/default/files/Org-Charts.pdf> (last accessed July 19, 2011).

<sup>169</sup> Banking information reflects Bank Supervision Department at the Central Bank of the Bahamas per E-mail from Karen Rolle, Examiner V, Bank Supervision Department, Central Bank of the Bahamas, to Henson (March 8, 2011) (on file with author). Insurance information per Insurance Commission of the Bahamas, *About Us*, <http://www.icb.gov.bs/home/about-us> (last visited September 4, 2011). Insurance Commission of the Bahamas (July 13, 2011). Securities information from Securities Commission of the Bahamas, 2 The Lighthouse 4 (December 2010), available at <http://www.scb.gov.bs/documents/Stats%20Digest-VOL%202.pdf>.

<sup>170</sup> Banking and Securities information per E-mail from Marcia Woolridge-Allwood, Director, Banking, Trust & Investment, Bermuda Monetary Authority to Henson (July 25, 2011) (on file with author). Insurance information per Bermuda Monetary Authority, Reports and Accounts 2010 5, available at [http://www.bma.bm/uploaded/762-2010\\_Annual\\_Report\\_FINAL\\_with\\_Cover.pdf](http://www.bma.bm/uploaded/762-2010_Annual_Report_FINAL_with_Cover.pdf)

<sup>171</sup> British Virgin Islands Financial Services Commission, 21 BVI Financial Services Commission Statistical Bulletin, 3-6 (December 2010), available at

Cayman <sup>172</sup>	515	749	9395
Dubai <sup>173</sup>	30	42	223
Guernsey <sup>174</sup>	225	746	1845
Hong Kong <sup>175</sup>	193	167	2594
Isle of Man <sup>176</sup>	167	226	148
Jersey <sup>177</sup>	84	348	1465
Singapore <sup>178</sup>	892	253	392
United Kingdom <sup>179</sup>	237	593	1961
Nevada <sup>180</sup>		1900	145
Delaware <sup>181</sup>	637	1852	
Vermont <sup>182</sup>	187	1231	71

<http://www.bvifsc.vg/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=711&PortalId=2&DownloadMethod=open>.

<sup>172</sup> Cayman Islands Monetary Authority, *The Navigator 4* (April 2011), available at [http://www.cimoney.com.ky/about\\_cima/about\\_feedra.aspx?id=492&terms=Navigator](http://www.cimoney.com.ky/about_cima/about_feedra.aspx?id=492&terms=Navigator).

<sup>173</sup> Dubai Financial Services Authority, Public Registry – Firms, <http://www.dfsa.ae/PublicReqister/Default.aspx> (last accessed July 15, 2011).

<sup>174</sup> Guernsey Financial Services Commission Annual Report & Financial Statements for the Year Ended 31 December 2010 45.

<sup>175</sup> E-mail from KM Chan, Senior Executive Officer, Office of the Commissioner of Insurance, Hong Kong SAR, to Henson (February 11, 2011) (on file with author). Hong Kong Monetary Authority, *Ann. Rep. 2010 214* (2011) Investments information from Investments information from Hong Kong Securities and Futures Commission, *Revitalisation: Ann. Rep. 2010-2011 68* (2011).

<sup>176</sup> Isle of Man Financial Services Commission, *Financial Services Act 2008 – Licenseholders*, <http://www.gov.im/fsc/stats.aspx> (last accessed July 15, 2011). Isle of Man Insurance & Pensions Authority, *Registered Entities – Search Results*, [http://www.gov.im/ipa/entitiessearch.aspx?recordstartindex=-1&searchinsurance=1&searchtext=&business\\_type=All](http://www.gov.im/ipa/entitiessearch.aspx?recordstartindex=-1&searchinsurance=1&searchtext=&business_type=All) (insurance).

<sup>177</sup> Jersey Financial Services Commission, *Regulated Entities*, [http://www.jerseyfsc.org/the\\_commission/regulated\\_entities/index.asp](http://www.jerseyfsc.org/the_commission/regulated_entities/index.asp), (last accessed 2/10/2011).

<sup>178</sup> Monetary Authority of Singapore, *Number of Financial Institutions and Relevant Organizations in Singapore*, [http://www.mas.gov.sg/fi\\_directory/](http://www.mas.gov.sg/fi_directory/) last accessed (7/14/2011).

<sup>179</sup> United Kingdom Financial Services Authority, *Ann. Rep. 2010/11 230 & Appendix 7* (2011).

<sup>180</sup> E-mail from Jake Sunderland, Public Information Officer, Nevada Division of Insurance, to Henson (July 14, 2011) (on file with author). Telephone Interview with [employee requesting anonymity], Nevada Secretary of State, Securities Division (July 12, 2011).

<sup>181</sup> Delaware Department of State, *The Office of the State Bank Commissioner*, <http://www.banking.delaware.gov/> (select “financial institutions” hyperlink and “non-depository institutions” hyperlink, last accessed 2/05/2012). Department of Insurance, *Authorized Companies*, <http://delawareinsurance.gov/departments/berg/authorizedcompanies.shtml> (last accessed July 19, 2011)

<sup>182</sup> Department of Banking, Insurance, Securities & Health Care Administration, *Verify a License*, <http://www.bishca.state.vt.us/banking/verify-license>, (last accessed July 19, 2011). E-mail from Sue S. Clark, Regulatory and Consumer Affairs Director, Vermont Department of Banking, Insurance, Securities & Health Care Administration, to Henson (March 25, 2011) (on file with author). E-mail from Ellen Adams, Insurance Company



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Licensing, Vermont Department of Banking, Insurance, Securities & Health Care Administration, to Henson (March 28, 2011) (on file with author). E-mails from Amanda J. Smith, Securities Investigator, Vermont Securities Division, to Henson (March 28, 2011) (on file with author).

**Table 3: Insurance Entities by Jurisdiction and Classification**

Jurisdiction	Domestic insurance entities	Offshore insurance entities
Bahamas <sup>183</sup>		
Bermuda <sup>184</sup>	158	1190
British Virgin Islands <sup>185</sup>	36	219
Cayman <sup>186</sup>	27	739
Dubai <sup>187</sup>		
Guernsey <sup>188</sup>	13	679
Hong Kong <sup>189</sup>	85	77
Isle of Man <sup>190</sup>	15	101
Jersey <sup>191</sup>	9	176
Singapore <sup>192</sup>	95	54

<sup>183</sup> Information for the Bahamas was unavailable; multiple phone calls and emails were unreturned.

<sup>184</sup> Bermuda reports domicile of beneficial owners at a one-year lag. In 2009, 124 of 1061 insurers had Bermuda-based beneficial owners. Since there are currently 1348 insurers, there would presumably be 158 domestic insurers if proportions remained constant. Bermuda Monetary Authority, Reports and Accounts 2010 39-41, available at [http://www.bma.bm/uploaded/762-2010\\_Annual\\_Report\\_FINAL\\_with\\_Cover.pdf](http://www.bma.bm/uploaded/762-2010_Annual_Report_FINAL_with_Cover.pdf)

<sup>185</sup> British Virgin Islands Financial Services Commission, 21 BVI Financial Services Commission Statistical Bulletin, 6 (December 2010), available at <http://www.bvifsc.vg/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=711&PortalId=2&DownloadMethod=open>

<sup>186</sup> Cayman Islands Monetary Authority Insurance Division, *Number of Licensees Regulated Under the Insurance Supervision Division*, available at [http://www.cimoney.com.ky/regulated\\_sectors/reg\\_sec\\_ra.aspx?id=242#cap\\_stats](http://www.cimoney.com.ky/regulated_sectors/reg_sec_ra.aspx?id=242#cap_stats), (click “number of licensees under the insurance division).

<sup>187</sup>

<sup>188</sup> Guernsey Financial Services Commission Annual Report & Financial Statements for the Year Ended 31 December 2010 at 29

<sup>189</sup> Office of the Commissioner of Insurance, *Number of Authorized Insurers by Place of Incorporation as at 4.1.2012*, available at <http://www.oci.gov.hk/download/poi.pdf>, gathered 2/15/2012.

<sup>190</sup> Insurance and Pensions Authority, *Regulated Entities*, available at <http://www.gov.im/ipa/entitiessearch.aspx>, gathered 2/8/2012.

<sup>191</sup> E-mail from David Hart, Deputy Director, Insurance and Investment Business, Jersey Financial Services Commission to Henson on 02/16/2012.

<sup>192</sup> Monetary Authority of Singapore, Number of Financial Institutions and Relevant Organisations in Singapore, [http://www.mas.gov.sg/fi\\_directory/index.html](http://www.mas.gov.sg/fi_directory/index.html), last gathered 2/15/2012. Gross premiums for general insurance business are split evenly between domestic and offshore business. *Monetary Authority of Singapore*, MAS Annual Report 2010/2011 106 (2011).

United Kingdom <sup>193</sup>	536	57
Nevada <sup>194</sup>	260	1640
Delaware <sup>195</sup>	28	1824
Vermont <sup>196</sup>	31	1213

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<sup>193</sup> United Kingdom Financial Services Authority, Ann. Rep. 2010/11 237-238 (2011). .

<sup>194</sup> E-mail from Jake Sunderland, Public Information Officer, Nevada Division of Insurance, to Henson (July 14, 2011) (on file with author).

<sup>195</sup> Department of Insurance, Authorized Companies, <http://delawareinsurance.gov/departments/berg/authorizedcompanies.shtml> (last accessed July 19, 2011).

<sup>196</sup> Department of Banking, Insurance, Securities & Health Care Administration, BISHCA Recommended Budget, <http://www.bishca.state.vt.us/sites/default/files/Org-Charts.pdf> (last accessed July 19, 2011).

**Table 4: Financial Regulators per Capita**

	<b>Population</b>	<b>Regulators</b> <sup>197</sup>	<b>Regulators per 1000 population</b>
<b>Bahamas</b> <sup>198</sup>	353,658	198	0.560
<b>Bermuda</b> <sup>199</sup>	64,237	172	2.678
<b>BVI</b> <sup>200</sup>	28,213	138	4.891
<b>Cayman</b> <sup>201</sup>	54,878	160	2.916
<b>Dubai</b> <sup>202</sup>	1,905,000	121	0.064
<b>Guernsey</b> <sup>203</sup>	62,451	100	1.601
<b>Hong Kong</b> <sup>204</sup>	7,108,100	845	0.119
<b>IOM</b> <sup>205</sup>	84,497	64	0.757
<b>Jersey</b> <sup>206</sup>	97,857	114	1.165
<b>Singapore</b> <sup>207</sup>	5,183,700		N/A

<sup>197</sup> See Table 1, supra.

<sup>198</sup> Department of Statistics of the Bahamas, Comparison Between the 2000 and 2010 Population Censuses and Percentage Change (2011), available at <http://statistics.bahamas.gov.bs/download/095485600.pdf>

<sup>199</sup> Bermuda Department of Statistics, 2010 Census of Population & Housing: Final Results 1

<sup>200</sup> Development Planning Unit, Population Indicators, 1994-2008, available at [http://www.dpu.gov.vg/images/dpu\\_pdf/DemographicIndicators%201994%20to%202008.pdf](http://www.dpu.gov.vg/images/dpu_pdf/DemographicIndicators%201994%20to%202008.pdf)

<sup>201</sup> Economics and Statistics Office, The Cayman Islands 2010 Population and Housing Census: Preliminary Report (February 7, 2011)

<sup>202</sup> Dubai Statistics Center, Dubai in Figures 2010 3 (2011), available at <http://www.dsc.gov.ae/Publication/دبي%20في%20القرن%20العاشر%202010.pdf>

<sup>203</sup> Policy Council, Guernsey Population Update 1 (January 18, 2012), available at <http://www.gov.gg/CHttpHandler.ashx?id=5271&p=0>

<sup>204</sup> Census and Statistics Department, Hong Kong Statistics: Population and Vital Events, [http://www.censtatd.gov.hk/hong\\_kong\\_statistics/statistics\\_by\\_subject/index.jsp?subjectID=1&charsetID=2&displayMode=T](http://www.censtatd.gov.hk/hong_kong_statistics/statistics_by_subject/index.jsp?subjectID=1&charsetID=2&displayMode=T), last accessed 2/19/2012

<sup>205</sup> Yn Tashtey, Provisional Key Census Results (December 8, 2011), available at <http://www.gov.im/lib/docs/treasury/economic/census/mdr081211provisionalkeycensus.pdf>

<sup>206</sup> States of Jersey, Jersey Census 2011 1 (2011), available at <http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20CensusBulletin1%2020111208%20SU.pdf>

<sup>207</sup> Department of Statistics, Time Series on Population (Mid-Year Estimates), <http://www.singstat.gov.sg/stats/themes/people/hist/popn.html>, gathered 2/19/2012

<b>UK FSA</b> <sup>208</sup>	62,262,000	3458	0.056
<b>NV</b> <sup>209</sup>	2,700,551	112	0.041
<b>Delaware</b>	897,934	127	0.141
<b>VT</b>	626,431	92	0.147

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<sup>208</sup> Office for National Statistics, Annual Mid-year Population Estimates, 2010 2 (June 30, 2011)

<sup>209</sup> Data for U.S. States available at <http://2010.census.gov/2010census/>, select state in "Population Finder"