

# Trust & Private Client Newsletter

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Conyers Dill & Pearman



## Bermuda Abolishes Perpetuity Period for Trusts

*On 1 August 2009, the Perpetuities and Accumulations Act 2009 (the “2009 Act”) will come into force in Bermuda, abolishing the rule against perpetuities for Bermuda law trusts in all cases except in respect of Bermuda real estate. The legislation will apply immediately to trusts under a will executed on or after 1 August 2009 as well as inter vivos trusts settled on or after 1 August 2009. The 2009 Act was passed by the Bermuda Parliament on 29th May following a period of thorough research and analysis by key industry professionals and regulatory bodies of how the new rules would best fit the traditional characteristics of Bermuda trusts. The 2009 Act will enhance the flexibility and functionality of Bermuda trusts and increase Bermuda’s attractiveness to wealthy families looking to establish trusts in offshore jurisdictions.*

### Before 1 August 2009

Prior to the 2009 Act, the position in Bermuda relating to the rule against perpetuities was derived from English law dating back several centuries where the rule was originally designed to limit the time period within which future interests in property must vest. Upon careful analysis, it has been determined that the old public policy rationales for the perpetuity rule no longer apply to modern society. Bermuda previously dealt with the perpetuity rules by its Perpetuities and Accumulations Act 1989 (the “1989 Act”), which permitted a fixed trust period up to a maximum of one hundred years. A similar maximum fixed period also applied in relation to the rule against excessive accumulations of income.

Under the 1989 Act, in conjunction with the Trusts (Special Provisions) Act 1989, perpetual trusts were permitted for non-charitable purpose trusts (as opposed to private trusts with defined beneficiaries).

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## Key provisions of the 2009 Act – instruments created on or after 1 August 2009

The principal provision, contained in Section 3 of the 2009 Act, sets out that, in respect of instruments created on or after 1 August 2009, the rule against perpetuities will apply where the instrument seeks to limit property in trust so as to create successive or contingent interests or estates only to the extent that the property is land situated in Bermuda. Equally, the rule against perpetuities will apply to a power of appointment created by an instrument only to the extent such power is exercisable over land in Bermuda. For the purposes of the 2009 Act, land in Bermuda does not include income from land or the proceeds of sale of land.

Thus, for example, where a trust is created over assets that include real estate in Bermuda and a portfolio of investments and cash, the rule against perpetuities will apply only in respect of the Bermuda real estate while the cash and investments may validly remain in trust in perpetuity.

The 2009 Act also specifically repeals Section 15 of the 1989 Act so that, for instruments created on or after 1 August 2009, accumulations of income will no longer be restricted to 100 years.

## Key provisions of the 2009 Act – instruments created prior to 1 August 2009

For trusts already in existence on the commencement day of the 2009 Act, Section 4 of the 2009 Act expressly provides that the power of the court to extend the duration of a trust, the time within which an interest in property must vest or take effect, or the time within which certain powers are exercisable, is not limited by Section 3. It is anticipated that, in order for an existing trust to “opt in” to the new rules under this section, an application would more than likely be made to the court under either Section 48 of the Trustee Act 1975 (Variation of Trusts) or under Section 47 of the same Act, which is a far simpler procedure.

Approval by the court under Section 47 will depend on whether the court deems such arrangement to be expedient and for the benefit of the trust as a whole. There are already precedents of Bermuda cases where the Court has granted a new perpetuity period in appropriate circumstances. The 2009 Act now makes that approval even easier than before with respect to existing trusts.

It is recognized that there are instances where a retroactive application of the 2009 Act (where it would have applied equally to instruments created prior to the commencement date as to instruments created on or after that date) would not have been appropriate, such as for example where the abolition of a perpetuity date might have created potential exposure to Generation Skipping Transfer Tax for US tax purposes.

The removal of the perpetuity period for most trusts offers additional flexibility as it allows for enhanced multi-generational wealth planning.

## Conclusion

Although not every settlor will wish to create a perpetual trust, the removal of the perpetuity period for most trusts offers additional flexibility as it allows for enhanced multi-generational wealth planning. Notwithstanding the current worldwide economic downturn, many successful individuals have accumulated significant wealth and are looking at longer term financial planning to ensure that their families can benefit from this wealth without it being dissipated by the third generation.



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## Bermuda Ascends to OECD White List

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### White List

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On 8 June 2009 the Organisation for Economic Cooperation and Development (OECD) announced that Bermuda had moved onto its “white list” of countries ranked by tax transparency standards. Bermuda was the first jurisdiction to move up from the OECD’s “grey list” putting it among those top tier countries that have “substantially implemented” internationally agreed tax standards, as monitored by the OECD. The move came after Bermuda signed its twelfth tax information exchange agreement (TIEA) with the Netherlands. The OECD requires countries to sign at least twelve TIEAs in appropriate form with OECD countries in order to reach the top tier. Bermuda’s ascendancy to the white list confirms and enhances its position as a “blue chip” international business and trust jurisdiction and its long standing position of transparency and cooperation which has, through the years, differentiated Bermuda from other jurisdictions.

In light of the global financial crisis and financial scandals that have affected countries around the world, the international focus on tax evasion and the implementation of the internationally agreed tax standards developed by the OECD has intensified since 2008. These issues were high on the agenda of the G20 London Summit in April of this year, with the OECD

Secretariat issuing at its conclusion on 2 April 2009 a Progress Report constituting its assessment of the implementation of the legal and administrative framework for transparency and exchange of information for the 84 jurisdictions that participate in the OECD’s Global Forum on Transparency and Exchange of Information. The Progress Report includes a three tier list commonly referred to as the “white”, “grey” and “black” lists. The white list identifies jurisdictions that have substantially implemented the internationally agreed tax standard, the grey list those jurisdictions that have committed to but not yet implemented the standard and the black list jurisdictions that have not committed to the standard.

At the time of the G20 London Summit, Bermuda had TIEAs with the United States, Australia and the United Kingdom and subsequently signed further TIEAs with New Zealand, Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway, Sweden and finally the Netherlands on 8 June 2009 thereby satisfying the qualifying standard of twelve TIEAs to ascend to the white list. Bermuda has since signed its thirteenth TIEA with Germany and has concluded TIEA negotiations with Mexico, Canada and Japan. At the time of signing Bermuda’s TIEA with Germany, Bermuda’s Minister of Finance, Paula Cox, affirmed Bermuda’s commitment to supporting the OECD

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initiative to implement standards of information exchange and transparency and indicated Bermuda's objective was to conclude TIEAs with all of the G7 countries and Bermuda's other important international and trading partners "thereby exceeding by the widest of margins the minimum standard of 12 TIEAs".

The principles of transparency and effective information exchange in tax matters have been articulated and refined through the work of the OECD's Global Forum on Taxation. Currently the standards for exchange of information are set out in Article 26 of the OECD Model Convention and the 2002 Model Agreement on Exchange of Information. These standards have been endorsed by the G20 and UN Committee of Experts on International Cooperation on Tax Matters and now serve as a basis for most bilateral tax treaties as the internationally agreed standard for exchange of information. Exchange of information between the tax authorities of countries can be done bilaterally or multilaterally. The model agreement contains two versions, one being a model for bilateral agreements and the other a model for a multilateral instrument which provides a basis for an integrated bundle of bilateral agreements.

When done bilaterally, two main types of agreements are used - Double Taxation Agreements (DTAs) and TIEAs. TIEAs are typically intended for use with countries for which a DTA is not considered appropriate, mainly because they have no, or low taxes on income or profits. TIEAs tend to be narrower in scope than DTAs but are more detailed than DTAs on the subject of information exchange. They specify how such information exchange is to occur. Bermuda's TIEAs require only the provision of information "upon request" and include strict conditions about the form of such requests. They are designed to prevent so-called "fishing expeditions". The agreements set out a number of requirements that the applicant territory must meet to show the relevance of the request to tax matters. The OECD model at article 5 section 5 sets out seven such criteria, while for example, the TIEA that the United Kingdom has signed with Bermuda sets out nine.

Most importantly, the agreements identify situations in which a party may decline a request to supply information. These may include instances where disclosure may reveal trade or professional secrets, confidential communications between a client and their legal representative for the purposes of seeking or providing legal advice or for use in existing or contemplated legal proceedings or where disclosure would be contrary to public policy.

**Bermuda's ascendancy to the white list cements its competitive edge as a top tier international business and trust jurisdiction.**

Information exchanged for tax purposes must be treated as confidential. TIEAs contain rules to ensure that information is used only for authorised purposes and thereby protect taxpayer privacy rights. Typically unauthorised disclosure of tax related information received from another country is a criminal offence.

At the G20 London Summit in April the G20 declared a commitment to "take action against non-cooperative jurisdictions, including tax havens", and stated: "We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over." Bermuda's ascendancy to the white list and ongoing commitment to meet and exceed the OECD's high standards of transparency and exchange of information for tax purposes cements its competitive edge as a top tier international business and trust jurisdiction.



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*Advising on the laws of Bermuda, British Virgin Islands and the Cayman Islands and comprising one of the largest and most experienced offshore trust & private client practices in the world, **Conyers Dill & Pearman** trust lawyers advise individuals, families and corporate clients on a broad range of issues concerning estate planning and private investment structures, and on regulatory laws affecting business transactions and personal assets.*

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