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Andrew P. Morriss

Texas A&M University School of Law, [amorriss@law.tamu.edu](mailto:amorriss@law.tamu.edu)

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# Changing the Rules of the Game: Offshore Financial Centers, Regulatory Competition & Financial Crises

Andrew P. Morriss\*

Even ardent proponents of free markets often concede a significant role for the state in providing the “rules of the game” for market competition by creating contract and property law, providing dispute resolution services, and enforcing court judgments.<sup>1</sup> At the same time, those favoring a more substantial role for the state resist politically inconvenient charges that interventionist policies can lead down Friedrich Hayek’s “Road to

Serfdom”<sup>2</sup> by arguing they merely seek to “level the playing field” by adding sufficient safeguards to prevent fraud and financial crises, preserving market competition while taming what they view as its excesses.<sup>3</sup> However, because goods, services, capital, and people can move across borders, states must compete for these resources. That competition limits the ability of states to move toward the interventionist end of the spectrum and

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\* H. Ross & Helen Workman Professor of Law and Business and Professor, Institute for Government and Public Affairs, University of Illinois.

1. See Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust*, COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY, May 2004, at 3. (“Make government prevent force and fraud; otherwise, let people do what they will. That position leads quite naturally to the development of ordinary markets . . .”)

2. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (University of Chicago Press) (1944).

3. See, e.g., Tax Justice Network, *Our Core Themes* available at [http://www.taxjustice.net/cms/front\\_content.php?idcatart=2](http://www.taxjustice.net/cms/front_content.php?idcatart=2) (“We support simplicity and a level playing field on tax.”); See also Rebecca Christie & Robert Schmid, *Geithner Calls for New ‘Rules of the Game’ in Finance*, REUTERS (March 26, 2009) (“‘To address this will require comprehensive reform,’ Geithner said at a House Financial Services Committee hearing. ‘Not modest repairs at the margin, but new rules of the game.’”); For criticism of the concept of a “level playing field” see William Vlcek, *“A Level Playing Field and the Space for Small States,”* Paper presented at the annual meeting of the International Studies Association 48th Annual Convention, Feb 28, 2007.

so frustrates proponents of greater regulation of financial markets.

Part of the competition for economic activity involves provision of law and competition among states, which helps shape the law they provide.<sup>4</sup> This competition takes place within a framework of international law including treaties, customary public and private law, and conflict of law rules. Like any competitor with power to affect the rules of the game, however, states seek to alter this framework to provide themselves with advantages against their competitors. The global financial crisis provided a powerful group of states, including the United States, the United Kingdom, France, and Germany, with an opportunity to change the rules of international regulatory competition to disadvantage offshore financial centers (OFCs) in their competition with these onshore governments over financial services. Putting White House Chief of Staff Rahm Emanuel's dictum of "never let a serious crisis go to waste"<sup>5</sup> into practice, interest groups favoring additional regulation in these onshore jurisdictions have sought to use the financial crisis to seek changes in the rules of the game for international financial competition that reduce OFCs' comparative advantages.

After briefly describing some of the changes sought by pro-regulation onshore

interests, I will discuss three of the claims made in support of such regulations: (1) that OFCs provide lax regulatory regimes that undercut onshore efforts to provide stability; (2) that confidentiality laws undercut onshore efforts at financial regulation; and (3) that tax competition inhibits onshore regulatory efforts. I conclude that these are an insufficient basis for limiting regulatory competition.

### Changing the Rules

Soon after the current financial crisis began, public officials of onshore economies began to blame offshore financial centers ("OFCs") for contributing to the crisis and to call for regulatory measures to limit OFCs' abilities to compete in the global financial market: New York City District Attorney Robert Morgenthau complained that "vast sums of money . . . lie outside the jurisdiction of U.S. regulators and other supervisory authorities."<sup>6</sup> UK Prime Minister Gordon Brown called on "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>7</sup> French President Nicolas Sarkozy denounced "the excesses of financial capitalism which has experienced serious abuses: concealment of risks, uncontrolled sophistication of fi-

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4. ERIN O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* \_\_ (Oxford University Press) (2008).

5. *A 40-Year Wish List*, WALL ST.J., January 28, 2009, at A14.

6. Robert M. Morgenthau, *Too Much Money is Beyond Legal Reach*, WALL ST.J., September 30, 2008 at A19 available at <http://online.wsj.com/article/SB122273062657688131.html>.

7. Nigel Morris, *Brown leads global drive to close down tax havens*, THE SUNDAY INDEPENDENT, February 19, 2009, available at <http://www.independent.co.uk/news/uk/politics/brown-leads-global-drive-to-close-down-tax-havens-1625959.html>.

nancial instruments, gaps in regulation and persistence of tax havens capturing a part of global savings that would be more justly employed financing investment and growth.”<sup>8</sup>

At the same time, several large countries are acting inconsistently with well-established international legal principles as part of efforts to restrict competition by OFCs. In the United States, the Obama Administration endorsed the Stop Tax Haven Abuse Act, legislation proposed by Sen. Carl Levin aimed squarely at OFCs that did not cooperate with the U.S. Treasury in enforcing American tax laws. The Levin proposal requires that OFCs assist in stopping not only criminal tax evasion but also legal tax avoidance,<sup>9</sup> ignoring well-established international law principles that jurisdictions are not required to assist each other in collection of tax revenue.<sup>10</sup> In a second departure from normal state-to-state conduct, Germany and other European governments have paid millions of Euros to the thief for account data stolen from a Liechtenstein bank and Germany created a new

identity for the informant through a witness protection program—despite Liechtenstein’s attempt to arrest the informant for violation of its banking laws,<sup>11</sup> a dramatic unwillingness to abide by the usual norms of comity toward a fellow member of the European single market. In a third major departure from established international legal principles, Britain invoked anti-terrorism laws against a bank in NATO ally Iceland to seize assets after the bank’s internet subsidiary collapsed, putting the bank on the same terrorism list as al-Qaeda.<sup>12</sup> All these measures are expressions of interest groups within large, developed economies’ desire to rewrite the rules to limit regulatory and tax competition by small jurisdictions.

If successful, these efforts will damage the world economy by removing an important set of competitors from the scene. The losers will include not just the residents of OFCs but the residents of the developed economies, since OFCs play an important role in encouraging transaction cost minimizing regulatory and fi-

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8. Quoted in *Sarkozy on Tax Havens, and more*, Tax Justice Network, August 28, 2008 available at <http://taxjustice.blogspot.com/2008/08/sarkozy-on-tax-havens.html>, original speech, *XVIeme Conference Des Ambassadeurs Discours Du President De La Republique, M. Nicolas Sarkozy* available at <http://www.ambafrance-uk.org/XVIeme-conference-des-Ambassadeurs.html>.

9. Kevin Drawbaugh & Corbett Daly, *Obama admin. backs tax haven bill*, Reuters Mar. 3, 2009 available at <http://www.reuters.com/article/politicsNews/idUSTRE52271L20090303> (endorsement). S. 506, *Stop Tax Haven Abuse Act*, §101 (requiring jurisdictions to assist in ending tax avoidance).

10. See Rose-Marie Antoine, *The Legitimacy of the Offshore Financial Sector – A Legal Perspective*, in REGULATORY COMPETITION & OFFSHORE FINANCIAL CENTERS (forthcoming).

11. See, e.g., *Informant in German Investigation ‘Fears’ for his Life*, Der Spiegel, March 8, 2008 available at <http://www.spiegel.de/international/business/0,1518,540283,00.html>; Mark Landler, *Liechtenstein Issues Warrant for Tax Informant*, N.Y. TIMES, March 13, 2008 available at <http://www.nytimes.com/2008/03/13/business/worldbusiness/13tax.html>.

12. *Id.*

nancial innovations.<sup>13</sup> Moreover, OFCs play a critical role in pressuring autocratic governments into ceding power over their economies to market forces, reducing the scope of autocracies' ability to interfere with the rule of law.<sup>14</sup>

Governments compete to attract economic activity to their jurisdiction for three reasons. All governments require economic activity within their jurisdiction to generate the tax revenues necessary to fund their operation.<sup>15</sup> To draw economic activity to their jurisdictions, governments can offer direct incentives (e.g. tax exemptions, direct subsidies), effectively discounting the price of operating within their boundaries. Such discounts are costly, however, as they reduce the net revenue to the government from the economic activity. Moreover, direct subsidies can lead to "price wars" among jurisdictions competing for the economic activity and investments lured by discounts are vulnerable to better offers from competing jurisdictions.

Governments also compete for economic activity by providing subsidized services that lower transactions costs, including the rule of law. Moreover, governments can offer packages that consist

of more than simple enforcement of contracts and protection of property rights as part of their provision of the rule of law. To encourage economic activity, governments can provide efficiency-enhancing rules. For example, providing standard corporate, partnership, and other entities reduces transactions costs and encourages economic activity within a jurisdiction.

When one jurisdiction discovers a new efficiency-enhancing innovation, it can lure economic activities to it. Other jurisdictions then must adopt similar innovations if they are to compete effectively. The spread of the LLC in the United States following its initial adoption by Wyoming is an example of such competition.<sup>16</sup> The development of segregated portfolio companies (also known as segregated cell companies) by offshore jurisdictions is another, with several domestic U.S. jurisdictions soon following the OFCs' lead and adopting their own laws allowing versions of these entities.<sup>17</sup>

Competition can also produce bad outcomes. For example, actors interested in committing fraud may offer benefits to governments to turn a blind eye to the fraud. Antigua's relationship to Sir Allen

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13. See Andrew P. Morriss, *The Role of Offshore Financial Centers in Regulatory Competition*, REGULATORY COMPETITION & OFFSHORE FINANCIAL CENTERS, U Illinois Law & Economics Research Paper No. LE07-032. available at SSRN: <http://ssrn.com/abstract=1275390>; See also Jonathan R. Macey & Anna Manasco Dionne, *Offshore Finance & Onshore Markets: Racing to the Bottom or Moving Toward Efficient?*

14. *Id.*

15. Benevolent governments also seek to encourage economic activity because such activity directly increases the wealth of their citizens. Malevolent governments will seek economic activity because it generates wealth they can confiscate.

16. See, e.g., Larry E. Ribstein, *The Evolving Partnership*, 26 J. CORP. L. 819 (2001); O'HARA & RIBSTEIN, *supra* note 4, at 29, 114; Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L. J. 1459 (1998).

17. Morriss, *supra* note 13.

Stanford and Stanford International Bank, which appears to have been little more than a sizeable Ponzi scheme,<sup>18</sup> is a recent example.<sup>19</sup> The legal literature contains many claims of such competition producing a “race to the bottom,” including with respect to Delaware’s role in corporate governance, although these claims are often contested.<sup>20</sup> The challenge is to distinguish legitimate efforts to prevent fraud, money laundering, and other criminal activity from efforts to weaken competitors under the guise of tackling such problems. Thus evaluating regulatory competition requires that we attempt to determine whether it will lead to good outcomes (promoting efficiency enhancing, wealth maximizing innovations) or bad outcomes (races to the bottom that reduce welfare).

There are a number of reasons to think regulatory competition is likely to be beneficial. Erin O’Hara and Larry Ribstein have offered a theory of regulatory competition based on domestic interest groups lobbying for laws that will attract outsiders to do business in a jurisdiction, with the additional business benefiting the domestic interest groups (e.g. the Delaware corporate bar benefits from the use of Delaware by out-of-state corporations

as the state of incorporation).<sup>21</sup> Jonathan Macey and Anna Dionne have recently argued that competition between offshore and onshore jurisdictions produces efficiency-increasing competition to offer regulatory measures and innovations in both onshore and offshore jurisdictions as a result of competition to offer “optimal laxity.”<sup>22</sup> Rose-Marie Antoine has shown that offshore jurisdictions are more innovative than onshore jurisdictions in developing governance mechanisms for trusts as a result of their competition for trust business.<sup>23</sup> I have argued elsewhere that OFCs have produced beneficial innovations in hedge fund and captive insurance law.<sup>24</sup>

However, as noted earlier the financial crisis has prompted a wide range of policy proposals from onshore governments aimed at restricting the ability of OFCs to compete with the onshore governments. Implicit in these proposals is the argument that competition between OFCs and onshore governments reduces onshore jurisdictions’ ability to regulate in beneficial ways. Other critics of OFCs have argued that offshore jurisdictions promote fraud and theft, particularly in countries with poor governance and proposed regulatory measures limiting com-

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18. S.E.C., *SEC Charges Two Accountants And Antiguan Regulator For Roles In Stanford Ponzi Scheme*, Litigation Release No. 21092, June 19, 2009 available at <http://www.sec.gov/litigation/litreleases/2009/lr21092.htm>.

19. Stacey-Marie Ishmael, *Sir Allen’s Antigua, or the curious case of Stanford International Bank*, FT Alphaville, Feb. 17, 2009 available at <http://ftalphaville.ft.com/blog/2009/02/17/52560/sir-allens-antigua-or-the-curious-case-of-stanford-international-bank/>.

20. See O’HARA & RIBSTEIN, *supra* note 4, at \_\_ (summarizing debate).

21. *Id.*

22. Macey & Dionne, *supra* note 13.

23. Antoine, *supra* note 10.

24. Morriss, *supra* note 13.

petition from OFCs.<sup>25</sup> These proposals rest on two propositions:

Onshore government regulatory efforts in financial services are undercut by competition from OFCs.

Restricting competition from OFCs will therefore enhance onshore regulatory efforts in financial services.

Both of these statements are controversial, although the policymakers making these arguments have generally treated them as self-evident and not requiring an effort to provide proof.<sup>26</sup> Both are related to important questions about the role of the state in regulating financial markets.

Do OFCs Undercut Onshore Regulation of Financial Services?

The claim that onshore regulatory efforts are undercut by the regulatory competition provided by OFCs can be divided into three parts. First, onshore regulators claim that offshore jurisdictions regulate too little.<sup>27</sup> Second, onshore regulators argue that offshore confidentiality laws allow onshore taxpayers to illegally evade taxes they owe onshore governments.<sup>28</sup> Third, onshore governments argue that the lower tax rates in offshore jurisdic-

tions reduce onshore governments' abilities to tax their citizens by enabling onshore taxpayers to structure transactions to reduce their taxes.<sup>29</sup>

## Regulatory Laxity

Are offshore financial centers too lax in regulating financial services providers? There are three reasons to believe they are not. First, there is no agreed objective measure of regulatory stringency by which we can compare regulators in different jurisdictions. While onshore politicians sometimes suggest that OFCs are unregulated, regulators in major OFCs often have broader powers than onshore regulators. For example, one of the Cayman Islands' chief financial regulators, the Financial Secretary, described an interview he conducted with a banker he suspected of problematic behavior as follows: "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 obligations in the community as a Class A banker." Ultimately, the regulator concluded that the banker's

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25. See, e.g., RAYMOND BAKER, *CAPITALISM'S ACHILLES HEEL: DIRTY MONEY AND HOW TO RENEW THE FREE-MARKET SYSTEM* (2005).

26. A third, unstated premise underlying these proposals is the claim that increasing the effectiveness of onshore regulatory efforts in financial services will lead to improved financial stability and prevent events like those that produced the current financial crisis from recurring. Addressing this question is beyond the scope of this Article.

27. See note 7 *supra*.

28. See *EU proposes tougher rules to tackle tax evasion*, AFP, Nov. 13, 2008 available at [http://afp.google.com/article/ALeqM5iX8cL3opKyKc\\_yNXGXCKgSc1uQnw](http://afp.google.com/article/ALeqM5iX8cL3opKyKc_yNXGXCKgSc1uQnw).

29. See, United States Department of the Treasury, *Leveling the Playing Field: Curbing Tax Havens and Removing Tax Incentives for Shifting Jobs Overseas*, May 4, 2009 available at <http://www.treas.gov/press/releases/tg119.htm> (United States government "seek[s] to reduce the amount of taxes lost to tax havens – either through unintended loopholes that allow companies to legally avoid paying billions in taxes, or through the illegal use of hidden accounts by well-off individuals.").

“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>30</sup> It is 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 similarly 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. Comparing regulatory frameworks thus requires both evaluating formal rules and powers and the actual practice of regulation across jurisdictions.<sup>31</sup> Leading OFCs like Bermuda, the Cayman Islands, the Channel Islands, Dubai, and Singapore offer a combination of laws, regulations, regulators, and regulatory culture that makes the effective degree of regulation at least equal to that in onshore jurisdictions, although sometimes with different goals.<sup>32</sup>

Second, offshore jurisdictions have large investments in their reputations, since any offshore jurisdiction that allowed significant fraudulent or criminal

behavior would quickly lose its ability to attract business and so deprive its population of the benefit of the offshore financial sector.<sup>33</sup> These revenues are significant: the Cayman Islands derive approximately half their government revenues from offshore-financial industry fees and a significant portion of tourism there is finance-industry-related as well.<sup>34</sup> As a result, the major OFCs have invested heavily in their regulatory infrastructure. For example, the Cayman Islands’ major regulator is the Cayman Islands Monetary Authority, whose board consists of financial professionals drawn from both the islands and internationally and whose credentials compare favorably to those of regulators in the United States.<sup>35</sup> The Cayman Islands Stock Exchange is an affiliate member of the International Organization of Securities Commissions, a member of the Intermarket Surveillance Group and recognized by the U.K. Revenue and Customs Board, signals that it meets international standards and allowing listed securities to be sold in major markets.<sup>36</sup> Major OFCs are regularly reviewed by the International Monetary Fund, an organization controlled by onshore governments, and generally received favorable reviews when compared against best practices

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30. VASSEL JOHNSON, AS I SEE IT: HOW CAYMAN BECAME A LEADING FINANCIAL SECTOR 159-160 (2001). Note that the banker, Jean Doucet, eventually did end up behind bars on an unrelated matter; *id.* at 163-164.

31. See Andrew P. Morriss, *Regulatory Intensity & Offshore Financial Centers*, Working Paper (2009).

32. *Id.*

33. A similar argument is made concerning Delaware’s role as a provider of corporate law within the United States. See Macey & Dionne, *supra* note 13.

34. Andrew P. Morriss & Craig M. Boise, *Creating Cayman*, (Working Paper, 2009).

35. Morriss, *supra* note 31.

36. See Cayman Islands Stock Exchange, *Recognitions, Affiliations, and Memberships*, (2008) available at <http://www.csx.com.ky/>.



standards that onshore governments sometimes do not themselves meet.<sup>37</sup> British OFCs are also reviewed by the British Treasury, and also have received favorable reviews.<sup>38</sup> Thus by most objective measures, the major OFCs (if not the less developed ones like Antigua) have been successful at providing adequate regulation, at times even exceeding the regulatory stringency of onshore governments. There is some indirect evidence to support this contention: the most dramatic frauds in recent years have occurred not in OFCs but in onshore jurisdictions: Enron, Parmalat, and Madoff are all financial scandals with onshore roots.

Third, even among regulators in major onshore financial centers there are dramatic differences in how regulatory agencies are structured, the regulatory philosophy, and the regulations imposed on financial services firms. For example, the United States and the United Kingdom take dramatically different approaches to financial services regulation in both the structure of their respective regulators and the type of regulation.<sup>39</sup> The competition between the New York City and London over the financial ser-

vices business is at least as intense as the competition between those financial centers and OFCs.<sup>40</sup> Thus aside from jurisdictions without any serious regulatory oversight (e.g. Antigua) or corruption problems (e.g. the Turks & Caicos Islands),<sup>41</sup> the largest OFCs provide what is best described as a different form of regulation rather than an absence of regulation. This is not surprising; as Macey and Dionne note, jurisdictions compete in many regulatory dimensions and zero is not always the desired level of regulation by financial services firms.<sup>42</sup> Since OFCs specialize in products for sophisticated investors, it is not surprising that OFCs regulate differently from onshore jurisdictions where regulatory concern is focused on retail products.<sup>43</sup> Thus the differences between OFCs and onshore regulators are differences in focus, philosophy, and approach similar to the differences among onshore jurisdictions rather than differences in regulatory laxity. The differences between onshore and offshore regulators are thus not adequately described as two ends of a uni-dimensional spectrum. The regulatory competition is thus better described as a competition for the optimal level of regulation.

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37. Richard K. Gordon, *The International Monetary Fund & the Regulation of Offshore Centers*, REGULATORY COMPETITION & OFFSHORE FINANCIAL CENTERS (forthcoming).

38. Morriss, *supra* note 31.

39. See 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).

40. See Edward F. Greene, *Modernizing U.S. Regulation of Capital Markets*, in SEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE: A CONTRAST IN EU AND US PROVISIONS, 379-390 (Practicing Law Institute 2008).

41. Alex Barker, "Turks and Caicos premier hits out at UK moves," *Financial Times*, March 18, 2009 at al; M Rensselaer W. Lee III, *THE WHITE LABYRINTH: COCAINE AND POLITICAL POWER* 183 (Transaction Publishers)(1991).

42. Macey & Dionne, *supra* note 13.

43. Morriss, *supra* note 31.

## Confidentiality

Onshore governments regularly attack offshore governments for providing strong financial privacy laws. An attack on confidentiality is central to the proposed Stop Tax Haven Abuse Act in the United States, with the draft legislation including a series of presumptions to disadvantage those jurisdictions that fail to assist the United States in stopping tax avoidance as well as tax evasion.<sup>44</sup>

Does confidentiality undermine onshore efforts at regulation? Certainly the inability of onshore law enforcement or tax authorities to obtain comprehensive information on offshore financial activity means that money laundering and tax evasion are more likely to succeed than if onshore authorities had complete information. But success in law enforcement and tax collection are not the sole metrics by which policies must be evaluated. As Rose-Marie Antoine argues, “[t]hat confidentiality can sometimes be abused does not make confidentiality itself an abusive or illegitimate concept. Rather, we have accepted that in every financial endeavor and structure there will be weaknesses and what we need to do is to have checks and balances and avenues for redress.”<sup>45</sup>

Financial privacy is not something of interest only to OFCs or money launders. Confidentiality in financial matters is a well-established principle in both civil

and common law. For example, most common law OFCs trace their confidentiality laws to the landmark 1924 U.K. decision, *Tournier v. National Provincial Bank*<sup>46</sup> and confidentiality in commercial matters is the basis for the protection of trade secrets, a position that the United States (among others) has vigorously asserted.<sup>47</sup> Civil law jurisdictions have their own long history of respecting financial privacy.<sup>48</sup> Differences over confidentiality between onshore jurisdictions and OFCs thus reflect differences in emphasis, not differences in kind.

Further, financial confidentiality also protects opposition politicians from countries like Venezuela, Russia, and Zimbabwe, where governments have attempted to undercut domestic opponents by attacking their financial resources.<sup>49</sup> A significant problem with the attacks on confidentiality by the European Union and United States is that those attacks make it harder for jurisdictions to refuse requests for information from unsavory regimes.

Confidentiality is thus not an issue on which onshore governments can legitimately claim that other interests must yield to their interests in enforcing their tax laws. Rather it requires that jurisdictions negotiate accommodations to each others’ interests, with both OFCs and on-

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44. See note 9 *supra*.

45. Antoine, *supra* note 10.

46. *Tournier v. Nat’l Provincial Bank*, [1924] 1 K.B. 461.

47. Antoine, *supra* note 10.

48. Antoine, *supra* note 10.

49. Morriss, *supra* note 13.

shore jurisdictions treating each others' interests as deserving of respect.<sup>50</sup>

At the moment, the onshore assault on offshore jurisdictions' confidentiality laws is yielding some results, with Switzerland tentatively agreeing to breaches of bank secrecy that would have been previously unthinkable as a result of the UBS scandal.<sup>51</sup> And if the Stop Tax Haven Abuse Act becomes law in the United States in anything approximating its summer 2009 form, it will be virtually impossible for any jurisdiction to avoid a high degree of cooperation with the United States tax authorities to avoid the draconian presumptions the act will apply to non-cooperative jurisdictions.<sup>52</sup>

These changes are unlikely to have the effects their sponsors anticipate, however. Confidentiality was vital to the 1960s and 1970s business models of OFCs seeking individual wealth management business but is irrelevant to the 1990s and later business models built on aircraft financing, captive insurance, asset securitization, and hedge fund domicile.<sup>53</sup> Moreover, criminal enterprises

and tax cheats seeking to launder or conceal assets will need only to further develop their existing financial networks outside the formal financial system (e.g. the Black Market Peso Exchange) or pay the additional transactions costs of more complex financial structures to avoid triggering onshore regulatory attention.<sup>54</sup>

In sum, even if onshore pressure on OFCs over confidentiality laws is successful, it is not likely to yield significant differences in financial services activities because confidentiality is not an integral part of modern OFCs' business models.

## Tax Competition

Tax competition is often misleadingly described as a simple competition between high and low tax jurisdictions over rates applied to a single form of taxation. Rather, as Craig Boise has noted, different jurisdictions have different tax structures and those differences create opportunities for business structuring to reduce overall tax bills.<sup>55</sup> For example, the "zero tax" Cayman Islands indeed

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50. Antoine, *supra* note 10; Craig M. Boise, *Regulating Competition in Offshore Financial Centers* (Case Research Papers Series in Legal Studies, Paper No. 08-26, 2008), available at <http://ssrn.com/abstract=1266329>.

51. See Carrick Mollenkamp, et al., *UBS to Give 4,450 Names to U.S.: Tax-Evasion Pact May Disclose 10,000 Clients: Swiss Government*, WALL ST.J., Aug. 20, 2009, available at <http://online.wsj.com/article/SB125068571743342973.html>. Swiss law allows the major changes the United States is seeking be subject to referenda in the cantons and so any tentative agreement with the Swiss federal government may not survive that process. See COUNCIL OF EUROPE, TREATY MAKING – EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY 268-269 (2001). It is not clear, however, that reducing the scope of confidentiality provisions will actually produce a major increase in enforcement of onshore tax and regulatory laws.

52. See *supra* note 9.

53. Indeed, even by 1976 when the Cayman Islands created the Confidential Relationships (Protection) Act, making it a criminal offense to reveal confidential information, the Act's main purpose was to build confidence in the jurisdiction's reliability rather than to shelter dodgy money. See Morriss & Boise, *supra* note 34.

54. See James Sloan, *Black Market Peso Exchange Update*, 12 UNITED STATES DEPT. OF THE TREASURY, FinCEN Advisory, June 1999, available at [http://www.fincen.gov/news\\_room/rp/advisory/pdf/advis12.pdf](http://www.fincen.gov/news_room/rp/advisory/pdf/advis12.pdf).

55. Boise, *supra* note 50.

have no income tax but they have what is effectively a hefty sales tax (with rates approaching 50% on some goods).<sup>56</sup> Cayman also has significant property transfer taxes.<sup>57</sup> Cayman's tax structure is similar to that used by Texas, which also has no income tax and a predominately sales and property tax regime.<sup>58</sup> Not surprisingly, given onshore jurisdictions' hypocrisy on tax practices,<sup>59</sup> Cayman, but not Texas, is considered to be engaged in "unfair tax competition" and is the subject of pressure from onshore governments over its tax structure.

Differences in tax systems are inevitable because the purpose of tax rules differs among societies and because of path-dependent choices about definitions and concepts. As a result, businesses have an incentive to minimize their costs by structuring themselves to minimize the total cost of doing business (legal and accounting fees plus tax payments). Onshore governments can restrict such competition by erecting barriers that raise the cost of using OFC structures, but they do so at a cost to themselves. For example, Barbados has an extensive network of tax treaties that allow companies from high tax jurisdictions (e.g. Canada) to reduce their tax burden on international operations below the domestic level.<sup>60</sup> Opponents of tax competi-

tion typically portray this as a loss of tax revenue to the high tax domestic jurisdiction.<sup>61</sup> It is equally possible, however, to consider it as enabling the high tax jurisdiction to price discriminate in its taxation between international and domestic activity, applying a higher rate to domestic income than would be possible otherwise. For example, Canadian natural resource companies, among the world's leaders in their field, would find it difficult to compete internationally if they had to pay domestic Canadian tax rates on their non-Canadian operations.

Moreover, there are a number of areas where taxation is irrelevant to OFCs' business models. For example, the Cayman Islands are the domicile of the captive insurance companies of many U.S. non-profit health care providers, a group unconcerned with taxation of earnings. And many offshore captives opt to pay U.S. income taxes as if they were U.S. entities, again making tax issues irrelevant to the decision to locate offshore. Similarly, many investors in offshore hedge funds are nonprofit organizations, such as university endowments. For these investors, the tax exemption of an OFC-based hedge fund is not a means of avoiding U.S. income taxes. Finally, tax-related OFC structures often offer onshore jurisdictions considerable benefits. For

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56. The tax is collected as an import duty. Because the Islands import virtually everything and because virtually all imports come through a relatively easy to monitor port, the tax can be collected most efficiently as a duty rather than at the point of sale.

57. See Stamp Duty Rates, available at <http://www.tamarasiemens.com/stampduty.html>.

58. See Tax Foundation, *Texas*, available at <http://www.taxfoundation.org/research/topic/60.html>.

59. Boise, *supra* note 50.

60. See, e.g., Jamal Hejazi & Matthew Zadro, *Canada: Barbados International Business Corporations*, GOWLINGS, July 3, 2008, available at <http://www.mondaq.com/article.asp?articleid=62580>.

61. See, e.g., OXFAM, *TAX HAVENS: RELEASING THE HIDDEN BILLIONS FOR POVERTY ERADICATION* (2000).

example, the use of finance subsidiaries in the Netherlands Antilles in the 1970s and early 1980s saved U.S. corporate borrowers an estimated 2-3% interest because such subsidiaries allowed the U.S. parents to obtain financing in the cheaper Eurodollar market.<sup>62</sup>

Tax structuring undoubtedly plays a role in some aspects of modern OFC business models but it is less important than onshore governments appear to believe. As a result, onshore governments efforts to limit tax competition are likely to be at least partially counterproductive, since obstructing use of OFCs will deny the benefits of OFC structures to onshore jurisdictions' economies. To the extent that tax competition from OFCs does limit the upper level of tax rates an onshore jurisdiction can charge, an onshore jurisdiction wishing to charge more must simply find other margins on which to compete. New York and France are able to levy high taxes on entities operating within their boundaries despite tax competition from Texas and Ireland because the former two jurisdictions offer amenities and advantages not available in the latter two.<sup>63</sup> New York and France may not be able to accomplish all of their tax policy objectives, but their tax policies can hardly be said to have been completely frustrated by tax competition from lower tax jurisdictions within or without the United States and European Union.

### **Will Limiting Competition by OFCs Enhance Onshore Regulation?**

The short answer is "no." The significant OFCs like Bermuda, the Cayman Islands, the Channel Islands, Hong Kong and Singapore provide important competition for onshore jurisdictions. Rather than undermining onshore regulation, OFCs can play a constructive role in international finance for three reasons. First, OFCs offer onshore jurisdictions important advantages. OFCs provide a means of price-discrimination. Some economic activities sensitive to transactions costs, including tax rates, relocate to OFCs. But the profits from the OFC-located segment ultimately will be reinvested or spent in onshore jurisdictions, creating more economic activity onshore, because investment opportunities within OFCs are too small to absorb the capital created by the offshore sector. As the example of Canadian natural resource companies shows, allowing businesses to opt out of domestic tax regimes for their international businesses can have important benefits for both shareholders and businesses. As the nonprofit health care captive example shows, OFCs offer more ways to cut transactions costs than low taxes.

Second, the constraints imposed on well-run onshore economies by OFCs are relatively small and likely affect large economies like the United States and Eu-

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62. Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, \_\_ TEX. INT'L L. J. (forthcoming).

63. The mix of taxes charged by New York and France may be different than it would be in the absence of tax competition.

ropean Union only on the margin. For example, even assuming the worst case scenario, nominal U.S. corporate tax rates remain among the world's highest.<sup>64</sup> At most, OFCs offer some American businesses a chance to lower their tax rates in the same fashion as the complexities of the Internal Revenue Code do for others.<sup>65</sup> Confidentiality provisions are largely irrelevant to most business structures and virtually all OFCs already have tax information exchange agreements that permit transfer of information where there is specific evidence of criminal activity. Even the impact of legal innovations offshore is attenuated by the additional transactions costs of operating in multiple jurisdictions. It seems hard to credit onshore politicians' claims that there is a significant pool of unregulated and under-taxed funds to be recaptured

by new international financial regulations. Where OFCs likely have a larger impact is on smaller economies, where the ability to opt out of a corrupt or inefficient legal system is important to creating viable non-state sectors.<sup>66</sup>

Third, setting the "rules of the game" for international finance is properly the subject of multilateral negotiations among all affected jurisdictions. The domestic interests of any one sector, whether concerned with tax collections or securities regulation, cannot be the only concern. In their efforts to resist competition from OFCs, the United States and European Union risk damaging an international financial system that has served the world economy well since World War II. Rather than changing the rules, onshore jurisdictions should strive to compete more effectively on the merits.

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64. See Scott A. Hodge & Andre Dammert, *U.S. Lags While Competitors Accelerate Corporate Income Tax Reform* 184 TAX FOUND. (Aug. 2009), available at <http://www.taxfoundation.org/files/ff184.pdf>.

65. See Chye-Ching Huang, *Putting U.S. Corporate Taxes in Perspective*, CENTER ON BUDGET AND POLICY PRIORITIES, Oct. 27, 2008, available at <http://www.cbpp.org/cms/?fa=view&id=784>.

66. Morriss, *supra* note 13.

