



Guide to Executive Entities in The Bahamas

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Preface

Set out below is a summary of certain provisions of The Executive Entities Act, 2011 (the “Act”), which is a useful synopsis of the Act. This summary is by no means exhaustive and does not purport to contain all applicable qualifications and exceptions or to be a complete review of such matters.

The Executive Entities Act, 2011 (the “Act”) came into force on 1 February 2012 in The Bahamas. The Act was designed to facilitate the creation, operation, management and termination of a new private wealth structure, the Executive Entity (the “BEE”).

The Act is the result of a joint effort by a working group of the Bahamas Financial Services Board and Lawrence Graham LLP (“LG”), a London law firm, which saw the BEE as an innovative opportunity for private wealth structures.

What is the BEE?

The Act defines the BEE as “a legal person established by a Charter to perform only executive functions and registered in accordance with the Act” and is “able to sue and be sued in its own name”. The name of the BEE must end with the words “Executive Entity” or the abbreviation of such words to “EE” or “E.E” or a foreign language equivalent.

Executive Functions are defined in s. 2 as:

- any powers and duties of an executive, administrative, supervisory, fiduciary and office holding nature including, but not limited to, the powers and duties of -
 - (i) an enforcer, protector, trustee, investment advisor and the holder of any other office of any trust, and
 - (ii) the holder of any office of any legal person;
- the ownership, management and holding of
 - (i) executive entity assets; and
 - (ii) trust assets.

Purpose of the BEE

The BEE is to be used as a vehicle to carry out executive functions in private wealth structures provided that the Purpose and executive functions shall comply with any relevant regulatory law and the executive functions performed in relation to any entity, trust or other arrangements shall be limited to such entities, trust or other arrangements as are domiciled in or regulated by the laws of The Bahamas or a jurisdiction specified in the First Schedule to the Financial Transactions Reporting Act, 2000 (as amended from time to time) (for the list of jurisdictions see Appendix 1). With no particular or minimum capital requirement, the BEE is to hold only such assets as are required to carry out these functions (s.4).

Establishment of a BEE

In order to establish a BEE in The Bahamas there must be

(i) a Charter to which the Founder subscribes; (ii) registration with the Registrar General; and (iii) issuance of a Certificate of Registration, which is conclusive evidence that the BEE is capable of being and is duly registered under the Act.

The Charter (s. 7)

The Charter, which is to be in English, must be executed by the Founder in the presence of the Executive Entity Agent (the “Agent”) or another witness. It must also state:

- the name of the BEE;
- the name and address of the Founder; where the Founder is a legal person, the number and place of registration of that legal person and the address in The Bahamas for service of documents on the Founder;
- the Purpose;
- that the BEE is an “Executive Entity”;
- the number and description of the officers and, where no officer is appointed, a provision for the appointment of a council;
- the time period for which the BEE is established;
- the terms upon which the BEE shall be revoked or wound up and particulars as to the disposition of surplus BEE assets on dissolution;
- the name and address in The Bahamas of the Agent; and
- the address of the registered office in The Bahamas of the BEE.

Under section 7(2), the Charter makes provisions for all the rights and powers of the Entity inclusive of and without limitation the reservation of any rights or powers to the Founder, for the appointment, removal, period of office and the authority of officers/council to bind the Entity and the amendment of any provisions of the Charter/Articles.

The Articles (s. 8)

The Charter may provide that Articles be made. Such Articles are to be executed by the Founder.

Registration

In order to register a BEE, the following documents must be provided (s. 28):

- A statement and declaration:
 - a statement signed by the Agent or the counsel and attorney engaged in the formation of the BEE containing the following particulars which are taken from the Charter:

- (i) the name of the BEE;
- (ii) the date of the Charter and the date of any amendment made thereto prior to the submission of the statement to the Registrar;
- (iii) the Purpose;
- (iv) a statement that the BEE is an “Executive Entity”;
- (v) the date of the Articles (if any) and the date of any amendment made prior to the submission of the statement to the Registrar;
- (vi) the name and address of the Agent;
- (vii) the period for which the BEE is established; and
- (viii) such other particulars that the Agent or the counsel and attorney may deem fit their absolute discretion.

- a statutory declaration of compliance made by the Agent or counsel and attorney engaged in the formation of the BEE regarding all relevant requirements of this Act .

- a fee as prescribed in the Executive Entities Regulations, 2012 (the “Regulations”).
- The Charter and Articles may, but need not be, delivered to the Registrar, who shall retain them in the register upon payment of the prescribed fee.

Officers

An Officer may be a natural or legal person with the exception of an undischarged bankrupt, the mentally incapacitated and a convicted criminal (s. 11).

The Officer’s duty is to administer the BEE in the furtherance of its purpose. When carrying out its duties, the Officer must act honestly and in good faith with a view to the best interest of the BEE and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. An Officer is not to delegate any of his powers to another person unless otherwise provided in the Charter or Article (s. 12). In circumstances where you have both officers and council members, they can not exercise each others’ functions or duties.

The Agent

Before the BEE is registered, the Founder shall appoint an Executive Agent who must satisfy the following

requirements:

- duly licensed as a provider of financial and corporate services under the Financial and Corporate Services Providers Act or as a trust company under the Banks and Trust Companies Regulation Act; and
- has by himself, or by his agent authorized in writing, signed and delivered to the Founder (before the Executive Entity is registered) or to the Executive Entity (after the Executive Entity is registered) a consent in writing to as the Executive Entity Agent.

Such appointment is personal and their statutory powers may not be delegated to any other person (s. 13).

Secretary

The appointment of a Secretary is optional under the Act. As an officer, the Secretary is restricted to carrying out the usual secretarial duties and shall not carry out any of the statutory duties assigned to the Agent (s. 15).

Executive Entity Council (the “Council”)

Where the Charter does not provide for the appointment of officers, it may provide for the appointment of a Council. The Council through its Council Members ensures that the BEE and the Officers comply with the provisions of the Charter, Articles and the Act, supervise the administration of the BEE and ensure that the Officers comply with the instructions of the Council (s. 18). The Council has the power to access the books, records and accounts of the BEE. It has the further right to:

- be informed of all meeting of the Officers;
- attend and be heard but not to vote at meetings;
- be included in the circulation of the Executive Entity’s business documents when they are circulated to the Officers;
- be informed of any delegation of powers to Officers; and
- appoint an auditor.

Any individual or legal person may be appointed a Council Member unless they are bankrupt, mentally incapacitated, a convicted criminal, dissolved or otherwise ceases to exist. Any liability to the BEE which a Council Member may have incurred in such capacity shall continue to be a liability enforceable against him by the BEE even once that person ceases to be a Council Member (s. 17).

Registered Office

The BEE must have a registered office in The Bahamas

which will serve as the address of the BEE to which all communications and notices shall be sent (s. 16).

Capacity

The validity of an act done by the BEE or of a disposition of assets to or by a BEE cannot be challenged on the grounds that the BEE did not have the requisite capacity to do such things. However, a Founder, Officer or Council Member may bring proceedings against the BEE to prevent an act or disposition on the basis of lack of capacity. The BEE or a person representing or acting on its behalf may also bring proceedings against the incumbent or former Officers, Council or Agent for loss or damage through their unauthorized act (s. 33).

Meetings

The BEE is required to hold at least one meeting of the Officers each year (the “Annual Meeting”) (s. 37). Written notice of seven days must be given to all Officers of the Annual Meeting and minutes of the Annual Meeting shall be kept.

Financial Records

The Act requires the BEE to keep sufficient financial statements, accounts and records at the registered office so as to correctly explain all financial transactions, accurately determine the financial position of the BEE and allow financial statements to be prepared (s. 43).

Seal

A BEE may, but is not required to have a seal for use in The Bahamas (s. 35). If the BEE has a seal, it must be affixed in the presence of and witnessed by an Officer or Council Member of the BEE.

Confidentiality

The Charter and Articles of a BEE need not be filed and are not of public record, therefore, the name of the Founder need not be disclosed.

Forced Heirship

The Act (s. 63) contains similar provisions to those in the Trusts (Choice of Governing Law) Act, with respect to the non-recognition and enforcement of forced heirship claims.

Life of a BEE

A BEE may be established for an indefinite or definite period of time.

Indemnification

Each Officer, Council Member and Agent shall be

indemnified against all expenses and liabilities incurred in connection with the carrying out of their duties subject to their acting honestly and in good faith with a view to the best interest of the BEE. The amount required for the indemnification attaches as a lien on the assets of the BEE which have priority over any claims of the BEE (s. 21).

Certificate of Good Standing

A Certificate of Good Standing (the “Certificate”) can be obtained from the Registrar to certify that a BEE is (i) on the register; (ii) has paid all applicable fees; and (iii) has complied with all notices of the Registrar and any orders of the Court. The Certificate would also indicate whether or not the BEE is in the process of being liquidated or removed from the register (s. 60).

Removal and Restoration to the Register

Where the Registrar has reasonable cause to believe that a BEE no longer satisfies the requirements set out in s. 5 (2) and s. 13, the Registrar shall serve on the BEE a notice that the name of the BEE may be removed from the register. The Act then prescribes a procedure which allows the BEE to respond to the notice. Failing a satisfactory reply, the Registrar will remove the name of the BEE from the register (s. 50). There is also a process for restoration (s. 51).

Exemptions

Entities are not subject to any business licence fee (unless carrying on business in The Bahamas), income tax, capital gains tax or any tax on income or distributions accruing to or derived from the BEE or in connection with any transaction to which the BEE is a party.

Penalties

An Officer, Council Member, Agent or Auditor shall be guilty of an offence punishable on summary conviction by a fine of \$10,000 or imprisonment for two years or both if he knowingly and with intent to deceive:

- falsely represents the financial position of the BEE to any person;
- withholds information relating to the financial position of the BEE or any other matter regulated by this Act from any person entitled to receive that information; or
- falsifies any document to be delivered to the Registrar under the Act; or required by the Act to be prepared in respect of the BEE (s. 66).

Uses

The BEE fills the “missing link” in structuring. It is the perfect option to ensure that procedures and mechanisms are put in place for effective and efficient administration of wealth preservation structures. High net worth individuals have an enhanced ability to include trusted family members, advisers or friends in the administration and management of their wealth who would discharge their functions in accordance with the Charter and or Articles of the BEE. It is anticipated that the involvement of such persons could minimize family conflicts.

The BEE is a separate legal entity which enjoys the protection and benefits of limited liability. Since higher or lower standards of care or levels of exoneration and indemnification may be prescribed in the Charter of the BEE, a Founder can tailor the operation of the BEE to function in accordance with his or her wishes and for example can take into account his or her own concerns such as the make up of the family and the nature of the assets involved. Individuals who comprise the governing bodies may be more inclined to take on such roles given

the limited liability status of the BEE and the possibility of a level of risk which will probably be more palatable than other more traditional choices.

Many other structures presently in use, for example trusts, purpose trusts and companies limited by guarantee, require beneficiaries, enforcers or members. However, such considerations do not arise in a BEE since it has a separate legal existence and has no “ownership” interests. It is ideal as an “orphan” structure.

In addition, the fact that the BEE has no shareholders, allows for privacy and continuity of ownership. The fact that the BEE can have limited or perpetual existence gives additional flexibility to planners..

Finally, a BEE is very cost effective and easy to operate; there is a requirement for annual meetings of the officers and council (if any) but no requirement to make annual filings at the registry.

APPENDIX 1

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|-----------------|----------------|
| Australia | Isle of Man |
| Barbados | Italy |
| Belgium | Japan |
| Bermuda | Liechtenstein |
| Brazil | Luxembourg |
| Canada | Malta |
| Cayman Islands | Netherlands |
| Channel Islands | New Zealand |
| Denmark | Norway |
| Finland | Panama |
| France | Portugal |
| Germany | Singapore |
| Gibraltar | Spain |
| Greece | Sweden |
| Hong Kong SAR | Switzerland |
| Ireland | United Kingdom |
| | United States |