

ANNUAL CLIENT SEMINAR IN THE BAHAMAS

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HIGGS & JOHNSON hosted its annual client seminar under the theme '*Changing Times: Ensuring Success in a New Era*'. Welcome remarks were given by Oscar N. Johnson, Jr., Managing Partner of the firm. The Rt. Hon. Perry G. Christie, Prime Minister, then gave a speech emphasizing what is needed for ensuring success of the financial services industry and outlined new legislation which will allow The Bahamas to meet the needs of its clients.

The first session, '*Requests for Financial Information: Appropriate Responses*' was presented by **Tara Cooper Burnside**, Partner at the firm. She provided insights with regard to suitable responses to different types of request for financial information typically received by clients. She also discussed protective provisions in current legislation for financial institutions which have to disclose information.

Higgs & Johnson's Senior Partner, **Philip C. Dunkley, QC**, spoke on the topic '*Asset Recovery from Complex Trust Structures*'. He discussed the use of trusts and vehicles by fraudsters and explained how trusts are broken down to enable asset recovery. He indicated the jurisdictional barriers and challenges faced and provided practical considerations that should be taken into account by practitioners.

Associate, **Dwana Davis-Imhoff**, elaborated on the topic '*Decoding "Dishonest" Investment Directions: Interpreting the Meaning through Case Studies*'. She explained the difference between 'dishonesty' and 'fraud' as set out by the Trustee Act and provided

examples of dishonesty. She also analyzed a case study showing how to identify a dishonest investment direction.

Jillian Chase-Jones, Senior Associate, discussed '*The Best of the BEE: Its Uses and Advantages*'. She gave an overview of the new financial services structure the 'Executive Entity' also known as the BEE. She illustrated practical applications of the BEE, highlighted its flexibility and a variety of advantages and benefits to clients.

The seminar concluded with a panel discussion on '*Increasing Transparency and Information Exchange – What Does This Mean for the Future of Financial Services in International Financial Centres*.' The moderator for this segment was **Heather L. Thompson**, Partner at Higgs and Johnson. Panelists were James Smith CBE, JP – Chairman of Colina Financial Advisors Limited; Mark Scheer – Shareholder of Gunster Law firm in Miami; and **Tom Mylott** – Senior Associate in the Cayman Islands office. The panelists answered a number of questions posed by the moderator pertaining to a multitude of international and inter-governmental initiatives. The panelists exchanged ideas and discussed experiences garnered in their respective jurisdictions.

In its ongoing effort to promote education in The Bahamas, the firm sponsored the attendance of faculty and students of both the College of The Bahamas Law Degree program and the Eugene Dupuch Law School.

Sponsors of the seminar included H&J Corporate Services Ltd. and First Bahamas Title Insurance Agency.

The information contained in this newsletter is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This newsletter can in no way serve as a substitute in such cases.

For additional copies of FOCUS, please contact Antonia Burrows at 242 502 5200 or at aburrows@higgsjohnson.com.



THE BEST OF THE 'BEE' - ITS USES AND ADVANTAGES

Jillian Chase-Jones

The BEE has limited liability, no share capital, no beneficiaries, no minimum asset requirement, and no annual filing requirements.

In exploring the uses and advantages of the Bahamian Executive Entity (the "BEE"), it is important to have an understanding of what the BEE is. The BEE has often been compared to trusts, foundations and companies. While the BEE may have common and similar traits to any one of those vehicles, it should not be mistaken for or confused with any of them. In very simple terms, the BEE is an administratively and structurally simplified vehicle created to perform an executive, administrative, fiduciary or shareholder function; either as a stand-alone vehicle or as part of a structure.

Background

The concept of the BEE arose out of a search by a legal advisor to an international family for the ideal vehicle to hold the shares of a private trust company and/or to act as protector of a trust. After much discussion with Lawrence Graham LLP and a working group of the Bahamas Financial Services Board, it was decided that rather than amending legislation relating to existing vehicles an additional structure was necessary for The Bahamas' wealth planning toolkit; hence the enactment of the Executive Entities Act, which came into force on 1st February, 2012, and the accompanying Regulations, which came into force on 2nd February, 2012.

Key Characteristics

The defining or key characteristics of the BEE are:

- it has no shareholders;
- it is a legal and registered entity – so it is capable of suing and being sued

in its own name;

- it is created to act in a specific executive, administrative, fiduciary or shareholding role; and
- it is only permitted to hold assets allowing it to carry out the function for which it has been established or trust assets.

The BEE has limited liability, no share capital, no beneficiaries, no minimum asset requirement, and no annual filing requirements. It affords continuity since it can be established for a definite or indefinite period. Confidentiality is also provided as the names of the Founder and the Executive Entity Council are not publicly filed. The BEE also has simplicity of management and flexibility.

Key Positions of the BEE

The key positions of the BEE are:

- founder (the person signing the Charter which establishes the BEE);
- executive entity agent (must be a Bahamas based service provider, which would also provide the registered office of the BEE – this is the only Bahamian requirement);
- executive entity officer (who would perform the day-to-day administrative tasks of the BEE);
- executive entity council (this is the Governing Body of the BEE); and
- executive entity secretary.

While the Act speaks about the BEE having Officers and Council Members, it is not mandatory for the BEE to have both. If the BEE has only Officers or only Council

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Members, whichever office is appointed will perform the duties of both. Where a BEE has appointed both Officers and Council Members, it should be noted that an Officer cannot be appointed to serve as a Council Member or perform those duties simultaneously.

Documentation for a BEE

The Charter is the main governing document of the BEE which can be as simple or complex as needed. The Act specifies what information the Charter must or may contain. The mandatory items are:

- the name of the BEE;
- the name along with an address of the Founder and, if a legal person, the number and place of registration of such legal person and an address in The Bahamas for service of documents on the Founder;
- the purpose of the BEE;
- that the BEE is an executive entity;
- the number and description of Officers and where no Officer is appointed, the Charter must include provisions for the appointment of an Executive Entity Council;
- whether the BEE has been established for an indefinite or definite period and if definite, that period;
- the event or happening upon which the BEE will be revoked or wound up; and
- the name and address in The Bahamas of the Executive Entity Agent and the address of the registered office in The Bahamas of the BEE.

The Articles are designed to work along with the Charter and would typically

include additional governance provisions. In some circumstances, it might be desirable for the Charter to be filed with the Registrar General, making it a public document. In that circumstance it might be useful to have Articles which would contain the more substantial governing provisions of the BEE and any other information which the Founder would prefer to be kept confidential.

Registration of the BEE

The following three items must be provided upon registration of a BEE:

- a registration statement of the BEE – this provides a summary of the BEE and only lists the name, purpose, officers and the name and address of the Executive Entity Agent;
- a statutory declaration of compliance; and
- the prescribed fee – which is \$550 per annum charged on a quarterly pro-rata basis depending on the date of registration. The annual fee for the BEE is \$500 provided that the same is paid before 30th April.

The registration statement and the statutory declaration can be signed by either the Executive Entity Agent or the attorney engaged in the formation of the BEE. There is no statutory requirement to list the names of the Founder or Executive Entity Council, thereby preserving confidentiality.

Advantages of the BEE

The BEE fills the gap which was previously identified in the Bahamas' wealth planning toolkit. It has limited liability which is attractive to office holders. It also offers considerable privacy and provides a perpetual existence.

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Practical Uses of the BEE

The BEE as Protector/Protector Committee

It has become the norm for a settlor, when establishing his trust, to name a close friend or family member as protector of the trust and to give such person a great deal of power in relation to the trust and its assets. An alternative is to establish a BEE. This will afford the protector limited liability since he would be acting not in his personal capacity but rather in the name of the Executive Entity.

Similarly, if the trust calls for a protector committee, it may be possible for the intended committee members to constitute the Executive Entity Council of the BEE. The use of a BEE would not only afford the protector committee limited liability but issues of continuity in membership of the protector committee would also be avoided. The Charter could speak to appointments of new Executive Entity Council members to replace those who might be disabled, deceased or who

wish to retire for some other reason. Additionally, for the purposes of the trust instrument, while the composition of the Executive Entity Council will change, the BEE itself will always be the named protector committee.

Shareholder of a Company

By using a BEE as the shareholder of a Company, issues of continuity would be addressed since there would be no need to transfer shares to beneficiaries upon the death of the original holder of such shares. The Charter would stipulate the treatment of dividends. In essence, the BEE would act as a conduit between the Company and the ultimate beneficial owner.

Conclusion

In summary, the BEE has been designed as an administratively and structurally simplified vehicle aimed at performing a specific function and should be embraced as a welcome addition to the Bahamas' wealth planning tool kit.

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Jillian T Chase-Jones is a Senior Associate in the Firm's Private Clients and Wealth Management practice group and has experience in international trust and company administration, estate planning, probate, immigration and real estate matters.



INCREASING TRANSPARENCY AND INFORMATION EXCHANGE

Ja'Ann M. Major

The Higgs & Johnson Annual Client Seminar 2012, concluded with a break out session on the topic *"Increasing Transparency & Information Exchange - What does this mean for the future of financial services in international financial centres?"* Given the multitude of international and inter-governmental initiatives, this question is the hot topic of the year. Panelists were James Smith, CBE., J.P. of CFAL, Bahamas, Attorney

Mark Sheer of Gunster Law Firm of Miami, Florida and Higgs & Johnson Senior Associate, Tom Mylott (TM); Higgs & Johnson Partner Heather L. Thompson served as the moderator for the session.

The initial questions for discussion were (i) whether a small International Financial Centre (SIFC) can adopt its own strategy ignoring international and intergovernmental exchange of information treaties and arrangements

Mr. Scheer expressed the view that under the provisions of FATCA, any U.S. person who holds an interest in any foreign financial assets (which include foreign financial accounts) must disclose these assets to the U.S. government.

and (ii) whether independent countries are in a better position than non-independent countries to navigate these straits. There was a consensus between Mr. Smith and Mr. Mylott that while it is not impossible for a SIFC to adopt its own strategy, it would not be able to entirely ignore what is happening in the international community. Mr. Sheer added that the suggestion would be somewhat of a practical impossibility as many financial institutions span several jurisdictions. As to the question whether independent countries are in a better position than non-independent countries, the panelists agreed that there are “up sides” and “down sides” to both in that there are some policies of non-independent countries which independent countries may find useful and vice versa.

The panelists expressed their views on whether automatic information exchange was inevitable. Mr. Sheer considered that it was. Mr. Smith however indicated that while automatic information exchange may well occur, the degree of the exchange would vary among different jurisdictions. In his contribution on the question, Mr. Mylott compared the Swiss model to the United States’ Foreign Account Tax Compliance Act (FATCA). Switzerland recently entered into withholding tax agreements with the governments of the UK and Austria allowing for the collection of past and unpaid taxes on undeclared assets and taxes on future earnings. By virtue of these withholding tax agreements the British and Austrian governments would be able to collect taxes owed to them while Switzerland would be able to retain its banking secrecy and privacy laws. The agreements would also preserve the anonymity of Switzerland’s foreign account holders. The Swiss model would

guarantee a significant amount of revenue but there will be no details on the particulars of the bank accounts. Mr. Scheer expressed the view that under the provisions of FATCA, any U.S. person who holds an interest in any foreign financial assets (which include foreign financial accounts) must disclose these assets to the U.S. government. Beginning in 2014, FATCA will mandate that all foreign financial institutions enter into an agreement with the U.S. Treasury Department to report information about its U.S. account holders (including names, account numbers and account balances) each year. Where a country has privacy or secrecy laws, any U.S. account holder should be asked to waive their rights under the privacy or secrecy rules so that their information can be reported to the U.S. Government. Should that U.S. client refuse to waive their rights, that client’s bank account should be closed. Mr. Sheer expressed doubt that the U.S. would ever adopt the Swiss approach since it flies in the face of what FATCA is aiming at and that is, obtaining details of foreign bank accounts.

Will SIFCs be able to implement automatic information exchange?

In responding to the question Mr. Sheer expressed the view that change must come from the financial institution rather than by government implementing a policy. Mr. Mylott disagreed since in his view it would be risky for a financial institution to comply with the FATCA rules for automatic information exchange without the involvement of the government. Mr. Smith expressed his concerns about SIFCs implementing automatic information exchange as countries have different confidentiality rules some of which may prohibit the automatic information exchange

For The Bahamas, Mr. Smith recommended that the government consider revising The Bahamas' existing TIEAs with other countries so that it obtains tangible benefits before completely changing its mode of taxation.

anticipated under FATCA. Before a SIFC is able to implement automatic information exchange, there must be legislation which clearly specifies the consequences of breaching the country's confidentiality rules.

Recommendation

Given the implications of automatic information exchange and the possibility of the SIFC model of taxation changing as

a result, panelists were of the view that financial institutions and governments should not commit to automatic information exchange until it becomes a global standard. For The Bahamas, Mr. Smith recommended that the government consider revising The Bahamas' existing Tax Information Exchange Agreements with other countries so that it obtains tangible benefits before completely changing its mode of taxation.

Ja'Ann M. Major, Associate in the Ocean Centre office, is a member of a number of practice groups including the Real Estate and Conveyancing, Commercial Law, Probate & Estate Administration and Maritime Law.

FIRM WELCOMES NEWEST PARTNER, PORTIA J. NICHOLSON, IN THE BAHAMAS



Based in our Ocean Centre office in Nassau, Ms. Nicholson is a member of the firm's commercial Transactions; Financial Services; Securities; Insolvency and Corporate Restructuring; and Intellectual Property practice groups. She has extensive experience as a Corporate and Commercial lawyer in Jamaica and The Bahamas having served as in-house counsel and as a private practitioner.

Ms. Nicholson obtained an LLB degree from the University of the West Indies, a Certificate of Legal Education from the Norman Manley Law School and a MBA from Nova Southeastern University. She has also obtained executive training at the Harvard Business School.

Since joining Higgs & Johnson in 2005, Ms. Nicholson has been a key advisor with respect to many significant cross border and local transactions, infrastructure projects and Initial Public Offerings.

PARTNERS RECEIVE 'ACCREDITED MEDIATOR' CERTIFICATION



Philip S. Boni, Head of Litigation, Cayman Islands



N. Leroy Smith, Lyford Cay Office, The Bahamas

Philip S. Boni (top) and N. Leroy Smith (bottom), have been accredited by the London School of Mediation as a Civil and Commercial Mediator, having satisfied the requirements of the United Kingdom Civil Mediation Council and the National Mediator Database.

Mr. Boni's primary area of concentration is Civil Litigation and he has been involved in a number of reported cases in the Cayman Islands in areas including trusts, commercial disputes, banking and confidentiality matters and family law. In 2006, he received a certificate of Accredited Mediator Training from ADR Chambers (UK) Limited.

Mr. Smith is a practitioner in the firm's Litigation practice group and has had a particular focus on all facets of trust law, worked in contentious and non-contentious commercial matters, as well as telecommunications law and maritime law.

He also regularly counsels a number of local and international companies and insurers in relation to personal injury, defamation and other tort-based claims.

Mr. Boni noted, "We are in a time of change when the traditional methods of dispute resolution are perceived by many as no longer serving the needs of the community. We look forward to assisting in that change by mediating disputes as a neutral third party searching for common ground involving empathy rather than acrimony to assist participants to reach a successful outcome."

BREAST CANCER AWARENESS SUPPORTED IN THE BAHAMAS AND CAYMAN ISLANDS



Higgs & Johnson continued its support of The Lee Denim Day (Bahamas, top photo) and the Lions Dress Down/Dress Pink Day (Cayman Islands, bottom photo). Both initiatives continue to be among the largest single-day fundraisers for breast cancer awareness in the respective jurisdictions, providing assistance in raising well-needed funds for the fight against breast cancer and evoking nationwide support.



The firm relaxed its dress code at all of its offices and encouraged members and staff to participate in the awareness and fundraising initiatives. The annual Lee National Denim Day was organized in conjunction with the Cancer Society of The Bahamas. The Lions Club of Tropical Gardens' also provided lapel pins, bracelets and other breast cancer awareness items for purchase to support the Lions Club's various activities which included providing mammograms, support, education and financial assistance.

H&J's 'EXCELLENCE IN TEACHING' AWARD



Higgs & Johnson has been the corporate sponsor of the national *H&J Excellence in Teaching Award* for the last sixteen years in its ongoing effort to recognize teachers for their outstanding contributions in the field of education.

The award, presented this year to winner Nadia Smith, Art teacher at C.C. Sweeting Secondary School, is a cash prize that rewards educators who exemplify excellence in the teaching profession and leadership development.

During the presentation, Ms. Smith talked about the grueling nature of aspects of the competition and how honoured she feels to have won. Her supervisor, Ms. Sainville as well as the principal Ms. Young, sung her praises continuously and both noted how proud they are to have been able to mentor such a young and talented teacher.

In presenting this award, Partner, Vann P. Gaitor, who is also a former teacher himself commented, "Higgs & Johnson will continue to be an advocate of good quality education and as such we understand the importance of supporting and applauding the noteworthy efforts of teachers such as Ms. Smith which have brought her this recognition. We are proud advocates of the National Teacher of the Year Programme and delighted to recognize excellence in teaching through the *H&J Excellence in Teaching Award*".

H&J's CLIENT SEMINAR SCENES ~ 2012

A) Oscar N. Johnson, Jr. gives welcome remarks.



B) The Rt. Hon. Perry G. Christie gives opening remarks.



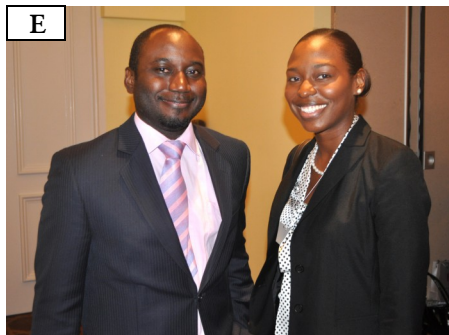
C) Philip C. Dunkley, QC (left) with invited panelist Mark Scheer during the cocktail reception.



D) Tom Mylott (center) with seminar attendees.



E) Jillian Chase-Jones with seminar attendee during the cocktail reception.



F) Oscar N. Johnson, Jr. (center) with attendees during the coffee break.



G) Heather L. Thompson poses a question to the panelists.



H) Tara Cooper Burnside (right) with client during the break.

