H&J FOCUS

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FOCUS

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REGULATION & LICENSING: THE COMMUNICATIONS ACT, 2009

By: K. Kelly Nottage

On the 1st September, 2009 the Communications Act, 2009 (the "Act") came into force in The Bahamas and established a new regime consolidating the regulation and licensing functions previously governed by the Telecommunications Act, 2000 and the Broadcasting Act, 1956.

Regulatory Function

The Act is the central piece of three new pieces of legislation introduced by the Government of the The Bahamas in 2009 to govern the licensing and regulation of communications networks and services in The Bahamas. The other pieces to this regulatory puzzle are the Utilities Regulation and Competition Authority Act, 2009 which establishes the Utilities Regulation and Competition Authority ("URCA"), the body empowered by sections 7 and 8 of the Act to regulate communication networks and services, and the Utilities Appeals Tribunals Act, 2009 which establishes a Tribunal with exclusive jurisdiction to hear and determine all matters and disputes referred to it and relating to law regulated by URCA .

URCA

Section 8 of the Act imbues URCA with a wide ambit of general regulatory powers to regulate the communications sector. Such powers include, but are not limited to, a power to impose conditions and penalties by order; issue regulations; issue technical rules and standards; issue, suspend, vary, or revoke licenses, permits and exemptions; and a power to conduct inquiries, investigations and oral hearings. In addition to these powers, URCA also has a duty, imposed on it by section 11 of the Act, to consult with persons whose rights or interests may be adversely affected or prejudiced by proposed regulatory measures. The result of this duty is that prior to issuing any technical rules and standards, URCA is under a duty to consult with those whom such regulations adversely affect and to exhibit that they have given consideration to their views.

Scope of Regulation

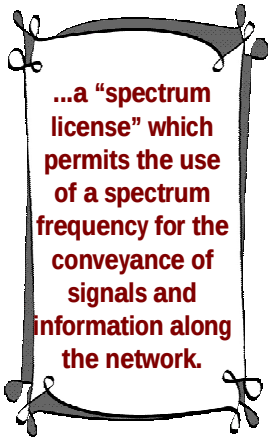
The scope of regulation under the Act is vast. In addition to regulating the use of radio spectrums and the operation of communication networks, the Act by virtue of section 45 and section 65 respectively provides URCA with regulatory responsibility for the creation and governance of consumer protection rules and regulations as well as regulations governing competition in the marketplace. Section 52 of the Act provides URCA with further general powers to regulate and issue codes of practice in relation to content transmitted over the communication networks. Such content includes, but is not limited to: political broadcasts, sports and national events broadcasting and national emergency and disaster conditions. While URCA has a wide array of regulatory powers, perhaps one of the most important features of the Act is the introduction of a new licensing regime.

Licensing

What services require a license?

Under section 16 of the Act, URCA has the responsibility and power to license the establishment, maintenance, and operation of a network or the provision of carriage service, including the use of any radio spectrum. Section 2 of the Act defines "carriage service" as "any service consisting in whole or in part of the conveyance of signals by means of a network,

Communications Act, 2009 continued



except in so far as it is a content service, including the provision of ancillary services to the conveyance of signals and conditional access or other other related services to enable a customer to access a content service." "Content service" means a service either for the provision of material with a view to its being comprised in signals conveyed by means of a network or that is an audiovisual service. Likewise "network" is, in summary, a transmission system for the conveyance of signals. Such system includes all associated apparatus, equipment, facilities and software. Examples of activities caught by section 16 of the Act, and therefore requiring a license, are the occupation and transmission of a radio signal, the operation and provision of a cable television network and the provision of mobile cellular services.

Types of Licenses

There are two categories of licenses URCA are capable of issuing under the Act. The first is an "operating license" which authorises the licensee to operate a communication network or service. The second is a "spectrum license" which permits the use of a spectrum frequency for the conveyance of signals and information along the network. Obtaining a spectrum license does not automatically permit a licensee to operate a network and, as such, there are some licensees, such as the operator of a radio station or a mobile phone service, who will require both a spectrum license and an operating license.

Individual Licenses

Within the categories of "operating license" and "spectrum license", the Act provides for the issuance of, primarily, two types of license. Pursuant to sections 19 and 20 of the Act, the first are termed "individual licenses". According to Guidelines issued by URCA on the 1st September, 2009 (EC – 15/2009) the individual licenses are issued where it may be necessary to set specific conditions on a licensee and where the activity to be licensed requires a greater degree of regulatory intervention or monitoring. Such a license may also be appropriate for a licensee who has been granted exclusive rights, such as exclusive use of a radio spectrum.

Class Licenses

A second type of license that may be issued by URCA is the class license. These licenses are issued with standard conditions to which all licensees are subject. Class licenses may either be registered or non-registered. Pursuant to sections 22 and 23 of the Act URCA may determine the conditions of such licenses and, as relates to a registrable class license, no person may operate a communication network or utilize a spectrum without first registering with URCA. At the date of publishing this article, URCA has released registration guidelines for two registrable class licenses: one spectrum license and one operating license. Under a non-registered class license any person may operate a network under the license without having to make an application to URCA. To date, URCA has issued one non – registered class spectrum license which denotes exclusive radio frequencies for aviation and marine activity and one non-registered operation class license which provides for operation of a personal network for non-commercial use.

Further Information

The Act confers a vast range of regulatory powers upon URCA and, since its inception, URCA has been busy consulting with the public and drafting guidelines and regulations under the powers conferred by the Act. Further information on URCA, its consultation process and the licensing process under the Act can be obtained from URCA's website at: http://www.urcabahamas.bs

K. Kelly Nottage is an associate in the Nassau office of the firm and is a member of the Litigation, Intellectual Property, and Commercial practice groups.

CAYMAN ISLANDS EXEMPTED COMPANIES TAX EXEMPTION CERTIFICATES

By: Chris Narborough

An exempted company is broadly similar to an "international business company" or "IBC", which can be formed in The Bahamas and other jurisdictions.

Incorporation of a Cayman Islands exempted company can be completed rapidly after the Cayman office of Higgs & Johnson receives detailed instructions, funds for incorporation and appropriate due diligence on the relevant parties. An exempted company is broadly similar to an "international business company" or "IBC", which can be formed in The Bahamas and other jurisdictions.

An exempted company may be granted a twenty year guarantee by the Cayman Islands Government that it will not be subjected to taxation in the Cayman Islands, by the issue of a Tax Exemption Certificate ("TEC"). Although the Cayman Islands does not currently have taxes on income, capital, capital gains or sales, clients should consider the potential value to them of being in possession of a TEC in the event that such taxes are ever introduced in the future in the Cayman Islands. Each and every exempted company is entitled to apply for, and can routinely expect to be issued with a TEC.

As part of a series of revenue enhancing measures, the Cayman Islands' Government recently increased the fee payable for the issue of a 20-year TEC. TECs will now cost just over US$1,800, up from US$610, a one-time fee.

The value to a client of a TEC will of course depend very much on the level of net annual income that a client's exempted company produces and in many situations that number may dwarf the fee increase making TECs still very attractively priced to some clients. For others, they should note that it is NOT mandatory for an exempted company to apply for a TEC.

We recommend that clients obtain fiscal and legal advice from experts in their own country in relation to what clients wish to achieve by using a Cayman Islands exempted company.

Clients wishing to take further advice from Higgs & Johnson in relation to TECs or any other Cayman corporate law issues should contact one of our corporate attorneys at the Cayman office by emailing cayman@higgsjohnson.com.

Chris Narborough, Partner of the firm in the Cayman office, practices all aspects of offshore legal business including General Company and Commercial law, Banking, Insurance and Trusts.

TARA COOPER - BURNSIDE JOINS FIRM'S PARTNERSHIP

Higgs & Johnson is pleased to welcome its newest Partner to the firm, Ms. Tara Cooper Burnside. She joined the firm in 2005 as an Associate and is a member of the firm's Litigation, Financial Services Law & Regulation and Insolvency & Restructuring Groups.

Tara provides advice on a wide scope of insolvency, multi-jurisdictional commercial, employment and transactional matters. Her financial services regulation practice covers the range of transactional, regulatory and compliance issues that financial institutions confront on a daily basis. Further, Tara's litigation practice includes complex commercial disputes and contentious insolvency matters such as director misfeasance actions and fraudulent preference claims.

US LAW: PROPOSED DEVELOPMENTS TO AFFECT FOREIGN FINANCIAL INSTITUTIONS

By: Iyandra P. Smith

Proposed US legislation will require foreign financial institutions to enter into agreements with the IRS to avoid 30% withholding tax on all US-sourced income and capital payments.

Overview

On 9th December, 2009, the House of Representatives (United States) passed the "Tax Extenders Act of 2009" ("TEA"). The Senate is currently reviewing the contents therein. The TEA reintroduces the Foreign Account Tax Compliance Act of 2009 ("FATCA") with certain specified amendments. The purpose of the TEA is to prevent the avoidance of tax on income and proceeds from assets held abroad by United States' ("US") citizens or residents. The TEA was designed to provide greater disclosure to the Internal Revenue Service ("IRS") by foreign financial institutions in respect of assets held by them on behalf of US persons. The US Government has concluded that many US individuals looking to evade their tax obligations in the US have sought to hide income and assets from the IRS by opening secret foreign bank accounts with foreign financial institutions.

The U.S. Government has concluded that many US individuals looking to evade their tax obligations in the US have sought to hide income and assets from the IRS by opening secret foreign bank accounts with foreign financial institutions.

Because many of the foreign financial institutions that hold accounts on behalf of US persons are outside the reach of US law, US legislators have determined that the appropriate solution is to impose taxes on foreign financial institutions, many of which have substantial investments in US financial assets or hold substantial US financial assets for the account of others. It is an extremely important bill and if passed by the US Senate will change the way trust and financial services providers in The Bahamas conduct business in the future.

Withholding Taxes to Enforce Reporting

The TEA intends to achieve its primary objective by imposing a 30% withholding tax on withholdable payments made to a non-US institution. For such purposes, withholdable payments are defined as (1) any gross proceeds from the sale or other disposition of any property of the type which can produce interest or dividends from sources within the US, and (2) any US source payment of interest (including original issue discount and portfolio interest), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, emoluments and other fixed or determinable annual or periodical gains, profits and income, if such payment is from sources within the US.

Information Reporting Regime for Certain Payments to Foreign Financial Institutions

The TEA would create a new reporting regime that effectively requires full disclosure, by the foreign financial institution, of a US person's account maintained at that foreign financial institution. The term "foreign financial institution" is defined broadly to include any non-US institution that: (1) accepts deposits in the ordinary course of a banking or similar business, (2) is engaged in the business of holding financial assets for the account of others, or (3) is engaged (or holding itself out to be engaged) primarily in the business of investing, reinvesting or trading in certain securities, partnership interests or certain commodities or any interest.

Note that the proposed new reporting regime will be in addition to the current withholding tax regime applicable to US source income paid to non-US persons and the qualified intermediary program. The qualified intermediary program governs the obligations of foreign financial institutions under the current US withholding tax regime applicable in relation to US source income paid to non-US and US persons.

Information Exchange by Foreign Financial Institutions Would Eliminate Withholding Tax

Foreign financial institutions will be required to determine which of its equity and debt holders (and certain other of its counterparties and other "account holders") are US persons and to report this information to the IRS or otherwise be subject to a 30% withholding tax on its US-source income and/or the proceeds of certain sales and other dispositions. The withholding tax could be avoided only if the foreign financial institution enters into an agreement with the Treasury or the IRS to provide information relating to US persons that directly or indirectly maintain an account at such

U.S. LAW: PROPOSED DEVELOPMENTS Cont'd

financial institution.

If a foreign financial institution is unable to obtain information from a particular account holder, the foreign financial institution may either (i) withhold 30% from the payments it makes to the recalcitrant account holder or (ii) elect to receive its US-source payments subject to 30% withholding on the portion that is allocable to the recalcitrant account holder.

...a foreign financial institution may elect to provide full IRS Form 1099 reporting, as is currently the case for US financial institutions.

Foreign Financial Institutions May Elect to Undertake Information Reporting as if they were US Financial Institutions, Subject to Certain Modifications

As an alternative to the proposed reporting requirements set out above, a foreign financial institution may elect to provide full IRS Form 1099 reporting, as is currently the case for US financial institutions. Under this election, the foreign financial institution reports on each account holder that is a specified US person or US-owned foreign entity as if the holder of the account were a natural person and citizen of the US. As a result, both US and foreign-source income is subject to reporting regardless of whether the amounts are paid inside or outside the US.

If a foreign financial institution makes the election, the institution is also required to report the following information with respect to each US account maintained by the institution: (1) the name, address, and tax identification number of each account holder that is a specified US person; (2) the name, address, and tax identification number of each substantial US owner of any account holder that is a US-owned foreign entity; and (3) the account number of the account.

Effective Date

It is proposed that the principal provisions of the TEA will become effective for payments made after 31st December, 2012.

Steps Forward & Recent Updates

Similar provisions of the TEA, relating to foreign account tax compliance, also were incorporated in the "Hiring Incentives to Restore Employment" Act, which was passed and signed into law on 18th March, 2010. Therefore, foreign financial institutions are now agents of the United States Government, without any corresponding need of the Senate to pass the TEA**.** If you would like to discuss the implications derived from this article, please contact the author at ismith@higgsjohnson.com or Heather Thompson, Partner, at hthompson@higgsjohnson.com.

Iyandra P. Smith is a law clerk at Higgs & Johnson and a Florida Bar Attorney currently seeking admission to The Bahamas and District of Columbia Bars. She is also a PhD Candidate at the Institute of Advanced Legal Studies, University of London.

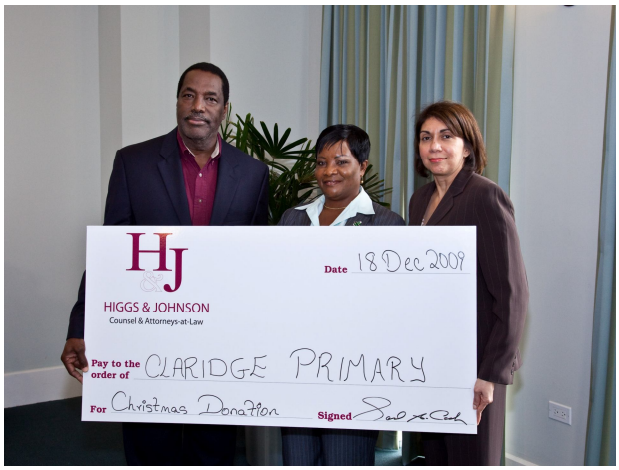
NEW ASSOCIATE IN THE CAYMAN ISLANDS

Kate Palfrey joined the Cayman office and was also admitted to practise as an attorney-at-law in the Cayman Islands in October 2009. Kate has six years of experience in law and has undertaken a wide range of legal work, while specialising in commercial transactions and disputes. She joins the Litigation department of the firm.

Kate graduated with a BA (Hons) First Class from the University of Warwick in the UK in 2001. Thereafter, she obtained Distinctions in both the Post Graduate Legal Diploma and the Legal Practice Course before commencing her training contract at the top 15 UK law firm, Pinsent Masons in 2003. Kate was admitted as a solicitor of the Supreme Court of England and Wales in September 2005. In February 2009 she was awarded a specialist LLM in competition law by King's College, London, whilst working as a solicitor in the Litigation department at Pinsent Masons.

H&J CHARITABLE CONTRIBUTIONS

(L-R) Dr. Earl A . Cash, Partner – Higgs & Johnson; Ms. Katherine Rose, Principal – Claridge Primary School; Ms. Surinder Deal, Partner – Higgs & Johnson.



Higgs & Johnson's Bahamas donated to its adopted school, Claridge Primary, in lieu of sending client greeting cards this past Christmas. The firm remains committed to supporting the educational system in the country and also participates in 'Cans for Kids', an organization that recycles aluminum cans and donates the proceeds to Claridge Primary.

Ms. Katherine Rose, principal of Claridge Primary, noted "As the school has many needs at this time the donation is very beneficial and we are thankful for Higgs & Johnson's contribution."

(L-R) Mr. Kendle Burrows, Principal & Dr. Enead Capron, Vice Principal of E. P. Roberts Primary School with Mr. Oscar N. Johnson Jr., Partner of Higgs & Johnson

In memory of the late Mr. Oscar Johnson Sr., Higgs & Johnson's Bahamas made a donation to E. P. Roberts Primary School. Partner of the firm, Mr. Oscar Johnson Jr., is also the grandson of the school's namesake Mr. E. P. Roberts.

Mr. Johnson stated, "The firm believes, as do I, that a good education is a key component in the pursuit of excellence. I am also proud to be able to honor my father and grandfather through this donation to the school."

Mr. Kendle Burrows, principal of E. P. Roberts, noted, "I am delighted to receive this donation on behalf of the school and will utilize the funds to the betterment of the students."

H&J Cayman office attorneys and staff pictured in red as a part of the Heart Fund Initiative.

Higgs & Johnson's Cayman office participated in the Cayman Heart Fund's Red Dress Day. It was an initiative to raise funds in an effort to reduce the impact of Cardiovascular Disease. Attorneys and staff at the Cayman office generously donated to the cause and dressed in red to show their support.

Country Managing Partner Mr. Philip Boni said, "We at Higgs & Johnson in Cayman remain committed to making donations to worthy causes. This particular donation was a result of our staff getting involved by contributing to the overall collection of funds and also by purchasing pins which were worn on the Red Dress Day."