



FIRM WELCOMES REGIONAL MANAGING PARTNER, MR. DEREK N. JONES

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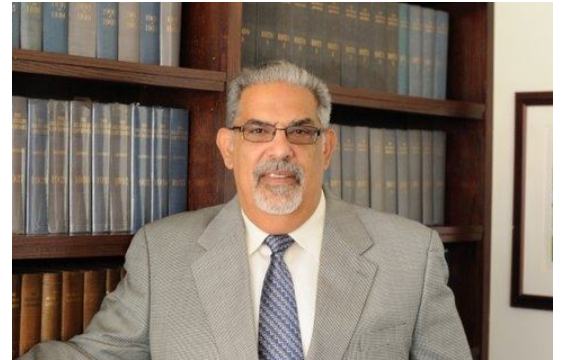
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Higgs & Johnson is pleased to announce that Mr. Derek N. Jones (pictured) has joined the Firm as Regional Managing Partner and will be based in the Cayman Islands office.

Mr. Jones has been practicing law for over forty years having served first as head of Litigation, then Managing Partner and finally Senior Partner of Jamaica's largest law firm Myers, Fletcher & Gordon. He is a former President of the Jamaican Bar Association.

In his role as Regional Managing Partner, Mr. Jones will have responsibility for the management of the Cayman office and for managerial planning generally in the Caribbean region. He also joins the Cayman Litigation team, bringing with him a wealth of experience in litigation and the telecom sector.

Chris Narborough, a lawyer with thirty years' experience, over twenty of which have been in the Cayman Islands, will continue to head the Commercial Transactions practice group. Philip



Boni, who was admitted to the Bar of the Cayman Islands in 1982, leads the Litigation team and his primary area of concentration is Civil Litigation. Gina Berry leads the Real Estate & Development practice group and has considerable expertise in the areas of Conveyancing and Real Property law. Philip C. Dunkley, Q.C. will remain Global Managing Partner.

Higgs & Johnson remains at the forefront of the profession, providing clients with innovative, quality and pro-active services. The partners are confident that the accomplished skills and talent which Mr. Jones brings to the firm will be employed by him to strengthen and consolidate the practice of the firm in the Cayman Islands.

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.



Contingent and Prospective Creditors - Cayman Islands

Alexia Adda

The proposition that some futurity is included in the simplest form of the wording is supported by the UK authority of *Cheyne Finance plc*.

As a result of the coming into force of section 94 (1)(b) of the 2010 Revision of the Cayman Islands Companies Law ("the Law"), the rights of contingent and prospective creditors to petition the court to wind up a company on the ground that a company is insolvent has been reinstated. It is thus reunited with the previous position as set out in s.124(1) of the UK Insolvency Act 1986 ("the IA 1986").

Definition of Inability to Pay Debts

The previous test of insolvency, enshrined in the IA 1986, followed two central principles:

Section 123 (1) (e): "A company is deemed unable to pay its debts...if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due"; and

Section 123 (2): "A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."

The first 'commercial' or 'cash flow test' is defined according to whether or not a company is as a matter of fact, paying its debts as they fall due. The second 'balance sheet' test is self-explanatory in denoting an element of futurity.

According to Sealy and Milman, "... contingent and prospective liabilities are not (at least normally) for the purposes of Section 123 (1) (e), while insolvency calculated on a balance-sheet basis becomes a separate test under section 123 (2)."

The new Cayman Islands' test as prescribed by section 93(c) of the Law, is an emulation of Section 123 (1) (e), minus the end phrase 'as they fall due'. Some significance has been placed on the removal of this end phrase as excluding the allowance of the balance sheet test in addition to the cash flow test. It is therefore unclear whether or not the phrase 'unable to pay its debts', either with or without the additional 'as they fall due', is sufficient to incorporate an element of futurity, such that

current as well as upcoming debts are included in the test of the company's solvency. This makes the position awkward between the test for insolvency and the rights of contingent and prospective creditors to petition to wind up on grounds of insolvency due to the absence of that futurity.

The proposition that some futurity is included in the simplest form of the wording is supported by the UK authority of *Cheyne Finance plc*. In this case, Briggs J looks to Australian case law in recognizing the artificiality of limiting an assessment of a company's solvency to one moment in time despite the absence of any balance sheet test-related words in their legislation. S.95A of the Australian Corporations Act 2001 prescribes a cash flow test in similar form to that found in the Cayman Islands' s.93 (c). However, Briggs J emphasizes the importance of assessing the solvency of a company as a whole when stating:

"It is clear from that brief review of the Australian decisions that in an environment shorn of any balance sheet test for insolvency, cash flow or commercial insolvency is not to be ascertained by a slavish focus only on debts due as at the relevant date. Such a blinkered review will, in some cases, fail to see that a momentary inability to pay is only the result of a temporary lack of liquidity soon to be remedied, and in other cases fail to see that due to an endemic shortage of working capital a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks or even months before an inevitable failure".

He adds: "the common sense requirement not to ignore the relevant future was found to be implicit in the Australian cases in the simple phrase 'as they become due'." Although this 'simple phrase' has been excluded from the Cayman Islands' test, one wonders whether the common sense approach referred to by Briggs J will be followed by the Cayman Courts, regardless.

If instead, the view is taken that the distinct

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Since the purported suspension of the payment of redemption proceeds was invalid (and as the redemption date had passed), the petitioners were found to be creditors with locus standi to present a creditor's petition for the winding up of the fund.

elimination of any reference to the simple phrase or to the principle enshrined in s.123(2) of the IA 1986 necessarily requires one to ignore all contingent and prospective liabilities, the specific restoration of the contingent and prospective creditors' rights under s.94(1)(b) would be in question.

The Implications of the Contingent/Prospective Creditors' Rights

There has been much speculation as to how these provisions work together in matters involving suspended redemptions and/or suspended redemption payments. Whether a redeeming investor, who petitions to wind up a fund on the basis of its failure to pay redemption monies, amounts to a prospective or contingent creditor or whether they remain a shareholder until completion of the full redemption process (including payment), is uncertain.

One is warned off placing too much reliance upon the legislation since it is the funds' documents which will dictate to a large extent, the powers of a redeeming investor against a fund.

The case of *Matador Investments Ltd* concerned the question whether or not the fund was entitled to suspend payment of redemption proceeds to redeeming investors. As Quin J. pointed out, it is the funds' constitutional documents that must underlie the answer:

"The parties have the right to determine as a matter of contract how the redemption process operates and similarly any rights by the Company to suspend redemptions or the right to receive payment of the redemption proceeds... each case depends on its particular facts. The Court of Appeal in Strategic Turnaround did not lay down a uniform code to apply to the construction and interpretation of Articles and accompanying Offering Memorand[a] of Cayman Islands Mutual Fund companies... This Fund, like any other fund, must have regard to the redemption dates and times for payment as stipulated in the pertinent fund documents and

agreed between the parties."

In that case, the fund had suspended redemptions after the redemption date had passed, in breach of its Articles and Offering Memoranda, and had exercised a power it did not have under those documents to suspend payment of redemption proceeds. Quin J. found that the fund's Articles did not, as required, expressly permit the fund to suspend redemption proceeds, nor did the decision of *Strategic Turnaround* dictate that a fund's power to suspend redemptions automatically includes a power to suspend payment of redemption proceeds.

Since the purported suspension of the payment of redemption payments was invalid (and as the redemption date had passed), the petitioners were found to be creditors with *locus standi* to present a creditor's petition for the winding up of the fund. Prior to the passing of the redemption date they would have been prospective creditors and under s.94(1)(b) may today have had *locus standi* to petition under that provision.

On the other hand, the Court of Appeal found in the *Strategic Turnaround Master Partnership* case that the suspension had been exercised validly. The fund's Articles referred to the power to suspend redemptions as encompassing the entire suspension process, which included the payment of the redemption proceeds. Furthermore, unlike the case with *Matador Investments Ltd.*, this power had been exercised before the payment had become due and payable. Consequently, in the absence of a debt due and payable it could not be said that the petitioner had *locus* to present a creditor's petition since they were not an actual creditor. Although in that case the petition was instead allowed under just and equitable grounds, it may also have been permitted today as a prospective creditor's petition (as long as the Articles so allowed) under s.94(1)(b), thus delineating the impact this new provision may have going forwards.

Ms. Alexia Adda is an Associate in the Cayman Islands office of the firm and advises on a broad range of commercial litigation, including alternative dispute resolution, insolvency and trust litigation as well as financial services matters.



The Business Licence Act, 2010

Alexandra T. Hall

The Business Licence Act, 2010 (the "BLA 2010") and the Business Licence Regulations, 2010 (the "BLR 2010") came into force on 1st January, 2011. An amendment to the BLA 2010 has been passed by the House of Assembly and is awaiting passage by the Senate.

The BLA 2010 changed the way applications for new business licences and renewals are made and the method upon which the fee payable for operating a business in The Bahamas is calculated. No longer is the size or the profitability of the business relevant to the calculation of fees payable. For most businesses it is only the amount of turnover of the business which has an effect on the business licence tax payable.

Upon the passage of the amendment to the BLA 2010, turnover will be defined as *"...the total revenues in money and money's worth accruing to a person from his business activities within The Bahamas during the preceding year or in such other accounting period as the Secretary may allow, including all cash and credit sales and commissions without any deductions whatsoever; and for hotels, turnover shall exclude occupancy tax collected."*

Business Licence Fees

Upon the passage of the amendment to the BLA 2010, some of the taxes payable under the BLA 2010 will be as follows:

- new businesses - \$100;
- occasional licence - \$25;
- temporary licence – 1.5% of the value of the contract;
- companies that are designated non-resident under the Exchange Control Regulations \$300;
- professionals, i.e. accountants, doctors, lawyers, architects, engineers, etc., 1% of turnover, irrespective of amount of turnover; and
- businesses not otherwise dealt with in the BLA 2010: -

- where turnover does not exceed \$50,000 per annum - \$100;
- where turnover is \$50,001 - \$500,000 per annum – 0.5% of turnover; and
- where turnover is greater than \$500,000 – 0.75%.

The business licence tax payable for some businesses has been set as 0.5% of turnover irrespective of amount turnover. These businesses are:-

- agricultural and animal husbandry/ mixed farming;
- fishing/fish farms;
- food/meat/fruit processing;
- construction companies;
- hotels;
- wholesalers of petroleum products; and
- wholesalers of food products;

Under the BLA 2010, insurance companies will pay a business licence tax that is the equivalent of 3% of gross premiums collected during the quarter or \$25, whichever is higher.

Companies that provide telecommunication services must pay a business licence tax equal to 3% of gross revenue of the company.

The business licence tax payable by banks and trust companies that are licenced under the Banks and Trust Companies Regulations Act ("BTCRA") and categorised as authorised dealers will be calculated with reference to such licensee's assets as per its last audited financial statement. The business licence taxes payable are as follows: -

- Assets less than \$250 million - \$450,000;
- 250 million - \$500 million - \$600,000;
- More than \$500 million but less than \$1 billion - \$1,200,000;
- More than \$1 billion but less than \$1.5 billion - \$1,800,000;
- More than \$1.5 billion but less than \$2

The BLA 2010 changed the way applications for new business licences and renewals are made and the method upon which the fee payable for operating a business in The Bahamas is calculated.

Firm's Charitable Contributions

Cayman Islands Special Olympics Team



Partners, Associates and staff of Higgs & Johnson present check to participants of the Special Olympics Cayman Islands.

Higgs & Johnson is proud to sponsor the Special Olympics Cayman Islands 2011 team. The Cayman Islands have been represented in the Special Olympics for over 19 years. As a corporate sponsor the firm is able to assist the organization with achieving their long term goals of providing quality training to Caymanian athletes and involving more persons with intellectual disabilities.

Mr. Derek Jones, Regional Managing Partner noted, 'The Special Olympics Cayman Islands' team is to be commended for their hard work, dedication and commitment to participating in the games. Higgs & Johnson is a proud sponsor of the team and wish them every success in Athens.'

Cayman Islands Heart Fund



Pictured above are staff proudly showing their support of the Cayman Heart Fund by wearing red.

With cardiovascular disease being the number one health problem in the Cayman Islands, Higgs & Johnson continued its support of the Cayman Heart Fund by relaxing its dress code at its Cayman office on Friday 4th March 2011. Staff members were encouraged to participate by wearing red and donating funds, which were matched by the Firm.

The Cayman Heart Fund ("CHF") is a non-profit, non governmental organization dedicated to the reduction of heart and circulatory disease. Educational, awareness and screening programs are central to the CHF's mission, which also includes diagnosing high Blood Pressure, Cholesterol and Diabetes. Board Member, Dr. Sook Yin, was on hand to receive the donation and commended the Partners and Staff of Higgs & Johnson for their enthusiastic support.

The Firm's monetary donation, she indicated, will assist the CHF in making a difference in the Caymanian community. Dr. Yin also noted the importance of adopting healthy lifestyles especially in high-stress professions; and that women were especially prone to cardiovascular disease.

Newly appointed Regional Managing Partner, Derek Jones, stressed his support of meaningful community partnerships, which are "at the heart" of the Higgs & Johnson culture. Mr. Jones was therefore especially proud of the firm-wide support of the CHF's initiative, which can only result in a healthier Cayman.

Annual Donation to Adopted Bahamian School - Claridge Primary



(L-R) N. Leroy Smith, Partner; Heather L. Thompson, Partner; Philip C. Dunkley, Q.C., Senior & Global Managing Partner; Ms. Katherine Rose, Principal – Claridge Primary School; Surinder Deal, Partner; Michael F. L. Allen, Partner & Tara A. A. Archer, Partner.

Higgs & Johnson presented the principal of Claridge Primary, Katherine Rose, with its annual Christmas donation in lieu of sending client Christmas greeting cards. Last year's donation enabled the school to improve its computer lab facilities. This year's donation will assist in the pilot program, TECHCITED, which is in progress at all South Eastern District schools. It is the hope that it will eventually be introduced to all the schools in The Bahamas.

TEHCITED is an online e-learning program targeted towards students between grades 3 through 6 who are operating 2 grades below their current grade level. The Special Education teacher at the school, Ms. Christine Cunningham, will be spearheading the program.

Ms. Katherine Rose, principal of Claridge Primary, noted "We are very excited to embark upon this new pilot program as we foresee it being very beneficial to our students; and we are ever thankful to Higgs & Johnson's continued pledge to contribute to our school."

Bahamian Partner Re-elected Director of FIDA



Vivienne Gouthro (far left) being installed with other directors for 2010–2012.

Higgs & Johnson is pleased to announce that its partner with responsibility for the Freeport office, Vivienne Gouthro, was reelected as a Director of the International Federation of Women Lawyers ("FIDA") for 2010 – 2012 having served on the board since 2004.

FIDA is an international non-government organization in consultative status with the Economic and Social Council of the United Nations. The group was organized in Mexico City in 1944 to promote the principles and aims of the United Nations in their legal and social aspects; to enforce and promote the welfare of women and children and to promote the study of comparative law.

Vivienne Gouthro noted, "I am glad to continue to serve as a Director and as Chair of the Legal Research Committee. At FIDA one of our goals is to positively impact the legal and general community by hosting education seminars. As we assist in the review and drafting of current laws, we then have the opportunity to update third parties on the same."

The Business Licence Act, 2010 continued

billion - \$2,400,000;

- Assets exceeding \$2 billion - \$3,750,000; and
- Institutions that are newly licenced under the BTCRA and have no audited financial statements – assessment will be based on a reasonable estimate of the licensees assets.

Occasional Licence

An occasional licence is a licence that is granted for a period not exceeding 7 days. An occasional licence can be granted to an applicant a maximum of 4 times per year. Persons who may apply for an occasional licence include:

- traveling salesman;
- a person staging a trade show or expo;
- a person staging a business event at any place or premises of public dancing, singing, music or other public entertainment; or
- a person vending at a regatta, a farmer's market or other like national or community event.

Who must obtain a temporary licence?

Every foreign person intending to engage in business activities within The Bahamas must obtain a temporary licence prior to carrying out business. The approval of the Minister of Finance to engage in such business activity must be obtained before the temporary licence is granted. Where an applicant has failed to pay all licence fees outstanding under any previous licence a temporary licence will not be granted.

Submission Documents

Every business applying for a business licence must submit the completed Business Registration Form A along with a certificate of good standing or receipt indicating that annuals fees have been paid and a letter from the National Insurance Board showing that the business is current with its contributions.

A receipt showing that all taxes due and payable under the Real Property Tax Act must accompany the application where a business is operated on premises owned by the business owner.

If fees were previously paid for reserving a

trading name, a receipt showing that the 2010 fees payable under the now repealed Registration of Business Names Act must also be submitted.

Regulation 5 the BLR 2010 provides that where a business has a turnover of \$1,000,000 or more, financial results that are submitted must be accompanied by a statement as to the turnover of the business. This statement must be certified by a person who is qualified in accounting and has no interest in the business.

In addition to the items indicated above, if the business in question requires approvals, permits or certificates from another Government ministry, department or other regulatory authority to conduct business in The Bahamas, a copy of such approval, permit or certificate must be submitted with the completed Business Registration Form A.

Submitting the Business Registration Form A

If the business is located on New Providence or Paradise Island the application for a business licence must be submitted to the Secretary for Revenue. Where the business is located on a Family Island, the application should be submitted to an officer in the Business Licence Office or Public Treasury on that island. If there is no Business Licence Office or Public Treasury then the application should be submitted to the Administrator's Office.

Exemption

No annual business licence tax is payable in respect of the following businesses carried on within The Bahamas –

- businesses that are more than 60% Government owned;
- ecclesiastical, charitable or cultural institutions or organizations registered as non-profit entities within The Bahamas;
- the club or commissary of any foreign state operating under a special agreement with the Government;
- where a person carries out his vocation as a minister of religion;
- a person in the service of the Government, or of a public body, or of any other person,

...if the business in question requires approvals, permits or certificates from another Government ministry, department or other regulatory authority to conduct business in The Bahamas, a copy of such approval, permit or certificate must be submitted with the Business Registration Form A.

The Business Licence Act, 2010 continued

and who does not carry on that business otherwise than in the service of the Government or of that body or that other person;

- where a person practices in the course of his employment wholly in the service of another person whose undertaking or business does not comprise the rendering of services of the nature of such practice;
- businesses licenced under the Lotteries and Gaming Act;
- businesses licenced under the Spirits and Beer Manufacture Act; and
- any bank or trust company licenced under the BTCRA which is not an authorised dealer and which has satisfied the Secretary of Revenue that it has paid the requisite fees under the BTCRA.

Until the expiration of the Hawksbill Creek Agreement, businesses operating in the Port Area of Grand Bahama are exempted from the payment of business licence taxes.

If a business was licenced as a petty, very small or small business under the Business Licence Act, 1980, i.e. a business with a turnover not exceeding \$250,000 per annum, and it qualified for an exemption from the payment of business licence fees by virtue of paying or agreeing to pay all outstanding licence fees by the 30th June 2010, the exemption from the payment of business licence fees continues until 31st December 2011.

Business Licence Taxes Paid in Error

Section 20 of the BLA 2010 provides that, where upon a written application, the Minister of Finance is satisfied that any monies paid by an applicant was paid in error or was not otherwise required to be paid, approval may be given to the Secretary for Revenue to grant a refund.

Waiting Time and Expiration

The BLA 2010 provides that a business licence will be granted within 7 working days of receipt of an application where the requirements for such application as outlined in the BLA 2010 are met.

Upon the passage of the amendment to the BLA

2010, persons carrying on a business shall, before the 31st March of every succeeding year submit financial results to the Secretary in the form prescribed together with payment of the relevant tax.

Business Fee vs Business Tax

The following is a comparison of the amount payable under the now repealed Business Licence Act, 1980 (under which a "Business Licence Fee" was payable) and under the BLA 2010 (under which a "Business Licence Tax" is payable):-

BUSINESS A

Business Licence Fee

Turnover (total income) - \$ 85,000.00
 LESS Cost of goods/ services - \$ 53,000.00
 Gross Profit - \$ 32,000.00

Gross Profit as a percentage of turnover
 $(\$32,000.00 / \$85,000.00) \times 100 = 37.00\%$

Profitability of a Business: Medium
 Size of Business: Very Small
 Business Licence: **\$ 500.00**

Business Licence Tax

General $0.5\% \times \$85,000.00 = \mathbf{\$425.00}$
 Professionals $1\% \times \$85,000.00 = \mathbf{\$850.00}$

BUSINESS B

Business Licence Fee

Turnover (total income) - \$265,000.00
 LESS Cost of goods/ services - \$199,700.00
 Gross Profit - \$65,300.00

Gross Profit as a percentage of turnover
 $(\$65,300.00 / \$265,000.00) \times 100 = 24.06\%$

Profitability of a Business: Low
 Size of Business: Medium
 Business Licence: $\frac{1}{2}$ of $1\% \times \$265,000.00 = \mathbf{\$1,325.00}$

Business Licence Tax

General $0.5\% \times \$265,000.00 = \mathbf{\$1,325.00}$
 Professionals $1\% \times \$265,000.00 = \mathbf{\$2,650.00}$

Section 20 of the BLA 2010 provides that, where upon a written application, the Minister of Finance is satisfied that any monies paid by an applicant was paid in error or was not otherwise required to be paid, approval may be given to the Secretary for Revenue to grant a refund.

Ms. Alexandra T. Hall is an Associate at the Ocean Centre office in The Bahamas and specializes in areas of commercial and company law.



Offshore Voluntary Disclosure Initiative 2011

Lyandra Smith Bryan

The 2011 Initiative was created for the purpose of bringing those U.S. taxpayers intentionally avoiding their domestic tax obligations into compliance.

All United States persons, resident in The Bahamas, must file a Report of Foreign Bank and Financial Accounts ("FBAR") if such persons have a financial interest in or signature authority over any financial account in a foreign country and must disclose their interests in such accounts, if the aggregate value of these accounts exceeds \$10,000.00 (even if for one day). The Internal Revenue Service ("IRS") has declared another opportunity for U.S. taxpayers to voluntarily disclose foreign financial accounts without the threat of criminal prosecution coupled with a considerable reduction in civil penalties. This new offshore voluntary disclosure initiative is called the 2011 Offshore Voluntary Disclosure Initiative ("2011 Initiative"). What makes the 2011 Initiative so significant is that it is the last, best opportunity for U.S. persons with undisclosed foreign accounts to have their "sins forgiven" IRS Commissioner Douglas H. Shulman stated: "The situation will just get worse in the months ahead for those hiding assets and income offshore. The new disclosure program is the last, best chance for people to get back into the system."

Under the 2011 Initiative, U.S. taxpayers have until 31 August 2011 to disclose all of their previously undisclosed foreign financial accounts and in doing so, can, in most cases, escape the risk of criminal prosecution and the burden of greater civil and criminal penalties. In addition, U.S. taxpayers wishing to participate in the 2011 Initiative must cooperate with the IRS in the voluntary

disclosure process and agree to pay all unpaid taxes, delinquency penalties on the overdue taxes, and in lieu of the other penalties that may apply, pay a penalty of twenty-five percent (25%) of the amount in the foreign bank accounts in the year with the highest aggregate account balance between the years 2003 and 2010. Furthermore, U.S. taxpayers must also file or amend federal income tax returns and offshore-related information returns for the tax years 2003 to 2010.

The 2011 Initiative is the second voluntary disclosure program for U.S. taxpayers with unreported foreign assets. In 2009, the IRS offered a similar program which resulted in approximately 15,000 disclosures. The 2011 Initiative is less favourable than the IRS' 2009 voluntary disclosure initiative, where a U.S. person who failed to disclose a foreign account only needed to file or amend federal income tax returns over a period of six years and not eight years as required by the 2011 Initiative. Moreover, if such U.S. taxpayers voluntarily disclosed their foreign accounts in 2009, they only paid a 20% penalty as opposed to a 25% penalty now in place for the 2011 Initiative.

The 2011 Initiative was created for the purpose of bringing those U.S. taxpayers intentionally avoiding their domestic tax obligations into compliance. Those U.S. persons who have previously failed to file an FBAR with respect to a foreign account have one last chance to disclose by participating in the 2011 Initiative.



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Mrs. Lyandra Smith Bryan is an Attorney at Higgs & Johnson in the Ocean Centre office and is admitted to the State of Florida, District of Columbia, and The Bahamas Bars. She specialises in international tax and estate planning and practices in all aspects of offshore legal business, General Company and Commercial Law, Securities, Trusts.