

**Contribution**  
**By**  
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**Honourable Attorney-General**  
**&**  
**Minister of Legal Affairs**  
**On**  
**A Compendium of 15 Financial Industry Related Bills**  
**Wednesday, 23 November 2011**

**Introduction & Context**

Madam President:

The financial sector in The Bahamas is important to the economy and employment of Bahamians and therefore the social wellbeing of our community. The Government has a history of strong supportive for the financial sector.

The industry is recognized as representing an estimated 15% - 20% of the gross domestic product for The Bahamas, second in terms of economic impact to the tourism sector. Banking and trust operations constitute the largest share of the financial services industry in terms of assets, expenditure and employment.

The Central Bank has reported in its report for 2010 that:

- Despite adversities to growth in operations by events in the global financial market, the sector's performance trends have stabilized since the height of the financial crisis.
- Wealth management trust business represents the core focus of the international banking sector.
- At end-2010, the total number of banks and trust companies licensed to conduct business within or from within The Bahamas increased by 4 to 276

- Preliminary employment figures in banks and trust companies showed a slight gain of 0.4% to 4,927 – an improvement from 2009's 2.1% decline.
- Bahamians represented 93.8% of the number of persons employed in the sector as at end-2010.
- During 2010 average base salaries in the sector grew by 3.6% over the prior year, and there was a slight increase (\$0.3 million for a total of \$2.2 million) for outlays on staff training.

The Government's primary role is that of regulator. However, as the second industry of our economy, the Government must also facilitate the growth, development and general wellbeing of the sector.

So in addition to ensuring that is well regulated, the Government seeks to facilitate growth and development of the industry by bringing to Parliament the proposed legislation before us.

## **Regulatory**

The past 11 years have been reasonably active in terms of evolving standards for the regulation of international financial services.

## **Legislation**

Senators would recall that during the year 2000 this Government (during its second administration) restructured the legal framework regulating the sector in response to then evolved standards promoted by the *Financial Action Task Force* (FATF) as regards anti-money laundering, and the *Organisation for Economic Cooperation and Development* (OECD) as regards transparency and information exchange for tax purposes.

Those laws have served the industry well. All remain in place and provide the backbone (or foundation) of the regulatory framework for the industry more than a decade later. They have been supplemented and adjusted apace international evolving standards such as to provide an anti-terrorism regime post the events of September 2001.

Today, several of the Bills before us are in the nature of ongoing adjustments to keep abreast of the ever evolving standards.

### Tax agreements

As to transparency and information exchange for tax purposes:

- In January 2002 this Government (in its second administration) entered a tax agreement between The Bahamas and the United States of America. This was the first such agreement ever entered by this country.
- In March 2002 the Government committed to the OECD that the country would provide for transparency and information exchange for tax purposes on the condition that all competitors do likewise – i.e. a level playing field condition was made.
- Between 2003 – 2007 most of 40 so-called ‘tax havens’, which included The Bahamas, had made a commitment to transparency and information exchange.
- In September 2009 the OECD, towards encouraging information exchange for tax purposes, determined that it would identify countries that had achieved progress in entering tax agreements that meet the international standard. Twelve (12) agreements were established as a benchmark for these purposes.
- The Bahamas, then, only having one such agreement - that with the USA, the Rt. Hon. Prime Minister Hubert Ingraham stated:

“The Commonwealth of The Bahamas notes significant recent progress towards the adoption of standards on tax transparency and information exchange set by the OECD. The Bahamas reaffirms its commitment recorded in a March 2002 agreement between The Bahamas and the OECD. The Bahamas recognizes significant advances in commitments to broader application of OECD standards of transparency. The Bahamas is ready to negotiate and conclude appropriate arrangements to accommodate these OECD standards.”

- Promptly that year this Government embarked upon negotiations with other countries for additional tax treaties to establish a tax information exchange network that would ensure a high standard of compliance for the benefit of this country's financial industry.
- The Government succeeded. To date there are 28 tax treaties and the number will shortly be increased.
- On the matter of these treaties, I am pleased to note that last week (17 November 2011) Canada's Department of Finance announced the commencement of its treaty with The Bahamas. What is particularly interesting is that, as the case with the Bahamas' treaty with the United States, there accrues positive benefits beyond the fact of growing the treaty network.

The benefit is that where Canadian subsidiaries do business in The Bahamas they are now allowed to distribute income to the parent company in Canada without that income being taxed in Canada. This is called "*Exempt Surplus*". This is beneficial in that it is an encouragement to Canadian business to established subsidiaries in The Bahamas. This may mean more use of Bahamian corporate vehicles, more opportunities for Bahamian professionals, more demand for offices premises and rental accommodation to facilitate such operations.

The Government conducted a trade mission to Canada in March of this year. Representatives of our financial services industry strongly supported the mission. This treaty is very timely for them.

[Refer to 18Nov11 Nassau Guardian article, Business Section, Raymond Winder, Chartered Accountant quoted as stating – that the TIEA puts The Bahamas "...at a competitive advantage as compared to the current tax treaty Canada has with Barbados.]

The commencement of the treaty with Canada is good news, indeed, for the financial sector. It is good for Bahamians.

## The Bills

### Regulation

Within the context of ensuring that The Bahamas maintains its place as a well regulated financial centre, there are Bills before this Senate that would address two requirements:

1. Providing an accounting records keeping requirement for certain relevant entities and arrangements; and
2. Correcting certain technical inconsistencies in provisions for access to information and the treatment of information by the Minister under The Bahamas and the United States of America Tax Information Exchange Agreement Act, Ch. 369B; and the International Tax Cooperation Act, No. 18 of 2010.

Seven (7) Bills address the first (accounting records) requirement, namely:

- International Business Companies (Amendment) Bill, 2011 – No. 2;
- Segregated Accounts Companies (Amendment) Bill, 2011;
- Investment Funds (Amendment) Bill, 2011;
- Exempted Limited Partnership (Amendment) Bill, 2011;
- Foundations (Amendment) Bill, 2011;
- Partnership Limited Liability (Amendment) Bill, 2011; and
- Purpose Trusts (Amendment) Bill, 2011.

For further consideration is the accounting records requirement in the context of the domestic business activities conducted by companies under the Companies Act and partnerships under the Partnership Act.

Bills to address the second (TIEA) requirement are:

- The Bahamas and the United States of America Tax Information Exchange Agreement (Amendment) Bill, 2011; and
- International Tax Cooperation (Amendment) Bill, 2011.

Collectively, there are nine (9) regulatory-type amending Bills before us today.

### Modernising and Improving the Company Liquidation Regime

On instructions, the Law Reform and Revision Commission conducted a review and revision of the law relating to the winding up of companies, also known as company liquidation.

Ever since the development of the joint stock company in England during the 1800s, the incorporated company has been an important vehicle through which persons combined capital and share and limit liability to engage in commerce. So indispensable is the company to commerce, that in any modern country the legal regime – enabling law - governing incorporation, administration, governance, liquidation and dissolution may be regarded as basic infrastructure for commerce. The enabling law, like all infrastructure, requires review and modernization from time to time.

There are currently 53,691 companies registered under the Companies Act and 162,217 registered under the International Business Companies Act.

Before us is a Bill to repeal and replace Part VII of the Companies Act which governs the winding up of companies and replace it with a new regime called Part VII and VIIA. The new Part VII will regulate the local liquidations while Part VIIA would provide a regime by which the Supreme Court may make orders to facilitate foreign liquidations where they need to carry out some activity in The Bahamas.

The existing rules that include the *English Rules* of 1949 are to be replaced with new rules, namely:

- Companies Liquidation Rules, 2011;
- Insolvency Practitioners Rules, 2011; and
- Foreign Proceedings (International Cooperation) Liquidation Rules, 2011.

The Bill incorporates common law developments and modern company liquidation provisions and is tailored to address the needs of The Bahamas as an important financial centre. In preparing the new provisions, regard was had to the recently modernized company liquidation regimes of the Cayman Islands and the British Virgin Islands, amongst other jurisdictions.

New features are:

- Standing is provided for a relevant regulator (Central Bank, Securities Commission, Insurance Commission, etc) in the case of a company carrying on a regulated business, to petition for the winding up of a company whose licence has been suspended or revoked<sup>1</sup>;
- The meaning of insolvency is to include the balance sheet test – namely, where the value of the companies liabilities exceeds its assets<sup>2</sup>;
- The court's jurisdiction is expanded to order a winding up of a foreign company which has property located in The Bahamas<sup>3</sup>;
- The term “shadow director” is introduced and defined as a person in accordance with whose directions or instructions the directors are accustomed to act, and

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<sup>1</sup> S. 186 (f).

<sup>2</sup> S. 187 (b).

<sup>3</sup> S. 185(d)(i).

such person may be held to account in the course of the liquidation as may be officers and directors<sup>4</sup>;

- Provisions are made for dealing with costs incurred in the course of a liquidation in connection with assets that a company in liquidation held under a trust<sup>5</sup>. This is a situation that is increasingly arising in this jurisdiction and which has given rise to recent adjudications. Currently no statutory provision addresses the matter. It is important in such circumstances that assets available to satisfy creditors not be burdened by such costs, while at the same time ensuring that those costs are equitably borne by the persons who benefit from the trust asset. This provision – section 204 - is an example of how responsive the revision exercise has been and how relevant the new law will be to matters existing in The Bahamas.
- Liability for directors is provided for where they allow a company to trade while knowing it to be insolvent<sup>6</sup>; and
- The court is empowered to make ancillary orders to facilitate in The Bahamas a foreign liquidation where the activities of the foreign liquidation include matters in The Bahamas.

Drafts of this Bill were widely circulated over a period of approximately 12 months throughout the financial services industry, the legal profession and the accounting profession. The Attorney-General assisted by law officers in the Law Reform and Revision Commission conducted consultations and received comments from many quarters - from which the drafting exercise benefitted greatly.

The proposed new companies' liquidation regime will be applied to International Business Companies by the companion Bill to amend the International Business

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<sup>4</sup> S. 183.

<sup>5</sup> S. 204.

<sup>6</sup> S. 244.



Companies Act that will incorporate, *mutatis mutandis*, the relevant parts of the Companies Act.

### Wealth Management Sector of the Financial Industry

The Attorney-General and law officers from the Law Reform and Revision Commission have worked closely with industry to provide four Bills that are expected to go far to improve the quality and attractiveness of the trust services product offered in The Bahamas. Those Bills are:

- Trustee (Amendment) Bill, 2011;
- Purpose Trusts (Amendment) Bill, 2011;
- Rule Against Perpetuities (Abolition) Bill, 2011; and
- Executive Entities Bill, 2011.

By the amendment to the Trustee Act, it is proposed to strengthen the existing trust law regime as it relates to the administration of trusts and to make provisions for the arbitration of trust disputes under the provisions of the recently enacted Arbitration Act which came into force last year.

By the Purpose Trusts amendment, to provide for a more liberal meaning of the reference to the term “the *rule against perpetuities*”.

By the Bill to abolish the *rule against perpetuities*, it is proposed to abolish that ancient rule of trust law that presents substantial complexity in property law and which no longer serves a useful purpose. By abolishing this rule, greater flexibility of trust arrangements would be possible by allowing settlers of trusts greater freedom to arrange their and their families’ wealth management affairs.

Many jurisdictions have already abolished the *rule against perpetuities*, including South Australia, Manitoba, Turks & Caicos Islands, Anguilla, Bermuda and most of the states in the United States of America.

The Executive Entities Bill is intended to create a new legal entity intended to be used in the context of wealth management structures to perform executive functions.

By use of an EE, the roles of protectors, enforcers, asset allocators and other advisors may be institutionalized by means of specific mandate in the constitutional documents of the EE, namely the Charter and Articles.

Notable features are as follows:

- The Purpose of an EE will be limited to carrying out executive functions as set out in its Charter and in so doing it must comply with any relevant regulatory law<sup>7</sup>;
- An EE shall be governed by a council, and officers. Council members and officers must act in accordance with the Charter, Articles, and the Act in furtherance of the Purpose of the EE. Further, the standard of care is the same as the standard known in company law for directors and officers<sup>8</sup>.
- Every EE must have a registered office in The Bahamas<sup>9</sup>.
- An EE may only hold such assets as necessary for the performance of its functions and capital adequacy requirement under any relevant regulatory law<sup>10</sup>.
- Every EE must keep accounting records to the same standard as per the OECD established standard, as will be required of IBC, Investment Funds, etc.

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<sup>7</sup> CI 5.

<sup>8</sup> Part III.

<sup>9</sup> CI 16.

<sup>10</sup> CI 4(1).

- An EE may be used only to perform executive functions in relation to an entity, trust or other arrangement domiciled in or governed by the laws of The Bahamas or a jurisdiction specified in the First Schedule to the Financial Transactions Reporting Act, Ch. 368;
- An EE may be liquidated under provisions that would incorporate the winding up provisions of the Companies Act that are to apply *mutatis mutandis*.

### **Wrap-up**

Madam President:

These fifteen (15) Bills are all in keeping with the *strategy statement* published by the Government and The Bahamas Financial Services Board last year, and tabled in this Honourable Chamber. The *strategy statement* provides focus for the forward movement of the industry towards predetermined objectives.

The Government together with the BFSB is committed to developing *The Bahamas Brand*. That brand will be synonymous with a clean environment and good regulation.

We believe that in a world where personal wealth, commerce and investments are more mobile than ever, The Bahamas is perfectly positioned to be the smartest, safest and simplest financial centre for connecting the world's fastest growing economies and for serving those wealthy individuals with them.

It is hoped that all of these Bills would be enacted before year's end.

I commend them to Honourable Senators.