

# PRIVATE TRUST COMPANIES OF THE BAHAMAS

McCartney's Short Commentary

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The purpose of a Private Trust Company (hereinafter known as 'PTC') is to act as trustee of a specific trust or, in some cases, a group of trusts. The new legislation, which came into force on the 27th of December, 2006, takes the form of an amendment to the Banks and Trust Companies Regulation Act, 2000 and introduces specific regulations for PTCs. This legislation is designed to reduce red tape and enhance the range of financial services offered in The Bahamas.

In The Bahamas, PTCs have become a preferred tool in the structuring of the estate and inheritance planning needs of families with substantial wealth. They may also provide successful entrepreneurs with significant advantages when structuring their participations.

The use of a Bahamian Private Trust Company creates a balance between the needs of a family to control trust assets yet ensure that those assets remain in trust. It enables the family to own operating businesses in a trust while having an involvement in the management of their family business. It involves a local incorporated company or an IBC to act as trustee of one or more trusts for a single family. Such trust company in turn holds the private company shares. The shares of the PTC can be held by a purpose trust or a charitable trust, i.e. a trust with no beneficiaries and the objective ("purpose") to hold the shares in the PTC. This exercise is to make ownership disappear and to add an additional guarantee that the initial intention of the Settlor is maintained.

## *Legislative Highlights*

Section 2 of the Act is amended to provide that a PTC (which can be a company incorporated either under the Companies Act, 1992 or the International Business Companies Act, 2000) must state in its memorandum and articles of association that it acts as a trustee only for a trust(s) created by or at the direction of a Designated Person (an individual who is named in a Designating Instrument). If there is more than one Designated Person named, then each Designated Person must be a blood relative of or related by some other family relationship to a Designated Person.

The Act is further amended to provide for a Registered Representative (hereinafter known as the 'RR'), a separate legal entity, which is either a Central Bank licensee or a Financial and Corporate Service Provider (hereinafter known as the 'FCSP') which has obtained prior approval of the Central Bank.

The Governor of the Central Bank ("the Governor") will have the authority to withdraw any approval with respect to the RR, and any exemption granted and notice of such withdrawal shall be published in the local Gazette. An FCSP wanting to act as an RR shall, before doing so, apply for written approval of the Governor. It

should be noted that existing FCSPs must engage in RR services through a subsidiary company.

The Governor may grant or deny approval based upon:

- the fitness of the FCSP;
- the business record and relevant experience of the FCSP or its beneficial owners;
- whether it has sufficient human and physical resources to act as the RR; and
- the best interests of the financial industry.

#### *Functions of the Registered Representative*

Functions of the RR include that of secretary, director, and Bahamas Agent (which must be under a service agreement). Such services may also be provided by the duly appointed officers of the RR. The RR is responsible for ensuring that the PTC is established for a lawful purpose and that it operates as a PTC. When the PTC ceases to meet the requirements for exemption, it is the duty of the RR to inform the Governor.

The RR must obtain an annual compliance certificate from the directors and receive information on request from the PTC about the PTC's transactions. The Regulations provide that the RR must maintain the following books and records in The Bahamas: (a) Memorandum and Articles of the PTC (which do not name the trusts but do limit the activity of the PTC), (b) Designating Instrument, (c) CV of Special Director, (d) trust instruments for each trust, (e) a list of all PTCs for which the RR acts, and (f) at the discretion of the RR, form of acknowledgement (whereby the settlor acknowledges that he is aware that the following are not required for PTCs: (i) that the directors possess expertise in trust administration, (ii) fidelity bond, (iii) capital exceeding \$5,000 and (iv) an annual audit).

According to the Regulations, the RR must also fulfil know-your-customer requirements in accordance with the Financial Transactions Reporting Act. Such requirements include the RR verifying the identities of the settlor and any person providing the funds or assets which are subject to the trust, the Designated Person, the protector of any trust in which the PTC is trustee, and the vested beneficiaries of any trust of which a PTC is a trustee. Further, the RR holds the responsibility to report any suspicious transactions to the Financial Intelligence Unit of The Bahamas.

#### *The Functions of a Special Director*

A PTC must have at least one Special Director who has knowledge of trust administration or at least five years experience in a discipline relevant to trust administration, which include qualified legal training, finance, commerce, investment management, or accountancy. The Special Director need not be a resident of The Bahamas. Where the RR acts as a director of the PTC and the RR is a licensee of the Central Bank, the requirement for a Special Director is waived.

### *Fees and Penalty Costs Associated with the Formation of a PTC*

Legislative stipulations surrounding the formation and operation of a PTC include the following:

- PTCs must have a minimum share capital of \$5,000. The license fee for PTCs is \$5,000 annually.
- The RR must be a resident of The Bahamas and maintain a minimum share capital of \$50,000. The fee payable to act as the RR of a PTC is \$2,500 annually.
- In the event the PTC fails to comply with a direction of the Governor or engages in conduct that is unlawful or detrimental to The Bahamas, the Governor may impose sanctions against the PTC or the RR. Such sanctions include:
  - a fine of no more than \$5,000;
  - a Supreme Court Order compelling compliance;
  - amending or varying conditions of the licence;
  - requiring substitution of any director or officer;
  - appointing a person to advise on proper conduct;
  - appointing a receiver to assume control of the PTC's or RR's affairs; or
  - such other action as the Governor deems necessary.

### *Advantages of a Bahamian PTC*

The main advantage of a PTC lies in the opportunity to be much more closely involved in the operation of the trust (either directly or by appointing trusted advisors or family members to the board of the PTC). The representation of family members, protectors and others involved in the administration of the family's affairs on the board of directors of the PTC:

- Provides families with a greater level of control over the administration of the trusts;
- adds an extra layer of confidentiality regarding their financial affairs.

This characteristic can be very important for individuals unfamiliar with the trust concept. Further, PTCs may appeal to persons desiring to add an extra layer of confidentiality regarding their financial affairs. Provided the PTC is properly run, it should be possible to retain control within the family without prejudicing the validity of the underlying trust. If need be the client can change the administrator of the PTC without changing the actual trustee itself and while leaving the client's chosen advisors on the board of the PTC.

PTCs will be exempt from some of the obligations of ordinary trust companies. For instance, a PTC need not have a license from the Central Bank of The Bahamas (“the Central Bank”) to operate. Also, PTCs will be exempt from the requirements of the Business License Act.

PTCs can also lower the potential legal exposure of the professional trustee and even solve any trustee succession issues as PTCs have the advantage of perpetual life and can serve as trustee indefinitely. PTCs are not ideal for every client but can offer significant advantages for high net worth individuals seeking trust services.