



Honor Et Integritas

HIGGS & JOHNSON
Counsel & Attorneys-at-Law

LEGAL GUIDE

Private Trust Companies (PTCs)

For more information

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Introduction

Generally speaking, the purpose of a PTC is to act as trustee of a specific trust or, in some cases, a group of trusts. The main distinction between PTCs and institutional trust companies is that a PTC allows the settlors and beneficiaries more involvement in its administration. Such involvement could include representation on the board of directors of the PTC.

The new legislation, which came into force on the 27th of December, 2006, takes the form of an amendment (“the Amendment”) to the Banks and Trust Companies Regulation Act, 2000 (“the Act”) and introduces specific regulations (“the Regulations”) for PTCs. This legislation is designed to reduce red tape and enhance the range of financial services offered in The Bahamas.

The Legislation

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. It should be noted that the beneficiaries

of trusts administered by PTCs are not restricted in any way. PTCs must have a minimum share capital of \$5,000. The licence fee for PTCs is \$5,000 annually.

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

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

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 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 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 private trust company. 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 shall report any suspicious transactions to the Financial Intelligence Unit.

In addition to the RR, 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. Such disciplines include law, 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.

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.

The Governor also has the discretion to petition the court for an order to transfer the trusteeship of a trust to a new trustee; the court, in addition to granting this order, may also give such supplemental or incidental orders or other directions as the court deems fit.

Conclusion

The introduction of PTCs in The Bahamas and the new legislation granting numerous regulatory exemptions should give The Bahamas a renewed prominence in the field of wealth management and estate planning. The Bahamas will now be able to offer a product comparable to Bermuda and Jersey.

Individuals and trusted intermediaries alike

should note that PTCs can provide families with a greater level of control over the administration of trusts. 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.

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.

In conclusion, the PTC legislation currently in force provides for a clear and speedy process to form and manage PTCs. Through the joint efforts of both the Government and the private sector, The Bahamas will now be able to be more competitive globally in the financial services sector while providing reasonable but effective regulation of PTCs. Higgs & Johnson, along with others, played an active role in the legislative drafting process. ●

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