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STEP Bahamas

**"Criteria for Trustees rendering legal assistance to other
countries in civil and criminal matters"**

**By the Hon. Alfred M. Sears
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How should Bahamian registered Trustees deal with overtures by United States authorities and other foreign authorities to have Trustees render assistance in criminal and civil matters outside of the procedure and mechanism of Bahamian law?

The Bahamas is a major offshore financial centre with millions of dollars under trust administration. Most of these funds would have originated primarily in G7 countries, including the United States. The G7 countries, as high tax jurisdictions, tend to view offshore jurisdictions, such as The Bahamas, as direct competitors in the provision of financial services to New York, London, Paris, Lugano and others as well as to project offshore financial centres as unfair magnates for their respective potential tax revenues.

There is no substantial evidence and data in support of the claim that the existence of low-tax offshore financial centres discourages taxpayer compliance, or contribute to undermining the integrity and fairness of tax structures or increase the administrative cost to taxpayers in the OECD member countries. Yet in July 2000 the FATF listed 29 countries, including The Bahamas, as non-cooperative countries, the Financial Stability Forum branded The Bahamas as a jurisdiction engaged in “harmful tax practices” and the United States Treasury Department issued Advisory #13 against The Bahamas as a jurisdiction, inter alia, with “systemic problems, bank secrecy and bearer shares”.

Although there is fierce competition between G7 countries and offshore financial centres such as The Bahamas in the provision of financial services, there must also be international cooperation to protect the integrity of the global financial services industry from the corroding effects of money laundering, the financing of terrorism and organized crime.

The global regulatory agencies, such as the OECD, the Financial Action Task Force (FATF), the Financial Stability Forum (FSF), the World Bank and the International Monetary Fund, which prescribe the anti-money laundering and the combating of the financing of terrorism rules, conditions and guidelines, or the standards for international cooperation in this area, are primarily controlled by the G7 countries.

Without a direct voice in the deliberations of the FATF and FSF, there is a genuine concern that the OECD onshore jurisdictions may use their influence in these organizations to advance their competitive interests, or practice plain protectionism under the guise of regulatory concerns.

Thus, the reality of realpolitik, where the onshore jurisdictions control the global regulatory framework, has led countries outside of the G7, including offshore jurisdictions, such as The Bahamas, to call for a level playing field in the application of the rules and for a global forum under the

auspices of the United Nations and for the formation of an international Treaty to place the prescription, application and monitoring functions of the anti-money laundering and combating the financing of terrorism regime, where there will be more transparency and equitable global participation.

It is, I submit, this critical tension between fierce competition in the provision of financial services between OECD member onshore jurisdictions and non-OECD member offshore jurisdictions, with control over the rule-making process by the OECD member onshore countries, which has made the area of international cooperation in the global financial industry so charged with difficulties for The Bahamas as well as other offshore financial centres, especially in the aftermath of 9/11 and the United States military intervention in Iraq and Afghanistan.

International Legal Assistance in Criminal Matters

In June 2000, The Bahamas was labeled by the Financial Action Task Force (FATF) as an uncooperative jurisdiction within the context of acceding to requests for legal assistance from foreign jurisdictions, who were seeking information about their nationals and others, who were alleged to have been engaged in money laundering and other criminal activities. In response to this threat to the Bahamian economy, a

compendium of laws were passed in 2000 including, The Banks and Trust Companies Regulation Act, the Central Bank of The Bahamas Act, the Financial Intelligence Unit Act, The Proceeds of Crime Act, The Financial and Corporate Service Providers Act, The Financial Transactions Reporting Act, The International Business Companies Act, The Evidence (Proceedings In Other Jurisdictions) Act, and The Criminal Justice (International Cooperation) Act. Notably, in 2004 the Anti-Terrorism Act was enacted to implement the United Nations convention respecting the suppression of the financing of terrorism, the United Nations Security Council Resolution 1373 on terrorism and generally to make provision for preventing and combating terrorism.

Additionally, a Financial Intelligence Unit was established and measures were taken to address the complaints of delays in the Ministry of Foreign Affairs and in the Office of the Attorney General as regards the processing of requests for assistance under the provision of the Mutual Legal Assistance Treaties. The International Legal Cooperation Unit (“ILCU”) was established within the Office of the Attorney-General to expedite international requests for legal assistance.

The functions of the ILCU are especially important as the FATF continues to monitor the level of cooperation, which exists between The

Bahamas and its global partners, through its regional arm, the Caribbean Financial Action Task Force (CFATF). Any perception that The Bahamas is non cooperative could result in our country being placed again on the 'blacklist'.

Requests for International cooperation in criminal matters come in various forms and include:

1. Requests for assistance in criminal matters under the Mutual Legal Assistance (Criminal Matters) Act, 1988, which deals with the Mutual Legal Assistance Treaties (MLATS), which the Government of The Bahamas has signed with:-
 - a. The United States of America;
 - b. Canada; and
 - c. The United Kingdom – specifically in relation to Drug Trafficking and Confiscation of the Proceeds of Drug Trafficking.
2. Requests for obtaining evidence for use in criminal proceedings/investigations in The Bahamas or in foreign jurisdictions, with whom The Bahamas has not negotiated an MLAT Treaty fall within the provisions of the Criminal Justice (International Cooperation) Act, 2000 (“CJICA”).

3. Anti-Terrorism Act

4. Tax Information Exchange Agreement (TIEA) – Ministry of Finance

What obligations to assist are placed on The Bahamas?

Pursuant to the respective Treaties with the USA and Canada The Bahamas is obligated to provide assistance which shall include:

- the taking of testimony or statements of persons;
- providing documents, records, and articles of evidence;
- executing requests for searches and seizures;
- transferring persons in custody for testimonial purposes;
- serving documents;
- locating persons;
- exchanging information in relation to the investigation, prosecution and suppression of offences;
- immobilizing forfeitable assets; and
- any other matter mutually agreed upon.

International requests for obtaining evidence for use in civil proceedings/investigations in The Bahamas or in foreign jurisdictions fall within the provisions of the Evidence (Proceedings in Other Jurisdictions) Act, 2000. Under the EPOJA assistance can be requested for the examination of witnesses, the production of documents, the inspection, photographing, preservation custody or detention or any property, the taking of samples of any property and the carrying out of any experiments on or with any property, the medical examination of any person and the taking and testing of blood samples from any person.

Criteria for Trustees in rendering legal assistance to foreign officials

As a Trustee registered under the laws of The Bahamas, Trustees are possessed with the same obligations to provide international legal assistance as are placed on the country as a whole under the treaties or under the CJICA.

While the Trustee has a fiduciary relationship with the trust beneficiaries, and is concerned with acting in the best interests of the beneficiary and the trust, the Trustee would no doubt be under an obligation to comply with an Order of the Supreme Court which orders the

Trustee to provide the requested assistance, pursuant to the legislation previously outlined.

In the majority of cases, a Trustee may be served with a production Order of the Supreme Court, or an Order that the relevant Trustee personnel shall submit to an examination/deposition on Oath before a court appointed examiner to answer questions specified in the Order which may pertain to transactions, trust documents and the settlor and beneficiary of the trust.

Trustees must therefore comply with an Order of the Supreme Court while remaining vigilant that the information supplied does not extend beyond what is requested and ordered. The release of any information beyond what is requested and ordered may amount to a 'fishing expedition' which could potentially create a breach of fiduciary duty between the Trustee and the beneficiaries.

In particular, Trustees should determine whether there exists a clear and definite set of circumstances that a crime has been committed by the subject of the request, and that the crime can be linked to The Bahamas and more specifically to the trust. In other words, there must be a nexus

between the alleged crime and the assistance that is required from the Trustee.

However, under the CJICA it appears that it is sufficient that effect may be given to a request for international assistance where under the law of the foreign country a crime has been committed and there are reasonable grounds for suspecting that such an offence has been committed; and that proceedings in respect of that offence have been instituted in that country or that an investigation into that offence is being carried on in that country, and that the Trust in The Bahamas was used in the facilitation of that alleged crime. Consequently, the Supreme Court which has jurisdiction to entertain such an application for assistance has the authority to make such order as it sees fit to give effect to the request.

It appears that the majority of requests for legal assistance that would apply to Trustees involve money laundering and would typically give rise to international request proceedings under the Proceeds of Crime Act, Chapter 93 and the Proceeds of Crime (Designated Countries and Territories) Order 2001. Section 40 of the POCA criminalizes the offence of money-laundering.

Confidentiality & The obligation of Trustees to provide international legal assistance in the absence of an Order of the Court

Notwithstanding a Trustees's obligation to provide assistance when ordered to do so by a court of competent jurisdiction in The Bahamas, Trustees are under **no** obligation to provide non-public information to certain United States Attorneys, States Prosecutors and other foreign officials who seek to circumvent the Bahamian legal procedure by approaching Bahamian Trustees directly, sometimes coercively, to render assistance outside of the mutual legal assistance procedure that has been bilaterally negotiated.

Trustees should ensure that they act in good faith and to the benefit of their fiduciary clients who they are bound to protect. Furthermore, they must ensure that they do not breach the confidential nature of their fiduciary position. A Trustee should not be placed in a position where the interests of these foreign officials and his duty to his client conflict.

Where overtures are made by United States authorities and other foreign authorities to have the Bahamian registered Trustees render assistance in criminal and civil matters outside of the procedure and mechanism of Bahamian law, Trustees should make a determination that

the assistance does not amount to what the Supreme Court in the case of The Attorney-General vs. Capital Management International and others, Common Law, No. 785 of 2000 has deemed a ‘**fishing expedition**’. Mr. Senior Justice Osadebay SJ, as he was at that time, held that when considering international requests for legal assistance **“fishing” expeditions were not to be countenanced**.

In essence, fishing expeditions are requests for information that are irrelevant to the subject of the request and could possibly include information which breaches confidentiality.

Moreover, where a Trustee’s client agrees to the render the requested assistance to the foreign official, in the absence of an Order of the Supreme Court, Trustees should properly consider the criteria for determining whether a request amounts to “**a fishing expedition**”, as defined by Senior Justice Osadebay, as he then was, in The Capital Management Case as follows:

“It is not enough, and certainly not enough, for the applicant to recite what may appear to be a ritual – that the information is required for the purposes of an investigation being carried out. In attempting to satisfy the Court that the evidence to be obtained “is to be used in criminal proceedings” which may be in the investigation stage, the Competent Authority must show some evidence to the effect that such criminal proceedings are in fact contemplated, hence the investigation, and hence the

request for the information. The applicant should show in what way the information or evidence if obtained would impact on the contemplated criminal proceedings. It may be necessary in the circumstances to show the status of the investigation so far. In applying for the Order, the Competent Authority must produce to the Court the following evidence or information:

- (a) The name of the agency or law enforcement authority conducting the proceeding to which the request relates;**
- (b) The subject matter and nature of the proceeding for the purposes of which the request is made and in particular the criminal offences for the investigation, prosecution or suppression of which the assistance is requested and a summary of the facts which form the basis thereof;**
- (c) A description of the evidence or information sought or the acts of assistance to be performed; such description shall specify where possible the time period to which any such evidence or information relates;**
- (d) The purpose for which the evidence, information, or other assistance is sought; and**
- (e) An indication of any time limit within which compliance with the request is desired, stating reasons.**

In addition, the application should, to the extent necessary and possible, contain the following:

- (a) Available information on the identity and whereabouts of a person to be located;**
- (b) The identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;**
- (c) The identity and location of persons from whom evidence is sought;**
- (d) A precise description of the place or person to be searched and of the objects to be seized;**
- (e) A description of the type and amount of expenses which the Requesting State is willing to assume in the execution of the request; and**
- (f) Any other information which may be brought to the attention of the Requested State to allow it to execute the requests.**

In my opinion all the above when considered in the context of section 7(1) of the MLA are an indication that “fishing” expeditions are not to be countenanced.

Consequently, Trustees must ensure that requests for assistance from foreign countries do not cause an erosion of the personal confidence towards the beneficiaries, as any breach of fiduciary duties will cause the Trustee to be liable to account to any challenges the beneficiaries are faced with because of the assistance provided.

NEW THREATS TO THE BAHAMIAN FINANCIAL SERVICES SECTOR

Despite the fact that the measures taken by The Bahamas have resulted in The Bahamas being removed from the Black List and the Monitoring List of the FATF and given a clean endorsement, as reflected in the most recent Mutual Evaluation by the CFATF in November 2007, there are still certain threats from the United States and other OECD member countries to The Bahamas as an offshore financial centre.

The first threat is posed by certain U.S. agents, such as United States Attorneys, States Prosecutors as well as other foreign state officials who perceive the mutual legal assistance procedure and other legal mechanism

of international cooperation under Bahamian law as too time consuming and cumbersome. Rather than applying to the Competent Authority under Bahamian law for assistance, they circumvent the Bahamian legal procedure by approaching Bahamian trustees directly, sometimes coercively, to render assistance outside of the mutual legal assistance procedure negotiated and promulgated between the United States Government and the Government of the Commonwealth of The Bahamas. In short, how should Bahamian trustees deal with these overtures by United States authorities and other foreign authorities to have the Bahamian registered trustees render assistance in criminal and civil matters outside of the procedure and mechanism of Bahamian law?

The second threat to the Bahamian financial services industry is posed by protectionist U.S. legislative measures, such as the Bill being proposed by the United States Senate. In the 110 Congress, 1st Session, sponsored by U.S. Senators Levin, Coleman and Obama, was read twice and referred to Committee. The short title of the Bill is “**Stop Tax Haven Abuse Act**”. The objective of the Bill is “**to restrict the use of offshore tax havens and abusive tax shelter to inappropriately avoid Federal taxation, and for other purposes.**” The Bill places The Bahamas on the Initial List of offshore secrecy jurisdictions which should be **deemed** listed

by the Secretary of the Treasury and subject to penal sanctions. Such jurisdictions will be subject to a **rebuttable presumption** that a U.S. person exercised control over an entity **where he/she directly or indirectly formed or transferred assets to, was a beneficiary of, or received money or property, or the use thereof from a trust,** formed, domiciled or operating in an offshore secrecy jurisdiction. The Bill also authorizes the Secretary, in consultation with the Secretary of State, the U.S. Attorney General and the Chairman of the Federal Reserve, to take punitive measures against such jurisdictions, including prohibiting any corresponding accounts or payable-through accounts by U.S. financial institutions or the use of a credit, debit or charge card in the United States.

The third threat to the Bahamian financial industry is the increasing assertion of extra-territorial jurisdiction by United States federal and state courts over foreign entities and professionals who have minimum contacts with the United States.

Domicile and citizenship have traditionally been accepted as proper bases of personal jurisdiction in most jurisdictions. However, in the United States Supreme Court in the case **International Shoe Co. v. State of Washington** the Court held that **“solicitation within a State by agents of a foreign corporation plus some additional activities there are**

sufficient to render the corporation amenable to suit brought in the courts of the State to enforce an obligation arising out of its activities there.”

The concept of minimum contacts as a basis of asserting personal jurisdiction over a foreign defendant was further clarified by the U.S. Supreme Court by applying a reasonable foreseeability test in the case World-Wide Volkswagen Corp. v. Woodson in which it was held that

“when a corporation purposefully avails itself of the privilege of conducting activities in the forum State ... it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected cost on to the consumers, or if the risk is too great severing its connection with the State ... the Forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the Forum State.”

Trust practitioners operating in The Bahamas must therefore be conscious of the existence of long-arm statutes in states, such as New York, as well as of the common law principles under International Shoe and World-Wide Volkswagen Corp. which may convert activities such as

investment promotional activities in, business solicitation visits to, or the sending of promotional literature to the United States into grounds upon which to assert personal jurisdiction by a United States court over a Bahamian trust company or trust professional.

The fourth threat facing offshore financial centres such as The Bahamas is the growing protectionism in the United States and other OECD countries in the face of the current recession. During this period of crisis, there is will be the temptation by some to view offshore financial centres as the cause for the erosion of the tax base in OECD member countries, at a time when their recovery strategy from the current recession include massive public works expenditures. According to Dr. Jack Rasmus, the United States experienced the worst month in September 2008 since the Great Depression of the 1930s. More than 800 banks have been placed on the unstable list. While a U.S.\$700 billion bail-out fund was approved by Congress for the U.S. financial sector, some economists estimate that the total bad debt may eventually require about U.S.\$5 trillion. Further, from December 2007 the U.S. Federal Reserve has granted below market value emergency loans in excess of US \$800 billion to U. S. and European banks. Therefore, the total amount that the U.S. Government has committed to the financial sector thus far is in excess of US \$1.6

trillion. It is unlikely that this recovery strategy will solve the recession, as there is also a deterioration in other sectors of the economy, with credit contraction causing businesses to cut costs and lay off employees to maintain operations. Companies such as Chrysler, G.M., Sears, Airlines, trucking companies and retail chains have been placed on the unstable list. In this charged environment, it would be easy, although erroneous, to look at offshore financial jurisdictions as taking away U.S. and other OECD member tax dollars at a time when they are needed most.

Recommendations

I therefore recommend that the Society of Trust & Estates Practitioners (Bahamas), consistent with its goals to educate, facilitate networking by its members, raise the profile of wealth management and render advice to the Government of The Bahamas, undertake the following measures to better protect the wealth management industry in The Bahamas:

1. Lobby the Bahamian Government to make an official protest against the practice by agents of the United States and other OECD member countries who undermine the legal process in

The Bahamas dealing with international cooperation and the Mutual Legal Assistance Treaty between the United States and the Commonwealth of The Bahamas by seeking to induce Bahamian trust entities and professionals to circumvent the established legal process for international cooperation; thereby, undermining the rule of law in The Bahamas. If these protests were made now, it would give The Bahamas a tactical advantage, rather than raising them when The Bahamas is on the defensive or under some imminent threat.

2. Invest in a private sector policy facility to conduct economic intelligence monitoring of the global economy and trends, to assess their impact on the financial industry of The Bahamas and propose policy recommendations to improve the competitiveness of the Bahamian jurisdiction as a centre of wealth management.
3. Lobby the United States, in partnership with the Bahamian Government and other private sector partners, to stop the passage of the **Stop Tax Haven Abuse Bill** by the U.S. Senate and House of Representatives, to blunt the growing protectionist tendencies in the United States and to educate

U.S. policy makers and media of the true nature of the Bahamian financial industry and the collective commitment of The Bahamas to fight money laundering and the combating of the financing of terrorism.

4. Promote the convening of a global forum on money laundering and terrorist financing, under the auspices of the United Nations, leading to the formation of a global treaty through which offshore jurisdictions, such as The Bahamas, would have a voice in the prescription and application of the rules on a level playing field. The Economist, in its November 15-21st 2008 issue in an article entitled “**Redesigning Global Finance**”, at page 13, stated that the current global crisis is, in part, due to the absence of a global mechanism to regulate finance in the following terms:

“International finance cannot just be ‘fixed’, because the system is a tug-of-war between the global capital markets and national sovereignty. As cross-border financial flows have expanded and big financial institutions have far outgrown their domestic markets, finance has become one of the most globalised parts of the world economy. At the same time, finance is inherently unstable, so the state has to play a big role in making it safer by lending in a crisis in return for regulation and oversight. Governments broadly welcome the benefits of global

finance, yet they are not prepared to set up either a global financial regulator, which would interfere deep inside their markets, or a global lender of last resort. Instead, regulated financial firms are overseen by disparate national supervisors (in America they are sometimes state based).”

I submit that the case is even more compelling for the formation of a global treaty and monitoring mechanism, under the United Nations, in the area of anti-money laundering and combating the financing of terrorism.

Conclusion

Trustees are under no obligation to provide assistance to foreign officials in the absence of an Order of a court of competent jurisdiction of The Bahamas. Where assistance is rendered by the Trustee, it must be done with the express permission of the beneficiaries of the Trust, while ensuring that the provision of the assistance does not amount to a fishing expedition, and that the Trustee protects and preserves the confidential relationship with the trust beneficiaries.

I submit that the existence of tax free financial centres, such as The Bahamas, tend to impose discipline on high tax regimes, such as the OECD countries, by forcing them to make more efficient use of tax revenues in their spending decisions.

It is accepted that the proper controls and supervision are indispensable to maintain the integrity of any onshore or offshore financial centre. However, we should resist protectionist measures in OECD member countries which are designed to keep multinational enterprises in high tax regime in the name of fighting money laundering. Multinational enterprises should be free to carry on their activities in the most conducive and cost effective environment. All countries, small and large, should be free to compete in offering services to these entities in a high tax or low tax environment.

In this period of global recession and growing protectionism in the United States and other G-7 countries, I challenge STEP to remain vigilant and creatively involved in the promotion of excellence and best practices in the wealth management industry, in the protection of the Bahamian jurisdiction from protectionism from onshore competitors and to lobby for a more rational and transparent global management regime in the area of anti-money laundering and combating the financing of terrorism.

Thank you.