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STEP Bahamas Branch Committee Elections and AGM

TAX INFORMATION EXCHANGE AND OTHER REPORTING REQUIREMENTS

Information Reporting

Gathering and Disclosing Client Information - Some Silver Linings

In having the honor to address this Annual General Meeting of The Bahamas Branch of STEP so soon after your most successful Caribbean conference, I thought it might be useful to supplement some of the views I expressed at that conference concerning the position of the trustee in the maelstrom of rapidly evolving rules, regulations and counter rules and regulations relating to information gathering and disclosure. My remarks focus specifically on tax information exchange. However, much that will be said is applicable across the board to any request for information, be it from the Government of the Commonwealth of the Bahamas or any foreign government or international institution.

In my view, the most important thing for a trustee to do is to have a frank discussion with new and existing clients, or their representatives, concerning the challenges created by the new transparent world. It should always be remembered that compliance is the responsibility of the client, and the trustee would do well to limit its involvement to disclosing to the client the necessity for proper compliance and good solid planning by reputable, competent advisors. Having done that and having been satisfied, as we will discuss in more detail below, that the client, in fact, understands and has acted upon the trustee's advice, then the trustee normally need go no further with the client other than carrying out the plans suggested by the client's advisors. Like all other glittering generalities, however, this approach has its exceptions.

First of all, as I have mentioned, the trustee must be satisfied that the client understands the necessity for proper planning, the need for competent assistance and sound plans (including contingency plans in the case when there is, in fact, an investigation or a request for information) and the need, of course, to be responsive to steps to be taken to implement the plan. In all of this, the trustee must, of course, exercise common sense. If the plan suggested is odiferous, the trustee cannot put his head in the sand. If the advisors appear to be just too aggressive, the trustee must take the steps to protect both the trust and the trustee.

In carrying out its responsibilities, the trustee must always remember that they are in the Bahamas and that their first responsibility is to the Government of the Bahamas and the laws of the Bahamas. The Tax Information Exchange Agreement ("TIEA"), for example, has been implemented through legislation in the Bahamas (namely, Law Number 22 of 2003), and, accordingly, exchange of information obligations to that extent are part of the laws of the Bahamas. However, it is not beyond foreign governmental institutions to simply make blanket direct demands for immediate information concerning a client or a trust or the like without going through required procedures. This has happened in the United States and in other countries. The IRS, for example, has been chastised in situations where Revenue Agents have failed to comply with both IRS procedures and procedures set forth under the United States Right to Financial Privacy Act. *See United States v. Kao*, 81 F.3d 114 (9th Cir. 1996). Just because a foreign governmental institution makes a demand on a trustee to provide information doesn't mean that the trustee should immediately turn over the information. In fact, quite the contrary is the case. The financial confidentiality laws remain very much in place in the Bahamas. Accordingly, failure on the part of the trustee to make sure that information, when it is requested, is turned over in accordance with applicable legal procedures and after due notice to the client, may very well expose the trustee both to civil suit and disciplinary action.

What then should the trustee do? The first thing is to review account opening forms and agreements to make sure that certain provisions relating to the disclosure of information are set forth either therein or in the trust deed or both. These provisions should include an acknowledgement by the client that, under certain circumstances, the trustee may be compelled to turn over certain information to governmental authority. The trustee should agree within reason to exercise best efforts to notify the client, of the fact that information has been requested. The Trustee's notice to the client should be accomplished in a timely fashion such that the client, or his representative, may take appropriate action to preserve the confidentiality of any information which is, in fact, confidential under the law or otherwise to raise issues of lack of compliance with the treaties or rules relating to information exchange. The trustee, however, should be exonerated in the event that the trustee either is unable to provide such notice or is precluded by law from providing such notice such as in the case where anti-tipping applies as under the Proceeds of Crime Act 2000, Section 44(1) and (2), or other applicable anti-tipping rules.[1] The trustee should also be specifically authorized under both the account opening form and the trust deed itself to utilize trust funds for the purposes of complying with governmental information disclosure requirements.

In addition, the account opening forms should set forth the name of the legal, tax and other advisors of the client in his residence country with an authorization on the part of the client for the trustee to contact these client compliance personnel whenever issues arise and to rely on their advice even if mistaken. The client should be obliged to supply

[1] The implementing Act exonerates the trustee for turning over information in response to requests under the TIEA. However, it does not necessarily absolve the trustee for failure to timely inform the client that proper language in the account opening forms can deal with this.

the trustee with any changes in this information. The account opening forms should request some basic contact and other information concerning the advisors, so that the trustee can reach a reasonable conclusion that the advisors are competent. In the case of doubt, the trustee, of course, should consult its own counsel or other available facilities to "check out" the advisors. Once the trustee is reasonably satisfied that the advisors are competent, the trustee is in a position to rely upon the expertise of these advisors, unless, of course, the advice is obviously wrongful or outlandish. It would be wise, in appropriate circumstances, for the trustee to become a joint client of the tax and legal counsel representing the client in his residence country. One of the few meaningful privileges with regard to nondisclosure information, which remain under, for example, the Tax Information Exchange Agreement with the United States and such legislation as the Financial Intelligence Unit Act 2000, Section 4(2)(d) is the attorney/client privilege. The trustee should require that counsel designate any written information to the trustee as confidential where the professional confidentiality rules appropriately apply. The trustee should make sure that legally confidential information is appropriately segregated in its files, so that privileged information which is indeed protected by the Tax Information Exchange Agreement or other law is not accidentally turned over to the authorities.

The trustee should designate a tax and securities (and other applicable) disclosure compliance officer. Staff must be trained to immediately direct all correspondence or other notices or requests from any governmental authority to the trustee's compliance officer rather than routing such correspondence in the normal course of business. There are typically relatively short response times applied to such information requests.

It should be noted, however, that under the Bahamas TIEA and the implementing Act, the Minister of Finance, in his discretion, may grant a person on whom a demand for information has been made up to twenty-eight (28) days to respond. Moreover, the Minister may extend the time specified in the notice beyond twenty-eight (28) days where he considers that the circumstances warrant such an extension. In addition, once the Minister has obtained the information, he is required by law not to disclose or reveal the contents or import of the articles or information obtained to any person for twenty (20) days commencing on the day on which he has obtained the articles or information. The Minister may, in his discretion, extend the time for holding of any article or information without further disclosure in the event that a taxpayer or interested person has objected to the Minister's providing the assistance requested or has sought judicial review of or other lawful recourse against an act of the Minister with regard to the disclosure of the information. Specific jurisdiction is granted to the Supreme Court with respect to the review of any action requested under or pursuant to the TIEA. Accordingly, in the Bahamas, there is adequate time for a client to seek a review of the propriety of any request of tax information under the U.S. TIEA provided the client or his compliance personnel have been given adequate notice by the trustee. Moreover, response time may not be adequate in other circumstances.

It is essential, therefore, that the trustee put itself in a position where it can, in fact, provide reasonable notice to the client, or his designated compliance officer, for the purposes of seeking a review of the request in the courts of the Bahamas. It should also

be noted that, for example, with respect to requests for information from the United States Securities and Exchange Commission, in addition to notifying the client, the trustee should immediately notify the proper officer at the Central Bank. Discussions are being held between the Central Bank of the Bahamas and the United States Securities and Exchange Commission for proper procedures to be implemented where the Securities and Exchange Commission requires information. Normally, the Securities and Exchange Commission should not approach the trustee directly, but rather, should proceed through the Central Bank to obtain the information desired. Accordingly, direct contacts with trustees, which the United States Securities and Exchange Commission often attempts, should immediately be directed to the Central Bank.

In addition to putting appropriate procedures in place with regard to a client at the outset of a client relationship, it is necessary to add disclosure matters to the trustee's normal agenda for annual reviews and consultations with the client and his advisors. There are constant changes in any tax plan, and the trustee should be made aware of these changes. However, it is important, and I think it should be placed in the account opening documents as well, to impress upon the client that the trustee cannot constantly be an auditor of changes with regard to any kind of tax plan. Once again, the trustee's compliance officer should be made aware of changes involving advice of counsel respecting the client's structure. Any changes in the client's advisors should likewise be evaluated.

The above, no doubt, may add somewhat to the cost of operation. In view of the universality of these problems, however, no trustee should be sensitive to passing on these costs to a client. In fact, I doubt whether your colleagues in other jurisdictions have any compunctions about doing so. Of course, the most important thing here is communication. The client must understand that these additional costs are first, for his protection; second, necessary, in any case, by reason of the change in environment; and, universal in their nature, such that, no matter where service would be sought, the same or similar additional costs would be involved.

If the above procedures are carried out, it seems to me that the trustee should be in a position to calmly, but firmly, make an easy transition to the new order of the information exchange world. The trustees will have adequate time to do this, because a significant number of requests for information with regard to criminal matters is not likely until, at the earliest, 2005, and with regard to civil matters, at the earliest, 2007. Other types of exchange information requests are, of course, possible now, and so the trustee should move with deliberate speed to implement the above suggestions, but, as always, everything should be done in an orderly and competent fashion. It should be remembered, moreover, that information, which is truly legally confidential is still confidential under Bahamian law and under the TIEA and other applicable provisions of law, and, therefore, not everything is subject to public disclosure. Also remember that a greater degree of confidentiality exists vis-à-vis countries other than the U.S. Information obtained by the United States, for example, cannot be turned over to other government authorities. Other governments (such as for example, Canada) have not moved very swiftly with regard to an information exchange program of their own. The

OECD situation is still mired in the level playing field morass, and is likely to be in that position for some period of time to come. Accordingly, it should be understood that, first of all, not all confidentiality has been surrendered. Second of all, that a transition to the new world is relatively easy, and third, that it is likely that this new world may very well result in an actual improvement in business conditions.

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