Private Banking & Wealth Management

Contributing editors
Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov

2018

GETTING THE DEAL THROUGH

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Private banking and wealth management

1 What are the main sources of law and regulation relevant for private banking?

Private banking in the Commonwealth of The Bahamas (The Bahamas) is primarily governed by the Banks and Trust Companies Regulations 2000, Chapter 316 (BTCRA). The BTCRA requires that any entity that wishes to engage in banking business must obtain a licence from the Central Bank of The Bahamas (CBB), where banking business is defined to encompass all aspects of commercial banking.

The services offered by private banks may also require that they obtain a licence from the Securities Commission of The Bahamas (SCB) under the Securities Industry Act 2011 (SIA), in order to deal in, arrange deals in, advise on or manage securities ('securities business').

Private banks are also subject to financial transactions regulations being a financial institution under the Financial Transactions Reporting Act 2000, Ch 368 (FTRA) and the Financial Intelligence Unit Act 2000, Ch 367 (FIUA).

2 What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The CBB and the SCB are the main regulatory bodies relevant for private banking and wealth management. The CBB is primarily responsible for the governance of banks, trust companies, private trust companies and money transmission services. The SCB governs securities dealers and advisers, fund managers and administrators and financial and corporate service providers. Additionally, the Financial Intelligence Unit is responsible for ensuring compliance with the financial transactions regulations.

3 How are private wealth services commonly provided in your jurisdiction?

Private wealth services are not restricted in The Bahamas to private banks but include trust companies, multi-family offices, securities investment advisers and managers, investment fund administrators and financial and corporate service providers.

4 What is the definition of private banking or similar business in your jurisdiction?

There is no distinct definition of private banking in The Bahamas. The key feature of private banking in The Bahamas, as espoused by The Bahamas Financial Services Board, a public-private initiative that promotes the financial services industry of The Bahamas, is a personal relationship with a private banker that will provide expert advice and stewardship of all of a client's financial affairs. Private banking is said to work one-on-one with clients who may be dealing with multiple income streams and business interests that require complex solutions.

5 What are the main licensing requirements?

In licensing a private bank, the CBB will look at a variety of factors; chief among them is the fitness and propriety of the applicant, minimum capitalisation requirements and the three-year business plan. The considerations made by the CBB also include the nature and sufficiency of the financial resources, the soundness and feasibility of the business plan and the business record and experience of those who will operate the private bank.

6 What are the main ongoing conditions of a licence?

Private banks in The Bahamas are subject to five main types of ongoing conditions. These can be separated into capital adequacy requirements, physical presence requirements, corporate governance requirements, information sharing requirements and requirements to maintain policies and procedures. The application of the ongoing conditions may differ depending on whether the private bank is a branch or subsidiary of an existing foreign bank or whether the private bank is a stand-alone institution. Summarised below are the minimum requirements that are generally applied to all banking institutions.

Capital adequacy

A private bank must maintain a capital adequacy ratio of at least 8 per cent at all times, at least three-quarters of which must take the form of Tier 1 capital (ie, 6 per cent), unless it is a branch of an existing foreign bank or a managed branch. Additionally, a private bank's Tier 1 capital must be predominantly comprised of common equity, therefore, each bank must maintain a minimum of 4.5 percent of risk-weighted exposures consisting of Common Equity Tier 1.

Physical presence

Private banks are required to maintain a minimum physical presence in The Bahamas at all time. Physical presence does not require that the bank maintains a physical premises in The Bahamas, as Bahamian regulations allow a bank to be managed by a third-party managing agent in The Bahamas, but the bank must meet certain conditions that demarcate a physical presence in The Bahamas.

Corporate governance

The CBB regulations prescribe the corporate governance requirements of private banks and private banks are required to certify their compliance with corporate governance requirements to the CBB within 120 days of the end of each calendar year.

Information sharing

Private banks are also required to periodically share certain other information about their business to the CBB, where applicable, including publishing yearly statement of their accounts; notifying and obtaining approval from the CBB in respect of any outsourcing of material functions by the bank; making disclosures with respect to remuneration, risk management and financial statements; and, generally, notifying the CBB of any changes or proposed changes to their business, operations, shareholders or corporate information.

Policies and procedures

Private banks are required by the CBB to maintain policies and procedures in respect of certain key aspects of its business including, but not limited to, anti-money laundering and the countering of terrorist financing, internal assessments of capital adequacy and management of certain types of risks.

7 What are the most common forms of organisation of a private bank?

The majority of private banks in The Bahamas are subsidiaries of existing foreign banks. There are also branches of foreign private banks operating in The Bahamas. Less frequent are stand-alone private banks that operate exclusively from within The Bahamas.

8 How long does it take to obtain a licence for a private bank?

It can take between three and six months to obtain a licence to conduct private banking business in The Bahamas.

9 What are the processes and conditions for closure or withdrawal of licences?

A private bank that wants to surrender its banking licence must obtain the prior approval of the CBB. Such approval would be sought by the bank writing to the CBB outlining its plan for the closure of accounts and custody of assets with respect to non-responsive account holders. The private bank will then have to submit to a termination audit to confirm there are no outstanding liabilities prior to the surrender of its licence. Following the termination audit, the CBB may sanction the surrender of the licence or impose additional requirements on the bank's dealings with accounts.

The process of a voluntary surrender of a securities business licence requires that formal notification in writing of surrender, setting out the reasons or circumstances for the surrender, is given to the SCB. The notification must be accompanied by the original licence or registration certificate for cancellation. The surrender of the licence or registration will take effect on the later of (i) 21 days after receipt of the original licence or certificate for cancellation; and (ii) all debts owed to the SCB and all matters outstanding (including disciplinary actions) before the SCB having been satisfied and properly concluded. In particular, if there are any financial filings that are outstanding these would need to be submitted.

10 Is wealth management subject to supervision or licensing?

Wealth management services will generally involve managing or advising on securities; both activities require a licence to engage in securities business from the SCB.

11 What are the main licensing requirements for wealth management?

Applicants for a licence to engage in securities business must submit an application in the form prescribed by the SCB. Applicants are required to meet tests of fitness and propriety, financial resources and capital adequacy, banking, clearing and custody arrangements, internal controls and risk management systems, policies and procedures and arrangements made for execution and settlement of securities transactions on behalf of customers.

12 What are the main ongoing conditions of a wealth management licence?

Physical presence

Individual wealth managers are required to reside in The Bahamas. Where the wealth manager is a company, it is required to maintain a minimum physical presence in The Bahamas at all time. Physical presence does not require that a physical premises is maintained in The Bahamas, as Bahamian regulations allow a wealth manager to be managed by a third-party managing representative in The Bahamas, but the wealth managers must meet certain conditions that demarcate a physical presence in The Bahamas.

Corporate governance

Among other requirements, the board of directors of wealth managers should comprise (except where specific exemption has been granted) both executive and non-executive members, as appropriate to the organisation's needs, who are able to act independently of undue influence from internal and external sources and the roles of chairman of the board and the chief executive officer should be separated.

Information sharing

Licensees are required to periodically share certain other information about their business to the SCB, including publishing yearly statements of their accounts; notifying and obtaining approval from the SCB in respect of any outsourcing of material functions by the bank; updating the SCB annually with information on their operations and their key personnel, shareholders and service providers; and, generally, notifying the SCB of any changes or proposed changes to their business, operations, shareholders or corporate information.

Anti-money laundering and financial crime prevention

13 What are the main anti-money laundering and financial crime prevention requirements for private banking in your jurisdiction?

All banking institutions are required to adhere to the CBB Guidelines for Licensees on the Prevention of Money Laundering and Countering the Financing of Terrorism (the AML Guidelines), which incorporate the mandatory minimum requirements of Bahamian law as they relate to anti-money laundering and countering the financing of terrorism (AML/CFT), which are promulgated by the Proceeds of Crime Act 2000, Ch 93 (POCA), the Anti-Terrorism Act 2004, Chapter 107, the FIUA and the FTRA (collectively, the AML/CFT Laws), and the Regulations (the AML/CFT Regs) made thereunder, as well as guidance on industry best practices.

Among other things, the AML Guidelines require that banking institutions:

- establish clear responsibilities and accountabilities to ensure that policies, procedures and controls that deter criminals from using their facilities for money laundering or the financing of terrorism are implemented and maintained, and that sufficient controls and monitoring systems are in place for timely detection and reporting of suspicious activity;
- appoint a money laundering reporting officer (MLRO) to report to the Financial Intelligence Unit the suspicions of their staff regarding money laundering or terrorist financing and a compliance officer (who may be the same person as the MLRO) who shall ensure full compliance with the AML/CFT Laws and AML/CFT Regs;
- develop and implement a risk rating framework that is approved by its board of directors as being appropriate for the type of products offered by the bank and capable of assessing the level of potential risk each client relationship poses to the bank;
- identify customers and verify customers' identity using reliable, independent source documents, data or information; and verify that any person purporting to act on behalf of the customer is so authorised, and identify and verify the identity of that person; and
- record the purpose and reason for establishing the relationship with the customer and the anticipated level and nature of activity to be undertaken.

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

A PEP is defined as a natural person who is or has, in the preceding year, been entrusted within or outside The Bahamas with 'prominent public functions' or is or has been entrusted with prominent public functions in an entity established by formal political agreements between member countries that have the status of international treaties, whose existence is recognised by law in member countries and which is not treated as a resident institutional unit of the country in which it is located. Prominent public functions include the roles held by a head of state, a head of government, senior officials in the executive, legislative, administrative, military or judicial branches of a government (whether elected or not), senior officials of major political parties, senior executives of government-owned corporations and senior management of international organisations (eg, director, deputy directors and members of the board or equivalent functions), but shall not include middle-ranking or more junior officials.

Given the risks associated with doing business with PEPs, private banks are required to:

- have appropriate risk management systems in place to determine whether the customer or a beneficial owner of the customer is a PEP; and
- have developed a clear policy and internal guidelines, procedures and controls regarding such business relationships.

Licensees who establish or maintain business relationships with PEPs and other related parties (eg, immediate family members, close associates or related companies) are required to perform additional due diligence procedure, using a risk-sensitive approach prior to establishing a private banking relationship for a PEP.

When establishing a private banking relationship with a PEP, or determining whether to continue business relationships with customers who are found to be or who subsequently become PEPs, a bank should:

- obtain senior management approval for the commencement or continuation of business relationships with such customers;
- take reasonable measures to establish the source of wealth and source of funds of the customer and the beneficial owner of the customer; and
- conduct enhanced monitoring of the business relations with and transactions for the customer, in order to detect any changes so that consideration can be given as to whether such changes appear unusual or suspicious.

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

As a minimum banks and wealth managers are required to obtain the (i) full and correct name of the individual; (ii) address; (iii) date and place of birth; and (iv) purpose of the account and the nature of the business relationship. In The Bahamas, the AML/CFT Laws and AML/CFT Regs take a risk-based approach to identity verification, which may be satisfied by means of such documentary or other evidence as is reasonably capable of establishing the identity of that person.

Typically, banks require that a potential customer provide:

- one of the following to verify name and nationality: (i) current valid passport; (ii) driver's licence bearing the photograph and signature of the applicant; (iii) voter's card; or (iv) national identity card;
- a recent utility bill, tax assessment or bank or credit union statement containing details of the address to confirm address; and
- a statement of source of income.

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Tax offences are not predicate offences for money laundering.

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

Bahamian law does not require financial intermediaries to verify tax compliance by clients. However, it is typical for financial intermediaries operating from The Bahamas to require clients to confirm tax compliance, particularly following the imposition of the US Foreign Accounts Tax Compliance Act (FATCA) and the imminent implementation of the OECD's Common Reporting Standard (CRS) in The Bahamas.

18 What is the liability for failing to comply with money laundering or financial crime rules?

Under the applicable anti-money laundering laws and the AML Regs, a person convicted of money laundering can face an unlimited fine and up to 20 years in prison. Where a person fails to disclose knowledge or suspicion of money laundering to the Financial Intelligence Unit or a police officer that person could face an unlimited fine and up to 10 years in prison. Where an offence is committed by an entity, as opposed to an individual, and that offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, that individual, as well as the body corporate, shall be guilty of that offence and could face the relevant penalty.

Client segmentation and protection

19 Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Bahamian laws generally do not apply differently depending on the characteristics of the client, although Bahamian law does provide that the requirement to file a prospectus does not apply to a distribution of securities of an issuer if the purchaser is an accredited investor. The term 'accredited investor', in the context of private banking, includes:

(i) any individual whose individual net worth, or joint net worth with that person's spouse, at the time of the purchase exceeds B$1 million;
(ii) any individual who had an individual income in excess of B$200,000 in each of the two most recent years, or joint income with that person's spouse in excess of B$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year;
(iii) any person, other than an individual, with total assets in excess of B$5 million not formed for the specific purpose of acquiring the securities offered;
(iv) any entity in which all of the equity owners are accredited investors; or
(v) any person residing outside of The Bahamas who qualifies as an accredited investor, however defined, or has similar status, under the securities legislation of that person's country of residence, or who meets the criteria specified in (i) or (ii) above and is otherwise lawfully entitled to purchase the securities under the securities laws applicable to such purchase.

20 What are the consequences of client segmentation?

See above.

21 Is there consumer protection or similar legislation in your jurisdiction relevant to private banking?

There is no general consumer protection or similar legislation relevant to private banking in The Bahamas. The SIA, however, prescribes the duties that persons licensed to engage in securities business owe to clients. These include duties to:

- act honestly and fairly in conducting their business activities in the best interests of their clients and the integrity of the market; and
- act with due skill, care and diligence, in the best interests of their clients and the integrity of the market.

Exchange controls and withdrawals

22 Describe any exchange controls or restrictions on the movement of funds.

The Exchange Controls Regulations Act 1952, Ch 360 (ECRA) and corresponding regulations regulate the movement of funds, including any documents intended to facilitate the movement of funds (ie, traveller's cheques, drafts, etc), in The Bahamas through controlling and regulating gold, currency, securities and foreign exchange. Foreign exchange constitutes any currency that is not the Bahamian dollar, which is pegged to the US dollar at par.

Gold or foreign currency may only be dealt with (bought, borrowed, sold or lent), in The Bahamas, by authorised dealers or by persons who have obtained permission from the CBB.

23 Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

The ECRA imposes restrictions on the ability of a person resident in The Bahamas for exchange control purposes (exchange control residents) to withdraw foreign currency in The Bahamas. For exchange control residents, foreign currency may only be obtained from an authorised dealer or by a person who has obtained permission from the CBB. There are no similar legal restrictions on cash withdrawals of Bahamian dollars.

The restrictions on foreign currency withdrawals only apply to persons who are deemed exchange control residents. As clients of private banking institutions in The Bahamas, including the Bahamian entities typically used to hold accounts with private banks, are

invariably not exchange control residents, the ECRA does not operate to restrict the ability of such private banking clients to withdraw foreign currency in The Bahamas.

24 Are there any restrictions on other withdrawals from an account in your jurisdiction?

Yes. Any document or instrument utilised with the effect of an exchange control resident receiving foreign currency in The Bahamas is restricted. This includes cheques, bullion, securities, drafts or letters of credit. This does not apply to the typical private banking client that is not an exchange control resident.

Cross-border services

25 What is the general framework dealing with cross-border private banking services into your jurisdiction?

Bahamian law does not apply to private banking services offered on a purely cross-border basis (ie, via telephone, post, email or other electronic means from a foreign location) and there are no generalised marketing events in connection with any service or product offering within the jurisdiction.

26 Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Where private banking services are provided on a cross-border basis, local laws and regulations would not impose any licensing requirement on the private bank where services or products are provided to its clients in The Bahamas.

27 What forms of cross-border services are regulated and how?

Cross-border services are generally not regulated by Bahamian law.

28 May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Employees of foreign private banking institutions may enter The Bahamas to meet with clients or prospective clients without being licensed in The Bahamas. However, it is generally advised that foreign wealth managers are cautious when doing so, to ensure that what they are doing does not amount to the offering of securities in The Bahamas, which is subject to regulation. In particular, Bahamian law prohibits the marketing, promotion or offering of financial instruments to the public, the solicitation of funds from the public and the marketing and the mass communication by any means, including random cold calls, unless the person engaging in such activity is licensed to do so. Moreover, an employee should not represent or hold the foreign private banking institution out as providing services from within The Bahamas.

29 May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

A foreign private banking institution may provide documents to clients and prospective clients in The Bahamas without triggering any licensing or registration requirements. It is advised, however, that clients or prospective clients do not execute the documentation for the purpose of effecting a purchase or sale of securities at a meeting with an employee of the foreign private banking institution that takes place in The Bahamas.

Tax disclosure and reporting

30 What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

There are no income, capital gains or corporation taxes imposed on individuals that are resident in The Bahamas for tax purposes. Consequently, there are no obligations placed on Bahamian taxpayers under law to disclose or establish tax compliance of private banking accounts to Bahamian authorities.

As a result of international obligations with regard to the automatic exchange of tax information, such as FATCA and the CRS, private banks operating from with The Bahamas have made it a policy to require clients to confirm their tax compliance. While this is not a requirement under Bahamian law, private banking institutions regularly include a compliance certification in self-certification documentation used for the purpose of FATCA and the CRS to protect themselves from liability.

31 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Owing to the lack of direct taxation of Bahamian taxpayers, there are no reporting requirements imposed on financial intermediaries in respect of Bahamian clients. In relation to international clients, however, financial intermediaries (inclusive of private banks) are required to report information for tax purposes on their non-resident clients and US citizen clients in compliance with CRS and FATCA, respectively.

Information is required to be reported in respect of all client accounts held by US citizens (except those that have a balance that does not exceed US$50,000 and those that are deemed excluded, which includes retirement and pension accounts, non-retirement savings accounts, certain term life insurance contracts, accounts maintained in The Bahamas that are held solely by an estate, if the documentation for such account includes a copy of the deceased's will or death certificate, and escrow accounts) and persons tax resident in jurisdictions that are 'Reportable Jurisdictions' under Bahamian law for the purposes of CRS. All reporting by Bahamian financial institutions is made to the Ministry of Finance of The Bahamas, which relays such information, where appropriate, to the relevant jurisdiction.

The information required to be reported include the following:

- the name, address, tax residency, tax identification number and date and place of birth;
- the account number (or functional equivalent in the absence of an account number);
- the account balance or value as of the end of the relevant reporting period (ie, end of calendar year); and
- the total amount of interest or dividend or other amount (depending on nature of account), paid in or credited to the account in the relevant reporting period.

Reporting under FATCA is ongoing. The first reports in respect of CRS will occur in 2018 with respect to all relevant accounts in existence as at 1 July 2017.

32 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

Client consent is not required to permit reporting under FATCA or the CRS, as such reporting is authorised by legislation. Nevertheless, it is customary for financial intermediaries to obtain clients' consent via waivers. Under FATCA and CRS, the reporting of client information to the relevant authority does not constitute a breach of confidentiality as The Bahamas And The United States Of America Foreign Account Tax Compliance Agreement Act 2015 and the Automatic Exchange of Financial Account Information Act 2016, respectively, absolves a financial intermediary or private bank from liability for disclosing information required to be disclosed under FATCA and CRS. Furthermore, the BTCRA, which imposes a duty of banking secrecy, absolves financial intermediaries from liability if disclosure of information enables the bank (or its agents) to perform its duties or exercise its functions under applicable laws or regulations.

If consent is obtained and revoked, disclosure of information under FATCA and CRS would not result in the financial intermediary or private bank being subject to liability to the client.

Structures

33 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

The most common legal structure for holding private assets in The Bahamas is the international business company (IBC). An IBC is a

Update and trends

Private banks and wealth managers have had to adjust to the new landscape of transparency and automatic exchange of information. Although Bahamian institutions are well positioned, due to generally high standards of compliance with KYC obligations, they have had to invest in the necessary systems and knowledge to ensure compliance with disclosure obligations.

Due to the increase in transparency, clients are opting for simpler structures. We expect this trend to continue in the coming years.

Fintech has yet to make its mark in the Bahamian private banking and wealth management industry. At the time of writing, there was no legislation in place to govern or encourage the growth of the fintech industry in The Bahamas. There is, however, a recognition by the regulators that it is but a matter of time before a fintech industry blossoms in The Bahamas and they and the industry need to prepare for its arrival. We expect to see the emergence of a fintech market sooner rather than later.

limited liability company incorporated under the International Business Companies Act, 2000. IBCs are flexible structures that offer separate legal personality and confidentiality. An IBC can be established in as little as 24 hours and generally costs between US$2,000 and US$2,500 to incorporate. There is also an annual fee payable to the Registrar General of The Bahamas and the IBC's Registered Agent, which, together, can range between US$1,000 and US$1,500.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

Where the private banking relationship is established with a structure, private banks in The Bahamas are required to obtain the following information:

- a certified copy of the company's certificate of incorporation;
- a resolution of the board of directors of the company, authorising the opening of the account and conferring authority on the person or persons who will operate the account;
- the KYC information indicated above in question 15 with respect to each person authorised to operate the account;
- confirmation that the corporate entity has not been struck off the register or is not in the process of being wound up; and
- names and addresses of the beneficial owners of the entity that have controlling interests.

35 What is the definition of controlling person in your jurisdiction?

The concept of controlling person in The Bahamas is only relevant for corporate entities. For corporate entities, KYC is only required in respect of beneficial owners that have a controlling interest. For entities other than corporate entities, KYC is required on all beneficial owners.

A controlling person of a corporate entity is a person that has an interest of 10 per cent or more in a corporate entity's voting shares.

36 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

There are no Bahamian regulatory or tax obstacles to using structures to hold private assets.

Contract provisions

37 Describe the various types of private banking contract and their main features.

The relationship between private banks in The Bahamas and their clients is generally governed by the banks' general terms and conditions. The general terms and conditions of Bahamian private banks generally include provisions regarding:

- the manner and means of instructions given to the bank and other correspondence, including the bank's liability (or lack thereof) for failing to act on such instructions or correspondence;
- the manner for dealing with complaints and disputes – banks generally include an exclusive jurisdiction clause of The Bahamas, with governing law being Bahamian law; and
- confidentiality and data protection clauses.

The general terms and conditions may be supplemented by special contracts which are entered into pursuant to the provision of special services to the customer or special transactions not covered by the general terms and conditions.

38 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

In The Bahamas, the relationship between bank and customer is a contractual relationship. The standard of liability will therefore be that contracted between the private bank and its clients. As there are few restrictions on the freedom of contract between bankers and their customers in The Bahamas, private banking institutions generally restrict their liability to acts of gross negligence, wilful default and fraud.

39 Are any mandatory provisions imposed by law or regulation in private banking contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

Bahamian laws and regulations do not mandate any provisions or requirements with respect to private banking contracts.

40 What is the applicable limitation period for claims under a private banking contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The statute of limitation under a private banking contract is six years from the date the cause of action arises. The limitation period is suspended in the case of fraud, mistake or concealment; in which case the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. The limitation period may be waived altogether if agreed to between the bank and the client.

Confidentiality

41 Describe the private banking confidentiality obligations.

Confidentiality obligations are imposed on private banks via statute and common law. As indicated above, the BTCRA imposes a duty of banking secrecy upon entities licensed as banks and trusts. A duty of banking secrecy is also imposed by Bahamian common law. Bahamian banking secrecy mandates that banks and their officers, directors, employees and other related parties maintain the confidentiality of client information, unless the express or implied consent of the client is given authorising such disclosure except in certain circumstances.

Under the Data Protection (Privacy of Personal Information) Act 2003, Ch 324A (DPA), persons or entities that are in possession of personal information are prohibited from disclosing such information except under certain prescribed circumstances. Furthermore, data controllers are obligated to lawfully and fairly collect information, ensuring that the information is both accurate and kept up to date and that the collected information is relevant and not excessive. The information collected should only be kept for lawful purposes and not for longer than necessary. Proper security measures to protect the information should also be in place.

42 What information and documents are within the scope of confidentiality?

Information and documents within the scope of bank secrecy include those relating to the identity, assets, liabilities, transactions or accounts of the client. For the purpose of the DPA the relevant information is data relating to a living individual who can be identified from the data.

43 What are the exceptions and limitations to the duty of confidentiality?

Exceptions to the duty of confidentiality are provided for both in statute and common law. The BTCRA provides that disclosure of confidential information can be done without liability if it is disclosed to perform legally imposed duties or duties within the scope of

employment; enables or assists the CBB to exercise its functions; or provides information with a view to instituting criminal or disciplinary proceedings in specified instances.

Under the common law, banks may disclose confidential information if they are under compulsion of the law, owe a duty to the public, or the disclosure is in the interests of the bank. Further, there may be disclosure where the client has given express or implied consent. There is substantial case law on this subject.

The DPA allows disclosure where disclosure is made to or on behalf of the affected individual or where it is required to safeguard the security or protect international relations of The Bahamas, to prevent, detect or investigate an offence, to apprehend or prosecute an offender, to prevent injury or death to a person or serious loss or damage to property, by law or court order or in the course of legal proceedings.

44 What is the liability for breach of confidentiality?

Liability for a breach of confidentiality can result in a maximum fine of B$25,000, a maximum of two years in prison, or both, in addition to any damage that a customer can prove as a result of the breach of confidentiality.

Disputes

45 What are the local competent authorities for dispute resolution in the private banking industry?

Unless otherwise provided (ie, an arbitration clause) in the contract governing the relationship between the private bank and the customer, disputes with private banks are dealt with by the Common Law and Equity Division of the Supreme Court of The Bahamas.

The Supreme Court of The Bahamas is the second highest court in The Bahamas, with power to oversee civil and criminal matters. Proceedings in the Supreme Court are initiated by filing a writ of summons, which may or may not be accompanied by a particulars of claim, summarising the claim and setting out the remedies being pursued.

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

There are no formal procedures pursuant to which a client of a private banking institution can lodge a complaint with a local regulator. Notwithstanding this, if a client of a private banking institution were to lodge a complaint with the CBB or the SCB, each regulator would have the authority to investigate the matter and sanction the private banking institution if it is in breach of any applicable laws or regulations.

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