

Corporate Trustees and the Fiduciary's Perspective
A View from the Corporate Trustee's Desk

Outline

1. Introduction

- a. Disclaimer – not giving legal advise, not speaking on behalf of my employer
- b. My background and current job title
- c. Purpose of presentation
- d. Compare types of work - paralegal vs. trust officer
 - i. Review and draft documents
 - ii. Post death administration
 - iii. Transactional work – GRATs, IDGTs, Sales
 - iv. Knowledge with investments and other assets helpful

2. Initial General Observations

- a. Estate planning and administration used to focus primarily on tax avoidance; now, “touchy feely” and focus has shifted slightly to include inter-family communication and legacy planning
- b. Litigation, divorce, unprofessional trustees and executors as well as imprudent spending and investment management are just as threatening to wealth, as are taxes
- c. Planning for the future
 - i. 10,000 baby boomers a day are turning 65 yrs and older
 - ii. Most children born after year 2000 are expected to live to be more than 100 yrs old
 - iii. Anticipated that there will be 5 & 6 generations of a family living at the same time
 - iv. Need to solve the problems of longevity, including legacy and who will serve as fiduciary so far in the future.

3. Corporate Trustees

- a. Named trustee can be anyone but the burden may be more than some individuals can comfortably bear
- b. Corporate Trustees have professional expertise and continuity and is unbiased to a greater degree than a friend or family member

- c. Regulatory supervision and protection – higher level of scrutiny than a friend or family member
 - i. National bank vs. state bank or other fiduciary –
 1. Section 92(a)(a) of the National Bank Act authorizes the OCC to permit national banks to act in eight enumerated fiduciary capacities (trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estate of lunatics)
 2. 12 CFR Part 9 sets forth the standards that apply to the fiduciary activities of national banks who operate in a fiduciary capacity
 3. For purposes of 12 CFR Part 9, fiduciary capacity is defined as trustee, executor, administrator, guardian, custodian, transfer agent, investment advisor (if bank receives fee) and any capacity in which the bank possesses investment discretion on behalf of another
 4. Enforcement of fiduciary law is neither a guarantee against loss nor an assurance of expected performance by the fiduciary. Courts have recognized that even sound fiduciary administration and investment practices can produce unexpected losses

d. Advantages of corporate trustee

- i. Can help prevent family members who otherwise might have been named trustee from taking sides and dividing a family.
- ii. Corporate fiduciaries often have more resources; providing access to teams of experts in real estate, private equity, charitable services, etc
- iii. Have an unlimited lifespan

4. Duties of a Corporate Trustee

a. Initial steps

- i. Meets with grantor/beneficiary
- ii. Studies terms of trust/will
- iii. Accepts trusteeship and takes control of assets

b. Administrative duties

- i. Transfers assets to trust ownership and sets up bookkeeping records
- ii. Inventories assets – records tax basis and acquisition dates

- iii. Assesses quality of assets and adequacy of insurance
 - c. Bookkeeping responsibilities
 - i. Collects dividends and interest
 - ii. Prepares and maintains an accounting of all items of income, principal, receipts and disbursements
 - iii. Handles all asset capital changes
 - d. Investment supervision
 - i. Assists with establishment of investment strategy
 - ii. Performs ongoing review of investment performance
 - iii. Supervises ongoing business interests
 - e. Tax requirements
 - i. Prepares and files estate and fiduciary tax returns
 - f. Responsibilities to beneficiaries
 - i. Remits income to beneficiaries per instrument
 - ii. Exercises discretion when advancing principal to beneficiaries per instrument
 - g. Distributes trust upon termination
 - i. Handles division and distribution of assets
 - ii. Provides accounting and tax data
- 5. Risk Management
 - a. OCC requires risks to be identified, measured, controlled and monitored
 - b. Types of risk
 - i. Transactional
 - ii. Compliance
 - iii. Reputational
 - iv. Strategic
 - c. Risk management
 - i. No two banks/systems are the same
 - ii. Policies and Procedures
 - 1. Account acceptance – Pre-Acceptance Reviews
 - a. Indemnification
 - b. Acts of prior trustees

- c. Co-trustee provisions
 - d. Compensation
 - e. Resignation provisions
 - f. Exculpatory provisions
 - g. Trustee powers
 - h. Trust assets (concentrated positions, real property)
- 2. Account Acceptance – Patriot Act requirements
 - a. Know your client
 - b. Assign risk level
- 3. Account administration
 - a. Duty to diversify
 - b. Recordkeeping and document safety
 - c. Periodic account reviews
 - d. Discretionary distributions
 - e. Client communication
- 4. Management information reporting
 - a. Financial recordkeeping systems
 - b. Reports to monitor risk, compliance with policies and financial performance
 - c. Administrative reports on day-to-day activity
 - d. Investment performance reports – portfolio reviews and transaction reports
 - e. Customer statements and presentations