

WHAT PLANNERS OUTSIDE OF DELAWARE NEED TO KNOW ABOUT DELAWARE TRUST LAW

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I. General Information

Clearly wealthy individuals are free to establish trusts outside of their state of residence, but what state or states should they consider using? The benefits or advantages that may be derived can vary substantially from jurisdiction to jurisdiction. The choice of a particular jurisdiction may affect among other things which state has a right to tax the income of the trust, the court which has jurisdiction over its administration, the permitted length of the trust's existence, investment flexibility, and the access of creditors of a beneficiary to assets of the trust. Therefore, to properly advise your clients, you need to have some appreciation of the advantages and disadvantages of other jurisdictions.

The intent of this outline is to provide an overview of just some of the benefits available to trusts located in Delaware. As you will see, Delaware's trust law and court system have allowed it to develop and maintain a preeminent position as a domestic situs for personal trusts and are worth consideration when establishing trusts. These laws are constantly being reviewed and updated frequently in an effort to maintain this standing. This outline has been revised to incorporate the most recent changes made to the Delaware trust code.

a. Trust Code – Where can I find the statutes which affect Delaware trusts?

- i. The vast majority of statutory trust law may be found within Chapters 33, 35 and 61 of Title 12.
- ii. The statutes relating to Delaware's Rule Against Perpetuities are located within Chapter 5 of Title 25.
- iii. Delaware's statutes regarding fraudulent conveyance are contained in Title 6.
- iv. Delaware Tax statutes are located in Title 30.

b. Court System (Delaware Court of Chancery and Supreme Court)

- i. Nearly all trust matters requiring court intervention are presented to the Delaware Court of Chancery, which has original and exclusive jurisdiction over equity matters.
- ii. Appeals from the Court of Chancery go directly to the Delaware Supreme Court.
- iii. No jury participation.
- iv. The judges of the Court of Chancery (the Chancellor and Vice Chancellors) are handpicked by the Governor of Delaware. These judges are well trained and very skilled in dealing with complex financial matters and fiduciary issues.

*I would like to thank my colleague, Anthony Smedley, for his assistance in updating and enhancing this outline.

Politically neutral orientation - the Delaware Constitution requires political party balance within its judiciary.

- v. Matters are handled by Delaware courts in a timely and efficient manner.
 - a) Judicial accountings are not required for inter vivos trusts and only certain testamentary trusts. See 12 Del. C. §§ 3521-3523.
 - b) The Court of Chancery does not supervise the administration of a trust unless requested to do so. 10 Del. C. §6504. There is no requirement for Letters of Trusteeship or to otherwise register a trust with the Court.

c. Tax Treatment

- i. **Income Tax** – accumulated income and capital gains for future distribution to non-resident beneficiaries of an irrevocable trust are not taxed in Delaware. 30 Del. C. §1636. **No Delaware Beneficiaries = No Delaware Income Tax.**
 - a) Delaware’s tax regime piggy backs off the federal income tax system.
 - 1. If distributions are made, distributed income will not be taxed as a result of a distribution deduction.
 - 2. If there is undistributed income and capital gains and the trust has no Delaware beneficiaries, there will be no income tax in Delaware as a result of the Non-Resident Beneficiary Deduction. See 30 Del. C. §1636.
 - b) Delaware’s fiduciary income tax return is Delaware Form 400-I.
- ii. **Gift, Inheritance and GST Tax** – None of these taxes are currently applicable in Delaware.
- iii. **Estate Tax** – Effective January 1, 2018, Delaware will no longer have an estate tax as a result of a stand-alone estate tax repeal bill signed July 5, 2017 by Governor John Carney Jr. The repeal of 30 Del. C. § 1501-1507 was memorialized in 81 Del. Laws, c.52, § 1, eff. Jan. 1, 2018.
- iv. **Hidden Fees and Taxes** – Delaware does not have gross receipts taxes, franchise taxes or intangible personal property taxes.

II. Delaware Drafting Considerations

a. Settlor’s Intent is Paramount and Controls – 12 Del. C. § 3303

The terms of a trust instrument will be given maximum effect in Delaware **even** in instances where a provision runs contrary to a statute or other law. 12 Del. C. § 3303(a).

Through the adoption of § 3303, in 2003, Delaware granted Settlers tremendous freedom to control, through the terms set forth in a trust instrument, the administration and disposition of the assets he/she places in trust. The language used by the legislature makes it abundantly clear that the Settlor’s intent shall be paramount. The current version of § 3303(a) states as follows:

(a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts and trust administration, including, but not limited to, any such laws pertaining to:

(1) The rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time, as set forth in subsection (c) of this section;

(2) The grounds for removal of a fiduciary;

(3) The circumstances, if any, in which the fiduciary must diversify investments; and

(4) A fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument;

provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own wilful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's wilful misconduct. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.

As you can see, the Settlor has tremendous freedom to alter the rights and interests of the beneficiaries of a trust he or she may establish through the terms included in the trust instrument. *Id.* The legislature makes it clear in the examples included in § 3303(a) that even the duty to inform beneficiaries of their interests in the trust or any duty to diversify may be modified by the language set forth in the trust instrument. Absent inclusion of language modifying the duty to inform beneficiaries, a trustee in Delaware would be subject to removal and/or surcharge for neglecting to inform an individual of his or her interest as a beneficiary of a trust. See McNeil v. McNeil, 798 A.2d 503, (Del. Supr. 2002).

This underlying theme of freedom of a Settlor to define rights and duties is also echoed in § 3302(e) which states that the investment management standards set forth in this section may be expanded, restricted or eliminated by express provisions in a governing instrument. 12 Del. C. § 3302(e).

Section 3306 of Title 12 was added to the Delaware trust code in 2008 as a compliment to § 3302(e) and § 3303(a). A court's power to allow a fiduciary to deviate from the terms of a governing instrument with regard to the investment or management of fiduciary property has been modified to clarify that such power is subject to the provisions of § 3303 pertaining to the effect of express language in a governing instrument.

These provisions provide maximum flexibility so the Settlor's intent may be achieved.

For example, a Settlor, who funds a trust with privately owned business interests or illiquid assets, may take comfort that the dictates set forth by them in the trust instrument regarding the particular responsibilities of the trustee will be respected.

However, the power to modify rights and interests of beneficiaries and powers and duties of fiduciaries would be pointless, unless the trustee could rely on such without the possibility of being held liable. Delaware addresses this concern in §§ 3586 and 3302(e). A trustee who acts in good faith reliance on the provisions of a trust instrument will not be liable to a beneficiary for a breach of trust to the extent the breach resulted from reliance on the terms of the trust instrument. 12 Del. C. § 3586 and § 3302(e).

b. Dispositives and Beneficial Interests

i. **Delaware's Direction (and Consent) Statute – 12 Del. C. § 3313 (see also new 12 Del. C. §3313A regarding "Excluded Trusts")**

Delaware was the first jurisdiction to statutorily allow for "directed" trusts. Section 3313 was added to Title 12 of the Delaware Code more than 30 years ago. A "directed trust" is a trust in which various roles or responsibilities traditionally within the discretion of the trustee are separated off and allocated among others (third party advisers, co-trustees, beneficiaries or even the settlor).

In the past, directed trusts were commonly used to eliminate a trustee's authority to sell or manage a specific trust asset or assets and to allocate such responsibility to another. In recent times, however, this statute has been artfully used to reallocate various other roles heretofore vested with the trustee, such as tax compliance, voting, management, information disclosure, amendments and distributions discretion. The statutory authority for "directed or consent trusts" in Delaware is found in 12 Del. C. § 3313, which states as follows:

(a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.

(b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

(c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then except in cases of wilful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's objection to such act or failure to provide such consent after having been requested to do so by the fiduciary.

(d) For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

(e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of the adviser, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

(1) Monitor the conduct of the adviser;

(2) Provide advice to the adviser or consult with the adviser; or

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

(f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

(1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;

(2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and

(3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.

As you will note from the forgoing, with the inclusion of express language in the trust, one or more persons may be granted the authority to direct (or consent or disapprove) investment, distribution or other decisions traditionally handled by the trustee. The persons granted such responsibility and authority shall be considered to be advisers and **fiduciaries** when exercising such authority unless the trust instrument states otherwise. **CAUTION:** Appointment of an adviser to serve in a non fiduciary capacity, may affect among other things the statutory protections the advisers would otherwise have under Delaware law, the adviser's ability to have court and attorney fees paid from the trust corpus, and in certain instances the income tax status of the trust. Additionally, it is unclear how a court would react to a loss resulting from the actions or inactions of an adviser serving in a non-fiduciary capacity. Therefore, it is prudent to have the adviser serve in a fiduciary capacity in Delaware.

Over time, the definition of "Investment Decision" under paragraph (d) of this statute has been expanded. For example, this definition has been expanded to make it clear that it includes the valuation of non-publically traded

investments. Among other things, a trustee holding non-publically traded investments at the direction of an adviser shall value such as directed by the adviser.

In 2015, paragraph (d) of this statute was further expanded to include the powers to borrow and lend for investment purposes, the management, control and voting powers related to the trust's investments, the selection of custodians and subcustodians other than the trustee, and the involvement of investments advisers, managers, or other investment providers. Since this definition is updated periodically, it may be appropriate to reference it in direction language to benefit from future statutory enhancements. Please note, it may be problematic for corporate trustees from a regulatory standpoint to have assets custodied away from them. Moreover, assets held outside of Delaware could affect creditors' rights and whether a state has jurisdiction in a dispute.

Additionally, paragraph (e) was expanded to account for situations where the fiduciary shall not take specified actions except at the direction of the adviser.

In Delaware, absent express language to the contrary, a fiduciary is not liable for any loss resulting from following the direction of an adviser absent wilful misconduct on the part of the trustee so directed. 12 Del. C. § 3313(b), See also 12 Del. C. § 3303(a). This approach is very different from the approach of the Uniform Trust Code §808(b) and the Restatement of Trusts (Second) §185.

Even though there are states with similar Direction statutes, trustees in Delaware may be more comfortable than trustees in other states with a similar statute, because the protections afforded by the Delaware direction statute have been judicially tested and upheld. See Duemler v. Wilmington Trust Co., C.A. No. 20033 N.C. (Del. Ch. 2004). Moreover, the courts in Delaware will give effect to the grantor's wishes as expressed by the terms of their trust.

Consent Advisers - Delaware also recognizes consent advisers. 12 Del. C. § 3313(c). A trust could require the consent of an adviser to empower the trustee to act and except in cases of wilful misconduct **or gross negligence** by the trustee, the trustee will not be liable for any loss resulting from an act taken or foregone as a result of the consent adviser's objection to such act or failure to provide consent after having been so requested by the trustee. Id. Please note, this approach is rarely used except in relation to distributions. The default standard of care as noted in bold is slightly higher than the standard of care in the directed context. However, similar to most other statutes in the Delaware Trust Code, the grantor may override this default standard by including express language in the trust document. For example, the standard could be set as wilful misconduct instead of gross negligence.

Trust Protectors – Delaware's "Directed Trust" statute, Section 3313 of Title 12, specifically acknowledges the term "protector" and clarifies that the term "adviser" shall include a "protector." Like any other adviser, a protector will serve in a fiduciary capacity, unless the governing instrument provides otherwise, and the protectors will have all of the powers and authority granted to them in the governing instrument. For those unfamiliar with the roles typically allocated to a protector, subsection (f) contains a non-exhaustive list of the powers that a protector might be granted:

- (1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
- (2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
- (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument. 12 Del. C. § 3313(f)

Practical Note: Since the use of an adviser diminishes the responsibilities and potential liability of the trustee, corporate trustees in Delaware generally will charge a reduced fee when serving as trustee of a directed trust.

ii. Distributions in Further Trust (“Decanting”) – 12 Del. C. § 3528

Like many other states, Delaware has a decanting statute. The Delaware statute was actually derived from the New York statute. Absent a restriction in the trust instrument, if a trustee has the power to currently distribute principal to a beneficiary or beneficiaries, it may instead exercise such power to distribute in further trust for such one or more of the beneficiaries. *Id.*

§ 3528. Trustee’s authority to invade principal in trust.

(a) Unless the terms of the instrument expressly provide otherwise, a trustee who has authority (whether acting at such trustee’s discretion or at the direction or with the consent of an adviser), under the terms of a testamentary instrument or irrevocable inter vivos trust agreement (including a trust that, by its terms, is revocable but was created by a settlor who presently lacks the capacity to revoke the trust), to invade the principal or income or both of a trust (the “first trust”) to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, may instead exercise such authority (whether acting at such trustee’s discretion or at the direction or with the consent of an adviser, as the case may be) by appointing all or part of the such principal or income or both as is subject to the power in favor of a trustee of a trust (the “second trust”) under an instrument other than that under which the power to invade is created or under the same instrument, provided, however, that, except as otherwise provided in this subsection (a):

(1) The exercise of such authority is in favor of a second trust having only beneficiaries who are proper objects of the exercise of the power except that the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary’s interest that are substantially identical to the first trust’s terms and conditions concerning such beneficial interests;

(2) In the case of any trust, contributions to which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) (26 U.S.C. § 2503(b)) of the Internal Revenue Code of 1986 (26 U.S.C. § 1 et seq.) (hereinafter referred to in this section as the “I.R.C.”), by reason of the application of I.R.C. § 2503(c) (26 U.S.C. § 2503(c)), the governing instrument for the second trust shall provide that the

beneficiary's remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the governing instrument for the first trust;

(3) The exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law; and

(4) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary who is the only trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions.

Notwithstanding the foregoing provisions of this subsection (a), the governing instrument for the second trust may grant a power of appointment (including a power to appoint trust property to the powerholder, the powerholder's creditors, the powerholder's estate, the creditors of the powerholder's estate or any other person, whether or not such person is a trust beneficiary) to 1 or more of the trust beneficiaries who are proper objects of the exercise of the power in the first trust. The exercise of a trustee's authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard. For purposes of this subsection (a), an open class of beneficiaries identified in the governing instrument for the first trust (such as, but not limited to, a class comprised of the descendants of a person who is living or who has living descendants) is a proper object of the exercise of a power to make distributions and the exercise of such a power in favor of a second trust having only beneficiaries, including unborn future beneficiaries, who are among the members of the open class satisfies the requirement of paragraph (a)(1) of this section even if, pursuant to the terms of the governing instrument for the second trust, the class remains, or might remain, open beyond the time when the class would have closed pursuant to the terms of the governing instrument for the first trust; provided, however, that the governing instrument for the second trust shall not permit distributions to or among members of the open class sooner than when or in excess of the amounts permitted by the governing instrument for the first trust. A trustee's power, pursuant to this subsection (a), to appoint principal in favor of the trustee of a second trust shall include the power to create the second trust.

(b) The exercise of the power to invade the principal of the trust under subsection (a) of this section shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust.

(c) The exercise of the power to invade the principal of the trust under subsection (a) of this section shall be considered the exercise of a power of appointment (other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate) and shall be subject to the provisions of Chapter 5 of Title 25 covering the time at which the permissible period of the rule against perpetuities begins and the law which determines the permissible period of the rule against perpetuities.

Consequently, a second trust may have a term that is longer than the term set forth in the governing instrument for the first trust, including, but not limited to, a term measuring by the lifetime of a current beneficiary.

(d) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust which arises under any other section of this chapter or under another statute or under common law.

(e) When exercising the authority granted under subsection (a) of this section, the trustee and any adviser directing or consenting to the trustee's exercise of such authority shall be held to the standard of care and the standard of liability applicable to the trustee and any such adviser when making outright distributions, free from trust, to or for the benefit of 1 or more permissible distributees. No trustee or adviser shall have a duty to exercise such authority nor, absent wilful misconduct, any liability to any person for failure to exercise such authority or failure to consider whether to exercise such authority.

(f) This section shall be available to any trust that is administered in this State.

This statute has evolved over the years, and will likely continue to do so, as this concept evolves and the courts and taxing authorities react to it. In 2011, the statute was amended to address its application to trusts permitting principal distributions among an open class of beneficiaries and paragraphs (e) and (f) were also added.

In 2013, section (e) of the statute was amended to include that no trustee or adviser shall have a duty to exercise such authority granted under subsection (a) nor, absent wilful misconduct, any liability to any person for failure to exercise such authority or failure to consider whether to exercise such authority.

In 2014, subsection (a) of the second paragraph of the statute was amended to include the situation where a class of beneficiaries for the second trust remains, or might remain, open beyond the time when the class would have closed pursuant to the terms of the governing instrument for the first trust.

In 2015, subsection (a) of the statute was amended to specifically include trusts that are revocable by their terms where the settlor currently lacks capacity. Additionally, this subsection was amended to include in subsection (a)(1) that a “governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary’s interest that are substantially identical to the first trust’s terms and conditions concerning such beneficial interests.” Finally, the exercise of authority by the trustee of the first trust to appoint to a second trust includes not only principal, but income, or a combination of each.

Since trusts are portable and the laws of a new trust situs may not be as flexible as the laws of Delaware, I suggest the inclusion of an express decanting provision within a newly drafted trust. An express decanting provision can offer even more flexibility than that contained in the statute if the grantor wishes to extend such flexibility to the trustee.

iii. Merger of Trusts – 12 Del. C. § 3325(29)

Delaware law permits the merger of trusts without judicial involvement and is quite liberal. Please keep this in mind when drafting a new trust. If the grantor does not wish to allow such flexibility, it can be overridden by an express merger provision. Under Delaware law, a trustee is authorized to “declare 1 or more new trusts for the purpose of merging all, or a portion, of an existing trust or trusts with and into the new trust or trusts and to merge any 2 or more trusts, including statutory trusts and foreign statutory trusts...whether or not created by the same trustor and whether or not funded prior to the merger, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.” 12 Del. C. § 3325(29).

III. **Quiet Trusts and Drafting for the Designated Representative Role - 12 Del. C. § 3303(d) & 12 Del. C. § 3339**

a. **Confidentiality of Trusts Administered in Delaware as Quiet Trusts**

- i. In the extreme, a “quiet” trust for a **period of time** is possible in Delaware. Certain circumstances may warrant a delay in the beneficiary’s notice of his or her interest in a trust beyond the time originally specified in the trust. Section 3303(a) makes it clear that any duty to provide information to a beneficiary, even as to the existence of a trust, may be modified through the inclusion of express language. For example, through the inclusion of express language, the duty to inform a beneficiary of his or her interest or of transactions may be deferred to a specific date in the future (e.g. the beneficiary’s attainment of age 30) or a triggering event (i.e. the death of an interested party).

In the event that interested parties wish to modify an existing Delaware trust to include quiet trust provisions, this can be accomplished using Delaware’s decanting statute (12 Del. C. § 3528 referenced above), or a nonjudicial modification agreement (See 12 Del. C. § 3342.). Though the decanting statute does not require notice to the beneficiary, some level of notice may still be required (see McNeil, 798 A2.d 503 (Del. 2002). Additionally, a nonjudicial modification agreement enables any trust to be modified to include any provision in the governing instrument of a trust upon the written consent or written non-objection of the trustor, all then living fiduciaries **and all beneficiaries**. The interests of all beneficiaries must be adequately represented either directly or through virtual representation under 12 Del. C. § 3547 (referenced below). The beneficiaries or those that can represent them (if any) must consent to the modification for it to be effective. Not so quiet now! If you ever may want a trust to be “quiet,” you should add language at the outset that can be triggered later.

- ii. The Court of Chancery does not supervise the administration of a trust, unless requested by a party in interest. 10 Del. C. §6504. Delaware does not require registration of trusts (no Letters of trusteeship or registration). Jurisdiction is taken only upon petition.
- iii. Judicial accountings typically are not required for inter vivos or testamentary trusts, unless requested by an interested party. 12 Del. C. § 3522. Moreover, they are rarely filed in Delaware because a Trustee may not be entitled to charge the expenses associated with such judicial accounting to the trust. The Delaware Supreme Court in Bankers Trust Co. v. Duffy, 295 A2d 725 (Del. Supr. 1972) held that a trustee may be allowed to satisfy attorney’s fees associated with a judicial accounting out of the trust corpus only where: 1. it is

demonstrated that the attorney's fees were necessary for the proper administration of the trust; or 2. the services resulted in a benefit to the trust.

b. Designated Representatives

Delaware law provides in § 3303 that a person may act as a designated representative for a beneficiary of a trust with the ability to represent and bind this beneficiary in a fiduciary capacity. 12 Del. C. § 3303(d). § 3339 of Title 12 defines the title "designated representative" and provides that this individual may be expressly named in the governing instrument, appointed by an individual with the authority under the governing instrument to appoint a designated representative, appointed by a beneficiary or appointed by the trustor. 12 Del. C. § 3339. When drafting quiet trust provisions which include a notice recipient, care should be taken to avoid conflicts of interest and to define such recipients as a Designated Representative to avoid any question regarding their intended role and powers.

§ 3303 Effect of provisions of instrument

(d) During any period of time that a governing instrument restricts or eliminates the right of a beneficiary to be informed of the beneficiary's interest in a trust, unless otherwise provided in the governing instrument, any designated representative (as defined in § 3339 of this title) then serving shall represent and bind such beneficiary for purposes of any judicial proceeding and for purposes of any nonjudicial matter, and shall have the authority to, and is a proper party to, initiate a proceeding relating to the trust before a court or administrative tribunal on behalf of any such beneficiary.

§ 3339 Designated representatives of trusts

(a) For purposes of this title, the term "designated representative" means a person who is authorized to act as a designated representative in the manner described in at least 1 of the following paragraphs of this subsection (a) and who delivers to the trustee such person's written acceptance of the office of designated representative. A person who is authorized to act as a designated representative in the manner described in this subsection:

(1) Is expressly appointed under the terms of a governing instrument as a designated representative or by reference to this section;

(2) Is authorized or directed under the terms of a governing instrument to represent or bind 1 or more beneficiaries in connection with a judicial proceeding or nonjudicial matter, as those terms are defined in § 3303(e) of this title;

(3) Is a person appointed by 1 or more persons who are expressly authorized under a governing instrument to appoint a person who is described in paragraph (a)(1) or (2) of this section;

(4) Is a person appointed by a beneficiary to act as a designated representative of such beneficiary; and/or

(5) Is a person appointed by the trustor to act as designated representative for 1 or more beneficiaries.

(b) A designated representative shall be presumed to be a fiduciary.

c. Virtual Representation – 12 Del. C. § 3547

Delaware's virtual representation statute is broad and may minimize the need for the appointment of a guardian ad litem in matters before the court and may be useful in non-judicial situations as well (ie. non-judicial modifications). As the virtual representation statute is a key differentiating factor, it is set out in its entirety below.

§ 3547 Representation by person with a substantially identical interest

(a) Unless otherwise represented, a minor, person who is incapacitated, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable (hereinafter referred to as an "unascertainable person"), may for all purposes be represented by and bound by another who has a substantially identical interest with respect to the particular question or dispute but only to the extent that there is no material conflict of interest between the representative and the person represented with respect to the particular question or dispute.

(b) A presumptive remainder beneficiary or the person or persons authorized to represent the presumptive remainder beneficiary under any other subsection of this section may represent and bind contingent successor remainder beneficiaries for the same purposes, in the same circumstances, and to the same extent as an ascertainable competent beneficiary may represent and bind a minor or person who is incapacitated, unborn or unascertainable. As used in this subsection (b), a "presumptive remainder beneficiary" means as of any date, a beneficiary who, as of any date and but for the exercise of any power of appointment, would receive income or principal of the trust if the trust were to terminate as of that date (without regard to the exercise of any power of appointment) or, if the trust does not provide for its termination, a beneficiary who would receive or be eligible to receive distributions of income or principal of the trust if all of the beneficiaries currently receiving or eligible to receive distributions of income or principal were deceased.

(c) In the case of a trust having a beneficiary who is a minor or incapacitated who may not be represented by another pursuant to subsection (a) or subsection (b) of this section, the surviving and competent parent or parents or custodial parent (in cases where 1 parent has sole custody of the beneficiary), or guardian of the property of the beneficiary may represent and bind the beneficiary for purposes of any judicial proceeding or nonjudicial matter pertaining to the trust; provided that, in the case of a beneficiary represented by 1 or both parents, there is no material conflict of interest between the beneficiary who is a minor or incapacitated and either of such beneficiary's parents with respect to the particular question or dispute. Furthermore, such representative may, for all purposes, represent and bind an unborn person or unascertainable person who has an interest, with respect to the particular question or dispute, that is substantially identical to the interest of the beneficiary who is a minor or incapacitated represented by the representative, but only to the extent that there is no material conflict of interest between the beneficiary who is a minor or incapacitated represented by the representative and the unborn or unascertainable person with respect to the particular question or dispute.

(d) Unless otherwise provided in the governing instrument, the provisions of this section shall apply for purposes of any judicial proceeding and for purposes of any nonjudicial matter. For purposes of this section, judicial proceedings shall include any proceeding before a court or administrative tribunal of this State, including a proceeding that involves a trust whether or not the administration of the trust is governed by the laws of this State, and nonjudicial matters include, but are not limited to, the grant of consents, releases or ratifications pursuant to § 3588 of this title and the measurement of the limitation period described in § 3585 of this title.

(e) For purposes of this section, there is a presumption that a material conflict of interest exists between the representative and each trust beneficiary in any judicial proceeding or nonjudicial matter:

(1) In which the representative would, as a result of the judicial proceeding or nonjudicial matter, be appointed to a fiduciary or nonfiduciary office or role relating to the trust unless the representative presently serves in a fiduciary or nonfiduciary office or role relating to the trust and will not receive greater authority, broader discretion, or increased protection by reason of the new appointment;

(2) In which the representative currently holds a fiduciary or nonfiduciary office or role relating to the trust and, as a result of the judicial proceeding or nonjudicial matter, will receive greater authority, broader discretion, or increased protection, including but not limited to any limitation on exculpation from, or indemnification for any existing or potential future liability; or

(3) In which the representative has any other actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth.

Since the virtual representation statute is arguably a default provision similar to other statutes within the Delaware Trust Code, the grantor may wish to override this default provision with an express provision in the trust document if the default representation is not to their liking. Please keep in mind, there is always the possibility (although unlikely) that the court may find that such a provision is contrary to public policy and invalidate its application.

IV. Trustee Powers and Liability Standards

a. Delaware law affords the trustee with both general and specific powers.

§ 3324 General powers of trustee

(a) A trustee, without authorization by the court, may exercise:

(1) Powers conferred by the terms of the trust; and

(2) Except as limited by the terms of the trust, any other powers conferred by this chapter.

(b) Except as modified by the terms of a trust, the exercise of a power is subject to the fiduciary duties otherwise prescribed by law.

§ 3325 Specific powers of trustee

Without limiting the authority conferred by § 3324 of this title, a trustee may:

(1) Collect trust property and accept or decline additions to the trust property from a trustor or any other person;

(2) Acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition or otherwise change the character of trust property;

(4) Deposit trust funds in an account in a regulated financial services institution, including an institution operated by or affiliated with the trustee;

(5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) Advance money for the protection of the trust, where the trustee has a lien on the trust property as against a beneficiary for reimbursement of those advances, with reasonable interest;

(7) With respect to an interest in a proprietorship, partnership, limited liability company, statutory trust, business trust, corporation or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members or property owners, including merging, dissolving or otherwise changing the form of business organization or contributing additional capital;

(8) With respect to stocks or other securities, to exercise the rights of an absolute owner, including the right to:

a. Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

d. Deposit the securities with a securities depository or other regulated financial services institution;

(9) With respect to an interest in real property, construct, make ordinary or extraordinary repairs, alterations or improvements in buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(10) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within the duration of the trust;

(11) Grant an option involving a sale, lease or other disposition of trust property or take an option for the acquisition of property, excluding an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(12) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents and beneficiaries against liability arising from the administration of the trust;

(13) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(14) With respect to possible liability for environmental conditions:

a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an entity in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

b. Take action to prevent, abate or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly

by the trustee, whether taken before or after the initiation of a claim or governmental enforcement action;

c. Decline to accept property into trust or to disclaim any power with respect to property that has or may have environmental liability attached;

d. Compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

e. Pay the expense of any inspection, review, abatement or remedial action to comply with environmental law;

(15) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust:

(16) Pay taxes, assessments and compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(17) Exercise elections with respect to federal, state and local taxes;

(18) Select a mode of payment under any employee benefit or retirement plan, annuity or life insurance payable to the trustee, exercise rights thereunder, and take appropriate action to collect the proceeds, including exercise of the right to indemnification against expenses and liabilities;

(19) Make loans out of or guarantees based on trust property, including loans to or guarantees for the benefit of a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and subject to § 3536 of this title, the trustee has a lien on future distributions for repayment of those loans and for the repayment of an amount equal to any payment made or that might be made on account of such guarantee; provided further that any such loans or guarantees shall only be permitted to the extent the same are either:

a. Made for investment purposes;

b. Made in lieu of a distribution amount that could have been made currently to or for such beneficiary under the terms of the governing instrument, not made in excess of such amount, and the fiduciary creates a reserve for the potential liability; or

c. Made to or for the benefit of another trust of which such beneficiary is also a beneficiary, provided the requirements of paragraph (19)b. of this section are satisfied.

(20) Appoint a trustee to act in another state or country as to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's guardian;

b. Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act [Chapter 45 of this title], and for such purpose, to create a custodianship;

c. If there is no custodian paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

d. Depositing it in a regulated financial services institution in an interest bearing account or certificate in the sole name of the beneficiary and by giving notice of the deposit to the beneficiary; or

e. The trustee managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) Decide, in accordance with § 61-103(b) of this title, how and in what proportions any receipts or disbursements are credited, charged or apportioned as between principal and income, including the ability to create reserves out of income for depreciation, depletion, amortization or obsolescence;

(24) If all interested beneficiaries also consent, consent to the resolution of a dispute concerning the interpretation of the trust or its administration by mediation, arbitration or other procedure for alternative dispute resolution;

(25) Prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(26) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(27) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(28) Sever any trust estate on a fractional basis into 2 or more separate trusts for any reason; and segregate by allocation to a separate account or trust a specific amount or specific assets included in the trust property or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirement or election, to reduce potential generation-skipping transfer tax liability, or for any other reason, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and income earned on a segregated amount, specific assets, or gift after segregation occurs shall pass to the designated taker of such amount, specific assets, or gift. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation shall be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective, and shall be held on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance or segregation that, if altered, would adversely affect qualification of the trust for any federal tax deduction, exclusion,

election, exemption, or other special federal tax status must remain identical in each of the separate trusts created;

(29) Declare 1 or more new trusts for the purpose of merging all, or a portion, of an existing trust or trusts with and into the new trust or trusts and to merge any 2 or more trusts, including statutory trusts and foreign statutory trusts as defined in § 3801 of this title, whether or not created by the same trustor and whether or not funded prior to the merger, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust;

(30) Take such actions as are necessary to cause gains from the sale or exchange of trust assets, as determined for federal income-tax purposes, to be taxed for federal income-tax purposes as part of a distribution of income (including income which has been increased by an adjustment from principal to income under § 61-104 of this title), a unitrust distribution, or a distribution of principal to a beneficiary; and

(31) Exercise all rights and powers granted to a fiduciary under the Fiduciary Access to Digital Assets and Accounts Act, Chapter 50 of this title.

Delaware's default Trustee powers offer a lot of flexibility. I would suggest that any trustee powers section should state that the powers included in the trust are in addition to those provided by state law.

b. Multiple Fiduciaries

Since the administration of a trust in Delaware may be controlled by multiple fiduciaries (e.g. trustees, advisers, and protectors), it is important that they work in concert. To encourage communication, the legislature makes it clear that each fiduciary owes a duty, upon request, to the other fiduciaries associated with the trust to keep them reasonably informed about matters over which the fiduciary has authority or discretion. A request for information, however, does not create any additional responsibilities or duties for the fiduciary requesting or receiving this information.

§ 3317 Co-fiduciaries; duty to keep informed

Except as otherwise provided in a governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries) has a fiduciary duty upon request to keep all of the other fiduciaries for the trust reasonably informed about the administration of the trust with respect to any specific duty or function being performed by such fiduciary to the extent that providing such information to the other fiduciaries is reasonably necessary for the other fiduciaries to perform their duties; provided, however, that a fiduciary requesting and receiving any such information shall have no duty to: monitor the conduct of the fiduciary providing the information; provide advice to or consult with the fiduciary providing the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary receiving the information would or might have exercised the fiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary providing the information.

Rather than relying on the above statute, it may be helpful to specifically address these issues within the language of the trust.

c. Liability Standards

The standard of wilful misconduct comes up over and over in the Delaware Trust Code. For example:

1. The administration of a trust whose terms may expand, restrict, eliminate or otherwise vary any laws of general application to fiduciaries (12 Del. C. § 3303);
2. Following the direction of an adviser or making decisions with the consent of an adviser (12 Del. C. § 3313); and
3. The exercise of the power to invade principal or failing to exercise the power to invade principal. (12 Del. C. § 3528).

So what rises to the level of “wilful misconduct” in Delaware? It is defined as intentional wrongdoing, not mere negligence, gross negligence or recklessness. “Wrongdoing” means malicious conduct or conduct designed to defraud or seek an unconscious advantage. 12 Del. C. § 3301(g).

d. Statutes of Limitations

When drafting a Delaware trust, it is important to be aware of the statutes of limitations or statutes of repose that may apply to the extent there is not express language in the trust instrument that overrides its application.

§ 3585 Limitation of action against trustee following trustee's report.

(a) A beneficiary may initiate a proceeding against a trustee for breach of trust until the first to occur of:

- (1) Two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim; or*
- (2) The date the proceeding was otherwise precluded by adjudication, release, consent or limitation.*

(b) A report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence.

(c) For the purpose of subsection (a) of this section, a beneficiary is deemed to have been sent a report if:

- (1) In the case of a beneficiary having capacity, it is sent to the beneficiary; or*
- (2) In the case of a beneficiary who under § 3547 of this title may be represented and bound by another person, it is sent to the other person.*

(d) If subsection (a) of this section does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within 5 years after the first to occur of:

- (1) The removal, resignation, or death of the trustee;*
- (2) The termination of the beneficiary's interest in the trust; or*
- (3) The termination of the trust.*

(e) This section does not preclude an action to recover for fraud or misrepresentation related to the report.

e. Trustee Commissions

Under Delaware law, trustees are entitled to reasonable compensation in accordance with the trust document, and if the document is silent as to trustee compensation, reasonable compensation is allowed.

§ 3560 Trustees entitled to compensation in accordance with instrument

(a) Trustees under wills, trustees under inter vivos deeds of trust, both revocable and irrevocable, and successors to such trustees, are entitled to reasonable compensation for their services in accordance with the instrument creating the trust. Subject to other provisions of this subsection, if a trust instrument fixes the reasonable compensation of a trustee, the trustee is entitled to compensation as so determined. Upon proper showing, the Court of Chancery may fix or allow greater or lesser compensation than could be allowed under the terms of such trust in any of the following circumstances:

- (1) Where the duties of the trustee are substantially different from those contemplated when the trust was created;*
- (2) Where the compensation in accordance with the terms of the trust would be unreasonably low or high;*
- (3) In extraordinary circumstances calling for equitable relief.*

(b) An order under this section allowing greater or lesser compensation applies to such actions taken in the administration of a trust as the order shall specify.

In many instances, the trust document will say that the corporate trustee shall be paid in accordance with its published fee schedule, but what if that will not be used to determine the fee? I suggest that additional language be included in the trust document stating “or as otherwise agreed to.” An additional question is: who is the counter-party to the trustee in this agreement? I suggest that the counter-party be expressly addressed within the trustee compensation provision (ie. a majority of the adult beneficiaries).

§ 3561 Reasonable compensation when trust instrument does not determine

(a) As used in this section, the term "qualified trustee" means any person authorized by the law of this State or of the United States to act as a trustee whose activities are subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation or the Comptroller of the Currency of the United States.

(b) Unless a trust instrument specifically provides that the trustee shall serve without compensation, when a trust instrument does not fix the compensation of the trustee, reasonable compensation shall be allowed. Subject to the provisions of § 3562 of this title, such compensation shall be determined as follows:

- (1) For qualified trustees:*
 - a. Each qualified trustee shall file with the Register in Chancery for every county in this State, a copy of a schedule or formula by which its allowance as compensation shall be computed. Such schedule or formula may be based upon or reflect the following factors:*
 - 1. The time spent or likely to be spent in administering a trust of the type contemplated;*
 - 2. The risks and responsibilities involved;*
 - 3. The novelty and difficulty of the tasks required of the trustee;*

4. *The skill and experience of the trustee;*
5. *Comparable charges for similar services;*
6. *The character of the trust assets;*
7. *The time constraints imposed upon the trustee in administering the trust;*

b. Each qualified trustee shall provide a copy of its current trustee fee schedule or formula as filed upon any filing pursuant to paragraph (b)(1)a. of this section to the settlor of any revocable trust and to each current income beneficiary of every other trust from which it will seek to be allowed compensation to be calculated in accordance with such schedule or formula;

c. Each qualified trustee shall be allowed as reasonable compensation for services with respect to each trust from which it is entitled to compensation under this section, an amount determined by application of the schedule or formula so filed to trusts of that size and type.

(2) For other trustees, the Court of Chancery shall from time to time promulgate a rule fixing the method by which trustees other than qualified trustees may be allowed compensation for their services.

(3) There shall be no presumption that a fee schedule filed under paragraph (b)(1) of this section is any more or less reasonable than the schedule promulgated under paragraph (b)(2) of this section.

f. Investments

i. Prudent Investor Rule – 12 Del. C. § 3302

Delaware adopted its version of the Prudent Investor Rule in 1986 nearly a decade before other jurisdictions adopted this investment management approach for trusts.

There are no per se impermissible investments for trusts governed by Delaware law. A fiduciary is authorized to acquire every kind of property or investment and no investment is deemed imprudent because it is not specifically mentioned within § 3302 of the trust code. 12 Del. C. § 3302(a), (b).

There is no explicit duty to diversify investments in Delaware's Prudent Investor statute and any implicit duty to diversify may be waived in the governing instrument. 12 Del. C. § 3303(a). The 2007 amendment to § 3303 specifically clarified this point. Moreover, other aspects of the Prudent Investor standard as well as the duty of impartiality may be expanded upon or eliminated through the inclusion of specific investment guidelines or mandates in a trust. 12 Del. C. §§ 3302(e) and 3303(a). Like other Prudent Investor statutes, a Delaware trustee is able to take into consideration other assets or trust interests available to the beneficiaries when determining an investment management approach for a trust. 12 Del. C. § 3302(c).

ii. Self-Dealing & Affiliated Investments – 12 Del. C. § 3312

Even when the trust is silent regarding self-dealing, trustees may invest in affiliated securities or engage in transactions using affiliates, provided proper disclosure of compensation is made to individuals receiving statements. 12 Del. C. § 3312(b) and (c). No disclosure is required if the trust instrument or a court

order expressly authorizes such self-dealing. Id. In 2015, 12 Del. C. § 3312(c) was amended to include that no disclosure is required "if the fiduciary invests in an affiliated investment or otherwise deals with an affiliate or an interest in an affiliated investment at the direction of an adviser." In 2011, § 3534 was added to Title 12 establishing the manner in which the above disclosure and other notice may be provided. Both 12 Del. C. § 3312 and 12 Del. C. § 3307, which deals with common fund investments, are provided here in full:

§ 3312 Investments in affiliated investments; transactions with affiliates

(a) As used in this section:

(1) "Affiliate" means any corporation or other entity that directly or indirectly through 1 or more intermediaries controls, is controlled by or is under common control with the fiduciary.

(2) "Affiliated investment" means an investment for which the fiduciary or an affiliate of the fiduciary acts as adviser, administrator, distributor, placement agent, underwriter, broker or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the fiduciary or an affiliate of the fiduciary receives or has received a fee or commission.

(3) "Fee or commission" means compensation paid to a fiduciary or an affiliate thereof on account of its services to or on behalf of an investment.

(4) "Fiduciary" means any person, including a bank or trust company, acting as a fiduciary as defined in § 3301(d) of this title, and includes an agent with investment discretion.

(5) "Investment" shall mean any security as defined in § 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of § 2(i) of the Commodity Exchange Act, or any other asset permitted for fiduciary accounts pursuant to the terms of § 3302 of this title or by the terms of the governing instrument, including by way of illustration and not limitation, shares or interests in a private investment fund (including a private investment fund organized as a limited partnership, limited liability company, a statutory or common law business trust, or a real estate investment trust), joint venture or other general or limited partnership, or an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940.

(b) Subject to the investment standards stated in § 3302 of this title, a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment and, upon satisfaction of the conditions stated in subsection (c) of this section, such fiduciary may receive fiduciary compensation from such account at the same rate as the fiduciary would otherwise be entitled to be compensated.

(c) A fiduciary seeking compensation pursuant to subsection (b) of this section shall disclose to each principal in an agency relationship, and to all current recipients of account statements of any other fiduciary account, all fees or

commissions paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment or such other dealing with an affiliate. The disclosure required under this subsection may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees or commissions received or to be received by the fiduciary or any affiliate of the fiduciary and an explanation of the manner in which such fees or commissions are calculated (either as a percentage of the assets invested or by some other method). Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure. Notwithstanding the foregoing provisions of this subsection, no such disclosure is required if:

(1) The governing instrument or a court order expressly authorizes the fiduciary to invest the fiduciary account in affiliated investments or otherwise deal with an affiliate or an interest in an affiliated investment; or

(2) The fiduciary invests in an affiliated investment or otherwise deals with an affiliate or an interest in an affiliated investment at the direction of an adviser (who expressly directs the fiduciary to enter into a transaction that would otherwise require disclosure under this subsection and who is not an affiliate) pursuant to subsection (b) of § 3313 of this title.

(d) A fiduciary that has complied with subsection (c) of this section (whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order) shall have full authority to administer an affiliated investment (including the authority to vote proxies thereon) without regard to the affiliation between the fiduciary and the investment.

Section 3312 is helpful, but may be unavailable in some quiet trust situations and does not cover all self-dealing situations. I suggest that affiliated investment and other self-dealing provisions be specifically addressed in the trust document.

So what happens if Section 3312 does not apply to the self-dealing transaction(s)? In a case brought before the Supreme Court of Delaware in 1999, the Court considered whether a testamentary trustee breached his fiduciary duties to the beneficiaries of the trust when a corporation formed by the trustee and a co-administrator of a decedent's estate, purchased real property from the estate. Stegemeier v. Magness, 728 A.2d 557 (1999). The Court pointed out that under current Delaware law, "an interested transaction is not void but is **voidable**, and a court will uphold such a transaction against a beneficiary challenge only if the trustee can show that the transaction was fair and that the beneficiaries consented to the transaction after receiving full disclosure of its terms. The Court also stated that "under trust law, self-dealing occurs when the fiduciary has a 'personal interest in the subject transaction of such a substantial nature that it might have affected his judgment in material connection.'" Id. at 564 (citing Vredenburg v. Jones, 349 A.2d at 39). Additionally, "the rule is well established that a person acting in a fiduciary capacity cannot also act for himself where he has duties to perform for another, 'specifically that one who is acting in such a position of trust cannot be a purchaser from the estate for which he is trustee, however fair the terms of

sale or however honest the circumstances of an individual transaction may be.” Id. (citing Vredenburg v. Jones, 349 A.2d at 33). The inclusion of self-dealing language is preferable to relying on §3312 because it demonstrates the settlor’s intent regarding such actions.

V. Execution Requirements – 12 Del. C. § 3545

Section 3545 requires that a creation, modification or revocation of a Delaware trust where a beneficiary (other than the trustor) acquires or is divested of an interest in the trust as a result of surviving the trustor shall be void unless 1) creation, modification or revocation is in writing and either executed by the trustor and witnessed by at least one disinterested person or two credible persons or 2) executed by a trustee who is a disinterested person.

A trust document not executed in accordance with § 3545(a) will not be void merely because of subsection (a) if such writing was validly executed in compliance with the law, at the time of execution, of the place which serves as the initial place of administration of the trust, or, if the trust is not yet actively administered, the initial situs of the trust. 12 Del. C. § 3545(b).

To avoid any arguments regarding proper execution of a trust, it is customary in Delaware to have a trustee’s signature witnessed by two witnesses and notarized.

VI. Conclusion

The foregoing gives you a flavor of why Delaware is worth considering and the advantages that its use may afford clients. Though many of the advantages set forth above are not unique to Delaware, it is rare to find them aggregated in laws of one jurisdiction that also has an excellent court system. I hope you find this outline useful.