



**DIRECTED TRUSTS, TRUST PROTECTORS,
PRIVATE TRUST COMPANIES AND
OTHER BELLS AND WHISTLES**

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Table of Contents

| | |
|--|----|
| I. DIRECTED TRUSTS | 1 |
| A. Introduction..... | 1 |
| B. Definition | 1 |
| C. Statutory Recognition of “Advisers” | 2 |
| 1. UTC | 2 |
| 2. Third Restatement..... | 2 |
| 3. Delaware Provisions | 2 |
| D. Directed Trusts – The Language of the Trust Instrument..... | 5 |
| 1. Trust Adviser Language | 5 |
| (a) Investment Direction Adviser | 5 |
| (b) Special Holdings Direction Adviser | 5 |
| (c) Distribution Adviser..... | 6 |
| (d) Trust Protector | 6 |
| E. Definition | 7 |
| 1. Administrative Trustee Duties..... | 7 |
| F. Trustee Fees. | 7 |
| G. Fully Directed Trusts | 8 |
| H. Liability Issues | 9 |
| 1. The Delaware Decision | 9 |
| 2. The Virginia Decision | 10 |
| 3. Trust Protector – Case Law | 11 |
| 4. Sealed Case..... | 13 |
| II. THE DELAWARE LIMITED PURPOSE TRUST COMPANY..... | 15 |
| A. Establishing and Operating a Private Trust Company under Delaware Law | 15 |
| 1. Formation of a Delaware Limited Purpose Trust Company..... | 15 |
| (a) Articles of Association..... | 15 |
| (b) Public Notice Requirements | 15 |
| (c) Application for Certificate of Public Convenience and Advantage..... | 16 |
| (d) Public Hearing | 16 |
| (e) Organizational Meeting | 17 |
| (f) Articles of Organization..... | 17 |
| (g) Certificate of Incorporation..... | 17 |
| (h) Certificate to Transact Business..... | 17 |
| 2. Operation of Limited Purpose Trust Company | 17 |

| | | |
|------|---|----|
| (a) | Powers of Limited Purpose Trust Company | 17 |
| (b) | Restrictions on Limited Purpose Trust Company Powers | 18 |
| (c) | Restrictions on Limited Purpose Trust Company Business..... | 18 |
| (d) | Headquarters and Directors..... | 18 |
| (e) | Bank Examination..... | 18 |
| (f) | Annual Assessment..... | 19 |
| (g) | Costs..... | 19 |
| B. | Recommendations Concerning the Establishment of a Limited Purpose Trust Company under Delaware Law | 19 |
| 1. | Recommendation to Establish a Delaware Limited Purpose Trust Company..... | 19 |
| (a) | Legal Issues..... | 19 |
| (b) | Choice of Banking Entity..... | 20 |
| 2. | Recommendations For Delaware Headquarters | 21 |
| (a) | Office Space..... | 21 |
| (b) | Employees..... | 21 |
| 3. | Recommendations For the Structure of the Limited Purpose Trust Company’s Board of Directors..... | 21 |
| III. | APPENDIX..... | 22 |
| A. | Investment Direction Adviser Language | 22 |
| B. | Distribution Adviser Language..... | 25 |
| C. | Trust Protector Language..... | 28 |
| D. | Administrative Trustee Language..... | 32 |

Directed Trusts, Trust Protectors, Private Trust Companies and Other Bells and Whistles

Michael M. Gordon, J.D., LL.M.

I. DIRECTED TRUSTS

A. Introduction. Directed trusts are not new. Delaware (for example) has statutorily recognized the power of the trustor of a trust to restrict a trustee's authority to dispose of or otherwise deal with specified trust assets for more than twenty years. 12 Del. C. § 3313 (65 Laws 1986, ch. 422, § 5). Prior to the statute, going back to the early 1900s, Delaware adopted the practice of allowing directed trusts to accommodate its wealthiest families.

In its earliest form, directed trusts tended toward the limitation of a trustee's power to sell specific trust assets without the consent or written direction of a person not serving as trustee. Today the limitations on a trustee's authority to deal with certain trust assets often affect all of the trustee's discretionary powers over the assets including voting decisions, management decisions, distribution decisions and other decisions previously solely within the realm of the trustee's discretion.

The desire of wealthy families to preserve their control over the stock of the corporation founded by their ancestors and the recognition that today's trusts often hold new kinds of unique trust investments have driven the issue of directed trusts. In fact, trustees faced with the fiduciary duty to diversify trust assets and deal impartially with income beneficiaries and remainder beneficiaries welcome the ability to limit their liability through the use of directed trusts.

The result has been the creation of a statutory framework authorizing a trustor (or the trustee and the trust beneficiaries through appropriate trust modification proceedings) to include in trust instruments a new regime for the administration of specific trust assets. In addition to the traditional trustee, the new regime often includes trust advisers. See, Rachel Emma Silverman, *How Many Trustees Do You Need?* Wall St. J., July 12, 2007, at B5.

B. Definition. A directed trust is a trust that removes one or more powers or discretions traditionally held by the trustee and vests that power or discretion in a person who is either a special trustee or not a trustee at all. The power or discretion can relate to investment decisions, management decisions, distribution decisions and any other decision affecting the administration of the trust. The starting point for the creation of directed trusts is the statutory framework that permits them coupled with the carefully worded language of the trust instrument.

C. Statutory Recognition of “Advisers”. A trustor’s statutory power to dictate the rights and obligations of the beneficiaries and trustee through the express terms of a trust instrument and the trustee’s statutory right to rely in good faith on the terms of the trust instrument for protection from liability are essential to the effective use of directed trusts. Three different approaches are illustrated below.

1. UTC. Section 808(b) of the Uniform Trust Code states:

If the terms of a trust confer upon a person other than the trustee of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power **unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty** that the person holding the power owes to the beneficiaries of the trust. [emphasis added]

2. Third Restatement. Section 75 of the Third Restatement of Trusts states:

...[I]f the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, **unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries**. [emphasis added]

3. Delaware Provisions. The foregoing provisions for directed trusts should be compared with the more protective provisions adopted by Delaware and a few other states.

(a) Delaware law recognizes a broad class of advisers including direction advisers, consent advisers and trust protectors. Where one 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 decisions of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides. 12 Del. C. § 3313(a).

(b) When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its “willful misconduct”.

Direction Provision

If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then **except in cases of willful 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. 12 Del. C. § 3313(b). [emphasis added] The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. 12 Del. C. § 3301(g) and 12 Del. C. § 3301(h)(4). The term wrongdoing means malicious conduct or conduct designed to defraud or seek an unconscionable advantage. 12 Del. C. § 3301(g).

- (c) The statutory standard of care required of a fiduciary acting on the consent of a Consent Adviser is only somewhat broader. When a trustee acts with the consent of a Consent Adviser, the trustee will only be liable for its “willful misconduct” or “gross negligence”.

Consent Provision

If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then **except in cases of willful 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 failure to provide such consent after having been requested to do so by the fiduciary. 12 Del. C. § 3313(c). [emphasis added]

- (d) In all cases, there may be an adviser who is a “trust protector”.

Trust Protector

... 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:

- (i) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
 - (ii) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
 - (iii) 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).
- (e) The statutory protection afforded trustees of directed trusts would be diminished if advisers or beneficiaries could sue the trustee on the theory that the trustee had a duty to keep them informed and to impart to them knowledge affecting their interests in the trust so they could perform their duties as advisers or otherwise protect their beneficial interests in the Trust.

Duty to Monitor, Communicate and Inform

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, then, except to the extent that the governing instrument provides otherwise, **the fiduciary shall have no duty to:**

- (i) **monitor the conduct of the adviser;**
- (ii) **provide advice to the adviser or consult with the adviser; or**
- (iii) **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.** 12 Del. C. § 3313(e). [emphasis added]

* * *

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. Id.

- (f) Recognizing the multiple roles played by different fiduciaries, Delaware adopted 12 Del. C. § 3317 in 2010. The statute states that, except as provided in the governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries) has a duty to keep the other fiduciaries reasonably informed about the administration of the trust with respect to the specific duty or function being performed by that fiduciary. The statute further provides that a fiduciary who requests and receives such information has no duty to monitor the conduct of the other fiduciary, provide advice or consult with the other fiduciary or provide information or communicate or warn 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 different manner. 12 Del. C. § 3317.
- (g) One aspect of the directed trust structure that is often overlooked is the potential liability of the adviser appointed to direct the trustee with respect

to investment decisions, distribution decisions or other decisions of the trustee. Absent express language in the governing instrument such adviser is deemed to serve in a fiduciary capacity and will be held to the prudent person standard. However, Delaware law permits a trust agreement to exculpate and indemnify a fiduciary (including an adviser) for all acts other than those committed with willful misconduct. 12 Del. C. § 3303(a).

D. Directed Trusts – The Language of the Trust Instrument. Once the statutory framework is in place, the focus shifts to the specific language of the trust instrument. A sample trust instrument, including the most common directed trust provisions, is included in the appendix.

1. Trust Adviser Language. The particular adviser language included in the trust instrument depends upon the purpose for which the trust is created and the reason why the adviser is appointed. There are innumerable reasons why trustors create directed trusts and it would be impossible to include in this outline all of the language used over the years creating trusts with trust advisers. Most directed trusts do, however, fall into certain categories and the most common are illustrated below.

(a) Investment Direction Adviser. The most common form of directed trust is one that is directed with respect to investment decisions. Often trustors find it desirable to bifurcate traditional trustee responsibility through the appointment of an Investment Direction Adviser that has the ability to direct the trustee with respect to the investment of the trust assets.

The most common reasons for the use of an Investment Direction Adviser are: (1) the trust will be funded with a concentrated position that a corporate trustee would be uncomfortable holding or (2) the trustor would like to appoint a trustee to administer the trust and be responsible for the distribution of all of the trust assets while allowing the trustor's financial advisor to make all investment decisions for the trust. By designating a trustee in a jurisdiction that allows directed trusts the trustor is able to bifurcate these traditional trustee responsibilities and vest all investment authority in the third party adviser. Sample Investment Direction Adviser language is included in the Appendix.

(b) Special Holdings Direction Adviser. Another common use of the directed trust structure is the bifurcation of investment responsibilities only with respect to a certain class of assets. For example, the trust may be funded with a combination of marketable securities as well as an ownership interest in the trustor's family business. The trustor would like the corporate trustee to manage and invest the marketable assets however neither the trustor nor the corporate trustee want the corporate trustee to participate in any decisions relating to the trustor's family business. It is possible to appoint an adviser (i.e. Special Holdings Direction Adviser) that has the ability to direct the trustee as to the special assets while at the same time allowing the

trustee to be responsible for the investment and management of the marketable securities held in the trust.

Another reason to include the position of Special Holdings Direction Adviser applies when the trustor wants to retain investment control over the trust by serving as the Investment Direction Adviser of the trust. It is possible that if the trust is funded with certain assets (i.e. life insurance policies insuring the trustor's life or voting IRC Section 2036(b) stock) the trustor's retention of investment control over the trust assets could result in the trust assets being includible in the trustor's estate for Federal Estate Tax purposes. In this situation it is desirable to carve out the problematic assets and define them as "Special Holdings." The trustor can retain the ability to direct investments with respect to the non-Special Holdings and a third party adviser can be appointed to direct the trustee as to the investment of the Special Holdings.

- (c) Distribution Adviser. Another common use of the directed trust structure is to bifurcate distribution responsibility through the appointment of a Distribution Adviser who has the ability to direct the trustee as to when and how the beneficiaries will receive distributions from the trust based on the standards contained in the trust instrument. Often a trustor will want a corporate trustee to be responsible for the investment and administration of the trust assets but will want someone who is more familiar with the beneficiaries and their particular needs to decide when distribution should be made to the beneficiaries. This may be particularly true where the beneficiaries have special needs or substance abuse issues. It is also a desirable tool in situations where the trustor has specific ideas about how and when distributions will be made to the beneficiaries. The trustor could appoint a family member or trusted adviser, who will have much more intimate knowledge of the family and their circumstances than the corporate trustee, to direct the trustee regarding trust distributions. Sample Distribution Adviser language is included in the Appendix.
- (d) Trust Protector. One of the more powerful positions that can be created in the directed trust structure is that of Trust Protector. Often the Trust Protector is vested with key powers that will allow the trust instrument to remain flexible as circumstances change over time. Typical Trust Protector powers include the following:
 - (i) The ability to amend the trust for administrative and tax purposes;
 - (ii) The power to change the situs and governing law of the trust;
 - (iii) The power to appoint, remove and replace the trustee and other trust advisers;
 - (iv) The ability to convert the trust from a grantor trust into a non-grantor

trust for income tax purposes; and

- (v) The power to expand the permissible class of beneficiaries of the trust.

One issue that often arises is whether the Trust Protector should serve in a fiduciary or non-fiduciary capacity. Under Delaware law, a Trust Protector is deemed to serve in a fiduciary capacity unless the terms of the governing instrument provide otherwise. 12 Del. C. § 3313(a). It is common practice to have the Trust Protector serve in a fiduciary capacity. However, there are certain powers that may be conferred upon the Trust Protector which could only be exercised in a non-fiduciary capacity (i.e. the ability to convert the trust from a grantor trust into a nongrantor trust for income tax purposes and the power to expand the permissible class of beneficiaries of the trust). Sample Trust Protector language is included in the Appendix

E. Definition. Purely administrative trustees provide only trust administration services. Example: A wealthy New York resident wishes to create a perpetual trust in Delaware with marketable securities for tax purposes. The trustor already has a sophisticated team of financial planners and investment advisers. The trustor creates a Delaware limited liability company (“LLC”) to which he transfers marketable securities. The trustor then creates a Delaware dynasty trust naming a Delaware trustee as a Purely Administrative Trustee. The only asset held by the Delaware trustee is the LLC units. The language of the trust instrument includes a Special Holdings Direction Adviser to direct the trustee with respect to all matters concerning the LLC units held in trust. Because the trust may one day hold investment assets, the trust is a directed trust with an Investment Direction Adviser named to direct the trustee with respect to all matters concerning trust investments. There is a Distribution Adviser to direct the trustee with regard to trust distributions. A Trust Protector provision is included allowing the Trust Protector to remove and replace the trustee, the Special Holdings Direction Adviser, the Investment Direction Adviser and the Distribution Adviser. The Trust Protector may also change the situs of the trust as well as the law governing its administration and modify the language of the trust instrument to obtain favorable tax treatment or facilitate the efficient administration of the trust.

1. Administrative Trustee Duties. The only duties performed by the Administrative Trustee are to hold the LLC units, maintain trust records, prepare or otherwise arrange for the preparation of fiduciary income tax returns, keep account records, facilitate communications with trust beneficiaries, and maintain an office for its business in the state. The trustee has no liability for actions taken or not taken by the Special Holdings Direction Adviser, the Investment Direction Adviser, the Distribution Adviser and the Trust Protector absent the trustee’s willful misconduct.

F. Trustee Fees. Administrative trustees, recognizing the limited role they play, offer low fees for trust services. Typically, administrative trustees will serve for annual

fees of anywhere from \$3,500 to \$10,000 per trust. To illustrate the fee structure, below are actual fee quotes from two Delaware trust companies for providing trust services in different capacities for a trust with assets valued at \$7.5 million.

Bank I

1. Where we hold only an LLC interest, our fee is \$5,000 per year.
2. Where we hold liquid assets, subject to direction on investments, our fee is \$24,000 per year.
3. Where we hold liquid assets, but have full discretion as to investments, our fee is \$77,000 per year.

Bank II

1. Bank II is hired as trustee. Under this scenario, there is no direction adviser. Bank II is trustee and manages the investment portfolio at its discretion, subject to the terms of the trust document. The fee schedule is as follows:

| <u>Fee Schedule</u> | <u>Rate</u> | <u>Balance</u> | <u>Fee</u> |
|--------------------------------------|-------------|--------------------|-----------------|
| First \$2,000,000 of principal value | 0.500% | \$2,000,000 | \$10,000 |
| Next \$3,000,000 | 0.375% | 3,000,000 | 11,250 |
| Next \$5,000,000 of principal value | 0.350% | <u>2,500,000</u> | <u>6,250</u> |
| Total | | \$7,500,000 | \$27,500 |

2. Bank II is hired as trustee. The trust holds LLC units only and Bank II, the administrative trustee, is directed to hold the LLC units in the trust.

\$6,000 for the first \$10 MM of assets held in the LLC.

\$10,000 for assets valued between \$10 MM and \$20 MM in the LLC.

G. Fully Directed Trusts. Purely administrative trustees evolved from the carefully crafted language of trust instruments that define the duties and responsibilities of various advisers to the trust. The combination of Direction Advisers and Distributions Advisers coupled with the power of the Trust Protector resulted in the development of a trust concept where the formerly fully responsible corporate trustee

now serves only in an administrative capacity while all of the duties and responsibilities traditionally vested in the corporate trustee rest now in the hands of advisers and protectors to the trust. Sample Administrative Trustee language is included in the Appendix.

H. Liability Issues. Can directed trusts protect fiduciaries from liability? Will the statutory framework previously discussed and the language of the trust instrument really work? Two state court decisions on the matter may be helpful in answering these questions: One is a Delaware decision and the other is a Virginia decision. Both involve Investment Direction Advisers.

1. The Delaware Decision. In *Duemler v Wilmington Trust Co.*, C.A. No. 20033 N.C. (Del. Ch. 2004), the corporate trustee was sued by an individual co-trustee who was the sole Investment Direction Adviser of a trust established by his family. The Investment Direction Adviser chose not to tender a bond owned by the trust when he had the option to do so. The issuer of the bond defaulted and the Investment Direction Adviser sued the corporate trustee alleging the corporate trustee breached its fiduciary duty to the trust by, among other things, failing to provide the Investment Direction Adviser with appropriate financial information to allow the Investment Direction Adviser to make an informed decision. The case was litigated in the Delaware Court of Chancery.

(a) The Ruling. The Court decision is not reported. The Court was so certain of the proper outcome of the case that it ruled from the bench. A copy of the transcript of the decision may be obtained by email request to mgordon@gfmlaw.com. Relevant quotes are set forth below.

THE COURT: I'm in a position to rule. I'm not going to require that the parties expend additional resources on this. The matter is abundantly clear to me. (Tr. P. 3, L. 2-5).

* * *

...Mr. Duemler was the investment adviser for a high-risk approach to investing of particular - of assets under a particular trust. Had he wished for Wilmington Trust to be investment advisor to run a high-risk portfolio - I'm sure Wilmington Trust likes to make money. It would be willing to do it. It costs a lot more. (Tr. P. 3, L. 10-16).

Finding that the trust held "a nondiversified portfolio with extremely risky assets" (Tr. P. 11, L. 22-23), the court stated: I think in terms of the division of trust responsibilities, it was absolutely clear that this was on Mr. Duemler's side of the ledger. (Tr. P. 12, 9-11).

The Court held that the proximate cause of the loss was "the breach of fiduciary duty by Mr. Duemler" who had the primary responsibility for being the investment adviser. (Tr. P. 13, L. 4-13).

- (b) Significance of the Decision. The Court upheld the statutory defense under 12 Del. C. § 3313(b) (Delaware’s directed trust statute) and noted that the case was “an apt instance for its application” because there was “absolutely no evidence of willful misconduct” on the part of Wilmington Trust Company. (Tr. P. 15, L. 12-16). Moreover, the court admonished the investment direction adviser for arguing that the trustee was responsible for failure to provide relevant information. The court stated: And you don’t get to come in and hang your fellow fiduciary on that unless they engaged in willful misconduct. There is none there. And if I were to rule that, ‘oh, no. What the problem is here is the failure to provide information or to make sure that the fiduciary making the decision knew what they were doing,’ I think that would gut the statute. (Tr. P. 16, L. 5-12).

The court’s clear recognition of the intent and purpose of the directed trust statute and its firm ruling upholding the statute is a clear indication that Delaware courts will enforce directed adviser provisions in a trust instrument based on the statutory framework that permits them.

2. The Virginia Decision. In *Rollins v Branch Banking and Trust Company of Virginia*, 2001 W.L. 34037931 (Va. Cir. Ct.), the plaintiffs were children and grandchildren of the grantors of two trusts created in 1977 for their benefit. The plaintiffs were suing the corporate trustee for breach of fiduciary duty, in particular, the trustee’s failure to diversify trust investments. The trusts were funded primarily with shares of stock in two textile corporations. At the inception of the trusts, the trustee “obtained the written authority of the beneficiaries to over-concentrate the trust” with textile stocks. *Rollins*, at *1. The trust remained over concentrated in the textile stock until 1997 (20 years later) when the stock was sold. The beneficiaries sued the trustee for \$25 million, the amount they claim they lost due to the trustee’s failure to diversify the trust investments. The trustee, citing the Virginia directed trust statute, filed the equivalent of a motion for summary judgment contending that when, as here, the trust vests the power to make investment decision exclusively in persons other than the trustee, the trustee cannot be liable for the loss resulting from the retention of the investment. *Rollins*, at *2.
- (a) The Ruling. The court ruled in favor of the corporate trustee citing the Virginia directed trust statute and quoting the specific language of the trust instrument. The Virginia trust statute (which has since been changed to a version closer to the UTC provision) then provided:

§ 26-5.2. Liability of a fiduciary for actions of cofiduciary C. Whenever the instrument under which a fiduciary or fiduciaries are acting reserves unto the trustor, testator, or creator or vests in an advisory or investment committee or any other person or persons, including a cofiduciary, to the exclusion of one or more of the fiduciaries, authority to direct the making or retention of investments, or any investment, the excluded fiduciary or

cofiduciary shall be liable, if at all, only as a ministerial agent and shall not be liable as fiduciary or cofiduciary for any loss resulting from the making or retention of any investment pursuant to such authorized direction. Va. Code § 26-5.2.

The court found that: “The trustee’s power to diversify, however, was limited by the express language of Article X of the trust instruments” which stated “investment decisions as to the retention, sale, or purchase of any asset of the Trust Fund shall likewise be decided by such living children or beneficiaries, as the case may be”. *Rollins*, *2.

- (b) Significance of the Decision. Like *Duemler*, the plaintiffs in *Rollins* argued that the trustee had a duty to keep them informed and to impart to them any knowledge affecting their interest in the trust. *Rollins* at *4. However, the court was not persuaded:

The plain language of the instrument, however, clearly contradicts the beneficiaries’ argument. The beneficiaries, alone, had the power to make investment decisions. **The statute enacted by the General Assembly recognizes the basic principal (sic) that the court cannot hold a trustee, or anyone else, liable for decisions that it did not and could not have made.** The statute clearly applies in this instance and the beneficiaries have not stated a cause of action against the trustee for failing to diversify the trust assets. The demurrer is granted as it relates to all claims for failure to diversify. *Rollins*, at *2. [emphasis added]

The court’s clear recognition of the intent and purpose of the directed trust statute and its firm ruling upholding the statute is a clear indication that Virginia courts will enforce directed adviser provisions in a trust instrument based on the statutory framework that permits them.

3. Trust Protector – Case Law. Perhaps because the concept of trust protector is so new in the United States or because cases are settled or are otherwise disposed of, there appear to be no reported decisions dealing with the subject of fiduciary liability for an administrative trustee following the direction of a Trust Protector. There have been at least two Trust Protector cases in Delaware in which the author’s law firm was involved. One case is a matter of public record. The other was sealed by the court during the proceedings to protect the privacy of the parties.*2.

- (a) The Friedman Case. In *Friedman v. U.S. Trust Company of Delaware, C.A.* No. 20205 NC (2003 Del. Ch.), an elderly California resident was the beneficiary of a credit shelter trust established in 1970 by his late wife. He was about to marry for the fifth time. All of the residuary trust assets were held in more than 25 limited liability companies. The resident’s son persuaded his father to move the residuary trust to Delaware “for asset protection purposes” prior to the marriage. U.S. Trust Company of

Delaware agreed to serve as administrative trustee. A routine proceeding was conducted in the Court of Chancery to have Delaware accept jurisdiction over the trust, recognize U.S. Trust Company of Delaware as the trustee, declare that Delaware would thereafter govern the administration of the trust and modify the trust to include direction adviser provisions including the appointment of the son as a Trust Protector. The father resigned as trustee of the residuary trust. The father and son had a falling out. The son informed the father that the son, as Trust Protector, was now in charge of all of the business assets held in the 25 limited liability companies. When the father realized he had lost control of the residuary trust assets, he filed suit in Delaware seeking to open the judgment transferring the trust situs and appointing the son as Trust Protector. The reformed trust document defined the role of the Trust Protector as follows:

The Trustee shall not exercise any of its rights, powers or privileges under the Trust, or take any action under the Trust ...except upon written direction of the Trust Protector.

- (b) The Ruling. The court was deeply concerned with certain procedural matters. In particular, no notice of the change of situs of the trust had been given to the father's other three children who were remainder beneficiaries of the trust. The court also struggled with the concept of a purely administrative trustee and the role of the Trust Protector as evidenced by the following excerpt from the transcript of a hearing before the court.

The Court: Trust Protector... sounds like a super hero, or something like that. Is that something under California law that's developed as a concept? ...Why do we need a trustee when you have the omnipotent-

Attorney: In this case, that's a good question. Virtually all of the powers are vested in [the son], as Trust Protector.

* * *

The Court then questioned the attorney for the Trust Company to determine how the father lost control of the trust assets in the process.

Trust Co.: We simply did not have any knowledge of those facts that created this. My client was a facilitator. And under these instruments, if they are to govern, we are Administrative Trustee... that's our limited role. We are at the direction of the Trust Protector.

The Court: You are not really - - you are almost a pure Administrative Trustee. Right?

Trust Co.: I would say we are a pure Administrative Trustee.

The Court: Not even a money managing trustee, or anything like that.

Trust Co.: That's correct.

Immediately following the hearing, the court opened and vacated the order appointing the son as Trust Protector and the trust company as Administrative Trustee. The action was stayed pending further proceedings. In the interim, the parties agreed to litigate their dispute in California where the trust had been administered for more than thirty years.

- (c) Significance of the Outcome. The court did not assess any liability against the corporate fiduciary and all of the corporate fiduciary's legal fees were paid by the trust.
4. Sealed Case. Little can be said about the second Delaware case involving a Trust Protector. The case is under seal. However, it involved an offshore asset protection trust moved to Delaware pursuant to the Delaware Qualified Dispositions in Trust Act by a Trust Protector. It was alleged that the beneficiary of the trust suffered from mental illness and the Trust Protector essentially directed the Delaware Administrative Trustee not to make any distribution to or for the benefit of the beneficiary who the Trust Protector viewed as uncooperative. The beneficiary petitioned the Delaware court, which had jurisdiction over the Delaware Administrative Trustee, for the payment of approximately \$7,000 in certain past due bills and a stipend of only \$4,000 per month from a trust with a corpus that exceeded \$1 million.
- (a) The Ruling. The corporate fiduciary took the position that it could not make any distributions from the trust except upon direction of the Trust Protector. There was hostility between the Trust Protector and the trust beneficiary. The court urged the parties to resolve their differences by stipulation. At one point the court wrote:

Dear Counsel:

My in-box gives me an inclination that rationality might not be prevailing in this matter.

At the urging of the court, the parties entered into a stipulated settlement paying the beneficiary's delinquent bills and establishing a \$4,000 monthly living allowance. It was stipulated that the Trust Protector would resign (as would the Delaware corporate fiduciary) and the trust would be transferred back to the offshore jurisdiction from which it came

- (b) Significance of the Outcome. No liability was assessed against the corporate fiduciary who served as a purely administrative trustee. All of the corporate fiduciary's legal fees were paid by the trust.

II. THE DELAWARE LIMITED PURPOSE TRUST COMPANY

A. Establishing and Operating a Private Trust Company under Delaware Law. The formation and operation of a Delaware Limited Purpose Trust Company are governed by Chapter 7 of Title 5 of the Delaware Code. What follows is an outline of the necessary steps that must be taken to both form and operate a Delaware Limited Purpose Trust Company, as well as recommendations from the Office of the State Bank Commissioner on these issues.

The Delaware Code authorizes the establishment of a limited purpose trust company. *5 Del. C. § 774.* The limited purpose trust company is designed to bring out-of-state trust business to Delaware without competing with existing Delaware bank and trust company business. There are at least twenty-one Delaware Limited Purpose Trust Companies.

1. Formation of a Delaware Limited Purpose Trust Company. The following steps must be taken by the incorporators to form a Delaware Limited Purpose Trust Company:

- Draft Articles of Association;
- File notice of intention to incorporate with the State Bank Commissioner;
- Publish notice of intention to incorporate;
- Apply for Certificate of Public Convenience and Advantage;
- State Bank Commissioner holds formal, public evidentiary hearing;
- Hold an organizational meeting to adopt bylaws and elect directors, a president, a secretary and such other officers as the bylaws may prescribe;
- Draft Articles of Organization;
- Submit the Articles of Organization to the State Bank Commissioner for approval;
- File the Articles of Organization with the Secretary of State;
- File certified copies of the Certificate of Incorporation, bylaws and Articles of Organization with the State Bank Commissioner for a Certificate to Transact Business.

(a) Articles of Association. To form a limited purpose trust company, three (3) or more persons, at least two (2) of whom must be citizens and residents of the State of Delaware, associate themselves by a written agreement called the Articles of Association. *5 Del. C. § 722.* The Articles of Association must contain the information set forth in *5 Del. C. § 723.*

(b) Public Notice Requirements. Notice of the intention of the incorporators to form a limited purpose trust company must be filed with the State Bank Commissioner. *5 Del. C. § 724.* The Notice must have attached as exhibits: (i) a copy of the application for a Certificate of Public Convenience and Advantage; (ii) a copy of the Articles of Association; (iii) a proposed form of public notice; and (iv) where the incorporators are acting on behalf of a corporate entity, a copy of the corporate resolution. Public notice in such

form as the State Bank Commissioner shall approve shall be published at least once a week for two (2) successive weeks in one (1) or more newspapers designated by the State Bank Commissioner. *Id.*

- (c) Application for Certificate of Public Convenience and Advantage. Within sixty (60) days after the second publication of the notice of intention to incorporate (and on or before the public hearing), the incorporators must apply to the State Bank Commissioner for a Certificate that Public Convenience and Advantage will be promoted by the establishment of a limited purpose trust company. 5 *Del. C.* § 725. The application must be accompanied by a non-refundable investigation fee of \$1,150. 5 *Del. C.* § 735. In determining whether a Certificate of Public Convenience and Advantage shall be issued to a limited purpose trust company, the State Bank Commissioner considers several factors specified in 5 *Del. C.* § 777.

One important factor that the State Bank Commissioner considers is the financial and managerial resources of the limited purpose trust company. 5 *Del. C.* § 777(a)(1) . State law provides that the limited purpose trust company have a minimum of \$500,000 of capital stock and a minimum of \$250,000 of paid-in surplus. 5 *Del. C.* § 745. As a practical matter, the statutory capital requirements are \$1,000,000 because 5 *Del. C.* § 748 requires the capitalization of profit relative to surplus to eventually equal 100 percent of the initial capital stock value.

The application will include projected financial statements for the first three years of operations. If any losses are projected during this three-year period, in addition to the statutory capital requirements, the Bank Commissioner will require sufficient initial capital to cover the projected losses.

The State Bank Commissioner has adopted the New York State capital standard for limited purpose trust companies. This standard is 0.25 percent of assets under management. Therefore, the capital requirement for a Delaware limited purpose trust company is the greater of \$1,000,000 or 0.25 percent of assets under management (the tip over point is \$400,000,000). Assets under management consist of assets in irrevocable trusts. Assets held in revocable trusts are excluded.

- (d) Public Hearing. The State Bank Commissioner will hold a formal, public evidentiary hearing on the application for a determination of public convenience and advantage and whether the Articles of Association comply with law. The hearing is held no earlier than twenty (20) days after and no later than sixty (60) days following the second publication of the public notice. It is the experience of the State Bank Commissioner that only the staff of the Office of the State Bank Commissioner and the interested parties attend these hearings.

- (e) Organizational Meeting. If the State Bank Commissioner issues the Certificate of Public Convenience and Advantage, the incorporators are required to hold an organizational meeting. *5 Del. C. § 727.* The organizational meeting of the incorporators must be called by a notice, which states the time, place and purposes of the meeting. *5 Del. C. § 727(a).* At the organizational meeting, the incorporators shall adopt bylaws and elect directors, a president, a secretary and such other officers as the bylaws may prescribe. *5 Del. C. § 727(b).*
- (f) Articles of Organization. The president and a majority of the directors elected at the organizational meeting shall then make and sign the Articles of Organization, which shall set forth: (i) a copy of the Articles of Association; (ii) the names of the subscribers thereto; (iii) the name, residence and post-office address of each of the officers of the corporation; and (iv) the date of the first meeting. *5 Del. C. § 728.* The Articles of Organization must then be submitted to the State Bank Commissioner for approval. *5 Del. C. § 729.*
- (g) Certificate of Incorporation. If the Articles of Organization are endorsed by the State Bank Commissioner, they then must be filed within thirty (30) days of such endorsement in the Office of Secretary of State. *5 Del. C. § 730.* Upon the filing of the Articles of Organization, the Secretary of State shall issue a Certificate of Incorporation to the limited purpose trust company. *5 Del. C. § 731(a).*
- (h) Certificate to Transact Business. A certified copy of the limited purpose trust company's Certificate of Incorporation, the Articles of Organization and the State Bank Commissioner's endorsement must be filed with the State Bank Commissioner, together with the \$5,750 fee for the Certificate to Transact Business. *5 Del. C. §§ 733, 735.* Once the capital stock has been issued, a list of the stockholders, with their names, residences, mailing addresses and number of shares held, must be filed with the State Bank Commissioner. *5 Del. C. § 733.* If the State Bank Commissioner is satisfied with an investigation of the manner of payment for the capital stock, the State Bank Commissioner issues a certificate authorizing the limited purpose trust company to begin to transact business. *Id.*

2. Operation of Limited Purpose Trust Company.

- (a) Powers of Limited Purpose Trust Company. A limited purpose trust company is permitted only to carry out all actions necessary or incidental to the performance of "trust company powers." *5 Del. C. § 775(a).* The Delaware Code defines "trust company powers" to mean "all of the powers, rights, privileges and franchises incident to a trust company established under subchapter IV of this chapter, except: (a) to receive deposits subject to check or to repayment upon presentation of a passbook, certificate or deposit or other evidence of debt, or upon request by depositor; and (b) to make loans."

5 *Del. C.* § 773(4). The general powers of a limited purpose trust company are listed in 5 *Del. C.* § 761.

- (b) Restrictions on Limited Purpose Trust Company Powers. While a limited purpose trust company has all the powers specified in 5 *Del. C.* § 761, there are certain statutory restrictions that apply solely to limited purpose trust companies, as opposed to other trust companies and banks. 5 *Del. C.* § 775. The specific limitations of limited purpose trust company powers are listed in 5 *Del. C.* § 775(b). Section 775(b) prohibits a limited purpose trust company from having more than a single office in the State, merging or consolidating except with an affiliate and exercising any power of appointment in a manner inconsistent with 12 *Del. C.* § 3548.
- (c) Restrictions on Limited Purpose Trust Company Business. A Delaware limited purpose trust company must “be operated in a manner so as not to attract customers from the general public in this State to the substantial detriment of existing banks or trust companies located in this State other than corporations established under this subchapter, provided that such limited purpose trust company may be operated in a manner likely to attract and retain customers with whom it or any affiliate thereof have or have had business relations;” 5 *Del. C.* § 777(b)(1). During a telephone conversation, the State Bank Commissioner informally opined that (i) this requirement does not restrict Delaware limited purpose trust companies from competing with each other, and (ii) does not restrict the Delaware limited purpose trust company from accepting unsolicited trust business from Delaware residents.
- (d) Headquarters and Directors. A limited purpose trust company is required to maintain its headquarters in Delaware. 5 *Del. C.* § 777(b)(4). A limited purpose trust company must have at least five (5) directors; however, none of the directors need be a resident of Delaware. 5 *Del. C.* § 772(a). It is recommended that there be at least one director with trust company experience.
- (e) Bank Examination. A Delaware limited purpose trust company is subject to periodic examination by the State Bank Commissioner. 5 *Del. C.* § 122(a). The examination extends to “the affairs of the institution, its resources and liabilities, the investment of its funds, the mode of conducting its business, the safety and prudence of its management, the acts of its officers, directors, trustees or managers, its compliance or noncompliance with its charter and bylaws, its compliance or noncompliance with the Code and any other Delaware statutes, and also, such other matters, as in the judgment of the Commissioner may have relation to the solvency or insolvency of the institution.” 5 *Del. C.* § 122(c). As part of the application, the limited purpose trust company will adopt general trust industry standards, which will become the basis for measuring compliance.

Historically, the State Bank Commissioner examines Delaware limited purpose trust companies once each year. Examinations of Delaware limited purpose trust companies involve two examiners (at a charge to the examinee of \$400 per day for each examiner) for five to ten business days. The State Bank Commissioner is known to make other, limited examinations. For example, in connection with one application for a Delaware limited purpose trust company, the State Bank Commissioner personally visited each then existing Delaware limited purpose trust company to investigate the quality of each company's office space.

- (f) Annual Assessment. In lieu of the corporate franchise tax, each Delaware limited purpose trust company is subject to the bank franchise tax. The bank franchise tax assessment is based on the total assets of the company. 5 *Del. C.* § 127(b). The assessment is no more than \$0.05 per \$1,000 in assets, with a \$500 minimum (equal to \$10,000,000 in assets). *Id.* Because assets under management are not subject to assessment, most Delaware limited purpose trust companies pay only the minimum annual assessment.

If the Delaware limited purpose trust company will be the lessor of commercial real estate, it will have to apply and pay for a business license as a commercial lessor. 30 *Del. C.* § 2301(o).

- (g) Costs. The following costs will be incurred in the formation and operation of a limited purpose trust company”
- \$1,150 investigation fee to the State Bank Commissioner for the Application for Certificate of Public Convenience and Advantage;
 - \$5,750 fee to the State Bank Commissioner for the Certificate to Transact Business;
 - \$28.75 (estimated) filing fees to the Secretary of State;
 - \$500 (minimum) annual assessment fee to the State Bank Commissioner;
 - \$10,000 - \$20,000 (estimated) annual examination fee to the State Bank Commissioner;
 - \$40,000 (estimated) annual fee for 1,500 square feet of rental space;
 - \$175,000 - \$200,000 (estimated) annual salaries for a receptionist and an experienced trust officer;
 - \$25,000 - \$35,000 (estimated) in legal fees to establish a Delaware Limited Purpose Trust Company

B. Recommendations Concerning the Establishment of a Limited Purpose Trust Company under Delaware Law.

1. Recommendation to Establish a Delaware Limited Purpose Trust Company.

- (a) Legal Issues. Delaware's favorable substantive trust law, its trust friendly legal environment that protects trustees acting in good faith from unwarranted claims and its limitation on claims periods to create certainty

weigh in favor of a decision to create a Delaware limited purpose trust company. A Delaware limited purpose trust company will allow a non-Delaware trust company to “export” Delaware’s favorable trust law to the many trusts the non-Delaware trust company already administers that can benefit from a change in situs to Delaware and may help the non-Delaware trust company to attract new trust business.

(b) Choice of Banking Entity. Once the decision to establish a Delaware trust company has been made, the next decision is to choose the form of trust company through which to conduct business. We understand the choices to be as follows:

- Delaware limited purpose trust company;
- Delaware bank and trust company;
- Newly chartered national bank limited to non-deposit trust company business;
- Expansion of existing national bank by establishing one or more Delaware trust offices;
- Merger of national bank into existing Delaware chartered bank and trust company.

A Delaware bank and trust company is a depository institution and, therefore, the procedures to form and operate a Delaware bank and trust company are more complex and expensive than a Delaware limited purpose trust company. For example, a Delaware bank and trust company is subject to FDIC regulation.

An existing national bank can apply to the OCC for a charter for a non-deposit trust company. Essentially, this is a national bank charter containing only those provisions needed for a trust company. The process to obtain such a charter may be more expensive and take longer to obtain, but there are no readily available sources for comparison.

It is our understanding that the OCC has taken the position that a trust office is not a branch and, therefore, will permit a national bank to open a trust office anywhere. Under the OCC’s position, a national bank could open one or more Delaware trust offices.

There are several problems with an out-of-state national bank opening trust offices in Delaware. First, the authority for the OCC’s position concerning branching is not clear and is subject to challenge. While we know of no challenge to date, to our knowledge no national bank has opened a trust office in Delaware. In fact, several of the existing Delaware limited purpose trust companies are national bank affiliates.

The second problem with an out-of-state national bank opening a Delaware trust office is that it creates questions about the situs of the trust company. It would be hard for a New York based national bank, for example, to argue that

its trust office in Delaware is a Delaware situs trust company. This structure could cause the trust administered by the trust company to lose the benefit of Delaware's income tax deduction for accumulations for non-resident beneficiaries.

Beginning in 2013, new trust only national banks are required to obtain Federal Deposit Insurance Corporation insurance before the OCC will grant a charter. FDIC insurance increases the cost of using a national bank only for trust services.

The last alternative is for a national bank to merge into an existing Delaware state chartered institution under the bank branching rules. Delaware requires that the state chartered institution be at least five years old. Finding or creating a suitable merger candidate will take time and involve considerable expense.

For the foregoing reasons, we recommend the establishment of a Delaware limited purpose trust if the decision is made to establish a trust business in Delaware.

2. Recommendations For Delaware Headquarters.

- (a) Office Space. The Delaware headquarters of the limited purpose trust company will require a space of approximately 1,500 square feet. Within that space there should be an office for the trust officer, a conference room and a reception area. The State Bank Commissioner expects the office to be secured and in a quality location.
- (b) Employees. The Delaware headquarters of the limited purpose trust company must have at least two full-time employees. One employee must be a professional trust officer. That is, the individual must be college educated and experienced in trust administration. The second employee is a receptionist/secretary.

3. Recommendations For the Structure of the Limited Purpose Trust Company's Board of Directors.

The Delaware Code requires a limited purpose trust company to have five directors. Although none of the directors need to be resident in Delaware, one or more resident directors will help establish that the limited purpose trust company is maintaining its headquarters in Delaware. The State Bank Commissioner will review the resumes of the directors and will be looking for managerial experience. It is helpful that at least one director be an individual with trust company experience. There is no requirement that meetings of the Directors be held in Delaware. However, holding meetings in Delaware helps establish that the headquarters of the trust company is being maintained in Delaware.

III. APPENDIX

A. Investment Direction Adviser Language

Investment Direction Adviser. Notwithstanding any other provision of this Agreement, there may at any time be one or more Investment Direction Advisers (the “Investment Direction Adviser” or “Investment Direction Advisers”) to serve in accordance with this Article _____. The role and function of the Investment Direction Adviser is set forth in this Article _____. The Investment Direction Adviser shall serve in a fiduciary capacity and conform to the purposes of this Agreement.

(a) Initial Appointment of Investment Direction Adviser. The initial Investment Direction Adviser shall be _____. All additional and subsequent Investment Direction Advisers shall be appointed in the manner provided in this Article _____. To the extent that more than two persons are serving as Investment Direction Adviser at any time, an affirmative vote of a majority of such Investment Direction Advisers must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Investment Direction Advisers must act unanimously. Notwithstanding the foregoing, to the extent that more than one Investment Direction Adviser is serving, the Investment Direction Advisers may designate one such Investment Direction Adviser to communicate all directions to the Trustee.

(b) Role and Function. The Investment Direction Adviser shall hold and exercise the full power to manage the investments of the Trust, including, but not limited to, the power to purchase, sell and retain all of the Trust assets, and the power to exercise voting, subscription, conversion, option and similar rights with respect to such property and to participate in and consent to any voting trust, reorganization, merger, dissolution or other action affecting any such property. The Trustee shall follow the direction of the Investment Direction Adviser with respect to all matters relating to the management and investment of Trust assets. In the event no Investment Direction Adviser is then serving, the Trustee shall hold and exercise the full power to manage and invest the Trust assets.

(c) Loans, Guarantees and Creation of Entities. Without in any way limiting the broad powers conferred upon the Investment Direction Adviser pursuant to this Article _____, the Investment Direction Adviser shall have the specific authority to direct the Trustee to borrow and lend money and to guarantee the repayment of any indebtedness, for such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the Investment Direction Adviser deems advisable, including the power to borrow from the Trustee itself and any of its affiliates and to mortgage, pledge or encumber such portion of the Trust property as may be required to secure any loans or indebtedness and as makers, endorsers or guarantors to renew existing loans or guarantees. The power to direct the Trustee to guarantee loans shall include the power to direct the Trustee to guarantee the loans of any partnership, limited liability company, corporation, business trust or other business entity (owned in whole or in part by the Trust) in proportion to the Trust’s ownership interest in such business entity. The Investment Direction Adviser shall also have the specific authority to direct the Trustee to create partnerships, limited liability companies, corporations, business trusts or other business entities and to transfer any portion of the Trust estate to such entity.

(d) Directions to Trustee. Any investment direction to the Trustee shall be in writing, delivered by mail, courier, facsimile transmission, electronic mail, or otherwise in such form as the Trustee may specify from time to time by written notice to the Investment Direction Adviser. The Trustee shall have no obligation to investigate or confirm the authenticity of directions it receives or the authority of the person or persons conveying them, and the Trustee shall be exonerated from any and all liability in relying on any such direction from a person purporting to be the Investment Direction Adviser without further inquiry by the Trustee.

(e) Liability of Trustee. At any time that an Investment Direction Adviser is serving, the Investment Direction Adviser shall have sole responsibility (and the Trustee shall have no responsibility) for the investment and management of the assets of the Trust and the Trustee shall make only such sales and investments as the Investment Direction Adviser directs. The Trustee shall be under no obligation to review the Trust assets, make any investment recommendations with respect to them, solicit any direction from the Investment Direction Adviser, value the assets if they are non-marketable, or insure the assets. The Trustee need not review whether the Investment Direction Adviser is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Investment Direction Adviser, or for acting on a direction of the Investment Direction Adviser or with respect to its implementation of any such direction of the Investment Direction Adviser and the Trustee shall not be liable for any loss resulting from action taken by the Investment Direction Adviser, or taken by the Trustee in accordance with the Investment Direction Adviser's direction. As provided in 12 Del. C. § 3313(e), the Trustee shall have no duty to monitor the conduct of the Investment Direction Adviser, provide advice to the Investment Direction Adviser or consult with the Investment Direction Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Investment Direction Adviser. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article _____ or any other provisions of this Agreement concerning investment decisions (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proved by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Investment Direction Adviser shall not be liable for the acts or defaults of each other or any other Adviser.

(f) Liability of Investment Direction Adviser. In accordance with 12 Del. C. § 3303, the Investment Direction Adviser need not inquire into the Trustee's performance of its duties, and shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith or through willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust.

Notwithstanding the foregoing, the instrument of appointment appointing any Investment Direction Adviser may provide that such Investment Direction Adviser shall be required to abide by the prudent person standard imposed by 12 Del. C. § 3302(a), or in any corresponding provision of law which may be later enacted.

(g) Indemnification. The Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the Investment Direction Adviser for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Investment Direction Adviser under this Agreement (unless the Investment Direction Adviser has acted in a manner that does not comply with the standard of liability applicable to the Investment Direction Adviser).

(h) Resignation of Investment Direction Adviser. Any Investment Direction Adviser serving hereunder may resign at any time by providing written notice to the Trustee, the Trust Protector and the Notice Recipients. Such resignation shall become effective at such time as the resigning Investment Direction Adviser shall provide in the notice of resignation.

(i) Removal of Investment Direction Adviser. The Trust Protector shall have the power to remove any Investment Direction Adviser by providing written notice to such Investment Direction Adviser, the Trustee and the Notice Recipients. The removal shall become effective at such time as the Trust Protector indicates in the notice of removal.

(j) Appointment of Additional or Successor Investment Direction Advisers. The Trust Protector shall have the power to appoint additional Investment Direction Advisers if at such time there are fewer than three Investment Direction Advisers serving and shall have the power to designate a successor Investment Direction Adviser upon the death, resignation, removal or incapacity of the last serving Investment Direction Adviser by providing written notice to such additional or successor Investment Direction Adviser, the Trustee and the Notice Recipients. The appointment of additional or successor Investment Direction Advisers shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance by the designee.

(k) Power to Hire Agents. The Investment Direction Adviser shall have the power to employ agents and pay such agents reasonable compensation. The Investment Direction Adviser may at any time and in its sole discretion provide investment and management services through a subadviser of the Investment Direction Adviser's selection. The Investment Direction Adviser shall be solely responsible for the supervision and oversight of any subadviser. The Investment Direction Adviser shall notify the Trustee in writing of its selection of any subadviser, and the Trustee shall be entitled to rely upon information and direction received from any subadviser until it receives written notification from the Investment Direction Adviser of its termination of such subadviser.

(l) Compensation. The Investment Direction Adviser may be entitled to reasonable compensation for its services as agreed upon by the Investment Direction Adviser and Trust Protector.

B. Distribution Adviser Language.

Distribution Adviser. Notwithstanding any other provision of this Agreement, there may at any time be one or more Distribution Advisers (the “Distribution Adviser” or “Distribution Advisers”) to serve in accordance with the provisions of this Article _____. The role and function of the Distribution Adviser is set forth in this Article _____. The Distribution Adviser shall serve in a fiduciary capacity and conform to the purposes of this Agreement.

(a) Initial Appointment of Distribution Adviser. The initial Distribution Adviser shall be _____. To the extent that more than two persons are serving as Distribution Adviser at any time, an affirmative vote of a majority of such Distribution Advisers must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Distribution Advisers must act unanimously. Notwithstanding the foregoing, to the extent that more than one Distribution Adviser is serving, the Distribution Advisers may designate one such Distribution Adviser to communicate all directions to the Trustee.

(b) Role and Function. The Distribution Adviser shall hold and exercise the full power to direct the Trustee to distribute income and principal of the Trust pursuant to the standards established under this Agreement. The Trustee shall follow the direction of the Distribution Adviser with respect to all matters concerning the distribution of income or principal of the Trust. In the event no Distribution Adviser is then serving, the Trustee shall hold and exercise the full power to make discretionary distributions of income and principal of the Trust pursuant to the standards established under this Agreement.

(c) Directions to Trustee. Any distribution direction to the Trustee shall be in writing, delivered by mail, courier, facsimile transmission, electronic mail, or otherwise in such form as the Trustee may specify from time to time by written notice to the Distribution Adviser. The Trustee shall have no obligation to investigate or confirm the authenticity of directions it receives or the authority of the person or persons conveying them, and the Trustee shall be exonerated from any and all liability in relying on any such direction from a person purporting to be the Distribution Adviser without further inquiry by the Trustee.

(d) Liability of Trustee. Provided a Distribution Adviser is then serving, the Distribution Adviser shall have sole responsibility (and the Trustee shall have no responsibility) for all discretionary actions involving any distribution of income or principal of the Trust. The Trustee shall make only such distributions of income or principal as the Distribution Adviser directs, or that are non-discretionary and mandated by the terms of the Trust. The Trustee shall be under no obligation to review the beneficiaries’ needs or requests for income or principal distributions, make any recommendation with respect to such distributions, solicit any direction from the Distribution Adviser, calculate the impact of any distribution on the likely duration of the Trust, or ensure the equality of distributions among the beneficiaries. The Trustee need not review whether the Distribution Adviser is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Distribution Adviser, or for acting on a direction of the Distribution Adviser and it shall not be liable for any loss to the Trust or any claim of inequality, partiality or unreasonableness resulting from any action taken at the direction of the Distribution Adviser, or taken by the Trustee in accordance with the direction of the Distribution Adviser. As provided in 12 Del. C. § 3313(e),

the Trustee shall have no duty to monitor the conduct of the Distribution Adviser, provide advice to the Distribution Adviser or consult with the Distribution Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Distribution Adviser. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article _____ or any other provision of this Agreement concerning distribution decisions (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proved by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Distribution Adviser shall not be liable for the acts or defaults of each other or any other Adviser.

(e) Liability of Distribution Adviser. In accordance with 12 Del. C. § 3303, the Distribution Adviser shall not be held liable to any beneficiary for any distribution decision made hereunder, unless it results from actions taken in bad faith or through willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust.

(f) Indemnification. The Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the Distribution Adviser for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise that result from the performance or non-performance of the powers given to the Distribution Adviser under this Agreement (unless the Distribution Adviser has acted in a manner that does not comply with the standard of liability applicable to the Distribution Adviser).

(g) Resignation of Distribution Adviser. Any Distribution Adviser serving hereunder may resign at any time by providing written notice to the Trustee, the Trust Protector and the Notice Recipients. Such resignation shall become effective at such time as the resigning Distribution Adviser shall provide in the notice of resignation.

(h) Removal of Distribution Adviser. The Trust Protector shall have the power to remove any Distribution Adviser by providing written notice to such Distribution Adviser, the Trustee and the Notice Recipients. The removal shall become effective at such time as the Trust Protector indicates in the notice of removal.

(i) Appointment of Additional or Successor Distribution Advisers. The Trust Protector shall have the power to appoint additional Distribution Advisers if at such time there are fewer than three Distribution Advisers serving and shall have the power to designate a successor Distribution Adviser upon the death, resignation, removal or incapacity of the last

serving Distribution Adviser by providing written notice to such additional or successor Distribution Adviser, the Trustee and the Notice Recipients. The appointment of additional or successor Distribution Advisers shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance by the designee. At no time may the Grantor, the Grantor's Spouse, any beneficiary of this Trust, or any party who is a related or subordinate party to the Grantor, the Grantor's Spouse, or any beneficiary of this Trust under Section 672(c) of the Code, serve as Distribution Adviser of any trust created by or pursuant to this Agreement.

(j) Compensation. The Distribution Adviser may be entitled to reasonable compensation for its services as agreed upon by the Distribution Adviser and Trust Protector.

C. Trust Protector Language.

Trust Protector. Notwithstanding any other provision of this Agreement, there shall at all times be one or more Trust Protectors (the “Trust Protector” or “Trust Protectors”) to serve in accordance with the provisions of this Article _____. The role and function of the Trust Protector is set forth in this Article _____. The Trust Protector shall serve in a fiduciary capacity and conform to the provisions of this Agreement.

(a) Initial Appointment of Trust Protector. The initial Trust Protector shall be _____. To the extent that more than two persons are serving as Trust Protector at any time, an affirmative vote of a majority of such Trust Protectors must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Trust Protectors must act unanimously. Notwithstanding the foregoing, to the extent that more than one Trust Protector is serving, the Trust Protectors may designate one such Trust Protector to communicate all directions to the Trustee.

(b) Role and Function. The Trust Protector shall have the following roles, powers and duties:

(1) To amend the administrative and technical provisions with respect to any trust created by or pursuant to this Agreement in accordance with Article _____ of this Agreement, at such times as the Trust Protector may deem appropriate for the proper administration of the Trust and for tax purposes.

(2) To designate the law of any jurisdiction (under which the terms of any trust created by or pursuant to this Agreement shall be capable of taking effect) to be the governing law of any trust created by or pursuant to this Agreement, as provided in Article _____ of this Agreement.

(3) To terminate the Grantor’s or Trust Protector’s power to reacquire Trust property in accordance with Article _____ of this Agreement. The Trust Protector’s power to terminate the Grantor’s or Trust Protector’s power to reacquire Trust property shall be exercisable in a non-fiduciary capacity and without the approval or consent of any person in a fiduciary capacity.

(4) To direct the Trustee to divide the Trust estate as set forth in section (c) of Article FIRST of this Agreement.

(5) To remove and replace the Trustee as provided in Article _____ of this Agreement.

(6) To remove any Investment Direction Adviser and appoint additional and successor Investment Direction Advisers as provided in Article _____ of this Agreement.

(7) To remove any Distribution Adviser and appoint additional and successor Distribution Advisers as provided in Article _____ of this Agreement.

(8) To appoint additional and successor Trust Protectors as provided in this Article _____.

(9) To delegate any powers conferred upon the Trustee pursuant to this Agreement to an Adviser or such other person or entity as the Trust Protector so determines.

(10) To appoint a Special Fiduciary in accordance with Article _____ of this Agreement; and to remove any Special Fiduciary and appoint successor Special Fiduciaries.

(11) To enter into fee agreements with the Trustee, the Investment Direction Adviser and the Distribution Adviser.

(c) Direction to Trustee. Any direction to the Trustee from the Trust Protector shall be in writing, delivered by mail, courier, facsimile transmission, electronic mail, or otherwise in such form as the Trustee may specify from time to time by written notice to the Trust Protector. The Trustee shall have no obligation to investigate or confirm the authenticity of directions it receives or the authority of the person or persons conveying them, and the Trustee shall be exonerated from any and all liability in relying on any such direction from a person purporting to be the Trust Protector without further inquiry by the Trustee.

(d) Liability of Trustee. The Trustee need not review whether the Trust Protector is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Trust Protector, or for acting on a direction of the Trust Protector and it shall not be liable for any loss to the Trust resulting from any action taken at the direction of the Trust Protector, or taken by the Trustee in accordance with the direction of the Trust Protector. As provided in 12 Del. C. § 3313(e), the Trustee shall have no duty to monitor the conduct of the Trust Protector, provide advice to the Trust Protector or consult with the Trust Protector or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Trust Protector. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article _____ or any other provision of this Agreement concerning actions of the Trust Protector (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Trust Protector shall not be liable for the acts or defaults of each other or any other Adviser.

(e) Limitations of Responsibilities. The Trust Protector shall have no duty to monitor the conduct of the Trustee, the Investment Direction Adviser and the Distribution Adviser, and shall not be liable for any exercise or failure to exercise the powers granted herein, provided that the

Trust Protector shall consider in good faith the advisability of their exercise if and when requested to do so by a beneficiary, his or her guardian or a member of his or her family.

(f) Indemnification. The Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the Trust Protector for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Trust Protector under this Agreement (unless the Trust Protector has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust).

(g) Resignation of Trust Protector. Any Trust Protector serving hereunder may resign at any time by providing written notice to the Trustee and to the Notice Recipients. Such resignation shall become effective at such time as the resigning Trust Protector shall provide in the notice of resignation.

(h) Removal of Trust Protector and Appointment of Additional or Successor Trust Protectors. The Trust Protector shall have the power to appoint additional Trust Protectors if at such time there are fewer than three Trust Protectors serving and shall have the power to designate a successor Trust Protector to serve upon the death, removal, resignation or incapacity of the last serving Trust Protector by providing written notice to such additional or successor Trust Protector, the Trustee and the Notice Recipients. The appointment of additional or successor Trust Protectors shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance of the designee. Upon the removal, resignation, death or incapacity of the last serving Trust Protector, and provided a successor Trust Protector has not been designated in accordance with the provisions of this Article _____, then the following individuals in the order named shall appoint a successor Trust Protector by providing written notice to the successor Trust Protector, the Trustee and the Notice Recipients:

1. The Grantor, while he is living and competent;
2. The Grantor's Spouse, while she is living and competent;
3. Prior to the division of the Trust estate in accordance with section (c) of Article _____, a majority of the adult beneficiaries of the highest generational level who are competent and at least twenty-five (25) years of age and to whom the Trustee is then authorized to distribute income; and
4. After the division of the Trust estate in accordance with section (c) of Article _____, the Primary Beneficiary, if the Primary Beneficiary is competent and at least twenty-five (25) years of age (or his or her parent who is a descendant of the Grantor or legal guardian if under age twenty-five (25) or incapacitated).

The appointment of a successor Trust Protector shall become effective at such time as provided in the instrument of appointment and upon written acceptance by the designee.

Notwithstanding the foregoing, the following individuals in the order named shall have the power to remove any Trust Protector by providing written notice to such Trust Protector, the Trustee and the Notice Recipients:

1. The Grantor, while he is living and competent;
2. The Grantor's Spouse, while she is living and competent;
3. Prior to the division of the Trust estate in accordance with section (c) of Article _____, a majority of the adult beneficiaries of the highest generational level who are competent and at least twenty-five (25) years of age and to whom the Trustee is then authorized to distribute income; and
4. After the division of the Trust estate in accordance with section (c) of Article _____, the Primary Beneficiary, if the Primary Beneficiary is competent and at least twenty-five (25) years of age (or his or her parent who is a descendant of the Grantor or legal guardian if under age twenty-five (25) or incapacitated.

The removal shall become effective at such time as indicated in the notice of removal. At no time may the Grantor, the Grantor's Spouse, any beneficiary of this Trust, or any party who is a related or subordinate party to the Grantor, the Grantor's Spouse, or any beneficiary of this Trust under Section 672(c) of the Code, serve as Trust Protector of any trust created by or pursuant to this Agreement. In the event of a vacancy in the office of Trust Protector, and provided no successor Trust Protector has been appointed within sixty (60) days, the Trustee shall petition the Court then having jurisdiction over the Trust for the appointment of a successor Trust Protector. All costs of such petition, including reasonable attorneys' fees, shall be a proper charge to the Trust estate.

(i) Agents and Advisers. The Trust Protector is authorized to hire agents and advisers to assist the Trust Protector in carrying out its duties, and to pay such agents and advisers reasonable compensation.

(j) Compensation. The Trust Protector shall be entitled to reasonable compensation for its services as agreed upon by the Trust Protector and a majority of the Notice Recipients.

D. Administrative Trustee Language.

Exclusive Duties of Trustee. In the event that _____, or a successor Trustee, is serving as Trustee of any trust created by or pursuant to this Agreement, and there is an Investment Direction Adviser, a Distribution Adviser and/or Trust Protector serving pursuant to Articles _____, _____ and _____ of this Agreement, _____, or any successor Trustee, shall exercise all of its powers hereunder, except to the extent otherwise expressly provided in this Article, solely at the written direction of the acting Investment Direction Adviser, the Distribution Adviser and/or Trust Protector (the “Advisers”) in accordance with the provisions of this Agreement.

(a) Administrative Duties of Trustee. Notwithstanding the foregoing provisions of this Article, the Trustee shall have the following exclusive administrative duties, which shall, subject to the provisions of section (b)(9) of Article _____ of this Agreement, all be performed by the Trustee in the Trustee’s sole discretion and not at the direction of the Advisers:

(1) To maintain an account or accounts for the purpose of the custody and safekeeping of the Trust assets, receiving trust income and contributions and from which trust expenditures and distributions are disbursed.

(2) To maintain storage of tangible personalty and evidence of intangible Trust property.

(3) To maintain Trust records and to originate, facilitate and review Trust accountings, reports and other communications with the Notice Recipients, the Advisers and unrelated third parties, except that the Trustee shall not be responsible for the accuracy of information provided to the Trustee by any third party pursuant to an agreement into which the Advisers have directed the Trustee to enter.

(4) To maintain an office for Trustee meetings and other Trust business.

(5) To respond to inquiries concerning any trust created hereunder from the Notice Recipients, the Advisers, and unrelated third parties.

(6) To execute documents in connection with the performance of its duties under this Article.

(7) To retain accountants, attorneys, agents and other advisers in connection with the performance of the Trustee’s administrative duties.

(8) To prepare and file (or arrange for the preparation and filing of) income tax returns for the Trust.

(9) To allocate receipts, expenses, and distributions to income or principal in the Trustee’s discretion.

(b) Powers of the Trustee. Subject to the provisions of Articles _____, _____ and _____ of this Agreement relating to the Investment Direction Adviser, the Distribution Adviser and the Trust Protector, the Trustee shall have all of the powers contained in Article _____ of this Agreement.

(c) Affiliates. The Trustee, at the direction of the Investment Direction Adviser, if one is serving, is authorized to invest in, retain or otherwise deal in any securities managed, issued, underwritten or distributed by the Trustee or by any of its affiliates, any participation in any investment company registered under the Investment Company Act of 1940, or any investment fund exempt from registration under the Investment Company Act of 1940, for which the Trustee or its affiliates is an adviser or agent, and any other “affiliated investment” within the meaning of 12 Del. C. § 3312, and is authorized to otherwise deal with or transact business with any of its affiliates, notwithstanding the fact that such trustee or affiliate may receive separate fees, commissions or other costs directly from such security, fund, “affiliate investment,” dealing or transaction.