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Participant Guide

Liability Risks Arising from Holding Certain Assets in Trust

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Presents

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By

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Liability Risks Arising from Holding Certain Assets in Trust

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I. The Current Landscape Regarding Trust Diversification Requirements

A. Uniform Prudent Investor Act

The Uniform Prudent Investor Act (the "UPIA") was born out of modern portfolio theory, which aims to maximize overall portfolio return while simultaneously minimizing risk. UPIA § 1(b) states that "[t]he prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust," and a Trustee is insulated from liability if the Trustee reasonably relied on such altered provisions in making investment decisions. The Trustee must consider "purposes, terms, distribution requirements, and other [trust] circumstances" while investing, evaluated in the context of the entire portfolio. UPIA § 2. Some of these circumstances include tax consequences, the effect of inflation or deflation, expected total return or "an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." UPIA § 2(c). A Trustee also has a duty to diversify the portfolio, absent special circumstances, and must act solely in the interests of the beneficiaries. *See* UPIA §§ 3, 5-6. Investment and management functions may be delegated, but the Trustee must "exercise reasonable care" in selecting an agent, establishing scope and terms of the delegation and periodically reviewing the agent's actions.

The UPIA has been enacted by the vast majority of states and the District of Columbia, though frequently with some modifications. *See*, *e.g.*, Ala. Code § 19-3B-902 (2015) (adding size of the portfolio, trust purpose and estimated trust duration to factors for risk and return objectives); Minn. Stat. § 501C.0901 (2016) (stating that the "prudent investor rule is a test of conduct and not of resulting performance;" removing duty of loyalty and delegation provisions).

B. Case Law

A Trustee is generally required to diversify trust assets under the UPIA. The UPIA is largely grounded in the philosophy that diversification reduces overall risk and that reducing overall risk is desirable. Nonetheless, settlors sometimes express a desire that a trust hold a high concentration of equity in a closely-held family business, a publicly-traded company or other types of investments. The courts have reviewed many cases involving failure to diversify investments and whether a governing instrument provision was effective to relieve the Trustee from the ordinarily applicable diversification obligation.

In *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Tr. #1 U/A January 18, 2002,* 855 N.E.2d 592 (Ind. App. 2006), a general retention clause, which authorized the Trustee to retain investments, combined with a clause explicitly lessening the Trustee's duty to

diversify, was sufficient to exculpate the Trustee from the default duty to diversify trust assets. The court observed that the Restatement (Third) of Trusts § 229 (2007) left open a window enabling a settlor to reduce a Trustee's duty to diversify by including a clause to that effect in the trust instrument.

In contrast, in *Wood v. U.S. Bank*, 828 N.E.2d 1072 (Ohio Ct. App. 2005), John Wood created a trust wherein nearly 82% of the trust's assets consisted of Star Bank stock. The Trustees were permitted under the trust agreement to retain, manage and invest the stock held in the trust "as they deemed advisable or proper." Shortly after Mr. Wood's death, some of the trust assets were sold to cover the debts, taxes and expenses of the estate. As a result, Star Bank stock comprised an even higher percentage of the trust assets than before the sale. The Trustee held the stock until mid-2000 when the stock was worth just half the value as compared to just a few years earlier.

Ohio R.C. § 1339.54(B) (renumbered as Ohio R.C. § 5809.03(B) (effective 1-1-2007)) tracks UPIA § 3, which requires the existence of special circumstances before the Trustee will be relieved of a duty to diversify. According to the court, the language of Mr. Wood's trust was unambiguous and authorized Star Bank to retain its own stock even though Star Bank would ordinarily not have been permitted to do so under the "rule of undivided loyalty." However, the beneficiaries argued, and the court agreed, that the retention language in the trust did not override Star Bank's statutory duty to diversify. The court found that Mr. Wood's trust was silent as to diversification and therefore the duty to diversify set forth in Ohio R.C., § 1339.54(B) applied. The court stated that, to eliminate the duty to diversify, the trust instrument must specifically authorize the Trustee "to retain in a specific investment a larger percentage of the trust assets than would normally be prudent." The authorization to retain in this case, the court found, was insufficient to meet this standard.

In re Chase Manhattan Bank, 809 N.Y.S.2d 360 (4th Dep't 2006), *rev'g In re Will of Dumont*, 791 N.Y.S.2d 868 (2004), involved a trust created under the testator's Will that was funded with a high concentration of stock in Eastman Kodak Company upon the testator's death. The will contained a provision stating that the stock was not to be disposed of by the Trustee for purposes of diversification and that the Trustee would be exculpated from liability for any diminution in value of the stock. The Trustee could sell the stock, however, if "there shall be some compelling reason *other than diversification of investment* for doing so" (emphasis added). The beneficiaries successfully argued at trial that the Trustee breached its duty by failing to sell the Kodak stock earlier than it did. The Appellate Division reversed, finding that, even if a compelling reason existed to sell the stock, the Trustee did not act imprudently in failing to do so. The Appellate Division discussed evidence showing that the stock's fundamentals and performance were still strong during the time frame at issue and that the Trustee would have actually acted imprudently if it had then sold the stock.

Similarly, in *In re JP Morgan Chase Bank, N.A.*, 133 A.D.3d 1292 (N.Y. App. Div. Nov. 20, 2015), the Supreme Court, Appellate Division, of New York held that the Trustee did not breach its fiduciary duty by failing to sell a concentrated position in Kodak stock within 30 days

of receipt of the stock. JP Morgan Chase Bank served as Trustee of three separate trusts, each of which was initially funded with shares of Kodak stock. Two of the trusts were established in 1966, and the third trust was established in 1976. The Trustee had sole investment authority over the trusts, and none of the trust instruments contained any restrictions regarding investment decisions. In 1968, the Trustee began selling small amounts of Kodak stock. In the 1990s, the Trustee sold larger portions of the stock. The three trusts were entirely divested of the Kodak stock by January 2002. Upon the death of one of the beneficiaries, the Trustee filed petitions seeking judicial settlement of the trust accounts. The remainder beneficiaries of the deceased beneficiary's interest objected alleging, *inter alia*, that the Trustee failed adequately to diversify the trusts' investments. The Surrogate's Court determined the Trustee was negligent in its management of the three trusts by failing to sell 95% of the Kodak stock held in each trust within 30 days of the receipt of the stock. The Appellate Division modified the Surrogate's Court's decision and held that the Trustee did not breach its fiduciary duty under any of the three standards of care applicable during the relevant period.

C. Drafting Recommendations

It is possible for a retention clause in a trust instrument effectively to negate the duty to diversify under the UPIA. Drafters must give careful attention to such a clause to ensure that it is precisely tailored to have the desired effect. For instance, the retention clause is more likely to be upheld if it expressly states that the purpose of the clause is to override the Trustee's duty to diversify under applicable law.

Customized language may be more effective than a general boilerplate provision, as demonstrated by *Wood v. U.S. Bank*. If the settlor anticipates that his or her trust or future trusts will hold highly concentrated stock, it may be wise in the retention clause specifically to reference the company's name and, perhaps, other information. The provision should not be so specific, however, as to limit or erase future flexibility for unforeseen circumstances. Thus, the trust instrument could include a provision stating that the waiver of the duty to diversify may itself be waived by a majority of trust beneficiaries at any time or requiring written consent of the beneficiaries before disposing of the concentrated stock.

D. *W.A.K. ex. rel. Karo v. Wachovia Bank, N.A.*, 712 F. Supp. 2d 476 (E.D. Va. 2010)

In *W.A.K. ex. rel. Karo v. Wachovia Bank, N.A.*, 712 F. Supp. 2d 476 (E.D. Va. 2010), in 1966, Rosalie S. Karo established a trust for the benefit of her husband, Toney Karo ("Toney"), her son, Drew Karo ("Drew"), and her minor grandson. Wachovia Bank, N.A. and Toney served as Trustees. The Trustees began to acquire Wachovia stock in the trust, and by 2007, Wachovia stock constituted approximately 65% of the trust's assets.

Wachovia repeatedly recommended to Toney and Drew that the Trustees diversify the trust's assets, but Toney and Drew would not agree. Toney and Drew also signed several "Letters of Retention" ("LORs"), which acknowledged Wachovia's advice as well as its conflict

of interest in purchasing its own stock. The LORs also stated that Toney and Drew desired to preserve the trust's ownership of Wachovia stock. After the value of the shares declined substantially, the trust beneficiaries sued Wachovia for failure to diversify trust investments.

Wachovia argued that the trust instrument waived the requirements of the Virginia Prudent Investor Rule. The court observed that, for such a waiver to be effective, the trust instrument must expressly manifest an intention that the Rule be waived. The trust instrument empowered the Co-Trustees to take actions "as they in their uncontrolled discretion may deem advisable," subject to certain conditions. In addition, the trust instrument authorized the Co-Trustees "[t]o retain as permanent any now existing investments (including stock of the corporate Trustee or in any of its affiliated and holding companies) of the trust property and any investments hereafter transferred to the Trustees . . . ." Finally, the trust instrument authorized the Trustees "to invest the trust property and from time to time alter, change, or vary such investments and reinvestments thereof without being confined to investments lawful through statute or otherwise for fiduciaries in the State of Virginia . . . ." The court found that this language sufficiently waived the requirements of the Prudent Investor Rule.

The court also upheld the effectiveness of the LORs signed by Toney and Drew, stating that "[t]here is no evidence that any of these retention documents were returned unsigned or that Toney ever attempted to rescind these retention authorizations." The court stated that the LORs gave Toney and Drew "the ultimate authority to direct the Trustees' actions" and that "Wachovia fulfilled all duties required under Virginia Law and the terms of the trust instrument."

II. Recognizing and Addressing Difficulties That May Result From Holding Closely-Held Business Interests

A. Georgia Supreme Court Directs Court of Appeals Regarding Fiduciary Duty Standards to be Applied to the Management of Family Entities Owned by Trust

Rollins v. Rollins, 780 S.E.2d 328 (Ga. Nov. 23, 2015)

In 1968, O. Wayne Rollins established the Rollins Children's Trust (the "RCT") for the benefit of his grandchildren. At the time of trial, Wayne's sons, Gary and Randall, were two of the three Trustees. Wayne created several family entities to hold the RCT assets.

Wayne also established nine Subchapter S Trusts (the "S Trusts") in 1986 for the benefit of his grandchildren. The S Trusts held interests in the family entities. Gary and Randall shared voting control over the family entities, with Randall holding majority interests. Gary and Randall also managed these entities. Gary was sole Trustee of the S Trusts.

In 2010, beneficiaries of the S Trusts and the RCT filed suit for an accounting of the family entities and numerous other breaches of fiduciary duty. The Court of Appeals ruled that the beneficiaries were entitled to accountings and that the Trustees held Trustee-level fiduciary

duties with regard to the management of the family entities, as opposed to the corporate or partnership-level fiduciary duty, which is a lower standard.

The Supreme Court of Georgia reversed the Court of Appeals regarding whether Gary as Trustee was required to provide an accounting of the family entities, stating that the Court of Appeals "failed to give due deference to the discretion of the trial court in this matter."

Regarding whether the Court of Appeals applied the proper fiduciary standard to Gary and Randall, as Trustees, regarding their management of the family entities, the Supreme Court first analyzed Wayne's intent. The Supreme Court believed that Wayne, an experienced businessman, did not want the Trustees to have control over family entities to the same extent the Trustees would have control over other trust property not held in family entities. The trusts held only minority interests in the family entities. The Supreme Court concluded that "the only reasonable conclusion with regard to the settlor's intention is that he did not intend for the trustees to be held to trustee-level fiduciary standards when performing their corporate duties." Thus, the Supreme Court held that the Trustees should be held to a corporate or partnership-level fiduciary standard.

On remand, the Court of Appeals concluded that a jury must determine the capacity in which Gary and Randall were acting when they committed the alleged breaches of fiduciary duty when managing the family entities. The Supreme Court again granted certiorari. The Supreme Court explained that "[p]laintiffs seek damages for the manner in which they have allegedly been impacted by certain corporate management decisions Gary and Randall have made in their role as managers of certain family entities." The Supreme Court repeated its determination in its prior opinion that, even though Gary and Randall managed the entities, the S Trusts and the RCT held only minority interests in these family entities. Therefore, a corporate or partnership-level fiduciary standard should be applied. The Supreme Court stated that it is not necessary for a jury to decide this issue.

The Supreme Court noted, however, that the above direction "does not preclude the Court of Appeals . . . from applying a trustee-level fiduciary standard to decisions [Gary and Randall] made as trustees of the trusts." For example, the beneficiaries complained that Gary and Randall breached their fiduciary duties as Trustees when they invested RCT assets in entities controlled by Gary and Randall. The beneficiaries also asserted that Gary and Randall breached their fiduciary duties when they conditioned distributions from RCT upon their adherence to a code of conduct. The Supreme Court stated that, in this situation, Gary and Randall were acting as Trustees, and the Court of Appeals should apply a Trustee-level fiduciary standard.

Similarly, the beneficiaries also alleged that Gary, as Trustee of the S Trusts, breached his fiduciary duty by placing the trust assets in entities controlled by Gary and Randall. The Supreme Court stated that "[t]hese alleged actions could only have been taken in Gary's capacity as a trustee and must be examined in accordance with the fiduciary and other duties imposed by the trust." The Supreme Court came to a similar conclusion with regard to Gary's vote, as

Trustee, to amend a partnership agreement for one of the family entities to allow non-pro rata distributions.

Gary, as Trustee, also executed a shareholder agreement regarding one of the family entities that restricted the shareholders from transferring their shares to anyone other than Wayne's descendants. Gary also executed this agreement in his individual capacity with respect to his personal interest in this entity. Randall also executed the shareholder agreement as president of the entity. The Supreme Court stated that the Trustee-level fiduciary standard applies with respect to Gary's execution as Trustee, but that standard does not apply to his actions in his individual capacity. The Trustee-level fiduciary standard also would not apply to Randall's execution of the agreement in his capacity as president.

Gary and Randall also applied a code of conduct in determining whether distributions would be made from certain partnership entities to the S Trust beneficiaries. The Supreme Court found that these decisions were made with respect to each S Trust's capital account. Consequently, Gary and Randall made these decisions as managing partners. These decisions were not made by Gary in his capacity as Trustee. Therefore, the Supreme Court held that the Court of Appeals must determine whether this decision was a breach of duty by applying a partner-level fiduciary standard.

The Supreme Court remanded the case again to the Court of Appeals.

B. Selection of Trustees

The selection of initial Trustees and successor Trustees is very important. In the absence of a special, overriding provision in the trust instrument conferring voting power over business interests on a person who is not a Trustee, the Trustees will be in control of the business interests held in trust and, as to each such interest that constitutes a controlling interest, will be in control of the business itself. Further, depending on the trust's dispositive provisions, the Trustee may have the responsibility for deciding to what extent, if at all, any family business interests are distributed to beneficiaries. Thus, the future of the family business could rest largely or completely in the hands of the Trustee.

In structuring the succession of Trustees for each trust in the business owner's estate plan, the following factors should be considered: (1) the age and maturity of the proposed Trustee; (2) the extent of the proposed Trustee's abilities generally in handling financial matters; (3) the current and/or expected future involvement, if any, of the proposed Trustee as an active participant in the operations of the business; and (4) the identity of the beneficiary or beneficiaries of the particular trust. Of course, the selected Trustee must possess the expertise and the temperament effectively to address the demands of the business insiders and outsiders who have competing interests. The Will or trust document should also include appropriate provisions exonerating the Trustee from conflict of interest claims. *See* Gabbard, "Fiduciary Factors for Drafting Trusts With Closely Held Stock," ESTATE PLANNING, March 2015.

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Designating a young adult child of the business owner who is or is expected to be actively involved in the business as a Co-Trustee along with a corporate fiduciary can enable the child to ease his or her way into a primary decision-making role. In circumstances in which, say, only one child is an active participant in the business and a trust of which a non-actively involved child is the primary beneficiary would be funded with a portion of the business interest as well as other non-business assets, the trust instrument could designate the child who is the primary beneficiary of such trust as Trustee of such trust but designate the active participant child as the trust protector with sole authority to vote the family business interests. *See* Gabbard, *supra*.

The trust instrument should ordinarily contain provisions allowing Trustee removal and replacement. In addition to building into the removal and replacement provisions the customary safeguards, the estate planner after consulting with his or her client, may also include language ensuring that, unless there is a material breach of fiduciary duty, the removal and replacement provisions cannot be used to wrest the power to control the business interests away from the person whom the business owner selected to have such control. Particular persons may be given the removal and replacement powers, and such powers may be made exercisable only under stated circumstances.

C. Balancing Investment Performance With Beneficiaries' Needs

A Trustee must pay careful attention to the characteristics of a trust's income and remainder beneficiaries when a significant portion of the trust's assets are interests in a closely-held, family business. Following the death of the business owner, the business equity will often be allocated between or among continuing trusts to be created under the business owner's estate plan. The business owner may wish to include in his or her Will or trust instrument specific directions regarding such allocation. Typically, the choices of trusts to which such business equity could be allocated will include a marital trust, a credit shelter trust, separate trusts for the sole or primary benefit of the owner's descendants with respect to whom such trusts are established and analogous versions of such trusts that are designed to be exempt from generation-skipping transfer tax. To the extent not contrary to trust instrument provisions, the Trustee, in allocating business equity between or among continuing trusts, should consider:

- Who are the beneficiaries of the continuing trusts (and, in particular, whether any beneficiaries are active participants in the business);
- Who are the Trustees of the continuing trusts (and, in particular, whether any such Trustees are active participants in the business);
- What are the purposes and dispositive provisions of the continuing trusts;
- What are the prospects for growth in value of, or production of cash dividends or distributions by, the equity interests;
- Is it expected that any of the continuing trusts will give rise to an estate tax marital deduction; and

- Is it expected that the value of any of the continuing trusts will be included in a beneficiary's gross estate for estate tax purposes (*e.g.*, a trust that gave rise to a marital deduction or a non-GST exempt trust)? Alternatively, is it expected that the value of the trust assets will escape transfer taxation indefinitely (*e.g.*, credit shelter trust or a dynasty trust)?

In designing provisions allocating the equity in the family business among continuing trusts, the owner and the practitioner should consider, in addition to the above-listed factors, whether a direction that such equity should be allocated to particular trusts should supersede, or be superseded by, a general direction to allocate all property among the owner's then living descendants, *per stirpes*.

III. Special Concerns When Holding Other Nontraditional Assets in Trust

Nontraditional assets include intellectual property, livestock, closely-held business interests, artwork, oil, gas and other minerals, certain real estate such as farm and ranch property, timberland and commercial property. Although such assets can be an important part of a trust's investment returns, they can give rise to substantial challenges. These assets can often be illiquid, difficult to value and require specialized expertise to manage. In addition, such assets can give rise to liability that may result in losses beyond the amount invested.

The general duties of a Trustee holding nontraditional assets are similar to the duties regarding other trust assets. The Trustee must keep the assets productive. The assets generally must be part of a diversified investment portfolio. The Trustee must regularly disclose important information concerning such assets to the beneficiaries. As always, the Trustee must fulfill the duty of care, which requires the Trustee to make sure that the Trustee possesses or obtains the required expertise to manage the nontraditional assets. This may require involving additional parties with specialized knowledge concerning such assets. The Trustee may also need to implement policies and procedures specific to such assets.

A. Utilizing Directed Trusts

A directed trust is one in which a trust instrument confers one or more of a Trustee's usual responsibilities on a third party. The third party has the power to direct the Trustee as to the matter under the third party's control, and often the Trustee has no discretion over that particular area of administration. Sometimes, a settlor will designate a third party to have authority over investment decisions, although a settlor may designate a third party to oversee other Trustee functions, such as distributions, as well. This arrangement is different from that of a delegated trust, which is one in which the Trustee contracts with a third party to perform certain fiduciary acts. In the latter arrangement, the third party acts as an agent of the Trustee, subject to the terms of the contractual relationship. In a directed trust, however, the third party may act as a co-fiduciary with the directed Trustee or the directed Trustee actually may act in a manner that is almost identical to that of an agent of the third party.

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A directed trust is often appropriate for trusts that will hold unique assets that are especially challenging to manage. A settlor may wish to name a family member as Trustee but feel that he or she does not have the level of sophistication or time required to manage such assets.

The drafter should consider inserting provisions in the trust instrument specifically addressing the extent of liability for the directed Trustee and the third party. Counsel should also be familiar with the default liability standards for directed Trustees and third-party directors under applicable state law. *See, e.g.*, S.D. Codified Laws §§ 55-1B-2; 55-1B-4. Because there is wide variation among the laws of states regarding the treatment of directed trusts (and in some states there are no such laws), it may be appropriate to provide that the trust's governing law will be that of a state that will provide a high level of protection for directed Trustees, such as Delaware. *See* 12 Del. Code § 3313.

B. Other Options

When the governing instrument does not include powers sufficient to permit the Trustee effectively to manage a specialty asset, the Trustee must determine whether continued retention of the asset is appropriate. In those cases where the governing instrument does not grant sufficient powers and retention of the asset is not appropriate, the Trustee should consider taking steps to liquidate (or, perhaps, distribute) the asset in an orderly fashion. If retention is appropriate – as a part of a balanced portfolio, due to specific direction in the governing instrument to retain the investment or because of a request by the beneficiaries – the Trustee may need to seek a modification of the governing instrument to include the appropriate power(s).

➔ **Planning Point:** Practitioners should inquire with their clients about specialty assets they own so that appropriate powers may be included in the estate planning documents.

IV. Socially Responsible Investing

Socially responsible investing, or "SRI," has become more popular in recent decades. Generally, SRI promotes the consideration of social and/or ethical issues in investing in addition to financial return. *See* Susan N. Gary, *Is It Prudent to Be Responsible? The Legal Rules for Charities That Engage in Socially Responsible Investing and Mission Investing*, 6 NW. J. L. & SOC. POL'Y 106 (2011). For example, a settlor may provide that, when the Trustee is considering how to invest trust assets, the Trustee should avoid companies with poor environmental histories or companies known for using child labor in developing countries. In a similar vein, so-called "mission investing" involves Trustees' investing in companies that are advancing a particular mission or cause. When a trust instrument contains explicit and clear instructions permitting a Trustee to engage in SRI, such Trustee may select investments on the basis of SRI if such investments are appropriate and produce the same or higher returns as investments selected without considering SRI. "If the trust instrument does not clearly authorize SRI principles, a trustee may consider a beneficiary request for responsible investing in the

context of appropriate investment standards. That is permissible if the trustee can demonstrate that SRI will match or exceed the performance of other types of investments." Akers, "ACTEC 2014 Fall Meeting Musings," (2014).

A. Duty of Loyalty

SRI and mission investing have been scrutinized for their failure to adhere to the duty of loyalty espoused by the Uniform Prudent Investor Act ("UPIA"). Specifically, critics suggest that such investing mechanisms do not cause trust assets to be invested solely for the benefit of the beneficiaries, which is typically viewed in terms of financial benefits provided directly by the trust to the beneficiaries. *See Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971) (finding that Trustees breached their fiduciary duty, in part, due to investing in stock of utility companies to force the utilities to purchase coal which would consequently benefit coal worker beneficiaries).

The Comments to Section 5 of the UPIA set forth the conflict between the duty of loyalty and SRI: "No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns – in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause." A Trustee who invests to fulfill his own social agenda, at the cost of lower returns on trust investments, breaches the Trustee's duty of loyalty to the beneficiaries.

Section 802 of the Uniform Trust Code addresses a Trustee's fundamental duty of loyalty. Subsection (a) provides that "[a] trustee shall administer the trust solely in the interests of the beneficiaries." The remainder of Section 802 deals with the conflicts between the Trustee's fiduciary and personal interests. Subsection (b) provides, *inter alia*, that a trust investment transaction affected by a conflict between the Trustee's fiduciary and personal interests is voidable by a beneficiary *unless* authorized by the terms of the trust. Would this "terms of the trust" exception to the general rule set out in subsection (a) apply to SRI even where there is no conflict between the Trustee's fiduciary and personal interests?

B. Duty of Impartiality

Trustees must act impartially as among the various beneficiaries of the trust. It may not be possible (or appropriate) to engage in SRI when the needs and goals of the beneficiaries are in conflict, even if such investment produces the same result as non-SRI investing. Beneficiaries will possess different beliefs and values, such that investments that are "socially responsible" to one may be in conflict with another's closely-held beliefs.

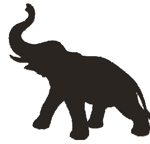
C. Duty of Prudent Investment

"The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other

circumstances of the trust." Restatement (Third) of Trusts, § 90 (2007). While little guidance is available, Scott & Ascher on Trusts (5th ed.) notes the following:

> Only to the extent permitted by the terms of the trust or by the consent of the beneficiaries may the trustees of private trusts properly take social considerations into account in making investment decisions. In the case of the trustees of charitable trusts, however, the Restatement somewhat softens its opposition: social considerations may be taken into account in investing the funds of charitable trusts to the extent that charitable purposes would justify an expenditure of trust funds for the social issue or cause in question ….

8 AUSTIN W. SCOTT ET AL., SCOTT & ASCHER ON TRUSTS § 19.1.13 (5th ed. 2007).



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Certificate of Attendance

____

(Participant Name)

____

(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Liability Risks Arising From Holding Certain Assets in Trust

July 26, 2016

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

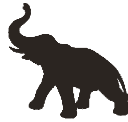
The following states have been approved for 1.5 hours of General Credit: (Course number is indicated in parenthesis):Alabama, Arkansas (TWE52036), California, Delaware, Georgia, Idaho, Illinois, Iowa (204673), Kentucky (161807), Louisiana, Maine (038994), Minnesota (214215), Mississippi, Montana (31618), Nebraska(118634), Nevada (14891), New Mexico, New York, North Carolina, North Dakota, Oregon (1048* 234), Pennsylvania, Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (901337750), Utah , Vermont, Virginia, Washington, Wisconsin , & Wyoming.

These states have been approved for the following General Credit: Colorado – 2 hours, Florida - 2 hours (1508041N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Hawaii, Maryland, Massachusetts, Michigan & South Dakota
The following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Indiana & Ohio-Site Coordinators must apply for credit as the sponsor in order for participants to receive credit
Kansas–Attorney or Site may apply 30 days prior to program
New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit and self-report their attendance.*
New Jersey-Attorneys can use this certificate to submit to New Jersey State Bar for 1.5 General credits (Reciprocity Rule)
New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, CO, DE, GA, KY, LA, MS, NM, NC, ND, OK,. Type of credit: Areas of Professional Practice, 1.5 Credits
* In order for PA attorneys to receive credit they must listen to the teleconference in a live classroom setting. The teleconference site must also be listed on the PACLE website and the site must be open to any PA attorney who desires to listen to the program. Call PACLE at 1-800-497-2253 with questions on website listing.

****As required by the following State Bars, and in order to obtain CLE in these states, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia and Washington. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604



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(Participant Name)

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Liability Risks Arising From Holding Certain Assets in Trust

July 26, 2016

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour. For information regarding available CPE credits please visit http://cpemarket.nasbatools.com/index.
  Instructional delivery method: Group-Live
  NASBA #103655; Field of Study –Specialized Knowledge & Application
- **Enrolled Agent (IRS)** — **2.0 credit hours**
  Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
- **Certified Financial Planner (CFP™)** — **1.5 credit hours**
  Course #223933
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 credit hours**
- **Certified Wealth Strategists (CWS®)** — **2.0 credit hours**
- **Certified Investment Management Analyst (CIMA®)** — **1.5 credit hours**
  Course # **16CFI007**
  If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your My IMCA account at www.imca.org/user
- **Certified Trust Financial Advisor (CTFA™)** — **2.0 credit hours**

Fiduciary Law	0
Taxes	0
Investments	2
Financial Planning	0
Ethics	0

- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant** — **1.5 credit hours**
  (**No Individual State Insurance Credit Available)

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2D)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

INSTRUCTIONS

Certify Your Attendance Online at www.vsb.org

Complete this Certification. Retain for two years.
MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.
A $100 fee will be assessed for failure to comply with either deadline.

Member Name: ______________________________ **VSB Member Number:** ______________

Address: ______________________________ **Daytime Phone:** ______________

______________________________ **E-mail Address:** ______________

____
City **State** **Zip**

Course ID Number: **NDD0408**

Sponsor: **Cannon Financial Institute**

Course/Program Title: **Liability Risks Arising from Holding Certain Assets in Trust**

Live Interactive *Approved CLE Credits (Ethics Credits): **1.5** **(0.0)**

Date of telephone/webcast:______________ **Location(s):** ______________

By my signature below I certify

___ I attended a total of ____________ (hrs/mins) of **approved CLE**, of which (______) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)
___ The sessions I am claiming had written instructional materials to cover the subject.
___ I participated in this program in a setting physically suitable to the course.
___ I was given the opportunity to interact with the presenter (in real time if live interactive or other method if pre-recorded).
___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.
___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

______________ Date ______________________ Signature

Questions? Contact the MCLE Department at (804) 775-0577

If not certified online, this form may be mailed to:
Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
Web site: www.vsb.org

[Office Use Only: Teleconference]

Pennsylvania Continuing Legal Education Board

601 Commonwealth Avenue, Suite 3400 ▪ P.O. Box 62495 ▪ Harrisburg, PA 17106-2495
(800)497-2253, (717)231-3250 ▪ FAX (717)231-3251
www.pacle.org
E-mail: pacleb@pacle.org

CREDIT REQUEST FORM

BA_____

This form is to be used when you have attended a course that is not sponsored by an AccreditedProvider. Lawyers seeking Pennsylvania CLE credits must complete Section B of this form and return it to PACLE, along with a Uniform Certificate of Attendance, if available, and a check made payable to PACLE for the $1.50, per credit hour attendance fee payment. Please refer to Section C to calculate the correct attendance fee payment.

SECTION A : Course Information

Provider: **1854** Cannon Financial Institute

Course: **226554** Liability Risks Arising From Holding Certain Assets in Trust (488166)

Date: 07/26/2016 13:00 **Location:** Alternate Delivery

Total CLE Credit Hours: Maximum: 1.50 = 1.50S

SECTION B : Lawyer Information

Lawyer Name ________________________________ PA Lawyer ID ___________

Address ____

City _____________________________________ State __________ Zip _____________

By signing below, I certify that I attended the activity described above and am entitled to claim:
_____ Substantive

________________________________ ______________________
Signature Date

I am enclosing check #_________________ for $__________

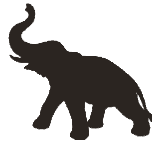
NOTE: If you attended the maximum 1.50 credit hours for this course, please enclose $3.00 attendance fee payment. See Section C below for calculation.

SECTION C : Attendance Fee Calculation

Pennsylvania grants one (1) CLE credit for each 60 minutes of attendance at an approved course. Pennsylvania requires a $1.50 per credit hour attendance fee payment. This $1.50 fee is also required for any portion of a credit hour. We accredit only programs that are at least one hour long; in addition, we accredit only in half hour increments. Please refer to the example below when calculating your attendance fees.

1 hour = 1.50	1.5 to 2 hours = $3.00	2.5 to 3 hours = $4.50	3.5 to 4 hours = $6.00
4.5 to 5 hours = $7.50	5.5 to 6 hours = $9.00	6.5 to 7 hours = $10.50	7.5 to 8 hours = $12.00

etc...



CANNON

FINANCIAL INSTITUTE

Certificate of Attendance

____

(Participant Name)

____

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Liability Risks Arising From Holding Certain Assets in Trust

(750728)

July 26, 2016

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

Colorado – 2 General Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Liability Risks Arising From Holding Certain Assets in Trust

Date and Time of Activity: July 26, 2016 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,

10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics: 0

Elimination of Bias in the Legal Profession:

Prevention, Detection and Treatment of Substance Abuse:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: ________________________

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:______________________________

Elimination of Bias in the Legal Profession:______________________________

Prevention, Detection and Treatment of Substance Abuse: ______________________________

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.