

Delaware Traditional
Trustee - Investment
Management

Prudent Investor Rule.

- Delaware adopted the Prudent Investor Rule with certain additional safeguards. 12 Del. C. §3302. The Trustee is authorized to acquire every kind of property. 12 Del. C. §3302. The investments are to be considered as part of an overall investment strategy and performance shall be considered with a view to the entire portfolio, rather than on an asset by asset basis. 12 Del. C. §3302(c). Absent a breach of trust, a Trustee is not liable to a beneficiary for any loss or depreciation in the value of the trust property, or for the failure to make a profit. 12 Del. C. §3583(b).

Directed Trusts – Investment of Trust Assets

- If a trust instrument provides that a Trustee is to follow the direction of an advisor (Investment Advisor, Consent Advisor, Trust Protector) or is to not take specified actions except at the direction of an adviser, and the Trustee acts in accordance with such direction, then except in cases of willful misconduct on the part of the Trustee, the Trustee shall not be liable for any loss resulting directly or indirectly from any such act. 12 Del. C. §3313(b).
 - Willful misconduct is defined as intentional wrongdoing, not mere negligence, gross negligence or recklessness and "wrongdoing" means malicious conduct or conduct designed to defraud or seek an unconscionable advantage. 12 Del. C. §3301(g) and 3301(h)(4).
 - The terms "legal investment" or "authorized investment" or words of similar import, as used in any governing instrument, shall mean any investment which is permitted by the terms of § 3302 of this title.

What are Administrative Trustees Looking for from Clients:

If entity is an LLC/LLP – Operating Agreement, Assignment of ownership to the Trust, Valuation (Waiver) updated annually.

If assets are marketable securities – list of assets.

Understanding of what is held in the LLC.

Marijuana

- Despite 46 states adopting laws legalizing marijuana (for either medical or recreational use), the sale of marijuana remains illegal in the US under federal law.
- In January 2018, Attorney General Jeff Sessions rescinded an Obama administrative policy that had largely restrained the federal government from intervening in states that had legalized marijuana.
- This summer, Senators Cory Gardner of Colorado and Elizabeth Warren of Massachusetts introduced SIL18725 (“The States Act”) a proposed amendment to the Controlled Substances Act, that ensures each state the right to determine the best way to handle marijuana within its borders. As of June 7, 2018, the bill had been read twice and referred to the Senate Committee on the Judiciary.
- U.S. federal banking laws place severe restrictions on banks and other financial institutions that deal with cannabis-related companies. Despite the growth in the cannabis industry, banks (particularly large banks and financial institutions) are very reluctant to bank MRBs (marijuana related businesses). In 2014, FinCEN issued guidelines on the due diligence required to service MRBs, but they were determined to not have the force of law.
- While some states have tried to charter state financial institutions to service MRBs, these largely failed because the Federal Reserve would not allow these institutions to have master accounts.
- Could The States Act become law? Yes.
- Are trust companies going to be willing to invest in cannabis-related companies? Probably not. So long as cannabis remains illegal in the U.S. for federal purposes, and banking restrictions remain in place, large banks (or even small banks) will likely not permit investments in cannabis-related companies. Once the federal law has been amended in such a way that selling cannabis is not illegal for federal purposes - and the banking restrictions have been lifted – that might prove to be a different answer. In the meantime, the answer is going to be no.
- What about holding it in a directed trust? Since Trustees do have a requirement to understand what they are holding in the trust, they are not going to be willing to hold an investment, the sale of which remains illegal in the U.S.

Is Bitcoin Currency?

Medium of Exchange	<ul style="list-style-type: none">– Widely accepted– Satisfies tax payments– Eliminates need to barter
Store of Value	<ul style="list-style-type: none">– Must hold its value over medium term– Supply must be constrained to avoid rapid devaluation
Unit of Account	<ul style="list-style-type: none">– Common measure of value– Financial statements

Are trust companies going to be willing to invest in Bitcoin?

- Since bitcoin is a decentralized digital token, there is no central authority. The system is run by a decentralized network of computers around the world that keeps track of all Bitcoin transactions. The transactions that are constantly updating and recording these transactions is called Blockchain. Bitcoin is stored in “wallets” and the owner receives a private Key. These keys have been stolen by hackers. Approximately \$800,000 in bitcoin was stolen in 2018.
- Evercore Wealth Management has started investing in a single feeder fund to the Andreessen Horowitz cryptofund. The fund does not actually own bitcoin – but instead invests in companies that are related to bitcoin, such as Coinbase, a service that provides an accessible interface to trade bitcoin.

Bitcoin is not recognized by the FTC.

- What about holding bitcoin in a Directed Trust? Yes. Bitcoin is not illegal like cannabis. Banks are going to want ironclad exculpatory provisions – but I think they will be willing to hold bitcoin in directed trusts.

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