

2025 Delaware Trust Conference

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Delaware Trust Planning for International Clients

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Recent Trends in Planning for International Clients

In the past

U.S. was not often the first choice for global families setting up trusts or other entities

- Reputation for relatively high taxes and strong enforcement
- Concerns about privacy in a more open society

Currently

Multinational families establishing U.S. trusts for their U.S. and/or non-U.S. family members

- Safety, stability and reliable court systems
- Modern trust laws creating certainty in planning as well as tax efficiencies; flexibility
- International families still in a phase of taking another look at their overall plans and where the U.S. fits in
 - Move existing entities from offshore and other onshore jurisdictions to the U.S.
 - Seeking privacy from third parties and bad actors

Key Motivations for Choosing the U.S.

**Death of foreign settlor of foreign grantor trust
with U.S. beneficiaries**

**Beneficiary of a foreign
non-grantor trust becomes a U.S. person for income
tax purposes**

**No longer any non-U.S. beneficiaries
of a foreign non-grantor trust**

Foreign settlors planning to move to the U.S.

Note:

Consult counsel re: tax
and other effects in home
country

Separating Administrative Situs and Tax Situs

- **“Hybrid” Trusts**

- Administrative situs - created and administered under the law of a U.S. state
 - Trust instrument can include all of the provisions and flexibility of a modern trust in the jurisdiction of administrative situs
- Tax situs – trust is “foreign” for U.S. tax purposes
 - Non-U.S. person has power over one or more “substantial decisions” relating to the trust
 - The person holding the power is often the settlor of the trust

- **Automatic Conversion of Trust**

- Intent may be for the automatic conversion of the trust to a U.S. non-grantor trust upon the death of the settlor
- Ensure that U.S. persons hold all substantial decisions
 - Be aware of potential non-U.S. Investment Advisors, Distribution Advisors, Trust Protectors, etc.
 - Be aware of who has the power to remove and replace these positions

Foreign Grantor Trusts: The “Grand Slam” of Trusts

- Many practitioners are very familiar with the use of grantor trusts, often referred to as “intentionally defective grantor trusts” or IDGTs”, in planning. Grantor trusts allow trust assets to grow due to the grantor paying the income taxes on the trust asset’s income.
- However, an even greater benefit can be realized through the use of foreign grantor trusts (“FGTs”). Under IRC § 672(f)(2), a foreign grantor can be treated as the income tax owner of all or a portion of a grantor trust, but only if:
 - The power to revest title to trust property in the grantor is “exercisable solely by the grantor without the approval or consent of any other person or with the consent of a related or subordinate party who is subservient to the grantor” (i.e., the trust is revocable),
OR
 - “The only amounts distributable from (the trust) (whether income or corpus) during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor.”
- The foreign grantor is only taxed on US Fixed, Determinable, Annual, or Periodical Income (FDAPI) or Effectively connected Income (ECI), allowing for US income tax-efficient growth of the trust. If no US situs assets are held by FGT, no US income tax will be owed during the foreign grantor’s lifetime.
- It is essential to fund FGTs only with non-US Situs assets, as the retained powers/interests can cause US estate inclusion.

Achieving Basis Step-ups for FGTs

- A revocable FGT under IRC § 672(f)(2) might not receive a basis step-up under IRC § 1014, which is counter-intuitive.
- IRC § § 1014(b)(2) and (3) each permit a basis step-up for assets held in a revocable trust, but only if the terms of the trust require income be paid “to or on the order or direction of the decedent ...” Therefore, one should include that language in all revocable FGTs to receive a step-up in basis.
- A basis step-up might also be achieved by making a “check the box” election on underlying holding companies, if any (and if those companies are eligible for the election). Treas. Reg. § 301.7701-3. Following the enactment of the Tax Cuts and Jobs Act (TCJA), this has become more complex as the “30-day rule” for making check the box elections was repealed.
- A check the box election may also address Controlled Foreign Corporation (CFC) and Passive Foreign Investment Company (PFIC) issues.

U.S. Trusts with Foreign Settlers – Delaware’s APT Statute

- Delaware’s “Qualified Dispositions in Trust Act”, 12 Del. C. § 3570 et al. (the “Act”), allows for self-settled asset protection trusts
- Under the Act, the grantor can retain certain powers, including lifetime and testamentary powers of appointment, and can control investment decisions (by serving as the Investment Adviser of the trust). In general, under the Act the only restrictions on the grantor are the following:
 - The grantor may not serve as trustee of the trust.
 - The grantor may not serve in an “adviser” position other than investment adviser.
 - The grantor may not retain the power to direct distributions.
 - The grantor may not demand a return of assets transferred to the trust.
- Section 3572 of the Act is Delaware’s “tacking” provision for creditor protection purposes that can be very useful when migrating a self-settled trust from another jurisdiction, including from non-U.S. jurisdictions

Considerations When Establishing U.S. Trusts

- Motivations for Onshoring
- Onshore From Inception
- Onshoring an Offshore Trust
- Type of Trust – Grantor vs. Non-grantor

Motivations for Moving Onshore

Benefit of U.S. law,
trust friendly courts and
“modern trust” statutes

Avoid jurisdictions which
are black-listed and/or
have recently had high
profile scandals

Facilitate access to
credit from U.S.
financial institutions

**Perception of greater
privacy** U.S. has not
adopted Common Reporting
Standard, and FATCA
appears less intrusive

- Confidence that “silent”
trusts will be respected by
courts

Administering Onshore From Inception: *Advantages*

Foreign status for tax purposes

- Preserves income tax benefits of traditional FGT during life of the foreign settlor
- Potentially delays subjecting assets to U.S. income tax

Avoids need for migration or decanting

- Saves time and money
- Avoids concerns about the re-settlement of a new trust

Seamless transition to typical non-grantor U.S. trust at death of foreign settlor

- Beneficiaries relieved of need for proactive involvement during stressful time
- U.S. Trustee continues in same role
 - Avoids involving a new Trustee that doesn't know family or background.
 - No need for modification to comply with local trust laws

Administering Onshore From Inception: *Caveats*

- **U.S. non-grantor trust may not be best outcome for non-U.S. beneficiaries**
 - This can be highly dependent on the nature of the trust assets
 - If there are both U.S. and non-U.S. beneficiaries at death of foreign grantor, possibly split the trust into two non-grantor trusts
 - (1) Traditional U.S. non-grantor trust for U.S. beneficiaries
 - (2) Foreign non-grantor trust for income tax purposes that has an administrative situs in the U.S. (USFNGT) for non-U.S. beneficiaries
 - No throwback tax or concerns about accumulated income for non-U.S. beneficiaries
 - If properly drafted and administered, U.S. taxation can be kept to a minimum

Tax and Legal Implications to Onshoring

- **During lifetime of Settlor**

- Foreign beneficiaries
 - Benefit from maintaining a FGT offshore as a Foreign Non-Grantor Trust (FNGT)
 - Can avoid U.S. income and estate taxes if no U.S. situs assets or U.S. business income
- U.S. beneficiaries
 - Benefit from the FGT remaining offshore
- Note that foreign beneficiaries can become U.S. persons for tax purposes in the future
 - Concerns relating to accumulated income
 - Burdensome reporting requirements

- **Upon Death of Settlor**

- U.S. beneficiaries
 - Throwback tax on accumulated income in FNGT with U.S. beneficiaries
 - Burdensome reporting of offshore accounts and assets

Factors to Consider When Onshoring

Terms of the
trust agreement

Trust assets

Accumulated
income in trust
(skim trust)

Interest of the
settlor and/or
beneficiaries

Laws in the
original trust's
jurisdiction

Laws in the
onshoring
jurisdiction (DE!)

Common Strategies for Passing the Control Test

Private Trust
Company

US trust company
or bank

A majority of
Individual
Trustees based in
the US

Directed trust
with C Corp SPV

Foreign Trusts: What Makes a Trust Foreign vs US?

If both of the below tests are not met, the trust will be a Foreign Trust.

THE COURT TEST

- A US court must be able to exercise primary jurisdiction over trust administration
- Usually when the control test is met, the court test is met, so less focus is put on it. But what if the trustee is a US person living outside of the US? That Trustee should come to the US for meetings regarding trust administration. It is best also to have a trustee that resides in the US

THE CONTROL TEST

- One or more US persons must have the authority to control all “substantial decisions” in the trust so no non-US person can have veto power over any substantial decision. Examples of substantial decisions:
- Whether and when to distribute income or corpus
- The selection of beneficiaries
- Whether to terminate the trust
- Whether to remove, add or replace a trustee
- Investment Advisors’ or Protectors’ powers often include substantial decisions

A foreign trust created under US law may be domesticated by the following simple steps:

- Remove or replace foreign trustee(s), so there is a majority of US Trustees
- Remove or replace foreign Trust Protector, Investment Advisor, Distribution Advisor or other key Office Holder

Throwback Tax for Distributions of UNI to U.S. Beneficiaries

- The “throwback tax” is a US anti-deferral rule that is meant to put US beneficiaries of foreign complex trusts in the same tax position as if the trust were a domestic trust.
- Distributions of accumulated income (i.e., undistributed net income (UNI)) are “thrown back” to the year in which the income was earned by the trust.
- Unless distributed in the year in which realized, capital gains lose their character and are taxed as ordinary income.
- These distributions are taxed at the highest ordinary income tax rates for that year.
- An interest charge (rate applicable to underpayments of tax), is added and compounded daily. The interest charge accrues for the period beginning in the year the income was earned and ending with the year the UNI is distributed.
- If income is accumulated for many years, the throwback taxes due may be as much as the entire distribution.
- UNI of a FNGT with US beneficiaries is not cleansed by onshoring the trust to the US, but the UNI portion can be frozen.
- Onshoring via decanting may cause immediate taxation of UNI if the distribution is viewed as a trust distribution.

Techniques for Mitigating the Throwback Tax

- Distribute DNI annually to avoid accumulated income
- Use offshore private placement life insurance (PPLI)
- Take into account the local law definition of fiduciary accounting income and make sure that all of that is distributed annually
- Structure the trust to qualify for the specific gift or bequest exception of 3 or less distributions
- Use the “default method” of calculating accumulation distributions

Additional Onshoring Considerations

- **Trust Assets**

- Must retitle the trust to name the new U.S. Trustee
- If the offshore Trustee has a U.S. affiliate, the process may go more smoothly
 - KYC and AML process more streamlined
 - Offshore and U.S. Trustees tend to have different requirements and practices when it comes to release, refunding and indemnification provisions when the Trusteeship is changed
- New accounts may be needed for banking, custody and investments
- May need to retitle real estate held in trust

- **Rule Against Perpetuities (RAP)**

- RAP varies in jurisdictions
- Offshore jurisdictions may have shorter RAPs (e.g., 150 years in the Cayman Islands)
- Original RAP from offshore jurisdiction should continue after onshoring
 - Be especially careful when migrating a trust by decanting or appointment

The Delaware Advantage

12 Reasons to Select Delaware

Direction Trusts

Delaware's "Direction Trust" law authorizes a complete bifurcation of investment responsibilities between a Delaware resident trustee and an outside investment advisor.

Income Tax Advantages

There is no Delaware income tax on retained earnings on Delaware irrevocable trusts provided certain conditions are met.

Total Return Trusts/Power to Adjust

Delaware law gives trustees considerable flexibility in re-characterizing income and principal to best serve Clients' short- and long-term needs.

Asset Protection Trusts

Delaware authorizes irrevocable trusts which, when structured correctly, are protected from the settlor's creditors (in most instances), but from which the settlor may still derive benefit.

Dynasty Trusts

Delaware was one of the first states to abolish the common-law rule against perpetuities, thereby allowing trusts to continue into perpetuity.

The Delaware Court of Chancery

This specialized equity court handles all corporate and fiduciary matters. They are generally prompt in their decisions as well as being held in high regard for their sophistication.

Delaware General Assembly

The Delaware legislature is very receptive and responsive to initiatives set forward by the fiduciary community. Delaware is often on the "cutting edge" nationally in enacting trust legislation in a bipartisan fashion.

Confidentiality/Flexibility

Delaware law is sensitive to a Client's desire for privacy and contractual flexibility in trust matters. Quiet trusts (12 Del. C. § 3303(a), (c)) and Designated Representatives (12 Del. C. § 3303(d))

USA Jurisdiction

As one of the 50 states, there are numerous advantages to Delaware being a U.S. rather than an offshore jurisdiction. Delaware is also physically located near New York City, Philadelphia and Washington, D.C.

A Full Suite of Advantages

While other jurisdictions may possess some specific advantages listed above, none has the full suite of advantages, collectively known as the "Delaware Advantage."

Trust Modifications

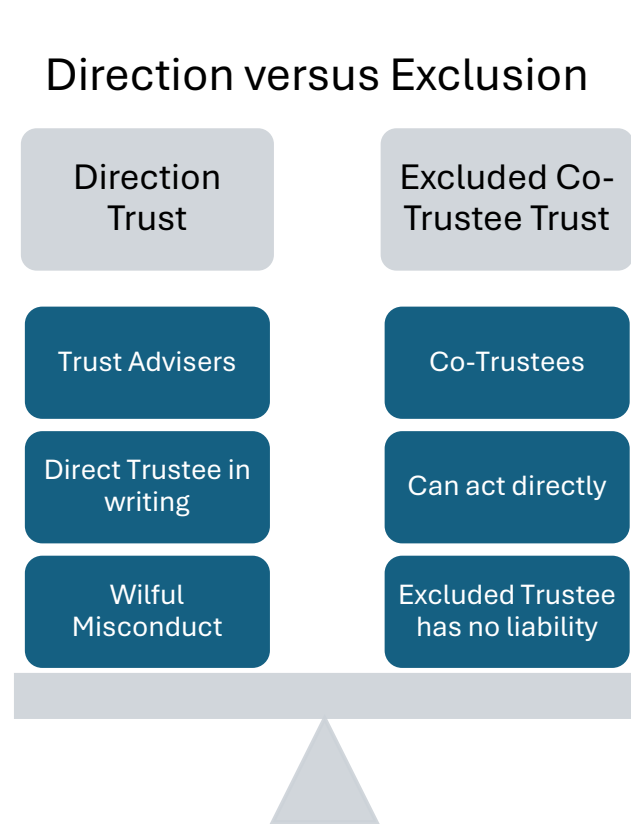
Delaware has a comprehensive suite of options for Decanting (12 Del. C. § 3528), Merger (12 Del. C. § 3525(29)), Non-Judicial Settlement Agreement (12 Del. C. § 3338), and Modification by Consent Agreement (12 Del. C. § 3342)

Professional Infrastructure

Delaware has a large professional class of trust professionals and firms offering a healthy competitive market setting a high service standard.

3313 & 3313A Distinctions

Section 3313A of Title 12 enacted in 2017. Referred to as “Excluded Co-Trustee Statute”.



DE nexus concerns:

Exclusive administrative powers to the DE trustee

1. To maintain an account to custody trust assets, receive trust income and make disbursements
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
4. To maintain an office for trustee meetings and other trust business
5. to respond to inquiries concerning the trust from beneficiaries, trust fiduciaries and unrelated third parties
6. To execute documents in connection with performance of its duties
7. To retain accountants, attorneys, agents, and other advisers in connection with the performance of its 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 its discretion.

Comparison to other Jurisdictions

	Alaska	Delaware	Florida	Nevada	Pennsylvania	South Dakota	Wyoming
Directed Trusts	Directed Trusts are permitted	Directed Trusts are permitted	Directed Trusts are permitted	Directed Trusts are permitted	Directed Trusts are permitted	Directed Trusts are permitted	Directed Trusts are permitted
Period of Perpetuity	Indefinite period of perpetuity	Indefinite period of perpetuity	1,000 years	365 years	Indefinite period of perpetuity	Indefinite period of perpetuity	1,000 years
NJSA Statute	Yes	Yes	Yes	Yes	Yes	No	No
Domestic Asset Protection Trusts	4-year look-back period with no exceptions.	4-year look-back period with exceptions for marital and tort claims made prior to assets transferred to trust.	Does not allow for Domestic Asset Protection Trusts.	2-year look-back period with no exceptions.	Does not allow for Domestic Asset Protection Trusts.	2-year look-back period with exceptions for marital claims made prior to assets transferred to trust.	4-year look-back period with exceptions for marital and tort claims made prior to assets transferred to trust.
Virtual Representation	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Privacy – duty to inform	No duty to inform beneficiaries of a revocable trust's creation	No requirement to inform beneficiaries of a trust's creation	Duty to inform beneficiaries cannot be waived	No requirement to inform beneficiaries of a trust's creation	Duty to inform beneficiaries of trust's existence, identify key information, and provide reporting.	No duty to inform beneficiaries of a revocable trust's creation	Duty to inform beneficiaries of a trust's creation can be waived by trust agreement
State Income Tax on Trusts	Only if beneficiaries live in state	None	None	None	Yes	None	None