



WYOMING TRUST  
ASSOCIATION

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FIDUCIARY SOLUTIONS:  
A WYOMING PERSPECTIVE

Prepared for the Wyoming Trust Association  
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One of the most difficult questions facing families of wealth is the selection and structuring of their fiduciary relationships. A competent trustee must be an expert in investing and finance, taxation, trust and business law of multiple jurisdictions, and regulatory compliance. But perhaps more importantly, the trustee must have a deep and unbiased knowledge of the client family and the individuals who comprise it, be trustworthy beyond reproach, and prioritize the sustainability and stewardship of family relationships as well as family finances.

Even for families that have been fortunate to identify one or several such fiduciaries, questions of longevity and therefore succession are inevitable. Many families have historically relied on trusted advisors and senior family members to serve in these roles. However, growing concerns with fiduciary liability, coupled with the increased administrative burden of serving as a trustee, have led many families to consider fiduciary structures and institutional solutions rather than individuals when addressing their fiduciary needs.

The purpose of this note is to address a range of fiduciary solutions available under Wyoming law and to discuss the merits and drawbacks of each. Section I provides a brief overview of trustee duties. Section II evaluates the individual trustee. Section III assess the merits of corporate trustees, both as a traditional “full” trustee as well as in a delegated and directed capacity. Section IV reviews the private family trust company (PTC), both regulated and unregulated. Section V concludes.

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## I. Trustee Duties

This note assumes the reader is generally familiar with the role of the trustee and associated fiduciary duties. The specific obligations of a trustee vary by jurisdiction; in Wyoming, they are governed by the Wyoming Uniform Trust Code<sup>2</sup>. For the purposes of this note, the three basic functions of the trustee may be described as investing, distributing, and administering, all subject to the terms of the trust and relevant governing law. While some jurisdictions permit the trustee to delegate some or all of these tasks, a traditional “full service” trustee is ultimately responsible for ensuring that all three functions are performed and is therefore liable to the beneficiaries for failure to adequately perform.

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<sup>2</sup>W.S. §§ 4-10-101 *et seq.*

The trustee's duty to invest requires the trustee to evaluate, select, and monitor the investments and financial activities of the trust. Investments must be appropriate and consistent with the needs of the beneficiaries, both current and remaindermen. Often, a trust will adopt an Investment Policy Statement (IPS) in order to provide guidance to investment advisory firms; the trustee is responsible for monitoring adherence to the IPS.

The trustee's duty to distribute requires the trustee to decide when and how to distribute (or withhold) assets to the beneficiaries. The trustee must evaluate the terms of the trust, the intentions of the settlor, and the needs of the beneficiaries, both current and future. Frequently, the determination of when and what amount to distribute is informed by income and transfer tax planning in addition to the circumstances of the individual beneficiary.

The duty to administer includes holding title to trust property, maintaining accurate books and records, reviewing and filing of tax returns, and reporting to beneficiaries.

## II. Individual Trustees

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Often, the simplest solution to the fiduciary problem is to name a family member, friend, business associate, or trusted advisor (the "Individual Trustee") as trustee. Individual Trustees typically have close relationships with settlors and understand their intentions and values. Individual Trustees are often chosen as a result of their familiarity with the family's financial activities and family values and have reasonable experience in business and asset management. They are also frequently more cost effective than other fiduciary solutions owing to loyalty to the family, other sources of professional compensation, and myriad other factors.

However, Individual Trustees are also the riskiest fiduciary solution. Individual Trustees with the appropriate investment and administrative expertise are difficult to identify. Those with sufficient skill are often difficult to retain; in some instances, professional affiliations preclude them from serving as trustee. Others are concerned with the administrative burden, fiduciary liability, or the expense or impossibility of maintaining adequate insurance. In addition, Individual Trustees may be reticent to be in a position to say "no" to a cherished friend, family member, or client. Finally, Individual Trustees may be limited by geographic location – families seeking to locate entities and assets in a favorable jurisdiction may not have a relationship with an Individual Trustee who resides in the preferred trust situs.

Other risks aside, the Individual Trustee suffers from one fatal flaw: mortality. Eventually, Individual Trustees retire or become otherwise unable or unwilling to serve. Careful planning may mitigate the succession risks associated with the individual trustee; nevertheless, unanticipated circumstances can lead to the failure of even the most thoughtful planning. Therefore, families of wealth are increasingly turning to entities rather than individuals to avoid the cost, administrative inefficiency, and delay associated with Individual Trustee succession.

### III. Corporate Trustees

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Historically, the alternative to the Individual Trustee was the Corporate Trustee – a bank or other financial institution authorized to provide fiduciary services. Corporate Trustees provide investment, distribution, and administrative services to individual trusts, typically charging as a percentage of assets under management. Corporate Trustees benefit from institutional longevity and professional investment and asset management, solving, in part, for the risk associated with Individual Trustee expertise and succession. However, Corporate Trustees are often limited by internal risk management protocols and may balk at operating businesses, real estate, concentrated positions, and alternative investments. In addition, the Corporate Trustee may be viewed as unduly risk averse in evaluating the needs of beneficiaries and may be an impediment to family governance and beneficiary empowerment.

In order to address the perceived shortcomings of the traditional Corporate Trustee relationship, many states, including Wyoming, have adopted statutes which allow the “unbundling” of trustee services. That is, they authorize different individuals or firms to provide some or all of the core fiduciary functions – investing, distributing, and administering. The unbundled approach is appealing to many client families owing to the ability to incorporate existing advisory and service relationships while locating entities and assets in favorable jurisdictions.

#### a. Delegated Trusts

In a delegated trust, an Individual Trustee or Corporate Trustee is named. That trustee then delegates authority over one or several of the core trustee activities to a third party. For instance, an Individual Trustee might be named, who then delegates investment authority to a third-party investment advisory firm. In this way, the Individual Trustee may rely on a professional asset management firm while retaining control over distributions and administration.

In Wyoming, trustee delegation may take at least two forms. In the first, more common form, an Individual Trustee or Corporate Trustee may delegate some or all trustee duties and powers to an agent authorized to act on behalf of the trustee<sup>3</sup>. This relationship typically involves an Individual Trustee that desires to retain authority over trust distributions but would like assistance with investment and administration tasks. Wyoming law provides relief from fiduciary liability for the actions of an agent<sup>4</sup> so long as the trustee exercises reasonable care, skill, and caution when selecting the agent; establishing the scope and terms of the delegation; and, reviewing the agent’s actions in order to monitor compliance and performance under the terms of the delegation<sup>5</sup>.

Less commonly, in the event Cotrustees are serving, one Cotrustee may delegate the performance of any trust function to another Cotrustee, unless expressly prohibited by the trust instrument<sup>6</sup>. This Cotrustee arrangement may work well for families who desire an Individual Trustee but seek a greater level of investment expertise, or where trust documents restrict the class of potential trustees. And, the liability of the delegating Cotrustee for the actions of other Cotrustees is limited under most circumstances<sup>7</sup>.

The delegated trustee relationship is a powerful tool for Individual Trustees seeking professional assistance with trust investment and administration, particularly in instances of a restrictive trust instrument. However, given the residual liability associated with proper selection and monitoring of agents, many Corporate Trustees prefer the directed trust, discussed in greater detail in the next section.

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<sup>3</sup>W.S. § 4-10-807, <sup>4</sup>W.S. § 4-10-807(c), <sup>5</sup>W.S. § 4-10-704(a), <sup>6</sup>W.S. § 4-10-703(e), <sup>7</sup>W.S. §§ 4-10-703(f)-(g)

## **b. Directed Trusts**

The directed trust takes the concept of unbundled fiduciary services to its logical conclusion – rather than name one trustee who may subsequently delegate to others, a directed trust expressly provides for the segregation of trustee duties among multiple parties. Under a directed trust model, an Administrative Trustee is “directed” by advisors or committees designated in the trust instrument as to actions with respect to investments, distributions, or both. In Wyoming, a trustee is considered an “excluded fiduciary” when it is directed as to a particular activity<sup>8</sup>. An excluded fiduciary has no duty to review the actions of the person or entity providing the direction<sup>9</sup> and is therefore relieved from fiduciary liability for the action or inaction thereof<sup>10</sup>.

For example, a directed trust may specifically name an Administrative Trustee, whose sole fiduciary duty is to administer the trust and execute directions received; an Investment or Trust Advisor, whose sole fiduciary duty is to direct the Administrative Trustee as to the investment and management of trust assets; and, a Distribution Advisor, whose sole fiduciary duty is to direct the Administrative Trustee as to distribution decisions. An Administrative Trustee may be directed as to investments but retain fiduciary authority, and therefore liability, over discretionary distributions and administration.

For new Wyoming trusts, adopting the directed trust structure is a straightforward matter of drafting the trust to provide for a Trust or Investment Advisor, a Trust Protector, a Distribution Advisor, or other fiduciary roles as the client may determine. For existing trusts which do not contemplate the directed trust structure, the qualified beneficiaries of the trust may unanimously agree to designate a Trust Advisor with the power to direct the trustee<sup>11</sup>, typically via a Non-Judicial Settlement Agreement.

The directed trust model works extremely well for families who desire a Corporate Trustee for administrative and jurisdictional purposes but want to involve family members and existing advisory relationships in investment and distribution activities. It is also effective for families that own complex assets, such as operating businesses, real estate, or concentrated positions, in a limited number of trusts. At my firm, for instance, a common fact pattern is a settlor that wants a Wyoming trust while retaining an existing investment advisory relationship. In that instance, the firm would be named as Administrative and Distribution Trustee but the existing investment advisor would be named as Trust Advisor.

## **IV. The Private Trust Company**

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The Wyoming fiduciary solutions discussed to this point contemplate the trustee of an individual trust. For families with multiple trusts, large and complex assets, or a desire for additional input into fiduciary decision-making, a private trust company (PTC) may be an effective solution. Wyoming law permits families to form their own PTC<sup>12</sup>, owned by the family and operated by family members, trusted advisors, the family office, and an administrative services provider. The PTC is authorized to provide fiduciary and trustee services to the family members of a “designated relative,” including multiple generations, spouses, and key employees of family-affiliated entities<sup>13</sup>. However, the PTC may not serve the general public as a trust company or depository institution<sup>14</sup>.

<sup>8</sup>W.S. § 4-10-718(a), <sup>9</sup>W.S. § 4-10-715, <sup>10</sup>W.S. § 4-10-717, <sup>11</sup>W.S. § 4-10-718(e), <sup>12</sup>W.S. § 13-5-601 et seq., <sup>13</sup>W.S. § 13-5-301(a), <sup>14</sup>(vii), W.S. § 13-5-601(b)

The PTC serves as trustee of family trusts, similar to the Corporate Trustee discussed above. Unlike a traditional Corporate Trustee, however, the PTC is owned directly or indirectly by the family, frequently through a Purpose Trust<sup>15</sup>. The PTC is managed by a Board of Directors, in the event of a corporate structure, or a Board of Managers, if the PTC is organized as a limited liability company (LLC). The exact composition of the Board varies case by case based on the wishes of the family and tax sensitivities; most commonly, it is comprised of family members and family advisors and often includes a representative of the administrative services company.

The Board appoints various committees to make decisions regarding the fiduciary needs of the family trusts, frequently including: Investment Committees, Discretionary Distribution Committees, and Audit/Amendment Committees. These committees are populated with family members and advisors; tax-sensitive powers are held by committees comprised of disinterested parties.

The Board also elects Officers to conduct the business of the PTC. Typically, A representative of my firm serves as PTC Secretary or Assistant Secretary in order to document PTC activities within Wyoming and provide local signature authority. The Board also selects an administrative services provider resident in the PTC jurisdiction to provide administration and “back office” services, often in conjunction with a family office. Care must be taken to ensure that the PTC has sufficient connection – “nexus” – with the chosen jurisdiction in order to avail itself of the intended legal and tax treatment.

The PTC structure offers numerous benefits. For families that own complex assets in trust, such as operating businesses, real property, concentrated positions, or alternative investments, the PTC Board and Investment Committee can manage assets that traditional Corporate Trustees may find impracticable or unduly risky. The PTC also provides additional opportunities for family involvement on the Board, as Officers, or as members of a committee, yielding benefits both in family involvement and control as well as family governance and beneficiary education.

As a business entity, the PTC enjoys a perpetual lifespan, mitigating and providing a mechanism for succession considerations. The corporate or LLC structure also provides limited liability associated with the entity; the Board and Officers are protected by the business judgment rule and, in some instances, fiduciary liability insurance. Therefore, trusted advisors who might otherwise be prohibited or wary of serving as a trustee may consider serving as on the Board or committee. And, from a cost perspective, the PTC benefits from economies of scale and may therefore be more cost effective than traditional Individual or Corporate Trustees as it is typically operated at break-even or a de minimis profit. PTCs are typically funded by trustee fees paid by administered family trusts on an ongoing basis.

In some states, PTCs are subject to mandatory supervision by the state banking commission. In Wyoming, a PTC may elect to be unregulated as a Private Family Trust Company (PFTC)<sup>16</sup> or regulated by the Wyoming Division of Banking and the State Banking Commissioner (the “Commissioner”) as a Chartered Family Trust Company (CFTC)<sup>17</sup>.

#### **a Private Family Trust Company - Unregulated**

The Wyoming PFTC is “unregulated” in the sense that it is not subject to regular supervision or examination by the Commissioner and the Division of Banking<sup>18</sup>. Instead, the Board, in conjunction

<sup>15</sup> W.S. § 4-10-410, <sup>16</sup>W.S. §§ 13-5-701 *et seq.*, <sup>17</sup>W.S. § 13-5-603, <sup>18</sup>W.S. § 13-5-702(a). Note that the Commissioner retains the right to inspect upon reasonable cause to believe that the PFTC proposes to transact or has transacted with the general public.

with their advisors, determine that supervision is not necessary in order to achieve their fiduciary objectives.

The formation articles for a Wyoming PFTC must include a statement that the entity is formed to provide fiduciary services exclusively for one or more family members of one<sup>19</sup> “designated relative,”<sup>20</sup> typically identified in the Bylaws or Operating Agreement of the PFTC. The PFTC must send a Waiver of Trust Company Charter to the Commissioner electing PFTC treatment<sup>21</sup>. Following formation, the PFTC may provide fiduciary services to family members without further supervision by the Commissioner. Wyoming law does not impose any additional requirements on PFTCs, such as minimum capitalization, office space, insurance, banking relationships, surety bonding, or resident corporate personnel. However, the Board of the PFTC must be mindful of nexus considerations and therefore best practice is to demonstrate as great a possible connection with Wyoming as practicable, which often includes resident PFTC personnel, a Wyoming bank account, Wyoming office space, maintaining corporate books and records in Wyoming, and conducting PFTC and underlying trust administration within Wyoming.

## **b. Chartered Family Trust Company – Regulated**

For families who desire additional regulatory oversight, the Wyoming CFTC provides a solution. Typically, families elect the “regulated” CTFC in order to comply with Securities and Exchange Commission (SEC) regulations; because two unrelated families desire to operate within the same PTC structure<sup>22</sup>; or, because they desire state supervision as evidence of additional nexus or for peace of mind.

Upon corporate formation, a Wyoming CFTC must apply for a charter from the Wyoming Banking Commission prior to conducting fiduciary business<sup>23</sup>. CFTCs are required to maintain a physical office within the state where all material business records and accounts may be accessed for examination by the Commissioner<sup>24</sup> as well as a bank account with a state or nationally chartered bank with an office in Wyoming<sup>25</sup>. CFTCs must maintain minimum capitalization of five hundred thousand dollars, exclusive of organizational expenses<sup>26</sup>, and obtain a surety bond or pledge capital to the Commissioner in the amount of one million dollars<sup>27</sup>. CFTCs are required to maintain at least one million dollars of insurance to cover officers, managers, members, and employees against loss owing to dishonest, fraudulent, or criminal acts or omissions of bonded persons<sup>28</sup>. CTFCs are subject to inspection by the Commissioner at least once every three years and more frequently as the Commissioner may determine<sup>29</sup>.

Given the additional legal and regulatory requirements associated with the regulated CFTC, most families naturally prefer the PFTC. However, as discussed above, there are circumstances where the regulated CFTC may be preferable. Most commonly, clients elect the state-regulated CFTC structure in order to comply with SEC regulations arising under the Investment Advisers Act of 1940 where a PFTC would not satisfy the Family Office exemption<sup>30</sup>. In other instances, two unrelated families desire to operate under one PTC structure, often motivated by a jointly-owned operating business; while the PFTC may only serve the family members of one designated relative, the CFTC may serve families members of two unrelated designated relatives<sup>31</sup>. Still other families desire the additional oversight provided by state regulation and many advisors believe that state regulation is strong evidence of Wyoming nexus.

Ultimately, families considering a Wyoming PTC must evaluate the benefits and disadvantages of the unregulated PFTC compared with the regulated CFTC and, in conjunction with their advisors, determine which structure is right for their family’s fiduciary needs.

<sup>19</sup>W.S. § 13-5-301(a)(v)(B), <sup>20</sup>W.S. §§ 13-5-701(b)(ii) and (iii), <sup>21</sup>An electronic version of the Charter Waiver is available online as from the Wyoming Banking Commission website, <http://wyomingbankingdivision.wyo.gov/home/areas-of-regulation/laws-and-regulation/application-forms>, <sup>22</sup>W.S. § 13-5-301(a)(v)(A), <sup>23</sup>W.S. § 13-5-606, <sup>24</sup>W.S. § 13-5-604(a)(i), <sup>25</sup>W.S. § 13-5-604(a)(ii), <sup>26</sup>W.S. § 13-5-605, <sup>27</sup>W.S. § 13-5-413, <sup>28</sup>W.S. § 13-5-414, <sup>29</sup>W.S. § 13-5-607, <sup>30</sup>See 17 C.F.R. Part 275 § 275.202(a)(11)(G)-1, <sup>31</sup>W.S. § 13-5-301(a)(v)(A)

## Conclusion

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For families of wealth, the choice of fiduciary is foundational to the ongoing success of the family. A well-chosen fiduciary solution empowers the family through thoughtful and strategic asset management, wealth transfer, and family governance. A poorly chosen fiduciary can cause erosion of wealth, administrative nightmares, and family discord. Many families that have been served well by Individual Trustees are now facing questions regarding succession and difficulties identifying the next generation of trustees. Corporate Trustees are a potential solution; increasingly, families are unbundling their fiduciary relationships through delegated and directed trustees. And, finally, for families with complex needs, regulated and unregulated PTCs allow the family to “own” the trust company. Wyoming law provides for a variety of flexible and efficient fiduciary solutions which empower clients and families of wealth to customize their fiduciary relationships. Please contact the Wyoming Trust Association if you would like more information regarding Wyoming fiduciary solutions.