

Foreign Trust Registration?

Friday, November 10, 2023

Caveat: This missive deals with a probably rare issue where a Trust is administered for a beneficiary who resides in a foreign country which has adopted mandatory registration and beneficiary disclosure laws. How should the U.S. trustee respond when the foreign country makes such demands on the trustee?

Take-Away: We live in a world where transparency is expected as a normal course of dealing. However, sometimes the source that requires such transparency has a highly limited basis for making its demand. Such might be the case where a foreign country demands registration and/or disclosures about a Trust when the only connection between that foreign country and the Trust is the residence of a single trust beneficiary. This places a unique stress on the trustee of that Trust.

Background: Coming as a surprise to many is the fact that some foreign jurisdictions require the registration of a trust and disclosure information about the U.S. Trust or its beneficiaries. These foreign reporting and disclosure requirements can put a trustee in a bind when a U.S. based Trust has a trust beneficiary who is a resident of a foreign jurisdiction that imposes the registration of the Trust and information disclosures. Ignoring them may not be an option for the trustee. There has been a push internationally for more transparency in beneficial ownership arrangements, and the U.S. is only now coming 'late to that party' with its Corporate Transparency Act. Thus, it is reasonable to assume that at some point other countries will attempt to require a trustee to provide information about the Trust where a beneficiary is a resident of a foreign jurisdiction.

U.S. Trustee Non-Disclosure Laws: Generally, under the Uniform Trust Code, and also under the Michigan Trust Code (MTC), U.S. Trusts are not required to register or disclose their beneficial or equitable owners to the U.S. government

other than for either (i) income and transfer tax reporting purposes; or (ii) possibly under the Corporate Transparency Act if the Trust owns a 25% or larger interest in a *reporting entity*. Otherwise, a basic principle of trust law is that the principal place of trust administration generally governs the duties of the trustee and ordinarily that local law determines which court has primary, if not exclusive, jurisdiction over the Trust.

MTC: In Michigan, as in most other states, the Michigan Trust Code (MTC) is primarily a set of *default* rules that apply only if the terms of the Trust fail to deal with a particular issue or problem. Consequently, a settlor is normally free to override many of these *default* laws included in the MTC. The MTC describes the duties of the trustee to include: (i) keeping beneficiaries reasonable informed of the administration of the Trust; (ii) complying with a beneficiary's request for information that is reasonably related to the trust's administration; (iii) administering the trust assets solely in the interest of the Trust's beneficiaries; and (iv) dealing impartially if the Trust has two or more beneficiaries.

Not *Default* Rules: However, a couple of these MTC rules cannot be overridden by the settlor's direction in the Trust instrument. Thus, they are not *default* rules that the settlor can choose to ignore. The two non-*default* rules (there are others but not relevant to disclosures) include:

(a) the duty of the trustee to administer the Trust in accordance with MCL 700.7801, i.e., to administer the Trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries- [MCL 700.7105(2)(b);] and

(b) the duty under MCL 700.7814(2) to provide beneficiaries with the terms of the Trust and information about the Trust's property and to notify *qualified* trust beneficiaries of an irrevocable Trust of the existence of the Trust and the identity of the trustee. [MCL 700.7105(2)(i).]

Foreign Laws: While it is unlikely that foreign laws that require a Trust's registration or beneficiary disclosure would apply to a purely U.S. based Trust, or

that a foreign country would even have jurisdiction over the U.S. based Trust's administration, it is still possible that a foreign country may some day claim that the Trust must be registered with that foreign country and disclose its beneficiaries if a beneficiary is a resident of that country.

Example 1: An irrevocable Trust exists with multiple beneficiaries, like a *dynasty* Trust, yet only one trust beneficiary currently resides in a foreign country that mandates Trust registration and disclosure obligations. The other trust beneficiaries will not be pleased if the trustee complies with the foreign country's registration and disclosure requirements, as such compliance might publicly reveal sensitive, identifying information about the Trust or its beneficiaries. Or the cost borne by the Trust to comply with these foreign registration and disclosure rules is perceived by the trust beneficiaries as a 'needless' financial burden. Consequently, almost all the trust beneficiaries object to the trustee's intent to comply with the foreign law and its ongoing compliance requirements, solely because only one trust beneficiary chooses to reside in a foreign country. Yet if the trustee fails to comply with the foreign country's registration and disclosure obligations, that country could then penalize its resident trust beneficiary for the trustee's failure to comply, thus possibly triggering a breach of the trustee's fiduciary duty to treat all trust beneficiaries impartially.

Example 2: Some foreign countries impose the reporting obligation on the trust beneficiary, not the trustee. A 22-year-old trust beneficiary, after studying at the Sorbonne in Paris for a few years, decides to reside in France after college. She is one of many beneficiaries of a *dynasty* Trust established by her wealthy grandparents. The trustee of the *dynasty* Trust normally has the duty to keep all beneficiaries informed. Consequently, the trustee will be required to provide to this one 22-year-old trust beneficiary enough information about the Trust for her to comply with the foreign reporting obligations. However, that *dynasty* Trust is drafted as a *silent* Trust under Michigan's soon-to-be-enacted *silent* Trust Act. [Proposed MCL 700.7409a.] The trust beneficiary only knows that the Trust exists, but she has no knowledge about its assets or its terms, only that she must wait 25 years before she entitled to receive information about the Trust and

its terms. In effect, the trust beneficiary cannot comply with France's registration and reporting requirements.

Planning to Deal with Foreign Registration and Reporting Requirements: Trust instruments should be drafted in such a way that makes it easier for a trustee to make decisions with respect to foreign registration and reporting requirements to limit the trustee's potential liability for reporting or not reporting. A few Trust instrument provisions to be considered follow:

Duty to Investigate: The Trust instrument might clarify the trustee's duty investigate the scope and application of foreign law reporting requirements. While this provision might be a bit extraordinary for most Trusts, it is important to remember that the trustee is expected to consider the circumstances and needs of the beneficiaries in administering a discretionary Trust and in deciding whether to make distributions to the trust beneficiary. Accordingly, it seems reasonable or prudent for the trustee to ask whether any trust beneficiary is a resident in a jurisdiction that imposes reporting obligations.

Request Information from Beneficiary: The Trust instrument might expressly authorize, but not obligate, the trustee to periodically request information with regard to a beneficiary's domicile or tax residence and note that the trustee can rely on the information provided by the beneficiary or on the beneficiary's behalf and that the trustee is relieved from liability for any act or failure to act taken in good faith reliance on any information so provided.

Authorize Compliance with Foreign Laws: The Trust instrument might expressly authorize but not obligate the trustee to comply with any known foreign registration or disclosure requirement, notwithstanding that compliance may not be legally required if the foreign country does not have jurisdiction over the trustee and notwithstanding that the cost of compliance may be prejudicial to one or more trust beneficiaries or others who may in the future become beneficially interested in the Trust.

Rely on Foreign Legal Counsel Advice: The Trust instrument might expressly allow the trustee to rely without further investigation on an opinion of foreign legal counsel as to the interpretation of the relevant foreign laws that purportedly impose reporting requirements and whether a disclosure is, in fact, legally required. The trustee would then be relieved from liability for any action taken, or not taken in reasonable reliance on that foreign counsel's advice.

Shift Compliance Costs to Beneficiary: The Trust instrument might provide the trustee with discretion to charge the cost of compliance with registration and reporting, or the fees of foreign legal counsel, to a particular trust or trust share that benefits only the beneficiary whose connections to that foreign jurisdiction caused the reporting obligation.

Authorize Ignoring Foreign Reporting if Beneficiary Jeopardized: The Trust instrument might authorize the trustee to ignore and refuse to comply with any foreign country reporting obligation that the trustee concludes is contrary to the best interests of the trust beneficiaries, e.g., the trustee is concerned that a disclosure of information about the Trust or about a particular beneficiary would put that beneficiary's security at risk.

Temporary Removal of Beneficiary: The Trust instrument, if a wholly discretionary trust, might give to a trust director the authority to temporarily remove an individual as a trust beneficiary, i.e., the beneficiary whose residence abroad is causing the foreign reporting obligation. This power to temporarily eliminate a trust beneficiary is not much different than the trustee's sole and absolute discretion to refuse or make distributions to a beneficiary for a period.

Conclusion: While most Trusts that we deal with do not have beneficiaries living abroad. But we also know that we live in a highly mobile world with international companies and employment opportunities. As 'corporate transparency' is now a world-wide expectation, it is reasonable to believe that

some long-term Trusts will have beneficiaries who live abroad. As such, the need for unique Trust provisions that address compliance with foreign registration and reporting may not be as extreme as we might otherwise imagine, particularly in the case of *dynasty* Trusts that are expected to last for multiple generation.