

ORGANIZATION AND OPERATION OF NEW HAMPSHIRE FAMILY TRUST COMPANIES

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Beginning in 2006, the New Hampshire legislature has enacted trust and banking law reforms that have established the state as a jurisdiction of choice for nondepository trust companies (“NDTCs”). The purpose of this legislation is to build an infrastructure to support a thriving trust service industry and the white collar jobs and tax revenues it can produce. One category of NDTCs is a type of private trust company referenced in RSA Chapter 392-B (the “Act”) as a “Family Trust Company” (“FTC”)¹. An FTC can offer families of extraordinary wealth (generally, \$100 million and above) an opportunity to have their own trust companies to manage their wealth over generations. This is particularly true since the coordination of wealthy families finances and other affairs through the other popular vehicle, the family office, has recently been subject to stricter SEC regulations. Information relating to FTCs that is filed with the New Hampshire regulator, the Bank Commissioner, is confidential and not open to public inspection. New Hampshire is one of only a handful of states that have enacted laws providing for a lighter touch regulatory regime of FTCs, and grants the Commissioner the discretion to waive the application of any one or more regulatory requirements that would otherwise apply.

This alternative FTC regime, together with recently enacted state-of-the-art trust laws, make the Granite State an optimal location for trust planning and administration – particularly among the less progressive states in the northeast. Any family with resources sufficient to leverage the benefits of an FTC should give serious consideration to doing so in New Hampshire.

What is an FTC?

An FTC is a company chartered by the Bank Commissioner to provide trust and investment services to members of a single family. The FTC is prohibited from transaction business with the general public. Its charter expressly prohibits the company from making loans and accepting deposits. It is regulated by the New Hampshire Banking Department (the “Department”).

¹ This M&K White Paper is devoted to FTCs. The other category of NDTC is a “public” NDTC that is the subject of a separate M&K White Paper.

Who Can Benefit from a FTC's Services?

What constitutes the members of a family the FTC serves is determined by reference to a "designated person" from whom all relationships are established. It is important to think carefully about the identity of that person. He or she is the key link in the class of persons who may be served by the FTC. Under the Act, family members as defined to include:

- **"Family Members"**

- Any individual within the fifth degree of lineal kinship to the designated relative.
- Any individual within the ninth degree of collateral kinship to the designated relative.
- The spouse or former spouse of the designated relative and of any individual qualifying as a family member.
- A company controlled by one or more family members who possess, directly or indirectly, the power to direct or cause the direction of the Company's management and policies whether through the ownership of voting securities, by contract, or otherwise.
- A trust established by a family member or by an individual who is not a family member if non-charitable beneficiaries who are family members represent a majority of interest in the trust.
- The estate of a family member
- A charitable foundation or other charitable entity created by a family member.

A legally adopted individual is treated as a natural child of the adoptive parents. Lineal kinship refers to a family member who is a direct lineal descendant of the designated relative. Collateral kinship refers to a relationship that is not lineal, but stems from a common ancestor. Degrees are calculated by adding the number of steps from the designated relative through each person to the family member either directly in the case of lineal kinship or through the common ancestor in the case of collateral kinship. No company, trust, charitable foundation, or other charitable entity is allowed to qualify as a family member if the Commissioner determines that the entity was organized or operated for the purpose of evading the limitations of the Act.

- **Non-Family Members**

The Act also allows an FTC to engage in any sales, solicitations, arrangements, agreements, or transactions to provide services, whether or not for a fee, to no more than 15 natural persons who are not family members. In order for a person to be eligible to receive those services, the person must be: (i) an employee of the FTC or of a trust or company that is a family member; and (ii) engaged principally in providing services to the FTC or its fiduciary accounts.

What is the Process for Chartering an FTC?

The organization of an FTC is commenced by the filing by at least 3 organizers of a petition to the Commissioner requesting the grant of a charter. An FTC may operate in corporate or limited liability company form. The minimum capital is \$250,000, although the actual capital may be higher if the Commissioner determines the risk attendant to a particular FTC requires more than the minimum. The capital may be invested in "prudent investor" securities, subject to actions prohibitive on holding concentrated positions. Each FTC must pledge securities or post a surety bond in an amount of up to \$1,250,000 (\$300,000,000 for FTCs with Banking Department ratings of 3 or lower) to defray the Department's expenses if the FTC fails and must be liquidated under the Department's supervision.

To attain the status of an FTC (versus a public NDTC), the organizers must request the Commissioner to allow the company to be exempt from the normal requirements that apply to public NDTCs. The petition is accompanied by an application fee of \$10,000 and required information relating to the proposed company and its organizers, including the identity of the designated relative. All information related to the petition is confidential if the petitioners are granted FTC status.

If the Commissioner is satisfied with the information submitted by the organizers, the Commissioner will render a decision granting the petition. No notice or public hearing is required. In rendering a decision, the Commissioner will consider whether: (i) the proposed organizational and capital structure and the amount of initial capital appear adequate; (ii) whether the proposed officers and directors or managers, as a group, have sufficient experience, ability, standing, competence, trustworthiness, and integrity to demonstrate that the proposed FTC will be free from improper or unlawful influence and otherwise will operate in compliance with law, and (iii) that success of the proposed FTC is reasonably probable and whether the proposed name of the proposed FTC is likely to mislead the public as to its character or purpose or is the same as a name already adopted by an existing bank, savings association, or trust institution in New Hampshire, or so similar thereto as to be likely to mislead the public.

If the Commissioner approves the issuance of a charter, then the organizers have 90 days to file the FTC's organizational documents with the New Hampshire Secretary of State. The Secretary will then issue a Certificate of Organization that will constitute the FTC's special charter. The organizers must then deposit the required capital and provide the Commissioner with the names and addresses of the FTC's investors and the equity interests issued to each of them. The Commissioner will examine the list and confirm the posting of the required capital. If the Commissioner approves the investor's list and confirms the capital commitment, the Department will issue a certificate of authority to engage in business. The FTC must commence doing business as an FTC within a two year period after the issuance of the certificate or the certificate will lapse, although the Commissioner can extend that period for an additional year for good cause shown.

What Operational Requirements Apply to FTCs?

An FTC is required to have a board of not less than 3 directors, trustees, or managers who need not be residents of New Hampshire or the United States, unless the Commissioner issues an order requiring that no more than one of them to be a resident based on a finding that the FTC's safety and soundness is likely to be impaired. There is no absolute requirement that an FTC have New Hampshire resident officers, directors, managers or employees, and the Act imposes no requirement that the FTC maintain a physical presence in the state.²

The board of directors, trustees, or managers of an FTC must meet on a regular basis as often as necessary but not less than 4 times per year, unless the Commissioner issues an order requiring directors, trustees or managers to meet more frequently, based on a finding that the FTC's safety and soundness is likely to be impaired. The officers include an executive officer or officers, a secretary, a treasurer, and such other officers as may be prescribed in the FTC's organizational documents. The officers, except the treasurer, must be elected annually. The treasurer is also elected by the board of directors or managers but serves at their pleasure.

To maintain its status as exempt from the more onerous requirements applicable to public NDTCs, an FTC must file with the Commissioner an annual certification that it is in compliance with the provisions of the Act and the conditions and limitations of all exemptions granted. This annual certification is required to be filed in the form required by the Commissioner and accompanied by a fee of \$100. The annual certification is required to be filed on or before December 31st of each year. The Commissioner may examine or investigate the FTC periodically as necessary to verify the certification.

No more than once every 10 years after its organization, an FTC may designate, in any annual certification, a new designated relative to be effective on January 1st of the following year. This enables the family members served by an FTC to evolve over time. A designation of a new designated relative is accompanied by a fee of \$1,000. No former family member who is rendered ineligible to receive services as a family member as a result of the designation of the new designated relative is permitted to continue to receive services as a family member from the FTC on or after the new designated person is appointed.

An FTC may lose its status as a non-public NDTC if it fails to comply with the requirements of the Act or violates orders of the Commissioner. An FTC serving a broader class of persons than those permitted (i.e., family members plus 15 others) would become a public NDTC and be subject to all applicable requirements of New Hampshire banking law. An FTC may voluntarily convert its charter to that of a public NDTC and engage in business with the public if requested to do so by the Commissioner.

²Any given FTC may choose, however, to maintain a physical presence in leased or owned office space, or contract with a vendor to provide a "virtual" presence with leased space and employee, to achieve state income tax or other foreign state jurisdictional objectives.

If you wish to discuss the features of family trust companies in more detail, please contact Joe McDonald or Amy Kanyuk at (603) 228-9900.