

# The Policy and Provisions of the Trust Modernization and Competitiveness Act of 2006

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## **I. INTRODUCTION**

On June 20, 2006, Governor Lynch signed into law the “Trust Modernization and Competitiveness Act of 2006.”<sup>1</sup> According to the act, the purpose of the TMCA is “to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services.”<sup>2</sup> In signing the bill, Governor Lynch hoped “to make New Hampshire first in the country in the new national market for trust services and the good, high-paying jobs in that industry.”<sup>3</sup>

Think trust law is boring and arcane? Well, think again! The *Wall Street Journal* reported on TMCA’s enactment just two days after the Governor signed the bill, stating that the “latest entrant in the trust wars is New Hampshire, whose governor signed into law this week a bill that seeks to surpass most other states in innovative trust features.”<sup>4</sup>

This article examines this important legislative initiative which makes significant changes to New Hampshire’s statutes in two areas: (1) those governing trust companies, which are regulated by the Banking Department.; and (2) those governing the establishment and administration of trusts.

First, we summarize the principal policy considerations that led to enactment of the TMCA. Second, we identify and discuss some of the important provisions of the TMCA. We conclude with some thoughts about what will be required if New Hampshire intends to maintain a leading position in this area.

## **II. POLICY CONTEXT FOR ENACTMENT OF TMCA**

Given the topic of this article – laws regulating trust companies and trusts, not necessarily the most scintillating of legal issues – one might question why any reader

other than the authors (who love this stuff) would continue to read further. In this section, we try to entice the reader with a focus not on the technical provisions of the bill, but rather on the important policy reasons that led to very broad support by our state’s policy-makers, most of whom are not lawyers.

For these legislative sponsors, the TMCA is about jobs for New Hampshire citizens. The hope is that by affording the best legal “infrastructure” for trusts and trust services, New Hampshire can attract trust companies and other businesses that offer trust administration and wealth management services, and that, in turn, these businesses will provide good jobs to our citizens.

### **A. Why Now?**

Why has this initiative occurred at this time (and not 20 years ago)? In 1999, the Boston College Center on Wealth and Philanthropy (then the Social Welfare Research Institute) published a study that projected a wealth transfer of \$41 trillion by the year 2055 as Americans pass their accumulated assets from one generation to the next.<sup>5</sup> The authors of the study have characterized this transfer as “the largest intergenerational transfer of wealth in the history of the United States.”<sup>6</sup> As indicated below, this unprecedented transfer of wealth, coupled with a booming personal trust business across the nation, has helped to create a new “national fiduciary services market” for trust services.

### **B. How Does Wealth Get Transferred?**

Such an historic wealth transfer will have many repercussions for our society and our legal system.<sup>7</sup> Wealth is transferred by many common mechanisms, including wills, testamentary and lifetime trusts, gifts, and other sales and assignments. Moreover, wealth increasingly is being transferred to charitable organizations, charitable trusts, private foundations, and similar charitable entities. These wealth transfer mechanisms and charitable entities are governed by and subject to various systems of oversight and regula-

tion. For example, wills must comply with state statutory requirements and are typically subject to oversight by probate courts.<sup>8</sup> The governing laws and regulations are sometimes arcane and complex and often fail to attract the attention necessary to ensure that they reflect and respond to economic and social changes.

### **C. Trust Law Gets Modernized**

For centuries, trusts have been used by property owners to accomplish their wealth management and transfer goals. A “trust” may be defined as “a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”<sup>9</sup> A “settlor” or “grantor” of a trust is the person who creates the trust; a “trustee” is the person who holds legal title to the trust property; and the “beneficiary” is the person who is to benefit from the trust.<sup>10</sup>

While the original source of trust law was the common law, there has been much recent work to codify basic trust law rules in statutes. In 2000, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) completed a comprehensive codification of the law of trusts, known as the model Uniform Trust Code. As stated by the project:

The primary stimulus to the Commissioners’ drafting of the Uniform Trust Code is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many states is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide states with precise, comprehensive, and easily accessible guidance on trust law questions.<sup>11</sup>

But the model Uniform Trust Code did not merely codify long-standing trust rules; it also codified several “innovative provisions.”<sup>12</sup>

The model Uniform Trust Code drafters are not alone in seeking to promulgate new and innovative trust law. Very recently, several states have entered a vigorous competition for a piece of “the booming personal-trust business.”<sup>13</sup> This competition should be viewed as a direct consequence of the projected historic transfer of personal wealth and the development of a “national fiduciary services market” where wealthy individuals interested in passing assets to their heirs and charities are more and more careful to select the most favorable state trust laws.

New Hampshire has not sat idly by while this trust law business transformation unfolds. In 2002, the New Hamp-

shire legislature granted trustees the authority to convert a trust into a “unitrust,” thereby enabling trustees to invest trust assets for “total return,” to the benefit of both the income and remainder beneficiaries of the trust.<sup>14</sup> In 2003, the Legislature provided settlors with express power to override the “rule against perpetuities,” thereby allowing so-called “dynasty” or perpetual trusts.<sup>15</sup> In 2004, the Legislature adopted New Hampshire’s version of the Uniform Trust Code (the “UTC”).<sup>16</sup> The next year, this reform continued with the enactment of significant improvements and technical corrections to the UTC.<sup>17</sup> Collectively, this legislation placed New Hampshire among the top states with progressive trust laws, but the enactment of the TMCA, in the opinion of some commentators, puts New Hampshire’s trust law in first place.<sup>18</sup>

### **D. The Role of “Trust Companies”**

Perhaps the most important aspect of establishing a trust is the selection of a trustee. A settlor must have the highest faith that the trustee will carry out all her instructions and serve the purposes of the trust and its beneficiaries.

Traditionally, settlors have selected trusted family members, friends, or lawyers to serve as trustees. Another option has been a corporate trustee, or a “trust company.” These corporate trust institutions provide services both to the *institutional market* (e.g., employee benefit plan administration, traditional corporate trust administration, custodial activities, investment advisory and stock transfer agency services) and to the *personal trust market* (e.g., acting as fiduciary of personal trusts and related services such as investment management and professional administration of trust affairs). Most people are familiar with the provisions of such fiduciary services by trust departments of commercial banks. Increasingly, however, fiduciary services are provided by *nondepository* trust companies (i.e., financial institutions that do not accept deposits).

Corporate trust institutions are subject to regulation, typically by federal or state banking authorities. Most states prohibit the conduct of a “trust business” except pursuant to a license or charter issued by state banking regulators. Traditionally, this regulation occurred within the framework of statutes governing banks. Recently, states have been enacting separate regulatory regimes for nondepository trust companies.<sup>19</sup>

Why might a person select a corporate trustee over an individual trustee, such as a family member or a lawyer? First, many trusts will exist for several generations, well beyond the life expectancy of a single individual. Therefore, a corporate trustee can provide trustee continuity throughout the term of the trust. To be sure, a settlor could implement a mechanism for the beneficiaries to appoint successor individual trustees. However, after a time, the class of beneficiaries may include persons born after the settlor’s death, whose judgment the settlor cannot know. Moreover,

over time, the class of beneficiaries is likely to grow and become more diverse, making it more difficult for those beneficiaries to reach a consensus on a new individual trustee. Second, through the specialization of its individual employees, a corporate trustee can bring a variety of expertise and skills to the table that any one individual trustee is unlikely to be able to offer. Finally, a settlor may have concerns about exposing an individual trustee to potential fiduciary liability. Similarly, and perhaps most importantly, in the event of liability, a settlor may find the “deeper pockets” of a corporate fiduciary more attractive because of its greater ability to make the beneficiaries whole in the event of an actionable loss.

### ***E. The National Fiduciary Services Marketplace***

The banking and financial services industry has been undergoing a revolution since the 1980s. Traditional regulatory and political barriers to the development of a national market for banking and trust services began to disintegrate during the late 1980s as states liberalized state branching and interstate banking laws, and allowed out-of-state institutions to acquire their banks. Federal law soon followed these trends.<sup>20</sup> Barriers between industries also have come down, as Congress in 1999 repealed the 1934 Glass-Steagall Act prohibition against affiliations between banks, securities and insurance companies.<sup>21</sup>

As traditional regulatory barriers to national competition were eliminated, several other legal developments fueled the development of a national fiduciary services market. As one example, the 1986 enactment of the federal generation skipping tax created pressure to allow perpetual trusts, an attractive estate planning strategy for wealthy individuals who wanted to avoid the depletion of their wealth through successive estate taxes imposed at their descendants' deaths.<sup>22</sup> This pressure, along with others, drove states to modernize various aspects of their “wealth management” laws.<sup>23</sup>

The combined effect of these changes was to encourage the development of national financial services firms that compete for business on a national and international scope, along with a coherent body of information regarding the benefits and burdens for wealth management presented by each state's legal system. Just 20 years ago, it would have been a rare occurrence to have a discussion with your local banker concerning whether you should consider locating a trust in another state. Today, the standard marketing materials of national financial services firms seek to attract customers across the nation by offering “products” that use the best state laws.

### ***E. New Hampshire and Jobs***

These fundamental changes in the national (and international) financial services marketplace lead us back to

the TMCA and the reason for its enactment — jobs. The enactment of the TMCA reflects an understanding of these trends — the projected record transfer of intergenerational wealth, the demand for favorable, flexible and modern trust laws, the need for competent trustees, and the development of a national fiduciary services market.

During legislative consideration of the TMCA, one of the bill's proponents sponsored a study by an economic consulting firm which examined the economic impacts of enacting favorable trust and trust company laws.<sup>24</sup> The study concluded that if New Hampshire were to enact favorable laws making New Hampshire a cutting-edge environment for the establishment of trust companies and trusts, it would experience an increase in anywhere from 855 to 3,997 jobs by 2010. This study also forecast a resulting increase in state business taxes of between \$785,900 and \$3,675,300.

It is important to note that this study did not project an increase in jobs from the mere creation of personal trusts governed by New Hampshire law. Rather, the favorable forecast was based on assumptions regarding the need to provide trust and financial services to personal trusts in the developing national fiduciary services market. The report summarized New Hampshire's opportunity as follows:

Trust companies, private banks, investment advisors, multi-family offices, and other financial services firms serve the needs of this market. In addition, non-investment professionals (attorneys, accountants, business managers) play important roles in working with successful Americans to manage, grow, protect, and transfer their wealth to future generations. There are, however, no “dominant” companies that manage this transfer of assets to the next generation of Americans. Even the largest private banks, for example, control less than 5.0% of the overall market. This makes it a dynamic arena with opportunities for both current players and new entrants. Because New Hampshire is so close to two of America's major financial centers, Boston and New York, it stands to gain jobs, income and tax revenue from taking a leadership role in this market. Indeed, New Hampshire is the only state in the Northeast that can move to the forefront; compete against Delaware and a few other states with favorable finance laws, such as South Dakota.<sup>25</sup>

### ***III. KEY PROVISIONS OF THE TMCA***

The provisions of the TMCA can be divided into three major categories. First, there are a number of provisions devoted to modernizing New Hampshire's statutes governing banks and trust companies, including the authorization of a new species of regulated trust company known as a “family fiduciary services company.” Second, the UTC,<sup>26</sup> which New Hampshire adopted in 2004<sup>27</sup> and amended in 2005,<sup>28</sup> was amended again in several important respects.<sup>29</sup> Finally, one of the last sections of the act adopts the Uniform Principal and Income Act.

## **A. Modernize Statutes Governing Trust Companies**

The TMCA amends sections of RSA 383, 384, 390 and 392, which are key provisions of Title XXXV of New Hampshire's Revised Statutes Annotated that establish the State's regulatory framework for banks, other depository institutions and trust companies. One commentator has characterized these provisions as follows:

These amendments are intended to modernize New Hampshire's trust company laws to be at least equivalent to the near majority of states that have updated their laws either based on the Conference of State Bank Supervisors' 1997 "Statutory Options for Multistate Trust Activities" or by adopting comparably flexible trust company acts.<sup>30</sup>

While none of these provisions by itself is revolutionary, all of them together represent a substantial clarification and improvement to New Hampshire's trust company laws.

### **1. More Flexibility for Nondepository Trust Companies**

A number of the TMCA amendments nudge New Hampshire's trust company statutes toward a more flexible regulatory regime for trust companies, especially nondepository institutions.<sup>31</sup>

For example, the TMCA amends RSA 383:9-d to provide express authority to the Bank Commissioner to allow a highly-rated nondepository trust company to satisfy the examination requirement through an off-site examination of a qualified audit report and fiduciary audit.

The TMCA also establishes new provisions that protect certain confidential information of nondepository trust companies, including so-called "family fiduciary services companies," from disclosure to the general public.<sup>32</sup> The Bank Commissioner may disclose confidential information to the public only upon first giving notice to the affected trust company.<sup>33</sup> These protections are designed to assure trust companies that the state will not disclose confidential information to a potential competitor of the trust company; they do not prevent law enforcement and other state agencies from accessing information required to fulfill their official duties.<sup>34</sup>

In addition, the TMCA replaces the prior law's approach to listing each of the powers held by a trust company with a more modern and comprehensive statement of powers.<sup>35</sup> Other long-time constraints on trust companies have been eliminated, including the mandatory requirement that all trust companies authorized to act as a trustee or executor must post a fiduciary bond.<sup>36</sup> Also, the TMCA repealed a prohibition against banking and trust institutions lending trust assets to their directors, officers or employees.<sup>37</sup> The TMCA recognized that this restriction is unnecessary given the duty of loyalty under both the common law and the

UTC with respect to loans of trust assets to trustees and their employees.

### **2. Updated Organizational Procedures**

Many of the trust company amendments update the process for organizing and chartering a trust company. Among other things, these provisions reduce the number of persons required to organize a trust company from 10 to three,<sup>38</sup> fully implement the 2004 legislative determination that trust companies may be organized as limited liability companies,<sup>39</sup> and eliminate outmoded concepts such as "par value" for capital stock.<sup>40</sup>

During legislative deliberations on the TMCA, a question arose concerning the role of the Secretary of State's office regarding filings of corporate documents. The TMCA clarifies that a trust company must file its organizational instrument with the Secretary of State, regardless of how it is organized.<sup>41</sup> In a surprising twist, the Legislature took steps to emphasize this point by adding the Secretary of State to the Board of Trust Incorporation (which must approve all bank and trust company charters) as "a nonvoting member of the board for the sole purpose of monitoring filings required to be made with the secretary of state."<sup>42</sup>

### **3. More Robust Minimum Capital Requirements and Application Fees**

The minimum capital requirement for a trust company has been raised from \$250,000 to \$500,000 from \$250,000.<sup>43</sup> In addition, the Bank Commissioner may require a nondepository trust company to pledge securities or a surety bond to cover liquidation costs if the institution should fail, but such additional security shall not exceed \$1,000,000.<sup>44</sup> Existing nondepository trust companies are required to meet the higher capital requirement by January 2010.<sup>45</sup>

The TMCA also increased the fee for seeking a trust company charter from \$1,000 to \$5,000.<sup>46</sup> Even with this increase, New Hampshire remains competitive with other leading trust company states.

### **4. Authorization of "Family Fiduciary Services Companies"**

Finally, the TMCA enacts provisions that authorize a new type of regulated trust company, the "family fiduciary services company."<sup>47</sup> Unlike a traditional trust company that seeks to provide trust services to a wide range of customers, a family fiduciary services company is a nondepository trust company that is organized "to engage in business with one or more family members and [that] does not transact business with the general public."<sup>48</sup> To reflect the fact that such a limited scope institution is likely to present much less regulatory risk than an institution that provides services to the general public, the TMCA authorizes the Bank Commissioner to exempt a family fiduciary

services company from regulatory requirements.<sup>49</sup>

By expressly authorizing the formation of a trust company focused solely on a single family, the TMCA acknowledges that such family trust companies are an increasingly common tool used nationally by wealthy families to manage their assets held in trust. Advantages of a family trust company include: (1) greater fiduciary continuity; (2) improved access to high quality investment management and other services; (3) a platform to develop stewardship in new generations of the family; and (4) increased protection against liability for individuals involved in making decisions concerning family trusts. With this enactment, New Hampshire has sent a strong signal to the national fiduciary services marketplace that it understands these developments and intends to be a leader in the field.

### ***B Revise and Update the Uniform Trust Code***

Perhaps the most notable changes to the Uniform Trust Code<sup>50</sup> are as follows: First, the controversial rules requiring the trustee to provide certain information to certain trust beneficiaries, *notwithstanding the terms of the trust*, have been eliminated. Second, the provision concerning a trustee's liability with respect to the duty to diversify the investments of a trust has been modified. Finally, there now is guidance concerning the duties and liabilities of persons other than trustees who might be involved in administering a trust, and how responsibility and information is shared among the trustee and those other persons.

These three developments are notable particularly in terms of the policy behind the TMCA, namely, attracting trust business to the state of New Hampshire. Together, and even individually, they make New Hampshire a more attractive jurisdiction to settlors, who now will have more freedom to set the terms of the trust, and to trustees, who will face less uncertainty and risk.

These changes and other interesting changes to the UTC are discussed in further detail below.<sup>51</sup>

#### ***1. Notice to Beneficiaries***

One of the most controversial provisions of the UTC is a rule that required the trustee to provide certain information to beneficiaries, regardless of whether the terms of the trust relieve the trustee from that duty.

A bit of background about the UTC may be helpful here. Generally, the UTC is a set of default provisions that apply *only if* the terms of the trust do not provide otherwise or do not sufficiently address a particular issue.<sup>52</sup> In other words, generally the settlor is free to establish the terms that will govern the administration of the trust. However, there are several UTC provisions that prevail, *regardless* of the terms of the trust. These "mandatory" rules are enumerated in section 105(b). Prior to the TMCA, one of these mandatory rules – namely, section 105(b)(8)<sup>53</sup> – was the duty of the trustee of an irrevocable trust to provide certain information to certain beneficiaries and other parties, *even*

*if* the settlor did not wish such disclosure and, indeed, directed the trustee *not* to provide the information.

Following the trend in most jurisdictions that have adopted the model Uniform Trust Code,<sup>54</sup> the TMCA deleted the provisions of what was section 105(b)(8).<sup>55</sup> With the elimination of those provisions, a settlor who establishes a trust in New Hampshire now can set the rules concerning when, if ever, and to which beneficiaries, if any, a trustee must provide information concerning the trust.<sup>56</sup>

#### ***2. The Duty to Diversify***

Prior to the enactment of the UTC in 2004, the "prudent investor rule" applied to New Hampshire trusts pursuant to RSA 564-A:3-b. When the UTC was enacted in 2004, RSA 564-A:3-b was repealed and the prudent investor rule was re-codified as article 9 of the UTC.

Under the prudent investor rule, a trustee, among other things, has a duty to diversify the investments of a trust.<sup>57</sup> The duty, however, is not absolute. There are two explicit exceptions to the duty.

First, a trustee may be relieved of the duty to diversify by the terms of the trust.<sup>58</sup> In fact, the entire prudent investor rule is a default rule that, according to section 901(b) of the UTC, the settlor may expand, restrict, eliminate, or otherwise alter by the terms of the trust. Moreover, under section 901(b), the trustee will not be personally liable, or "surcharged," for not complying with the prudent investor rule or a particular aspect of it "to the extent that the trustee acted in reasonable reliance on the provisions of the trust" that altered or eliminated the rule. Therefore, as with any of the other default rules of the UTC, the terms of the trust may alter or eliminate the trustee's duty to diversify the trust investments.<sup>59</sup>

The second exception to the trustee's duty to diversify the trust investments is contained in section 903. Under that section, the trustee need not diversify if "the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." Thus, for example, the trustee may consider the tax consequences of selling a large block of stock with very low tax basis. Another example of "special circumstances" is a trust that clearly was designed to hold a family business or vacation home.<sup>60</sup>

The duty to diversify and the exceptions to it existed prior to the enactment of the TMCA. The TMCA, however, modified these rules in response to a relatively recent rash of stock concentration cases, some of which resulted in a trustee surcharge. Apparently, these cases were having or were perceived as having a chilling effect on the willingness of trustees to retain large concentrations of stock that comprised the initial trust corpus, despite the trustee's determination or belief that holding the stock was intended by the settlor and therefore was desirable or appropriate.<sup>61</sup> Specifically, the TMCA amended section 901(b), by adding the following italicized language: "A trustee is not liable to

a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust *or court order or determined not to diversify the investments of a trust in good faith in reliance on the express terms of the trust or a court order or pursuant to [section 903].*”

Adding this language appears to have done two things. First, section 901(b) now addresses the issue of a trustee’s liability *specifically* with regard to the duty to diversify.

Second, and much more significantly, it provides a “good faith” standard for judging the trustee’s actions in imposing liability with regard to trust diversification. In other words, a person challenging a trustee’s investment decisions must show that the trustee acted in bad faith in making a determination not to diversify trust investments before the trustee can be surcharged for any losses that occur as a result of the failure to diversify.

Settlors should find the good faith standard useful. They can establish trusts specifically intended for holding large concentrations of stock or specifically intended to consist primarily of, for example, interests in a closely-held business or a vacation home, with less concern that the trustee will sell the trust assets out of a fear of being surcharged for not diversifying. And of course, this good faith standard should be comforting to trustees. While a court may find that the trustee’s determination not to diversify was inappropriate and therefore may force the sale of a concentrated position, the trustee will not be surcharged unless there is a finding of bad faith. In sum, this change to section 901(b), which is somewhat unique, will make New Hampshire an attractive jurisdiction in which to establish a trust.

### **3. Trust Protectors, Trust Advisors and Directed Trusts**

Increasingly, settlors are appointing third parties – that is, persons other than the trustee – to exercise certain trust functions, to oversee the trustee’s performance of certain trust functions, or to direct the trustee’s exercise of certain trust functions. In practice, persons appointed to exercise powers and discretions normally exercised by the trustee, such as investment management authority, typically are referred to as “trust advisors.” On the other hand, persons appointed to exercise powers and discretions *not* normally exercised by the trustee, such as the power to remove and replace the trustee and the power to modify or terminate the trust, typically are referred to as “trust protectors.”

Enacted as part of the original UTC legislation in 2004, section 808 recognizes the trend of settlors to confer trust functions on third parties and ratifies the use of such third parties.<sup>62</sup> Specifically, section 808(b) provides that “[i]f the terms of a trust confer upon a person [the] power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person

holding the power owes to the beneficiaries of the trust.” Section 808(c) recognizes that the terms of the trust may confer upon a person (including the trustee) a power to direct the modification or termination of the trust. And section 808(d) provides that a third party with a power to direct “presumptively is a fiduciary,” with a duty “to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries” and subject to the corresponding liability for breaching a fiduciary duty.

While the model Uniform Trust Code provisions generally authorize “directed trusts,” the increasing use of “trust advisors” and “trust protectors” in trust documents has raised concerns about some specific areas of uncertainty. The TMCA takes significant steps to address these areas. Under the act, the UTC now has an entire new article devoted to trust protectors and trust advisors. In addition, other coordinating provisions have been added to the UTC and coordinating amendments have been made to existing UTC provisions.

In examining these new and amended provisions, it is useful to start with an explanation of some new definitions contained in section 103. Section 103(23) defines a “directed trust” as a trust with respect to which one or more persons is given the authority to direct or consent to a fiduciary’s (typically the trustee) actual or proposed decision, including investment decisions and decisions concerning distributions. Note that a “directed trust” is not new to the UTC; a directed trust already was covered by section 808 of the UTC. Now, however, the type of trust to which section 808 applies has a specific definition.

Section 103(24) defines an “excluded fiduciary” as a fiduciary who is excluded from exercising a power or who is relieved of a duty because such power or duty is vested in another person. For example, the terms of a trust might confer investment authority, but no other authority, solely upon a trust advisor, to the exclusion of the trustee. Accordingly, with respect to investment decisions the trustee is an “excluded fiduciary,” and with respect to all other trust functions the trust advisor is an excluded fiduciary. Perhaps somewhat redundantly, new section 711 confirms that a fiduciary is treated as an “excluded fiduciary” when it follows the direction of a trust protector or trust advisor, in accordance with the terms of the trust or court order.

Sections 103(27) and 103(28) provide the definitions of trust advisor and trust protector, respectively. It should be noted that a person authorized to appoint a trust protector or trust advisor also is considered to be a trust protector or trust advisor, respectively.<sup>63</sup> This is important, because as described below, unless the terms of the trust provide otherwise, trust protectors and trust advisors – and therefore, those given the authority to appoint them – are fiduciaries. The new article devoted to trust protectors and trust advisors is article 12. Sections 1201 and 1203 provide non-exclusive lists of the types of trust functions that can be conferred upon trust protectors and trust advisors, respectively.

Importantly, like section 808(d), sections 1202 and 1204 confirm that these third parties are fiduciaries, subject to fiduciary liability for breaches of duties vested in them. Perhaps of greatest significance to both settlors and trustees are sections 1206 and 1207. Section 1206 provides that the trustee, as an “excluded fiduciary,” does not have a duty to review the actions of a trust protector or trust advisor, and section 1207 insulates the trustee from liability for losses relating to duties vested solely in a trust advisor or trust protector. These provisions provide comfort to trustees, and to the relief of trust settlors and trust beneficiaries, eliminate the expense of needless trustee oversight. Finally, section 1205 clarifies that New Hampshire courts have personal jurisdiction over trust advisors and trust protectors, who are subject to the laws of this state.

Two other important and unique provisions are sections 703(i) and 813(k), requiring fiduciaries to communicate with one another on matters relevant to their respective duties and functions.

Other new UTC provisions concerning trust protectors, trust advisors, and directed trusts include section 711 (concerning directed trusts) and section 712 (concerning vacancies in the office of trust advisor or trust protector).

Like most other provisions of the UTC, the new provisions concerning trust advisors, trust protectors, and directed trusts are default rules that apply when the terms of the trust are silent or inadequate in resolving a particular issue. Thus, by enacting the TMCA, New Hampshire joins a number of states, including Delaware, Wyoming, Idaho, Alaska, and South Dakota, in providing greater guidance concerning these third parties and the respective rights and obligations of all of the fiduciaries involved in administering a trust.

#### **4. Other Notable Amendments to the UTC**

There are other amendments to the UTC under the TMCA that are worthy of mention.

Section 111 has been amended to confirm that one of the matters that may be resolved by a nonjudicial settlement is the termination or modification of a trust. Indeed, section 111 has been amended to clarify that the list contained in section 111(d), enumerating the types of matters that may be resolved by a nonjudicial settlement, is not an exhaustive list.

Sections 802(f) through (h) have been repealed and reenacted, and section 807(a) has been amended, to provide greater latitude for a trustee or an affiliate of the trustee to engage in transactions with a beneficiary, and for a trustee to engage in transactions with an affiliate, without violating the trustee’s duty of undivided loyalty to the trust beneficiaries. These revised provisions reflect the changes in the banking and financial services industry discussed earlier in this article.

Sections 405(c) and 412(a) have been amended to confirm the role of the director of charitable trusts in certain

proceedings. Otherwise, UTC sections specific to charitable trusts have not been amended.

Section 409, concerning so-called “purpose trusts,” has been amended to remove the time limit on such trusts. Previously, such trusts were enforceable only for 21 years.

### **C. Restore and Modernize the Uniform Principal and Income Act**

Under section 68 of the TMCA, New Hampshire adopted the Uniform Principal and Income Act (“UPIA”), codifying it at RSA 564-C.<sup>64</sup>

The UPIA establishes rules concerning the “income”<sup>65</sup> of a trust or an estate and the “corpus” or “principal” of a trust or an estate, including whether property received by a trust (referred to as “receipts”) is income or is principal and whether property disbursed from a trust (referred to as “disbursements”) should be charged to income or to principal. Such rules are important, because certain beneficiaries of a trust or an estate may be entitled only to “income” and certain beneficiaries may be entitled only to “principal.” Therefore, whether a particular receipt is deemed income or principal and whether a particular disbursement is taken out of income or out of principal can have a financial impact on the beneficiaries.

It should be noted that, like the UTC, the UPIA is a set of default rules that apply only if the terms of the governing instrument do not otherwise provide.<sup>66</sup>

This section does not contain an extensive discussion of the UPIA, which is beyond the scope of the article. Instead, this section will focus on those provisions and issues that relate to the policy behind the TMCA, as well as certain noteworthy provisions of the UPIA.

#### **1. A Set of Rules!**

The mere fact that New Hampshire trustees will now have a set of rules is itself significant. Without the UPIA, trustees have had to rely on common law rules in the absence of guidance in the governing instrument. As with most areas of law in New Hampshire, the common law concerning principal and income is sparse. Therefore, trustees often have had to administer trusts without any clear New Hampshire authority on principal and income allocation issues, relying instead on the law of other states, the restatement of the law on trusts, and treatises such as Scott and Bogert. Moreover, the common law sometimes is not well enough developed to provide effective guidance. Scott and Bogert likely have little to say about modern financial instruments, products, and arrangements. For example, there is little, if any, common law concerning how a trustee should treat the receipt of a minimum required distribution from an IRA of which the trust is a beneficiary. Thus, the UPIA is an important resource for New Hampshire trustees and beneficiaries, offering comprehensive guidance on questions relating to principal and income allocations when the governing instrument does not provide the answers.

## 2. Section 104: The Power to “Adjust”

The most powerful provision of the UPIA is section 104. Section 104 of the UPIA authorizes a trustee to make “adjustments” between principal and income if certain conditions are met. In other words, under certain circumstances, a trustee can re-classify as “income” an asset or a portion of an asset that currently is classified as “principal,” and vice versa. As mentioned above, certain beneficiaries of a trust or an estate may be entitled only to “income” and certain beneficiaries may be entitled only to “principal.” Thus, re-classifying assets – “adjusting” between principal and income – can affect the beneficiaries’ interests in the trust.

Section 104 is a very important corollary to the prudent investor rule, particularly in our current economic environment of low interest rates and low-dividend-yielding stocks, allowing trustees to fully embrace modern portfolio theory. The prudent investor rule instructs a trustee to invest the trust assets as a prudent investor would, taking into account the purposes and terms of the trust. Moreover, investments are not to be viewed individually; no particular investment is *per se* or inherently prudent or imprudent. Instead, the trust investments are to be viewed as a portfolio, and the portfolio as a whole should fit the purposes and provisions of the trust.

Now you are asking yourself, what do the prudent investor rule and UPIA section 104’s power to adjust have to do with one another? The missing piece of the puzzle has to do with the trustee’s “duty of impartiality” with regard to the trust beneficiaries. That is, unless the terms of the trust provide otherwise, the trustee has a duty to administer the trust in a manner that is fair to *all* of the trust beneficiaries. In other words, in administering the trust the trustee cannot favor one beneficiary or group of beneficiaries over another beneficiary or group of beneficiaries. Consider a trust that provides that beneficiary A is to receive all of the income of the trust for life, and beneficiary B is to receive the principal of the trust upon A’s death. The duty of impartiality, together with the prudent investor rule, says that the trustee must invest the trust assets in a way that will balance A’s desire for trust “income” – traditionally, interest, dividends, and rent – and B’s desire to grow the trust principal. At the risk of oversimplifying, the trustee, then, probably should not invest entirely in bonds and other fixed income assets that are unlikely to produce enough growth even to preserve the purchasing power of the principal; nor should the trustee invest entirely in non-income producing or under-productive growth equities.

Because section 104 allows a trustee to re-classify an asset from “principal” to “income,” section 104 “enables a trustee to select investments using the standards of the prudent investor without having to realize a particular portion of the portfolio’s . . . return in the form of traditional trust accounting income, such as interest, dividends, and rent.”<sup>67</sup> With section 104 in its toolbox, the trustee may

invest for “total return” – that is, in a manner that will grow the portfolio, whether that growth is in the form of “income” or capital appreciation – without violating the duty of impartiality and without running afoul of, and in fact better able to satisfy, the prudent investor rule.<sup>68</sup>

## 3. Noteworthy Variations from the Model Act

The UPIA is substantially similar to the model act. However, the TMCA added many “bells and whistles.” Some of these bells and whistles delineate the fiduciary’s *duties* with respect to certain *powers* granted by the UPIA. In other words, these provisions answer the question as to whether the fiduciary has a *duty* to make an affirmative determination about whether or not exercise a given power. Some of the bells and whistles describe the fiduciary’s exposure to liability for exercising certain powers. By reducing uncertainty, these added features make New Hampshire an attractive jurisdiction in which to establish a trust.

For example, like the model Uniform Principal and Income Act of 1997, section 104 gives the fiduciary the power to adjust between principal and income if certain requirements are met, as discussed above. The New Hampshire UPIA, however, adds three helpful and practical subsections that are not part of the model act. First, as with the California version of the UPIA, section 104(g) provides that a fiduciary does not have “a duty to make an adjustment, and a fiduciary is not liable for not considering whether to make an adjustment or for choosing not to make an adjustment.” Second, as with the California version of the UPIA, section 104(h) provides that the fiduciary may notify the beneficiaries of the proposed adjustment and if a beneficiary consents to the adjustment in writing or does not object in writing within a certain period of time, the fiduciary is not liable to that beneficiary for the adjustment. For purposes of notifying the beneficiaries, the virtual and other representation rules of article 3 of the UTC apply.<sup>69</sup> Section 104(h) also provides that the fiduciary or a beneficiary may petition the court to approve, deny, or modify the proposed adjustment. Finally, drawing from Delaware’s version of the UPIA, section 104(i) provides ordering rules concerning the income-tax character of the principal that is deemed to have been allocated to income when there is an adjustment from trust accounting principal to trust accounting income.

Another noteworthy departure from the model act relates to the allocation of trustee compensation, compensation of other investment advisors and custodians, and expenses for accountings, judicial proceedings, and other matters that involve both the income and the remainder beneficiaries of a trust. The model act allocates those charges equally to income and principal. Under New Hampshire’s version of the UPIA, the allocation of those charges is left to the discretion of the trustee.<sup>70</sup>

#### 4. *Deja Vu All Over Again!*

Many readers will recall that New Hampshire previously had adopted the UPIA, in 1997. After a short period, however, it was repealed retroactively, primarily due to the frustration executors and trustees, trusts and estates practitioners, and the probate courts experienced in applying the UPIA to estate and trust accountings required to be submitted to the probate court. The TMCA ensures that that experience will not be repeated. Section 602(d) provides that the UPIA is not to be construed to change the form of accounting required under the rules of the probate court. Thus, executors and trustees will continue to prepare the required probate forms in the same manner as they have in the past.

#### 5. *Effective Dates*

Although the effective date of the TMCA is August 19, 2006,<sup>71</sup> by its terms the effective date of the UPIA is January 1, 2007.<sup>72</sup> On that date, the UPIA will apply to (1) every *inter vivos* trust created on or after January 1, 2007; (2) every *inter vivos* trust created before January 1, 2007, but only upon the written election of the trustee delivered to the current income and principal beneficiaries of the trust; (3) the estate of every decedent who dies on or after January 1, 2007; (4) the testamentary trust of every decedent who dies on or after January 1, 2007; and (5) any other estate or testamentary trust if any interested person obtains the court's approval or if the court, on its own motion, so determines.<sup>73</sup>

### IV. CONCLUSION AND POSSIBLE NEXT STEPS

Will the hopes of legislators and others for jobs in a growing, national fiduciary services market be realized? Only time will tell. One point is clear, however: the competition among leading states to establish a foothold in this market will be fierce.

What steps might New Hampshire policy-makers take to strengthen its place in this developing market? A complete answer to this important question would be the topic for an entire article. However, the authors can identify three possible recommendations.

First, following the TMCA's enactment, the real focus of the impact of the initiative now shifts to the Banking Department. As noted above, many of the TMCA's provisions granted a broader authority to the Banking Department to establish more flexible rules and procedures for nondepository trust companies. How the Banking Department implements this new authority – adopting rules, processing applications, conducting examinations – will be critical to how New Hampshire's new laws are received by the major players in the financial services industry.<sup>74</sup>

- We recommend that the Banking Department, with the support of the Governor and leading legislators, initiate a working group with the private sector to develop a plan to implement the new authority provided by the TMCA. At a minimum, this “*TMCA Implementation Working*

*Group*” should include representatives of the New Hampshire Bankers Association, which was instrumental in enacting the TMCA. This group also should focus on additional statutory changes that may be required to continue to improve the state's trust company laws, by reducing regulatory burdens in a manner that maintains a safe and sound trust company environment.<sup>75</sup>

Second, as news of the TMCA's enactment of trust law reforms has hit the national media, other states already have responded by emphasizing that their laws are still better in some respects, and that their commitment to maintaining a leading status is better established. During deliberations on the TMCA, members of an “*ad hoc*” probate and trust law group worked extremely hard to review the legislation and offered substantial improvements to the original bill. This group, which is comprised of leading estate, probate and trust attorneys, representatives of the Charitable Trust Unit of the New Hampshire Department of Justice, representatives of the Trust Law Committee of the New Hampshire Bankers Association, and Probate Court judges and clerks, constitutes an effective, though informal, body to coordinate oversight of proposed legislation that addresses probate, trust and estate planning matters.

- We recommend that, with leadership and input from the Probate Court and the Governor, this “*ad hoc*” committee be strengthened into a more formal and regular task force. This “*Trust Law Task Force*” should maintain a comprehensive comparison of the trust laws of other leading states, with a view toward ensuring that New Hampshire's laws remain the best in the nation. This group could work closely with members of the legislature to provide thoughtful guidance on additional changes that could improve New Hampshire's trust laws.<sup>76</sup>

Third, one of the most attractive aspects of New Hampshire is that its state government is efficient, effective and accessible. The fact that legislation as comprehensive as the TMCA was enacted in one legislative session is evidence of our highly effective state government. While other state governments are typically not as agile and responsive, some have made building trust business a top priority.<sup>77</sup>

- We recommend that, with the leadership of the Governor, the economic development components of state government should be coordinated to communicate and market the state's now excellent trust company and trust laws to participants in the national fiduciary services marketplace. This “*Coordinated Trust Business Development Initiative*” should involve representatives from the Department of Resources and Economic Development and include education regarding the nature of the national market and the provisions of the new law.

## ENDNOTES

1. The act was enacted in Senate Bill 394 (2006 NH Laws, Ch. 320). We refer to this legislation as "TMCA."
2. TMCA, §1, II.
3. "Lynch Makes Trust Reforms Law to Attract Finance Jobs," Manchester Union Leader, June 21, 2006, p. B7.
4. Silverman, "States Court Family-Trust Business," *Wall Street Journal*, June 22, 2006, D1 ("WSJ Article").
5. Havens and Schervish, "Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy," Boston College Social Welfare Research Institute (1999). The complete report is available at <http://www.bc.edu/research/swri/meta-elements/pdf/m&m.pdf>.
6. Havens and Schervish, "A Golden Age of Philanthropy? The Impact of the Great Wealth Transfer on Greater Boston," Boston College Center on Wealth and Philanthropy (May 2006), p. 6.
7. As one stunning example, the world's second richest man, Warren Buffett, recently announced that he would give away the bulk of his fortune (estimated to be \$30 billion) to the Bill & Melinda Gates Foundation. Rick Cohen, executive director of the National Committee on Responsive Philanthropy, commented that this development raises real questions "about what it means to control that much wealth in one institution. At a minimum it poses a challenge to the Gates Foundation to open the foundation to as much public input and as many diverse viewpoints as possible because with the doubling of its assets, given how big it already is, it's a quadrupling of questions and challenges of accountability to the public over the disposition of those assets." Hrywna, "Buffett gives to Gates," Nonprofit Times (<http://www.nptimes.com/breakingnews.html>).
8. See, e.g., RSA 547 (establishing the Probate Courts) and RSA 551 (requirements for wills).
9. Restatement (Third) of Trusts, § 2 (2003).
10. DeGrandpre, *New Hampshire Practice – Wills, Trusts and Gifts*, 4th ed., ¶ 26.01.
11. Model Uniform Trust Code, Prefatory Note (2005).
12. *Id.*
13. Silverman, WSJ Article, *supra* note 4 at D1.
14. RSA 564-A:3-c; 2002 N.H. Laws, Ch. 191:1, effective January 1, 2003.
15. RSA 547:3-k; 2003 N.H. Laws, Ch. 143:1, effective January 1, 2004.
16. RSA Chapter 564-B; 2004 N.H. Laws, Ch. 130, effective October 1, 2004.
17. 2005 N.H. Laws, Ch. 270.
18. See Adler, "Trust New Hampshire: The Granite State Mines for Trust Gold," Trust and Estates (June 1, 2006), published on the web at: <http://enews.primediabusiness.com/enews/trustsandestates/v/44>.
19. See, e.g., North Carolina's express authorization for "private trust companies," N.C.G.S.A. §53-363, effective July 1, 2001.
20. The Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994, signed into law by President Clinton on September 29, 1994, eliminated most restrictions on interstate bank acquisitions and made interstate branching possible for the first time in 70 years.
21. The Financial Services Modernization Act of 1999 ("Gramm-Leach-Bliley") eliminated these depression-era restrictions.
22. See Anita M. Sarafa, "Where to Place Your Trust: A Comparison of Different State Situs Options," Paper Presented to the Greater North Shore Financial & Estate Planning Council (May 17, 2006).
23. In addition to authorizing perpetual or "dynasty" trusts, other important reforms included adoption of the Uniform Principal and Income Act and the ability to implement prudent "total return" investment management strategies; reductions in state income and inheritance or estate taxes; and enactment of asset protection rights such as authorization of "self-settled spendthrift trusts."
24. RKG Associates, Inc., "Forecasted Economic Benefits from Favorable Trust Company and Trust Laws," (December 2005), prepared for Trust New Hampshire First, LLC.
25. *Id.*
26. The UTC is codified at RSA 564-B.
27. 2004 N.H. Laws, Ch. 130, effective October 1, 2004.
28. 2005 N.H. Laws, Ch. 270, effective September 20, 2005.
29. The UTC also was amended in 2006 by another piece of legislation that made certain technical corrections to the UTC. See 2006 NH Laws, Ch. 91, effective May 5, 2006.
30. John P.C. Duncan and Michael R. Conway, Jr., "New Hampshire's Trust Modernization and Competitiveness Act of 2006: Purposes, Summary and Section by Section Description," Presentation to the New Hampshire Bankers Association (June 22, 2006). Attorneys Duncan and Conway were instrumental in drafting the TMCA.
31. The TMCA clarifies and confirms that all banks, other depository institutions and trust companies are eligible for the provisions of the amended statutes and rules, even if their charters, issued years before, might contain other restrictions. RSA 384:1-b.
32. RSA 392:9-a, I.
33. RSA 392:9-a, II.
34. RSA 392:9-a, III.
35. RSA 392:33.
36. RSA 392:14.
37. RSA 392:16.
38. RSA 392:2.
39. For example, RSA 392:1-a adopts the defined term "Organizational Instrument" to ensure that it includes not just articles of agreement for a corporation but also certificates of formation for a limited liability company. Similar clarifications relating to limited liability companies are made in 392:2-a; 392:4, and 392:18.
40. TMCA, § 34.
41. Prior to TMCA, RSA 392:2-a had stated that for trust companies organized as limited liability companies, "any filing required to be made with the secretary of state shall be made instead with the bank commissioner." TMCA § 9 repealed this statement.
42. RSA 392:1.
43. RSA 392:25, I.
44. RSA 392:25, II. This provision authorizes the Bank Commissioner to reduce or eliminate this requirement when liquidation risks are lower, such as in the case of a family fiduciary services company.
45. RSA 392:33, III.
46. RSA 392:5, I.
47. RSA 392:40-a, 40-b and 40-c.
48. RSA 392:1-a, III.
49. RSA 392:40-a, III.
50. The changes to the UTC are effective as of the effective date of the TMCA, which is August 19, 2006. TMCA, §70. For a discussion of the UTC as passed in 2004, see Michelle M. Arruda, "The Uniform Trust Code: A New Resource for Old (and New!) Trust Law," *New Hampshire Bar Journal*, Winter 2006, at 6.
51. In the text of this section of the article, sections of the UTC will be referred to as, for example, "section 105," instead of "RSA 564-B:1-105."
52. RSA 564-B:1-105(a).
53. Section 105(b)(8) is a combination and modification of sections 105(b)(8) and (b)(9) of the model act.
54. As of the date of this writing, 19 jurisdictions have enacted the Uniform Trust Code: Kansas, Wyoming, Nebraska, New Mexico, District of Columbia, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, North Carolina, Alabama, Florida, Ohio, and Pennsylvania. Of those jurisdictions, nine states in addition to New Hampshire – Kansas, Wyoming, District of Columbia, Arkansas, Virginia, South Carolina, North Carolina, Utah, and Tennessee – have completely omitted the mandatory duty to notify and provide reports to beneficiaries. Two jurisdictions – Nebraska and Alabama – have significantly reduced the scope of the mandatory duty. And three jurisdictions – Oregon, Maine, and Ohio – allow the settlor to waive the duty only if he or she names a surrogate to receive notices and information on behalf of the beneficiaries. Recognizing this trend, NCCUSL amended the model act in 2004 by placing sections 105(b)(8) and (b)(9) in brackets, NCCUSL's technique for indicating to enacting jurisdictions that the provision is optional.
55. TMCA, §49.
56. An interesting question is whether the new rule applies to an irrevocable trust in existence prior to August 19, 2006, and if so, in what manner.
57. RSA 564-B:9-903.

58. RSA 564-B:9-901(b).
59. Trust drafters should be wary about this exception, however. Terms of the trust merely authorizing the retention of assets acquired from the settlor, particularly provisions that are mere boilerplate, may not be sufficient to relieve the trustee of the duty to diversify. Rather, the terms of the trust should be more specific concerning the alteration of the duty. See, e.g., *Wood v. U.S. Bank, N.A.*, 828 N.E.2d, 831 at 839 (Ohio Ct. App. 2005); see also Restatement (Third) of Trusts, §229(d) (2003).
60. Model Uniform Trust Code §903 comments (2005).
61. See, e.g., *In re Will of Dumont*, 791 N.Y.S.2d 868, 4 Misc. 3d 1003(A) (N.Y. Sur. Ct. 2004), *rev'd*, 809 N.Y.S.2d 360, 26 A.D.3d 824 (N.Y. App. Div. 2006), *appeal denied*, 813 N.Y.S.2d 689, 28 A.D.3d 1257 (N.Y. App. Div. 2006); *Wood v. U.S. Bank, N.A.*, 828 N.E.2d, 831 at 839 (Ohio Ct. App. 2005). For discussions of this recent rash of cases, see Dana G. Fitzsimmons, Jr., "Dumont Stands," *Trusts and Estates*, June 2006, at 61, and "Dumont Reversed," *Trusts and Estates*, March 2006, at 56. For a recent discussion about the trustee's duty to diversify, see Christopher P. Cline, "Do Trustees Have an Absolute Duty to Diversify?" *Tax Management Estates Gifts and Trusts Journal*, May 11, 2006.
62. Uniform Trust Code §808 comments (2005).
63. RSA 564-B:7-711(b); RSA 564-B:7-711(c).
64. In the text of this section of the article, sections of the UPIA will be referred to as, for example, "section 104," instead of "RSA 564-C:1-104."
65. Note that the "income" of a trust or estate for state property law purposes is not necessarily the same as "income" for income tax purposes. A trust's or estate's income for property law purposes often is referred to as "accounting income."
66. Uniform Principal and Income Act §103 and its comments (1997).
67. Uniform Principal and Income Act §104 comments (1997).



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68. The unitrust conversion statute, enacted in 2002 and contained at RSA 564-A:3-c, also allowed trustees to more fully embrace modern portfolio theory and invest for total return.
69. RSA 564-C:1-104(h).
70. RSA 564-C:5-501(a). There appear to be errors in section 502, in that the section mirrors the model act and thus fails to coordinate with New Hampshire's version of section 501. These errors should be corrected in a future technical corrections bill.
71. TMCA, §70.
72. RSA 564-C:6-602(a).
73. RSA 564-C:6-602(b).
74. The Bank Department already has posted on its website new application forms for commercial nondepository trust companies and family fiduciary service companies.
75. Possible additional changes would be to eliminate the requirement that a majority of directors of an in-state banking institution must be residents of New Hampshire (RSA 384:3, IV) or the requirement that directors must be physically present at a majority of meetings (RSA 384:7-b).
76. As a possible agenda item for this group, we suggest that it consider whether New Hampshire should enact a statute authorizing "self-settled spendthrift trusts." The original version of the TMCA included such an authorization, but the Senate Judiciary Committee, with support from the "ad hoc" probate and trust law group, removed the provision from the bill. Other states, such as Delaware and Alaska, permit such trusts, and they have claimed that their laws remain better than New Hampshire due, in part, to these provisions.
77. "South Dakota is so intent on building its trust business that state government officials have greeted out-of-state trust clients at the airport." Silverman, WSJ Article, *supra* note 4.