

Entity ReviewPart II – TRUSTS

TRANSACTIONAL TRAINING PROGRAM

2021





Trust Basics:

Requirements

1. Written and Signed
2. Funded (assets must be transferred to the Trust)
3. Include Necessary Parties
4. Governed by state law (CA Probate Code §§15000-19530)

Parties

1. Settlor/Trustor/Grantor – establishes the trust
2. Trustee – administers the trust
3. Beneficiary – receives income and/or income from the trust

Revocable v. Irrevocable

1. Revocable – trust can be amended and revoked
2. Irrevocable – trust is set and may not be changed or revoked

Testamentary v. Asset Protection

1. Testamentary (“living trust”) – created for the purpose of passing on property and limit tax liability
2. Asset Protection – created to protect assets from creditors

Second Generation Trusts (“SGT”)

1. Often created after the death of one or both trustors
2. Typically irrevocable, except when trust is for surviving trustor



Performing a Trust Review

What is Needed from Client:

1. Trust Agreement and all amendments, restatements
2. Certificate of Trust (should be recent)
3. Death Certificates for deceased trustors
4. Term Sheet/Document Request Form/Loan Documents
5. Prelim

Minimum Areas to Cover (Use Trust Due Diligence Questionnaire):

1. Parties
2. Governing law
3. Revocability of the trust
4. Have SGTs been created by operation of terms (i.e. one or both trustors are deceased)?
5. Formal Name of the trust, and SGTs if applicable
6. Role the trust(s) will play in the loan (i.e. borrower, guarantor, pledgor)?
7. If the trust is expected to pledge property, who holds title?
8. Authority of the trust to enter into the contemplated transaction

Concerns Related to Trust Parties

1. Sham Guaranty – Typically revocable trust and one of Trustor and Guarantor are the Borrower and the other is a Guarantor
2. Current Trustee is not identified in any trust documents
3. Trustor(s) are deceased and no distribution has occurred



Authority for Transaction

Sources of Authority

1. Trust Agreement
2. Probate Code (California Probate Code Sections 16220-16249)

TRUSTEE POWERS

To carry out the purposes of any trust subject to this Agreement, and subject to any limitations stated elsewhere in this

11

Agreement, the Trustees shall exercise all rights and perform all acts that are necessary or advisable in the prudent management of the trust estate. The Trustees are vested with the following powers with respect to the trust estate, in addition to all of those powers enumerated in California Probate Code Sections 16220-16249, as amended from time to time:

More Samples of Authority

B. Loans. To make loans, either secured or unsecured, including loans to the estates of the Grantors; to borrow, and to encumber or hypothecate trust property by mortgage, deed of trust, pledge, or otherwise, for the debts of the trust or the joint debts of the trust and a co-owner of trust property;

L. Guarantee Loans

To guarantee loans made by third parties to beneficiaries of this Trust; to guarantee loans made or leases entered into by third parties to or with a corporation of which Trustor is a principal shareholder and whose stock is an asset of the Trust; to guarantee loans made by third parties to persons and organizations other than beneficiaries in connection with business transactions entered into by the Trustee on behalf of the Trust; and to pledge any Trust asset to secure any such guarantee.

More Samples of Authority

ARTICLE 7. POWERS OF TRUSTEE

In addition to all other powers and discretions granted to or vested in the TRUSTEE by law or by this instrument, and subject to any limitations stated elsewhere in this instrument, the TRUSTEE shall have the following powers and discretions:

7.1 General Powers. To do all such acts, take such proceedings and exercise all such rights and privileges in the management of the Trust Estate as if it were the absolute owner thereof, including, without limiting the generality of the terms, the following:

7.8 Power to Borrow Money and Hypothecate Trust Assets. To borrow money for any trust purposes, hypothecate the Trust Estate or any part thereof and replace, renew and extend any encumbrance thereon, on such terms, conditions and security as maybe determined by the TRUSTEE and to pay loans or other obligations of the Trust Estate, as the TRUSTEE in his discretion deems advisable;

— and to acquire any securities, properties, or other

More Samples of Authority

Financial Powers

A. In addition to all powers granted by law, the trustee shall have the following powers with respect to each trust held under this instrument, exercisable in the discretion of the trustee:

3. To borrow money at interest rates then prevailing from any individual, bank, or other source, whether or not the lender is then acting as a trustee, and to create security interests in the trust property;

Family Enterprises

A. For all purposes of this trust agreement and of any trust established under this trust agreement, the term "family enterprise" means any business entity, whether in existence on the date of this trust agreement or established hereafter, whether

More Samples of Authority – Family/Business Enterprise

Family Enterprises

A. For all purposes of this trust agreement and of any trust established under this trust agreement, the term "family enterprise" means any business entity, whether in existence on the date of this trust agreement or established hereafter, whether in the form of a business corporation, partnership, or other organization, in which one-third or more of the outstanding interests are held, in the aggregate, directly or indirectly, by me, my spouse and any of my descendants, any trust for the benefit of me, my spouse or any of my descendants, or another family enterprise. For all purposes of this trust agreement and of any trust established under this trust agreement, (i) the term "interest" in a family enterprise means stocks, partnership interests (whether general, special or limited) or other evidences of equity ownership in a family enterprise, and (ii) the term "indebtedness" of a family enterprise means notes, bonds or other evidences of a debt owed by such family enterprise.

B. Any interest in or indebtedness of any family enterprise is deemed to be a suitable investment of the trust property of any trust established under this trust agreement, even though such interest or indebtedness may not be marketable, may involve a high degree of business risk, and may constitute a substantial portion of the trust's property. Notwithstanding any rule of law with respect to the suitability of investments by a fiduciary, the trustee is expressly authorized (but not directed) to invest and reinvest trust funds in any family enterprise and to hold interests in and indebtedness of any family enterprise for an indefinite period.

More Samples of Authority



Spendthrift Provision. The interest of a Designated Beneficiary and/or Remainderman in the property held in a Trust Account, including income and principal, prior to actual payment or delivery by the Trustee, shall not be transferable by voluntary or involuntary assignment or by operation of law. No Designated Beneficiary shall have the power to assign, encumber, direct, distribute or authorize distributions from any Trust Account.



Probate Code – Authority to Borrower and Guarantee

16241. The trustee has the power to borrow money for any trust purpose to be repaid from trust property. The lender may include, but is not limited to, a bank holding company, affiliate, or subsidiary of the trustee.

(Enacted by Stats. 1990, Ch. 79.)

16244. The trustee has the following powers:

- (a) To make loans out of trust property to the beneficiary on terms and conditions that the trustee determines are fair and reasonable under the circumstances.
- (b) To guarantee loans to the beneficiary by encumbrances on trust property.

(Enacted by Stats. 1990, Ch. 79.)



Questions?