



# ARE YOU CROSSING THE (REGULATORY AND OPERATIONAL) LINE?

ELISE J. McGEE, PARTNER

JOSEPH J. VIVIANO, PARTNER

**McDermott  
Will & Emery**

Wednesday, May 1, 2024



# SPEAKERS



**ELISE J. McGEE**

Partner

McDermott Will & Emery LLP, Chicago  
+1 312 984 2748 | [emcgee@mwe.com](mailto:emcgee@mwe.com)



**JOSEPH J. VIVIANO**

Partner

McDermott Will & Emery LLP, Chicago  
+1 312 984 3697 | [jviviano@mwe.com](mailto:jviviano@mwe.com)

# AGENDA

- Conducting business in other states
- Investment advice
- Employment/professional hat issues
- Crypto regulatory issues
- Money transmission
- Privacy laws
- Information/reporting

# CONDUCTING BUSINESS IN OTHER STATES

- Separate regulatory considerations for corporate trustees with multi-jurisdictional activities
  - Requires analysis of “trust business” in states with touch points
  - Regulatory considerations are typically triggered by employees in state
  - Is there a policy in the policies and procedures manual?
- Registering to do business because of regulatory necessity may create undesirable tax nexus (for a private trust company and/or trusts)
- Some states (e.g., California) severely restrict foreign trust company activity in the state; review reciprocity laws
- Some types of activities require regulatory approval based on the location of the customer (e.g., money transmission)
- Court filings may require qualification to do business (personal representative/executor considerations)
- Other taxes and filings – workers comp, local licensing, employment taxes

# CONDUCTING “TRUST BUSINESS”

- Nearly all states limit or prohibit out-of-state banks and trust companies from conducting “trust business” or “acting as a fiduciary” in their state
  - Due to federal anti-discrimination law, these limitations and prohibitions do not apply to national banks (see 12 U.S.C.A. § 92a(b))
  - National banks remain subject to other state laws (e.g., employment)
- Potential penalties include fines on officers, directors and employees, cease and desist orders and removal from office
  - Any penalty may negatively impact licensing in home state
  - Unwanted negative publicity

# CONDUCTING “TRUST BUSINESS,” CONT.

- “Trust business” is analyzed on a state-by-state basis
  - “‘Business of a trust company’ or ‘trust company business’ means the holding out by a person, by advertising, solicitation or other means, that it is available to act as a fiduciary in this state and undertaking to act as a fiduciary in the regular course of its business.”  
NRS 669.029
- Many states have statutory prohibitions on advertising in the jurisdiction, but unclear what “advertising” means

# “TRUST BUSINESS” – OKLAHOMA EXAMPLE

- **Okla. Stat. §6-1702(34):** “Trust business” means the holding out by a person to the public by advertising, solicitation or other means that the person is available to perform any service of a fiduciary in this or another state, including but not limited to: (a) acting as a fiduciary, or (b) to the extent not acting as a fiduciary, any of the following: (1) receiving for safekeeping personal property of every description, (2) acting as assignee, bailee, conservator, custodian, escrow agent, registrar, receiver or transfer agent, or (3) acting as financial advisor, investment advisor or manager, agent or attorney-in-fact in any agreed upon capacity.
- **Okla. Stat. §6-1702(38):** “Unauthorized trust activity” means: (a) a company, other than one identified in subsection A of Section 5 of this act, acting as a fiduciary within this state, (b) a company engaging in a trust business in this state at any office of such company that is not its principal office, if it is a state trust institution, or that is not a trust office or a representative trust office of such company, or (c) an out-of-state trust institution engaging in a trust business in this state at any time an order issued by the Commissioner pursuant to paragraph 2 of Section 24 of this act is in effect.
- **Okla. Stat. §6-1706:** Notwithstanding any other provision of the Multistate Trust Institutions Act, a company does not engage in the trust business or in any other business in a manner requiring a charter, license or registration under this act or in an unauthorized trust activity by: (14) Provided the company is a trust institution and is not barred by order of the Commissioner from engaging in a trust business in this state pursuant to paragraph 2 of Section 1724 of this title: (a) marketing or soliciting in this state through the mails, telephone, any electronic means or in person with respect to acting or proposing to act as a fiduciary outside of this state, (b) delivering money or other intangible assets and receiving the same from a client or other person in this state, or (c) accepting or executing outside of this state a trust of any client or otherwise acting as a fiduciary outside of this state for any client.

# CONDUCTING “TRUST BUSINESS,” CONT.

- In general, states are unlikely to provide informal guidance to foreign fiduciaries as to whether an activity is “trust business,” triggering registration requirements
- Regulatory solutions:
  - Branch office or service office
  - Acquisition or merger
- Application procedures and requirements vary greatly
  - Regulatory capital requirements may be problematic for small commercial trust companies and private family trust companies



# RECIPROCITY

- Not all states have reciprocity
- 45 states and the District of Columbia have signed the Nationwide Cooperative Agreement for Supervision and Examination of Multi-State Trust Institutions
  - This means that these states agree to a uniform examination approach for trust companies with multi-jurisdictional business
- Twenty-four states have adopted elements of the Model Multi-State Institutions Act

# CONDUCTING OTHER BUSINESS

- If a trust company is conducting trust business in a state that is not the jurisdiction in which the company was formed, that state may require the PTC to “qualify to do business.”
- Other activities may also constitute doing business
  - No clear definition of “doing business” exists
  - Long list of statutory exclusions only somewhat helpful
  - Penalty for failing to register is usually limited to barring access to courts, past due fees and small fines
- Registering to do business is often simple and inexpensive, but may establish undesirable tax nexus

# POLICIES AND PROCEDURES

- States rely on the Trust Examination Manual (TEM), which is the Federal Deposit Insurance Corporation's (FDIC's) examination guide published for regulators of trust companies with state and national charters
- The TEM is designed to assist regulators conducting examinations of trust departments and accordingly explains trust concepts, regulatory policies and legal principles that govern the behaviour of fiduciaries
- The TEM is a useful resource when considering the types of policies that a private trust company's PPM should contain, given that it is frequently used and adopted by the same state banking regulators that regulate private trust companies

# INVESTMENT ADVICE (FEDERAL)

- The business of providing investment advice is regulated by federal and state law
- The Investment Advisers Act of 1940 generally requires investment advisers to register with the Securities and Exchange Commission (“SEC”)
- An investment adviser is a person who is paid for providing investment advice
- Exceptions to federal registration
  - Less than \$100 million of client assets
  - State regulated trust companies
  - Court-appointed trustees, trustees without discretionary power to buy and sell securities, and trustees receiving no compensation or administrative fees
  - “Family office rule”

# INVESTMENT ADVICE (FEDERAL)

- The “family office rule” took effect on August 29, 2011:
  - A family office is a “company” that (1) provides investment advice only to “family clients,” (2) is wholly owned by family clients and **controlled (directly or indirectly) exclusively by “family members” and/or “family entities”** and (3) does not hold itself out to the public as an investment adviser
  - A family office must satisfy each of these requirements to be exempt from registration under the family office rule
- If family members or family entities do not possess direct majority control over the governance of the family office, the family office may fail the Family Office Rule requirements despite the family’s ability to appoint the persons exerting direct control (*SEC’s 2012 response to FAQs*)

# INVESTMENT ADVICE (STATE)

- Generally, investment advisers are required to register with states to the extent they are not required to register with the SEC
- Investment advisers are typically required to register with a state if they do not have to register with the SEC and:
  - they have a place of business in the state; or
  - they have more than a specified number of clients in the state (e.g., more than 5 clients in California)
- Federally registered investment advisers may still need to file annual notices and pay fees in exempt states
- State registration may be required for unlicensed family trust companies that qualify for the family office rule

# SEC COMPLIANCE

- What is Form 13F?
  - Form 13F is the quarterly report filed with the SEC by “institutional investment managers” who exercise investment discretion over \$100 million or more in Section 13(f) securities.
    - “Institutional investment managers” include Registered Investment Advisers (RIAs), banks and trust companies who invest in, buy and sell securities for their own account or investment portfolio as well as natural persons managing of other natural persons’ stock holdings accounts.
    - Section 13(f) securities generally include public company equity securities, equity options, warrants, shares of closed-end investment companies, and convertible debt securities.
- Section 16 filings (Forms 3, 4, and 5):
  - Federal securities laws require individuals deemed “insiders” of a public company (such as officers, directors, and holders of more than 10% of any class of a public company’s securities) to report purchases, sales, and holdings of their company’s securities.
- Short-Swing Profit Rule:
  - All stockholders deemed insiders are subject to Section 16 short-swing profit rules: any profits made from the purchase and sale of securities within a six-month period must be returned to the public company.

# SEC COMPLIANCE

- What is a Form 3?
  - The initial filing due within 10 days after a person becomes an insider, which discloses his or her ownership of the company's securities.
- What is a Form 4?
  - Use to disclose an insider's purchases and sales of securities and derivative securities of a public company. Form 4 must be filed within two business days following the transaction date.
- What is a Form 5?
  - Used to report exempt transactions at end of year (such as gifts). Due 45 days after the public company's fiscal year ends.



# SEC COMPLIANCE

What is an HSR Act filing?

- Parties must notify the Federal Trade Commission and Department of Justice when a proposed transaction under the Hart-Scott-Rodino Antitrust Improvements Act (HSR) – such as a merger, joint venture, stock or asset acquisition, or exclusive license – meets specified thresholds and no exemptions apply.
- In general, any party who will hold more than \$119.5 million of stock after acquiring additional shares by any means must consider whether an HSR Act filing is required.
- Failure to file brings about steep consequences, including large daily penalties.

# EMPLOYMENT ISSUES

- Worker classification rules (employee vs. contractor) vary from state-to-state
- Employee rights vary from state-to-state
  - Mandatory medical and family leave
  - Overtime requirements / penalties
  - Anti-discrimination laws
  - Vacation pay
  - Job postings / salary publication
  - Enforceability of non-compete agreements
  - Mandatory indemnification laws

# PROFESSIONALS: WHAT STANDARD APPLIES

- Family office personnel may be subject to a heightened standard of care based on their expertise, their activities and/or their close relationship to the family
  - Attorneys, accountants and investment professionals
  - Fiduciary activities (e.g., private trust company)
  - Position of trust/confidence for family members
- Unclear whether standard of care rises to level of a fiduciary standard
  - There is very little case law on the standard of care applicable to family office personnel
  - Fiduciaries must hold their clients' best interests above their own
- Liability risk may be higher due to the nature of the clients (i.e., high net worth individuals) and the fact that family office services often overlap with the other family businesses

# PROFESSIONALS: FIDUCIARIES EVERYWHERE

- **Lawyers:**
  - Ethics authorities provide that an attorney is subject to applicable professional ethics codes even when the attorney is advising on subjects on which a non-lawyer can advise
  - All lawyers are fiduciaries, which is to say they owe clients fiduciary duties – who is the client?
    - Corporation (through its “authorized constituents”), although may also represent others (“A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents.”) *Model Rules of Professional Conduct 1.13*
    - Waiver for potential conflicts
    - Unintended attorney-client relationships
  - Enhanced knowledge of business operations + many people relying on counsel for advice = enhanced risk of liability
  - Lawyer as employee = follow orders of superiors, while complying with professional responsibility rules
  - If not in-house counsel, consider: “I’m not your lawyer,” inactive status, avoiding multiple hats to avoid potential conflicts (although permitted by Model Rules)

# PROFESSIONALS: FIDUCIARIES EVERYWHERE, CONT.

- **Accountants:** An accountant can be a fiduciary when providing certain professional services including tax services, asset management and general business consulting
- If the following three (3) elements are present, an accountant may be deemed to be a fiduciary:
  - The accountant positions themselves as an expert
  - The client places trust in the accountant
  - The client is heavily dependent upon the accountant's advice – *AICPA.org*
- **Investment Professionals:** An investment fiduciary provides investment advice or manages the assets of another person and stands in a special relationship of trust, confidence and/or legal responsibility – *Prudent Practices for Investment Advisors (Fi360)*
- **Trustees:** The relationship between trustee and beneficiary is a fiduciary relationship – *Restatement (Third) of Trusts § 2 (2003)*
- **Members and Managers:** Members in member-managed Limited Liability Companies (LLCs) and managers in manager-managed LLCs have fiduciary obligations
  - *Limited Liability Companies: A State-by-State Guide to Law & Practice § 8:7*

# DIGITAL ASSETS: U.S. REGULATORY FRAMEWORK

- How digital assets are regulated in the U.S. will depend on whether they are classified as "securities."
- SEC and the federal courts have applied the "investment contract" analysis first articulated by the US Supreme Court in *SEC v. Howey*, 328 US 293 (1946) (the **Howey test**) to determine whether a particular arrangement constitutes an "investment contract," and, therefore, a security.
- Under the Howey test, the arrangement must involve all of the following elements to qualify as an investment contract:
  - an investment of money;
  - in a common enterprise;
  - with an expectation of profits; and
  - solely from the efforts of others.
- On May 6, 2019, the SEC published the *Framework for 'Investment Contract' Analysis of Digital Assets* guidance (the **Framework**) for analyzing whether a digital asset is an "investment contract."

## The Framework:

- does not create a specific test for digital assets, but adds a list of factors to be considered when analyzing digital assets under each of the Howey test's prongs.
- acknowledges that "*a digital asset previously sold as a security*" could be "*reevaluated at the time of later offers or sales.*"
- makes clear that even if a digital asset is not a traditional security, its offer and sale can create a transaction in an investment contract, and thus be characterized as a security.

# FEDERAL MSB AND STATE MTLs

Many payment processors and cryptocurrency companies, including most cryptocurrency exchanges and transfer platforms, may require federal registration with the Financial Crimes Enforcement Network (“FinCEN”) and money transmitter licensure in most states (“MTLs”).



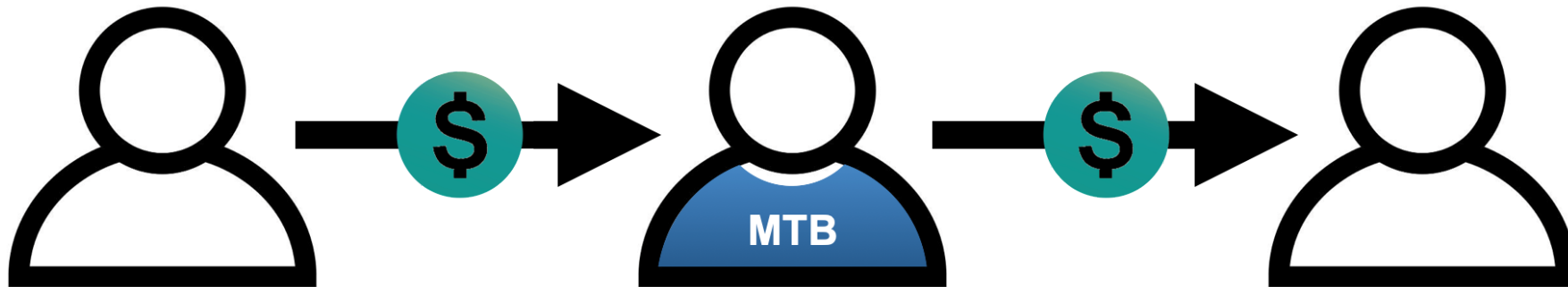
# FEDERAL REGISTRATION REQUIREMENTS

- Money transmitters must register as a “Money Service Business” (“MSB”) with the Financial Crimes Enforcement Network.
- This is a “registration” not a license application.
- This is a relatively quick registration which just requires the filing of a Form 107.
- However, MSBs are considered “financial institutions” which are required to maintain an anti-money laundering policy, to collect and maintain know-your-customer (KYC) information, and to file a series of filings with FinCEN.



# WHAT IS A “MONEY TRANSMITTING BUSINESS”?

- The term “money transmitting” includes “transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier.” See 18 U.S.C. § 1960(b)(2).
- The term “money transmitting business” means any business that “provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers’ checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.” See 31 U.S.C. § 5530(d)(1).



# STATE MTL LICENSING REQUIREMENTS

- Under the federal Unlicensed Money Transmitting Business Statute (18 U.S.C. § 1960), failure to register for a **state** license constitutes a federal felony.
  - (A) is ***operated without an appropriate money transmitting license in a State*** where such operation is punishable as a misdemeanor or a felony under State law, ***whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable***; 18 U.S.C. § 1960(b)(1)(A).
- Each state has its own registration and reporting requirements for money transmitters.
  - The state regimes have varying applicability to cryptocurrency, due to varying definitions of “money” or “monetary value” in the state statutes.
  - The state licensing process is extremely complex, time consuming, and expensive.

# MTL COMPLIANCE REQUIREMENTS

- Licensed money transmitters must maintain a comprehensive written AML policy.
- The AML policy must provide procedures and controls compliant with the Office of Foreign Asset Control regulations and must address Bank Secrecy Act (BSA) requirements.
- Policies must be independently reviewed at least annually to ensure compliance.
- Licensees must provide training on BSA and AML compliance.

# CRYPTO-TRUSTEE CHECKLIST

- Money Transmitter Licenses / New York BitLicense
- Use of Funds
- Scrutinize and Negotiate Contracts
- Custody
- Comingling cryptocurrency
- Securities Act of 1933 Issues
- Commodities Exchange Act Issues

# PRIVACY LAWS

- U.S. Federal Law
  - Gramm-Leach-Bliley Act, HIPPA
- U.S. State Law
  - At least 15 states have enacted privacy laws
- Europe (General Data Protection Regulation)

# PRIVACY LAW FUNDAMENTALS



# WHAT IS PERSONAL INFORMATION?

- Privacy and data security laws regulate “personal information” or similar defined terms:
  - “Personally Identifiable Information” (PII) ... *“sensitive” identifying data that poses security risks – often used in state data breach laws*
  - “Protected Health Information” (PHI) ... *used in HIPAA*
  - “Non-Public Information” (NPI) ... *used in financial privacy laws*
  - “Personal Information” ... *broader definition e.g., “any data that reasonably relates to an individual”*
  - “Personal Data” ... *often used in international laws/new state laws, also broadly defined*

# HOW TO DETERMINE WHAT LAWS APPLY?

- **What industry** (e.g., direct to consumer, government contracts, health care, critical infrastructure)?
  - Sectoral vs. general privacy laws
- **Where do I operate** (e.g., one state, 50 states, globally)?
- **Who are the data subjects** (e.g., consumers, employees, children, patients, students, residents of a certain state)?
- **What type of data is it** (e.g., employee information, sensitive information, genetic data, federal data)?
- **How is the data used** (e.g., to perform a contract/provide a service, marketing, secondary purposes, employment decisions)?



# KEY US FEDERAL LAWS ON DATA PROTECTION (NO COMPREHENSIVE FEDERAL PRIVACY LAW)

## Section 5 of the Federal Trade Commission (“FTC”) Act

- “Unfair or deceptive acts or practices” unlawful under “Section 5” of the FTC Act
- Used to enforce inaccurate/incomplete privacy disclosures (**deceptive**); unexpected or sensitive data practices without notice/consent (**unfair**)
- Recent enforcement actions targeting location data, “sensitive” data, advertising technology companies and Childrens' data
- Notable case: **Ascension Data & Analytics** – GLBA enforcement targeting mortgage company's vendor management program

## CAN-SPAM Act – Email Marketing

- Regulates commercial email practices
- Requires that marketing purpose is disclosed
- Unsubscribe (opt out) requirement – does not apply to transactional/account messages
- Sign ups/transfers of mailing lists/initial outreach not regulated

## Telephone Consumer Protection Act – Telephone/Text Marketing

- Regulates telemarketing, text marketing, fax marketing
- Requires consent before sending informational or marketing text messages in certain situations
- Restrictions on timing, frequency, content of messages

# RISKS UNDER US LAW

- Comprehensive privacy laws:
  - Generally enforced only by regulator
  - Fines generally several thousand dollars *per violation* (i.e., per consumer, per transaction)
  - Injunctions available
- Laws with private right of action:
  - Marketing laws like federal Telephone Consumer Protection Act (telemarketing and text message marketing)
  - Biometric privacy laws like Illinois Biometric Information Privacy Act
  - Health law in Washington state
  - State wiretap laws used against online tracking technologies like cookies

# STATE PRIVACY LAWS (CALIFORNIA)

- **Effective January 1, 2023**
- **Applicability Thresholds**
- For-profit entity that collects California consumers' personal information, or on the behalf of whom such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information, that does business in the State of California, and that:
  - (1) **As of January 1 of the calendar year, had annual gross revenues in excess of \$25,000,000 in the preceding calendar year; or**
  - (2) Alone or in combination, annually buys, sells, or shares the personal information of 100,000 or more consumers or households; or
  - (3) Derives 50 percent or more of its annual revenues from selling or sharing consumers' personal information.

# STATE PRIVACY LAWS (NEW HAMPSHIRE)

- **Effective January 1, 2025**
- **Applicability Thresholds**
  - Persons that conduct business in New Hampshire or produce products or services that are targeted to residents of New Hampshire that during a one-year period:
    - (a) Controlled or processed the personal data of not less than 35,000 New Hampshire unique consumers, excluding personal data controlled or processed solely for the purpose of completing a payment transaction; or
    - (b) Controlled or processed the personal data of not less than 10,000 New Hampshire unique consumers and derived more than 25 percent of their gross revenue from the sale of personal data.

# STATE PRIVACY LAWS (DELAWARE)

- **Effective January 1, 2025**
- **Applicability Thresholds**
  - Persons that conduct business in Delaware or produce products or services that are targeted to residents of Delaware that during a one-year period:
    - (a) Controlled or processed the personal data of not less than 35,000 unique Delaware consumers, excluding personal data controlled or processed solely for the purpose of completing a payment transaction; or
    - (b) Controlled or processed the personal data of not less than 10,000 unique Delaware consumers and derived more than 20 percent of their gross revenue from the sale of personal data.

# STATE PRIVACY LAWS (TENNESSEE)

- **Effective January 1, 2025**
- **Applicability Thresholds**
  - Persons that conduct business in Tennessee or produce products or services that are targeted to residents of Tennessee, have more than \$25 million in revenue, and
    - 1) Control or process the personal data of not less than 25,000 Tennessee consumers and derive more than 50% of gross revenue from sale of personal information; or
    - 2) During a calendar year, control or process personal information of at least 175,000 Tennessee consumers.

# INTERNATIONAL PRIVACY - GDPR

- Broad global reach—applies to:
  - Organizations located in EU
  - Organizations outside EU offering goods/services to EU
- UK, Switzerland have similar laws
- Model for other laws around world (including recent US state laws)
- Key requirements:
  - Privacy policy
  - Privacy rights
  - Data security
  - Data breach notification
  - Contracting
  - Assessments for high-risk activities



# GDPR: WHAT TO KNOW

- **Key differences** from US laws:
  - Permissioned approach with “**legal basis**” for all processing activities (vs. permissive in US)
  - **Data transfer** restrictions
  - More **details** in **privacy policies**
  - **Accountability/governance** requirements (e.g., policies, assessments, records)
- Risks are **significant**
  - **High fines** – up to 4% global revenue
  - Enforcement done at country level
    - Lots of regulators, **very active**



# INTERNATIONAL PRIVACY – OTHER LAWS

- Jurisdictions around the world passing new privacy laws
- **Brazil**
  - GDPR copycat (*Astro*)
  - Recent regulations allow for sanctions
- **China**
  - Strict data transfer restrictions
  - Independent obligations
- **India**
  - New law working way through legislative process.
- **Many other countries** have privacy laws, including many with data transfer requirements.



# INFORMATION/REPORTING

- U.S. Federal Law
  - Foreign Account Tax Compliance Act (“FATCA”)
- Foreign Countries
  - Common Reporting Standard (“CRS”)
  - Public Registries
- U.S. State Law
  - New York
  - Other states
  - Charitable trust registration

# INFORMATION/REPORTING (FATCA AND CRS)

- The Foreign Account Tax Compliance Act (“FATCA”) was enacted in 2010 in response to ongoing challenges in combating US tax evasion through the use of foreign financial accounts
- Separate from FATCA, certain foreign-owned entities are required to disclose beneficial ownership information to the IRS using Form 5472, but this information is not made public.
- In response to the US’s imposition of FATCA on the rest of the world, a large number of other countries, through the Organization for Economic Co-Operation and Development (the “OECD”), developed the Common Reporting Standard (“CRS”) as a set of guidelines to enact local laws governing the automatic exchange of tax-related information – typically through the Multilateral Competent Authority Agreement (“MCAA”)

# INFORMATION/REPORTING (FOREIGN COUNTRIES)

- Many countries outside the US have established beneficial ownership registries of companies and trusts (ostensibly to combat money laundering and terrorist financing).
- These registries list the owners and managers of companies and the trustees and beneficiaries of trusts.
- Some beneficial ownership registries of trusts go further and list the nature of the beneficiary's beneficial interest.
- In some cases, these beneficial ownership registries are accessible by the public, but more commonly they are restricted to law enforcement and other individuals or organizations that can prove a legitimate need for the information.
- Family offices and other entities will be subject to inclusion in local beneficial ownership registries to the extent they reside in those jurisdictions.

# INFORMATION/REPORTING (STATE REPORTING)

- Reporting under Corporate Transparency Act (“CTA”) begins on January 1, 2025 for entities in existence prior to January 1, 2024.
- Every state in the US maintains a list of information about corporations and other entities organized or registered to do business in that state.
- Usually, management information is collected and provided to the public.
- In 2024, New York became the first state to require LLCs to file beneficial ownership disclosures.
  - Applies to LLCs formed in New York or registered to do business in New York
  - No public disclosure (for now)
- California, Maryland and Massachusetts have similar bills pending.
- Remember to register charitable trusts!

# CONFLICTS OF LAW (OVERVIEW)

- Question of governing state law frequently arises in trust administration
- Common issues
  - Accounting and notice requirements
  - Virtual representation
  - Decanting
  - Statutes of limitation and repose
  - Validity and construction
  - Jurisdiction and venue
  - Creditor's rights

# CONFLICTS OF LAW (OVERVIEW), CONT.

- Example
  - Irrevocable trust created by a Florida resident under agreement designating Illinois law to govern the “validity, effect and interpretation” of the instrument.
  - The settlor’s daughter and a trust company act as co-trustees. The trust company is organized in Nevada but has a branch office in Delaware. The daughter lives in California.
- Questions
  - What law governs the validity and construction of the trust?
  - What law governs the administration of the trust?
  - What state has jurisdiction to enforce the trust?

# CONFLICTS OF LAW (VALIDITY/CONSTRUCTION)

- In most cases, the law stated in the trust instrument will control **validity and construction**.
  - UTC § 107: “The meaning and effect of the terms of a trust are determined by (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.”
- A state-by-state analysis is required if the trust instrument is silent.
  - Generally, the law of the state where the settlor resided or where the trust is administered will control.



# CONFLICTS OF LAW (ADMINISTRATION)

- In most cases, the law stated in the trust instrument will control the **administration** of the trust.
  - Restatement (Second) § 272: “The administration of an inter vivos trust of interests in movables is governed as to matters which can be controlled by the terms of the trust – (a) by the local law of the state designated by the settlor to govern the administration of the trust, or – (b) if there is no such designation, by the local law of the state to which tie administration of the trust is most substantially related.”
- The “principal place of administration” generally controls if the trust instrument is silent.
- State “welcoming statutes” may provide their state’s law governs unless trust instrument expressly provides otherwise.

# CONFLICTS OF LAW (ENFORCEMENT)

- In most cases, courts in the “principal place of administration” have **jurisdiction** to enforce the trust.
  - UTC § 202(a), (b):
    - “(a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.”
    - “(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.”
- A court in another state may acquire jurisdiction.
  - UTC § 202(c): “This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.”

# CONFLICTS OF LAW (METHODS TO CHANGE)

- Pursuant to the trust instrument
- Pursuant to statute
- By agreement of the necessary parties
- Decanting or modification
- Merger (potentially)
- Judicial order/registration
- Appointment of successor trustee

# THANK YOU

[mwe.com](https://mwe.com)

This material is for general information purposes only and should not be construed as legal advice or any other advice on any specific facts or circumstances. No one should act or refrain from acting based upon any information herein without seeking professional legal advice. McDermott Will & Emery\* (McDermott) makes no warranties, representations, or claims of any kind concerning the content herein. McDermott and the contributing presenters or authors expressly disclaim all liability to any person in respect of the consequences of anything done or not done in reliance upon the use of contents included herein. \*For a complete list of McDermott entities visit [mwe.com/legalnotices](https://mwe.com/legalnotices).

©2024 McDermott Will & Emery. All rights reserved. Any use of these materials including reproduction, modification, distribution or republication, without the prior written consent of McDermott is strictly prohibited. This may be considered attorney advertising. Prior results do not guarantee a similar outcome.