A First Look at New Hampshire’s Family Trust Company Laws

By W. John Funk

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New Hampshire has re-written the laws governing New Hampshire-chartered family trust companies (each an “FTC”) in 2015. Chapter 272 was signed into law on July 27, 2015. Effective October 1, 2015, a new regulatory scheme will be in place. The purpose of this article is to explain its provisions as they apply to family trust companies.

Trust companies are a type of bank regulated by the New Hampshire Bank Commissioner, who heads the New Hampshire Banking Department located in Concord, New Hampshire. FTCs are a subset of trust companies. They are subject (i) to certain general provisions that apply to all banks in a new chapter RSA 383-A, (ii) to provisions that apply to trust companies in a new chapter RSA 383-C and (iii) to provisions that apply only to FTCs in a new chapter RSA 383-D.

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Executive Summary

The Bank Commissioner and the banking department have been regulating family trust companies for a number of years. They were first subject to regulation under the general banking laws. Then, in 2010, a separate chapter RSA 392-B was enacted for FTCs alone. That chapter has now been superseded by RSA 383-D. At present there are a handful of FTCs in New Hampshire, but they represent a promising field for growth. Since FTCs are a subset of trust companies, it is important to understand the larger context in which they are regulated. The new laws have improved the efficiency of the banking department’s regulatory functions and have created a favorable environment for the organization of new trust companies in New Hampshire. The banking department now has a separate trust company division and its own division head. This development has been coupled with significant improvements in the trust laws of the state so that New Hampshire is now recognized as one of the most attractive places in the United States to conduct a trust business. See companion articles New Hampshire Modernizes Banking and Credit Union Law and New Trust Company Laws in New Hampshire.

For FTCs, RSA 383-D enacted special provisions that are tailored to their unique characteristics. Confidentiality of information is enhanced, the definition of eligible family clients has been clarified, exemption from trust company laws have been expanded and procedures for the termination of FTCs have been set forth for the first time. The bank commissioner also changed the capital requirements to reflect the low risk represented by FTCs and eliminated the pledge. The organization and management of FTCs are governed by RSA 383-A, except as modified in RSA 383-D. Otherwise, the regulatory structure set forth in RSA 392-B remained intact, but in a different format.
A. FAMILY TRUST COMPANY BASICS

1. General Powers. An FTC is permitted to provide trust, investment, and other services to family clients only. An FTC’s organizational documents are required to prohibit the FTC from accepting deposits and transacting business with the general public.

2. Family Clients. The touchstone of the term “family client” is the “family member,” which is determined by reference to a “designated relative” from whom all relationships are established. It is important to select that person carefully because he or she is the key link to the universe of persons who may be served by the FTC. An FTC may change the designated relative once every 10 years, so that relationship may evolve over time. Under the RSA 383-D, the family clients are comprised of:

a. A Family Member. This term is defined as an individual who is within (i) the 5th degree of lineal kinship to the designated relative, or (ii) the 9th degree of collateral kinship to the designated relative, or a spouse or former spouse of an individual described in clause (i) and (ii). A family member’s child includes the family member’s adopted child, stepchild, or foster child or an individual who was a minor when the family member became that individual’s guardian. Alternatively, an FTC may elect to treat as a family member any individual who is the designated relative’s lineal descendant and is not more than 10 generations removed from the designated relative. Notice of this election must be given to the bank commissioner. It is assumed that the standard approach is selected unless an FTC affirmatively elects the alternative. “Lineal kinship” means a family member who is in the direct line of ascent or descent from the designated relative, and “collateral kinship” means a relationship that is not lineal, but stems from a common ancestor. Degrees are calculated by adding the number of steps from the designated relative through each person to the family member either directly in the case of lineal kinship or through the common ancestor in the case of collateral kinship.

b. A Former Family Member. This term is defined as (i) a spouse or stepchild who was a family member but ceased to qualify as a family member as the result of a divorce, death, or any other reason or (ii) an individual who was a family member but ceased to qualify as a family member as the result of his or her adoption by an individual who is not a family member.

c. A Key Employee. This term is defined as any of the following individuals: an individual who is a director or executive officer, or employee of an FTC or its affiliate and, in connection with his or her regular functions or duties, participates in trust services or the entity’s management; an individual who is a director, officer, or employee of an eligible trust, a family entity, or family charitable organization and, in connection with his or her regular functions or duties, participates in the entity’s management; a current or former employee designated by an FTC as a key employee; or the spouse of a key employee.

d. A Former Key Employee. This term is defined as an individual is a former key employee only to the extent of (i) trust, investment, or other services that the FTC was providing to that individual (or an eligible trust of which the individual or the individual’s spouse was a settlor) immediately before the individual became a former key employee, and (ii) any trust, investment, or other service in connection with any additional investments that, with respect to an investment that the FTC advises or manages, the individual (or an eligible trust of which the individual or the individual’s spouse was a settlor) was contractually obligated to make before the individual became a former key employee.
e. Incompetent or Deceased Persons. An estate of any incompetent or deceased family member, former family member, key employee, or former key employee.

f. An Eligible Trust. This term means a trust of which (i) each settlor is a family member, (ii) a trust of which a settlor is a person other than a family member if noncharitable beneficiaries who are family members represent a majority of interest in the trust, (iii) a trust of which a settlor is a person other than a family member if a majority of the trust’s noncharitable qualified beneficiaries are family members, (iv) a trust in which one or more eligible trusts or other family clients are the only persons who currently are distributees or permissible distributees of trust income or principal, or (v) a trust of which the settlor is one or more of a key employee, a former key employee, or a spouse of a key employee or former key employee.

g. A family charitable organization. This term is defined as a nonprofit corporation, charitable trust, or other nonprofit or charitable entity if (i) it was created by a family client, or (ii) one or more family clients contributed all or substantially all of the money or other property that the entity has received as contributions.

h. A Family Entity. This term is defined as an entity controlled by one or more family clients other than key employees and former key employees.

i. Close Relationships. A family client may include a person designated by the FTC who has a close and continuous relationship with one or more of the foregoing family clients.

j. Involuntary Terminations. A family client may also include a person whose eligibility has been involuntarily terminated, such as from a death and divorce, but only for one year after the event. Note if the family relative is changed and a person becomes ineligible, then the person may also remain a family client for a year after the event.

No eligible trust, family entity or family charitable organization is allowed to qualify as a family client if the Bank Commissioner determines such entity is organized or operated for the purpose of evading the limitations of RSA 383-D.

B. ORGANIZATION

The organization of an FTC is governed by RSA 383-A and RSA 383-C. See New Trust Company Laws in New Hampshire. The application process is similar to that of trust companies, except the name and date of birth of the designated person must be included. Also, any exemptions from the requirements governing trust companies must be requested. In reviewing the application, the bank commissioner will consider the safety and soundness of the proposed FTC based on its services to a market which consists solely of family clients and on its financial success in avoiding net losses over multiple years. The minimum capital is $250,000, although the actual capital may be higher if the bank commissioner determines the risk attendant to the FTC requires more capital. The capital must be invested under prudent investor standards and is not permitted go below the minimum amount. FTCs are exempt from the pledge and fidelity bond requirements of trust companies. They are required to maintain an errors and omissions liability insurance policy. For purposes of determining the appropriate amounts of required capital and liability insurance, the commissioner must consider the FTC’s safety and soundness and give primary consideration to the liability insurance, which provides the primary protections for an FTC’s family clients.

C. MANAGEMENT AND OPERATIONS

A family trust company is required to have a board of not less than 3 directors, who need not be residents of New Hampshire or the United States, unless the bank commissioner determines based on safety and soundness considerations that one or more should be New Hampshire residents or citizens of the United States. A director or officer of an FTC is subject to the same standard of care that applies to
a director of a trust company, except that a director or officer is not personally liable to any person to the extent that, in the performance of his or her duties, the director or officer acts in good faith. In connection with any matter involving a trust, a director or officer acts in good faith to the extent that he or she acts in reasonable reliance on the terms of the trust, a nonjudicial settlement agreement under RSA 564-B:1-111, or a court order. An FTC may indemnify a director or officer against any liability, except to the extent that a court determines that the director or officer failed to act in good faith. The board of directors must meet quarterly or more frequently as necessary. The officers must include a president, a secretary and a treasurer.

An FTC may establish trust offices in the same manner as a trust company.

An FTC may lose its status as an exempt trust company if it fails to comply with the requirements of the RSA 383-D. It is required to certify its compliance annually to the bank commissioner. If it loses its status, it would become a trust company and be subject to all the requirements of New Hampshire trust company law. An FTC may voluntarily convert its charter into a trust company and engage in business with the public if permitted to do so by the bank commissioner.

D. EXAMINATIONS

The bank commissioner is required to examine an FTC in the same manner as a trust company, except in lieu of an examination, the commissioner may accept (i) a financial audit report, and (ii) a fiduciary compliance audit report that includes a review of each material aspect of the FTC's management, operations, compliance, and asset management and conforms to applicable generally accepted auditing standards. In determining whether to grant an exemption, the bank commissioner may consider (i) the quality of the FTC's management, operations, compliance, and asset management as determined under any prior examinations and reports, (ii) the quality, scope, and amount of coverage under the errors and omissions liability insurance policy that the FTC maintains, and (iii) any other relevant factors affecting the FTC's safety and soundness. However, if the bank commissioner determines that an FTC is or may have engaged in any activity that adversely affects its safety and soundness, then the commissioner may examine the FTC and may revoke any exemption.

E. CONFIDENTIALITY

FTC information is confidential, is not subject to subpoena, and is not subject to public disclosure, except in some narrow instances. “FTC information” includes the following information: (i) any of its information that is confidential under the banking statutes, (ii) the name, date of birth, and any other identifying information of the designated relative, (iii) the names, addresses, and equity interests of the FTC’s equity owners, (iv) capital contributions to the FTC, (v) the FTC’s directors and officers, (vi) the addresses of the FTC’s offices, (vii) the names and addresses of the FTC’s affiliates, (viii) the FTC’s business affiliations, (ix) any information that the FTC provides to the bank commissioner (whether in an application, in a report, in the course of an examination, or otherwise), (x) any information that the bank commissioner obtains in the course of an examination, (xi) an examination report, (xii) any person’s nonpublic personal financial information, (xiii) any information relating to any conversion, combination, reorganization, domestication, or dissolution of an FTC, and (xiv) any information relating to any transfer of an equity interest in an FTC.

F. DISSOLUTION

RSA 383-D sets forth procedures for the voluntary or involuntary dissolution of an FTC. Unlike other trust companies, the dissolution process is subject to the jurisdiction of the Probate Court of New Hampshire. The bank commissioner or any interested person may commence a judicial proceeding for purposes of seeking the dissolution. Each interested person must be a party to that judicial proceeding. An “interested person” means a person who is (i) a
A shareholder of an FTC organized as a corporation, (ii) a member of an FTC organized as a limited liability company, or (iii) a director or officer of the FTC.

The court may dissolve the FTC if it is established that: (i) the FTC has materially violated any applicable law, (ii) the FTC is or has engaged in any activity that jeopardizes its safety or soundness, (iii) the directors are deadlocked in the management of the FTC’s affairs, and the FTC’s equity owners are unable to break the deadlock, and irreparable injury to the FTC or one or more of the FTC’s clients is threatened or being suffered, (iv) the directors, its executive officers, or those in control of the FTC have acted, are acting, or will act in a manner that is illegal or fraudulent, (v) the FTC’s equity owners are deadlocked in voting power and have failed, for a period that includes at least 2 consecutive annual meeting dates, to elect successors to directors whose terms have expired, (vi) the FTC’s assets are being misapplied or wasted, (vii) an agreement of all of the FTC’s equity owners requires the dissolution and the FTC has not been dissolved in accordance with that agreement, (viii) the FTC’s authority to conduct trust business has terminated by the bank commissioner and the FTC has failed within a reasonable time to liquidate and distribute its assets and dissolve, or (ix) the FTC has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets and dissolve.

G. FOREIGN FAMILY TRUST COMPANIES

A foreign FTC may engage in trust business in this state. A foreign FTC that exercises trust powers in this state is generally subject to RSA 383-D. A “foreign FTC” means a foreign trust company that (i) is organized in a state or jurisdiction other than New Hampshire, and (ii) is authorized under the laws of that state or jurisdiction to provide trust, investment, and other services principally to members of one or two families and entities in which one or more of those family members have substantial interests. A foreign trust company may be examined by the bank commissioner and may convert to a New Hampshire charter.

H. OBSERVATIONS

A family trust company is a special trust company that is designed to serve the needs of a family with substantial resources. The owners can employ their own trust and investment advisors to manage their assets or retain the services of third parties to perform those functions. Information relating to the FTC is highly confidential and the privacy of its family clients is protected. Because of its favorable laws, New Hampshire is becoming the state of choice for these companies.