

Memorandum 84-28

Subject: Study L-640 - Trusts (Foreign Trustees)

Financial Code Section 1503 forbids the conduct of trust business in California by a foreign corporation (other than a national banking association) except for certain actions such as delivering, registering, paying interest on, certifying, redeeming, and cancelling bonds. Apparently there is a possibility that banks may be permitted to conduct trust business under federal law regarding interstate banking. Although California statutes have contained some misleading language, it does not appear that a foreign corporation can qualify to conduct a trust business in this state. At one time it appeared that a foreign corporation could qualify in this state to conduct a trust business. See 3 J. Goddard, Probate Court Practice § 1819, at 20 (3d ed. 1977). We assume that any attempt to expand the role of foreign corporations would be opposed by local interests.

As many as half of the states bar foreign corporations as trustees. See G. Bogert, The Law of Trusts and Trustees § 132, at 644 (2d ed. 1965). Most states that permit foreign corporate trustees attach some conditions. Some states, such as Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Texas, provide for reciprocity with other states. Id., at 643. A smaller number permit foreign corporate trustees from adjacent states.

Uniform Probate Code Section 7-105 would permit foreign trustees to receive distributions from local estates, to hold, invest in, manage, or acquire property in California, and to maintain litigation without the necessity of qualifying to do business in the state. Qualification would be required before a foreign corporation would be permitted to maintain the principal place of administration of a trust in the state or otherwise acts in a way requiring qualification to do business. The Comment to Section 7-105 says that this should

correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust.

Section 7-105 also provides that a foreign cotrustee is not required to qualify in the local jurisdiction solely because its cotrustee maintains the principal place of administration there.

California law, with some very minor exceptions relating to bonds as noted above, precludes foreign corporations, other than national banking associations, from directly or indirectly transacting trust business in this state. Apparently, alien and nonresident individuals may act as trustees. See Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.3, at 643-44 (Cal. Cont. Ed. Bar 1982). It should be noted that the UPC does not displace the general rules concerning what other acts require qualification by a foreign corporation in a state. The Corporations Code reflects a less parochial view of interstate commerce. Corporations Code Section 191(c) provides that a foreign corporation is not conducting intrastate business where it maintains an action or "conducts an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature." See also Corp. Code §§ 2100-2116 (foreign corporations). Some states do not distinguish between foreign corporations in general and foreign corporate trustees. See Bogert, supra, at 642.

In its 1973 study of the UPC, the State Bar found that a provision like UPC Section 7-105 "would facilitate the administration of trusts with multi-state real property assets" but also suggested that "this may create other problems that form the basis for the long-standing policy in California of prohibiting out-of-state corporate fiduciaries from transacting business in the State of California without qualifying to do so." State Bar of California, The Uniform Probate Code: Analysis and Critique 198 (1973). The Joint Editorial Board of the UPC responded by noting that the nature and importance of the other problems was not revealed, but presumed that they were "problems for local banks interested in keeping out corporate competitors." The Joint Editorial Board also asked whether the California system is "effective against arrangements involving cotrustees, nominees, and individual original and successor trustee arrangements that are frequently used to circumvent the barriers against foreign corporations." Joint Editorial Board of the Uniform Probate Code, Response of the Joint Editorial Board 71 (1974).

The Commission has several alternatives:

(1) The law could be left as it is with very limited authorization for actions by foreign corporate trustees. The push of federal regulations in interstate banking may eventually force changes anyway.

(2) A broader authorization like that provided in the UPC could be enacted. This appeals to the staff since it does not necessarily involve a direct challenge to local interests. By permitting an expanded list of activities by foreign corporate trustees, trust administration in multi-state trusts should be made simpler and cheaper.

(3) A reciprocity scheme could be adopted.

(4) California could apply its general foreign corporation qualification standards to corporate trustees, and thus permit them to operate in this state.

Respectfully submitted,

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