The private trust company comes back on shore – in the United States

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Confusingly, the term 'private trust company' is applied to two types of trust companies: commercial firms that serve the wealthy, 'private' clientele also served by 'private' banks; and truly private firms that are owned by and serve only a single wealthy family. To emphasise its single-family focus, the latter are now often referred to as 'private family trust companies' (PFTCs).

Today's PFTCs little resemble prototype 19th-century private-client trust companies. Perhaps more surprisingly, they bear little resemblance to 'private trust companies' of the 1990s, the gestation era for the PFTC. Those companies bear familiar names such as Rockefeller, Bessemer, Glenmede, Pitcairn and GenSpring and originally were created to meet the needs of a single family. But they all ended up serving the general public. Perhaps 'going public' allowed founding families to pursue more attractive opportunities, but the considerable pressure on each to spread across a larger client base the high costs of a commercial bank charter (the only trust charter available when they were organised) was a major factor in their making that course correction.

The modern US PFTC also differs markedly from a third form of 'private trust company': its 'offshore' single family private trust company contemporary. The role of an 'offshore' single family trust company (OFTC) has typically been limited to the equivalent of custodians of trust assets, or administrative and directed trustees. Sometimes their roles have involved a level of settlor or beneficiary participation in trust decision-making not clearly supported by the trust instruments or applicable laws. US private family trust company roles are typically broader and more robust than those of OFTCs.

Roles performed by PFTCs range from full trustees, with no or widely varying degrees of delegation to others, to directed and administrative trustees, to trust advisers or protectors or providing back-office and other support for family members who serve as trustees. In leading US states, of which there are several, these trust-related roles are fully supported by new, progressive and continually evolving trust and trust company laws. In addition to those roles, PFTCs are increasingly providing all of the financial, family governance and family development roles of modern family offices. As the only form of family office that can act as a trustee, PFTCs have become 'family offices on steroids'.

This article will explore the dynamics that initially made the PFTC charter attractive to wealthy families and the ever-improving US state law environments that have allowed it to thrive, with hundreds formed over the past two decades. It will also explore how and why those developments and the desire of sophisticated families to take advantage of them have led to PFTCs completely integrated with the implementation of family strategic plans. That integration includes, as would be expected, providing family and family member financial, investment and risk management. But it also includes involvement in family governance, family member development and engaging family members with each other across the generational and branch barriers that must be spanned for families to remain unified.

Limited federal taxation of foreign trusts and privacy protections as good as or better than those found in traditional offshore jurisdictions have led some commentators to call the United States the 'new offshore' jurisdiction for trusts.[1] Hence we conclude by considering whether those legal advantages – and, more broadly, the landscape of family trust companies made possible by maturing state law environments – present attractive trustee and family office options for families residing outside and not just inside the United States.

How the stage was set for the PFTC

Four major events of the late 20th century created an opportunity for the modern US single family private trust company industry to emerge. The first was the widespread adoption of the Prudent Investor Act,[2] statutorily revolutionising US trust law. The second was several key states' authorisation of 'dynasty trusts' with perpetual lives. The third was the sponsorship and support by the Conference of State Bank Supervisors (CSBS)[3] of model, non-depository (ie, non-bank) trust company legislation that included a private family trust company chapter.[4] These three developments were responsive to the desire of wealthy families to execute on the final major development of the same period: families making a priority of taking control of their own wealth, managing it and channelling its deployment according to multi-generational strategic plans.

The confluence of these events in the 1990s set the stage for fashioning a new, non-bank, single-family private trust company as an ideal tool for aggressively pursuing families' multi-generational hopes and aspirations by allowing them to control all of their own wealth – including the significant majority of that wealth in the hands of trustees.

The significance of the Prudent Investor Act to the development of PFTCs cannot be overstated, but that's not because of its feature most frequently cited, namely the liberalisation of the asset classes a trustee may prudently hold. Rather, it was the act's sanctioning delegation by trustees of their responsibilities, especially investment management, even to family members and family offices.[5]

A second impact of the act has been subtler but just as important: it set the precedent for statutorily revamping state trust laws to make them more flexible and more responsive to modern-day realities and the evolving needs and circumstances of settlors, beneficiaries and trustees over the long lives of trusts. The leading US states for trust law have assiduously and repeatedly followed this precedent ever since, as we shall see.

States keep leading the way

Great PFTC states developed a formula for attracting and holding private trust companies and the economic and tax benefits that come from their presence in a state. The formula has five components:

- progressive trust laws;
- progressive trust company laws, including private trust company laws;
- a state banking regulator encouraged by the legislative and executive branches to only impose a regulatory burden on PFTCs that is proportionate to the risk of a trust company that serves just one family;
- a judicial system that, in at least one key county, ensures that knowledgeable jurists and court administrators, without anti-wealth biases, will hear trust disputes and otherwise address trust issues requiring the court's participation; and
- a private-public working group and/or other public-private cooperation by executive and legislative branches of the state with bar groups, banking associations, trust institutions and family offices dedicated to ensuring that the state's laws, regulation of PFTCs and the family trust company environment in general keep pace with other leading states', the needs of wealthy families and the best thinking about family trust company activities.

States committing to this formula for attracting wealthy families' trusts and private trust companies have almost all succeeded in doing so. To many, Delaware may be a surprising omission from the list of the best PFTC states. Long known for its innovative trust laws,[6] Delaware has not built on its trust law prominence by adopting first-rate family trust company laws or other support. Therefore despite attracting more wealthy family trusts than any other state, Delaware is home to less than a handful of PFTCs.[7]

South Dakota was the first state to implement the entire formula, resulting in an early surge in South Dakota[8] private family trust companies in the late 1990s that continues today. Wyoming was next, primarily by adding in 2003 an excellent not-so-uniform Uniform Trust Code[9] to the authority it already provided for unregulated family trust companies.[10] Alaska[11] had also updated its trust company, tax and trust laws by the early 2000s and attracted many trusts, but very few single family private trust companies because of its remoteness.

Nevada was the next state to become highly successful at attracting family trust companies – primarily unregulated ones until about 2005, but thereafter regulated ones also. The pace of formation of both types increased with a complete rewrite of Nevada's trust and trust company laws in 2009 and 2010.[12] New Hampshire rewrote its trust and trust company laws in 2007 and 2008;[13] but because of an unwilling banking regulator, PFTC formations proceeded slowly until new leadership was installed in 2013.

The current roster of best PFTC states was completed in 2013 when Tennessee not only emulated the trust law progress of the other four states but went them one better with its own not-so-uniform Uniform Trust Code[14] incorporating unique and significant innovations. Over the past 10 years, Tennessee has also steadily improved its trust company laws.[15] These legislative actions and strict adherence to the formula given above transformed Tennessee into one of the leading states in the United States for wealthy families' trusts and PFTCs.

A selection of the trust laws most valuable to wealthy families

No doubt Tennessee will be matched and leap-frogged by one or more other states soon, just as it matched and leap-frogged them. But no state picks up the best of every other state's laws, which means that a family to whom particular issues are important must examine and compare the laws of each.[16]

Nevertheless, most of the trust law provisions important to families appear in the statutes of all five leading PFTC states: Nevada, New Hampshire, South Dakota, Tennessee and Wyoming. We briefly summarise many of those provisions as follows:

- flexibility for settlors creating trusts:
  - statutory support for settlors' provisions in trust instruments pre-empting common law or statutory default rules;
  - a robust Prudent Investor Rule and progressive Uniform Trust Code (eg, few mandatory default rules for trust instruments, support for appropriate asset concentrations, 'unhooking' from other states' Uniform Trust Codes and from the prior common law of the enacting state);
  - explicit directed/multi-participant trust authority and rules governing relationships among the trustees, advisers and protectors of a single trust;
  - strong authority to delegate prudently; and
  - powerful specialised trusts – eg, dynasty, purpose, quiet and asset protection.
- flexibility for beneficiaries:
  - explicit characterisation of fiduciary standards as 'administrative law', making them applicable to every trust administered in the state unless the trust specifies otherwise;
  - strong decanting authority;
  - judicial/non-judicial trust reformation/modification/termination;
  - strong virtual representation; and
  - unitrust conversion and power-to-adjust authority.
- reasonable protections for trustees without bullet-proofing:[17]
  - authority (only permitted in Nevada so far) to announce to all current beneficiaries a plan of action that, if not objected to, can be overturned in court but not be the basis for surcharging the trustee;[18] and
  - fiduciary duties of family trust companies based on the 'standards and practices' of regulated family trust companies, not commercial trust companies (lamentably, no such provisions have been statutorily adopted today but we expect them to be introduced).
- tax laws:
  - no state/local trust income taxes;
  - modest state/local trust company taxes;
  - elective community property asset trusts (which results in a 100% step-up in the basis for federal income tax purposes at the time of first to die of a married couple; only found in Alaska[19] and Tennessee[20]); and
  - similar exemptions from state taxation of foreign trusts to those available for federal trust taxation.

Again, this is only a sample of the state trust laws that are important to most families with substantial assets and many households. Others will be equally or more important to particular families.

Offshore statutory trust law observations

Trust laws such as those summarised above are only sparsely available in offshore jurisdictions, for two reasons. First, most offshore legislative bodies seem reluctant to adopt such laws. Secondly, when they do, the courts (usually those in England) often question whether trusts taking advantage of these provisions actually qualify as trusts, or they find another way around enforcing the apparent intent of the statute.

It is worth noting that US jurisdictions are not immune from similar judicial sentiments. Some US courts have attempted to read out of the law provisions of the Prudent Investor Rule that relax for certain investment concentrations common law prohibitions.[21] Consequently, Tennessee has felt obliged to write the following statements into its new Uniform Trust Code and Uniform Prudent Investor Act:

> *These modifications were undertaken deliberately and after significant consideration:*
> *(1) Therefore … no consideration shall be given to the need to promote uniformity of law … among states …; and*
> *(2) … courts shall not consult, rely on or give any persuasive value to such uniform acts … or any comments accompanying [them] ….*[22]

Despite the trust concentration cases alluded to, where hard facts made bad law, the odds are excellent that each of the provisions summarised above will be upheld in US jurisdictions (if not always properly interpreted). Unlike in UK jurisdictions, US trusts are not the creation of or within the sole province of chancery courts. They were statutorily created in the United States by the individual states, which fact provides substantial authority for their revision by the same means.

The new private family trust company charter

Earlier in this article we identified widespread adoption of a model trust company law sponsored by CSBS as the third event of four leading to today's PFTC because it made available a trust company charter that can be formed and operated at a much lower cost than a bank charter. A bank charter not only requires burdensome and expensive deposit and lending regulations, but also attracts supervision by at least two regulators – namely a state or federal chartering regulator and the Federal Deposit Insurance Corporation – and usually a third as well, namely the Federal Reserve Board.[23] Regulated state trust companies have only one regulator: a state banking regulator.

At some point – usually while the generation that created the wealth still lives – every wealthy family that wants to stay together as a family and preserve and grow its wealth begins seriously to think beyond how to make and enjoy that wealth.

In states also adopting the CSBS model law's private trust company chapter, an even more lightly regulated family trust company charter has become available. The best PFTC states did not stop with the CSBS version, though, but proceeded to create a family trust company charter uniquely well-suited to families' needs. The first of these were the 2007 New Hampshire and 2009 Nevada family trust company laws.[24] They define the family clients that a family trust company may serve far more broadly than the CSBS model does.[25] South Dakota followed in 2010 with a regulation relaxing the burdens on a private trust company not serving the public and defining its permitted clientele similarly broadly.[26] More recently, Tennessee,[27] Florida[28] and Wyoming[29] followed suit, but curiously the latter two defined the permitted clientele much more narrowly in some ways than the competing states who preceded them did.

These new laws and regulations formally recognise up to three tiers of non-bank trust companies (Nevada, Wyoming and Florida) or two tiers (South Dakota, New Hampshire and Tennessee). The three tiers are:

- regulated commercial trust companies;
- regulated single family trust companies; and
- unregulated single family trust companies.

Two-tier states do not offer unregulated single family trust companies. Each tier has a distinct level of regulatory burden, based on its perceived level of risk to the public. Commercial trust companies are at the high end of burdens but still deal with far less than banks; unregulated family trust companies sit at the low end; and regulated family trust companies have a somewhat higher level of regulation than unregulated trust companies.

PFTC charter type dictates RIA status

All state-regulated trust companies, including regulated family trust companies, benefit from the 'bank' exemption from registration as investment advisers (RIAs) with the US Securities and Exchange Commission (SEC).[30] Unregulated private trust company status, now available in Nevada, Pennsylvania,[31] Wyoming and Florida, provides the lowest level of regulation of any family trust company charter,[32] but they do not qualify for the bank exemption from SEC registration. That is a problem because today the SEC is a far more burdensome regulator than the state banking regulators. In order to avoid SEC registration an unregulated PFTC has to limit its clientele to those permitted by the new 'family office' exemption from SEC registration.[33]

Families seeking the lowest level of regulation have two choices, then: a regulated family trust company that meets state law limits on clientele whom a family trust company may serve, or an unregulated family trust company that restricts its clientele to meet both state family trust company and SEC family office limits. Unfortunately, the family office exemption defines the eligible clients for an exempt family office (and therefore an exempt, unregulated PFTC) much more narrowly than a commercial, first-tier regulated trust company may serve (ie, anybody) and even much more narrowly than the clientele a tier-two family trust company may serve in states offering that tier, notably Nevada, New Hampshire, South Dakota and Tennessee.

Peculiarly, Wyoming, which until last year did not define a 'private trust company' or a 'family trust company' other than as one not serving the public, adopted a three-tier approach in a law that in key respects limits the clientele of their new 'family trust company' even more than the SEC's family office exemption does.[34] Hopefully this was an oversight that will be mended in its 2017 legislative session.

Florida has no trust income tax, is the home or second home for many wealthy families, including a large number of international families, and recently adopted a three-tier family trust company act.[35] Consequently a lot of families are interested in the possibility of establishing a family trust company there. Unfortunately its only partially modernised trust laws, its narrow definition in its family trust company act of who may be served and its awkward regulatory scheme for second-tier and third-tier family trust companies seem unlikely to attract many Florida-licensed trust companies, especially from non-Florida families. All is not lost, though, for families interested in a Florida PFTC location. Florida's act allows trust offices of family trust companies chartered in another state.[36] Families with a fondness for Florida can put an office there of a family trust company sited in a better PFTC state.

Important trust company laws

As we have detailed, limited regulatory burdens and the availability of an exemption from SEC registration are two important features of a state's family trust company charter, but there are others, including the following:

- strong confidentiality for trusts, trustees, protectors, settlors and beneficiaries (including court proceedings);
- broad and express authority for fiduciaries to use affiliated advisers and investments, including related private investment funds;
- moderate capital requirements, mostly investable under the Prudent Investor Rule; and
- interstate office and activities authority (available in most states), facilitating:
  - family convenience;
  - taking advantage of an additional state's trust laws; and
  - hedging the risk of adverse changes in charter state laws or policies.

These are just examples of the advantages to PFTC-forming families that can arise from state trust company laws. As with state trust laws, new trust company laws other than these could be even more advantageous to a particular family.

The PFTC *raison d'être*: family control

The *raison d'être* for families forming a private trust company is to maximise the control that they may lawfully exercise over their wealth held in trust. A cynic might suggest families want that control just to inflate current distributions to family members, but in practice that is not what motivates families. What motivates them is the capability that control gives them to devise and implement a strategic plan for investing and deploying their wealth in a way they believe will give them the best opportunity to fulfil their vision for keeping the family together and family members living productive, meaningful and happy lives.

At some point – usually while the generation that created the wealth still lives – every wealthy family that wants to stay together as a family and preserve and grow its wealth begins seriously to think beyond how to make and enjoy that wealth. This naturally shifts their thoughts to envisioning a future that they desire for their family and to prioritising the use of at least some of their wealth to support that vision. The inevitable next step in this process is to ponder how wealth can be managed and deployed, both short and long term, to bring about that family future.

Even before any systematic articulation of a family vision, it will usually have found expression in a variety of ways, starting with the language of family trusts and other elements of family estate plans. Many founders of family wealth are inspired to lay down in writing a more complete vision in an informal 'letter of wishes' setting forth a family history, values and other elements of the family legacy and culture. Sometimes their views of the best strategies for the family to pursue after the founders are gone are also included in that letter.

Eventually, family members who want to keep the family strong and together may develop a common vision for the family and a strategic family plan for realising it, often called a 'family constitution' or, more usefully and accurately, a 'family compact'. These articulations will project out to at least a couple of generations but increasingly they seek to promote the happiness and success of multiple future generations. Invariably they address not only the goals of the family but also what the family believes are its best strategies for the management, expenditure and distribution of family wealth in order to achieve their goals. Implementing any far-reaching strategy requires family-wide control over its own wealth – that is, more control than can be exercised just by pleading with individual trustees or others actually controlling the wealth to support and implement the family strategic plan.

Wealth held in trust

Wealth held individually or jointly by family members is within family control and can be held and distributed in keeping with the family vision and strategic plan by those who created or subscribed to that plan – and hopefully by future generations of family members as well. But in the United States, and perhaps England, 50% to 90% of family wealth is typically held in trust, and families where that level is currently near 50% are usually one death or one new estate plan away from it nearing 90%.

Consequently, at least a majority of almost all families' wealth is controlled by one or more trustees. A trustee's control is wide, extending to every really important decision that can be made concerning trust assets, including:

- what form the wealth will take and how the assets kept or acquired will be managed;
- what expenditures of any kind for any purpose will be made from trust assets; and
- how trust assets will be distributed to trust beneficiaries, including charities.

Trustees are not, of course, free to make any decisions they want regarding trust management, expenditure and distribution. They are limited by the purposes and other terms of the trust and by their fiduciary responsibilities. Notwithstanding those limitations, trustees generally have substantial discretion regarding their decisions. How they exercise that discretion determines whether trust wealth will be deployed to further the family's vision and reflect its values and culture, or used in some other way. Trust decisions in keeping with a family's wishes will be made only if their trustees are aware of those wishes and if the family either controls the trustees or asks the trustees to do as it wishes with respect to each material decision and the trustees choose to do so.

Trustee options

Families have only three types of trustee to choose from:

- individuals, including of course family members;
- financial institutions; or
- their own family trust company.[37]

The willingness and ability of the first two to comply with a family's wishes will be limited not only by trust terms and trustee fiduciary duties but also by the trustees' knowledge, skill, cooperativeness and fiduciary risk tolerance. Whether trustees manifest any of these qualities in abundance depends on who the individual trust decision-makers are: the individual trustees or the trust officers and other personnel of a trust institution.

Even if the original individual trustees or trust personnel are willing to be generally cooperative, they may not be when there is conflict within the family, litigation involving the trustee, or other risks affecting the trustee. Moreover, successor trustees and new trust officers are always required at some point for long-lived trusts – often, every few years – and a successor trustee or trust officer may be less cooperative than the individual originally picked out by the settlor. Even family-member or trusted-adviser trustees will not always view the best interests of the beneficiaries in the same way that the broader family does, even if that trustee is privy to a family compact or other strategic plan. Furthermore, family-member/trusted-adviser trustees are increasingly aware of and sensitive to their personal risk as fiduciaries. Finally, not all generations or branches of a family may view the individual trustees chosen by another generation or branch as favourably as did the patriarch or other individuals who chose them.

The final trustee option, a perpetual private trust company, is the only one that can dependably be controlled and counted on by the family to be cooperative for as long as the trusts last, even in times of family strife. The fact that a family-controlled PFTC best ensures that trust decisions are informed by the family's vision, values and culture is, at heart, the fundamental reason why families with substantial wealth in trust create PFTCs.

What family control over trust assets does in practice

We frequently refer to a family vision as the motivator for a family to create a strategic plan and a private family trust company to implement it, at least with respect to trust assets. The typical family vision includes at least two elements: keeping the family together, for generations if possible; and building strong and productive family members, living lives they find happy and meaningful – hopefully also meaningful in light of the family's values. What different families mean by these aspirations, and the strategies they believe are most suited for realising them, can vary widely. What's true for all, though, is a belief that their aspirations can most readily be met by harnessing family wealth towards that end. That includes harnesses intended to ameliorate the harm that wealth can cause to family members.

The desire to fashion those harnesses is another way of depicting the primary reason why families seek the control provided by a PFTC. A list of further reasons must be entirely composed of concrete examples of what can, and in some cases must, be done by the family's trustees to fulfil its vision. Several important and interesting examples follow. It is anything but a comprehensive list, and not all of them will be applicable to every family.

Supporting family cohesion

One of the two elements we identify as central to almost every family vision is keeping the family together. Unfortunately, this element will usually only be supported by a non-PFTC trustee, if at all, as a by-product of its support of the other central element, namely building strong family members. This is because trustees typically focus only on the direct needs of individual family beneficiaries and not on those of the family as a whole. Also, trusts – especially legacy trusts – generally only speak in terms of achieving their purposes through direct benefits to individuals.

A strong case can be made that family cohesion can be of significant benefit to individual family beneficiaries, even though indirectly; but that case has to be made. Non-PFTC trustees are almost never willing to make that case nor capable of doing so even when willing. Only a family-controlled trustee will have the knowledge and incentive to make that case so that it can make the family's central goal of keeping together an important objective of all trust decision-making.

Creating a bespoke legal environment

Every trust and trust company law we have described in this article, as well as those only alluded to, can have a positive material effect or, by its absence, a negative effect on a family's ability to pursue its vision. A family with a PFTC has the opportunity to create a bespoke legal environment for itself by siting the PFTC and administering family trusts in one or more of the states that the family deems to boast the most beneficial trust laws, both governing and administrative, and the best tax, administrative and judicial environments – and then writing and administering its trusts to take advantage of those laws and environments.

Concentrating asset management in one entity
Only through a PFTC can a family concentrate management of all of its wealth in one entity, because only the PFTC can act as trustee of family trusts and act as investment adviser for all other family-related portfolios, if desired, without the costs, limitations and burdens of an RIA. By concentrating asset management in one entity, a family can:

- maximise investment management efficiency;
- avoid creating multiple and possibly inconsistent legal structures for controlling and administering family wealth; and
- limit some of the factors that propel families towards atomisation of their wealth, leading to breaking up the family, followed by poor investment performance, excess spending, and an ultimate return to 'shirtsleeves' for family members incapable of creating wealth on their own and/or curbing their spending.

Optimising risk management
Two dimensions of a regulated PFTC make it unique, in a positive way, regarding family risk management. First, even though the scope and quality of a PFTC's risk management is dictated by prudential and regulatory standards, little of what state banking regulators require goes beyond what is reasonably necessary to protect family wealth, family members and others who take responsible roles in the PFTC.[38] This means that a regulated family trust company can have a customised and very trim version of a corporate trustee risk management structure without any of the excessive burdens imposed on banks and securities firms by federal and state regulators.

The second element of regulated PFTC risk management is even more exceptional. If it has the reasonable but solid risk management structure referenced above, which includes prudent standards and processes, its management will be able to make its own analysis of the benefit-to-risk-ratios of actions it proposes to take in either their trustee or corporate capacities. This means the PFTC should be able to take actions that are prudent in light of the family's and its trusts' multi-generational goals even though they are not actions that an institutional trustee would be comfortable taking under its risk management policies.

Some key elements of a risk management structure that can and should be implemented in a PFTC are laid out here and, regarding investment management, in the next subsection. They include:

- *Structure and risks:* A quality risk management structure consists of a comprehensive policies and procedures manual, business practices and procedures effectively implementing them, and appropriate regular reviews and audits of the scope and performance of those controls.
  The main risks to be addressed include:
  - breaches of fiduciary duties;
  - flawed delegation and supervision of outside services providers;
  - engaging in trust activities in states where the company isn't authorised to do so;
  - undisciplined, out-of-policy asset management, including unjustifiable concentrations;
  - inappropriate family member intervention;
  - non-compliance with applicable federal and state laws; and
  - cyber insecurity;
- *Risk management expertise and culture:* Successfully implementing and maintaining a state-of-the-art management structure requires both compliance/risk management expertise and a family risk management culture. Some families develop the compliance/risk management expertise internally; others obtain it through a combination of internal and third-party resources. Either way, the experts can, should and are being used to teach family members the importance of proper risk management to protect the family. Such efforts lead to the creation of a risk management culture not only for the PFTC but also for the family, which is vital to long-term successful risk management.
- *Family member/trusted adviser protection:* A PFTC can significantly lessen the risk of personal liability of family members and trusted advisers if their former roles as trustees and trust advisers are recast as membership on the PFTC board and/or committees.
- *Risk management of an unregulated family trust company:* Unregulated family trust companies are required by well-informed prudence (but not by law) to put in place the same risk management structures as regulated family trust companies. Failing to do so would mean accepting unreasonable risks to family assets, family members and trust company management and other personnel. They would also not have the risk management expertise and guidance to implement the risk-based approach to trust decision-making described

above and in the next subsection with any assurance that the risks were known or prudently accepted and managed.

Undertaking informed, prudent and essential investment management

Using its control over family investment assets and a solid risk management structure such as described in the subsection immediately above, a PFTC can adopt family-directed investment management strategies allowing its management to make their own informed judgements about whether the expected benefits of an investment justify the anticipatable risks. Key examples of investment strategies to which such judgements may be applied include: deciding whether to keep or sell a family business; deciding whether to invest in alternative equities, including direct interests in businesses; or maintaining concentrations in particular assets or asset classes.

These risk–benefit decisions must be got right by a family with multi-generational aspirations. It has been argued persuasively that they are among the few types of investment whose projected performance after inflation, taxes, fees and, of course, distributions for beneficiary expenses is likely to be sufficient to meet the future needs of young and unborn generations that the family vision and dynasty trusts intend to be met.[39]

Again, the foundation for safely investing in such assets consists of two things: long time horizons for relevant investment portfolios; and an excellent risk management and due diligence structure providing the necessary information and expertise for the asset to perform as it should. Key elements of an investment management risk process that can permit prudently implementing such strategies are as follows:

- *Trust and beneficiary information gathering:* The objectives of each trust or other client portfolio must be derived from the terms-of-trust instruments and the goals provided by the owners of non-trust portfolios. Confirmation must be made that the trust instruments clearly identify a purpose of meeting needs of beneficiaries across more than the currently living generations, an allocation of resources between current and future generations supporting that purpose, and support asset concentrations reasonably required to achieve that purpose. The projected liquidity needs of living generations and unborn generations of family members have to be estimated as far into the future as required by the objectives of the trust or other investment portfolio. The current personal and trust resources of all current and future trust beneficiaries must be determined, too.
- *Portfolio investment plan and private investment due diligence:* For trusts not clear as to the generations intended to be served or their support for asset concentrations appropriate for accomplishing its purposes, the trusts should be clarified, conformed or otherwise modified or decanted, as allowed by the trust laws of the leading states. An investment policy for each trust or other portfolio, reflecting its objectives and corresponding short-term and long-term liquidity needs, should be created. The asset classes that the PFTC considers appropriate for meeting the liquidity needs of the portfolios should be determined based on their expected returns and associated short- and long-term risks. Quality due diligence on each specific material asset considered must be performed. Regarding directly owned businesses, real estate and other privately held investments, the PFTC must consider objectively the impact on risk of any material special knowledge that has been or will be obtained by direct family or family trust ownership and control of the asset.
- *Investment allocation:* Based on the foregoing information and investment risk management policies of the PFTC, it should determine a prudent investment allocation for each portfolio, including (where appropriate) such allocation strategies as:
  - managing portfolios or specific portions based on their very long time horizons;
  - using asset concentrations required and justified by very long time horizons in family businesses, private equity, real estate and other alternative investments;
  - accepting short- to mid-term volatility for all or portions of certain portfolios; and
  - balancing the short-term risks of concentrations with an appropriately large allocation to liquid assets to provide for shorter-term liquidity needs.
- *Annual review:* Annually review the portfolio objectives and liquidity needs, trust company-wide and portfolio policy statements, beneficiary circumstances, asset class performance and risk, and the allocation and investments of each portfolio.

Supporting family governance

A PFTC's ability to concentrate control over family assets in its trust and investment management accounts results, as intended, in substantial control by its owner, the family, over those assets and other PFTC activities. Families also control their family offices; but the PFTC's actual control over family wealth, especially as trustee, means that who actually controls a PFTC is much more important than who controls a family office.

Because of its control over substantial family wealth, the PFTC must always be controlled by the 'right people' in the family if it is going to pursue the family's goals successfully. Identifying those people and their successors – hopefully current and future family leaders – is a big part of family governance. Implementing a leadership and succession plan is simplified by a PFTC because of its control over the majority of family assets. Thus when a PFTC is trustee of all or most family trust wealth, it always plays a significant role in at least two of the most important family governance functions – not only the control of wealth, but also family wealth and leadership succession.

In order to be a trust company, the PFTC must have the internal and external resources necessary to play a major role in a third major family governance role: implementation of the family strategic plan. Those resources are the personnel, systems and relationships necessary for managing, keeping records of and reporting on substantial family assets, close relationships with family trust settlors and beneficiaries, and understanding and implementing the family's trust, investment and tax strategies.

The PFTC can also provide substantial fact gathering and other support for four other major functions of family governance that are usually the responsibility of a family council or similar body that controls the PFTC: family decision-making; creation of the strategic plan; confirming whether the plan is being implemented and well; and revising the strategic plan as necessary from time to time.

Encouraging family member engagement and development

Virtually every family vision, whether expressly embodied in trusts or not, calls for supporting the development of each family member with family resources. As it happens, in order to determine whether and when trust distributions may be appropriate, a trustee must determine the needs, desires and resources of trust beneficiaries. Doing that right requires the trustee to fashion a trusting relationship with each beneficiary. In a PFTC, these are jobs for the Distributions Committee with the assistance of trust officers. Many PFTC families have come to realise that the Distributions Committee's relationship with beneficiaries and its knowledge about them make that body an excellent resource for coordinating family member development.

Another important element required for achieving a family vision that a good relationship between a trustee and each family beneficiary can facilitate is promoting engagement and acceptance between generations. The chief obstacles to engagement and acceptance are distrust, which creates a chasm between generations, deepened by the new generation's culture typically veering off from that of the older generations. By recognising that their obligation to trust beneficiaries is at least as great as to settlors, PFTC trust officers can play a significant role in bridging this chasm with trust. That role can be enhanced by adding to trust officers' mission the function of helping beneficiaries to identify and pursue their personal development goals.

Another unique role that PFTCs can play in family member development is to make available to family members the multiple positions within a trust company and its committees requiring varying levels of knowledge, skill and maturity. These are not unlike positions within a family business, but the PFTC's versions of the roles are more likely to introduce young family members to the realities of personal balance sheets and income and expense statement management and long term personal financial planning.

All of these trustee roles together promote the integration of the needs, desires, goals, values and culture of members of each generation with family-wide goals, values and culture. None of those benefits can be expected from an institutional trustee or even individual trustees.

Why a US PFTC for non-US families?

A non-US family probably cannot better protect its trust assets or exercise greater control over them than by using a US PFTC. Nor will they find an offshore jurisdiction in which a family can find a family trust company that performs all of the roles authorised to a PFTC. That being said, every family has to choose from among the broad range of options available the

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one most appropriate for their family – including, of course, any only available from an OFTC.

In preparing for that decision, a non-US family will find there are several features of the US trust and family trust company environment of particular interest, including two already mentioned: limited federal taxation of foreign trusts; and privacy protections as good as or better than what traditional offshore jurisdictions can offer. Regarding the privacy issue, it is worth noting that this is not just the issue of the new Common Reporting Standard (CRS)[40] being embraced abroad that goes beyond the US Foreign Account Tax Compliance Act's[41] intrusions. It is also the question of the strong support in the European Union and elsewhere for forcing trust beneficiary and trust assets disclosures. Such a proposal is on the EU agenda, and France is proceeding with releasing such information publicly, defying predictions that no government would go forward without broad international support for fear of loss of competiveness for its institutions.[42]

Another benefit of US PFTCs is that none of the states discussed here, other than Alaska, suffer from the shortages of skilled professional and administrative personnel that plague many offshore trust jurisdictions. Other benefits of US PFTCs compared with OFTCs include:

- the availability of unregulated PFTCs (in Nevada, Pennsylvania, Wyoming and Florida);
- the relative economic stability of the United States and its states, compared with many countries including, arguably, most offshore jurisdictions;
- some offshore jurisdictions, but none from the United States, barring family trust companies from receiving fees for trust services, undermining the benefits of trade or business tax status for OFTCs and discouraging them from providing anything but the most basic trust services; and
- many offshore jurisdictions, but none from the United States, requiring a local commercial trust company to play a major role in the operations of the family trust company.

Optionality

Hopefully, it is clear by now that the greatest benefit that a PFTC can provide to a wealthy family is optionality. A broad range of excellent options exist, presenting the PFTC in any of the leading US states with the ability to choose and implement the most appropriate ones for the family.

The choices are made available to any family, both US-based and otherwise, that forms a PFTC in a leading state. Those are the states with progressive trust and trust company laws, a commitment to balanced regulation providing the economic freedom that investors and companies need in order to thrive, courts that are knowledgeable about trust law and the needs and aspirations of wealthy families, and private-public working groups committed to maintaining the state's leadership.

One option that is especially meaningful to every PFTC-forming family is the ability to choose how robust the PFTC's trustee and family office roles will be and to only pay for what the family needs. The PFTC can be an administrative or directed trustee and any other kind of trustee, including all flavours of full trustees – from ones that rarely delegate trust decisions to ones that delegate every decision it can. It can provide or engage and supervise the providers of every kind of family office service that a family requires or not provide any services other than trustee services. Most importantly, though, once a family decides on a course of action for its trust company, it will not need to persuade anyone in order to be assured that the course it chose will be navigated in accordance with its vision, values and culture.

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1 Jesse Drucker, "The World's Favorite New Tax Haven Is the United States", *Bloomberg Business Week*, 26 January 2016, available at www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-united-states.
2 In full, the Uniform Prudent Investor Act of 1994.
3 The members are all 50 state banking regulators and the DC and territorial banking regulators.
4 CSBS, *Statutory Options for Multistate Trust Activities*, 1995, principally drafted by John Duncan. Adding the PFTC chapter was the primary 'fee' for our draftsmanship. Ironically that chapter, where adopted, has been a much greater spur to economic development in several states than the CSBS, at least, anticipated.
5 Uniform Prudent Investor Act, §9.
6 See Del Code Ann, Title 12, Ch 35, Trusts, Subchapters I–VII (2015).
7 Only four in the 34 years since it adopted its 'limited purpose trust company' law. Del Code Ann, Title 5, Ch 7, Subchapter V, Section 773 and following (2016).
8 SD Codified Laws, Title 51A, Ch 51A-6A (2015); see also 'Fiduciaries and Trusts' at SD Codified Laws, Title 55, §§ 1–16 (2015).
9 Wyoming Uniform Trust Code, Wyo Stat Ann, Title 4, Ch 10 (2015).

10 Wyoming Chartered Family Trust Company Act, Wyo Stat §13-5-201 and following (2015). An unregulated state trust company does not solicit or serve the public and therefore is not chartered or supervised by state banking regulators. It is not required to apply for a charter, has no exams and no or immaterial trust company regulations, supervision and annual fees. Such companies are only permitted by four US states: Florida, Nevada, Pennsylvania and Wyoming.
11 See Revised Alaska Trust Company Act, Alaska Stat Ann, Title 6, Ch 26 (2015). See also "Trust Administration", Alaska Stat Ann, Title 13, Ch 36, Arts 1–5 (2015); and Uniform Custodial Trust Act, Alaska Stat Ann, §13.60.010 and following (2015).
12 *Trust Company Laws*: Chapter 669, "Trust Companies", Nev Rev Stat §669.020 and following (2015) (John Duncan was principal draftsman of 2009 revisions); Chapter 669A, "Family Trust Companies", Nev Rev Stat §669A.010 and following (2015) (John Duncan was principal draftsman); *Trust Laws*: Chapter 163, "Trusts", Nev Rev Stat §163.001 and following (2015).
13 *Trust Company Laws*: Chapter 383D, "Family Trust Company Act", NH Rev Stat 383-D:1-101 and following (2015); and *Trust Laws*: Chapter 564B, "New Hampshire Trust Code", NH Rev Stat 564-B:1-101 and following (2015) (John Duncan principal draftsman of 2007 and 2008 revisions of both the Trust Laws and Trust Company Laws).
14 Tennessee Uniform Trust Code, Tenn Code Ann, §35-15-101 and following (2015).
15 "Private Trust Companies", Tenn Code Ann, § 45-2-2001 and following (2016); and "State Trust Companies", Tenn Code Ann §45-2-2101 and following (2016).
16 To take advantage of more than one state's laws, a family can consider chartering in one state and adding an office in another if permitted by both states' trust company laws.
17 Even family trust companies as trustees should not be too insulated from the consequences of their mistakes: the risks to the family of a trustee that can act with impunity are too great.
18 See Nev Rev Stat Ann §164.725 (2015). This is an example of a provision that benefits beneficiaries as well as trustees in a PFTC environment, since what the PFTC is proposing as trustee of a family trust will almost always be desired by most if not all its beneficiaries.
19 Alaska Stat Ann §34.77.100 (2015).
20 Tenn Code Ann §35-17-105 (2015).
21 Unified Prudent Investor Act §§2(c)(8) and 3; see, eg, *In re Will of Dumont*, 791 NYS2d 868 (NY Sur Ct 2004) (*rev'd on other grounds*, *In re Chase Manhattan Bank*, 809 NYS2d 360 (Sup Ct 2006)); compare also *WAK ex rel Karo v Wachovia Bank*, NA, 712 F Supp 2d 476 (ED Va 2010).
22 See Tenn Code Ann §35-15-1101 (2015).
23 12 USCA §266.
24 See footnotes 13 and 12, respectively, above.
25 See Nev Rev Stat Ann §669.042 (2015) and NH Rev Stat Ann §383-D:4-402 (2016), respectively.
26 SD Codified Laws §51A-6A-66 (2015).
27 Tenn Code Ann §45-2-2001(B) (2016).
28 Fla Stat Ann §662.111(11) (2016); Florida Family Trust Company Act, Title 38, Chapter 662, "Banks and Banking" (2015).
29 Wyo Stat Ann §13-5-204(iv) (2015).
30 15 USCA §80b-2.
31 Pennsylvania has no Family Trust Company Act, and its trust and non-bank trust company laws have not kept pace with the leading states' discussed here.
32 See footnote 10 above.
33 17 CFR 275.202(a)(11)(G)-1.
34 Wyo Stat §13-5-204(a)(iii)-(vii) (2015).
35 Florida Family Trust Company Act, Fla Stat Ann §662.01and following (2016).
36 Fla Stat Ann §662.151, "Registration of a foreign licensed family trust company to operate in this state" (2016).
37 To some degree, directed trustees provide another dimension to the individual and institutional trustee option. Any useful discussion of directed trusts is beyond the scope of this article except to note that such a trust can be well suited to providing family control over a specific trust, especially one with special assets such as a business; but if the number of those assets is large, they are difficult to manage without creating a family trust protector-adviser company. See John Duncan and Anita Sarafa, "Achieve the Promise – and Limit the Risk – of Multi-Participant Trusts", 26 ACTEC LJ 769 (2011).
38 This does not include anti-money laundering laws or securities laws (eg, disclosure rules) and other federally imposed regulations that lay substantial burdens on all financial institutions without providing any risk management benefits. For the purposes of such laws, 'financial institution' is defined to include family offices even if serving only one family.
39 See, for example, the online commentary by Stuart E Lucas, available at http://wealthstrategistpartners.com/assets/images/documents/The_50_Percent_Rule_(CFA)_April_2014.pdf (last accessed 16 June 2016). See also Stuart E Lucas, *Wealth: Grow It and Protect It*, FT Press (2012).
40 Organization for Economic Cooperation and Development (OECD), *Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard*, 13 February 2014, available at www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Common-Reporting-Standard.pdf (last accessed 20 June 2016).
41 26 USCA §§1471–1474.
42 "Towards Public Registers of Beneficial Owners?", in *Offshore Trusts Guide*, available at http://offshoretrustsguide.com/features/Towards_Public_Registers_of_Beneficial_Owners__572084.html (last accessed 16 June 2016).

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