NEW HAMPSHIRE NONDEPOSITORY TRUST COMPANIES

By: Joe McDonald, Esq.
McDonald & Kanyuk, PLLC
89 North State Street
Concord, NH 03301
(603) 228-9900
jmcdonald@mckan.com

July 2015

The Granite State has taken its place as one of a handful of progressive trust law states for the formation and supervision of a "nondepository trust company" ("NDTC"). An NDTC is a business entity (typically a corporation or a limited liability company) authorized by law to provide the types of trust and related "fiduciary" functions that have historically been provided by the trust departments of banks. However, unlike a bank, a NDTC is prohibited by law from taking customers' deposits or making loans.

Recognizing the lower levels of risks of consumer harm and expensive regulation-supervised receiverships associated with a nondepository institution, in recent years New Hampshire has streamlined the application and supervision requirements for NDTCs. The state has also amended its trust laws governing trusts so that they are among the most flexible and modern in the nation. Recently, as federal securities and regulators have tightened client protections under laws governing investment advisors, a number of Massachusetts banks and trust companies[1] have formed "public NDTCs"[2] in New Hampshire to serve as qualified custodians to complement their advisory functions. At least one Massachusetts law firm has formed a public NDTC in New Hampshire to serve the firm's clients' trusts formerly administered by the firm's partners as personal trustees. A list of the NDTCs is maintained on the website of the New Hampshire Banking Department. This White Paper will answer several frequently asked questions posed by those who might consider forming a New Hampshire NDTC.

[1] For example, Cambridge Bancorp and its subsidiary, Cambridge Trust Company, formed Cambridge Trust Company of New Hampshire as a separate "division". Fiduciary Company Incorporated formed Fiduciary Trust Company of New England as a subsidiary and an affiliate of Fiduciary Trust Company of Boston. Loring, Wolcott & Coolidge, Boston, Massachusetts formed Loring, Wolcott & Coolidge Trust, LLC.

[2] New Hampshire recognizes two types of NDTCs: public and private. Public trust companies are governed by statute, and mainly by Chapter 392 of the New Hampshire Revised Statutes Annotated ("NHRSA"). A private NDTC is called a "Family Trust Company" ("FTC"). FTCs are governed by a separate regulatory regime contained in NH RSA Chapter 392-B. An FTC can serve only the members and trusts of a broadly-defined single family, whereas a public NHTC can offer services to the general public. This White Paper will focus on public NDTCs. A separate M&K White Paper is devoted to FTCs.

How are NH NDTC's Organized and Operated?

The New Hampshire Banking Department (the "Department") and its Commissioner is responsible for the regulation of public NDTCs under NH RSA Chapter 392 (the "Act") and other state banking statutes, most notably RSA 383:9-d relating to examinations. Charters are obtained through a petition filed with the Commissioner. An outdated "application" form and instructions are available on the Banking Department's website at URL www.nhgov/banking/ApplicationNonDepositoryTrust.pdf.[3]

The process usually begins with a pre-filing meeting with representatives of the Department to preliminarily introduce the founders and outline the business plan. If the Department indicates that the Commissioner will be receptive to considering their petition, the founders can proceed with the formal chartering process. Three persons, or "organizers", may petition for the charter. For NDTCs that are part of a holding company only the parent company is required to be the petitioner. The "examination fee" is $5,000. The petition will include the petitioner's proposed "organizational instrument" (Articles of Incorporation or Operating Agreement), and should also identify the management team, describe the business plan and provide three years of *pro forma* financial projections. There must be a managing body (corporate directors or LLC managers) of at least five persons. For holding company structures there is no requirement that any of those managers or directors be New Hampshire residents, although it is a good idea to have at least one who resides here. NDTCs not wholly owned by a parent company must have a majority of New Hampshire residents serve on the governing body. The Department will in most cases conduct a standard background check on the prospective managers and officers, and each individual who will serve as a director, officer or principal (greater than 10%) shareholder must complete and file a prescribed "Background and Financial Report" that will be kept confidential.

The minimum capital for a nondepository trust company is $500,000. The Commissioner has the right to increase this amount based on the Commissioner's perception of the risks inherent in any given business plan and ten "safety and soundness" factors listed in RSA 392:25 IV.[4] Chartered institutions are also required to retain a reasonable amount of working capital based on the Department's assessment of its expected costs of operation shown on the financial pro forma filed with the application, and later based on the NDTC's actual financial statements. Unlike the laws of many states that require that core capital be held in cash in a secure depository institution, a NDTC's statutory capital may be invested in prudent investor investments such as a portfolio of publicly-traded equities and treasuries or

[3] Note that substantial amendments were made to the Act in the 2012 and 2013 legislative sessions that as of July, 2014 are not reflected in the forms posted on the Banking Department website, including the "application" to charter a NDTC. Those forms are in the process of being updated by Department personnel. Before completing the form, it would be prudent to contact James Spencer Culp at (603) 271-3561.

[4] The current Commissioner is Glen A. Perlow, who began his term in August, 2012. The predecessor Commissioners had routinely required $1 million of capital for new institutions. Commissioner Perlow has been more flexible in requiring less than $1,000,000, and in some cases the $500,000 minimum, for NDTCs with strong safety and soundness characteristics.

high grade corporate bonds and securities, provided that any holding cannot exceed 15% of the NDTC's invested capital. An additional amount up to $1,000,000 must be pledged to the Commissioner in the form of approved investments, or more typically a surety bond, to be available in the event of a failure of the NDTC to cover the cost of dissolution.[5] The NDTC must also arrange for the purchase of a fidelity bond, usually in the amount of $1,000,000 - $2,000,000, covering each officer or employee who has access to trust funds to protect against losses from dishonest or fraudulent acts.

Once the application is filed and accepted as complete, a notice is published in a newspaper of state-wide circulation seeking comment. The Department's staff will review the application, seek clarifications and require changes proposed to governing documents, policy manuals, etc., when necessary, and conduct interviews with the prospective board of directors or managers. If the staff is satisfied with the application, then the Department will pass it on to the Commissioner with the Department's recommendation that the Commissioner approve or disapprove the granting of a petition. The Commissioner will review the application and recommendations and may (but is not required to) conduct a public hearing and then either approve or deny the petition.

The Commissioner approves the petition by issuing an official notice. The NDTC completes the organization process by holding a first meeting of the organizers, adopting by-laws, appointing officers and directors and/or managers, and adopting an operating agreement or other organizational instrument. They then file the organizational instrument with the Secretary of State within 60 days of the receipt of the Commissioner's notice of decision. The Secretary of State issues a "Certificate of Organization". The NDTC must file with the Commissioner a list of investors, the capital they contributed, and the equity interests they received, verified by the NDTCs president and secretary. The NDTC has a period of 2 years from the issuance of the Certificate of Organization to commence business before the charter lapses (although the Commissioner can extend this period for another year for good cause shown). If an application is denied, the applicant can re-file within 1 year of the notice of denial, but must pay an additional re-filing fee equal to the original fee paid.

The applicant can request that the Department seal from public inspection all or any portion of the application, and the Department is required to give the applicant 10 days advance notice of its intent to disclose any confidential information so that the applicant or approved NDTC can exercise its right to object and request a hearing on the issue.

Are there Specific NDTC Governance and NH Office Requirements?

They are minimal. A NDTC may be organized as a corporation or limited liability company. In addition to the requirement that the NDTC have at least 5 directors or managers,

---

[5] Current Commissioner Perlow has also been more flexible than his predecessors in requiring less than the $1,000,000 minimum of pledged securities/surety bond based on the applicant's business plan and his subjective evaluation of any given applicant's anticipated safety and soundness.

it must also have at least 3 officers: a president, clerk or secretary, and a treasurer. Reference in the NDTC's governing documents is made to the corporate and limited liability company statutes to govern the NDTC's operations to the extent that they are not inconsistent with the banking statutes. A NDTC is not required to have an office and staff in New Hampshire, but most NDTCs maintain at least a nominal presence and employees, either through a staffed office or a virtual presence through a New Hampshire entity service provider, so that they can avoid jurisdictional and taxation issues with other states for the trusts that they administer.

How Long can the Chartering Process be Expected to Take?

If an applicant is well organized, and proposes a credible management team and business plan, the process can be completed in as little as three to four months.

How Frequently are NDTC's Examined by the Department, and How Onerous and Expensive is the Process?

A newly-chartered NDTC can expect the Department to examine the NDTC within the first year of operation and then every 18 months thereafter. The Department's examiners follow the standards of the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. The costs of examination are paid by the NDTC based on statutory per diems. Typically an examination will last four to seven working days, and can cost up to \$8 - \$10,000, depending on the NDTC's size and the organization and the quality and transparency of its records. The Department may waive one 18 month examination requirement every six years for an NDTC that requests the waiver if the NDTC has consistently been given high ratings in past examinations. A "highly-rated" NDTC can also request that the commissioner accept an off premises examination of an external audit report of a CPA or PA meeting certain statutory requirements and a fiduciary audit conforming to generally accepted audit standards. See RSA 383:9-d I and II.

Does the NDTC Bear any Other External Costs?

There is an annual assessment based on the amount of assets the NDTC is managing and/or administering as fiduciary. The purpose of this assessment is to cover the Department's general overhead relating to its regulation of all institutions with trust powers for which the Department is the primary regulator. The costs are proportionately allocated among those institutions based on the size of their assets. 25% of the first \$5 billion of the institution's fiduciary assets is counted, followed by a 5% decrease for each additional \$5 billion up to \$25 billion, when the percentage is reduced to 2.5% for fiduciary assets up to \$50 billion and 1% above that. A NDTC's balance sheet assets and appropriate percentage of fiduciary assets are added together to arrive at the adjusted gross assets for each institution. The NDTC's share of the general overhead expenses is then calculated as percent of the adjusted assets for all regulated institutions. In recent years, the annual assessment for a NDTC having \$125M in adjusted assets (i.e., approximately \$4 billion of total assets) would be \$3,125. The amount payable by an NDTC with \$1 billion in adjusted assets (approximately \$4 billion of total assets) would be $25K. These amounts vary from year to year based on the Department's expenses and the assets of the institutions (depository and nondepository) that are sharing the cost.

Are there any additional requirements to be aware of before deciding to proceed with an application?

None really, except that each NDTC is required to file quarterly "call reports" with the Department that are similar to those filed by other banking institutions with the FDIC.

If you wish to discuss the features of New Hampshire NDTCs in more detail, please contact Joe McDonald or Amy Kanyuk at (603) 228-9900.