

New Administrative Rule Clarifies Laws Relative to Individuals Serving as Professional Fiduciaries

There has long been a cottage industry of individuals in the business of serving as professional fiduciaries. The laws have evolved in the last several years to clarify the instances in which an unlicensed individual may serve as a professional fiduciary. In 1997 the Oregon legislature amended existing banking statutes to define who is authorized to serve as a fiduciary. ORS 709.005(1) provides that no company shall transact any “trust business” until the company has obtained a certificate of authority from the Department of Consumer and Business Services. ORS 709.030(1) provides that no “person” other than a trust company shall transact a trust business. Trust business is defined as (a) acting as trustee as defined in ORS 128.005(2), (b) acting as a fiduciary as defined in ORS 125.005(2), and (c) acting as a personal representative as defined in ORS 111.005(26). “Trust company” means a company authorized to transact trust business. ORS 706.008(37). The term “person” includes individuals and entities. ORS 706.005(27).

ORS 709.030(4) exempts certain classes of persons from the licensing requirement. These include a person who (a) does not and will not regularly transact trust business in the ordinary course of the person’s business, (b) acts in a manner authorized by law and in the scope of authority as an agent of a trust company, or (c) is an attorney rendering a service customarily performed by an attorney. Other limited classes are also exempt, including those exempt by rule of the director.

In 1999, the legislature enacted ORS 125.240 and 125.221, setting forth disclosure requirements for professional fiduciaries. The law defines “professional fiduciary” as a fiduciary “who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary.” ORS 125.240(5). With few exceptions, unlicensed individuals were still prohibited by the banking statutes from serving as a fiduciary without complying with the licensing requirements of a trust company. In an effort to remedy this, the Division of Finance and Corporate Securities sought input from interested groups such as the Oregon Bankers Association, the Guardian/Conservators Association and the Elder Law and Estate Planning & Administration Sections of the Oregon State Bar. After a notice and comment period, the Division of Finance and Corporate Securities adopted the following administrative rule on October 25, 2002:

“OAR 441-505-4030

“Trust Company Exemption; Court Appointed Fiduciaries

“(1) As authorized by ORS 709.030(4) (g), an exemption from trust company licensing as required by ORS 709.005(1) is hereby created for any person appointed as a Fiduciary by a court of competent jurisdiction.

“(2) As authorized by ORS 709.030(4) (g), an exemption from trust company licensing as required by ORS 709.005(1) is hereby created by any individual appointed as

a Personal Representative, as defined in ORS 111.005, or as a Special Administrator as described in ORS 113.005, by a court of competent jurisdiction.”

The adoption of this rule specifically authorizes individual professional fiduciaries to conduct business, under certain circumstances, *without* the licensing requirement. This is the first time authority to act as a professional fiduciary has been granted to individuals. Section (1) of OAR 441-505-4030 addresses service as a “fiduciary.” It does not, however, specifically define the word “fiduciary.” The definition applicable in the relevant statutes is a “guardian or conservator appointed*** with respect to a protected person.” ORS 125.005(2). It should be mentioned here that even trust companies must have court appointment to serve as a conservator, personal representative, or special administrator. The administrative rules have not specifically addressed who may serve as a trustee. One interpretation is that except as provided in ORS 709.030, licensed trust companies are still the only entities allowed to serve as trustees.

The legislative intent behind the current rules is presumably to protect the public. Banks and trust companies under court appointment are subject to court oversight of their actions and must submit to state or federal ongoing audits and reviews. In contrast, the court is able to monitor and supervise private professional fiduciaries under court appointments, but is not able automatically to gain jurisdiction over fiduciary appointments through a trusteeship or power of attorney. Furthermore, unless specifically required by the trust document, private professional trustees may also lack the protection provided to beneficiaries by the requirements for state and national charters. These rules and procedures have been developed over many years and thus were not codified simultaneously.

Differences Between Private Individual Fiduciaries and Corporate Trust Companies

There are significant differences between private professional fiduciaries and trust companies that may explain the difference in treatment in the statutes. Trust companies are strictly regulated in their respective states under a state charter or by the Office of the Comptroller of the Currency (OCC) under a national charter. Trust companies are continually subject to the oversight of internal, federal, and state auditors. Other differences include:

- **Bonding** – Under most circumstances, courts cannot require trust companies to post a bond for any fiduciary appointment. ORS 709.240. To obtain and maintain their charters, trust companies are already bonded, insured, capitalized, etc. Although private fiduciaries are bonded for each appointment they still have not been able to obtain insurance for their general practice. There simply is not a market for insurance companies to underwrite insurance for this narrow class.
- **Court Accountings** – For those counties that by their SLRs have adopted it, UTCR 9.160(2)(f) and 3(h) exempts trust companies from certain requirements of court accountings. Trust companies must submit an account receipt and

disbursement report along with an account holdings list. The attorney then adds a narrative portion explaining the report. There is no need to reenter the data to another report explaining all exhibits. The court may request further information as it requires.

- **Fee Approval** – In most circumstances trust companies do not need prior court approval of fees. ORS 125.095(3). Trust companies are strictly regulated by the federal government and have a stated fee schedule that the court can review and approve before appointment. Fee schedules are generally based upon the market value of the protected person’s assets and, therefore, the fees are usually predictable. In contrast, private fiduciaries must obtain prior court approval for their fees. Most private fiduciaries charge by the hour, so their fees are generally unpredictable.
- **Disclosure** – Trust companies are exempt from the disclosure requirements of ORS 125.221 and 125.240. Trust officers must demonstrate as part of the ongoing internal and external audit that they have addressed any conflict of interest issues.
- **Investment Management** – Trust companies are authorized to perform investment management and can conduct both trust administration and investment management internally. In contrast, private fiduciaries may need to use an outside bank or broker to write checks and to invest the assets.
- **Corporate Succession** – Corporate officers have successive and ongoing authority to complete account administrative tasks, pursuant to a ratified corporate resolution. Except as provided in the trust agreement, an individual trustee may not transfer the office of the trustee to another or delegate the entire administration to a cotrustee or to another. ORS 128.015. Unlike specifically named individuals, any authorized trust officer may conduct business on behalf of the company.
- **Vouchers** – Conservators pursuant to ORS 125.475(3) and personal representatives pursuant to ORS 116.083(2)(d) are required to submit vouchers (cancelled checks) for all disbursements made during the period covered by the accounting, unless otherwise provided by order or rule of the court or unless the personal representative is a trust company that has complied with ORS 709.030. Trust companies, however, shall “(A) Maintain the vouchers for a period of not less than one year following the date on which the order approving the final account is entered; (B) Permit interested persons to inspect the vouchers and receive copies thereof at their own expense at the place of business of the personal representative during the personal representative's normal business hours at any time prior to the end of the one-year period following the date on which the order approving the final account is entered; and (C) Include in each annual account and in the final account a statement that the vouchers are not filed with the account but are maintained by the personal representative and may be inspected and copied***.” ORS 116.083(2)(d).

Conclusion

Until the legislature plays catch-up and reconciles ambiguities within the ORS and the OAR, the rules are what they are. With few exceptions, private professional fiduciaries must satisfy the licensing requirements of a trust company in order to serve in Oregon as trustee. Individuals serving as professional fiduciaries, personal representatives, or special administrators appointed by the court are exempt from the licensing requirement.

Finally, attorneys and other professionals should take note of the statutes and rules as they interrelate when choosing or recommending fiduciaries. Attorneys drafting trusts in which unauthorized fiduciaries are named may expose themselves to claims of malpractice, as well as to liability for fiduciary malfeasance.

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