CAYMAN ISLANDS

Cayman Islands Unit Trusts

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Trust Instrument

A unit trust is established through a trust instrument, which can be either a declaration of trust by the trustee alone or a trust deed executed by both the trustee and the manager. This instrument declares that the trustee holds the trust fund for the benefit of the unitholders and administers the property according to the terms of the trust instrument. The responsibilities of each of the trustee and manager are set out in the trust deed with the manager being delegated certain powers to manage the trust fund, primarily the investment decisions regarding the trust fund.

Unlike a company, a unit trust has no separate legal personality and the trustee, as holder of legal title to the trust fund, would be the party which sues or is sued in relation to the trust fund.

Forms of Unit Trust

Stand-alone unit trusts

- Stand-alone unit trusts are used for a single investment objective and strategy. Such trusts can issue either a single class of units or multiple classes. In the latter type of "multi-class" unit trust, each class of units will have different rights and terms and may also be used where the offering of units distinguishes between different types of investors. This form of unit trust is suitable for straightforward investment strategies where the trust holds a single pool of assets.

Umbrella unit trusts

- An "umbrella" unit trust is a more flexible structure where the trustee holds different pools of investments allocated to different sub-trusts. Each sub-trust may have different investment objectives and strategies. The trust instrument will state that a sub-trust is established as a "separate and distinct trust" but it should be noted that this only goes to the terms of the relationship between the unitholders of the relevant sub-trust and the trustee in respect of their participation in the wider umbrella trust arrangement.
- The trust instrument for an umbrella trust can be structured by trustee resolution or a supplemental trust deed. Where a sub-trust is established by supplemental trust deed, the principal deed should itself establish a "head" trust by settlement of property on the trustee. Accordingly, unless the "head" trust is established by the principal deed, there will be no valid trust until the first sub-trust is established. This form allows for the segregation of assets and liabilities among different sub-trusts, making it suitable for complex investment strategies.

Powers, Duties, and Trust Administration

Under Cayman Islands trusts law, trustees have general fiduciary duties imposed on them, such as acting in the best interests of the beneficiaries, managing the trust property prudently, and adhering to the terms of the trust instrument. In unit trusts, both the manager and the trustee are responsible for investment and trust administration functions with the manager of a unit trust also having a fiduciary role with some of the same duties as those of the trustee.

A unit trust is not a separate legal entity from the trustee and thus it is not possible to enter a contractual arrangement on behalf of the trust itself. Where a trustee enters into a contract pursuant to a power under the trust instrument, the trustee can be sued by another party (third party) to that contract. However, the third party will only have a claim against the other trustee(s) of the trust if the trustee had authority to act as agent for those other trustee(s) when contracting with the third party.

A unit trust deed may provide that the decision-making functions for contracts with third parties may be given to the manager under the trust instrument. However, if the manager is sued under the contract it would claim against the trustee even though the third party may only have a claim against the manager.

The fact that the third party does not have a direct claim against the trustee because only the manager entered the contract, may place the third party at a disadvantage. In such circumstances, the manager may be regarded as creating a security interest over the trust fund which it had no right to do as the trustee holds the legal title to the investments of the trust fund. Accordingly, where the security interest is created pursuant to an express power of the manager provided in the trust instrument, if the third party wishes to have direct contractual recourse the trustee should also be a party to the contract or the manager should be authorised as agent of the trustee.

Appointment of Service Providers

Service providers such as custodians or prime brokers may be appointed by the trustee or the manager, depending on the trust instrument. Where a prime broker is appointed, the trust instrument may provide the manager shall effect such appointment in consultation with the trustee. In the absence of an express provision in the trust instrument, the trustee should not allow the manager to appoint any prime broker without consultation with the trustee. This ensures that the trust's assets are managed and safeguarded by reputable and competent service providers.

Trustee Liabilities

Trustees are expected to show a high standard of care in performing their duties, such level being that of an “ordinary prudent man of business in managing his own affairs.” Where a professional corporate trustee is appointed there is a higher test of “special care and skill”. In addition, a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee.

The trust deed usually specifies the extent of the trustee's responsibilities, often limiting the trustee's role in investment decisions to ensure compliance with the trust's investment parameters. In such circumstances, the trustee’s function is generally not to assess the investment decisions carried out by the manager.

Section 47(1) of the Trusts Act provides that the trustee should be accountable only for its own acts and not for those of third parties unless through ‘wilful default’, meaning a deliberate breach of trust. This helps in mitigating the risk of liability for trustees while ensuring that the trust's investment strategy is properly executed.

Registration and Licensing

Cayman Islands unit trusts are typically registered as “exempted” trusts with the Registrar of Trusts pursuant to Section 74 of the Trusts Act and thus obtain a tax undertaking from the Governor in Cabinet. This ensures that the trust complies with local regulations and benefits from tax exemptions.

Unit trusts that qualify as mutual funds must be regulated under the Mutual Funds Act.

Power of Attorney given by the Trustee

As a general rule, trustees have no implied power to appoint an attorney to carry out their functions, subject to statutory exceptions and the ability to delegate purely administrative functions not involving the exercise of a discretion. Trustees may, however, be expressly authorised to delegate their powers, or certain of them, under the terms of the trust instruments.

Pursuant to the Powers of Attorney Act, a trustee may, by a power of attorney, delegate the execution or exercise of all or any of the trusts, powers and discretions vested in it for a period not exceeding twelve months. If a trustee is executing a power of attorney pursuant to the Powers of Attorney Act, the trustee, as the donor of the power, must give written notice of it to each other trustee and any person who has power under the trust instrument to appoint a new trustee, if applicable. Such notice must specify the date on which the power comes into operation, its duration, the identity of the donee of the power, and the reason why the power is given or delegated. Failure to comply with these notice provisions does not invalidate any act done or instrument executed by the donee of the power in favour of a third party.

If a power of attorney is given under the power to delegate under the trust instrument, the power should refer to the express power of delegation contained in the trust instrument.

Contact

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