

## **Professional Fiduciaries Act: Implications & Suggestions for Auxiliary Organizations**

**A. Background.** In 2007, the California Legislature enacted Senate Bill 1047 which, among other things, expanded the Professional Fiduciaries Act ("Act"). The expanded Act provisions became effective on January 1, 2009, and set a regulatory framework for individual fiduciaries. The Act imposes licensing, continuing education and reporting requirements on individuals serving as fiduciaries. See Cal. Bus & Prof. Code § 6500 et seq.

1. *Status of the Act and Implementing Regulations.* The Act intends to apply to persons and not to charitable organizations. Unfortunately, the Professional Fiduciaries Bureau ("Bureau"), charged with enforcing the Act, issued regulations which expand the scope of the Act and make it applicable, when a charity has been appointed as trustee, to employees of the charity who perform the functions of a trustee. See Cal. Code of Regs., Title 16, §§ 4400-4580.

In the last legislative session, a proposed amendment to the Act was introduced (SB 1466 - Cox) which would have exempted charitable organizations from the Act with respect to trusteeship of charitable remainder trusts, charitable lead trusts, and pooled income funds. SB 1466 failed passage, which means that, at present, the Act applies to California public charities -- including auxiliary organizations -- that serve as trustee of all types of trusts, including charitable remainder trusts, charitable lead trusts, and pooled income funds.

[Note: A legislative proposal has been submitted to the CSU Office of Advocacy & State Relations to include exemption legislation in the Trustees' 2011 Legislative Program.]

2. *Summary of the Act's Provisions.* The Act requires each person who is a "professional fiduciary" (as defined by the Act and regulations) to obtain (and maintain) a license issued by the Bureau.

(a) **Professional Fiduciary.** For purposes of the Act, a "professional fiduciary" is someone who acts as a conservator or guardian for two or more persons at one time or who acts as a trustee, an agent under a durable power of attorney for healthcare, or an agent under a durable power of attorney for finances, for more than three people or for more than three families, or any combination thereof at the same time. If someone is acting as a trustee for certain family members, the family members are not counted in determining if the trustee is required to obtain a license.

As a practical matter, this means that if an auxiliary organization is acting as a trustee for four or more charitable remainder trusts, charitable lead trusts, or pooled income funds, then technically those employees who are performing the functions of a trustee on the entity's behalf will each be considered a "professional fiduciary" and will need to obtain a license as provided in the Act.

(b) **Persons Exempted from the Act.** Certain individuals and entities are exempted from having to comply with the Act. Exempt individuals and entities include the following:

(i) an individual who serves as a fiduciary for members of his or her own family;

(ii) attorneys and CPAs who are licensed to practice in California;

(iii) persons who are licensed by the IRS as enrolled agents;

(iv) banks and trust companies; and

(v) licensed investment advisers.

(c) **Licensing Requirements.** If Auxiliary organization has been appointed as trustee of four or more CRTs or other trusts, its employees who perform the functions of a trustee, who are considered to be professional fiduciaries under the Act, will be required to obtain (and maintain) a license from the Bureau.

In order to obtain (and maintain) a license, a professional fiduciary must satisfy several requirements, summarized as follows:

(i) submit fingerprint samples to the California Department of Justice;

(ii) complete 30 hours of pre-licensing education;

(iii) pass a pre-licensing examination;

(iv) complete 15 hours of approved continuing education annually; and

(v) possess a bachelor's degree from an accredited college or university or an associate degree from an accredited college or university and have at least three (3) years of experience working in the fiduciary field.

There are additional administrative requirements that must be met. These include consenting to a credit check, the submission of a formal application (which requires the disclosure of certain personal information) signed under penalty of perjury, agreeing to comply with the "Professional Fiduciaries Code of Ethics", and the payment of an application filing fee. Additional information concerning the licensing requirements may be found at [www.fiduciary.ca.gov](http://www.fiduciary.ca.gov).

(d) **Consequences of Violating the Act.** If a person or entity fails to comply with the Act, the Bureau may bring an enforcement action against the offending person or entity. Enforcement actions can result in fines, sanctions, and license suspensions or revocations. For serious violations of the Act, the Bureau could refer the matter to the California Attorney General or to local district attorneys for criminal prosecution.

**B. Compliance Ideas.** Strict compliance with the licensing requirements of the Act could be expensive, time consuming and burdensome, especially if multiple employees of an auxiliary organization are considered to be professional fiduciaries under the Act – when the public charities exemption may indeed be enacted soon. Here are some ideas on how auxiliary organizations serving in trustee roles might comply with the Act, or at least demonstrate good faith toward the Act's intentions:

1. *Designate only Certain Employees to Perform Trust Services.* "Consolidate" its trustee activities within the organization by designating one or a few employees to perform key fiduciary functions for all trusts administered by the entity. The number of persons designated will likely depend on the number of trusts the entity administers. Consider splitting fiduciary functions between more than one office, e.g.

the business office (for tax compliance and financial reports to beneficiaries) and the development office (for communications with beneficiaries). It may only be necessary for an entity to designate one or two persons who will be responsible for actually exercising trustee duties for its trusts. The designated employee(s) would be delegated the authority to exercise key fiduciary functions, which would include making decisions on trust investment strategy (in consultation with the entity's investment advisors), signing all tax returns, and signing correspondence and other communications with trust beneficiaries. The designated person(s) will, of course, be able to obtain assistance from other persons as he or she deems necessary but he or she would have final authority with respect to all material trust matters.

Specifying a small number of persons who will be acting on the entity's behalf to administer its trusts should allow the organization to reduce the number of persons who will be required to obtain a professional fiduciary license. This should help reduce the compliance burden and related costs.

In choosing the persons who will administer its trusts, to the extent practical, organizations should try to select employees who are California Bar members and/or CPAs. This is because attorneys and CPAs who are licensed to practice in California are exempt from having to comply with the Act.

**2. Adoption of Written Policy Statement.** To better document the organization's intentions to comply with the Act, organization's board (or an authorized committee of the board) should adopt a written policy statement directing the appropriate officer or management to assign the trustee responsibilities for each trust administered by organization to a specific person. The policy statement should further provide that the person selected shall have the final authority to make all fiduciary decisions concerning the trust that has been assigned to him or her. Moreover, the policy statement should require that each designated person specifically acknowledge, in writing, his or her fiduciary responsibilities with respect to the trusts he or she has been assigned. A model policy statement is available from the Chancellor's Office, Systemwide Advancement.

**3. Adopt Board Resolution of Intent.** If an organization decides to await a public charities exemption by the Legislature or the Bureau, consider having the Board of Directors adopt a written resolution reciting the perceived circumstances and resolving to: use or engage only trained and experienced trust officers; exercise established trustee practices; and closely adhere to established fiduciary standards, including *The Professional Fiduciaries Code of Ethics*. See:

<https://www.calstate.edu/universityadvancement/intranet/policies-procedures/documents/Principles-of-Practice-for-Fundraising-Professionals-at-Educational-Institutions.pdf>