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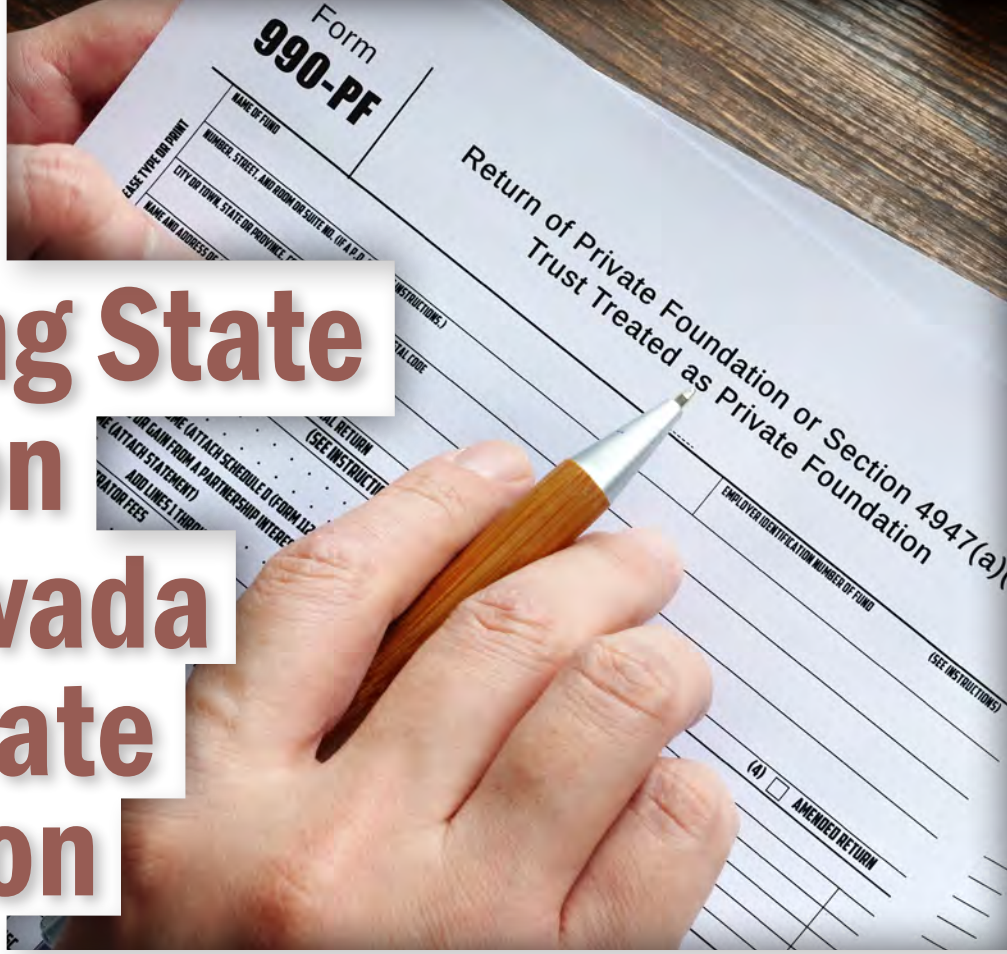


Minimizing State Regulation with a Nevada Trust Private Foundation

BY REYNOLDS CAFFERATA, ESQ.

Nevada is a favorable jurisdiction for a private trust. A Nevada trust may also be a favorable form for a private foundation (PF). A Nevada trust PF can avoid significant compliance costs in other states even when the family members involved with the PF are not Nevada residents.

Several states impose significant regulations and reporting requirements on charities and private foundations including: 1) CPA audits if a charity reaches a certain level of revenue—typically $1 million; and 2) a requirement to apply for state tax exempt status, file state tax returns, and other state filings. These requirements generally apply to PFs doing business in a state, even if the PF is incorporated under the laws of another state.

Nevada in contrast: 1) does not impose an audit requirement on PFs, 2) does not require PFs to obtain state tax exempt status or file or tax returns because it does not have a corporate income tax, and 3) generally have any required state filings for it to be a PF. The only Nevada tax exemption that a charity needs to apply for is if it wants to be exempt from paying sales tax in Nevada.[1] Other than the federal requirement to file a copy of the Form 990-PF with a state attorney general,[2] there are no other state attorney general filing requirements for charities in Nevada. For many PFs, being subject only to Nevada law could reduce their compliance cost. A Nevada trust form PF can also be structured to minimize the likelihood that the PF is doing business in states other than Nevada and subject to those states' audit and filing requirements.

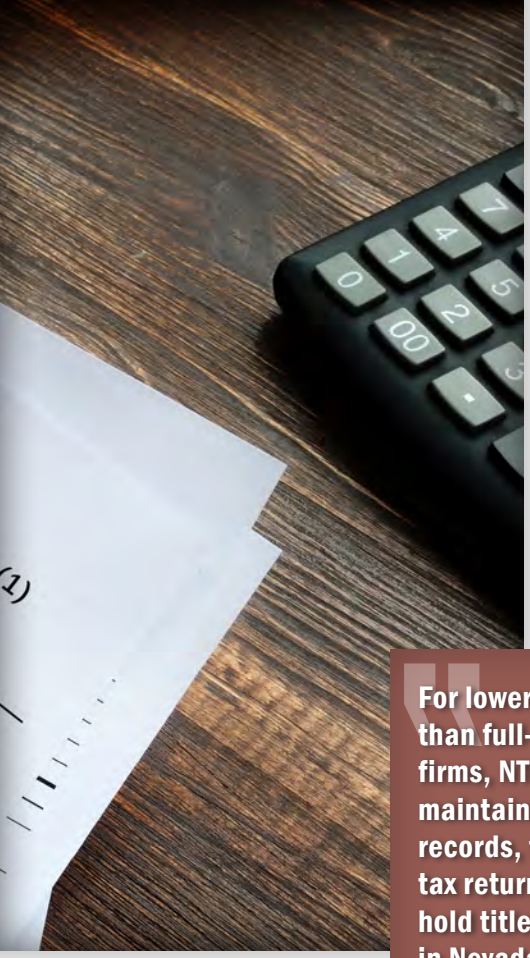
States will vary as to how they define what constitutes doing business within the state. For example, the California Attorney General broadly defines what constitutes doing business, and subjects a charity to registration requirements in California if it is:

- Actively soliciting donations from Californians through advertisements, mail, telephone, text, email, other Internet-based communications;
- Regularly receiving substantial donations from Californians;
- Conducting charitable programs or services in California, or targeting Californians with programs or services;
- Having directors, officers, employees, statutory members, or agents working in California, by holding meetings or assisting with operations;
- Maintaining an office or operations in California; or
- Holding property in California, such as real estate, books and records, or other tangible property.

However, making grants in California or holding investments with California financial institutions, absent other contacts, is not doing business in California.[3]

A PF incorporated outside of California that is doing business in California is required to register with the California Secretary of State, apply for tax exempt status with the Franchise Tax Board and register with the Attorney General's Registry of Charitable Trusts. All three agencies require annual or semi-annual filings. A PF doing business in California is also required to have its financial statements audited by a CPA in any year that its revenues exceed $2 million.[4]

If a PF incorporated in California wants to eliminate all its reporting obligations in California, the PF must



cease to be incorporated in California and also cease all activities in California that constitute doing business in California. The same would likely be true for a PF in other high-regulation states.

A Nevada trust PF may facilitate ending contacts with other states. Generally, the location of a trust and where it is subject to jurisdiction is its principal place of administration, often the location of the trustee. For example, the Uniform Trust Code provides that a trust provision designating a place of administration is valid if either the trustee is located in or is a resident of the designated jurisdiction, or part of the trust administration occurs in the designated jurisdiction.[5]

If a Nevada corporate trustee is used for a trust form PF (NVTPF), it may be easier for the NVTPF to avoid doing business in other states, even if persons in other states will have certain powers with respect to the NVTPF. This is because trust law allows individuals to have powers over a trust that are not fiduciary powers, which should not be considered acts of administration because the powers are not fiduciary powers. For example, individuals in states other than Nevada could have the power to direct which charities receive grants from the NVTPF, to direct how the NVTPF assets are invested, and to remove and replace the trustee of the NVTPF, because none of these powers would be fiduciary powers.

Individuals in states other than Nevada could also hold powers of appointment over the NVTPF to direct distributions to charities. Powers of appointment also are not fiduciary powers, so fiduciary authority would not be exercised by these individuals when picking which charities should receive grants from the NVTPF.[6]

Also, the Nevada Directed Trust rules allow a trust investment advisor to act in a non-fiduciary capacity (a trust director), so a person in another state could hold the power to direct investments for a NVTPF as a trust director without causing the NVTPF to be subject to regulation in their state.[7] It is important to note that some states (including California) provide that a trust director acts in a fiduciary capacity and may therefore take the position that a trust director of a NVTPF is engaging in administration of the trust in that state.[8] In order to avoid this concern, an individual could have a non-fiduciary right to advise a Nevada corporate trustee as to foundation investments, but not be an actual trust director.

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An individual in a state other than Nevada can also have the power to appoint and remove the trustee of a NVTPF without causing it to be subject to regulation in their state. This is because the power to remove and replace a trustee is the power of a trust protector under Nevada law, and the trust can provide that this power is not exercised in a fiduciary capacity.[9] California also recognizes this is not a fiduciary power.[10]

Nevada has trust companies that operate solely in Nevada and do not have offices or staff in other states. Nevada trust companies (NTC) are experienced in serving in an administrative role. For lower fees than full-service firms, NTCs can maintain trust records, file trust tax returns, and hold title to assets in Nevada. NTCs are generally willing to use third-party investment managers and are comfortable acting in a directed capacity. A NTC therefore would likely be comfortable administering a NVTPF where family members in other states: 1) through powers of appointment, directed the charitable distributions of the foundation; 2) where a trust advisor oversaw the investments of the trust and; 3) where a trust protector could remove and replace the trust company. All trust records would be maintained in Nevada, and Nevada would be the only place of administration since no fiduciary power was being exercised by anyone other than the Nevada trustee.

A family in a state other than Nevada should be able to avoid doing business in that state with an NVTPF with the following features:

- The sole trustee is an NTC.
- Family members have a non-fiduciary power to replace the NTC with another NTC or to appoint the NVTPF to a new NVTPF.
- Family members have a power of appointment over the NVTPF, which is a non-fiduciary power to direct distributions to qualified charities.
- Family members can either advise with respect to the investment manager used by the NVTPF or there is an investment advisor who acts in a non-fiduciary capacity under Nevada law.

In addition to keeping all administration and fiduciary activity in Nevada, the NVTPF needs to avoid contacts in other states, such as owning real property in the state or having employees in the state that would constitute doing business in other states. Even if the trust is administered in Nevada, if the NVTPF has an employee in California, for example, the NVTPF will be doing business in California and subject to all of its regulations.

The trust form and rules for determining the situs of a trust may allow a family in a high regulation state to form a NVTPF and avoid the cost of CPA audits and other costs of regulation in their home state. The family can maintain practical control over the NVTPF, including having the power to appoint distributions to charities chosen by the family and selecting investments favored by the family.

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ENDNOTES:

1. NRS 372.348.
2. Treas. Reg. § 1.6033-3(c) (Requires a private foundation to provide a copy of its 990-PF to the Attorney General of the state in which it was incorporated, the state in which its principal office is situated, and any other state in which it reports its property or assets).
3. California Department of Justice Charitable Trusts Section, "Attorney General's Guide for Charities. https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf; California Attorney General's Non-Profit Integrity Act FAQ "To whom does the Nonprofit Integrity Act apply? https://oag.ca.gov/charities/laws
4. Cal. Gov. Code § 12586(e).
5. Uniform Trust Code § 108.
6. UNIFORM POWERS OF APPOINTMENT ACT § 102(13); NRS 153.130.
7. NRS 163.5551.
8. Cal. Prob. Code 16612(a). But see Cal. Prob. Code § 16604 which says the California law applies only to a trust whose principal place of administration is in California.
9. NRS 163.5553.1(e); 163.5553.3
10. In California's Directed Trust Statute, a power to appoint a trustee is not a power of direction that is a fiduciary power. Cal. Prob. Code §§ 16602(d) and 16606(a)(2).

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