

PUBLICATION

Tennessee Investment Services Act Of 2007

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On May 10, 2007, Governor Phil Bredesen signed the Tennessee Investment Services Act of 2007 (the Act), which becomes effective July 1, 2007. This Act, which was supported by the Tennessee Bankers Association, attempts to provide protection from creditors by allowing a "person" to create a self-settled, asset protection trust referred to as an "Investment Services Trust" or IST. The effects and implications of this new Act and the use of an IST under Tennessee law are still being studied. Accordingly, we strongly caution you to consult with your estate planning counsel prior to establishing an IST to more fully understand the potential ramifications of an IST in your particular situation -- including the potential benefits and drawbacks of using an IST.

Briefly, the Act attempts to provide protection from creditors by allowing a "person" to establish an IST. An IST is a trust that appoints a "qualified trustee" to hold and administer property that is transferred to the IST pursuant to a "qualified disposition." Under the Act, an IST must expressly incorporate the laws of the State of Tennessee to govern the construction, validity and administration of the trust; must be irrevocable; and must provide that the interest of the transferor or beneficiary of the IST property or income may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before distribution by the qualified trustee.

A "qualified disposition" is a transfer into the IST, with or without consideration for the transfer. In making such a disposition, the transferor must first execute a "qualified affidavit" which states that the transferor: (1) has full right, title and authority to transfer the assets to the IST; (2) will not be rendered insolvent by the transfer; (3) does not intend to defraud a creditor by transferring the assets to the IST; (4) does not have any pending or threatened court actions against the transferor, except for those identified in an attachment to the qualified affidavit; (5) is not involved in any administrative proceedings, except for those identified in an attachment to the qualified affidavit; (6) does not contemplate the filing for relief under the federal bankruptcy code; and (7) did not obtain the assets being transferred to the IST through unlawful activities.

Pursuant to the Act, a qualified disposition cannot be attached by creditors unless the creditor makes a claim under the Uniform Fraudulent Conveyance Act if the claim arose prior to the qualified disposition; or, if the claim arises on or after the qualified disposition, by making such a claim within four years after the qualified disposition is made. Also pursuant to the Act, creditors cannot make claims against the qualified trustee or any person involved in the counseling, drafting, preparation, execution and funding of the IST.

The qualified trustee of an IST must either be a natural person who is a Tennessee resident or an entity that is authorized by Tennessee law to be a trustee and whose activities are subject to the control and supervision of the Tennessee Department of Financial Institutions, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision. The qualified trustee must maintain or arrange for custody and control of the property held under the IST; maintain the IST records; file the IST tax returns; or otherwise participate in the administration of the IST.

An IST, which is required to be irrevocable, is not deemed to be revocable according to the Act on account of one or more of certain powers reserved to or certain events benefiting the transferor, including the following: (1) the transferor maintains a power to veto a distribution from the IST; (2) the transferor maintains a power of appointment (other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate) exercisable by will or other written instrument effective only upon the

transferor's death; (3) the potential or actual receipt of income from the IST by the transferor; (4) the potential or actual receipt of income or principal from a certain charitable remainder unitrust or annuity trust by the transferor; (5) the receipt by the transferor each year of an amount specified in the IST, but not to exceed 5% of the initial value of the IST or its value as determined from time to time pursuant to the IST; (6) the potential or actual receipt or use of principal by the transferor if such receipt or use would be the result of the qualified trustee's discretion or as a result of compliance with certain other standards; (7) the transferor retains the right to remove a trustee or appoint a new trustee within certain limits; or (8) the potential or actual use of real property held under a qualified personal residence trust by the transferor.

In addition to authorizing the creation of an IST, the Act substantially extends the time period for the vesting of property held in trust under current Tennessee law of approximately 90 years, to a statutorily-designated 360 years for certain trusts that are created or that become irrevocable after June 30, 2007.

In summary, asset protection can be one of your most important objectives, and this new Act offers the possibility of another tool to assist in accomplishing that objective. However, other objectives such as estate planning and business succession planning can be just as important, and the possible benefits and consequences of an IST may be at odds with those other objectives. As a result, and especially since the provisions of this Act are still being studied, we caution you to consult with your estate planning counsel to determine whether an IST is a proper consideration for your particular circumstances and overall objectives.