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New York State Attorney General's Role with Charitable Trusts

~ A Presentation to United States Trust Co. of New York, April 14, 2004 ~

I. Introduction

I am delighted to speak with you today on the topic of the New York AG's involvement with Charitable Trusts, and for our purposes today this means split interest charitable trusts and estates with charitable interests.

First a footnote. Lawyers love footnotes. Although the AG's involvement with wholly charitable trusts, charities and charitable organizations is very closely related to its role with split interest trusts and estates, it's beyond the scope and time allotted for this presentation. Thus, to the extent that the N-PCL and Executive Law apply to Charities, Charitable Organizations and Wholly Charitable Trusts, I am not going to address them. This is nevertheless an important area, especially in light of the host of charitable trusts and entities established in memorial to 9/11 attack victims and I invite you to follow up with one of us in the future with any questions you may have.

The AG's role has a lot to do with regulatory compliance. Compliance is a heck of a topic to keep you awake with after this beautiful lunch.

Nevertheless, the AG is the representative of the public as the ultimate beneficiary of charitable dispositions. As such it has the statutory duty and authority to enforce the regulatory scheme and protect the public's interests in the proper administration of charitable entities. Its enforcement arsenal includes the power of subpoena, bringing criminal charges, and actions against trustees for surcharges, retribution, fines, and removal.

Keep in mind, as we progress, dare I say meander, through the role of the AG's Charities Bureau in supervising and regulating charitable trusts and organizations, that the way this topic gets exciting is mostly when a Trustee or Charitable Corporation fouls up.

Thus, the administration and investment of charitable trusts in accordance with the statutory, common law and regulatory framework of New York State is essential to keep from making the life of a trustee too exiting.

II. Overview: What is the Role of the Attorney General with Charitable Trusts

A. **First**, it's Supervisory:

- a. AG's supervisory authority over charitable trusts is rooted in the common law of charitable trusts and corporations, and
- b. in the *parens patriae* power of the State to protect the interest of the public in assets pledged to public purposes.
 - i. This means
 1. protecting donors, charities and beneficiaries of charities by overseeing the administration of charitable assets in the State of New York,
 2. representing the interests of beneficiaries of charitable dispositions, and
 3. enforcing laws governing the conduct of fiduciaries of charitable entities. EPTL 8-1.1 & 8-1.4
 - c. Consistent with its role to protect the public, the AG's office encourages counsel for charitable entities or counsel for such an entity's trustee, grantor or beneficiary to resolve questions through discussions with an attorney in the Charities Bureau or, in counties outside the Albany or New York City, by staff in the Attorney General's regional office.
 - i. Often, seeking the guidance of the Charities Bureau can resolve an issue before it becomes objectionable to the AG.
 - ii. In appropriate cases, the Attorney General has issued non-binding "no action" letters indicating that if an assumed set of facts is the case, the Attorney General would not take an adverse action.
 - iii. Note, however, that the Attorney General is not authorized to issue formal or informal opinions except to public agencies and officers.

B. **Second**, it's Regulatory:

- a. The AG has **broad powers to promulgate regulations** for registering charitable interests and for annual or periodic filings.

C. **Third**, it's a role of Oversight and Enforcement

- a. Coupled with its regulatory authority is the power to commence investigations, enforcement proceedings and to bring legal actions, including criminal proceedings, against trustees to protect the public interest.

- b. Under the EPTL, the Attorney General's regulatory and oversight authority extends to charitable trusts created under the laws of other jurisdictions that have assets in or are being administered in New York.

III. Registration and Annual Reporting

- A. WHAT TYPE OF ENTITY MUST REGISTER: The AG's office has simplified the registration and annual filing requirements by designating two types of charitable entities:
 - a. ONE: Charitable and other nonprofit organizations: These include charitable and other nonprofit organizations that solicit contributions from NYS and charitable organizations that are incorporated, are formed, or otherwise conduct activity in NYS including wholly charitable trusts that file IRS Form 990, 990-EZ or 990-PF.
 - b. And TWO: trusts and estates with charitable interests that do not file IRS Form 990 and its cousins.
 - i. This would include, in most instances, estates and split interest charitable trusts.
- B. There are two statutes that require registration of charitable and not-for-profit entities.
 - a. Article 7-A which requires the registration of charitable and other nonprofit organizations that solicit contribution from NY State.
 - b. EPTL Article 8, which requires the registration of both charitable organizations that are incorporated, are formed, or otherwise conduct activity in NY State AND TRUSTS AND ESTATES WITH CHARITABLE INTERESTS
- C. This results in three registration types of entities
 - a. Article 7-A Registration Entities
 - b. EPTL Article 8 Registration Entities – **Which are our focus today.**
 - c. Dual Registration Entities
- D. Specifically, EPTL § 8-1.4 requires the registration of charitable entities with the Attorney General and the filing of annual reports, together with the payment of a filing fee, EXCEPT FOR CERTAIN EXCEPTED ENTITIES, including **trusts and estates with deferred or contingent charitable interests.**
 - a. Applicability of registration and reporting provisions excludes government agencies, religious organizations, educational organizations, parent

teachers associations, hospitals, fraternal organizations, patriotic organizations, veterans groups, volunteer firefighters, ambulance workers, social, student or alumni organizations and historical societies, **trusts with deferred or contingent charitable interests** and cemetery corporations.

- b. **Deferred or contingent interests – Charitable Remainder Trusts.** IN FACT THE FORM USED TO REGISTER A SPLIT INTEREST TRUST OR ESTATE WITH A CHARITABLE INTEREST STATES “If the charitable interest is contingent or deferred by reason of intervening non-charitable interests, then the trust or estate is not required to register until the contingency occurs or the non-charitable interests terminate.”
- c. Conversely, EPTL 8-1.4(f)(1) requires trustees
 - i. to send annual reports to all current charitable beneficiaries (as in Charitable Lead Trusts) and
 - ii. to provide the Attorney General and such beneficiaries with notice of the termination of any interest that results in the requirement that trust assets and/or income be applied to charitable purposes (as in the termination of a non charitable interest in a CRT).
- d. As a practical matter, however, most charities with a deferred interest are likely to request or insist on receiving regular trust account statements from inception.

E. WHERE DO YOU FILE: The Attorney General Charities Bureau operates a Registration Section, which receives registrations, annual reports and filing fees; if the entity must register or file pursuant to EPTL § 8-1.4 and/or Article 7-A then it must do so with the New York City office of the Charities Bureau: **Attorney General Charities Bureau - Registration Section; 120 Broadway; New York, New York 10271.**

- a. There are regional offices throughout NY State. Some of these offices have **permitted estates and trusts to register with the regional office rather than 120 Broadway. The AG’s office has indicated that regional registration and annual filing may become statewide sometime in 2005. Stay tuned.**

F. WHO’S RESPONSIBLE TO FILE? In our case, the Fiduciary – Executor or Trustee

- a. EPTL § 8-1.4(a) **defines trustee broadly to include executors and all other trustees of charitable assets** including individuals, corporations, estates, trusts and other entities which administer property for charitable purposes in New York State (including foreign charitable corporations or trusts doing business or holding property in the State)

- b. This does not mean that the preparer necessarily must be the executor or trustee, but **registration and filing forms are filed under penalty of perjury.**
 - i. So that begs the question, whether the attorney for the fiduciary is willing to sign his or her name to the registration or annual filing forms.

G. WHEN MUST YOU FILE:

- a. Registration: Subsection (d) requires **registration within six months after holding of property for charitable purposes (which ordinarily includes filing of certificate of incorporation and receipt of Internal Revenue Code § 501(c)(3) determination letter** from the Internal Revenue Service).
- b. Annual Filings: Subsections (f) and (g) require **filing of annual reports within six months of conclusion of each fiscal year (usually by June 30, where fiscal year is the calendar year).**
- c. Extensions to file: **PRACTICE TIP:** Requests for extensions of time to file can now be made by EMAIL. This is the way to go because extension requests filed by mail must be in duplicate and accompanied by a prepaid self addressed envelope.

H. WHAT MUST YOU FILE:

- 1. Registration: Estates and Trusts with Charitable Interests (except contingent charitable interests) file a FORM CHAR001
 - a. Along with the CHAR001, depending on the type of entity, registering entities must include a copy of certain additional documents, unless instructed otherwise by the Charities Bureau or the Regional Office of the Attorney General handling the trust or estate matter:
 - i. Inter vivos Trusts:
 - 1. trust agreement and any amendments
 - ii. Testamentary Trusts:
 - 1. will and any codicils
 - iii. Estates:
 - 1. will and any codicils,
 - 2. decree admitting will to probate
 - 3. IRS Form 706, if prepared
 - 4. New York State Form ET-90, if prepared
- 2. Subsequent Annual Filings:

a. After a trust or estate has registered using the CHAR001 form, it is required to submit the following additional documents with its annual filing, unless instructed otherwise by the Charities Bureau or the Regional Office of the Attorney General handling the trust or estate matter:

i. Trusts:

1. CHAR004 (Annual Report of a Charitable Trust); **and**
2. a copy of current IRS Form 5227 (split interest trust information return) or current IRS Form 1041 (fiduciary income tax return), as applicable.

ii. Estates:

1. a copy of informal or judicial estate accounting, if available; and
2. a copy of the current IRS Form 1041

I. **WHAT DOES IT COST:** The short answer is not a lot compared to non-compliance.

- a. EPTL Filing fees which are required for the filing of annual reports (but not with registration) and are based on a schedule in subsection (p)
- b. Fees range from \$25 to \$1500 per year depending on size of organization, based on assets of organization at close of fiscal year, with exemption from filing reports and paying fees if both income and assets are below \$25,000 per year (in which case a verified statement must be filed confirming entitlement to the exemption under subsection (q)).

Charitable Portion of Trust or Estate EPTL Filing Fee

Less than \$50,000	\$25
\$50,000 or more, but less than \$250,000	\$50
\$250,000 or more, but less than \$1,000,000	\$100
\$1,000,000 or more, but less than \$10,000,000	\$250
\$10,000,000 or more, but less than \$50,000,000	\$750
\$50,000,000 or more	\$1500

- c. Also, if income during the year is high, but few or no assets remain at end of year, the minimum filing fee of \$25 must be paid.
- d. The largest fee becomes applicable only if the organization's net worth is over \$50 million.

J. **These reports are a matter of public record so long as permitted by laws of United States and other government agencies** (which exempts donor information based on Internal Revenue Service restrictions concerning 990s).

- K. WHAT HAPPENS IF YOU DON'T FILE: Subsections (r) and (s) were added at the Attorney General's request to encourage compliance with registration and reporting requirements.
- a. Subsection (r) makes the trustee (**THAT'S THE TRUSTEE**) **liable for a fine of \$10 per day, up to a maximum of \$1,000 for each failure to comply with the registration and reporting requirements**, but only after service by the Attorney General of a certified letter advising the charity of the failure to comply. After the 30-day period has expired, the fines can be imposed except that, where the Attorney General "finds that the failure to comply ... is due to excusable ignorance or inadvertence or other reasonable cause, the attorney general shall waive the fine imposed by this paragraph."
 - b. Other penalties do not apply to split interest trusts but bear mentioning in that they prohibit a charity from applying for funds from any NY governmental agency without certifying compliance with the registration and reporting requirements of EPTL 8-1.4.
 - c. Moreover, both the Internal Revenue Service and the Attorney General take the position that materially incomplete or incorrect filings do not start any statute of limitations running.
 - d. And a trustee who has not filed annual financial reports for any preceding year will not be granted an extension of time to file a current report.
 - e. In addition, while EPTL 8-1.4 and Article 7-A were substantially amended and cross referenced in 2002, Article 7-A imposes a host of additional prohibitions on fund raising for failure to maintain compliance with the statutory registration and filing requirements.

L. TERMINATIONS

- a. In general, the Charities Bureau will close the registration of an estate or split interest charitable trust upon receiving and reviewing the final accounting.
- b. Suffice to say that the termination requirements for charitable organizations and fully charitable trusts are considerably more onerous.

HOT TOPIC: The AG is reviewing retention issues, specifically what it considers to be too long a period for a trustee to hold on to assets after termination of the first interest in a split interest trust. According to representatives of the Charities Bureau, the AG is considering surcharges and penalties based on a percentage of the trust assets.

Stay Tuned.

M. WHERE DO YOU FIND THESE REGULATIONS?

1. Since July 1, 2003, they consist of new Parts 90 through 105 of 13 NYCRR.
2. The prior regulations, Parts 100 through 115 of 13 NYCRR, have been repealed.

IV. Return to role of **Oversight and Enforcement**

In the event of a formal objection by the AG, JUST WHAT CAN HAPPEN TO THE UNWITTING TRUSTEE?

1. AG has broad statutory authority **to prosecute and defend legal actions** to protect the interests of the State and the public. Executive Law § 63 et seq.

2. **to “investigate transactions and relationships of trustees** for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered.” EPTL § 8-1.4(i).

3. **issue and enforce subpoenas.** EPTL § 8-1.4 (j), (k); Executive Law §§ 63(12) & 175.2(h); N-PCL § 112(b)(6).

4. **“institute appropriate proceedings to secure compliance** with . . . section [8-1.4 of the EPTL] and to secure the proper administration of any trust, corporation, or other relationship to which this section applies.” EPTL § 8-1.4(m).

a. The Attorney General’s regulatory and enforcement powers **include authority to ensure that funds or property donated for specific charitable purposes are indeed used for such purposes.** This could arise in the context of restricted assets or if a trustee was somehow using assets in a manner inconsistent with the trust instrument. *E.g.*, EPTL §§ 8-1.1 and 8-1.4; St. Joseph’s Hospital v. Bennett, 281 N.Y. 115 (1939)

b. In general, the instruments establishing charitable trusts and organizations **are strictly construed according to their terms.** As in general contract law, parole evidence is not properly considered in assessing whether, for example, the trustee of a charitable trust has complied with the terms of the trust, so long as the trust instrument is not ambiguous and the trustee has fully complied with its literal terms. *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256 (1990) (the America’s Cup case).

c. ***Cy pres* - Deviation from the Terms of the Trust Document**

1. If the gift instrument is a testamentary trust or will, a restriction can only be lifted by the Surrogate’s Court pursuant to EPTL Article 8. AND GUESS WHAT, **such relief can be granted only by a New York court in a proceeding initiated on notice to the Attorney General.**

2. In such instances, a narrow *cy pres* standard applies.
3. This means that the court may lift part or all of the restriction if the applicant demonstrates that “circumstances have so changed since the execution of [the gift instrument]” that it is “impracticable or impossible” to comply literally with the terms of the charitable disposition, and the modification in the court’s judgment will “most effectively accomplish” the gift’s original general purposes. EPTL § 8-1.1(c)(1).
4. **CASE STUDY: Long Island College Hospital (“LICH”):** In Matter of Donald F. Othmer, 710 N.Y.S.2d 848 (Surr. Ct. Kings County 2000), and Matter of Mildred Topp Othmer, N.Y.L.J., June 8, 2000 at 32 (Surr. Ct. Kings County May 30, 2000), **the Court granted *cy pres* relief to LICH, which permitted LICH to use the restricted principal of endowment fund bequests as collateral to secure almost \$90 million of new financing for necessary capital improvement projects and immediate working capital needs.** The LICH decision represents **highly significant precedent** relevant to not-for-profit corporations, as the first decision to **address in detail the obligations of fiduciaries of not-for-profit corporations to safeguard charitable endowment fund assets while addressing an emergency financial situation.**

5. The AG can also seek **to surcharge individual trustees** who have arguably squandered or wasted charitable assets, requesting a court to order one or more trustees to pay restitution to the charitable organization and thereby make it whole.

6. **Finally, the AG is authorized to initiate court action seeking the removal of trustees**, broadly defined, who authorize, or acquiesce in, inappropriate payments or other benefits to fellow trustees. *See* EPTL 8-1.4(m) & (n).

7. **THE AG IS ALSO THE Enforcer of Fiduciary Duties**

- a. The Attorney General is the public officer with primary enforcement authority with respect to the management of charitable organizations and oversees the conduct of the entity’s trustee (or directors and officers). The Attorney General’s legal authority in this area arises directly from its **role as the enforcer of the duties of care, loyalty and obedience.**
 - i. Remember, these **duties apply to a trustee regardless whether the particular entity is required to register or is exempt from registration.**

- b. **The duty of care:** The common law duty of care requires that executors and trustees (as well as directors and officers of charitable organizations) be attentive to the organization's activities and finances and actively oversee the way in which its assets are managed. This includes attending and participating in meetings, reading and understanding financial documents, ensuring that funds are properly managed, asking questions and exercising sound judgment.
 - i. Various Sections of the EPTL, with which you are undoubtedly familiar, provide standards for the duty of care. These sections include EPTL 11-1.7, which prohibits exculpation from acts of bad faith as against public policy and 11-2.2 & 11-2.3, which codify the power and standards for investing.
- c. **The duty of loyalty:** The common law duty of loyalty requires trustees, directors and officers to pursue the interests and mission of the charitable entity with undivided allegiance. Private interests must not be placed above the charity's interests.
- d. **The duty of obedience:** Is relevant only in the context of charitable organizations, but bears mention. It includes the obligation of directors and officers to act within the organization's purposes and ensure that the corporation's mission is pursued. Although there is no explicit reference to the duty of obedience in the N-PCL or the EPTL, the duty may be inferred by the limitations imposed upon corporate activities as set forth in the purposes clause of the certificate of incorporation and the Directors' and officers' obligations as the corporate managers of the not-for profit organization. Moreover, EPTL § 11-2.3(b)(3)(B) explicitly refers to the needs of a trust's beneficiaries.
- e. **CASES:** a. In February, 1997, the New York Regents removed 18 of the 19 trustees of Adelphi University for neglect of their fiduciary duties when they approved an excessive compensation package for President Peter Diamandopoulos. *Committee to Save Adelphi v. Diamandopoulos*, decision of the Regents of the State University of New York (February 10, 1997). In a subsequent proceeding brought by the Attorney General against the former trustees, the New York County Supreme Court held that the lawsuit stated claims for relief against defendants, including causes of action against Diamandopoulos for breach of fiduciary duty and claims against the other trustees for reimbursement of the legal fees spent by them on their defense before the Board of Regents. *Vacco v. Diamandopoulos*, Index No. 401253/97 (Sup. Ct. N.Y. County April 6, 1998) The court also denied the trustees' motion for advance indemnification.
- f. Beginning in 1992, the Attorney General began investigating news reports of the misappropriation and mismanagement of charitable funds at the United Way of America ("United Way"). When new management took

over at United Way in 1995, the Attorney General and United Way entered into an Assurance of Discontinuance that required certain corporate governance reforms at the agency. Separately, the Attorney General sued two former United Way officers for alleged breach of fiduciary duty, seeking, *inter alia*, recovery of funds misappropriated from United Way. In July 1998, the New York supreme court held that the Attorney General had standing to sue these officers for losses suffered by the not-for-profit entity as a result of their breaches of fiduciary duty and granted the Attorney General's motion for partial summary judgment on the issue of liability based on the two officers' criminal convictions. *Vacco v. Aramony*, N.Y.L.J., Aug. 7, 1998, p. 21 (Sup. Ct. N.Y. County July 13, 1998).

V. WHEN IS A TRUSTEE OR EXECUTOR LIKELY TO ENCOUNTER THE AG BEYOND REGISTRATION, ANNUAL FILING OR CY PRES, IN PROBATE, PROBATE CONTESTS AND ACCOUNTINGS

- A. If a will contains a charitable bequest to an unnamed charity or in an unspecified amount then, pursuant to SCPA 1409, the notice of probate must include the address of the attorney general.
- B. EPTL § 8-1.4(e) deals specifically with the types of proceedings, such as probate contests, construction proceedings and fiduciary accountings, which are frequently brought in the Surrogate's Court or the Supreme Court involving charitable trusts and estates with charitable beneficiaries
 - i. **In such cases, the Attorney General is a respondent and a necessary party.**
 - ii. In estate accountings proceedings, the Attorney General's review of fiduciary accountings include, in part, scrutiny of executors, trustees, guardians and legal and other professional fees (which would affect the amount received by charitable beneficiaries in the residuary).
 - iii. The Attorney General also seeks, in accounting proceedings involving charitable trusts and estates, to uphold high standards of fiduciary conduct.
 - iv. The Attorney General represents the public as the ultimate beneficiaries of charitable dispositions and has the statutory duty to enforce the rights of such beneficiaries by appropriate proceedings in court. EPTL § 8-1.1(f).

CASES

- A. In its 1993 decision in *Estate of Donner*, 82 N.Y.2d 574, 606 N.Y.S.2d 137 (1993), a case in which the Attorney General actively participated, the **New York State Court of Appeals** re-emphasized the obligations of fiduciaries in the State of New York with respect to the management of assets and their dealings with beneficiaries, by upholding a surcharge on the coexecutors for investment losses incurred by the estate and a

reduction in the coexecutors' commission due to the failure of the coexecutors to act prudently in investing the estate's assets.

- B. More recently, in *Matter of Janes*, 90 N.Y.2d 41, 659 N.Y.S.2d 165 (1997), another case in which the Attorney General was an active participant, the **Court of Appeals** repeatedly relied on *Donner* to uphold a finding of liability against the corporate fiduciary of a multi-million dollar estate for failure to invest the assets of the estate prudently. The Court of Appeals also affirmed the Appellate Division, Fourth Department, award of damages of \$4.1 million, using a measure of damages consistent with *Donner* and its 1977 decision in *Matter of Rothko*, 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1977). The measure of damages is the value of the lost capital not lost profits. To calculate damages, determine the difference between the value of the stock on the date it should have been sold and either the proceeds from the sale of the stock if sold or the value of the stock at the time of the accounting if retained.

HOT TOPIC: According to the Charities Bureau the AG is reviewing the circumstances under which short form accountings are appropriate. I think its fair to say that the circumstances are going to become more limited.

HOT TOPIC: Also, the AG's office appears to be increasingly frowning upon trustees' delegating the preparation of accountings to third parties and may look to restrict such delegation in the future. The possibility of surcharging the trustee is also being considered if the trustee delegates the preparation of an accounting when the level of complexity does not justify such delegation.

VI. Charitable Trusts and the Power to Adjust.

- a. On Sept. 4, 2001, Governor George E. Pataki signed into law Chapter 243 of the Laws of 2001, effective Jan. 1, 2002, which replaced New York's then Principal and Income Act (EPTL § 11-2.1) with EPTL Article 11-A, providing new definitions of income and principal in a trust or estate.
- b. The legislation was not retroactive, but on its face applies to all trusts and estates existing as of, or created on or after, January 1, 2002.
- c. The law reflects the current opinion that fiduciaries should be authorized to strike a balance between capital growth and the need to provide sufficient income for current income beneficiaries and not necessarily be constrained by the common law or statutory definitions of principal and income.
- d. The definition of income was expanded to include an appropriate part of a fund's "total return," made up not only of interest, dividends, rents and royalties but also capital gains on investments of trust or estate principal. The legislation amended the prudent investor standard of fiduciary conduct set forth in EPTL § 11-2.3 by granting

fiduciaries the “power to adjust” funds between income and principal (in either direction) during or at the end of each fiscal year. See EPTL § 11-2.3(b)(5)(A).

- e. After prudently reviewing past and the longer term expectation performance of the trust’s or estate’s investments, the trustee may distribute so much of the “total return” to the present income beneficiary as would be “fair and reasonable” to all beneficiaries.
- f. Finally, newly added EPTL § 11-2.4 permits a trustee (but not an executor) to make an election, in lieu of determining income in a trust by using the power of adjustment, to have trust income equal a fixed percentage (called a “unitrust”) of four percent of the trust assets valued annually for the first three years. Thereafter, a formula applies.
- g. The power to adjust appears to apply to charitable trusts, but the legislation minimizes its effect: (1) the power may not be exercised in a charitable remainder trust to reduce the remainder passing to charity; and (2) the power cannot be used to change the amount required to be paid a beneficiary of a charitable remainder unitrust or annuity trust (see EPTL § 11-2.3(b)(5)(C)(iii)).
- h. **Application of the power to adjust to charitable trusts that are deemed private foundations, as defined (by exclusion) by Internal Revenue Code § 509(a), raises additional issues.** Private foundations are **subject to a number of requirements** that are not applicable to either publicly supported charities or supporting organizations under § 509(a), including the requirement imposed by Code § 4942 that private foundations make a minimum annual qualifying distributions of five percent of their net assets. These requirements are also specifically made applicable to New York trusts by EPTL § 8-1.8(a). **Failure to satisfy or make up over time the minimum distribution requirements applicable to private foundations subjects the entity to excise taxes.** The new legislation does not permit a trustee to exercise the power if its exercise may impose a tax burden on the trust. Therefore, the power to adjust should not be applied to trusts that are private foundations if a consequence would be a violation of the minimum distribution requirement. Furthermore, trusts that are private foundations would appear to be ineligible for the optional unitrust provisions of EPTL § 11-2.4, because that section mandates an annual payment equal to four percent of the net fair market value of the trust assets held, which would appear to violate the minimum distribution requirement of Internal Revenue Code § 4942. However, EPTL § 8-1.8(a)(1) might be interpreted as authorizing the payment of only an additional one percent. The issue is not free from doubt, because EPTL § 11-2.4 is optional.
- i. **In the case of split interest trusts, the power to adjust does not eliminate a trustee’s duty of impartiality, i.e., to treat fairly the interests of present and future beneficiaries or remainder or reversionary interests.**

CONCLUSION:

➤ I trust that this short talk has given or reinforced your sense that the AG is deeply involved and heavily armed in the supervision, regulation, and enforcement of charitable trusts.

- The statutory and regulatory scheme is complex and thorough.
- The penalties for not compliance are severe, and unwitting mistakes are generally not an excuse from liability.
- Thus, a trustee is well served by being familiar with, acting in accordance with, and complying with each applicable regulatory and reporting requirement under the EPTL, SCPA, Executive Law, and the N-PCL.
- Of course and without question, the assistance of legal counsel and compliance professionals can be instrumental to a trustee in meeting the challenges in this area.

Thank you.