

**DELAWARE COURT OF CHANCERY  
RULES 101 AND 104 AMENDED;  
NEW RULE 5.1**

---

**AMENDMENTS TO COURT OF CHANCERY  
RULES 101 AND 104**

On October 31, 2012, Chancellor Leo E. Strine, Jr. signed Amendments to Court of Chancery Rules 101 and 104. These changes took effect on December 1, 2012. Court of Chancery Rules 100 through 104 address the procedures and requirements for the Delaware trust consent petition practice and, following these amendments, also apply to any other action, including contested trust litigation, involving the modification of a trust. The following is a brief, general description of some of the notable changes to the Court of Chancery Rules. [Click here to download a copy of the Court's Order \(PDF 107 KB\).](#)

**Required Exhibits to Consent Petitions**

The Amendments to Rule 101 clarify which documents must be included as Exhibits to a consent petition filed in the Court of Chancery. Rule 101(a)(1) clarifies that the current trust instrument must be included as an Exhibit. Rule 101(a)(3) now clearly requires a blacklined version of the modifications to be included as an Exhibit, and not merely "some other appropriate document", which was allowed under the prior version of the Rule. Finally, under Rule 101(a)(4), the party submitting a consent petition must include a clean version of the proposed modified trust instrument as it will read if the relief requested in the consent petition is granted.

**Separate Orders Required**

Under new Rule 104(a), the party submitting a consent petition is required to file a separate proposed form of order for each item of relief requested. The Rule expressly prohibits orders for multiple individuals, multiple beneficiaries, or other interested parties, and now requires a separate proposed order for each individual, beneficiary, or interested party. The Rule also states that each

such separate proposed order submitted with a consent petition will be charged a filing fee equal to the fee charged for filing one proposed order. This amendment brings the requirements that were first introduced in a Standing Order dated October 7, 2012 into the Court of Chancery Rules.

**Application of Rules To Any Matter Involving a  
"Modification of a Trust"**

New Rule 104(b) states that Rules 100 through 104 shall apply to any matter before the Court of Chancery in which the relief sought includes the modification of a trust. The Rule expressly applies to all relief involving the modification of a trust, whether by means of a consent petition, civil action (i.e. contested litigation), court approved settlement or otherwise. However, the Rule states that "modification of a trust" does not include the severance or division of a trust, the merger of a trust, a distribution from a trust, or the appointment of a fiduciary of a trust if the action is permissible without court intervention under the terms of the agreement or under applicable law, unless the parties seek court approval of such action.

In general, new Rule 104(b) expands the scope of Rules 100 through 104 to contested civil litigation. Rules 100 through 104, which took effect on May 1, 2012, established many detailed requirements applicable to the consent petition practice in the Court of Chancery and applied initially to only the consent petition process. However, because of the new amendment to Rule 104(b), litigants involved with trust litigation involving the modification of a trust will need to carefully consider all of the additional requirements of Rules 100 through 104.

**COURT OF CHANCERY RULE 5.1:  
CONFIDENTIAL TREATMENT OF FILINGS**

Effective January 1, 2013, new Rule 5.1 was added, and old Rule 5(g) was deleted from the Court of Chancery Rules. Rule 5.1 is intended to make clear that only limited types of information qualify for confidential treatment in submissions to the Court, and that generally, absent a qualification for confidential treatment, proceedings in any Civil Action and all pleadings and other materials filed with the Register In Chancery in connection with a Civil Action, are matters of public record. The terminology associated with filing confidential information has

been changed. The “under seal” language of Rule 5(g) has been removed and replaced with the new terms “Confidential Filing” and “Confidential Treatment”. [Click here](#) to download a copy of the Court’s Order (PDF 272 KB).

Under new Rule 5.1(b), in order to obtain Confidential Treatment of information filed with the Court, the person seeking such Confidential Treatment must obtain an order specifying that there is “good cause” for such an order. Although a Court order was required and the concept of good cause existed under old Rule 5(g), new Rule 5.1 provides more detail and narrows the potential arguments that could be made by litigants regarding good cause. Under the new Rule, good cause exists only when the “public interest in accessing court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause.” The party seeking Confidential Treatment bears the burden of demonstrating good cause if Confidential Treatment is challenged pursuant to the procedure in new Rule 5.1(f).

In addition, new Rule 5.1(b) provides examples of categories of information that would typically qualify for Confidential Treatment. In the trust litigation context, such examples include sensitive proprietary information, sensitive financial, business, or

personnel information, and sensitive personal information such as social security numbers, financial account numbers and the names of minor children. This guidance in new Rule 5.1(b) will be useful for counsel seeking to keep sensitive details regarding client’s assets held in trust confidential.

Rule 5.1(f) provides a mechanism for a person to challenge the Confidential Treatment of a Confidential Filing. Any person wishing to challenge a Confidential Filing must file a notice with the Register In Chancery which triggers various deadlines for filings and the potential challenge to the public version of the documents.

---

The changes to these Chancery Court Rules are too detailed for a complete discussion here, and their impact in practice remains to be seen. Please refer to the downloadable copies of the new rules to review them in their entirety. Please also feel free to contact any member of the Morris Nichols Trusts, Estates & Tax Group to discuss this matter in greater depth.

### **Morris Nichols Trusts, Estates and Tax Group**

Thomas R. Pulsifer  
(302) 351-9226  
tpulsifer@mnat.com

Todd A. Flubacher  
(302) 351-9374  
tflubacher@mnat.com

Kimberly M. Gill  
(302) 351-9102  
kgill@mnat.com

Scott D. Goodwin  
(302) 351-9462  
sgoodwin@mnat.com