RISKY BUSINESS? INVESTMENT CONSIDERATIONS FOR TRUSTEES & TRUST ADVISERS IN THE UNITED STATES & ABROAD

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OVERVIEW

- Trustee Investment Obligations
- What Should a Trustee Do in a Volatile Market
  - Best Practices
  - Specific Investment Issues

TRUSTEE INVESTMENT STANDARD OF CONDUCT

TRUSTEE INVESTMENT STANDARD OF CONDUCT

DUTY TO INVEST

- Trustee Responsibilities
  - Manage and invest trust property in accordance with the terms of the trust instruments and applicable law
  - Make distributions of income and principal
  - File tax returns and handle other administration
- Duty to Invest
  - The trustee has the duty to invest trust assets consistent with the terms and objectives of the trust
    - Financial needs and risk tolerance of the beneficiary
    - Special assets
    - Adherence to the grantor's instructions in the trust
  - Executors and guardians are subject to different investment standards

TRUSTEE INVESTMENT STANDARD OF CONDUCT – US

THE PRUDENT INVESTOR RULE

- Most jurisdictions follow the Prudent Investor Rule
- The trustee has a duty to "invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust."
  - Requires the exercise of "reasonable care, skill, and caution"
  - Applies to the investments "not in isolation, but in the context of the trust portfolio as a whole and as part of an overall investment strategy that should incorporate risk and return objectives reasonably suited to the trust."

TRUSTEE INVESTMENT STANDARD OF CONDUCT – US

THE PRUDENT INVESTOR RULE, CONTINUED

- Key elements of the Prudent Investor Rule:
  - It is a test of the conduct of the trustee, not of resulting performance
  - No specific “legal list” applies
  - Imposes a specific duty to review trust assets and to make and implement decisions concerning retention and disposition of trust assets
  - Requires the trustee to adopt an investment strategy that considers both income and principal enhancement (consistent with the duty of impartiality)
  - Creates a “duty to diversify” the assets of the trust

TRUSTEE INVESTMENT STANDARD OF CONDUCT

THE PRUDENT INVESTOR RULE

- Factors a trustee should consider:
  - General economic conditions
  - Possible effect of inflation or deflation
  - Expected tax consequences of decisions or strategies
  - The role of each investment in the overall portfolio
  - The expected total return from income and appreciation of capital
  - Other resources of the beneficiaries known to the trustee
  - Needs for liquidity, income, and preservation or appreciation of capital
  - An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries

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“NEGLIGENT” INVESTMENTS – DUE CARE AND ATTENTION

- ‘[A] trustee is bound to conduct the business of the trust with the same care which an ordinary prudent man of business would take having regard to the interests, both in the present and the future, of those for whom he feels bound to provide or who have a claim on him.’
- *Re Whiteley* (1886) 33 ChD 347
- Codified duty of care – see Section 1 of the Trustee Act 2000
- Duty to exercise such care and skill as is reasonable in the circumstances” and regard is to be had to” a) any special knowledge or experience that he has or holds himself out has having, and b) [if he is a professional trustee] to any special knowledge or experience that is reasonable to expect of [such a person]

ENGLAND & OFFSHORE

UNAUTHORIZED INVESTMENTS & FALSIFICATION OF ACCOUNTS

- The trustee's essential duty is to honor obligations contained within the trust instrument or imposed by statute. Investments which are not authorized by either the instrument or by statute may result in investment-by-investment falsification of the trust account for which there is no defense
- For example, in England, the Trustee Act 2000 does not authorize investments in land (Section 3)
  - Investments in non-UK land are only permitted if the trust deed so expands the general power of investment (Sections 3 and 8)

ENGLAND & OFFSHORE

DISLOYAL INVESTMENTS & RECONSTITUTION OF THE TRUST

- The trustee owes undivided loyalty to his beneficiaries, and must not place himself in a position where his duties to third parties or his own interests' conflict with his duty to the beneficiaries
- Investments made in breach of the trustees' fiduciary duty are disloyal investments
- The trustee may be required to re-constitute the trust for any disloyal investments on an investment-by-investment basis without regard to whether they were competent investments
  - *However*, the trustee can argue that the disloyalty did not cause the losses, albeit the burden of establishing causation as a defense is on the trustee

TRUSTEE INVESTMENT STANDARD OF CONDUCT – US

THE DUTY TO DIVERSIFY

- The duty to diversify trust assets is not absolute and not necessarily intuitive
  - The duty to diversify may be modified or eliminated through the language of the trust
  - The duty to convert a single asset in which there is an over-concentration (possibly 10-15% of the trust value) into more than a single investment
  - Does not relate to investment allocations or mix
  - Some states have modified the duty to diversify trust assets through statutes governing the creation of private trust companies
    - By statute, a trustee is not liable for deciding not to diversify trust assets in good faith reliance on the terms of the trust or court order
    - New Hampshire and Nevada

TRUSTEE INVESTMENT STANDARD OF CONDUCT – ENGLAND & OFFSHORE

THE DUTY TO DIVERSIFY

- The General Power of Investment (Section 3 Trustee Act 2000): the trustee may make any kind of investment that he could make if absolutely entitled to the assets
  - However, this may be limited by trust deed if the trust was created after 2 August 1961
- Trustee must have regard to the "standard investment criteria" which includes:
  - "the need for diversification of the trust in so far as is appropriate to the circumstances of the trust"
- Section 4(1) of the Trustee Act 2000 set out the need for diversification in terms of the range of investments; for example, where the size of the portfolio is large, the trustees are obliged to consider the suitability of investments by reference to the overall risk level of the whole portfolio as opposed to individual investments
  - What might be considered to be a speculative investment on its own might not be categorized as such in a wide portfolio
- However, in reality many trusts contain non-diversification clauses excluding this obligation

TRUSTEE INVESTMENT STANDARD OF CONDUCT

CASE STUDY— CRYPTOCURRENCY

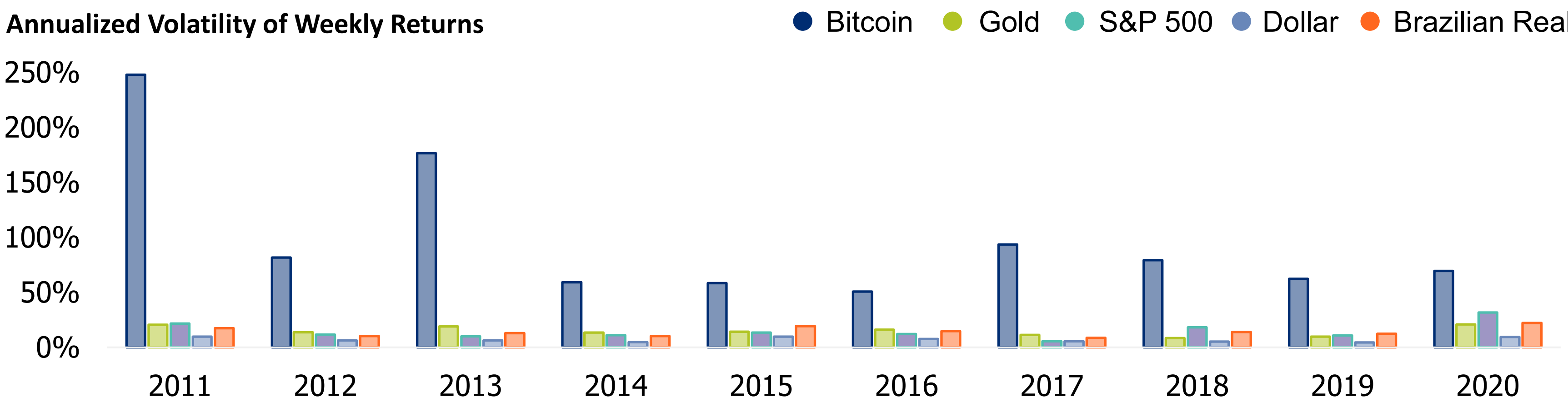
- Income beneficiaries ask the trustee to allocate a significant portion of the trust assets in Bitcoin
  - How should the trustee evaluate this request?
  - Is the investment imprudent, per se?
  - Which fiduciary duties are implicated?

Bernstein does not provide tax, legal, or accounting advice. In considering the information contained in this presentation, you should independently verify all conclusions before implementing any strategy on your own behalf or on behalf of your client.

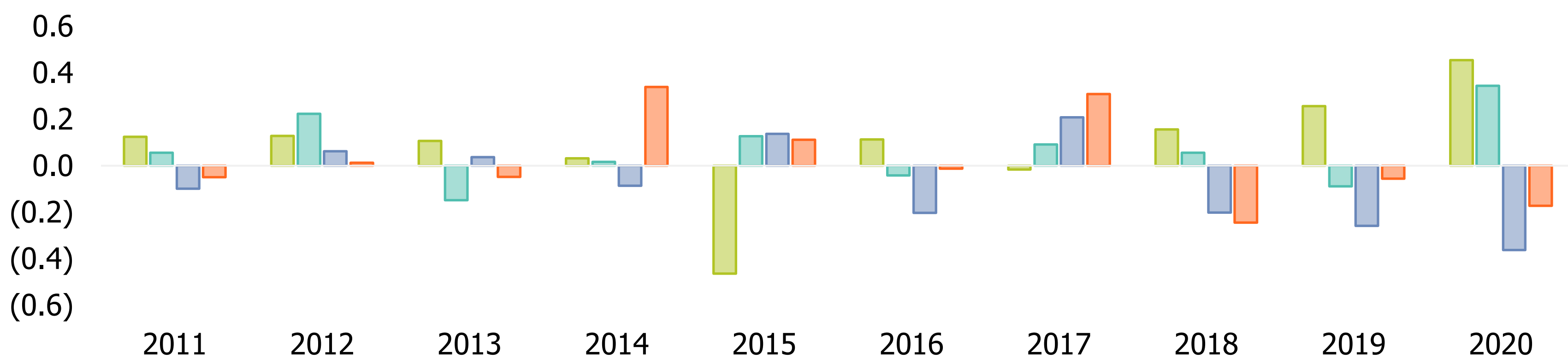
Cryptocurrency

Bitcoin's Returns Are Far More Volatile Than Any Other Major Asset

Annualized Volatility of Weekly Returns



Correlation of Bitcoin to Other Assets



Past performance does not guarantee future results.

Sources: Bloomberg and AB

Elements of the Prudent Investor Rule

- **Overall investment strategy:** The focus of the prudent investor rule is on the overall strategy, not one asset or asset class in isolation.
- **Risk/return:** The risk-and-return tradeoffs must be reasonably suited to the trust.
- **Duty to diversify:** The portfolio must be adequately diversified, including rebalancing as needed to maintain that diversity.
- **Facts and circumstances:** There are no "bright lines"; the portfolio is evaluated as a whole based upon all relevant facts and circumstances.
- **Duty to monitor:** The trustee has an ongoing duty to monitor the portfolio; this duty is relaxed in the case of a directed trust.
- **Adequate records:** The trustee must maintain records that adequately document investment decisions.
- **Modification or waiver:** The grantor may (and often does) waive or modify the prudent investor rule.

Bernstein's Perspective: Cryptoassets

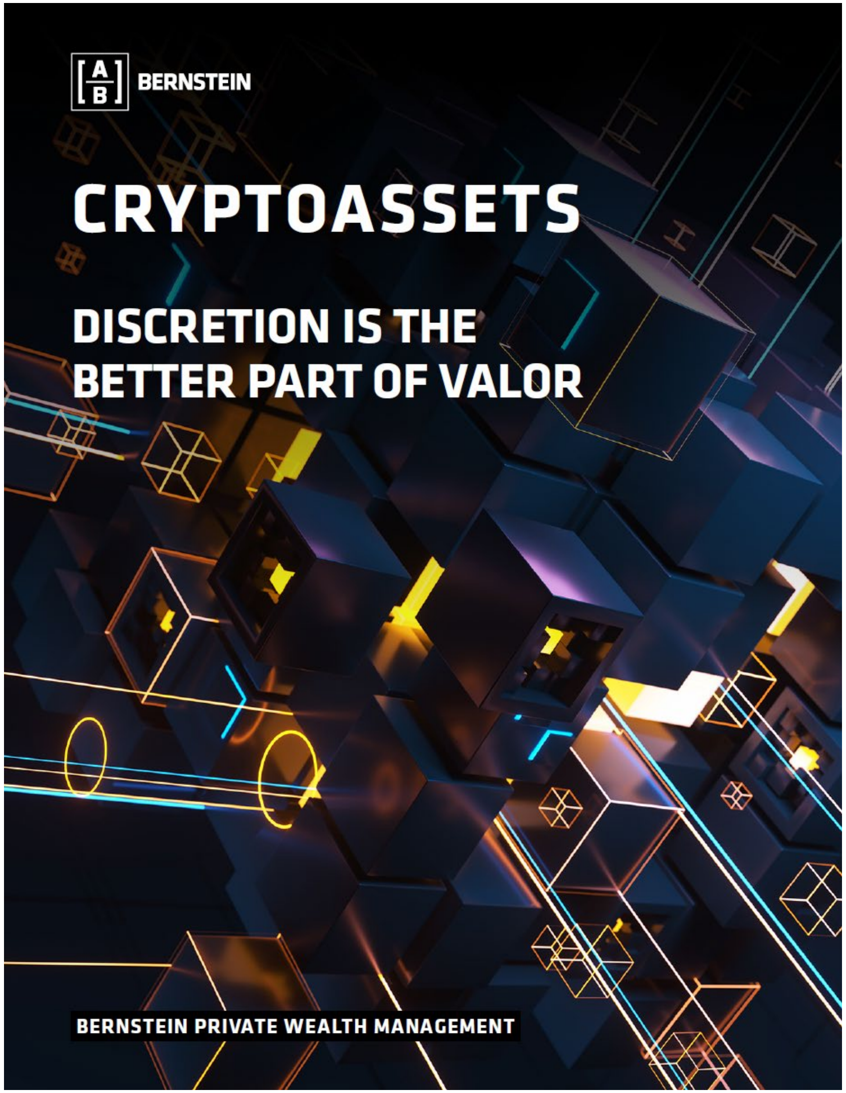
- **Broad Adoption:** Cryptoassets and blockchain technologies have made substantial fundamental progress in the past several years and the foundation is now in place for them to flourish. Even major central banks like the US Federal Reserve are considering digital versions of existing currencies that operate using blockchain technology.

- **Volatility:** As with any new technology, the market price may significantly diverge from fundamental developments, either too positively or too negatively, so investors need to tread carefully.

- **Valuation:** Valuing cryptoassets isn't impossible, but it is harder than valuing traditional assets. There's still little agreement on the best approach or the right assumptions for many assets. That wide margin of error leads to more volatility and necessitates caution.

- **How to Invest:** Investors should approach the space with a venture capital mindset—while the potential rewards may be large, these assets and projects could rapidly lose the majority or entirety of their market value. Diversification and due diligence will be critical, as will a balance of optimism and skepticism.

Bernstein's Most Recent Cryptoasset Research (July 2021)



You can access the whitepaper HERE.

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

BEST PRACTICES – DOCUMENTING PROCESS

- Prudent Investor Rule is a process based standard
- Trustees should document their rationale for making specific decisions with respect to trust assets
- Documentation provides evidence in a subsequent litigation that a trustee exercised reasonable care, skill, and caution in administering the trust

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

BEST PRACTICES – DOCUMENTING PROCESS, CONTINUED

- Activities that should be documented include, but are not limited to:
  - Decisions regarding the disposition or retention of assets
  - Decisions regarding distributions
  - Decisions regarding allocation of principal and income
  - Communications with beneficiaries
  - Decisions regarding investment policies
  - Decisions regarding advisors such as investment managers

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

BEST PRACTICES – COMMUNICATION WITH THE BENEFICIARY

- Prudent investor rules require that the trustee coordinate the trust investment with the investment needs and portfolio held outside the trust by the beneficiaries
- In volatile markets, trustees should maintain regular contact with beneficiaries to ensure that the trust portfolio is aligned with the best interests of the beneficiaries
  - This requires diligence by the trustee

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

BEST PRACTICES – REVIEW INVESTMENT MANAGERS

- Prudent investor rules require that the trustee acts with care
- This means that:
  - The trustee should ensure that trust investment managers are following the investment manager's respective policies and professional guidelines
  - If the investment manager is not following investment policy, trustee should consider terminating relationship

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – SELL DISCIPLINES

- A process instituted by the trust instrument or the trustee that requires a trustee to automatically sell a liquid trust asset if the value of the asset falls to a pre-determined threshold
  - Very few trust instruments have a sell discipline built into the investment or administration powers
  - Very few trustees have implemented sell disciplines
  - No case has expressly held that a sell-discipline is required for prudent management
- However, Plaintiff's attorneys have repeatedly brought cases on this theory of liability

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – SELL DISCIPLINES, CONTINUED

- The Crashing Elevator
  - Value of stock decreases dramatically in a short period of time
  - While lawsuits often focus on failure to diversify when trust had significant holdings in a stock that crashed, allegations that there should be built-in electronic sale disciplines to protect against such free falls are increasing in frequency
  - No case has held that an automatic or timed liquidation feature must be built into prudent fiduciary management
- Take Away
  - If the investment was trust-grade prior to the crash, and was acquired and maintained in compliance with the prudent investor rule, there should be no liability for the trustee in a Crashing Elevator situation

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – SELL DISCIPLINES, CONTINUED

- The Long March Down
  - Failure to implement a sell discipline when the value of a security declines steadily over a period of weeks or months
  - *Pickerel v. Huntington National Bank*, 2002-Ohio-1259 (Ct. App. 2002)
    - Rejected “Peak-of-the-Market” theory (citing In re Estate of Bentley, 163 Ohio 568 (1955))
    - Held that trustee/executor “who is confronted with a declining market at the time he receives stocks belonging to the estate, and who, in good faith, does not sell such stocks until later when the market has further declined” is not liable for any loss

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – SELL DISCIPLINES, CONTINUED

- The Long March Down
  - *In re Mark Anthony Fowler Special Needs Trust*, 160 Wash. App. 1001 (Ct. App. 2011)
    - Trustee satisfied the prudent investor rule and was not liable for unrealized equity losses trust suffered during in 2008-2009 financial crisis
    - Trustee's "decision not to liquidate stocks that had decreased in value during the market downturn was reasonable … [because] selling stocks at the bottom of the market and placing proceeds into insured deposits would lock in losses that would be difficult to recover."
  - *SunTrust Bank v. Farrar*, 277 Va. 546 (2009)
    - Trustee is not liable for breach of prudent investor rule when there is no market for a trust asset
    - Trustee "who retains a trust asset during a precipitous decline in the market when there was no market for the asset cannot be held to account so long as the trustee acted as a reasonable and prudent person would act in light of then existing conditions."

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – SELL DISCIPLINES, CONTINUED

- The Long March Down
  - *Uzyel v. Kadisha*, 188 Cal.App.4th 866 (2010)
    - Trustee violated California's Prudent Investor Rule by failing to take any measures to protect against a decline in the value of the trust's Qualcomm stock
    - The Court noted that the trustee was a "skilled investor who knew how to 'collar' stock, employ a put option, place a stop-loss order, or take other measures to protect against a price decline" but failed to do so
    - However, the Court also held that the trustee had acted in bad faith as he failed to take protective measures in retaliation for a separate suit the beneficiaries had filed

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – SELL DISCIPLINES, CONTINUED

- Take Away
  - A trustee has a continuing duty to monitor asset performance and sell if necessary
  - However, a trustee should not be liable for holding an asset during a decline in performance as long as the trustee acts with a reasonable basis and in good faith

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET – ENGLAND & OFFSHORE

TAKE ADVICE OR USE DISCRETIONARY ASSET MANAGERS

- Trustees must either take advice or use a discretionary asset manager (unless unnecessary or unreasonable)
- Difficulties with taking advice:
  - Still responsible for evaluating advice
  - Have they taken advice? The development of contractual estoppel and standard term sheets
    - *JP Morgan Chase Bank v Springwell Navigation Corp*. [2010] EWCA Civ 1221, [2010] All ER (D) 08 (Nov).
- Trustees typically use discretionary asset managers effectively offloading much of their exposure to investment claims
- Difficulties for trustees with discretionary asset managers include:
  - Monitoring performance
  - Appropriate policy statement regarding investments

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – OVERWEIGHT POSITIONS, CONTINUED

- Generally, trustees that hold trust assets in concentrated positions in a single or limited number of stocks may face exposure for a decline in the market value for failing to diversify the trust assets
- See, *In re Hunter*, 100 A.D. 39 996 (N.Y. Supr. Ct. 2012)
  - Trustee violated New York's Prudent Person Rule and Prudent Investor Act by maintaining a concentration of Kodak stock over a 20-year period during which the value of the stock declined precipitously

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – OVERWEIGHT POSITIONS, CONTINUED

- Duty to diversify typically applies to concentrations in a small number of assets, not to the allocation of asset classes
  - *See, Central Bank of Mattoon v. United States Department of Treasury*, 912 F.2d 897 (7th Cir. 1990)
    - Holding that investment in one or a few broad-based mutual funds is not a breach of the duty to diversify
  - *See, Goddard III v. Continental Illinois National Bank and Trust Co*., 177 Ill. App. 3d 504 (1st Dist. 1988) (same).

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – OVERWEIGHT POSITIONS, CONTINUED

- But See, *Estate of Scharlach*, 809 A. 2d 376 (Pa. Super. 2002)
  - The trustee invested exclusively in a bond portfolio and missed out on the stock market gains that occurred over the course of the 1990s
  - The Court held that the concentration in the bond portfolio (which was diversified) could constitute a failure to diversify due to lack of investment mix
  - Demonstrates that courts can depart from the common, case-defined meaning of diversification
- Take Away
  - Trustees should be mindful of the asset allocation in prudently managing trust portfolios
  - Trustees should be prepared to defend the process in electing to concentrate a trust portfolio in a single asset class

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – PERFORMANCE VERSUS AN INDEX – US

- Litigation arising out of trustee's comparison of performance to market indices
- *Matter of Jakobson Trust*, 662 N.Y.S.2d 360 (N.Y. Surr. 1997); *In re Trusts of Kuoching*, 717 N.Y.S. 2d 512 (App. Div. 2000)
  - Both cases held that the Prudent Man Rule could only measure damage in the event of imprudent trust management, not based on any performance driven standard
  - While cases applied Prudent Man Rule (which was replaced thereafter in New York by the Prudent Investor Rule), there is nothing about the Prudent Investor Rule that would change the result
- Take Away
  - If a trustee employs a prudent process in investing trust assets, the trustee should have limited exposure for performance that does not meet or exceed benchmarks

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – PERFORMANCE VERSUS AN INDEX – ENGLAND & OFFSHORE

- *Nestle v. National Westminster Bank plc* [1993] 1 WLR 1260 established that the difference between the index and actual returns was not an appropriate way to measure loss
- Nevertheless, if the trust is underperforming an appropriate index (ARC perhaps) or is seen as unduly risky or poorly performing (Enhance) then prudent for the trustee to consider change of asset manager

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – UNCONVENTIONAL INVESTMENT VEHICLES

- Start Ups/Unproven Companies
  - Potentially imprudent due to risk of failure
  - See, *Mennen v. Wilmington Trust Co*., 2015 WL 1897828 (Del. Ct. Ch. 2015)
    - Court held that Trustee acted in bad faith and breached trust by causing trusts to invest in unproven and closely held companies
    - Held the investments were imprudent because they “bore no relation to the long-term security of the trust”
- Take Away
  - Despite potential for large returns, should generally be avoided unless directed by the trust document
  - Volatile market increases risk of exposure of loss as access to additional capital or financing may be limited

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – UNCONVENTIONAL INVESTMENT VEHICLES, CONTINUED

- Investing on Margin and Short Sales
  - Creates a double exposure for fiduciary
    - Loss in value of investment purchased with borrowed funds
    - Loss in repayment of borrowing
  - *Merrill Lynch v. Bockock*, 247 F. Supp. 373 (S.D. Tex. 1965)
    - Held that short sales are not prudent investments because they amount to "rank gambles"
    - Held Merrill Lynch, the broker, liable to the trust because Merrill Lynch should not have allowed trustee to use trust funds in a short sale

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – UNCONVENTIONAL INVESTMENT VEHICLES, CONTINUED

- Investing on Margin and Short Sales
  - *Van Gundy v. Van Gundy*, 292 P.3d 1201 (CO Ct. Ap. 2012)
    - Trustee was not liable for breach of fiduciary duty for investing on margin because such investments were allowed by the trust instrument even though they may not ordinarily satisfy Colorado's Prudent Investor Rule
  - Take Away
    - Trustee should avoid investing on margin unless authorized by trust instrument and approved by the beneficiaries

WHAT SHOULD A TRUSTEE DO IN A VOLATILE MARKET

SPECIFIC ISSUES – TOTAL RETURN TRUST CONVERSION

- Many states have statutory provisions that allow for conversion to a total return trust to increase distributions to current beneficiaries
  - Conversion can create disagreements between future and current beneficiaries
- *McNeil v. Bennett*, 792 A.2d 190 (Del. App. 2001)
  - Considered conversion as a prudent investment issue
  - Held that the value of the percentage payout should not be at a level likely to cause meaningful erosion in the principal value of the trust
    - Principal value is measured against the value of the principal at the time of conversion
- Take Away
  - Volatile markets make litigation involving conversion more complex and expensive
  - Expert financial testimony is required to justify distribution rates

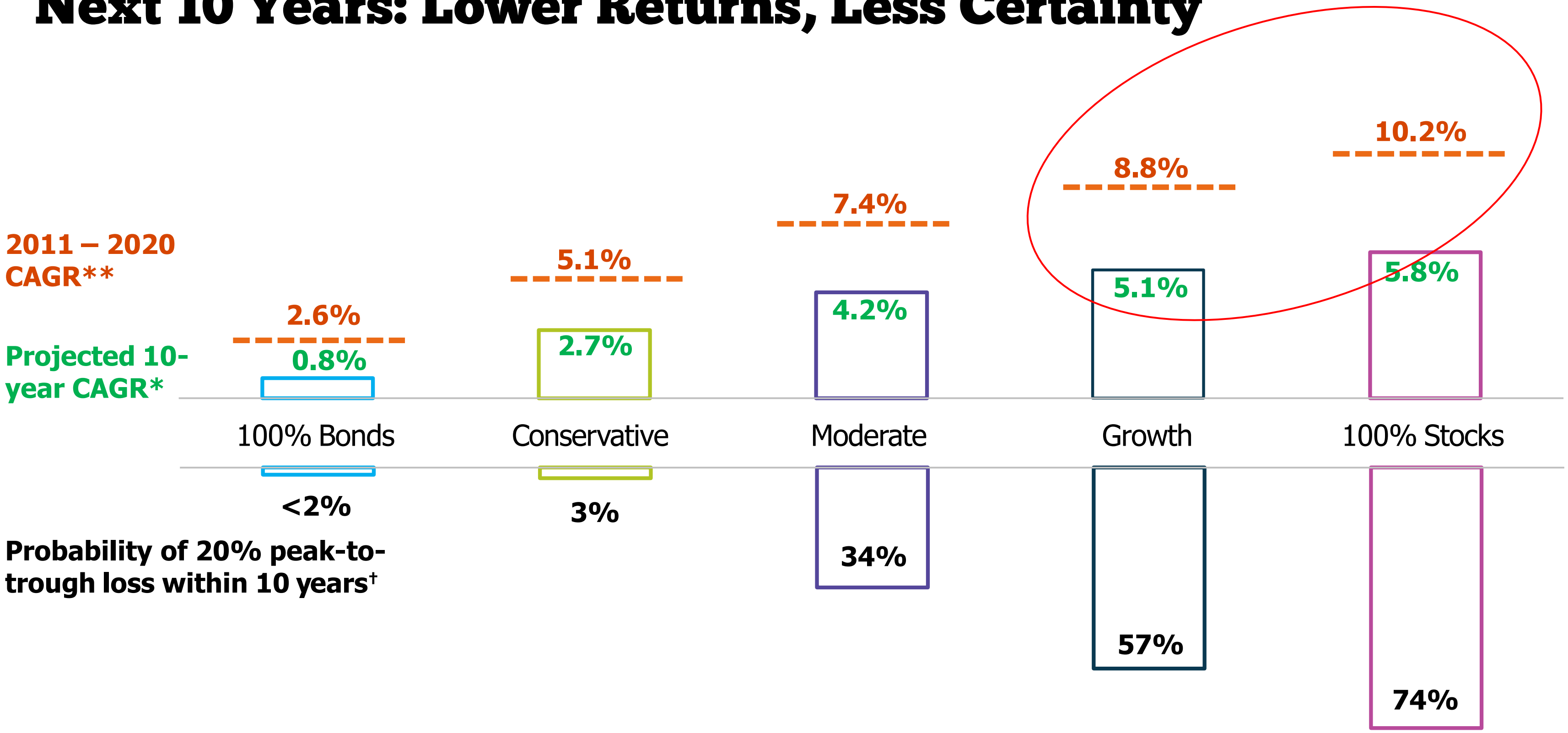
WHAT SHOULD A TRUSTEE DO IN A VOLATILE ENVIRONMENT

CASE STUDY—UNITRUST CONVERSION

- Remainder beneficiaries of a marital deduction trust have been advised to request a unitrust conversion of the income beneficiary's interest in exchange for a more growth-oriented asset allocation
- The applicable statute authorizes a unitrust conversion without judicial approval within a range of 3 to 5 percent per year
- How should the following factors be assessed?
  - Unitrust percentage
  - Expected inflation
  - Portfolio income taxes

Duty of Impartiality

Next 10 Years: Lower Returns, Less Certainty



Past performance is not necessarily indicative of future results. There is no guarantee that any estimates or forecasts will be realized.

*Based on Bernstein's estimates of the range of returns for the applicable capital markets over the next 10 years as of June 30, 2020

Projected pretax 10-year compound annual growth rate. Conservative is 30% stocks/70% bonds; moderate is 60% stocks/40% bonds; growth is 80% stocks/20% bonds. Stocks are represented by the following allocation for a 100% stock allocation: 16.2% US value, 16.2% US growth, 12.0% US diversified, 6.0% US small-/mid-cap, 21.2% developed foreign markets, 8.1% emerging markets, 9.6% US Low Vol Equity, 10.7% high-risk international. Equity geography weights may shift in proportion to total return-seeking allocation. Bonds are represented by diversified intermediate-term municipal bonds in the proportions noted. Additional details regarding allocation available upon request.

**Reflects compound growth rates from January 1, 2011, through December 31, 2020. Stocks represented by 60% Russell 3000 Index and 40% MSCI ACWI ex US. Bonds represented by Lipper Short/Int Blended Muni Fund Avg.

†Probability of a 20% peak-to-trough decline in pretax, pre-cash-flow cumulative returns within the next 10 years. Because the Wealth Forecasting System uses annual capital-market returns, the probability of peak-to-trough losses measured on a more frequent basis (such as daily or monthly) may be understated. The probabilities depicted above include an upward adjustment intended to account for the incidence of peak-to-trough losses that do not last an exact number of years.

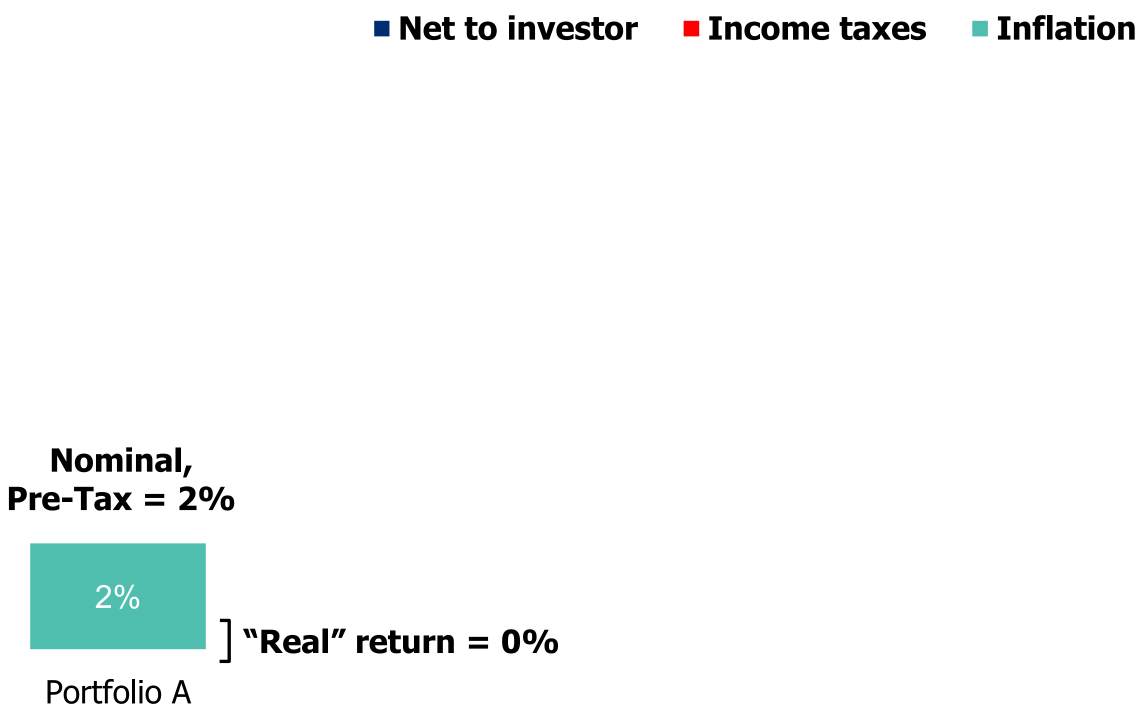
See Assumptions and Notes on Bernstein Wealth Forecasting System in Appendix for further details.

Source: Lipper, MSCI, Russell, S&P, and AB

Which of the Following Portfolios Do You Like Best . . .
A Tax-Exempt Portfolio that Barely Keeps Up with Inflation?

Hypothetical Portfolio Returns, Net of Inflation and Income Taxes*

Assumes:
- 2% Inflation
- 50% Ordinary Income Tax Rate
- 33% Long-Term Capital Gain Tax Rate



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*”Portfolio A” means hypothetical tax-exempt portfolio that is expected to return 2% per year over the illustrated period; “Portfolio B” means hypothetical portfolio that is expected to return 6% per year over the illustrated period with all returns characterized as qualified dividends and long-term capital gains and taxed at long-term capital gain tax rate; “Portfolio 3” means hypothetical portfolio that is expected to return 10% per year over the illustrated period with all returns characterized as ordinary income and short-term capital gains and taxed at ordinary tax rate.

Source: AB

. . . A Higher-Returning Portfolio that Loses Two-Thirds of Its Return to Inflation and Taxes?

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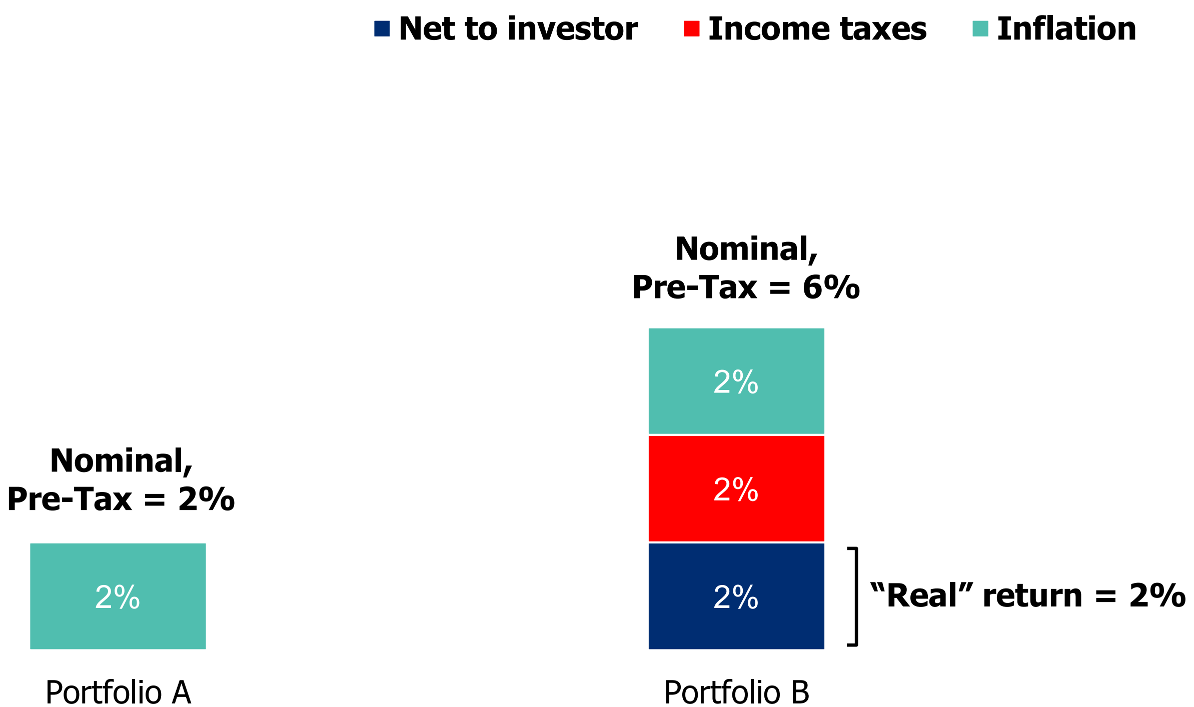

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Source: AB

. . . Or a High-Returning, Very Tax-Inefficient Portfolio that Loses 70% of Its Return to Inflation and Taxes?

Hypothetical Portfolio Returns, Net of Inflation and Income Taxes*

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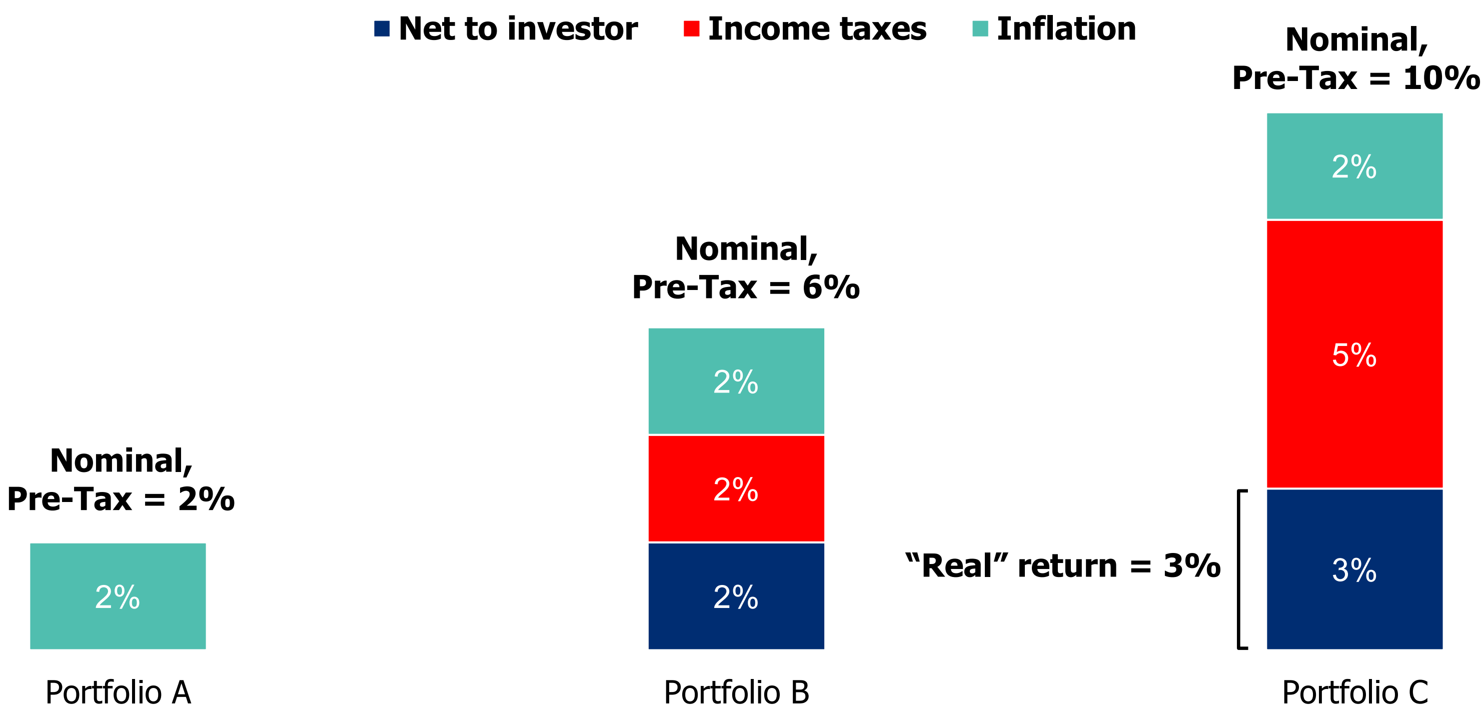

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Source: AB

Tax Minimization Strategy

But What if We Could Eliminate the Income Tax . . .

Hypothetical Portfolio Returns, Net of Inflation and Income Taxes*

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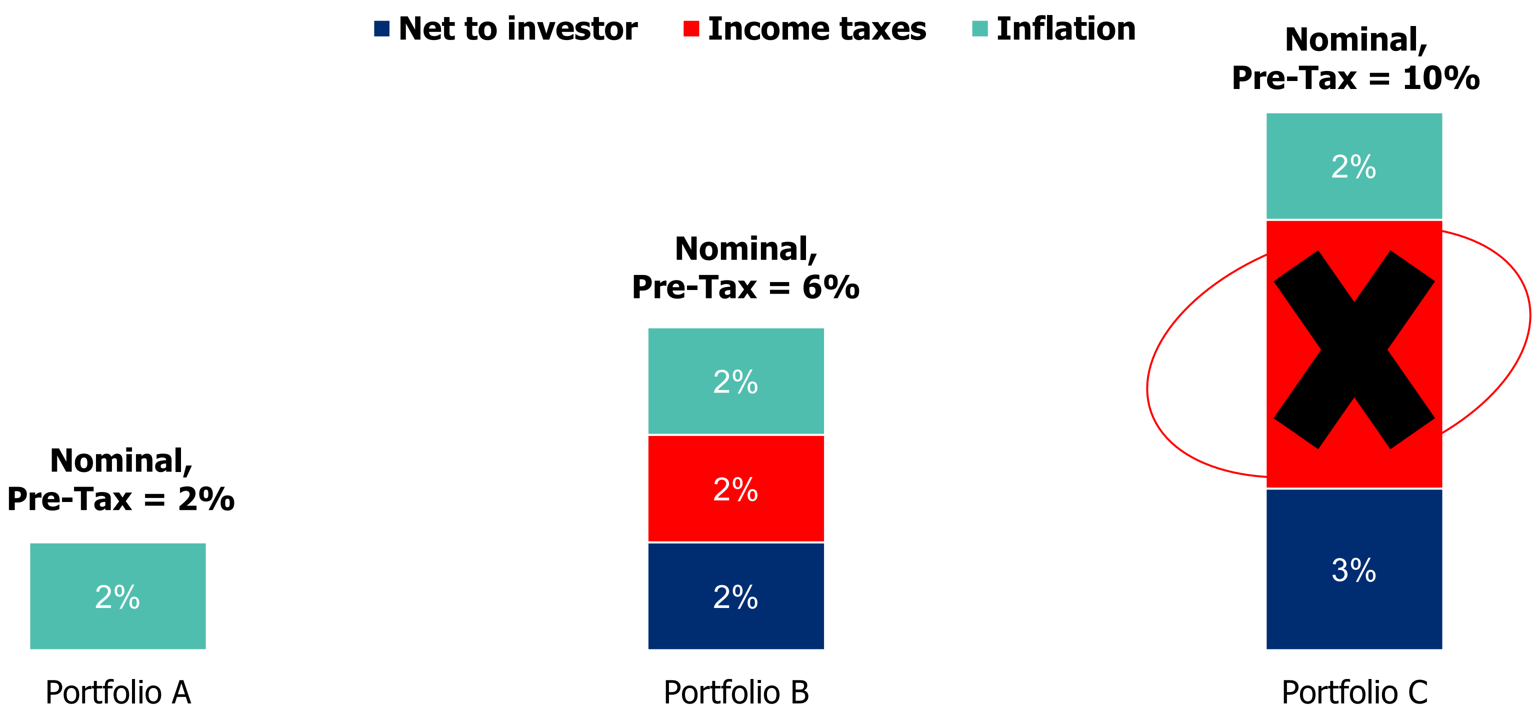

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Source: AB

. . . And Replace It with Something More Reasonable?

Hypothetical Portfolio Returns, Net of Inflation and Income Taxes*

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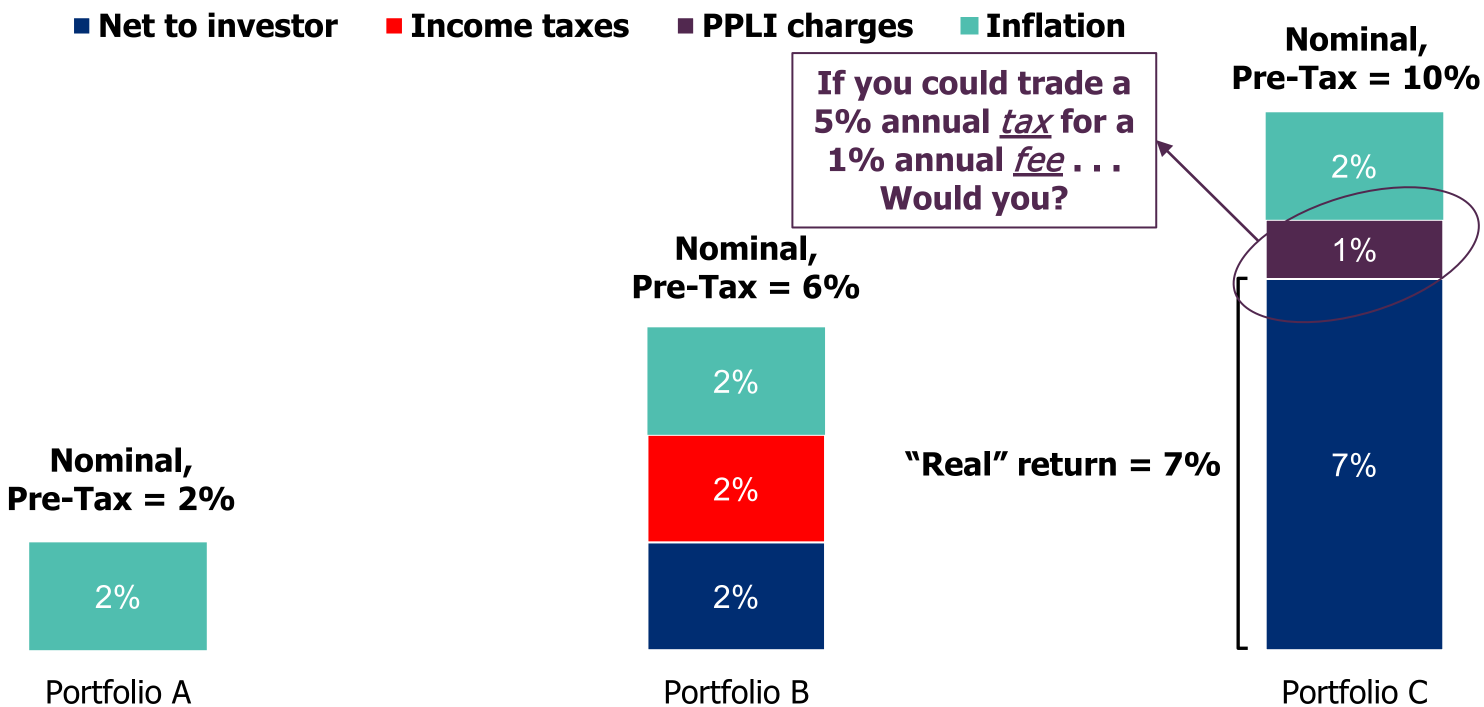

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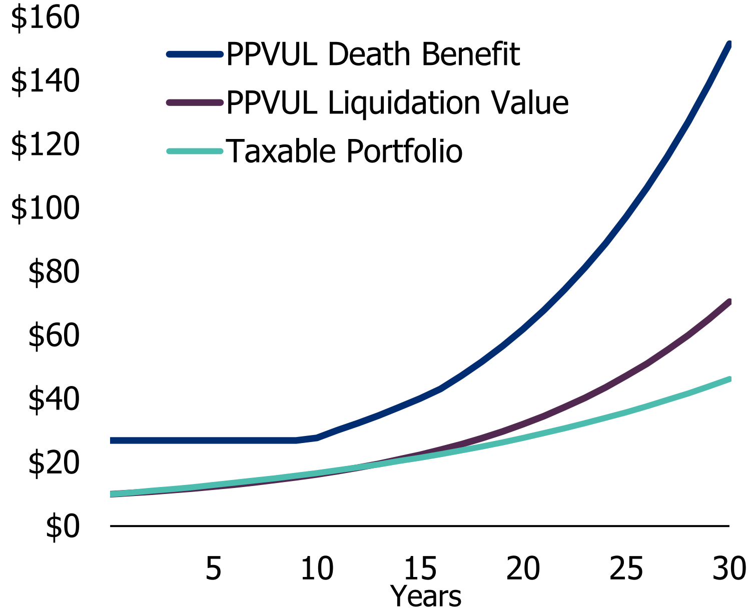
*"Portfolio A" means hypothetical tax-exempt portfolio that is expected to return 2% per year over the illustrated period; "Portfolio B" means hypothetical portfolio that is expected to return 6% per year over the illustrated period with all returns characterized as qualified dividends and long-term capital gains and taxed at long-term capital gain tax rate; "Portfolio 3" means hypothetical portfolio that is expected to return 10% per year over the illustrated period with all returns characterized as ordinary income and short-term capital gains and taxed at ordinary tax rate.

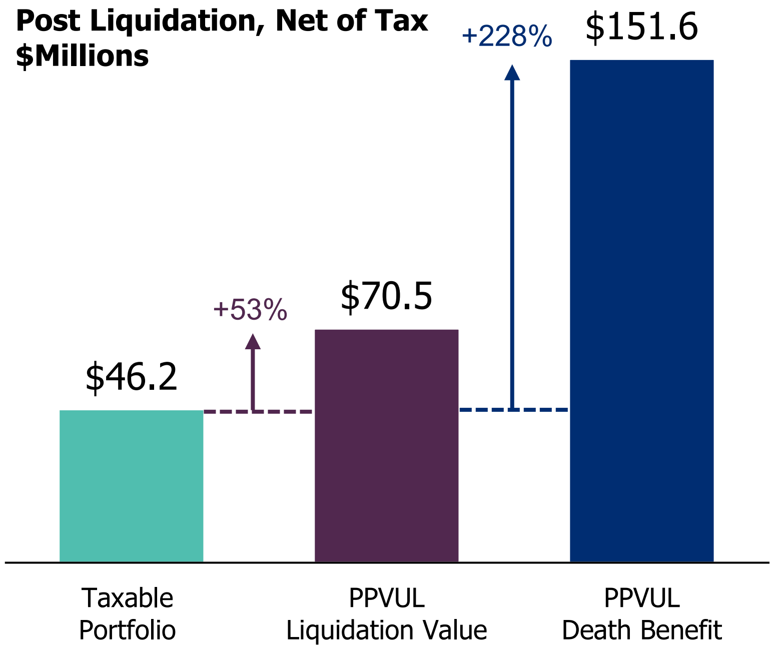
Source: AB

Diversified Approach with "Institutional" Pricing*: Best Absolute Outcome, Enhanced Efficiency

Growth of $10 Million
Post Liquidation, Net of Tax
$Millions



Portfolio Values at Year 30
Post Liquidation, Net of Tax
$Millions



*Assumes 10.0% return each year, consisting 2/3 of ordinary income / short-term capital gain and 1/3 of long-term capital gain / qualified dividends (2/3 long-term capital gain with 3-year holding period and 1/3 qualified dividends). Income taxes computed at an effective ordinary income / short-term capital gain tax rate of 55% and an effective long-term capital gain / qualified dividend tax rate of 35%. For each year depicted, "Taxable Portfolio" is the value of the portfolio net of taxes due for income, realized capital gains and unrealized capital gains. For each year depicted, "PPVUL Liquidation Value" is net of ordinary income tax for embedded growth of PPVUL policy (cash value). "PPVUL Death Benefit" represents the death benefit (no tax). PPVUL Assumptions – Insured: Male, Age 60, Preferred; Situs: Delaware; Modified Endowment Contract (MEC); Face Amount: $26,870,000; Investment: $10,000,000; Policy Underwriting Charge: $2,000; Premium Load Components – Year 1: $152,000 Total (Federal DAC Tax: $100,000, State Premium Tax: $2,000, Distribution Charge: $50,000); Annual M&E (assessed on Total Account Value): $10,000,000 to $40,000,000 = 0.45%, $40,000,000 and above = 0.35%; Annual COI (Cost of Insurance): cost of providing death benefit. Data do not represent past performance and are not a promise of actual future results or a range of future results.
Based on AB analysis and illustration provided by insurance provider. AB is not a legal, tax, estate, or insurance advisor. Investors should consult these professionals as appropriate before making any decisions.

ENGLAND & OFFSHORE
FORESEEABILITY & REMOTENESS

- The explosive first instance decision in *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB), [2011] 2 CLC 459 held that the global financial crisis of 2008 and following was not foreseeable and therefore investment losses during it were not actionable
- Overturned on appeal but on quite limited grounds specific to the case
- How will this jurisprudence be treated in connection with the Covid-19 pandemic?

ENGLAND & OFFSHORE

TRUSTEE PROTECTIONS – DEED LIMITS LIABILITY

- Trust Deed Limits Liability: a clause limiting trustee liability "unless such loss or damage shall be caused by his own actual fraud" was upheld and the court indicated the trustee could not be liable otherwise "no matter how indolent, imprudent, lacking in diligence, negligent or willful he might have been." *Armitage v Nurse* [1998] Ch 241
- Offshore jurisdictions are not always so generous and some do not permit such a far reaching exclusion of liability
- Anti-Bartlett Clauses: however beware overly broad clauses in light of obligations in respect of bribery and anti-money laundering

THANK YOU

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