

CALIFORNIA DEPARTMENT OF JUSTICE

TITLE 11. LAW

DIVISION 1. ATTORNEY GENERAL

**CHAPTER 4. SUPERVISION OF TRUSTEES AND FUNDRAISERS FOR
CHARITABLE PURPOSES ACT**

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

Probate Code section 16106 and Corporations Code sections 5913 and 9633 require charitable corporations and trustees to give notice to the Attorney General before they sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of their assets. However, “substantially all” is not defined. The proposed regulation defines “substantially all” assets as an asset or assets equal to or exceeding 75 percent of the value of all assets held by the charitable corporation or trust at the time of the notice or at any time during the six-month period before submitting the notice.

Similarly, a corporation holding assets in charitable trust (i.e., a mutual benefit corporation) must give written notice to the Attorney General 20 days before it sells, leases, conveys, exchanges, transfers or otherwise disposes of *any or all* of the assets held in trust. (Corp. Code, § 7913.)

Corporations Code sections 5913, 7913, and 9633 allow for the Attorney General to waive the notice requirements. However, these statutes do not include a standard for evaluating waiver requests. The proposed regulation allows the Attorney General to waive notice for a particular transaction if the Attorney General determines that the transaction poses no risk to the public interest and the monetary cost to the charitable corporation, trust, or mutual benefit corporation of providing notice to the Attorney General outweighs the potential benefit to the public interest.

BENEFITS ANTICIPATED FROM REGULATORY ACTION

Existing law establishes two means of regulating charitable trusts. The Probate Code imposes fiduciary duties upon trustees to ensure that assets are properly managed. Additionally, the Attorney General is vested with significant oversight of charitable assets, including the authority to bring not only an action against a person who misuses charitable assets, but also an action seeking to stop the diversion of charitable assets. In tandem, these statutory schemes are intended to deter and remedy fraud, misuse and improper self-dealing. However, without forewarning of major liquidations of charitable assets, the Attorney General is limited to prosecuting malfeasance after it has occurred.

To enable the Attorney General to proactively carry out these responsibilities, AB 900 requires a trustee holding assets subject to a charitable trust to give written notice to the Attorney General 20 days before disposing of all or substantially all of the charitable assets. By requiring charitable trusts to make such a filing with the Attorney General, AB 900 imposes the same

requirements on charitable trusts that presently exist for charitable corporations. (Corp. Code, §§ 5913, 9633.)

The proposed rulemaking defines “substantially all” assets so that a charitable corporation or trustee has clear guidance on when the notice requirement is triggered. The information in the notice will enable proactive enforcement action, including legal action to halt misuse or diversion of charitable assets.

The proposed rulemaking also creates a standard for the Attorney General to evaluate requests to waive the notice requirements. The Attorney General may waive notice for a particular transaction if the Attorney General determines that the transaction poses no risk to the public interest and the financial cost to the charitable corporation, trust, or mutual benefit corporation of providing notice to the Attorney General outweighs the potential benefit to the public interest.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION

§ 328.1 Transactions Involving All or Substantially All Assets of Charitable Corporation or Trust, or Assets in Charitable Trust Held by a Mutual Benefit Corporation

For purposes of giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust, subdivision (a) defines “substantially all” of the charitable assets to mean an asset or assets equal to or exceeding 75 percent of the value of all assets held by the charitable corporation or trust at the time of the notice or at any time during the six-month period before submitting the notice. This is necessary to provide clear guidance to charitable corporations and trustees of when the threshold for providing notice is met. The Attorney General is responsible for overseeing and protecting charitable assets at all times. (Gov. Code, § 12598; Corp. Code, § 5250.) Transactions involving all or substantially all assets are unusual in the lifecycle of most charitable corporations and trusts and provide opportunities to divert or misuse charitable assets. The Attorney General selected 75 percent for four reasons: (1) it is large enough that it will not require corporations or trusts to report on routine transactions, (2) it is a reasonable definition of what is “substantially all” of the assets, (3) it is consistent with the Attorney General’s interpretation of “substantially all” in Corporations Code section 5913 for the last 40 years, and (4) no alternative definition was proposed in response to the Attorney General’s invitation for comments as part of its preliminary rulemaking activities. Determining the value of the assets at the time of the notice or during the six-month period before submitting the notice is necessary to prevent a corporation or trustee from manipulating the timing or terms of the transaction to improperly avoid the notice requirements, as more thoroughly addressed in subdivision (b).

Subdivision (b) provides that the duty to give notice may not be avoided by structuring a single transaction into multiple transactions to avoid triggering the 75 percent threshold. If a transaction is part of or related to a series of transactions, all of the related transactions shall be considered and analyzed as a single transaction for purpose of giving notice. This is necessary to ensure that the Attorney General has appropriate oversight over charitable corporations and trustees.

Subdivision (b) lists four non-exclusive factors for the Attorney General to consider when determining whether a series of transactions will be considered a single transaction for purposes of this section. Analyzing these factors will ensure that a charitable corporation or trustee is not able to manipulate its transactions to avoid triggering the 75 percent threshold.

Subdivision (c) permits a trustee or board of directors to request a waiver of the notice requirement. Corporations Code section 5913, 7913, and 9633 authorize charitable corporations and mutual benefit corporations to request a waiver of the notice requirements. However, these statutes do not include an express standard for evaluating waiver requests. Subdivision (c) allows the Attorney General to waive notice for a particular transaction if the Attorney General determines that the transaction poses no risk to the public interest and the financial cost to the charitable corporation, trust, or nonprofit mutual benefit corporation of providing notice to the Attorney General outweighs the potential benefit to the public interest. When requesting a waiver, the trustee or board of directors must provide the Attorney General with all material facts (as defined in section 999.1, subdivision (c)) to enable the Attorney General to make such a determination.

This is necessary to reduce the burden on trustees and boards of directors to give notice when the transaction poses no risk to the public interest. There are times when the nature of the transaction makes it such that the Attorney General does not need the detailed information otherwise required to evaluate whether to approve the transaction. For example, if a charity is donating real property to another charity fulfilling the same purpose, requiring the charity to conduct an expensive appraisal may be counterproductive.

Subdivision (d) specifies that this regulation does not apply to a nonprofit mutual benefit corporation, unless it holds its assets in charitable trust. The notice requirement in Corporations Code section 7913 only applies to a corporation holding assets in charitable trust. Including this information in the regulation clarifies the scope of this section.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department concludes:

(1) It is unlikely that the proposal would create or eliminate jobs within the state because the proposed regulation defines “substantially all” assets for purposes of giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust. The 75 percent rule provides clear guidance to charitable corporations and trustees on when the notice requirement is triggered.

(2) It is unlikely that the proposal would create new businesses or eliminate existing businesses within the state because the proposed regulation defines “substantially all” assets for purposes of giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust. The 75 percent rule provides clear guidance to charitable corporations and trustees on when the notice requirement is triggered.

(3) It is unlikely that the proposal would result in the expansion of businesses currently doing business within the state because the proposed regulation defines “substantially all” assets for purposes of giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust. The 75 percent rule provides clear guidance to charitable corporations and trustees on when the notice requirement is triggered.

The Department also concludes that:

(1) The proposal would benefit the health and welfare of California residents. By providing a definition of “substantially all” assets, charitable corporations and trustees have clear guidance on when the notice requirement is triggered. The 75 percent rule enhances Attorney General oversight of trusts and charitable corporations.

(2) The proposal would not benefit worker safety because it does not regulate worker safety standards.

(3) The proposal would not benefit the state’s environment because it does not change any applicable environmental standards.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR SIMILAR DOCUMENTS RELIED UPON

The Department did not rely on any technical, theoretical, or empirical studies, reports, or similar documents in proposing these regulations.

The Department did not receive any comments in response to its February 28, 2022, invitation for comments as part of its preliminary rulemaking activities.

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the proposed action would not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The proposed regulation defines “substantially all” assets for purposes of giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust. The 75 percent rule provides clear guidance to charitable corporations and trustees on when the notice requirement is triggered.

The proposed regulation also creates a standard for evaluating waiver requests. The proposed regulation allows the Attorney General to waive notice for a particular transaction if the Attorney General determines that the transaction poses no risk to the public interest and the monetary cost to the charitable corporation, trust, or nonprofit mutual benefit corporation of providing notice to the Attorney General outweighs the potential benefit to the public interest.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department determines that these proposed regulations do not affect small businesses. Charitable entities are exempt from the definition of “small business.” (Gov. Code, § 11342.610, subd. (b)(6).)

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY’S REASON FOR REJECTING THOSE ALTERNATIVES

The Department considered the alternative of not defining “substantially all.” The phrase “substantially all” is an undefined term of art used throughout the codes. Similar provisions using this phrase that apply to charitable corporations have been in place since the 1970s and do not appear to have caused substantial compliance problems. From an enforcement perspective, there is arguably virtue in some degree of imprecision. Using a generally understood, longstanding term of art gives the Attorney General’s Office flexibility to execute its duties in a range of situations.

The Department rejected this alternative, in part, because AB 900 provides that “On or after January 1, 2022, the Attorney General shall establish rules and regulations necessary to administer this section.” (Prob. Code, § 16106, subd. (b).) Probate Code section 16106 was enacted to create uniformity regarding the notice requirements for trustees holding charitable assets. The 75 percent rule provides clear guidance to charitable corporations and trustees on when the notice requirement is triggered. The proposed regulation further provides that the duty to give notice may not be avoided by structuring a single transaction into multiple transactions to avoid triggering the 75 percent threshold. If a transaction is part of or related to a series of transactions, all of the related transactions shall be considered and analyzed as a single transaction for purpose of giving notice. Finally, the cost of compliance is minimal: in borderline cases, a trustee can err on the side of caution by simply giving written notice.

Performance Standard as Alternative:

The proposed regulation does not mandate the use of specific technologies or equipment. For purposes of giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust, the proposed regulation defines “substantially all” of the charitable assets to mean an asset or assets equal to or exceeding 75 percent of the value of all assets held by the charitable corporation or trust at the time of the notice or at any time during the six-month period before submitting the notice. The 75 percent rule is necessary to provide clear guidance to charitable corporations and trustees on when the notice requirement is triggered.