

CALIFORNIA DEPARTMENT OF JUSTICE
TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL
CHAPTER 4. SUPERVISION OF TRUSTEES AND FUNDRAISERS FOR
CHARITABLE PURPOSES ACT

NOTICE OF PROPOSED RULEMAKING

Notice published October 21, 2022

The Department of Justice (Department) proposes to adopt section 328.1 of title 11, division 1, chapter 4 of the California Code of Regulations concerning giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust, or assets in charitable trust held by a mutual benefit corporation.

PUBLIC HEARING

The Department has not scheduled a public hearing on this proposed regulatory action. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person or their authorized representative may submit written comments relevant to the proposed regulatory action. The written comment period closes on December 6, 2022, at 5:00 p.m. Only written comments received by that time will be considered. Please submit written comments to:

Department of Justice
Office of the Attorney General
Charitable Trusts Section
Attn: Sandra Barrientos, Deputy Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6551
sandra.barrientos@doj.ca.gov

NOTE: Written and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.

AUTHORITY AND REFERENCE

Authority: Sections 5913, 7913 and 9633, Corporations Code; Section 16106, Probate Code.

Reference: Sections 5913, 7238, 7913 and 9633, Corporations Code; Section 16106, Probate Code, Sections 12586 and 12587, Government Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations:

The Supervision of Trustees and Fundraisers for Charitable Purposes Act (Act), Government Code section 12580 et seq., provides the Attorney General with enforcement and supervisory powers over all charitable corporations, unincorporated associations, trustees and other legal entities holding property for charitable purposes, commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial coventurers. The Act establishes the Registry of Charitable Trusts, which is administered by the Department of Justice. (Gov. Code, § 12587.1.) Organizations and persons subject to the Act are required to register and file periodic reports with the Attorney General, among other requirements. (Gov. Code, §§ 12585, subd. (a), 12586, 12599, 12599.1, 12599.2.) The Attorney General is authorized to make rules and regulations regarding the Act, including the time for filing reports, the content of such reports, and the manner of executing and filing them. (Gov. Code, §§ 12586, subd. (b), 12587.)

Existing law regulates trust administration and requires a trustee to administer the trust according to the trust instrument. (Prob. Code, § 16000.) Existing law defines a charitable trust and prescribes the duties of the trustee of a charitable trust. (*Id.*, § 16100 et seq.; Gov. Code, § 12580, et seq.) In recent years, there have been an increasing number of cases involving self-dealing by charitable trustees that are making their way through California courts. For example, the Attorney General: (1) brought an action to remove the trustees of the Jean Schroeder Education Trust and to recover real property that was improperly sold to the trustee (*People of the State of California v. Bishop* (Super. Ct. Napa. County, 2014) No. 26-65141); (2) negotiated a settlement requiring Lithuanian Assistance Foundation to pay \$7 million to resolve claims that charitable assets were improperly transferred to its officers, directors and related entities (<https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-7-million-settlement-against-lithuanian>); and (3) brought an action against a trustee for failure to transfer charitable assets to the Livewire Lindskog Foundation, breaches of fiduciary duty, and misuse of charitable assets, including improper loans of trust assets to the trustee's friends (*People ex rel. Becerra v. Shine* (2020) 46 Cal.App.5th 288, 292).

Given the increasing frequency of cases involving the misappropriation of trust assets, the Legislature revised the law to provide greater oversight of trustees who seek to dispose of such assets. Effective July 1, 2022, a trustee holding assets subject to a charitable trust is required to give written notice to the Attorney General at least 20 days before the trustee sells, leases, conveys, exchanges, transfers, or otherwise disposes of all or substantially all of the charitable assets. (Prob. Code, § 16106, subd. (a).) The Attorney General is required to establish rules and regulations to administer these provisions. (*Id.*, subd. (b).)

By requiring charitable trusts to make such a filing with the Attorney General, Assembly Bill No. 900 imposes the same requirements on charitable trusts that presently exist for charitable

corporations. (Corp. Code, §§ 5913, 9633.) Charitable corporations may request a waiver of the notice requirements. (*Ibid.*)

Similarly, a mutual benefit corporation holding assets in charitable trust 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 unless the Attorney General has given the corporation a written waiver of this section as to the proposed transaction. (Corp. Code, § 7913.)

Effect of the Proposed Rulemaking:

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 rulemaking defines “substantially all” assets to mean an asset or assets equal to or exceeding 75 percent of the value of all assets held at the time of the notice or at any time during the six-month period before submitting the notice.

The proposed rulemaking also sets a standard for the Attorney General’s review of requests for waiver of 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.

Anticipated Benefits of the Proposed Regulations:

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 provide 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 provided in the notice enables 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.

Comparable Federal Regulations:

There are no existing federal regulations or statutes comparable to these proposed regulations.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Department has determined that these proposed regulations are not inconsistent or incompatible with existing State regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that this regulation will complement the existing regulations regarding notice to the Attorney General in Sections 999.1 through 999.4 of Title 11 and these are the only regulations that concern giving notice to the Attorney General of certain transactions involving all or substantially all of the assets of a charitable corporation or trust, or assets in charitable trust held by a mutual benefit corporation.

Forms Incorporated by Reference:

None.

Other Statutory Requirements:

None. On February 28, 2022, the Department issued an invitation for comments as part of its preliminary rulemaking activities under Government Code section 11346, subdivision (b).

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department's Initial Determinations:

Mandate on local agencies or school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other non-discretionary costs or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Cost impacts on representative person or business: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The obligation to give notice is a result of the statutes. The proposed action defines “substantially all” assets so that a charitable corporation or trustee knows when the statutory notice requirement is triggered.

Significant effect on housing costs: None.

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

Results of the Economic Impact Assessment (EIA):

The Department concludes that it is (1) unlikely that the proposal will create or eliminate jobs within the state, (2) unlikely that the proposal will create new businesses or eliminate existing businesses within the state, (3) unlikely that the proposal will result in the expansion of businesses currently doing business within the state.

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.

Business report requirement: Probate Code section 16106 and Corporations Code sections 5913 and 9633 require trustees and charitable corporations 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. The proposed regulatory action defines “substantially all” assets so that trustees and charitable corporations understand when the notice requirement is triggered.

The Department finds it is necessary for the health, safety or welfare of the people of this state that proposed section 328.1, which requires a report, applies to businesses.

Small business determination: The Department has determined that this proposed action does not affect small businesses because charitable entities are exempt from the definition of “small business.” (Gov. Code, § 11342.610, subd. (b)(6).)

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Department has determined that the proposed regulations are the most effective way to define “substantially all” assets. The 75 percent rule provides clear guidance on when the notice requirement is triggered and ensures that the Attorney General has appropriate oversight of charitable corporations and trusts. The cost of compliance is minimal: in borderline cases, a trustee can err on the side of caution by simply providing written notice.

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.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Department of Justice
Office of the Attorney General
Charitable Trusts Section
Attn: Sandra Barrientos, Deputy Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6551
sandra.barrientos@doj.ca.gov

Questions regarding procedure, comments, or the substance of the proposed action should be addressed to the above contact person. In the event the contact person is unavailable, inquiries regarding the proposed action may be directed to the following backup contact person:

Marlon Martinez
Department of Justice
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6437
regulations@doj.ca.gov

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process upon request to the contact person above. As of the date this Notice of Proposed Rulemaking (Notice) is published in the Notice Register, the rulemaking file consists of this Notice, the Text of Proposed Regulations (the “express terms” of the regulations), the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based. The text of this Notice, the express terms, the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based are available on the Department’s website at <https://oag.ca.gov/charities/law>. Please refer to the contact information listed above to obtain copies of these documents.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the Department analyzes all timely and relevant comments received during the 45-day public comment period, the Department will either adopt these regulations substantially as described in this notice or make modifications based on the comments. If the Department makes modifications which are sufficiently related to the originally-proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the name and address indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, a copy of the Final Statement of Reasons will be available on the Department’s website at <https://oag.ca.gov/charities/law>. Please refer to the contact information included above to obtain a written copy of the Final Statement of Reasons.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Rulemaking, the express terms, the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based are available on the Department’s website at <https://oag.ca.gov/charities/law>.