

CALIFORNIA DEPARTMENT OF JUSTICE

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

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

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

In subdivision (a), the reference to “certain” transactions in the first clause was amended to reference specific statutes—Probate Code section 16106 and Corporations Code sections 5913 and 9633. This is necessary to avoid ambiguity and clarify which statutes require notice to the Attorney General when all or substantially all assets will be disposed.

Subdivision (a) was further amended to require notice to be provided if the transaction involves “substantially all” assets under either book value or fair market value. This is necessary because a trustee or board of directors should not be able to avoid the notice requirement by choosing an alternate form of valuation.

Changes without regulatory effect. Title was amended. Authority and reference citations were amended.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES

Written comments received during the 45-day comment period are included in the rulemaking file under Exhibit 6.

Members of the public submitting written comments during the 45-day comment period, October 21, 2022 – December 6, 2022, identified in numbered order of receipt by the Department:

Written Commenter #	Name of Commenter	Affiliation
1	Arthur Rieman	The Law Firm for Non-Profits
2	Cassie Mancini	California School Employees Association (CSEA), AFL-CIO
3	Reynolds T. Cafferata	Rodriguez, Horii, Choi & Cafferata, LLP
4	Kevin Gould	California Bankers Association (CBA)

Summaries of public comments and corresponding responses are organized by topic. The specific comments that are represented in the comment summary statement are listed after each comment summary by the commenter number as identified above followed by a dash and numbered comment when a commenter submitted more than one comment.

Definition of “Substantially All”

Summary: Agrees with the 75% threshold of “substantially all” – anything less would not be acceptable. (1-1; 4-1.)

Response: The Department appreciates this comment of support. No change has been made in response to this comment.

Summary: A set percentage of substantially all should be retained in the final regulation. (3-1.)

Response: The Department appreciates this comment of support. No change has been made in response to this comment.

Valuation

Summary: Regulation should clarify how assets should be valued, e.g. book value or fair market value. (1-2; 3-2.)

Response: Accept. Amended § 328.1 requires notice if the transaction involves “substantially all” assets under either book value or fair market value.

Summary: Regulation should clarify that gross value is used to determine value. (3-3.)

Response: No change has been made in response to this comment. The regulation is reasonably clear. Amended § 328.1 requires notice if the transaction involves “substantially all” assets under either book value or fair market value. Neither the statutes nor the regulation allow a trustee to limit the disclosure obligation to the net value of the assets.

Waivers

Summary: Within 30 days of granting a waiver, the Department should publish a list of all organizations that received a waiver and the reason the Attorney General decided to issue a waiver. (2-1.) Waivers should be noted in the organization’s profile on the Department’s online Registry Verification Search/Registry of Charitable Trusts. (2-2.)

Response: No change has been made in response to this comment. Corporations Code sections 5913, 7913, and 9633 allow a trustee or board of directors to request a waiver of the notice requirements. To the extent the Attorney General issues a written response, such responses will typically be available pursuant to the Public Records Act. (Gov. Code, § 7920.000 et seq.) To the extent that the waiver request is made by a trustee that is registered with the Attorney General’s Registry of Charitable Trusts, a written response from the Attorney General will typically be posted to the registrant’s file which is publically available at: <https://rct.doj.ca.gov/>.

Safe Harbors

Summary: A safe harbor should be created to allow distributions to be aggregated over three years to meet the percentage threshold. Three years would provide the Attorney General with three RRF-1 filings to monitor the activities of the organization. (3-4.1.)

Response: No change has been made in response to this comment. A trustee should not be able to structure a transaction to avoid providing notice regardless of the period of time involved.

Further, the proposal that the Attorney General monitor RRF-1 filings, which will likely be filed more than a year after the transaction, is inconsistent with the statutory requirement that notice must be provided 20 days' prior to the transaction. (Prob. Code, § 16106; Corp. Code, §§ 5913, 7913, 9633.)

Summary: A safe harbor should be created to allow charities to distribute 50 percent of their assets to one organization, or a group of commonly controlled organizations, before the notice requirement is triggered. Under this safe harbor, the notice requirement could be applied only if the charity distributed more than 50 percent of its assets to a single organization or commonly controlled group of organizations. (3-4.2.)

Response: No change has been made in response to this comment. There should not be different percentage thresholds for different transactions. The proposed amendment would undermine the benefit of setting a clear definition for “substantially all.”

Regular Course of Business

Summary: The regulation should clarify the meaning of the phrase “usual and regular course of its activities” found in Corporations Code section 5913. (3-5.)

Response: No change has been made in response to this comment. This comment is outside the scope of the rulemaking as described in the Notice of Proposed Rulemaking published on October 21, 2022.

Statute Should Be Amended

Summary: The notice requirement in Probate Code section 16106 applies only to trusts that have no non-charitable interests that have not applied for tax exempt status. Assuming the Attorney General wants the notice requirement to apply to trusts that have obtained tax exempt status, the statute will need to be amended. (3-6.)

Response: No change has been made in response to this comment. The comment relates to the statute, not the proposed regulation. The Department cannot implement regulations that alter or amend a statute or enlarge or impair its scope.

Corporate Trustees

Summary: The regulation should clarify if the notice requirement applies to corporate trustees. (3-7.)

Response: No change has been made in response to this comment. The law does not exempt corporate trustees, nor are corporate trustees exempt from the registration requirements of the Supervision of Trustees and Fundraisers for Charitable Purposes Act. (See, e.g., Gov. Code, §§ 12581 and 12582.)

Limit Application

Summary: The regulation should exempt certain categories of assets, such as marketable securities. (4-2.)

Response: No change has been made in response to this comment. The Department cannot implement regulations that alter or amend a statute or enlarge or impair its scope. The proposed amendment is inconsistent with the language, structure, and intent of the law. Notice is required for transactions involving “all or substantially all” assets, regardless of the nature of the asset. (Prob. Code, § 16106; Corp. Code, §§ 5913, 9633.)

Written comments received during the 15-day comment period are included in the rulemaking file under Exhibit 10.

Members of the public submitting written comments during the 15-day comment period, April 3, 2023 – April 19, 2023, identified in numbered order of receipt by the Department:

Written Commenter #	Name of Commenter	Affiliation
5	Arthur Rieman	The Law Firm for Non-Profits

Valuation

Summary: Appreciates that regulation now clarifies how asset value is to be determined. (5-1.)

Response: The Department appreciates this comment of support. No change has been made in response to this comment.

LOCAL MANDATE DETERMINATION

The proposed regulation does not impose any mandate on local agencies or school districts.

ALTERNATIVES DETERMINATIONS

In accordance with Government Code section 11346.9, subdivision (a)(4), the Department has determined that no alternative it considered, or that it otherwise identified, or was brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, 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 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 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.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

The Department determines 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).)

DOCUMENTS INCORPORATED BY REFERENCE

None.

NON-DUPLICATION

Some of the regulations may repeat or rephrase in whole or in part a state or federal statute or regulation. This was necessary to satisfy the clarity standard set forth in Government Code section 11349.1, subdivision (a)(3).