



April 20, 2017

Submitted via email: usoge@oge.gov

The Honorable Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005-3917

Attention: “Request for Input on Discretionary Trusts”

Dear Director Shaub,

The Office of Government Ethics’ (OGE’s) “Request for Input on Discretionary Trusts” notice was published in the Federal Register on January 3, 2017.¹ In response, the Project On Government Oversight (POGO) submits the following public comment on possible misuses of discretionary trusts that may easily open the door to distribution of trust funds in ways that are not in the public interest. As an independent nonprofit organization committed to achieving a more accountable and transparent federal government, POGO has a longstanding interest in federal ethics issues. This comment is coauthored by POGO’s Board Member Dan Olincy who is a California State Bar certified specialist in probate, estate planning, and trust laws at Olincy & Karpel Attorneys at Law.²

In short, a discretionary trust is an arrangement whereby property is set aside with directions that it be used for the benefit of another, the beneficiary. Generally, the trust provides that the trustee (one appointed or required by law to administer the property) has the right to accumulate, rather than pay out to the beneficiary, the annual income generated by the property or a portion of the property itself. Such an arrangement provides the trustee with the latitude or discretion to give or deny the beneficiary some benefits under the trust.

However, a discretionary trust permits a trust donor to allow the trust beneficiaries to demand funds from the independent trustee, and to use those funds in a way that the donor himself or herself could not do. Thus, although OGE states that “an eligible income beneficiary of a discretionary trust does not have a financial interest in the holdings of the trust for purposes of 18 U.S.C. § 208”, in fact the beneficiary could use his or her discretionary power, demand from the trustee a distribution, and distribute the funds in a way that would be improper if done directly by

¹ 82 Federal Register 122, January 3, 2017; Submission deadline extended to April 20, 2017 by 82 Federal Register 14366, March 20, 2017.

² For more information on Mr. Olincy, please visit <http://www.olincykarpel.com/Attorneys/J-Dan-Olincy.aspx>.

the trustor. And if the trustor's children were the beneficiaries, the children might find it difficult—nay impossible—to reject their parent's wish. This is contradictory to OGE's April 2013 guidance.³

Additionally, while in these types of trusts the beneficiary may have no property interest that can be transferred or reached by creditors unless the trustee decides to pay or apply some of the trust property for the benefit of the beneficiary, this does not mean that beneficiaries have no property interest in general.

Based on the 7th Circuit's Scanlan v. Eisenberg and Barnhart v. Barnhart and the Third Restatement of Trust Law, it seems probable and in the vein of modern trust law's intentions that discretionary trust beneficiaries have a property interest in the trust (even if not well defined).⁴ This property interest gives them standing to bring suit and can compel trustees to disburse assets. This property interest has been found in some jurisdictions to be distinct from a beneficiary's lack of property interest or right to such interest in cases involving creditors.⁵ Given this and the amorphous and fluid structure of trusts, it does not seem farfetched for one to imagine a discretionary trust (and trustee combination) under which a beneficiary would have de facto unlimited ability to compel disbursements of the trust's assets.

Based on the fact that there are circumstances under which an eligible income beneficiary of a discretionary trust might be able to compel the trustee to make a distribution or payment, we think that OGE should reconsider its previous guidance which states that reporting pursuant to 18 U.S.C. § 208 should only occur when the beneficiary receives income during the reporting period. Reporting should be required for any discretionary trust that does not expressly disallow the beneficiary from compelling a distribution in order to fully protect and prioritize the interests of the taxpayers over potential conflicts of interest of elected and appointed officials.

Additionally, if the discretion lay with OGE, it seems fitting to question why § 208 and 5 CFR § 2634.310 reporting should not be mandatory for all discretionary trusts. It seems as though if OGE were to come down and reaffirm its April 2013 findings, discretionary trusts could be setup in ways to undermine and get around the purposes of financial disclosure reporting. Thus, if OGE determines it is bound or compelled to uphold its previous findings, we would request it urge Congress and the executive branch to make the necessary changes required to prevent the above abuses of ethical disclosure requirements.

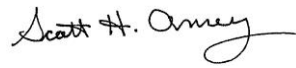
³ Director Walter Shaub, Jr., OGE Legal Advisory, *Reporting Requirements for Discretionary Trusts* (LA-13-14), April 9, 2013. [https://www.oge.gov/Web/OGEnsf/0/84366EACA265457E85257E96005FBEFC/\\$FILE/LA-13-04.pdf](https://www.oge.gov/Web/OGEnsf/0/84366EACA265457E85257E96005FBEFC/$FILE/LA-13-04.pdf); Director Robert I. Cusick, OGE Memorandum, *Discretionary Trusts* (DO-08-024), August 6, 2008. [https://www.oge.gov/Web/OGEnsf/All+Advisories/94CDD37DC8B2FF5F85257E96005FBE9C/\\$FILE/DO-08-024.pdf?open](https://www.oge.gov/Web/OGEnsf/All+Advisories/94CDD37DC8B2FF5F85257E96005FBE9C/$FILE/DO-08-024.pdf?open)

⁴ Scanlan v. Eisenberg, 699 F. 3d 838, 844-846 (7th Cir. Ill. 2012); Barnhart v. Barnhart, 114 N.E.2d 378, 388 (1953); Restatement (Third) of Trusts § 60 (It is rare for beneficiaries to be unable to compel discretionary distributions).

⁵ Estate of Gilbert, 156 Misc. 2d 379, 383 (N.Y. Sur. Ct. 1992); Matter of Duncan, 80 Misc. 2d 32 (N.Y. Sur. Ct. 1974).

If you have any questions, I can be reached at scott@pogo.org or (202) 347-1122.

Sincerely,



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