



THE TRUST PROTECTOR

Many settlors are uncomfortable with placing their wealth in the hands of unknown professionals in a distant and unfamiliar land. They want their own handpicked, personal emissary to oversee procedures and assure that their wishes are being respected and their best interests looked after. To resolve this issue, the use of Trust Protectors in trust structures is becoming increasingly popular in estate planning. Nevertheless, before adding a Protector to a Trust, the Settlor should carefully weigh the advantages and disadvantages inherent in the role of Trust Protector to define guidelines that will be direct and clear.

What is a Trust Protector?

The *Trust Protector* holds the power of oversight to direct the Trustees in matters relating to the Trust but, simultaneously, should not hinder the everyday running of the Trust. A Trust Protector should add flexibility to the Trust and allow the Settlor to delegate someone to deal with almost any conceivable future circumstance. This is very attractive in today's changing estate planning environment where legislation is in constant flux. The use of a Trust Protector can allow amendment of the Trust Deed to achieve positive results and allow administration consistent with the Settlor's intentions when circumstances change.

However, a disadvantage to the use of the Trust Protector is that the Settlor is vesting significant power in one person. In addition, because the Trust Protector will have the power to amend the Trust to adjust to changes in legal requirements, beneficial interests may be altered. Finally, another level of administration and expense is added to the overall running of the Trust.



Who Should Serve as a Trust Protector?

The trust protector is typically a person named outside the family who is independent of both the trustees and the beneficiaries. Lawyers, accountants, advisors or unrelated business-minded friends of the Settlor are often a good choice. Corporate fiduciaries are not necessarily the best selection due to their normally conservative, impersonal view which may make it difficult for them to exercise the confided authority.

What Powers should the Trust Protector have?

After determining who should act as the Trust Protector, the most important decision is to decide what powers the Trust Protector should be able to exercise. This, of course, will vary depending on individual circumstances. However, in all cases, the Settlor should be very careful in granting powers to the Protector and should always have a complete understanding of the potential consequences of each power given to the Trust Protector. It is rarely a good idea to give the Trust Protector sweeping powers to deal with every possible change in circumstances that may occur in the future. Instead, the Settlor should anticipate the mandates that will most likely assist in carrying out the purposes of the Trust which would be better in the hands of someone other than the Trustees.

There are some powers that may be helpful in most situations that the Settlor should consider. For example, the Trust Protector could be given the power to amend the Trust to comply with new legislation, to address any changes in the law that might significantly change the tax treatment of the Trust. In addition, the Trust Protector could be given the power to terminate the Trust or to remove, add or replace a Trustee. Other powers could include the ability to change the governing statutes or to expand or limit the powers of the Trustees. Some powers, however, such as disposition of income or the power to change beneficiaries should be looked at more closely because the nature of beneficial interests could be substantially altered.



Care should be taken to clearly define the purposes of the Trust and to give the Trust Protector ample guidance as to what is expected and what is not. Specific powers given to a Protector might include:

- monitoring and agreeing on the Trustee's fees;
- carrying out periodic reviews of the administration of the Trust;
- requiring an accounting or audit, with the power to nominate the auditors;
- being consulted or having veto powers before the Trustee makes any discretionary payments to beneficiaries;
- being consulted or having veto powers over sales of particular shareholdings or other Trust property;
- directing generally or in specific areas the exercise of Trustee investments or other managerial discretions;
- withholding consent where required before a beneficiary can institute legal proceedings against a Trustee;
- withholding consent to the Trustee's proposed exercise of a power to amend the administrative or managerial powers of the Trust; and
- removing and appointing Trustees:
 - appoint a new or additional Trustee;
 - remove a Trustee; and
 - require a Trustee to obtain its discretion.

Trust Protector as Fiduciary

It is almost always a good idea to state in the Trust Deed that the Trust Protector should serve the role in a *fiduciary* capacity. By specifying that this power must be so exercised, the Settlor is imposing a duty of loyalty and impartiality on the Trust Protector and ensuring that any actions the Trust Protector takes are for the good of the Trust and its beneficiaries, rather than for his or her personal gain.



Limitations on the Trust Protector

If the Settlor decides to name a Trust Protector, careful attention should be paid to make the document as clear as possible so the involvement of the Trust Protector does not unnecessarily complicate the Trust administration or cause unwanted tax consequences. The Trust Protector should not be able to confer any beneficial interest in himself or his family members. Similarly, the Trust Protector should be prohibited from doing anything that might cause the Trust to fail.

Conclusion

The use of a Trust Protector can be invaluable in giving the Settlor the peace of mind that his intentions will be carried out even if the laws or circumstances of named beneficiaries change. On the other hand, granting broad powers to a Trust Protector can cause unintended results and change beneficial interests that the Settlor never intended. If the Settlor does decide to add a Trust Protector, the Deed of Trust should carefully define and specify the powers of the Trust Protector, the limitations in place and the intent of the Settlor in making the nomination.

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euroFINESCOs.a.

HEADQUARTERS

Rua do Sol, 4
8200-448 GUIA (Algarve)
tel: +351 289 561 333
fax: +351 289 562 061

Madeira Branch

Rua do Aljube, 61, 2º Dtº
9000-067 FUNCHAL (Sé)
tel: +351 291 221095
fax: +351 291 221103

Lisbon Branch

Rua A.M. Cardoso, 15, 4ºD
1200-273 LISBOA (Chiado)
tel: +351 21 342 4210
fax: +351 21 342 4212

Internet

e-mail: info@eurofinesco.com
www.eurofinesco.com
PORTUGAL
mobile: +351 96 910 2813