Report on the [      ] Trust 2016 (the “Trust”)

Introduction and Overview

The Trust being set up is a discretionary trust. This is a trust where there are a number of people who can benefit (the “Beneficiaries”) and no single person has an entitlement to anything.

It is totally up to the trustees to decide which of the Beneficiaries can benefit. All the Beneficiaries have is a “hope” of benefitting.

Setting up a discretionary trust is flexible way of looking to provide for others but in a way that allows the trustees to react to the Beneficiaries requirements as and when they need to.

The person setting up the Trust is known as the ‘Settlor’ and this word is used throughout the Trust and this report.

Assets held in the Trust will be under the control of the trustees so that they are responsible for investment decisions (ultimately) and for any decisions to allow capital and/or income to be spent on any of the named beneficiaries.

The Settlor, through a document known as a ‘Letter of Wishes’ addressed to the trustees, can set out who they wish the trustees to consider as being principal beneficiaries under the Trust. The letter can be amended as time goes on during the Settlor’s lifetime. This letter is basically guidance for the trustees, allowing the Settlor to give the trustees a steer as to how to do things considering the reasons why the Trust was set up.

The Trust itself

The Trust Deed (“Deed” is the legal expression for the Trust document itself and is used throughout the actual Trust) is enclosed together with this Report.

The Trust deed can be divided into five main parts for the purposes of this explanation:

- Section 1 – Date and parties (people involved)
- Section 2 – Background (an explanation of why the Trust is being created)
- Section 3 – Main provisions (clauses 1 to 9)
- Section 4 – Administrative powers (clause 10 onwards)
- Section 5 – Schedule, confirming the initial Trust Fund

SECTION 1 - Parties

The first section in the Trust confirms who is creating the Trust, [      ]. [      ] is the Settlor.

This section also confirms who the initial trustees are, namely [      ].

The trustees will have little to do until such time that assets are transferred from the Settlor into the Trust. At that point, the trustees will need to make certain decisions such as where the funds are to be invested, which beneficiary is to benefit, and how, and who is to be responsible for the Trust’s administration.

The trustees are the legal owners of the Trust Fund, although they are not entitled in their capacity as trustees to benefit from any of the Trust assets, unless also named as beneficiaries, [which will not be the case here].
The trustees' job is to ensure that they exercise their discretion in respect of appointing any capital and/or income to any of the discretionary beneficiaries in whatever proportion they see fit.

The word “appointed” in the context of the Trust means “giving” any beneficiary some or an interest in the Trust Fund.

The trustees are also responsible for dealing with the annual tax returns and ensuring that all tax is paid in connection with the Trust (tax is paid from the Trust Fund).

It is important to note that any decisions made by the trustees (including decisions as to who is to benefit) must be unanimous unless specific provision is made in the Trust Deed to the allow them to act by majority. In the event that a unanimous decision cannot be reached and the effective operation of a trust is prejudiced, then an application to the court will be required. However, this is very rare and should always be seen as the last resort.

[Further to the Settlor's instructions the trustees must act unanimously.]

[Further to the Settlor's instructions, the trustees have the power to act by majority.]

In summary

- The Trust assets are held by the trustees for the benefit of the beneficiaries and
- The trustees, have complete discretion as to which of the beneficiaries can benefit from either of the income or capital of the Trust Fund, with
- The trustees given guidance as to how they should exercise their discretion from a Letter of Wishes prepared by the Settlor.

SECTION 2 - Background

The 'Background' confirms that the Settlor wishes to set up the Trust and will be transferring the initial funds over to the trustees to be dealt with in accordance with the terms of the Trust.

Once this handover is complete, the Trustees are then responsible for the trust’s assets.

It also confirms that the Trust is irrevocable, which means that the Settlor cannot change their mind once the Trust is in place and ask that the funds be returned.

[The Trust Fund will initially consist of [£50] to set up the Trust and in due course other assets will be transferred into the names of the trustees to be held on the terms of the Trust.]

SECTION 3 - The main provisions

Clauses 1 to 9 contain the main terms of the Trust.

Clause 1 contains a number of definitions and phrases used throughout the Trust. The word “deed” is used throughout the Trust and is used to describe both the Trust and other legal documents.

The Trust Fund (clause 1.1.1) means the money paid over to the trustees initially and anything added later on. All assets held by the trustees make up the Trust Fund.

The Trust Period (clause 1.1.2) is the maximum time for which the Trust can operate. This is defined as a maximum period permitted in law, namely 125 years, although it is in fact unlikely that the Trust will operate for that length of time.
The trustees have the power to shorten the Trust Period in any event (clause 9).

The Discretionary Beneficiaries are also defined (clause 1.1.3). They are

- [the Settlor’s children and “remoter issue” (bloodline descendants), which includes grandchildren, great-grandchildren etc.]
- [the [spouses][widows and widowers][civil partners][of the Settlor’s children and remoter issue]
- [charities][and]
- anybody else added at a later date using the provisions in clause 3.

[In this Trust Deed the definition of children and remoter issue includes legitimated, [illegitimate] and adopted children and bloodline descendants (clause 1.1.8). Simply being within the defined type of beneficiary does not mean that they will benefit however; it is still always down to the trustees to decide which of the beneficiaries can benefit.]

[If the Settlor wants to exclude illegitimate children / bloodline descendants, then there must be a specific exclusion spelt out in the Trust. The Settlor has chosen to have them included.]

Clause 2 confirms that if the Settlor wishes to make any addition to the Trust Fund, the trustees can receive it and it will be governed by the terms of the Trust.

Clause 3 gives the Settlor, the power to add, during their lifetime, additional beneficiaries to the Trust. Having this clause adds flexibility in case there turns out to be somebody that the Settlor would like to make provision for who does not fall within the group of people originally described. The Settlor would only want the power to add beneficiaries if they wanted to widen the class of beneficiaries.

Please also note that as the Settlor has the power to add beneficiaries, clause 13 must be included to ensure that the [Settlor / the Settlor’s spouse / the Settlor’s children under the age of 18] cannot be added and benefit from the trust assets.

[During their lifetime, the Settlor has the power to nominate someone else to have the power to add to the list of beneficiaries and if they do so, they must make that nomination in writing and notify the trustees. This person can add to the beneficiaries both during the Settlor’s lifetime and after they have died. This is a powerful provision and can add flexibility].

Clauses 4, 5 and 6 are the heart of the document and clause 4 sets out the trusts upon which the trustees hold the Trust Fund for the benefit of the beneficiaries. The trustees have complete power to benefit any one or more of the beneficiaries at such time and in such fashion as they wish.

The power to advance capital to or for the benefit of a beneficiary is to be exercised by deed. What this means is that a formal document will need to be produced recording the fact that money has been appointed out of the Trust Fund, the trustees exercising their discretion in favour of a named beneficiary. It is important that such records are kept.

Whilst the requirement for the execution of a deed is spelt out, it is common for trustees to record certain decisions they make in respect of benefitting a beneficiary, by way of a document called a “trustees resolution”. A resolution is often used when the amount being given to a beneficiary isn’t that great.

[The Settlor’s consent must be obtained before any capital can be given to a beneficiary.][If the Settlor is also a trustee, then the signing of the deed or trustees resolution by the Settlor in their capacity as trustee will be sufficient proof of consent having been obtained.]
Clause 5 deals with the income of the Trust and until such time, if any, the trustees exercise their powers under clause 4, the trustees are able to pay the income out to any of the beneficiaries as they wish, or to accumulate it. This power to accumulate exists throughout the Trust Period.

Clause 6 confirms that until the trustees exercise their power under clause 4, they can still apply capital from the Trust Fund at their discretion, to or for the benefit of any of the beneficiaries.

Clause 7 sets out what happens should the trustees not exercise their powers to appoint out all of the Trust Fund by the end of the Trust Period (125 years). This is a most unlikely scenario but should be dealt with.

Under such circumstances, the direct descendants of the Settlor will benefit.

You will see the expression 'per stirpes' at clause 7. This literally means 'by the roots'. What this means in practical terms is that beneficiaries a generation removed from the primary class of beneficiaries receive, between them, the share that would have been given to their ancestor. For example, assuming the Settlor has one child, if at the end of the Trust Period (125 years) the child has died (which he would likely have done), leaving children, then his children would take, if more than one, equally, what the child would have taken had he still been living. This provision cascades to the next generation as well.

It is of course extremely unlikely for there to be any assets still in the Trust 125 years after it was set up.

Clause 8 deals with the ultimate default trusts or the 'long stop provision', where no direct descendants survive.

[Under clause 8 [ ] will benefit.

Naming [ ] as the ultimate default beneficiary ensures that there is at least someone who will benefit at the end of the Trust period and ensure that the Trust Fund finds a home.]

Clause 9 allows the trustees to shorten the Trust Period should they decide to.

An example of where they might shorten the Trust Period would be after the appointing out of the last of the Trust Fund. Even though the Trust no longer has anything in it, it is still "alive". In order to tidy things up, the trustees could execute a deed stating the Trust Period expires the day after the deed is signed. That will be proof confirming the Trust has been brought to an end.

SECTION 4

Administrative powers

The administrative powers and provisions detailed in clauses 10 to 58 are to ensure that, in looking after the Trust Fund, the trustees have the ability to do the same things that the Settlor could have done had they been retaining the money under their own control.

Please note that the Trust includes a full range of powers, although some may not be relevant (or seem to be relevant) to the current or anticipated future requirements of the Trust. The expression relevant here is “better in than out” as who knows what the future could bring.

Clause 10 brings in to effect the trustees' administrative provisions as set out in the Trust.
Clause 11 covers the appointment [and removal] of trustees. During the Settlors’ lifetime, the Settlor has the power to decide who will be a new trustee [and to remove a trustee].

After the death of the Settlor, the trustees have the power to appoint new trustees.

Clause 12 confirms that the law applicable to the Trust is that of England and Wales. It does, however, give the trustees power to transfer jurisdictions, should they feel it prudent to do so, for example if it were more tax-efficient.

Clause 13 confirms that the Settlor / the Settlor’s spouse / the Settlor’s minor children can ever be a beneficiary of the Trust. This avoids any problems with the tax disadvantages that apply to ‘settlor-interested’ settlements in respect of Inheritance Tax.

Clause 14 removes the statutory (“statutory” means the laws given in acts of parliament) requirement to consult with beneficiaries in relation to the Trust’s assets. This gives the trustees that much more flexibility and free reign over the Trust Fund.

Clause 15 reiterates that the Trustees have all of the powers of an absolute beneficial owner with a non-exhaustive list of such powers set out within the clause.

Clauses 16 and 17 set out wide powers of investment and exclude a certain statutory provision that would only be relevant if the Trust owned a property (bricks and mortar). The trustees are given specific authority to purchase property for use by a beneficiary even where this would not strictly be justified on investment grounds i.e. to invest the Trust Fund in a single asset or type of asset and to even invest in non-income producing assets.

Clause 18 provides the Trustees with flexibility and protection in connection with the power to invest in non-income producing investments.

Clause 19 enables the trustees to lend to beneficiaries on non-commercial terms. This is a sensible provision to be included as it adds flexibility and gives the trustees additional protection in respect of the trust assets if they have concerns as to any absolute appointment to a beneficiary (i.e. lending some of the Trust Fund to a beneficiary may be better than giving him anything outright).

Clause 20 confirms the trustees’ power to borrow (were it ever likely to be required).

Clause 21 enables the trustees to guarantee borrowings by beneficiaries and companies in which the Trust Fund is invested and to use the Trust property to support such guarantees.

Clause 22 gives the trustees full powers of management in relation to any land included in the Trust Fund.

Clause 23 gives the trustees power to use any chattels , i.e. furniture, jewellery and the like comprised in the Trust Fund in whatever way they wish.

Clause 24 enables the trustees to allow beneficiaries to occupy or use Trust property on whatever terms the trustees think appropriate.

Clause 25 extends the limited statutory power to insure property (which would be required if either trust held property).

Clause 26 provides the trustees wide powers in relation to digital assets.

Clause 27 gives the trustees wide powers to take out and pay the premiums in respect of life insurance policies.

Clause 28 gives the trustees power to trade (run a business).
Clause 29 to 32 gives the trustees the power to establish legal entities (companies for example) if required and to deal with any entity during their period of trusteeship, including powers in relation to winding up.

Clause 33 negates some very complicated rules which require income to be apportioned between beneficiaries who may become successively entitled. These rules can trigger disproportionate administrative expenses and complications. This clause allows the trustees to ignore the rules.

Clause 34 allows the trustees to satisfy the interest of any beneficiary by allocating specific assets. It allows the trustees to swap assets between separate sub-funds with the Trust (were these ever to be created).

Clause 35 gives the trustees power to pay Trust expenses out of capital or income as they see fit.

Clauses 36 and 37 give the trustees power to release (give) Trust property to the treasurer or other proper officer of a charity or to the parent or guardian of any minor beneficiary and sub-clause 36.2 confers a range of administrative powers on any parent or guardian to whom such a release is made.

Clauses 38 to 40 extend the statutory powers to appoint agents and proxies and delegate and enable the trustees to hold investments through a nominee, such as a nominee company associated with any investment adviser who the trustees delegate investment management to. These clauses also ensure that the trustees are able to deposit share certificates and other title documents with an appropriate person.

Clause 41 states that the trustees may keep deeds and other Trust documents in any part of the world as they think fit.

Clauses 42 to 44 give the trustees power to delegate the management of investments, operation of bank accounts and other delegation generally. This is particularly useful as it enables them to employ an investment adviser in the way which is simplest and most cost-effective. The trustees still retain overall responsibility for the investment policy.

Clause 45 enables the trustees to give indemnities either secured against the Trust Fund or not. It also enables them to give warranties and similar undertakings which may be required in connection with the transfer of a business or a sale of shares in a company.

Clause 46 authorises the trustees to pay taxes even if these are not strictly enforceable against them or against a beneficiary personally.

Clause 47 empowers the trustees to charge for their work in connection with the Trust should there be a professional trustee included.

Clauses 48 and 49 enable the trustees to be paid for their services as directors of a company in which the Trust Fund is invested and to retain any commission they may derive from transactions relating to the Trust property.

Clause 50 allows the trustees to take out insurance against the risk of their being personally liable in respect of actions properly taken by them as trustees and to meet the costs of this out of the Trust Fund.

Clause 51 deals with the position which could arise if a trustee was also able to benefit in some way through any decision they make (directly or indirectly). This clause protects the trustees if they were to benefit.
Clause 52 enables further administrative powers to be added if this proves necessary.

Clause 54 enables the trustees to release any powers given to them where these powers are no longer appropriate.

Clause 54 specifies the documents which beneficiaries may request to see and confirms that all Trust documents are otherwise to be kept confidential.

Clause 55 exonerates the trustees from personal liability for claims made by illegitimate members of a class of beneficiaries where the trustees were unaware of their existence.

Clause 56 provides that lay trustees (those who take on the trustee role in addition to their day job) will not be personally liable for any act by them in that capacity unless they are guilty of fraud. Professional trustees who are entitled to be paid for their services will also be liable if they are negligent.

Clause 57 sets out that the duration of powers is only exercisable whilst the power is legally applicable.

Clause 58 specifies that the trustees' powers, authorities and discretions are exercisable without liability, subject to Clause 56 above.

SECTION 5

Schedule

This deals with the initial Trust Fund, which will be [£50] to properly set up the Trust.

[Additional capital assets/ income will be transferred in due course.]

Signing the Trust

All the “parties” need to sign where indicated, namely the Settlor (confirming he is setting up the Trust and is passing over to the trustees the initial Trust Fund) and by all the trustees (confirming they are agreeing to be trustees and will hold the Trust Fund on the terms of the Trust).

All parties must have their signatures witnessed (any other trustee or the Settlor cannot be a witness).

Once the Trust has been set up

Once substantial assets have been transferred and when the payment of regular income begins, the trustees will then be able to manage the Trust using the funds deposited in the trustees' bank account/trustee investment account. It will be up to the trustees to decide how best to invest the Trust’s funds for the benefit of the beneficiaries. They might consider, for example, whether they would prefer to invest in income producing assets or whether they would prefer to invest in assets that they hope will grow in capital value, or a combination of the two, whilst bearing in mind how they intend to use the Trust.

The trustees will have a duty to exercise skill and care in the administration of the Trust. The trustees have the power to make any kind of investment they could have made if they were absolutely entitled to the assets of the Trust. They must look at both the kind of investment (e.g. bond or shares) and the particular investment of that kind (e.g. shares in Tesco plc. or Barclays plc.) and they must consider the need for diversification (e.g. a range of investments from high to low risk). The trustees should also get proper advice from an IFA
about how to exercise the power. Also, the trustees should review the investments from time to time (at least annually) and should keep good records of their decisions.

As stated above, the trustees must produce a formal document (a deed or trustees resolution) when they advance capital to or for a beneficiary to record the fact that money has been appointed out of the Trust in favour of that beneficiary.

Once the Trust has been established, it will need to be registered at HMRC.

The trustees will be responsible for submitting annual tax returns for the Trust and for paying any tax due.