Adviser guide

Nucleus Flexible Gift Trust

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Introduction

This document consists of six sections:

1. The Nucleus Flexible Gift Trust: an overview
2. Inheritance Tax (IHT) planning and the Nucleus Flexible Gift Trust
3. The suitability of the Nucleus Flexible Gift Trust
4. The Nucleus Flexible Gift Trust provisions in detail
5. The UK tax implications of the Nucleus Flexible Gift Trust
6. Frequently asked questions

The following points should be noted about this document:

(a). The term 'spouse' includes registered civil partner

(b). The term 'settlor' refers to both the settlor and the lender.

Important note

The information in this Guide is based on our understanding of current law and HMRC practices, which can change. Although every care has been taken in the preparation of this Guide and the draft Trust Deed, neither Nucleus nor any of its officers, employees or agents accept responsibility for the operation of the Trust.

This document is provided strictly for general consideration only. Any action taken or refrained from must be preceded by discussion with the Settlor's legal and other professional advisers. Accordingly, neither Nucleus nor any associated or affiliated company nor any of their representatives, officials or employees accept any responsibility for any loss occasioned as a result of the use of the Nucleus Draft Flexible Gift Trust.

1. The Nucleus Flexible Gift Trust: an overview

1.1 The aim

The aim of the draft Nucleus Flexible Gift Trust is to enable an individual to undertake effective and flexible lifetime inheritance tax (IHT) planning whilst providing a named beneficiary or beneficiaries with an income.

It is essential that prior to completion, the settlor should confirm with their legal and professional advisers that it is suitable for their particular purposes. The tax position of the trust is complex and depends on each individual's circumstances. Nucleus cannot provide legal, tax or investment advice and accepts no responsibility for any reliance placed on the contents of this guide.

1.2 Tax effectiveness and flexibility

For tax purposes the flexible gift trust is an 'interest in possession' trust, where a named beneficiary is entitled to the trust income as it arises during their lifetime and the capital is ultimately payable to other beneficiaries identified on the trust deed.

The appointor can change the named beneficiary entitled to income, however there could be tax consequences for doing this and so tax advice should be sought and understood before doing so. In addition, the appointor can choose which beneficiary will be recipient of the trust capital. Until such an appointment is made no beneficiary is entitled to the capital.

There are several classes of potential beneficiaries whom could benefit from the trust. On completing the trust deed the settlor can add a class of beneficiary(ies) to the pre-designated list. Further beneficiaries can be added by the settlor notifying the trustees in writing at any time.

When a settlor creates a flexible gift trust (with cash or existing investments), the gift will be a chargeable lifetime transfer (CLT) for inheritance tax (IHT) purposes to the extent that the cash invested (or the market value of the existing investments transferred to the trust) exceeds the settlor's available annual exemption(s). However, provided the value of the gift is below the settlor's available nil rate band, no IHT entry charge should arise when the trust is made.

To ensure that the flexible gift trust is effective for IHT purposes, the settlor cannot benefit from the trust assets in any circumstances.

The settlor can choose whether to include their spouse as one of the beneficiaries. Although this would have no adverse IHT implications, it has important income tax implications, which the client should discuss with their tax adviser before proceeding.

Please speak to a regulated tax adviser for full details of the tax implications of a Flexible Gift Trust.

1.3 Avoiding probate (confirmation in Scotland)

An investment held within a Nucleus Flexible Gift Trust is legally owned by the trustees and so will not be an asset of the settlor's estate for probate purposes.

Under the Nucleus Flexible Gift Trust the settlor is automatically one of the trustees and further trustees are appointed in the trust deed. If any of the additional trustees retires or dies before the settlor, a replacement trustee should be appointed.

2. IHT planning and the Nucleus Flexible Gift Trust

Gifts to the Nucleus Flexible Gift trust made after 6 March 2006 are chargeable lifetime transfers (CLTs) and will be subject to the 'relevant property regime' for IHT purposes. Provided the gift, when added to the settlor's cumulative total of CLTs in the previous seven years, does not exceed the available IHT nil rate band there will be no tax to pay when the trust is established. Other charges can also arise in respect of 'relevant property' trusts every ten years and when benefits are paid out of the trust to the beneficiaries.

To ensure that the settlor makes an effective gift for IHT purposes, the settlor must not retain any benefit under the trust as otherwise the gift with reservation of benefit rules will apply.

The settlor's spouse may be included as a beneficiary. However, great care should be exercised if any payments are to be made from the trust to the settlor's spouse during the settlor's lifetime. If the settlor enjoys a direct or indirect benefit the trust could then be caught by the gift with reservation of benefit provisions thus making it ineffective for IHT purposes.

The inclusion of the settlor's spouse as a beneficiary under the trust would give rise to income tax implications, please seek professional tax advice as to what these implications might be.

3. The suitability of the Nucleus Flexible Gift Trust

3.1 Suitability

The Nucleus Flexible Gift Trust may be suitable for an individual who:

- would like to make a gift of collectives held in an existing Nucleus General account or the money intended for a new investment in the Nucleus wrap;
- wishes to provide a named beneficiary(ies) with an income from the investments but wishes to retain the flexibility to direct that all or part of the future income should go to another beneficiary and retain the right to decide which of the beneficiaries should benefit from the capital in the trust fund;
- understands that they will not be able to benefit from the investment under any circumstances;
- would like the benefits of the investment to be outside their estate for probate purposes when they die; and
- understand that, if making a gift jointly into the trust with another individual, this will be seen as each individual making a gift separately for IHT purposes.

In principle, the flexible gift trust can be used with new monies, existing investments held in the Nucleus General account as well as Nucleus bonds. When considering the underlying assets of the trust, the trustees should seek advice to ensure they can meet their responsibilities to all of the beneficiaries of the trust.

This is why, whilst an investment bond could be an asset of this trust, consideration needs to be given to the income requirements of the named beneficiary(ies). Investment bonds are non-income producing assets, meaning that any tax deferred withdrawals, would be return of capital and not income.

3.2 Matters to consider before establishing the Trust

Before recommending the Nucleus Flexible Gift Trust, it would be appropriate to determine:

- the potential IHT liability on the investor's estate,
- the gifting record of the clients and the types of gifts made,
- other practical objectives of the investor. Namely, how much flexibility is required, who the named and potential beneficiaries should be and, in particular, whether the settlor's spouse (in single settlor cases), should be included amongst the beneficiaries;
- the need to provide a beneficiary with an income from the trust that is paid out and that there is no desire to accumulate the income;
- that the settlor is happy to give up all future access to the investment;
- the size of the intended gift; and
- the choice of the intended investment.

The Nucleus Flexible Gift Trust may not be suitable for an investor who:

- requires some beneficial access to their investment; or
- has chosen to invest in accumulation units or shares as they prefer to have all the trust income accumulated and added to the trust capital for future use; or
- does not wish to grant any beneficiary a right to income and prefer to leave income distributions to the discretion of the trustees; or
- has decided that the sole investment of the trust should be a bond that does not produce any income.

The choice of trust or combination of trusts should always be discussed with professional advisers. Nucleus provide a 'trust selector' to assist in this process.

4. The Nucleus Flexible Gift Trust – The trust provisions in detail

For tax purposes the Nucleus Flexible Gift Trust is an interest in possession (IIP) settlement.

This means that the named beneficiary(ies) is/are entitled to the trust income as it arises. However, no beneficiary is entitled to the trust capital unless and until the appointor makes an appointment in their favour. Furthermore, the appointor has power to appoint future income to another of the beneficiaries at any time but any income that has arisen prior to such an appointment cannot be taken away from the named beneficiary who was entitled to it when it arose.

The appointor (initially the settlor and then the trustees, following the settlor's death) may appoint the trust benefits (capital or future income) to any of the potential beneficiaries.

The following is a summary of the key provisions as they appear in the draft Nucleus Flexible Gift Trust.

Recital

The deed, if thought to be suitable, would be executed by the settlor and the named additional trustees. Their details, and the date the trust deed is executed are all required in this 'opening' part of the trust deed.

Part 1 – Declaration

The trust applies alternative provisions depending on whether a new investment is contemplated or an existing investment is being transferred to the trustees.

The settlor also chooses the name for their trust.

Part 2 – Definitions

In this part of the trust the terms used throughout the trust are defined to avoid repetition. The most important definitions are those of the potential beneficiaries and the named beneficiaries.

The potential beneficiaries are those in favour of whom the trustees may make appointments of benefits. The classes of potential beneficiaries can be wide and can include the widow or widower of the settlor, the children and the remoter issue of the settlor, their spouses, the brothers and sisters of the settlor and their issue, anybody who would benefit from the estate of the settlor on the settlor's death, any person nominated in writing to the trustees by the settlor and any charity. The settlor can add any other individuals (apart from themselves) not covered by the standard wording.

The settlor can choose whether to include their spouse in the class of potential beneficiaries. This will have important income tax implications if the investments of the trust are collectives. The settlor is excluded as a beneficiary. In the case of joint settlors, neither can be a beneficiary.

The named beneficiary(ies) is the individual(s) who are entitled to the trust income as it arises. They will also benefit from the trust capital if the power of appointment is not exercised by the appointor by the end of the trust period, i.e. 125 years from the time the trust is created. They are named by the settlor in the trust deed at outset. At least one person must always be named and, if more than one is named, the shares in which they are to benefit must be stated otherwise they will benefit equally.

Part 3 – The main trust terms

In this part the power of appointment is defined as well as the entitlement to income and the default entitlement to capital if the power of appointment is not exercised.

As previously indicated, the power to appoint capital and future income under the trust is vested in the appointor. This is the settlor during their lifetime whilst they have full mental capacity and then the trustees. The power is exercisable at the appointor's discretion and includes the power to appoint further trusts in favour of beneficiaries.

Unless and until the power of appointment is exercised, the named beneficiary is entitled to any income arising from the assets held by the trustees. For this reason investments in accumulation units or shares and investment bonds may not be appropriate for this trust.

If not all of the trust property has been appointed by the end of the 125 year trust period then the named beneficiaries (or their estates if they have died by then) will benefit.

There is also a special provision dealing with any potential conflict of interest. If a beneficiary is also one of the trustees, the trustees (as appointor after the settlor's death) can only make an appointment in favour of that beneficiary if there is at least one other trustee who does not benefit directly or indirectly from the appointment being made.

The trustees have wide powers included in the trust to advance capital from the trust fund to the beneficiaries and to make loans to beneficiaries.

Part 4 – Trustees' administrative powers

The trustees have wide administrative powers to deal with the trust fund and to reinvest the proceeds of any investment in any way they wish. They also have the power to borrow funds, to make payments to parents or guardians of minor beneficiaries and to delegate certain powers.

Part 5 – Appointment, dismissal, retirement and remuneration of trustees

The power to appoint new or additional trustees vests in the settlor having full mental capacity during their lifetime and after their death the trustees. Additionally, whilst alive and having full mental capacity the settlor holds the power to dismiss any trustee provided at least one trustee other than the settlor and/or the settlor's spouse remains after such a dismissal.

After the death or loss of capacity of the settlor, if any trustee loses mental capacity, they can be dismissed by the majority of the other trustees. In all other cases, trustees under an English trust must act unanimously.

If two persons are joint settlors, they exercise their powers jointly during their joint lives and after the death or mental incapacity of the first of them the survivor exercises the settlors' powers alone.

There are also powers dealing with the retirement of trustees and corporate trustees.

Trustees who act in their professional capacity are entitled to charge fees.

Part 6 – Further trust provisions

These deal mainly with the trustees' liability for any loss to the trust fund.

The liability of individual trustees is limited so that they will not be held liable for any loss to the trust fund provided they act in good faith. Trustees who are paid for their services are also liable for negligence.

There are also comprehensive provisions excluding the settlor from all benefit (and the settlor's spouse unless the settlor specifically included the spouse as a beneficiary at outset).

Part 7 – Proper law

The draft trust deed specifies that the trust will be governed by the laws of England and Wales. If the Settlor wishes to have the laws of Scotland or Northern Ireland applying then they should seek legal advice about getting a bespoke trust deed created to suit their circumstances and the implications of this.

The tax implications of the trust are the same throughout the UK.

The Schedule.

The asset(s) being transferred to the trust is(are) identified in the Schedule.

Part 8 – Signatures

The trust deed is executed by all the parties by signing and having their signatures witnessed.

5. The UK tax implications of the Nucleus Flexible Gift Trust

It is assumed that the settlor, the beneficiaries and the trustees of the trust are a UK resident. Special rules apply where this is not the case and specialist advice may be required.

5.1 Inheritance tax

i). Establishing the Trust

For IHT purposes a transfer of value (a gift) takes place at the time the trust is created. Where there are two settlors, each is normally treated as making a gift of one-half of the value transferred. For existing investments in the Nucleus Wrap the value of the gift will be the value of the assets in the general account or the value of the bond that is or are made subject to the trust at the time of the gift. For new investments it will be the amount invested.

To the extent that the gift exceeds the settlor's available annual exemption, currently £3,000 for each settlor (£6,000 if the exemption for the previous tax year has not been used), it will be a chargeable lifetime transfer (CLT). Gifts in excess of the settlor(s) available nil rate band, will be subject to an entry charge of 20% if paid by the trustees, or grossed up to 25% if the settlor pays this. A further tax liability at 20% could arise on the gift if the settlor dies within seven years of making the transfer.

ii). Does HMRC need to be informed about the Discretionary Trust?

All UK express trusts have to register with the Trust Registration Service unless specifically excluded. It is the responsibility of the trustees to ensure the trust is correctly registered and the record is kept up to date.

Trustees may also need to report income and capital gains depending on the underlying assets. If the trustees need assistance with any of this, they should seek legal and tax advice, Nucleus cannot provide this for them.

In addition, where a person makes a gift that is a CLT they may need to report it to HMRC on IHT Forms found on the HMRC website.

Whether a gift will need to be reported depends on the amount of the gift and the nature of the assets gifted. For more information about when your clients need to report their gift, when and the forms required please see Inheritance Tax forms - GOV.UK.

iii). What are the IHT implications of the settlor dying within seven years of establishing the Flexible Gift Trust?

If the settlor dies within seven years of making the gift an additional 20% tax might be due if the original gift exceeded the settlors nil rate band at the time of the gift. Taper relief might apply to reduce that tax depending on the value of the gift and when death occurred. The trustees should seek tax advice to see if this applies to them.

If the value of the original gift is within the nil rate band no tax would be paid but it would utilise the nil rate band first in the IHT calculation.

iv). What are the IHT implications for the Trust?

The relevant property tax regime means this type of trust could be liable to:

- the "Principal Charge" on every 10-year anniversary,
- the "Exit Charge" when distributions are made to the beneficiaries or the trust is being wound up.

The Principal Charge

Principal charges apply at ten-yearly intervals from the creation of the trust.

The effective rate of IHT will be determined based on an assumed transfer by an assumed transferor. This will mean that it will broadly be necessary to take account of:

- the value of the property in the trust on the ten-year anniversary and the historic value of any related settlements and same day additions,
- the available nil rate band of the trust. This could be reduced if the settlor has made CLTs in the seven years before creating this trust as well as if the trustees have made any distributions to the beneficiaries.

If the capital in the trust fund at the anniversary includes income that has been accumulated by the trustees and added to the trust capital, there will be a reduction in the IHT rate that applies to this capital to allow for the period of time before which the accumulated income was added to the capital.

The Exit Charge

Exit charges will be based on the value of property distributed by the trustees to the beneficiaries.

i). First ten years

There will be no exit charges within the first ten years following the creation of the flexible gift trust if the cumulative total of the settlor's CLTs in the seven years immediately prior to creating the trust, when added to the value of the property transferred to the trust, is below nil rate band when the trust is created and no assets have been added to the trust. If an exit charge does arise, it will be calculated according to the number of quarters that have expired since the trust was created.

ii). After the first ten-year anniversary

The amount of any exit charge occurring after the first ten years will depend on the rate of tax charged at the last ten-year anniversary (if any) and the length of time (in quarters) that the property has been in the trust since the last principal charge.

5.2 Income tax

The income tax implications depend on which asset is held by the trustees. In most cases under the flexible gift trust, it will be income distributing collectives in the general account. However, it is possible, though unlikely while the income beneficiary is alive, to hold an investment bond.

Under the flexible gift trust the trust income will generally be assessed on the beneficiary entitled to it, rather than the trustees, although where the trustees actually receive gross income they will have a basic rate liability and the beneficiary would receive a credit for the tax paid by the trustees. If all the trust income is paid directly to the beneficiary, the trustee liability is avoided. Different rules apply where the settlor's spouse is a potential beneficiary.

If all income is paid directly to the beneficiary and not via the trustees, so that there is no income tax assessment on the trustees, this also avoids or helps minimise trust administration, as there will be no need for the trust income tax returns to be made by the trustees.

Should the underlying investment be an investment bond the person chargeable if a chargeable event gain occurs and income tax is due will depend on the circumstances at the time and specialist tax advice should be sought.

5.2.1 Creation of the Trust

There are no income tax implications on the transfer of a collective into trust except in the case of offshore non-reporting funds, in which case the gain (based on the market value of the investment at the date of transfer less the acquisition price but without the benefit of the annual exemption) will be taxed as the settlor's income.

Legally assigning an existing onshore or offshore bond into a trust by way of a gift to the trustees does not give rise to a chargeable event and so there are no income tax implications on transfer.

5.2.2 During the Trust's existence

As the named beneficiary is entitled to the trust income, any income must either be paid over to the beneficiary, or at least be identified and be capable of being held absolutely for the said beneficiary. For this reason, collectives where income is accumulated may not be suitable for this trust and should be avoided.

The income tax position will depend on whether the settlor's spouse is included as a potential beneficiary and the underlying assets held within the trust. Tax advice should be sought to ensure the clients and their trustees understand the full tax implications of holding their chosen assets within this trust structure, who is liable and the reporting requirements.

5.4 Advancement of assets out of the trust

Instead of disposing of collectives or surrendering onshore or offshore bonds prior to advancing capital to a beneficiary, the trustees could transfer or assign the assets out of the trust. These distributions may be subject to IHT exit charges and tax advice should be sought.

The tax effect of this would depend on the asset advanced.

i). Collectives

This would be a disposal for CGT purposes deemed to be at the market value of the investment at the time of appointment (with the exception of shares/units in an offshore non-reporting fund when the gains would be subject to income tax as offshore income gains) taking into consideration the trustees available CGT exemption, it would then be taxed at trust rates. However, the gain might qualify for gift hold over relief. Tax advice will need to be sought if the trustees are making this claim.

ii). Onshore or offshore bonds

Legally assigning the bond to an appointed beneficiary would not give rise to a chargeable event, unless done for money or money's worth and so there should be no income tax liability at the time of the advancement.

Any chargeable event gains arising on subsequent encashment by the 'receiving' beneficiary would be subject to tax at that beneficiary's tax rate(s).

6. Frequently asked questions

Who can be a trustee of the flexible gift trust?

The settlor will automatically be a trustee. Additional trustees must be appointed at the outset. Anyone over 18 years old and of sound mind may be appointed. It may be appropriate to appoint a professional adviser, such as a solicitor or accountant, as a trustee, although such a person is likely to charge a fee for acting as trustee. It is essential that at least one additional trustee survives the settlor if the need for probate to determine who the successor trustee will be is to be avoided following the settlor's death.

What does the term 'interest in possession' mean in relation to the named beneficiary?

'Interest in possession' that the named beneficiary(ies) is/are entitled to the trust income as it arises. This is why it is important that the trust assets should be collectives that produce and distribute income which can then be paid over to the named beneficiary(ies).

What investments can be held in the flexible gift trust?

The flexible gift trust is only available for use with investments held in a Nucleus Wrap. As indicated above, as the named beneficiary is entitled to income, collectives which only accumulate income and investments bonds (which are non-income producing) may not be suitable investments whilst the named beneficiary/ies are alive.

Is the flexible gift trust available for joint settlors?

Yes, if the couple are married or registered civil partners. In those circumstances the funds for investment must come out of a joint account or the settlors must already jointly hold a Nucleus General account or a Nucleus Onshore or Offshore bond.

Each will normally be treated as settling 50% of the assets.

Is stamp duty payable?

A transfer of shares/securities is normally subject to stamp duty but transfers for no consideration (i.e. gifts) are exempt. The notice of trust to the nominee company (see below) includes the relevant certification to this effect.

What is the role of the nominee company and why is the Notice of trust necessary?

The nominee company holds the legal title to the collectives held in the General account. The Notice of trust applies only to collectives held in the General account. As the underlying investments are held in the name of the nominee (as the 'legal owner'), the investor holds the 'beneficial title' to those assets and it is this beneficial title that the settlor transfers to the trustees. The settlor must also instruct the nominee company to re-register the beneficial title in the names of the trustees. This is done by giving the 'Notice of trust and direction to the nominee' to the nominee company as per the trust deed.

Can the trustees encash investments held in the Nucleus Wrap and pay the proceeds to the beneficiaries?

This is possible if the appointor first makes an irrevocable appointment of benefits in favour of the beneficiary.

Why should extreme care be taken in relation to payments made by the trustees to the settlor's spouse whilst the settlor is alive?

While the inclusion of the settlor's spouse as one of the potential beneficiaries does not constitute a reservation of benefit for IHT purposes, care must be exercised if any benefits are actually paid to the settlor's spouse during the lifetime of the settlor.

The settlor cannot in any way, directly or indirectly benefit from the trust. If this were to happen, the trust could be seen as one under which the settlor reserved a benefit and this would make it ineffective for IHT purposes. In practice, therefore, it may be advisable to avoid making such appointments altogether whilst the settlor is alive.

Also please note that if benefits are to be appointed to the settlor's spouse, during the settlor's lifetime, this can only be done by the trustees.

For new investments, can the settlor get their money back under the cooling-off rules?

No. As the application for the investment (be it a bond or general account) will be made by the trustees, if they exercise their right to cancel, the refund (which may be less than the amount invested) will be sent to the trustees. For full details of the cooling-off procedure please refer to the relevant product literature.

What are the charges associated with an investment in the flexible gift trust?

Nucleus makes no charge for the provision of the draft Flexible Gift Trust. The charges relating to the Nucleus General account and the Nucleus Onshore and Offshore bonds are covered in the relevant product literature. The financial adviser is, however, likely to make a separate charge for advice given in relation to the establishment of the trust. If professional trustees are appointed to administer the trust they are likely to charge too.

For literature in alternative formats, such as Braille, large print, audio or E-text, please call us on 0131 226 9535, or via the Relay UK service on 18001 0131 226 9535.

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