

## **Office of Government Ethics**

**82 x 14 -- 10/21/82**

### **Letter to a Private Attorney dated October 21, 1982**

We have reviewed the draft of the qualified blind trust agreement between [the Government official], as Settlor, and [a private individual], as Trustee, under the Ethics in Government Act of 1978 (the "Act"), which you have submitted for certification under 5 C.F.R. § 734.405. You have also requested an opinion on the effect of section 202(f)(3)(C)(ii) of the Act and of 5 C.F.R. § 734.403(b)(2), which was promulgated pursuant to it.

An analysis of the above-cited section of the Act, the regulation and the legislative history reveals that the rationale is to disallow holdings in a qualified blind trust which an interested party is specifically prohibited from holding by Federal laws or regulations applicable to officers or employees of the governmental Department or agency in which the interested party serves. The Report of the Senate Committee on Governmental Affairs on its draft legislation governing blind trusts, S. Rep. No. 639, 95th Cong., 2d Sess. (1978) (the "Report"), in its section-by-section analysis of section 303(d)(3)(C)(ii) of S.555, 95th Cong. 1st. Sess., which was incorporated verbatim into section 202(f)(3)(C)(ii) of the Act, makes it clear that that is the purpose and meaning of this provision. The Report states in pertinent part:

Clause (ii) requires that the trust instrument contain a provision stating that the trust shall not contain any asset the holding of which by an interested party is prohibited by any law or regulation. This provision is intended to cover laws prohibiting an officer or employee of certain Federal agencies from holding financial interests in industries directly regulated by that agency. For example, there is a provision applicable to the Civil Aeronautics Board prohibiting certain employees of that Agency from holding any financial interest in airlines. If such a prohibition exists with respect to an interested party, the trust instrument establishing that party's qualified blind trust must provide that the trust itself cannot hold any such prohibited holding. Thus,

a qualified blind trust established by someone working for the Civil Aeronautics Board would not be permitted to hold any airline stock even if the airline stock were to be purchased by the independent trustee without any direction from an interested party. This is a necessary and proper restriction on the investment powers of a trustee.

This provision also covers any asset the holding of which is prohibited by regulation. Some agencies have, by regulation, interpreted general conflict-of-interest statutes to prohibit the holding of specific financial interests. Therefore, if the Civil Aeronautics Board by regulation prohibited its employees from holding airline stock, such stock could not be held by a trustee of a qualified blind trust of an employee of the CAB.

However, this provision is not intended to apply to general prohibitions on holding any asset that constitutes a conflict. In such a case, one can only tell what holdings might present a conflict by having day-to-day knowledge of the activities of the Government official; and that might very well encourage frequent contact between the trustee and the beneficiary. Obviously, such communication would run counter to the central notion of proper blind trusts. Therefore, the trustee is not restricted as to new investments by such general conflict-of-interest prohibitions (such as 18 U.S.C. § 208 or Executive Order 11222).

The restriction against trustees investing in assets, which are specifically prohibited by statute or regulation, merits some explanation. It could be argued that since an official at the CAB has no knowledge of the trust holdings, what difference does it make if the trust holds stock in airlines? The answer to the question lies in the fact that such prohibitions typically concern agencies which regulate a single industry or class of industries. Thus, the problem of the appearance of conflict is heightened in that situation if, once the trust is dissolved, it is discovered that the official's trustee invested in companies directly and frequently regulated by the

trust's beneficiary. Public suspicion of improper communications between beneficiary and trustee might also be heightened. That situation is distinguishable from a Federal agency with broad jurisdiction and more general conflict-of-interest requirements. In the latter case, to prohibit the trustee from investments in that broad range of concerns could unduly restrict financial vitality of the trust. That outcome should not occur when only a comparatively narrow range of companies and interests are subject to the prohibition -- such as in the case of agencies like the CAB. Report at 18-19.

That the above-quoted Report contains the definitive interpretation of the Act is reflected in the Joint Explanatory Statement of the Committee of Conference on the Act to the effect that "for a full explanation of the blind trust provisions [of the Act] reference should be made to the Report . . . ." H.R. Conf. Rep. No. 1756, 95th Cong., 2d Sess. 71 (1978), reprinted in 1978 U.S. Code Cong. and Ad. News 4387.

In light of the foregoing, we advise you that inasmuch as there are no specific prohibitions with respect to holdings of officers and employees of the Department [in which the official serves], the trustee of the qualified blind trust created by [the official] is presently subject to no investment restrictions under section 202(f)(3)(C)(ii) of the Act and 5 C.F.R. § 734.403(b)(2). Should a subsequently enacted law or regulation contain such a specific prohibition or should [the official] subsequently assume duties within another governmental Department or agency to which such specific prohibitions apply, the trustee would be subject to those restrictions.

The draft trust agreement contains the suggestions and changes we recommended. We certify it as a qualified blind trust under 5 C.F.R. § 734.405.

We have also reviewed the draft Certificate of Independence submitted by [the individual named as trustee]. We approve [the individual] as a proposed trustee pursuant to 5 C.F.R. § 734.406(a).

Please submit to me within the next thirty days the trust agreement and the Certificate of Independence, both duly executed, together with a list of the assets to be placed in the

trust, categorized as to value in accordance with 5 C.F.R.  
§ 734.304.

Sincerely,

David R. Scott  
Acting Director