

Office of Government Ethics

88 x 9 -- 05/10/88

Letter to a Private Attorney dated May 10, 1988

This is in response to your letter (with its enclosures) of May 4, 1988. By your letter, you have transmitted an executed trust instrument dated April 30, 1988, between [a Government employee and spouse], as settlors, and you, as trustee. You have also transmitted a copy of a memorandum dated December 22, 1987, from the General Counsel of [the agency] to the Director of this Office.

Although you characterize the General Counsel's letter as advising this Office that [the Government employee and spouse] would place their holdings of [certain] securities in a blind trust, that is not the case. The memorandum states:

He [the Government employee] has advised me that within 120 days following his confirmation he will divest himself of all three interests or will make other arrangements, such as the establishment of a qualified trust, subject to your approval and the approval of this office [the Office of the General Counsel of [the agency]]. [Emphasis added.]

As you should be aware, our letter to the [confirming] Senate Committee dated January 15, 1988, a copy of which is enclosed, states our understanding that divestiture would occur within 120 days of confirmation. Approval for any other type of arrangement has not been granted by this Office, or to our knowledge by the Senate Committee or [agency] officials.

While this Office makes every effort to assist Government employees and their representatives to comply with applicable Federal laws and regulations, their cooperation with our basic procedures is necessary when it comes to a matter as complex as the establishment of a blind trust. The regulations promulgated by this Office state that it is essential that there be approval of proposed trust arrangements prior to the time the instruments are executed and the assets placed within the trust. See 5 C.F.R. § 734.401(b)(5) (relating to prior approval of trust document and assets). The model qualified trust instruments and instructional memorandum distributed by this Office emphasize

this point most clearly. Each of these documents contains language stating that --

a trust agreement is not permitted to be recognized as creating an efficacious blind trust arrangement unless it had been certified by this Office prior to its execution.

The current versions of these documents ("Model Qualified Blind Trust Provisions," draft of 1/27/88; and "Re: Blind Trusts for Executive Branch Officials," draft of 2/5/88) are enclosed for your ready reference. We note that you state in your letter that the instrument you prepared was based on our model agreement. You should be deemed to have the notice that document contains. We further note that you have had specific notice of this requirement as premature execution was a problem you and I discussed with respect to the previous trust qualification matter which you had before this Office.

The current matter illustrates the difficulties encountered in a situation where the parties have executed a trust instrument without any consultation with this Office. [The Government employee] is placed in an anomalous position, because under the terms of the executed instrument his assets have been purportedly placed substantively outside of his control. Nevertheless, under the principles of the Ethics in Government Act of 1978 and other applicable provisions of Federal law, the instrument may not be recognized as creating an efficacious blind trust. We are required to deem the portfolio as still in his hands. Otherwise, the situation would be most ambiguous -- it is doubtful that you could qualify as an independent trustee of [the Government employee's] trust, the trust instrument does not include provisions containing the minimum requirements for blind trusts which may be qualified by this Office, we have not been advised by [the agency] whether the initial portfolio would pass the threshold filters of the statutory scheme, and we have reservations concerning the viability of a blind trust which would have a portfolio of the minimal size presented. Accordingly, in addition to the rule of the above-cited regulation, there are other very practical reasons for not presuming to give any credence to the unilateral actions of the parties in this case.

Under these circumstances we must counsel that the securities in question should be completely divested in a prescribed manner

by [a certain date], which I compute to be 120 days after [the Government employee's] date of confirmation -- [date].
Otherwise, we will be constrained to advise [the Government employee's] confirmation committee, the [named] Senate Committee (which under Senate practices is considered to retain continuing jurisdiction) that a condition of confirmation remains unfulfilled.

Sincerely,

[A senior OGE staff attorney]

Enclosures