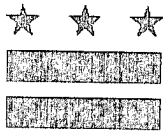
GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

October 25, 2013

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Dear Councilmembers:

This responds to your September 16, 2013 letter,[1] in which you seek guidance from the Office of Government Ethics on the subject of blind trusts. Specifically, you request an advisory opinion "on when and how Councilmembers can create and use blind trusts."

As you probably know, the use of blind trusts – or, as will be discussed here, "qualified blind trusts" – is commonplace in the federal government, even though there is no law generally requiring federal employees to divest financial assets. In the usual case, the employee transfers, without restriction, control and management of private financial assets to an independent trustee who may not communicate information about the identity of the holdings in the trust, except to inform the employee when an original asset has been disposed of or its value has become less than $1,000.[2] The trust is considered "blind" because, through the eventual sale of transferred assets and the purchase of new ones, the employee will be shielded from knowledge of the identity of the specific assets in the trust. To that extent, from a government ethics standpoint,

[1] The letter was mailed, and I did not receive it until September 26, 2013.

[2] *See generally* 5 U.S.C. app. 4 § 102(f)(3) (setting out requirements for qualified blind trusts).

any newly purchased asset is not considered a financial interest of the employee, for purposes of 18 U.S.C. § 208[3] and any other federal conflict of interest statute or regulation. *See* 5 U.S.C. app. 4 § 102(f)(4)(A).

For senior executive branch employees, one of the preconditions to using a qualified blind trust is that the trust receive prior approval by the employee's supervising ethics office. *See* 5 U.S.C. app. 4 § 102(f)(3)(D). Members of Congress can voluntarily set up a qualified blind trust, as long as it meets certain requirements, including prior approval, otherwise applicable to executive branch employees. *See* 5 U.S.C. app. 4 § 109(18)(A) (designating the Senate Select Committee on Ethics to monitor qualified blind trusts of Senators and Senate officers and employees); *id.* at § 109(18)(B) (designating the House Committee on Standards of Official Conduct to monitor qualified blind trusts for U.S. Representatives and House officers and employees).

However, while 18 U.S.C. § 208 applies to District government employees, including members of the Council,[4] federal law is silent on what office would approve a qualified blind trust for Councilmembers. Indeed, as I have confirmed with the federal Office of Government Ethics ("U.S. OGE"), there currently is no provision in federal law pursuant to which a District official can even establish such a trust.[5]

Local law is equally unhelpful. Although the Ethics Act mentions trusts in several places,[6] it is silent on the trust approval question, as well as on the subject of blind trusts altogether. To be sure, the Ethics Act does contain language similar to 18 U.S.C. § 208(a) that could, in an indirect way, suggest the use of a blind trust as a possible means to avoid financial conflicts of interest. *See* section 223 of the Act (D.C. Official Code § 1-1162.23) (prohibiting involvement in particular matters "in a manner that the employee *knows* is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee") (emphasis added). The argument in favor of blind trusts would be that the knowledge component of the conflict of interest provision could not be proved if the trust beneficiary had no knowledge of how the trust funds were invested. I do not completely discount this view, although the better course would be for the Council to follow the federal

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[3] Section 208(a) prohibits an individual from "participat[ing] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, *to his knowledge*, he...has a financial interest." (Emphasis added.)

[4] Section 208(a) applies to anyone who is "an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee."

[5] The relevant regulation, 5 C.F.R. § 2634.402, defines "employee," for purposes of the subpart on qualified trusts, as "an officer or employee of the executive branch of the United States."

[6] *See* section 101(4) (D.C. Official Code § 1-1161.01(4)) (defining "business" to include a trust); *see also* section 224(a)(1)(A)(i) (D.C. Official Code § 1-1162.21(a)(1)(A)(i)) (requiring public officials to file an annual public report containing a statement of, among other things, "a beneficial interest, including, whether held in such person's own name, in trust, or in the name of a nominee, securities, stocks, stock options, bonds, or trusts, exceeding in the aggregate $1,000, or that produced income of $200").

government's lead and enact legislation specifically authorizing the use of blind trusts, providing for an approval process for individual trust instruments,[7] and establishing disclosure requirements. At a minimum, such legislation should mirror relevant federal law and regulations or be even more restrictive. However, I must caution that there would still be the risk that the U.S. OGE would not recognize the trusts – or, under a given set of facts, an individual trust – for purposes of applying 18 U.S.C. § 208 to District government employees.

None of the foregoing is intended to suggest that Councilmembers cannot establish and use blind trusts.[8] Rather, my point is that, even if the Council were to adopt legislation as suggested in the preceding paragraph, no office in the federal government, including the U.S. OGE, presently has the authority to approve or monitor a Councilmember's trust, so as to provide any measure of protection against a criminal prosecution under 18 U.S.C. § 208.[9] Federal law would also have to change, then, to make that protection certain.

In sum, the current state of both federal and local law is such that I cannot respond to your request with any more particularity other than to say that the current use of a blind trust by a Councilmember carries with it the real risk of potential ethics violations, even if that trust is intended to avoid conflicts of interest.

Please let me know if you have any questions or wish to discuss this matter. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

Copy to: V. David Zvenyach, General Counsel to the Council

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[7] Presumably, the legislation would grant approval authority to the Council's General Authority or to the Director of Government Ethics.

[8] In fact, on at least two occasions, the Office of Campaign Finance ("OCF") has approved, with certain restrictions, the use of blind trusts as a means to defray Marion Barry's legal expenses when he was Mayor. *See* OCF Interpretive Opinions Nos. 90-04 (March 23, 1990) and 95-05 (November 29, 1995). However, I take issue with both Opinions, if for no other reason than that neither discusses the potential impact of relevant federal ethics laws. Further, I express no opinion here as to whether the use of such trusts would survive scrutiny under section 328 of the Campaign Finance Act of 2011 (D.C. Official Code § 1-1163.28) (Legal defense committees – organization).

[9] As the District's Director of Government Ethics, I have no such authority, nor does the Ethics Board itself.