

The Shortsightedness of Blind Trusts

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I. INTRODUCTION

In June 2005, Senate Majority Leader Bill Frist directed the trustees of his family's thirteen trusts to sell all stock in HCA—the hospital company established by Frist's father and brother, the nation's largest hospital chain.¹ This would have been an unremarkable event, except for the fact that all thirteen trusts were established as blind trusts for the benefit of Bill Frist and his immediate family members.² This blindness theoretically meant the trustees kept the former Senator and his family in the dark about the identity and management of the assets held in trust.

Policymakers enter government service owning assets and having private investment interests just like other people. Policymakers' private economic concerns may, however, present conflicts of interest with official decision-making.³ The Federal Ethics in Government Act

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1. Len Costa, *A Wink and a Nod*, LEGAL AFF., Jan.–Feb. 2006, at 18, 18.

2. *Id.* In addition, the timing of the sale was suspicious: the sale preceded a poor earnings report that caused the stock price to plummet by about nine percent in one day. *Id.* The Securities and Exchange Commission and the U.S. Department of Justice began an inquiry into the sale in September 2005 to investigate whether Frist improperly acted on any inside information. Jeffrey H. Birnbaum & R. Jeffrey Smith, *SEC, Justice Investigate Frist's Sale of Stock*, WASH. POST, Sept. 24, 2005, at A1. Frist denied any wrongdoing, asserting that he ordered the stock divestiture to avoid conflicts of interest as he contemplated a 2008 bid for the presidency. Carrie Johnson & Jeffrey H. Birnbaum, *SEC Issues Subpoena to Frist, Sources Say*, WASH. POST, Oct. 13, 2005, at A1.

3. There is no set definition of a conflict of interest. A broad interpretation is that a conflict of interest arises if 1) a person is in a relationship with another individual or a group that requires the person to exercise judgment on behalf of the individual or group, and 2) the person has an interest that tends "to interfere with the proper exercise of judgment in that relationship." Michael Davis, *Introduction to CONFLICT OF INTEREST IN THE PROFESSIONS* 3, 8 (Michael Davis & Andrew Stark eds., 2001). The Ethics Manual for the U.S. House of Representatives presents a more narrow definition, considering that the term "denotes a situation in which an official's conduct of his office conflicts with his private economic affairs." COMM. ON STANDARDS OF OFFICIAL CONDUCT, U.S. HOUSE OF REPRESENTATIVES, ETHICS MANUAL FOR MEMBERS, OFFICERS, AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES 87 (1992) [hereinafter HOUSE ETHICS MANUAL] (quoting ROBERT S. GETZ, CONGRESSIONAL ETHICS 3 (1966)). The Ethics Manual continues: "The ultimate concern, then, is risk of impairment of impartial judgment, a risk which arises whenever there is temptation

requires certain national policymakers and employees to publicly disclose their financial interests on an annual basis.⁴ Disclosing private economic matters allows the public to monitor potential financial conflicts of interest. Such disclosure need not detail specific assets when a policymaker opts to transfer his financial interests into a blind trust. The blind trust, then, operates as an exception to complete financial disclosure while, at the same time, attempting to shield a policymaker from conflicts of interest. Nonetheless, this shield functions properly only if the policymaker is actually blind to the identity and management of the assets once he has transferred them into the trust.⁵

Frist was not blind to the assets in his blind trusts. He received numerous updates from his trustees regarding the identity of certain trust assets, including the trust's hospital stock holdings.⁶ One trustee reported to the Senate that he told Frist in 2002 that HCA stock had been transferred into one of the trusts.⁷ Apparently, the trustee informed Frist on several occasions that HCA stock worth hundreds of thousands of dollars was placed into Frist's blind trusts.⁸

Despite this notification, Frist publicly claimed to have no knowledge of the assets in his family's blind trusts. Frist asserted in a January 2003 television interview "that he did not know how much HCA stock he owned, if any," because he had transferred his assets into a blind trust.⁹ He hid behind the blind trust shield to assuage the public's

to serve personal interests." *Id.* (quoting JAMES C. KIRBY, JR., CONGRESS AND THE PUBLIC TRUST 39 (1970)). Interestingly, the term "conflict of interest" appears to be a relatively recent invention of the latter half of the 20th century. Black's Law Dictionary did not include a definition of "conflict of interest" until 1979. The Index of Legal Periodicals did not include a "conflict of interest" subject heading until 1967. Davis, *supra*, at 17. Nonetheless, the concept seems to have much earlier origins. For example, the U.S. Constitution forbids federal officials from "accepting gifts, employment, or titles from foreign governments." Kathleen Clark, *Regulating the Conflict of Interest of Government Officials*, in CONFLICT OF INTEREST IN THE PROFESSIONS, *supra*, at 49, 49 (citing U.S. CONST. art. I, § 9, cl. 8).

4. 5 U.S.C. app. § 102(a) (2000).

5. Investments a policymaker transfers into a new blind trust will not suddenly become unidentifiable to that public official. Federal law attempts to address this problem. See *infra* notes 42–43 and accompanying text.

6. Costa, *supra* note 1, at 19 ("In a series of letters written to Frist between 2001 and 2005 and filed with the Senate Ethics Committee, the trustees informed him when HCA stock and other shares were purchased or sold on behalf of the trusts.")

7. Birnbaum & Smith, *supra* note 2. The majority of the Frist family's blind trust assets were managed by M. Kirk Scobey, Jr., president of Equitable Trust Company of Tennessee. David D. Kirkpatrick, *Frist Sale of Hospital Stock Spurs Inquiries into Trusts*, N.Y. TIMES, Sept. 24, 2005, at A8. Northern Trust, a Chicago-based company, managed other trusts, all of which sold HCA stock. *Id.*

8. Birnbaum & Smith, *supra* note 2; see also *supra* note 6 (referring to letters that Frist received from his trustees).

9. *Id.*

concerns about potential conflicts of interest.¹⁰ Similarly, Frist's financial disclosure reports for 2004 and 2005 assert that he did not know of the underlying assets in most of his blind trusts.¹¹

The former Senator's hospital investments raise concern because he was directly involved in crafting legislation that affected the health care industry.¹² Was his policymaking guided by the best interests of his constituents and the nation, or by his interest in furthering, or at least not hindering, the profitability of his family's hospital corporation?¹³

More recently, presidential candidate and Senator Barack Obama attempted to establish a blind trust that turned out not to be blind to him, causing even more public unease over the effectiveness of blind trusts. In 2005, Senator Obama acquired stock in a biotechnology concern developing an avian flu treatment, and then introduced a bill urging more research on avian flu drugs.¹⁴ Obama claimed that his broker purchased the stock pursuant to a blind trust agreement that had not yet been finalized, and that he did not learn of this investment until months later.¹⁵

As a conflict avoidance measure, the blind trust seeks to strike a balance between two competing public interests. We want to encourage qualified individuals to participate in government service. At the same time, however, we need to ensure that government decisions are not

10. Larry Margasak, *Documents Show Frist Keeping an Eye on His Blind Trust; SEC Investigating Sale of Hospital Stock*, COLUMBIAN, Sept. 25, 2005, at A6 (quoting Frist as having asserted: "Well, I think really for our viewers it should be understood that I put this into a blind trust. So far as I know, I own no HCA stock"). Two weeks before this interview, a trustee for the majority of the Frist family's blind trusts informed Frist that one of his blind trusts had acquired HCA stock valued between \$15,000 and \$50,000. Jeffrey H. Birnbaum, *Letters Show Frist Notified of Stocks in 'Blind' Trusts*, WASH. POST, Oct. 24, 2005, at A1.

11. In both years, Frist did list assets in one blind trust. The assets appear to be mostly real estate holdings; none is hospital corporation stock. William H. Frist, United States Senate Financial Disclosure Report for Annual and Termination Reports (May 15, 2006), available at http://www.opensecrets.org/pfds/pfd2005/N00003147_2005.pdf; William H. Frist, United States Senate Financial Disclosure Report for Annual and Termination Reports (May 16, 2005), available at http://www.opensecrets.org/pfd2004/NOOOO3147_2004.pdf.

12. Frist served in the U.S. Senate from January 1995 to January 2007. He singled out health care as a special concern during these years of service. Sheryl Gay Stolberg, *For Frist, a Political Fortune May Be Inextricably Linked to a Financial One*, N.Y. TIMES, Oct. 25, 2005, at A19. In 1995, Frist supported a bill that increased Medicare reimbursements to for-profit hospitals, such as those owned by HCA. *Id.* Frist participated in 1997 on a bipartisan commission to recommend changes to Medicare. *Id.* Frist also played a key role in amending Medicare in 2003 by adding a voluntary prescription drug benefit. *Id.*

13. Frist maintains he did nothing wrong regarding his blind trusts. He stated that he consulted with outside counsel and Senate Ethics Committee staff before selling HCA shares. Costa, *supra* note 1, at 19. Indeed, the Senate Select Committee on Ethics absolved Senator Frist of any wrongdoing in relation to his blind trusts. Stolberg, *supra* note 12, at A19.

14. Mike McIntire & Christopher Drew, *Obama, in Brief Investing Foray in '05, Took Same Path as Donors*, N.Y. TIMES, Mar. 7, 2007, at A1.

15. *Id.*

tainted by a policymaker's own financial interests.¹⁶ Valuing the latter concern can impair the former and vice versa. In other words, constructing absolute protections against financial conflicts of interest might mean complete disclosure of financial matters and divestiture of troublesome investments. Such limited options might discourage individuals from considering government employment. Blind trusts theoretically allow both interests to coexist peacefully. A critical evaluation of federal law regulating blind trusts, however, reveals that the use of blind trusts may err on the side of encouraging service to the public detriment of allowing policymakers' actions to be influenced by private financial concerns.

Exploration of the value of the blind trust vehicle in the public sphere merits immediate attention for a number of reasons. Disconcerting news reports regarding Senator Frist's and Senator Obama's blind trust investments undermine public confidence that these devices can prevent or deter financial conflicts of interest.¹⁷ At the same time, blind trusts are increasingly being touted as a solution to conflicts

16. These competing public policy interests are not novel. They played a part in congressional debates over enacting conflict of interest legislation in 1962. The Senate report on the proposed legislation commented on then-existing ethics statutes that created "wholly unnecessary obstacles to recruiting qualified people for government service." S. REP. NO. 87-2213 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3854. President-elect Carter apparently had these same public policy interests in mind. The ethics guidelines released by Carter's transition group before his inauguration recognized that "[t]o decree that no person can have any financial interests other than a salary from the Government would seriously limit the ability to recruit the most qualified persons." *Texts of Carter Statement on Conflicts of Interest and Ethics; Appointees' Guidelines*, N.Y. TIMES, Jan. 5, 1977, at A17.

17. Recent convictions of White House and congressional policymakers found to have used their power for personal gain further underscore the need to examine how to deter government officials from making decisions influenced by private financial interests. Representative Bob Ney agreed in September 2006 to plead guilty to charges related to gifts he received from lobbyist Jack Abramoff, after having denied that official actions previously taken on behalf of Abramoff were related to the gifts. Philip Shenon, *Ohio Congressman Is Said to Agree to Plead Guilty*, N.Y. TIMES, Sept. 15, 2006, at A14. A former White House budget official was convicted in June 2006 after lying to federal investigators about providing private assistance to Abramoff, his former lobbying partner. Philip Shenon, *Man Linked to Abramoff Is Sentenced to 18 Months*, N.Y. TIMES, Oct. 28, 2006, at A9. "A former top aide to Representative Tom DeLay" pleaded guilty in March 2006 to corruption charges stemming from his receipt of thousands of dollars in illegal gifts in exchange for influencing legislation. Philip Shenon, *Ex-DeLay Aide Pleads Guilty in Lobby Case*, N.Y. TIMES, Apr. 1, 2006, at A1. Representative Randy Cunningham pleaded guilty in November 2005, after acknowledging acceptance of "at least \$2.4 million in bribes," including hundreds of thousands of dollars in cash and other gifts from two military contractors while helping them win Pentagon contracts. John M. Broder & Carl Hulse, *Republicans Denounce Ex-Lawmaker*, N.Y. TIMES, Nov. 30, 2005, at A29. Congress responded to concerns prompted by these convictions by enacting the Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735 *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:pub1081.110.pdf (strengthening the disclosure requirements and enforcement of lobbying laws, among other purposes).

of interest in the private sector, “particularly given the nature of executive compensation, the business insider’s need to diversify and manage portfolio risk, the critical focus on corporate governance, and increased regulation.”¹⁸ While private use of these devices is on the rise, there is no universal definition of a “blind trust” or established rules for its operation.¹⁹ Similarly, some state legislatures have authorized the use of blind trusts by certain state officials as an alternative to financial disclosure.²⁰ These state blind trust rules are no more uniform than those for private blind trusts. Public unease over the effectiveness of federal blind trust rules, as well as the possibility that federal law may set a benchmark for private or state blind trusts, indicates a need to closely scrutinize the current federal statutory scheme.

This Article examines the blind trust, as presently authorized by federal law, and argues that the device does not provide sufficient protection against financial conflicts of interest for policymakers.²¹ The

18. Edmond M. Ianni, *Blind Trusts Offer Clients Customized Wealth Planning*, 30 EST. PLAN. 319, 322 (2003). The Securities and Exchange Commission rule 10b5-1 (17 C.F.R. § 240.10b5-1 (2006)), which took effect in October 2000, allows executives to delegate the purchase or sale of shares in their own companies’ stocks to a third party. Eric Schellhorn, *A New Take on the ‘Blind Trust,’* CHRISTIAN SCI. MONITOR, Jan. 14, 2002, at 20. Yahoo!, Inc. co-founder Jerry Yang established a blind trust under Rule 10b5-1 to trade Yahoo! stock. Yahoo! Inc. Current Report (Form 8-K) (June 10, 2002); Edmond M. Ianni, *Remove Temptation*, TR. & EST., June 2003, at 42, 45 [hereinafter *Temptation*].

19. *Temptation*, *supra* note 18, at 43.

20. See, e.g., Act of July 9, 2007, ch. 47, sec. 57, § 39.50.040, 2007 Alaska Adv. Legis. Serv. 47 (LexisNexis); CAL. CODE REGS. tit. 2, § 18235(a) (2000); CONN. GEN. STAT. ANN. §§ 1-79(a), 1-83 (West Supp. 2007); MD. CODE REGS. 19A.06.01.01–03 (2007). This Article does not thoroughly explore and analyze state blind trust rules, but it does draw on some features of different state rules to suggest amendments to federal legislation.

21. This Article does not address whether judges should be allowed to employ blind trusts as a means of avoiding financial disclosure. While federal judges and magistrates must adhere to the Ethics in Government Act’s financial disclosure mandates, they are prohibited from using blind trusts as an exception to disclosure. Pub. L. No. 93-512, § 455, 88 Stat. 1609, 1609 (1974) (codified as amended at 28 U.S.C. § 455) (requiring federal judges and magistrates to disqualify themselves in any proceedings in which their impartiality might reasonably be questioned). The amendment makes the statutory disqualification rules conform to the Code of Judicial Conduct rules regarding disqualification, which the Judicial Conference adopted in 1973. H.R. REP. NO. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352–53. The House Judiciary Committee Report on this legislation unambiguously states that a judge’s duty to inform himself about his financial interests “precludes use of a so-called blind trust.” *Id.* at 6356. Ironically, the Committee reasoned that a blind trust is not blind because the judge would still have to report profit, loss or earnings from the trust property on his income tax report. *Id.* Members of Congress and executive branch officials also must report this data on their tax returns, yet a blind trust is still considered to be a sufficient conflict of interest shield for them. See *infra* note 41 and accompanying text (statute authorizes a trustee to communicate information about a blind trust that will allow the policymaker to complete an income tax return). Congress specifically requires judges to be informed of their financial interests. A federal judge or magistrate must “inform himself about his personal and fiduciary financial interests.” 28 U.S.C. § 455(c) (2000). Whether judges should be allowed to rely on blind trusts is beyond the scope of this Article.

weaknesses of blind trusts result in two related injuries. First, because the rules for these trusts do not include sufficient incentives to maintain blindness, they may fail to prevent conflicts of interest. Policymakers knowledgeable about the financial assets they hold in a blind trust are in a position to make decisions influenced by a personal stake in the matter. Second, blind trusts can mislead the public into believing that policymakers are avoiding conflicts, when they may not be doing so.²² Blind trusts that are not truly blind to a policymaker tend to disguise actual or apparent conflicts of interest from public oversight. In this sense, blind trusts undermine the transparency essential to democratic governance.

To explore the deficiencies of blind trusts, Part II of this Article discusses the current use and legislative parameters of the “qualified blind trust” established under the 1978 Ethics in Government Act. This part also briefly reviews events that led to the codification of blind trust rules, underscoring that some of the problems initially prompting the legislation continue to exist today.

Part III describes how a private trust is used as an asset-management device, and analyzes the ways in which this traditional trust differs from a blind trust. Under a traditional trust, an outside trustee can effectively manage assets for a beneficiary because the beneficiary’s self-interest motivates him to monitor the trustee’s performance.²³ A trustee’s fiduciary obligation facilitates this oversight because a trustee must keep the beneficiary informed about the trust assets. Under a qualified blind trust, however, the beneficiary must be kept in the dark about his assets, contrary to his immediate self-interest. This fundamental difference gives rise to many of the flaws of blind trusts. Part III also discusses legislative attempts to compensate for a beneficiary’s inability to act on his self-interest and oversee the trustee’s performance. Finally, Part III maintains that these statutory efforts fail largely because there is no one else monitoring the trustee. This failure means that beneficiaries have a

22. Senator Frist is not the only public official to claim a blind trust absolves him completely of any potential conflict of interest, despite knowledge of the initial assets. Then Representative Thomas J. Bliley, Jr., criticized for potential conflicts between his role as chairman of the House Commerce Committee and his investment portfolio, responded by vowing to create a blind trust. He claimed that “[o]nce the trust is created, I will not know what I own, so that no one can claim that my decisions are based on my own self-interest.” David S. Cloud, *Bliley Investments Go to Blind Trust*, 53 CONG. Q. 1613 (1995).

23. To the extent the trust is established for the benefit of a minor child or incompetent adult, a parent, guardian, or conservator usually will be responsible for protecting the beneficiary’s interests. UNIF. TRUST CODE § 303 (2000) (amended 2005).

strong incentive to ignore the statutory restrictions on communicating with trustees.

Part IV presents proposals to address the flaws of blind trusts. It begins by recommending that the device should not be used as an exception to financial disclosure. Because blind trusts are ineffective as a means of avoiding conflicts of interest, a choice must be made between encouraging a broader pool of possible public servants and protecting the integrity of government decisions. Public policy should place a higher value on preserving the decision-making process. Government decision-makers should fully disclose their financial affairs. Where a financial conflict of interest arises, a public official should refrain from decision-making or divest himself of the asset. While this Part addresses the advantages of complete financial disclosure, it also recognizes problems inherent in this approach. Given that Congress has already rejected disclosure coupled with abstention as a solution, Part IV concludes with proposals for amending the statute governing qualified blind trusts in ways that will, among other things, help to ensure a trustee is adequately monitored so that a public official has less incentive to remove the blindfold by seeking prohibited information regarding trust assets.

II. CURRENT BLIND TRUST RULES

A. *Qualified Blind Trusts Under the Ethics in Government Act*

The Ethics in Government Act of 1978 formally established the “qualified blind trust” as an optional mechanism for circumventing full disclosure of financial interests while at the same time avoiding conflicts with official duties.²⁴ Until this enactment, there was no authoritative consensus as to what elements constituted a proper blind trust.²⁵ To understand the role of blind trusts, it is useful first to review the financial disclosure mandate of the Ethics in Government Act and earlier conflict of interest legislation governing the executive branch.

The Ethics in Government Act, as amended, requires certain employees and officials from all three branches of government to submit financial disclosure statements accessible to the public.²⁶ The purpose of

24. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

25. Office of Government Ethics, Advisory Opinion 86 x 12 (Sept. 8, 1986), available at http://www.usoge.gov/pages/advisory_opinions/advop_files/1986/86x12.pdf.

26. 5 U.S.C. app. §§ 101–102 (2000). Before this enactment, public officials were required to disclose their financial interests, but these disclosures were not made public. *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before*

disclosing financial interests is to facilitate public monitoring of, and to deter, conflicts of interest.²⁷ Persons who must report include the President, the Vice President, high-level executive branch employees, administrative law judges, members of Congress, high-level congressional officers and employees, federal judges, and federal judicial employees authorized to perform adjudicatory functions (collectively referred to as “reporting individuals”).²⁸ At least annually, each reporting individual must disclose the source, type, and amount of income he received,²⁹ as well as the identity and general value of the property he owns.³⁰ For example, if a reporting individual owns Acme stock worth \$95,000, and earns dividends of \$4000 during a calendar year, that person’s annual financial disclosure report must list the name of the corporation issuing the stock, mark the value of the asset as falling in the \$50,000 to \$100,000 category, and list dividends in the category of “greater than \$2500 but not more than \$5000.”³¹ This disclosure obligation extends to the financial interests of the reporting individual’s spouse and dependent children.³²

Financial disclosure obligations may require these same steps even if the Acme stock is held in a traditional trust that benefits the reporting individual. In general, the identity and value category of the underlying assets held by a traditional trust must be disclosed if the reporting individual has a beneficial interest in the trust.³³ However, the underlying assets of a trust need not be disclosed if they are held in a qualified blind trust.³⁴

the S. Comm. on Governmental Affairs, 95th Cong. 7 (1977) (statement of President Carter to Congress proposing the Ethics in Government Act of 1977).

27. HOUSE ETHICS MANUAL, *supra* note 3, at 157.

28. 5 U.S.C. app. § 101(f)(1)–(12) (2000). Officers and employees are required to report if they are in a position classified above GS-15 of the General Schedule, or earn pay equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule. *Id.* §§ 101(f)(3), 101(f)(6), 109(13).

29. *Id.* § 102(a)(1). Reporting individuals must disclose the actual amount of earned income, other than income earned from current employment with the U.S. government. *Id.* § 102(a)(1)(A). In addition, reporting individuals must indicate a general value category of income from publicly traded and non-publicly traded assets and unearned income sources. *See id.* § 102(a)(1)(B) (requiring the reporting of “dividends, rents, interest, and capital gains”).

30. *Id.* § 102(a)(3).

31. *Id.* § 102(a)(1)(B)(iii). Dividends and income must be reported when they accrue, even if dividends are automatically reinvested. U.S. OFFICE OF GOV’T ETHICS, PUBLIC FINANCIAL DISCLOSURE: A REVIEWER’S REFERENCE 8-10 (2d ed. 2004) [hereinafter REVIEWER’S REFERENCE].

32. 5 U.S.C. app. § 102(e)(1). Subsequent discussion of rules governing reporting individuals also applies to spouses and dependent children without specifically referencing these family members.

33. REVIEWER’S REFERENCE, *supra* note 31, at 7-27.

34. 5 U.S.C. app. § 102(f)(2)(A). The Ethics in Government Act also provides exceptions to financial disclosure for limited types of trusts and for assets held in a “widely held investment fund.”

A reporting individual who chooses to transfer assets into a qualified blind trust need not separate out on a financial disclosure report the exact assets held by the trust. For example, if the qualified blind trust holds Acme stock, the financial disclosure report would not name the Acme Corporation, but would include only the name of the trust. The reporting individual must also identify the trust as a qualified blind trust, report the value range of the individual's interest in the trust, and report the value range of income that the individual received from the trust. While reporting individuals are not required to establish blind trusts, they are an attractive alternative to disclosure for some public policymakers.

In addition to the specific financial disclosure requirements that the Ethics in Government Act imposes on certain officials from all three branches of government, separate legislation imposes liability on executive branch employees related to financial conflicts of interest. Any employee of the executive branch who participates in a decision, on a matter in which, "to his knowledge," he has a financial interest, is subject to civil and criminal liability.³⁵ Blind trusts also provide an exception to this general conflict of interest legislation. Holdings in a blind trust are not considered to be a "financial interest" for purposes of this conflict of interest statute.³⁶

So far, this section has described how a qualified blind trust limits both financial disclosure obligations, and the applicability of penalties for an executive branch employee's conflict of interest. The remainder addresses restrictions imposed on communication between a trustee and a beneficiary, as well as limitations on who may serve as a trustee. These are the provisions that attempt to render a trust blind to the beneficiary.

The qualified blind trust rules limit communication between a trustee and an "interested party"—a reporting individual or the individual's

A reporting individual need not report the underlying assets of a trust when the reporting individual did not establish the trust, and neither the reporting individual nor his spouse or dependent children know what is contained in the trust. *Id.* § 102(f)(2)(B). Examples of widely held investment funds include "a mutual fund, a regulated investment company, and a pension or deferred compensation plan." *Id.* § 102(f)(8). To qualify for this investment fund exception, such funds must not be controlled by the reporting individual and must be publicly traded or widely diversified. *Id.* § 102(f)(8)(A), (B).

35. 18 U.S.C. § 208(a) (2000). The current statutory prohibition stemmed from alleged civil war era abuses likely involving government officials making decisions about matters in which they had a personal interest. BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 110 (1964). Section 208, enacted in 1963, is a "direct lineal descendant" of the former § 434. *Id.* at 109. Section 434, enacted in 1958, was in turn based substantially on an 1863 amendment to an 1862 act. *Id.* at app. A, 274–76, 280–81.

36. 5 C.F.R. § 2634.401(a)(1)(ii) (2007).

spouse and dependent children.³⁷ In managing the assets, a trustee “shall not consult or notify any interested party.”³⁸ With few exceptions, the trustee may not provide any specific information on the trust assets or sources of income, and communication between any interested party and the trustee is limited.³⁹

There are three general types of authorized communication. First, a trustee and interested party may communicate in writing about the “general financial interest and needs of the interested party,” a direction to the trustee to sell all of an asset initially placed in the trust if it poses an actual or apparent conflict of interest, or notification of a law or regulation that prohibits the interested party from holding an asset.⁴⁰ Second, a trustee may provide quarterly reports to an interested party regarding the total value of that party’s interest in the trust, the net income or loss of the trust, any information necessary to enable an interested party to complete an individual tax return, and information that will allow a reporting individual to complete a financial disclosure report.⁴¹ Third, a trustee must notify the interested party when an asset initially placed in the trust is transferred out of the trust.⁴² When a public official first establishes a qualified blind trust, it cannot actually be “blind.” By virtue of the newness of the trust, the official knows what assets he transferred into it until a trustee notifies him that the trust no longer holds the asset. There is a limited statutory exception that allows a well-diversified portfolio placed in trust to be truly blind from its inception.⁴³ Absent this exception, or notice from a trustee, a public official must treat those assets as reportable financial interests.⁴⁴ Nonetheless, there appears to be no requirement that the reporting

37. 5 U.S.C. app. § 102(f)(3)(E) (2000) (defining “interested party” for purposes of qualified blind trusts as “a reporting individual, his spouse, and any other minor or dependent child”).

38. *Id.* § 102(f)(3)(C)(i).

39. *Id.* § 102(f)(3)(C)(v).

40. *Id.* § 102(f)(3)(C)(vi).

41. *Id.* § 102(f)(3)(C)(v).

42. *Id.* § 102(f)(3)(C)(iii).

43. A blind trust that is established with only “a well-diversified portfolio of readily marketable securities” that do not consist of “securities of entities having substantial activities in the area of the reporting individual’s primary area of responsibility” is considered completely blind from its inception. *Id.* § 102(f)(4)(B)(i). Accordingly, the reporting individual need not consider the initial assets to be financial interests for the purposes of § 102(f)(4)(A). *Id.* § 102(f)(4)(B)(i). Regulations governing executive branch blind trusts refer to blind trusts established with diversified assets as Qualified Diversified Trusts. 5 C.F.R. §§ 2634.401(a)(1)(iii), 2634.404 (2007).

44. 5 U.S.C. app. § 102(f)(4)(A) (2000). Treating the initial assets as a financial interest of the official means that the official will be subject to conflict of interest statutes, including 18 U.S.C. § 208 (prohibiting executive branch and independent agency officers and employees from taking government action while having a conflicting financial interest).

individual separately list these initial assets on a public financial disclosure form each year until the time the trustee provides notice that the asset has been transferred from the trust.⁴⁵

To facilitate blindness, a trustee must be independent from any interested party. To be independent, a trustee cannot be associated with an interested party; cannot be, or previously have been, an employee of or affiliated with an interested party; nor can a trustee be a relative of an interested party.⁴⁶

Adherence to these provisions limiting communication and who may serve as trustees is monitored by three different supervising ethics offices, one in each of the U.S. House of Representatives, the Senate, and the executive branch.⁴⁷

B. Qualified Blind Trust Antecedents

The Ethics in Government Act's standardization of the elements and operation of blind trusts sprang from a history of sporadic and informal blind trust use among public officials. Briefly reviewing the history of government officials' use of blind trusts reveals that some of the problems prompting federal legislation have not been solved by the advent of qualified blind trusts. Specifically, early use of blind trusts may have originated from a desire to give the public appearance that a policymaker was avoiding conflicts of interest without actually blinding the policymaker to an asset that stood to influence the execution of official duties. Legislation establishing qualified blind trust rules has not solved this problem.

45. Telephone conversation with Katja Eichinger, Counsel, Senate Select Comm. on Ethics (Feb. 23, 2007). Because the initial assets are listed in the trust document itself, a public record, there is no obligation to report these assets on a public financial disclosure report annually. *See also* discussion *infra* notes 147–49 and accompanying text. Senator Frist, for example, knew that his blind trusts held HCA stock, yet he did not list these assets as belonging to the trust on his public financial disclosure statement. *See supra* notes 6–11 and accompanying text.

46. 5 U.S.C. app. § 102 (f)(3)(A)(i)(I)–(III) (2000).

47. Executive branch qualified blind trusts are monitored by the Office of Government Ethics. 5 U.S.C. app. § 109(18)(D). The office was established by the Ethics in Government Act of 1978. *Id.* § 401(a). Particular agencies, however, have individual administrative offices in charge of monitoring compliance with the financial disclosure mandate of the Ethics in Government Act within the agency. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-51, GOVERNMENT ETHICS: HUD FINANCIAL DISCLOSURE REPORTS MISSING OR NOT REVIEWED (1990) (criticizing the Department of Housing and Urban Development's system for obtaining and reviewing financial disclosure statements). The legislative branch is monitored separately because the Constitution allows Congress exclusive authority to regulate itself. Costa, *supra* note 1, at 19. The House Committee on Standards of Official Conduct oversees qualified blind trusts for U.S. Representatives and House officers and employees. 5 U.S.C. § 109(18)(B). The Senate Select Committee on Ethics monitors qualified blind trusts Senators and Senate officers and employees. *Id.* § 109(18)(A).

President Lyndon B. Johnson appears to have been the first elected U.S. official to use a blind trust.⁴⁸ Nevertheless, Johnson knew about significant holdings in the trust.⁴⁹ When Johnson took office as Vice President in 1963, his family's ownership of a radio and television station in Texas deepened conflict of interest concerns that had followed him for nearly two decades. These concerns first arose when Johnson purchased a radio station while serving in the U.S. House of Representatives, then applied for a Federal Communications Commission ("FCC") license to construct a television station while serving as a U.S. Senator.⁵⁰ Johnson claimed he had not lobbied the FCC or cast a vote to further his media interests, but his political position likely played a role in securing favorable FCC decisions that helped his media holdings grow.⁵¹

Upon Johnson's ascent to the vice presidency, his staff encouraged him to sell his radio and television assets. He and his family were reluctant to do so. Instead, the Johnsons created a "blind trust" naming two business associates and family friends as the trustees and giving them complete discretion.⁵² While the trust provisions governing blindness are not known, the lawyer who drafted the trust reported that he was unaware of any agreement between the Johnsons and the trustees not to sell shares of the media holdings.⁵³ Given that one of his trustees

48. Costa, *supra* note 1, at 18.

49. The blind trust was likely created during the Kennedy Administration to help several cabinet undersecretaries avoid conflicts of interest. *Id.* (reporting that Sheldon Cohen, a tax partner at the law firm of Arnold, Fortas & Porter, was asked to find a solution to the Kennedy cabinet officials' potential conflicts). Within months of Kennedy's taking office, Congress passed significant conflict of interest legislation governing the executive branch. Bribery, Graft, and Conflicts of Interest, Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified as amended at 18 U.S.C. § 208 (2000)). While the legislation itself did not specifically mention blind trusts, its prohibitions lent themselves well to the creation of blind trusts. The statute continues to prohibit certain executive branch employees from participating in a matter in which the employee or those close to the employee have a known financial interest. *See* 18 U.S.C. § 208(a) (2000) (prohibiting participation when the employee knows of financial interests of a spouse; minor child; general partner; organization in which the employee serves as an officer, director, trustee, general partner or employee; or any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment). *See also supra* notes 35–36, and accompanying text.

50. Costa, *supra* note 1, at 18; *see also* ROBERT DALLEK, LYNDON B. JOHNSON: PORTRAIT OF A PRESIDENT 52 (2004) (discussing the Johnsons' decision to purchase radio station KTBC and commenting that Johnson's "involvement in a business that largely depended on the actions of a Federal agency for its success created a clear conflict between his private interests and public position").

51. DALLEK, *supra* note 50, at 76–77.

52. Costa, *supra* note 1, at 18–19; ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973, at 611 (1998).

53. Costa, *supra* note 1, at 19.

was the executive director of the Johnsons' broadcasting stations, Johnson must have had some degree of comfort that the trustees would not sell his interests.⁵⁴ Indeed, Johnson continued to own his radio and television properties when he left office in 1969.⁵⁵

Guidelines on how to structure and use blind trusts emerged slowly on the federal level. Interestingly, these initial guidelines were more restrictive of the types of assets appropriate for a blind trust than is current federal law. The U.S. Department of the Interior, in 1975, may have been the first federal agency to formulate standards relating to blind trusts.⁵⁶ These standards required a trustee to divest holdings that created conflicts of interest, and prohibited the trustee from acquiring assets that might create a conflict of interest.⁵⁷

In January 1977, President-elect Carter issued ethics guidelines in the aftermath of the Watergate scandal.⁵⁸ Carter's transition team proposed voluntary blind trusts for Carter appointees as an alternative to divestiture.⁵⁹ While Carter's guidelines limited blind trusts to cash or diversified assets, Carter himself placed his interests in two family-owned businesses into a trust that incorporated blind trust features.⁶⁰ Because Carter's trust prevented trustees from selling his share of a family farm, Carter continued to know of his ownership interest in that business.

54. Johnson's trustees were Donald S. Thomas, an Austin attorney and business associate, and Jesse Kellam, the executive director of the broadcasting stations that the Johnsons owned. DALLEK, *supra* note 52.

55. *Id.* Ironically, Johnson championed openness in government. In 1966, Johnson signed the Freedom of Information Act into law, stating: "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits." Carolyn Bingham Kello, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345, 346 n.7 (citing Steven Goldberg, Freedom Paper No. 6: Public Access to Government Information, <http://usinfo.state.gov/products/pubs/archive/freedom/freedom6.htm> (last visited Oct. 2, 2003)).

56. S. REP. NO. 95-639, at 3 (1978) [hereinafter SENATE BLIND TRUST REPORT].

57. *Id.*

58. *Id.* (citing *Texts of Carter Statement on Conflicts of Interest and Ethics; Appointees' Guidelines*, N.Y. TIMES, Jan. 5, 1977, at A17).

59. *Texts of Carter Statement on Conflicts of Interest and Ethics; Appointees' Guidelines*, N.Y. TIMES, Jan. 5, 1977, at A17.

60. *Id.* Carter transferred his interest in Carter's Warehouse and Carter Farms, Inc. to a trust that he may not have labeled a blind trust, but that limited information he could receive from his trustee. "No reports will be made to Jimmy Carter from the trustee or any investment advisors other than minimum tax information and an annual statement of the net value of the trust." *Id.* The trust agreement specified that the trust would retain Carter's interest in the farm, but would rent it for an annual fixed amount. Carter was to receive income from this interest not to exceed the amount established during 1977, to ensure that he and his family would not be affected from profits or losses of farm operations. Carter's partnership interest in Carter's Warehouse was to be either leased for four years for a fixed amount, or sold, at the discretion of the trustee. *Id.*

While both Presidents Johnson and Carter knew of the assets they held in trust, they may have been kept in the dark about management decisions. However, in most cases, blind management of sighted assets does not go far enough to foreclose the possibility that decisions could be tainted by a policymaker's interest in protecting known investments. Johnson, for example, may not have known of his radio and television stations' contractual commitments, but he did know that the health of his investments depended on FCC determinations and he was in a position in Congress and the White House to influence the FCC. Similarly, Carter stood to affect farm policy knowing of his family's agricultural interests, despite the fact that he may not have been involved in day-to-day decisions regarding his family farm.

Within months of the release of Carter's ethics guidelines, the Senate amended its Standing Rules to require dissolution of blind trusts existing in the Senate. The resolution established, as the sense of the Senate, that blind trusts should be either dissolved or modified to permit disclosure unless the Senate could establish a rule, or Congress pass legislation, that mandated minimum requirements and standards for blind trusts.⁶¹ In other words, the Senate maneuver was intended to press for unified rules regulating the establishment of blind trusts. The Senate Committee on Governmental Affairs held hearings on blind trusts in June 1977.⁶² Congress eventually enacted the Ethics in Government Act on October 26, 1978, which included rules governing qualified blind trusts.⁶³

III. WHY BLIND TRUSTS FAIL TO DETER OR AVOID CONFLICTS OF INTEREST

A large part of why blind trusts fail to safeguard against conflicts of interest is because they operate contrary to traditional trust norms. To understand the faults of blind trusts, then, it is first important to understand how a traditional trust works as a financial management device.

61. S. Res. 110, 95th Cong. (1977) (resolving to amend Rule XLII of the Standing Rules of the Senate).

62. SENATE BLIND TRUST REPORT, *supra* note 56, at 8.

63. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

A. Traditional Private Trusts Compared with Blind Trusts

A private trust is a legal arrangement under which a trustee manages property for one or more beneficiaries.⁶⁴ In a traditional trust, a grantor establishes the trust by conveying property to a trustee to manage for a person who is not willing or able to do so.⁶⁵ The trustee owns legal title to trust property and is held to a fiduciary standard of conduct.⁶⁶ As a fiduciary, the trustee must manage the trust property according to the interests of the beneficiaries. The trustee's actions are judged by an objective standard of care.⁶⁷

Under this traditional version of a trust, a trustee must provide beneficiaries with enough information about the trust property and its management to enable beneficiaries to protect their interests.⁶⁸ Depending on the nature of the beneficiary's interest, a trustee usually has to provide an annual report of information related to the "trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if

64. Trusts are now commonly used for estate planning purposes, as well as for gratuitous transfers and management of property. When a grantor establishes a trust for estate planning purposes, state law does not require the grantor, trustee and beneficiary to be three separate parties. Rather, a grantor can avoid probate by conveying all of his assets into a revocable trust. The grantor is also the trustee and beneficiary during his lifetime, and the trust names a beneficiary to receive the trust's assets when the grantor dies. *JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES* 485 (7th ed. 2005). As long as the trust names a beneficiary on the death of the grantor, courts have declared that the division of legal and equitable title is maintained even though the grantor retains the power to revoke the trust during his life. *E.g.*, *Farkas v. Williams*, 125 N.E.2d 600, 604 (Ill. 1955). This death-time beneficiary has an equitable interest in the trust; therefore the initial grantor owes the same fiduciary duty to this death-time beneficiary as would any trustee. *Id.* at 607–08.

65. Trusts were created in medieval England when grantors conveyed land to someone else to manage for the benefit of members of religious orders who had taken vows of poverty and were forbidden from owning property. *GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES* 11 (1965). Early trusts under feudalism were also used to avoid paying obligations owed to the lord of the manor. *Id.* Historically, trusts were useful primarily to convey property. Modern trusts are employed and valued as flexible asset management devices. *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 629 (1995).

66. *DUKEMINIER ET AL., supra* note 64, at 490.

67. *Id.* at 490–91.

68. UNIF. TRUST CODE § 813 (2000) (amended 2005). A trustee does not need to furnish information to beneficiaries with "remote remainder interests." *Id.* § 813 cmt. The exact scope of fiduciary duties varies somewhat among the states. The Uniform Trust Code, completed by the Uniform Law Commissioners in 2000, has been adopted by nineteen states and the District of Columbia. The National Conference of Commissioners on Uniform State Laws, *A Few Facts About the . . . Uniform Trust Code*, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-utc2000.asp (last visited Mar. 9, 2007). *See also* RESTATEMENT (THIRD) OF TRUSTS § 82 (2005) (describing trustee's general duty to furnish information to beneficiaries).

feasible, their respective market values.”⁶⁹ With this information, the beneficiary can monitor the extent to which a trustee is complying with fiduciary duties.⁷⁰

The traditional trust exploits a beneficiary’s self-interest while attempting to curb a trustee’s self-interest. Only the beneficiary has a financial motive to scrutinize the trustee’s performance and adherence to trustee standards. A trustee’s erstwhile interest in usurping trust funds is counteracted by the liability that fiduciary law imposes on such wrongdoing.

Blind trusts try to replicate the asset management function of a traditional “sighted” trust without relying on a beneficiary to watch over the trustee. To the contrary, a blind trust operates against the self-interest of a beneficiary by forbidding the extensive reporting that the trustee of a traditional trust owes to beneficiaries. The “blindness” involved is that of the beneficiary, who is kept in the dark by the trustee about the identity and management of the trust assets. By definition, then, a blind trust alters the very element of a traditional trust that makes the instrument work as a means to allow one person to manage wealth for another.⁷¹

As a general proposition, there are two interrelated problems with using a blind trust to prevent conflicts of interest. First, because neither the trustee nor the beneficiary has sufficient incentive to keep the blindfold on, the trust may not actually prevent conflicts of interest. In a traditional private trust, a beneficiary’s self-interest operates to ensure the trustee is complying with the trustee’s duties. A blind trustee’s duty to withhold information about the trust’s investments, however, is not in the beneficiary’s immediate self-interest.⁷² To the contrary, the blind

69. UNIF. TRUST CODE § 813(c) (2000) (amended 2005); *see also* RESTATEMENT (THIRD) OF TRUSTS § 83 (2005) (describing trustee’s duty to keep records and provide reports).

70. A beneficiary who is a minor child or incompetent adult will necessarily rely on a parent, guardian, or conservator to receive information from a trustee and monitor the trustee’s compliance with fiduciary duties. *See supra* note 23.

71. A blind trust also resembles a modern revocable trust in that the grantor and the primary beneficiary are one and the same person. *See supra* note 64. It is, however, very different from a typical revocable trust. The grantor of a blind trust must relinquish control over his assets to an outside trustee, unlike a typical revocable trust grantor who often maintains control as trustee. In addition, the purpose of a revocable trust is probate avoidance rather than to manage assets for someone else, so the trustee’s adherence to fiduciary duties becomes less important. *See supra* note 64.

72. Incentives or penalties established by law to regulate a blind trust can bring the maintenance of blindness more within a beneficiary’s self-interest. Executive branch employees who knowingly participate in matters affecting their financial interests are subject to criminal sanctions. 18 U.S.C. § 208 (2000). Members of Congress may incur civil penalties for seeking prohibited information from a trustee. *See infra* notes 78–79 and accompanying text (discussing

trust's grantor *qua* beneficiary is likely very interested in keeping updated on the status and management of his assets. And it is this grantor turned beneficiary who selects and pays the trustee, and retains the right to revoke the trust. This could potentially affect the trustee's resolve to maintain the blindfold. Furthermore, without the flow of information regarding the management of the trust from the trustee to the beneficiary, the third party trustee becomes less accountable. The lack of trustee oversight may also tend to erode incentives for blindness. A trustee who wants to avoid an after-the-fact claim for breach of fiduciary duty may be inclined to share proscribed information regarding trust assets. Likewise, a grantor troubled by the lack of oversight may pressure a trustee for this prohibited information.

Second, the existence of a blind trust may appear to eliminate the possibility that a conflict of interest will arise for a policymaker, when it in fact does not. A blind trust does not automatically shield a policymaker from conflicts of interest, given that the policymaker knows the identity of the assets he initially placed in a blind trust, and may have restricted a trustee from transferring some of these assets.⁷³ Where a blind trust masks an actual or apparent conflict of interest, members of the public may think that a decision is impartial when it may in fact be tainted by a policymaker's knowledge and protection of his personal investments. Blind trusts, then, impair the openness of the decision-making process that is key to democratic governance.

B. Mechanisms to Substitute for a Beneficiary's Self-Interest

Qualified blind trust rules try to squelch a beneficiary's self-interested desire to seek information from a trustee and attempt to replace the valuable role this self-interest plays in scrutinizing a trustee's actions. The rules also establish a means of monitoring the flow of information, or lack thereof, between an interested party and a trustee.⁷⁴ For example, the qualified blind trust statute puts a supervising ethics office in charge of determining whether a trust arrangement meets the criteria for a qualified blind trust.⁷⁵ The supervising ethics office must also approve of a proposed trustee, presumably by ensuring that the

penalties).

73. See 5 U.S.C. app. § 102(f)(3)(B) (2000) (authorizing a supervising ethics office to approve a restriction on the transferability of an asset).

74. See *supra* note 37 and accompanying text (defining "interested party" as "a reporting individual, his spouse, and any minor or dependent child").

75. 5 U.S.C. § 102(f)(7)(C). See also *supra* note 47 and accompanying text (identifying three supervising ethics offices).

trustee meets the statutory criteria for being independent.⁷⁶ This same office is designated to receive copies of authorized written communications between an interested party and his trustee.⁷⁷ Finally, the Ethics in Government Act subjects a trustee and a reporting individual to civil penalties for attempting to take off the blindfold shielding the reporting individual from knowledge of his assets.⁷⁸ The Attorney General may bring a civil action against anyone who knowingly and willfully, or even negligently, discloses or solicits unauthorized blind trust information.⁷⁹ The bill initially passed by the Senate in 1977 authorized not only civil penalties, but also imprisonment for up to one year for knowing and willful violations.⁸⁰ The final version that Congress enacted in 1978, however, omitted criminal liability.⁸¹

A public official may have additional incentive to maintain blindness beyond the civil penalties provided for in the Ethics in Government Act. A policymaker's circumvention or violation of the blind trust rules could attract public criticism and result in the loss of a position or career. Moreover, separate legislation subjects executive branch employees to criminal liability for substantial and knowing financial conflicts of

76. See *supra* note 46 and accompanying text (discussing independence of trustee).

77. 5 U.S.C. §102 (f)(5)(E). See *supra* notes 40–42 and accompanying text (relating to authorized communication between an interested party and a trustee).

78. A trustee may not disclose unauthorized information to “an interested party,” may not acquire assets prohibited by the trust instrument, may not solicit advice from an interested party regarding the trust if the trust instrument or the statute forbids doing so, and may not fail to file any document required to be filed by the statute. 5 U.S.C. § 102(f)(6)(A)(i)–(iv). A reporting individual may not “solicit or receive” unauthorized information regarding a qualified blind trust, nor fail to file any document required by the qualified blind trust rules. *Id.* § 102(f)(6)(B)(i)–(ii).

79. In an action regarding a knowing and willful violation, a court may not assess a penalty exceeding \$10,000. *Id.* § 102(f)(6)(C)(i). In an action regarding a negligent violation, a court may not assess a penalty exceeding \$5000. *Id.* § 102(f)(6)(C)(ii). This author has not been able to identify any civil actions brought by the Attorney General under these provisions.

80. SENATE BLIND TRUST REPORT, *supra* note 56, app. A at 33 (reproducing the qualified blind trust provisions of S. 555, 95th Cong. (1977), which would have imposed criminal sanctions in § 303(d)(6)(C)(i)).

81. Congress recently authorized imprisonment of not more than one year for any person who knowingly and willfully falsifies information that a person is required to report under 5 U.S.C. § 102, the Ethics in Government Act. Honest Leadership and Open Government Act of 2007, Pub. L. 110-81 § 702, 121 Stat. 735, 775–76, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ081.110.pdf. This criminal penalty apparently applies not only to trust information included in a financial disclosure report, but to any document that must be filed with a supervising ethics office, including a trust document, a list of the assets initially transferred into the trust, a notice from a reporting individual that he has transferred a new asset into an existing blind trust, copies of written communication between a trustee and an interested party, and notification of the dissolution of a blind trust.

interest.⁸² For the trustee, the statutory civil penalties may pale in comparison to liability for breaching fiduciary duties.⁸³

C. Flaws with Statutory Blindfold and Ameliorative Attempts

The safeguards discussed above do not fully replace the oversight traditionally performed by a self-interested beneficiary. Consequently, public officials benefiting from blind trusts may have a strong impulse to seek prohibited trust information. Knowing that a trustee is independent and is not sharing proscribed information with a beneficiary does not ensure the trustee is living up to the trustee's fiduciary duties. Nor do quarterly reports of net cash value or gains and losses of a trust suffice to ensure that a trustee is complying with fiduciary obligations. This information does not guarantee a trustee is adhering to the duty of loyalty,⁸⁴ the prudent investor rule,⁸⁵ the duty to diversify trust assets,⁸⁶

82. 18 U.S.C. §208(a) (2000). *See supra* note 49 (discussing the Bribery, Graft and Conflicts of Interest statute).

83. Under the Uniform Trust Code, a trustee is liable to the beneficiaries for violating trustee duties and may be compelled to redress a breach by "paying money, restoring property, or other means." UNIF. TRUST CODE § 1001(b)(3) (2000) (amended 2005).

84. The trustee's duty of loyalty is to "administer the trust solely in the interest of the beneficiaries." UNIF. TRUST CODE § 802(a) (2000) (amended 2005). The duty of loyalty precludes a trustee from, among other things, engaging personally in transactions involving trust property. UNIF. TRUST CODE § 802(a) (2000) (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 78(b) (2005). *See also* UNIF. PRUDENT INVESTOR ACT § 5 (1994) ("[T]rustee shall invest and manage the trust assets solely in the interest of the beneficiaries."). Forty-five states, the U.S. Virgin Islands, and the District of Columbia have adopted the Uniform Prudent Investor Act, which was approved by the Uniform Law Commissioners in 1994. The National Conference of Commissioners on Uniform State Laws, A Few Facts about the . . . Uniform Prudent Investors Act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upria.asp, (last visited Aug. 23, 2007). *See also* RESTATEMENT (THIRD) OF TRUSTS § 78(a) (2005) (discussing duty of loyalty in the trustee and trust relationship).

85. The prudent investor rule requires the trustee to "invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." UNIF. PRUDENT INVESTOR ACT § 2(a) (1994). While the rule has common law roots, it has been codified in the Uniform Prudent Investor Act and the Uniform Probate Code: the trustee has a duty to "observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . ." UNIF. PROBATE CODE § 7-302 (2005). The Restatement (Third) of Trusts also includes a prudent investor rule. RESTATEMENT (THIRD) OF TRUSTS § 90 (1990) (renumbered & amended 2005). Most states have enacted legislation governing a trustee's investment-related duties. *Prefatory Note*, UNIF. PRUDENT INVESTOR ACT, at 3-4 (1994).

86. UNIF. PRUDENT INVESTOR ACT § 3. The duty to diversify requires a trustee to see that assets comprise a broad, diversified portfolio, rather than allow investments to be concentrated in only a few industries or sectors of the economy. *Id.* § 3 cmt. at 29 (1994). The purpose of diversification is to reduce the risk of investing. *Id.*

rules governing proper delegation of trustee powers,⁸⁷ or the duty to keep “trust property separate from the trustee’s own property.”⁸⁸

The qualified blind trust disclosure and communication restrictions would not necessarily shed light on a trustee in violation of one or more of these duties. For example, a trustee might improperly delegate to a family member the authority to invest sixty percent of the trust funds into fine art (violating the duty to diversify) that is hanging in the trustee’s home (violating the duty of loyalty and the duty to keep trust property separate). Since the quarterly statements might not raise suspicion, the trustee’s violation of these duties could remain unnoticed until the fine art market takes a turn for the worse, the trustee’s home burns to the ground and the trust property is destroyed, or the trustee absconds with the art and is never heard from again. The purpose of a trustee’s accounting obligation to a beneficiary is to enable a beneficiary to discover a breach of fiduciary duty before disaster strikes and the trust assets are lost.⁸⁹

The model blind trusts disseminated by the Senate and executive branch try to plug this gap in trustee accountability by including a provision that requires the trustee to submit a full and complete financial accounting to the policymaker when a blind trust terminates.⁹⁰ This after-the-fact oversight may help ease the mind of a beneficiary. It may, however, present problems for a trustee, because it might encourage an

87. A trustee may delegate investment and management decisions as long as the trustee reasonably selects an agent, defines the scope and terms of delegation, and reviews the agent’s decisions. *Id.* § 9(a)(1)–(3).

88. UNIF. TRUST CODE § 810(b) (2000) (amended 2005); RESTATEMENT (SECOND) OF TRUSTS § 179 (1959) (describing a trustee’s duty to keep trust property separate from the trustee’s own property).

89. Some trust law scholars maintain that fiduciary duties simply are default rules and that the grantor and trustee can agree by contract to waive them. *See, e.g.,* Langbein, *supra* note 65, at 629 (arguing that trustees’ fiduciary duties find their origin in contract law); *see also* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 69 (2005) (pointing out that “[t]he default rule paradigm has increasingly influenced doctrine and permeates the recently promulgated Uniform Trust Code”) (footnote omitted). Under a contractarian view of trusts, a grantor and trustee could privately agree to modify or waive application of some fiduciary rules. Others, however, argue against the ability to waive or significantly modify essential trustee duties. *Id.* at 69–70. Even if a policymaker could legally waive application of fiduciary duties, it seems highly unlikely that he would be willing to do so with no ability to monitor the trustee’s performance.

90. Senate Select Comm. on Ethics, Sample Trust Agreement art. 15 (Oct. 7, 1994), <http://ethics.senate.gov/downloads/pdf/trust.pdf> [hereinafter Senate Sample Trust Agreement] (last visited Sept. 16, 2007); Office of Gov’t Ethics, Model Qualified Blind Trust Provisions art. 17 (Mar. 2002 draft), http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/forms/frmodel_f38.pdf [hereinafter OGE Model Blind Trust] (last visited Sept. 16, 2007). This requirement is not part of the Ethics in Government Act, nor does it appear in the regulations governing executive branch blind trusts.

assessment of the trustee's performance from a superior position of hindsight. Whether a trustee has complied with fiduciary duties, particularly investment-related duties, is supposed to be "determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."⁹¹

Blindness may be easier for trustees who have no proclivity to discuss investment decisions with a beneficiary. Nonetheless, the reporting individual has power over the trustee that may be sufficient to persuade a trustee to divulge information proscribed by the Ethics in Government Act. The reporting individual is the person who selects the trustee and the person who pays the trustee's fees. In addition, the reporting individual can seek to remove the trustee or can simply revoke the trust.

The threshold for trustee removal is not specified in the statute, but is set forth in vague terms in the regulations that govern executive branch blind trusts.⁹² The Ethics in Government Act requires supervising ethics offices to approve only trustee selection, not trustee removal.⁹³ Executive branch regulations and the model blind trust instruments from supervising ethics offices permit a trustee to be substituted "upon a showing of necessity and appropriateness."⁹⁴ A trustee's interest in retaining the policymaker's business may erode resolve to keep investment data undisclosed if a beneficiary is pressuring for information.

91. UNIF. PRUDENT INVESTOR ACT § 8 (1994).

92. Executive branch qualified blind trusts operate under a set of administrative regulations that do not govern legislative qualified blind trusts. 5 C.F.R. §§ 2634.401–409 (2007).

93. 5 U.S.C. app. § 102(f)(3)(D) (2000).

94. 5 C.F.R. § 2634.405(e) (2007) ("The terms of a qualified trust may not be revoked or amended, except with the prior written approval of the Director, and upon a showing of necessity and appropriateness."). The Senate Sample Trust Agreement states that "[a]ny amendment of the terms of this Trust Agreement, including the appointment of a substitute or successor Trustee, shall require the prior written approval [o]f the Committee, upon a showing of necessity and appropriateness unless it relates to the testamentary provisions of this trust." Senate Sample Trust Agreement, *supra* note 90, art. 18. The executive branch Model Qualified Blind Trust Provisions includes nearly identical language. OGE Model Blind Trust, *supra* note 90, art. 20. There apparently is no established standard by which to measure "necessity and appropriateness." Telephone conversation with Katja Eichinger, counsel, Senate Select Comm. on Ethics (Feb. 23, 2007). Interestingly, this express authorization to replace a trustee appears to be relatively new. The Office of Government Ethics' Model Qualified Blind Trust Provisions, dated November 1, 1980, does not include such a provision. Instead, this earlier version allows revocation or amendment to the terms of the trust agreement with prior written approval, upon a showing of necessity and appropriateness—omitting the clause specifically relating to "the appointment of a substitute or successor Trustee." Office of Gov't Ethics, Model Qualified Blind Trust Provisions art. 1(B) (Nov. 1, 1980 draft), *reprinted in* FEDERAL ETHICS HANDBOOK E-83 (1981).

Because blind trust rules do not sufficiently compensate for the lack of oversight by the beneficiary over his trustee found in a traditional sighted trust, blind trusts may not actually avoid conflicts of interest, given the powerful incentive for a beneficiary to seek information on his assets. Moreover, the rules do not address the fact that the existence of a blind trust may lead public observers to believe that policymakers are indeed avoiding conflicts, when this might not be the case. The rules leave a significant gap inasmuch as misleading public comments can suggest a blind trust is truly blind when it might not be. Senator Frist took advantage of this gap by stating publicly that he did not know whether his blind trusts held HCA stock, when he had good reason to know that they did.⁹⁵

The statutory efforts to maintain blindness, to provide oversight and to impose penalties for violations are not sufficient to overcome the problems inherent in blind trusts. Blindness runs contrary to the way most owners treat their property. An owner of property has a natural tendency to seek information on the health and management of an investment, particularly when the welfare of the owner or someone close to the owner depends on the investment. This natural tendency might be particularly strong for a newly-elected member of the House, who would be relinquishing power over his assets for what might only be a two-year term.

IV. RECOMMENDATIONS

A. Full Disclosure Coupled with Recusal or Divestiture

The best solution to the inadequacies of blind trusts is to eliminate their use as an exception to financial disclosure. Complete disclosure should be the rule. As Justice Louis Brandeis remarked, “sunlight . . . is the best of disinfectants.”⁹⁶ The idea that openness of the democratic process leads to accountability is the entire premise behind requiring financial disclosure.⁹⁷ It also comports with the recent trend to enhance

95. See *supra* notes 9–10 and accompanying text.

96. “Publicity is justly commended as a remedy of social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* 92 (1932).

97. The Senate Report on the Ethics in Government Act lists five rationales supporting public financial disclosure. Among them are that disclosure will increase public confidence in government and will enable the public to judge the performance of public officials. S. REP. NO. 95-170, at 21–22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4237–38.

and enforce disclosure in campaign finance law and with regard to policymakers' interaction with lobbyists.⁹⁸

Requiring officials to disclose the identity of their financial interests on public financial disclosure forms puts the burden on the public to discover a potential conflict of interest. Once financial interests are disclosed and a potential conflict brought to light, a policymaker could present evidence that no conflict is posed, seek a waiver from conflict of interest rules, divest himself of the interest, or recuse himself from official decision-making related to the private interest.⁹⁹

The policymakers who initially formulated the qualified blind trust favored disclosure and considered blind trusts extraordinary. The Senate Committee on Governmental Affairs, charged with drafting blind trust standards, recommended that “[f]or most government officials,” conflicts of interest were best avoided by “financial disclosure, together with the divestiture or liquidation of those holdings . . . [creating] potential conflicts . . . or recusal from decisionmaking in matters where the outcome may materially affect the financial interests of the individual or his family”¹⁰⁰ The Committee expressly stated that it did not recommend blind trusts for all government officials.¹⁰¹

98. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The act furthered the interests of disclosure by banning national parties and federal candidates from raising “‘soft money’ ([previously] unregulated contributions to political parties or committees).” Audra L. Wassom, *Campaign Finance Legislation: McCain-Feingold/Shays-Meehan—The Political Equality Rationale and Beyond*, 55 SMU L. REV. 1781, 1790 (2002). See also Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ081.110.pdf (strengthening the Lobbying Disclosure Act).

99. Charles D. Fox & David A. Herpe, *Blind Trusts: Easing the Burdens of Government Service*, TR. & EST., Mar. 1993, at 28, 28–30.

100. SENATE BLIND TRUST REPORT, *supra* note 56, at 12.

101. *Id.* Blind trusts may not be as extraordinary as initially anticipated. According to the Senate Office of Public Records, the number of senators who maintain blind trusts tends to fluctuate between fifteen and twenty. Telephone Conversation with Pamela Gavin, Pub. Records Superintendent, Senate Office of Pub. Records (Feb. 23, 2007). As of February 2006, “in addition to Frist, 17 senators and several members of the House” used blind trusts. Costa, *supra* note 1, at 19. The same number applied as of February 2007. Telephone conversation with Pamela Gavin, Pub. Records Superintendent, Senate Office of Pub. Records (Feb. 23, 2007). The exact number of blind trusts in use in the House of Representatives and the executive branch is unknown. The House of Representatives Clerk’s Office, which houses public documents, would not count the number of blind trusts in use within the House and suggested the author could visit the Legislative Resource Center to perform her own count. Telephone conversation with Janice Glosson, Registration and Compliance Clerk, Legislative Res. Ctr., Office of the Clerk, U.S. House of Representatives (Mar. 6, 2007). When the author attempted to perform a count of House blind trusts in person, the Legislative Resource Center (“Center”) provided a list of names under the heading “Blind Trust Agreements.” Center staff said the list, a 2005 tally of blind trusts among members of the House, was the most recent one available. The list showed that only nine blind trust agreements “still remain active.” Incredibly, however, six of the nine members had retired before 2005, the Honorable Peter Hoagland having retired a full decade earlier. Interview with Janice Glosson,

Disclosure, coupled with alternative actions once a potential conflict arises, is not a trouble-free solution for a variety of reasons. Disclosure itself can be problematic. It may deter qualified individuals from seeking public office or contributing to government service. Disclosure may invite frivolous claims of conflicts that impair governance. A more extreme possibility is that an opponent or opportunist could use financial information to sabotage an official's financial welfare or even threaten family members. The Ethics in Government Act implicitly recognizes these possibilities and declares it unlawful for any person to obtain or use a financial disclosure report for any unlawful or commercial purpose, other than commercial use by media for dissemination to the general public.¹⁰²

Further, even if the disclosure hurdle is cleared, the options for dealing with a potential or actual conflict will not always be easy to apply. In some instances, it may not be feasible for an official to recuse himself as often as the circumstances might require to avoid conflicts of interest. For example, high-level White House employees with diversified investment portfolios who participate in decisions affecting an array of industries could be asked to recuse so frequently that their ability to govern would be impaired. Furthermore, U.S. Senators and Representatives cannot be compelled to disqualify themselves from voting on matters related to their outside financial holdings.¹⁰³ The House of Representatives Ethics Manual explains that recusal is disfavored because it results in "the disenfranchisement of a Member's entire constituency on particular issues."¹⁰⁴ Presumably, financial disclosure operates to deter official decision-making on matters in which a member of Congress has a private financial interest because of the specter of being voted out of office. Despite a Congressional policy against abstention, recusal was presented as a viable alternative to blind trusts in debates before the enactment of current qualified blind trust rules.¹⁰⁵

Registration and Compliance Clerk, Legislative Res. Ctr., Office of the Clerk, U.S. House of Representatives, in Wash., D.C. (Apr. 26, 2007). The list is on file with the author.

102. 5 U.S.C. app. § 105(c)(1) (2000). The Act further authorizes the Attorney General to "bring a civil action against [anyone] who obtains or uses a report" for a prohibited purpose. *Id.* § 105(c)(2).

103. SELECT COMMITTEE ON ETHICS, UNITED STATES SENATE, SENATE ETHICS MANUAL 124 (2003); HOUSE ETHICS MANUAL, *supra* note 3, at 153.

104. See HOUSE ETHICS MANUAL, *supra* note 3, at 157. Senator Frist is reported to have "rejected suggestions" that he recuse himself from consideration of health-care legislation because of his HCA investments. Jube Shiver, Jr., *Frist's Possible Conflicts Seen As No Problem Under Senate Rules*, L.A. TIMES, Dec. 22, 2002, at A27.

105. SENATE BLIND TRUST REPORT, *supra* note 56, at 8, 11 (summarizing testimony from the June 7 and 9, 1977 hearings of the Senate Committee on Governmental Affairs). Senator John

Divestiture also is not a certain cure. Its efficacy as a solution to financial conflicts of interest is limited, depending on the employee's duties. An employee cannot be expected to divest himself of all assets to avoid all financial conflicts. Doing so may present a hardship, particularly if the sale results in significant capital gains tax liability or the interest is a partnership or family corporation.¹⁰⁶ Tax laws can be amended to minimize capital gains tax liability, but there is no remedy to a forced divestiture of family-held financial interests.¹⁰⁷ Under a complete disclosure regime, a person holding financial interests that pose a conflict with official duties, for which both recusal and divestiture is impracticable, may be forced to forgo government service.

Executive branch employees have an additional, albeit limited, option if full disclosure reveals the existence of a conflict of interest. Under the Bribery, Graft, and Conflicts of Interest statute, an executive branch employee may seek a waiver of conflict of interest rules and be exempt from liability for acting in an official capacity while affected by a personal financial interest.¹⁰⁸ A conflict of interest may be waived only for very narrow reasons, one being the employee's financial interest is not substantial enough to affect the integrity of that employee's official duties.¹⁰⁹ Waivers, however, can be time consuming for the official who must explain the financial interest implicated and the conflict that it poses with his duties.

B. Alternative: Reform Blind Trust Legislation

Many policymakers and observers may consider complete financial disclosure an extreme solution to guarantee that a policymaker's financial interests do not affect governmental decisions. Because of the difficulties and risks associated with financial disclosure, it is likely that the blind trust will continue to operate as an exception to disclosure.

If blind trusts remain an alternative to complete disclosure, the qualified blind trust rules must be amended to strengthen their ability to

Durkin advocated that senators be required to disqualify themselves from participating in any vote on any issue in which the senator or a family member had a direct financial interest. *Id.* at 11. Currently, recusal from participation in a matter is the most common form of Ethics Agreement seen in the executive branch. REVIEWER'S REFERENCE, *supra* note 31, at 5-4.

106. Fox & Herpe, *supra* note 99, at 30.

107. A witness at the Senate hearings on blind trusts, Alan Morrison, Director of Litigation, Public Citizen, suggested postponing capital gains tax liability incurred as a result of divestiture. SENATE BLIND TRUST REPORT, *supra* note 56, at 11.

108. 18 U.S.C. § 208(b)(1) (2000).

109. *Id.* The legislative history reflects an intent to allow waivers for interests of "insignificant proportions." S. REP. NO. 87-2213, *reprinted in* 1962 U.S.C.C.A.N. 3852, 3863.

deter conflicts of interest. The remainder of this section proposes fortification of four different areas of blind trust operation and enforcement: 1) the rules regarding initial assets must be modified to ensure that these assets are converted to a form of investment not disclosed to beneficiaries; 2) the system of selecting and monitoring trustees must be changed to minimize a beneficiary's incentive to remove the blindfold and monitor a trustee's performance; 3) a trust beneficiary's financial disclosure requirements must be broadened to facilitate public oversight of potential conflicts of interest; and 4) additional penalties must be imposed for rule violations to further solidify blindness and boost public confidence in blind trusts. These ideas are intended to be a starting place for a larger debate on the appropriate scope and operation of blind trusts.

Taken together, these proposals will help address the two significant flaws of blind trusts. First, reforming qualified blind trusts will better allow the device to actually prevent conflicts because the blindfold will be in place more securely. Second, public watchdogs will have sufficient information about a policymaker's blind trust to know when it is truly blind. In other words, a policymaker will not be able to hide behind the shield of a blind trust when he knows the identity of the assets held in his trust.

Critics might argue that the proposed modifications will do little to actually prevent conflicts of interest in Congress because legislators need not abstain from decision-making when a conflict arises. Even if it becomes public knowledge, for example, that a lawmaker knows the identity of an asset in his qualified blind trust, the legislator cannot be compelled to abstain from decision-making, nor can he be required to request that a trustee dispose of the asset.¹¹⁰ Nonetheless, these modifications will facilitate public oversight of potential conflicts. Legislators can forecast closer scrutiny and more public pressure should they continue to hold assets that pose frequent conflicts with official duties. Accordingly, these modifications may, in fact, prevent conflicts from occurring, at least when a legislator plans to seek reelection.

Furthermore, the only other option to actually prevent conflicts in Congress would be to require blind trusts for legislators who cannot recuse themselves when faced with a conflict of interest. Compulsory blind trusts for legislators, under the following proposed amended rules, would indeed be more effective as a means of avoiding conflicts.

110. See *supra* note 103 and accompanying text. Instructing a trustee to sell an asset that creates a conflict of interest is one of the statutorily authorized subjects of communication. 5 U.S.C. app. § 102(f)(3)(C)(vi) (2000).

However, requiring lawmakers to transfer their assets into blind trusts, along with those of spouses and dependent children, would likely discourage too many qualified candidates from considering public office.

1. Modify Rules Related to Initial Assets

A blind trust is only truly blind once the trustee transfers the initial assets out of the trust and replaces them with investments that the trustee is forbidden from disclosing to the reporting individual. Congress should consider four changes to current qualified blind trust rules to ensure that a reporting individual will, indeed, become blind to the initial assets and that this blindness will occur within a reasonable time after the trust's creation.

First, the rules should limit the type of financial interests that a grantor can place in a blind trust, so that holdings initially deposited are cash or easily transferable assets.¹¹¹ Requiring that a trust be funded solely with these types of readily marketable interests will allow a trustee to convey them out of a trust and reinvest the proceeds into new assets unknown to the reporting individual. Partnership interests, closely held family corporations, certain real estate holdings—assets that the reporting individual truly does not want to or is unable to transfer—should not be allowed to be held in a blind trust.¹¹² This limitation should also apply to any assets that a reporting individual transfers into a qualified blind trust after it is established. Assets that are not readily marketable are not appropriate for blind trusts and should be subject to financial disclosure obligations.¹¹³

Current blind trust rules already recognize the value of transferring only diversified assets to a blind trust. If a policymaker establishes a blind trust with a “well-diversified portfolio of readily marketable

111. This was one of President Carter's initial criteria for blind trusts, set forth in his January 1977 ethics guidelines. *Texts of Carter Statement on Conflicts of Interest and Ethics; Appointees' Guidelines*, N.Y. TIMES, Jan. 5, 1977, at A17. Alaska statutes authorize blind trusts for some public officials to limit their financial disclosure obligations. Alaska's rules do, however, limit the type of assets that may be transferred into the trust. Before 2007, the requirement was only that the assets “shall be marketable.” ALASKA STAT. § 39.50.040(b)(1) (2004). Recent legislation expands this rule to prohibit, among other assets, “assets with permanency that makes transfer by the trustee improbable or impractical.” Act of July 9, 2007, ch. 47, sec. 57, § 39.50.040(b)(1), 2007 Alaska Adv. Legis. Serv. 47 (LexisNexis).

112. Alaska's current statute gives a similar list: “real estate, security interests in personal property, mortgages, and interests in closely held businesses.” *Id.*

113. See SENATE BLIND TRUST REPORT, *supra* note 56, at 5 (suggesting that a blind trust with “holdings [which] are likely to remain unchanged . . . is hardly a blind trust. It is nothing more than a management device.”).

securities,” then the reporting individual does not need to treat the initial trust assets as a financial interest for purposes of conflict of interest rules.¹¹⁴ Furthermore, the trustee does not need to notify the reporting individual when any of these initial assets are transferred out of the trust.¹¹⁵ Nonetheless, a reporting individual currently is not required to restrict blind trust interests to such diversified holdings.

Second, Congress should require a trustee to sell initial assets that may pose a conflict of interest as soon as is practicable after a reporting individual identifies the potential conflict.¹¹⁶ Assuming that the first suggestion to limit initial blind trust holdings to easily transferable assets or cash is followed, a speedy sale of some initial trust property should pose no problem.

Third, blind trust rules should require trustees to turn over a certain percentage of the initial assets within a particular time frame to create more immediate blindness.¹¹⁷ For example, within the first year of the trust’s existence, a trustee could be required to transfer and reinvest at least sixty percent of the initial assets. A turn-over requirement is particularly feasible if the initial assets are limited to readily transferable investments, as suggested above. Trustees may be more comfortable operating under a mandatory sale rule if they are given safe harbor from the application of prudent investor rules.¹¹⁸ While it might not be prudent for a trustee of a traditional private trust to turn over such a large percentage of initial assets, trustees compelled to do so under revised qualified blind trust rules should be shielded from liability.

Finally, a reporting individual should never be allowed to restrict a trustee’s power to transfer a particular asset. Qualified blind trust rules currently allow an official to instruct a trustee not to sell an inception asset, as long as the supervising ethics office approves of the restriction.¹¹⁹ Accordingly, a new qualified blind trust can include assets that the trustee cannot transfer, so the reporting individual will continue to know the identity of these holdings. Assets over which a policymaker

114. 5 U.S.C. app. § 102(f)(4)(B)(i)(I) (2000).

115. *Id.* § 102(f)(4)(B)(i).

116. This was part of the Department of the Interior’s regulations regarding blind trusts for its employees, effective July 1975. SENATE BLIND TRUST REPORT, *supra* note 56, at 3 (citing 43 C.F.R. § 20.735.24(a)(3)).

117. Witnesses suggested this idea during the Senate Committee hearings in 1977, but Congress apparently rejected it as an arbitrary way of monitoring blind trusts. *Id.* at 10 (summarizing testimony from the June 7 and 9, 1977, hearings of the Senate Committee on Governmental Affairs).

118. *See supra* note 85 and accompanying text (discussing the trustee’s duty to manage trust assets as a prudent investor).

119. 5 U.S.C. app. § 102(f)(3)(B) (2000).

wishes to maintain ownership should be disclosed rather than protected by the appearance of blindness. A trustee of a blind trust must have complete discretion to dispose of any trust asset.

These proposals may give rise to the same capital gains tax liability problems identified in the earlier discussion on divestiture. Again, if a reporting individual must divest low tax basis assets so that only diversified assets remain in a blind trust, or a trustee must sell low tax basis property to adhere to these new rules, capital gains tax rules may need to be amended.¹²⁰

2. Strengthen Trustee and Blind Trust Monitoring

A number of modifications can be made to qualified blind trust rules to strengthen compliance, improve the way a trustee's performance is monitored, and enhance the independence of a trustee. These include establishing an independent government body to supervise blind trust creation and administration or delegating such supervisory responsibility to a private entity; authorizing only trustees selected from a slate of preapproved institutional trustees; disclosing the name of blind trustees on financial disclosure reports; assigning trustee monitoring responsibility to an independent entity or to the Attorney General; and clarifying the standards for trustee removal.

To ensure compliance with limits on communication and proper disclosure, the statute should be amended to change the way blind trust rules are supervised. The current supervisory system raises concern for at least two reasons. First, low staff levels cause worry about the viability of managing current oversight duties. Three separate offices now oversee federal qualified blind trusts.¹²¹ These minimally-staffed offices¹²² also manage other types of ethics issues for their institutions, such as oversight of lobbying disclosure rules.¹²³ Among the staffs'

120. SENATE BLIND TRUST REPORT, *supra* note 56, at 11.

121. *See supra* note 47 (identifying supervising ethics offices).

122. The House Committee on Standards of Official Conduct employs eight staff attorneys. Committee Staff, <http://www.house.gov/ethics/CommitteeStaff.htm> (last visited Mar. 14, 2007). The Senate Select Committee on Ethics staff includes four attorneys. JOINT COMM. ON PRINTING, U.S. CONGRESS, CONGRESSIONAL DIRECTORY 375 (Sept. 2006 online rev.), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_congressional_directory_interim_sep06&docid=109thin_txt-63.pdf. The executive branch Office of Government Ethics, Office of General Counsel and Legal Policy employs sixteen staff attorneys, program analysts, and others. U.S. Office of Government Ethics, http://www.usoge.gov/pages/about_oge/staff_directory.pdf (last visited Aug. 16, 2007).

123. The jurisdiction of the House Committee on Standards of Official Conduct is described at <http://www.house.gov/ethics/CommitteeJurisdiction.htm> (last visited Oct. 21, 2007); the scope of the

other duties, these offices are responsible for reviewing and approving all qualified blind trust instruments, initial trustee appointments, and amendments to trusts, and for reviewing all written communications between policymakers and the trustees of their blind trusts.¹²⁴

The practicality of small staffs, particularly in Congress, to manage significant oversight duties has troubled even some legislators. Legislators recently have introduced bills to create an independent Office of Public Integrity to supervise Congress's compliance with ethics rules, after a number of lobbying scandals indicated lax oversight on the part of the House and Senate ethics committee staffs.¹²⁵ The initial 2006 proposal ultimately failed,¹²⁶ but lawmakers have since introduced new bills to establish an independent monitoring body, showing that questions about committee oversight capacities remain.¹²⁷

The second concern with current blind trust oversight relates to whether ethics staffs can watch over the institutions that support them. Skeptics might challenge the efficacy of charging staff with overseeing ethics rules within their own institutions. Staff members are employed at the will of each of the three institutions, yet they are responsible for monitoring compliance with ethics rules and investigating alleged

Senate Select Committee on Ethics is illustrated at <http://ethics.senate.gov/> (last visited Oct. 21, 2007); the functions of the various subdivisions within the executive branch Office of Government ethics are explained at http://www.usoge.gov/pages/about_oge/organ_functions.html (last visited Oct. 21, 2007)

124. 5 U.S.C. app. §§ 102(f)(3)(D), (f)(5)(E) (2000). Blind trust instruments can be lengthy. The executive branch's Office of Government Ethics issued Model Qualified Blind Trust Provisions that totaled seventeen pages, excluding an appendix that lists initial assets. OGE MODEL BLIND TRUST, *supra* note 90.

125. *See, e.g.*, H.R. 4799, 109th Cong. § 1, 3 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4799ih.txt.pdf (proposing an independent Office of Public Integrity that would have oversight of, among other things, financial disclosure and other reports filed by all members of Congress pursuant to the Ethics in Government Act of 1978); S. 2259, 109th Cong. § 2 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s2259is.txt.pdf (proposing an Office of Public Integrity only for oversight of Senate ethics matters). The Center for Public Integrity charged that in the Senate alone, nearly 14,000 lobbying documents that should have been filed were missing and that nearly 300 individuals and entities lobbied without registering. Alex Knott & Sam Stein, *Senate Rejects Office of Public Integrity*, CENTER FOR PUBLIC INTEGRITY, Mar. 28, 2006, <http://www.publicintegrity.org/report.aspx?aid=791>.

126. *See* Sheryl Gay Stolberg, *Senate Approves Lobbying Limits by Wide Margin*, N.Y. TIMES, Mar. 30, 2006, at A1 (reporting on Senate approval of a lobbying reform bill, but rejection of a proposed Office of Public Integrity).

127. *See, e.g.*, H.R. 422, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h422ih.txt.pdf (proposing to establish an Office of Public Integrity "as an independent office within the legislative branch of the Government, to reduce the duties of the Committee on Standards of Official Conduct of the House of Representatives and the Select Committee on Ethics of the Senate, and for other purposes"). Similar to its predecessor bill, this proposal would delegate to an independent office oversight of financial disclosure and other reports filed pursuant to the Ethics in Government Act of 1978. *Id.* § 3(a)(1).

violations. In some cases, the supervising ethics staff themselves might be required to submit financial disclosure statements and opt to establish blind trusts to limit their required disclosures.¹²⁸

These concerns can be addressed by amending the statute to create one independent body whose sole task is to oversee all qualified blind trusts. Such an entity might be structured as an independent agency similar to the Federal Election Commission, which is charged with administering federal campaign finance law.¹²⁹ Alternatively, oversight of blind trust rules could be delegated to a private entity. Privatizing this function poses a hurdle no more significant than has privatization of other government jobs.¹³⁰ Any number of trust companies or accounting firms would likely be qualified and willing to contract to monitor blind trusts.¹³¹

In addition to assigning blind trust supervision to an independent body, the rules imposing blindness might be enhanced by exerting more control over trustee selection and making the identity of a trustee public. The rules could require that policymakers select trustees from a slate of institutional trustees qualified and pre-approved to serve as blind trust fiduciaries. The executive branch qualified blind trust regulations already take a step towards this end by requiring that trustees be

128. See *supra* note 28 and accompanying text (referring to congressional employees required to report financial interests). In Senate debates over a proposed Official Code of Conduct, Senator Goldwater proclaimed that “the American people will not be fooled by an in-house procedure which leaves it up to the Members of Congress to police themselves.” 123 CONG. REC. 10,044, 10,054 (1977) (statement of Senator Barry Goldwater on proposed Senate Resolution 110, Official Code of Conduct). While the 1978 Ethics in Government Act codified some of the rules the Senate voluntarily imposed on itself, the Act leaves monitoring of blind trusts in the hands of each institution.

129. Congress created the Federal Election Commission (“FEC”) in 1974 in an amendment to the Federal Elections Campaign Act. Pub. L. No. 93-443, § 208(a), 88 Stat. 1279–86 (1977) (codified as amended at 2 U.S.C. § 437c (2000)). The Commission is composed of six members who are appointed by the President and confirmed by the Senate. 2 U.S.C. § 437c(a)(1) (2000). Former outside counsel to two prior Speakers of the U.S. House of Representatives recently suggested an independent monitoring body similar to the FEC as a means of regulating the conduct of lobbyists. Randy Evans, *Follow That Lobbyist*, N.Y. TIMES, Feb. 10, 2007, at A15.

130. That is not to say that privatization of public education, prisons, subsidized housing, health care, welfare, and other government services has been without censure. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (discussing constitutional problems with government use of private entities to implement government programs); Mark Calaguas, *Military Privatization: Efficiency or Anarchy?*, 6 CHI.-KENT J. INT’L & COMP. L. 58 (2006), http://www.kentlaw.edu/jicl/articles/spring2006/s2006_Mark_Calaguas.pdf (last visited Aug. 13, 2007) (addressing concerns with the use of private military contractors).

131. The House Committee on Standards of Official Conduct has made a practice of recruiting accounting professionals from the General Accounting Office to assist in reviewing financial disclosure reports. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-89-103, FINANCIAL DISCLOSURE: LEGISLATIVE [sic] BRANCH SYSTEMS IMPROVED BUT CAN BE FURTHER STRENGTHENED 31 (1989).

institutions rather than individuals.¹³² Limiting potential trustees to carefully selected institutional entities could help to ensure that policymakers select trustees with resolve to maintain the blindness.

The reporting individual should also be required to disclose the name of the trustee on each year's public financial disclosure report. Currently, a reporting individual need not do so. In theory, the overseeing ethics office maintains a copy of the trust document naming the trustee. However, that information currently is available to the public only upon specific request and payment of a processing fee.¹³³ While identifying a trustee on each year's financial disclosure report would not directly enhance the monitoring of a trustee, doing so could bring more public or peer pressure on trustees to adhere to blind trust rules and fiduciary duties. For example, watchdogs concerned about the independence of a trustee could determine whether the trustee appears on an elected reporting individual's list of campaign contributors.

Additional modifications should be made to monitor trustee performance in managing trust property. No individual or institution systematically examines whether a trustee is complying with fiduciary duties.¹³⁴ The lack of such oversight creates incentive for a reporting individual to carry out his own oversight and seek more information from a trustee than is authorized by the Ethics in Government Act.

An independent oversight body like the two alternatives proposed above could also be made responsible for overseeing trustee compliance with fiduciary duties. Alternatively, trustees could be required to provide complete accountings to the Attorney General's office. This approach is similar to the way trustees of tax-exempt charitable trusts are

132. 5 C.F.R. § 2634.406(a)(2) (2007). Alaska also requires that the trustee of a blind trust be "a bank, trust company, or other institutional fiduciary." Act of July 9, 2007, ch. 47, sec. 57, § 39.50.040(b)(2), 2007 Alaska Adv. Legis. Serv. 47 (LexisNexis).

133. Document retention and purging policies make some original trust documents unavailable to the public. See *supra* note 101 and accompanying text. The Honest Leadership and Open Government Act of 2007 requires the Clerk of the House of Representatives to post on its Internet site reports that members of the House are required to file "under section 103(h)(1) of the Ethics in Government Act of 1978." Honest Leadership and Open Government Act of 2007, Pub. L. 110-81 § 304, 121 Stat. 735, 752-53, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ081.110.pdf. Section 103(h)(1) refers to "reports required under this title [Financial Disclosure Requirements of Federal Personnel]." 5 U.S.C. app. § 103(h)(1) (2006). Because a trust instrument likely is not a "report," a trust will probably not be included in the documents that the Clerk must post.

134. Trustees managing qualified blind trusts for executive branch officials, however, must maintain and make available for inspection by the Office of Government Ethics ("OGE") the trust's books of account and other records. 5 C.F.R. § 2634.403(b)(11) (2007). There is no requirement that OGE staff actually inspect such records.

monitored.¹³⁵ Members of Congress, however, would likely balk at granting trustee monitoring authority to the Department of Justice.¹³⁶

Finally, blind trust rules should be amended to bolster the long-term independence of trustees. For example, regardless of whether qualified blind trusts continue to be supervised by current ethics offices or by a new independent body, the oversight entity should have the authority to investigate possible violations of trust restrictions and determine that a trust no longer meets the requirements of a qualified blind trust based on violations.¹³⁷ Moreover, qualified blind trust rules should be clear on the standard of proof necessary for trustee removal. Mechanisms need to be in place to ensure that a reporting individual does not remove a trustee simply because the trustee refused to disclose unauthorized information related to the trust assets. Specifically, the standard should be tied to the performance of the investments and whether a trustee is following any general investment guidelines established by the reporting individual.

3. Expand Disclosure of Blind Trust Assets to Promote Citizen Oversight

Additional changes should be made to facilitate public oversight of potential conflicts of interest. Because a reporting individual apparently is not required to report on each financial disclosure statement the identity of assets known still to be in the trust, citizen oversight is extraordinarily cumbersome. The rules should require reporting individuals to list on their annual financial disclosure statements any asset held by a qualified blind trust that they know is still in the trust.

One of the significant innovations of the 1978 Ethics in Government Act authorizing blind trusts is that it refused to consider assets that the grantor initially placed in the trust to be truly blind.¹³⁸ Prior blind trusts

135. Most states have adopted statutes authorizing the state's Attorney General to enforce charitable trusts, but others have established this duty through judicial decisions. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATIONS 305-07 (2004). The problem of enforcing a charitable trust is analogous to concerns regarding oversight of a trustee's actions under a blind trust. Because the beneficiaries of a charitable trust are the public at large, there is no specific person to function like the self-interested beneficiary of a private trust. *Id.* at 301. Accordingly, the government, represented by the Attorney General, exercises oversight of charitable trusts by invoking its *parens patriae* power. *Id.*

136. While likely to present political problems, this idea may not pose a separation of powers problem because the Attorney General would be monitoring the trustees rather than monitoring an independent branch of government.

137. For executive branch qualified blind trusts, the Office of Government Ethics has such investigatory power, as well as the power to revoke the certification of a trust as a qualified blind trust. 5 C.F.R. § 2634.503 (2007).

138. SENATE BLIND TRUST REPORT, *supra* note 56, at 13.

were deemed blind the day after the trust was established despite the fact that the trust obviously contained the same investments placed in it by the government official.¹³⁹ Instead, the new rules required the grantor to disclose the initial assets to a supervising ethics office, which would then be subject to public scrutiny.¹⁴⁰

This treatment of initial assets continues. Policymakers who establish qualified blind trusts must submit to the supervising ethics office a list of the assets initially transferred into the trust, along with the category of the asset's value (not the actual value).¹⁴¹ These lists of initial blind trust assets are available to the public on request.¹⁴² Apparently, however, the public official need not disclose the identity of these known assets on an annual financial disclosure form.¹⁴³ Because the list of initial assets is a public record, there is no obligation to specifically identify them on a public financial disclosure report annually.¹⁴⁴ When a trustee sells all or most of an initial asset, he must notify the public official and the supervising ethics office of the assets sold, unless all of the initial assets were well-diversified.¹⁴⁵ These notices of sale are also available to the public.¹⁴⁶

Thus, in order for a citizen to determine whether a policymaker has a potential conflict of interest where a blind trust is involved, the citizen first must request, and likely pay a fee to obtain, a financial disclosure statement, from which he learns that a policymaker has established a blind trust.¹⁴⁷ It does not, however, indicate whether all of the

139. *Id.*

140. *Id.* at 14.

141. 5 U.S.C. app. § 102(f)(5)(A)(ii) (2000).

142. *Id.* § 102(f)(5)(D).

143. See *supra* notes 6–8, 11, 45 and accompanying text. Senator Frist knew that his blind trusts held HCA stock, yet did not list these assets as belonging to the trust on his financial disclosure report. In fact, Senator Frist maintained on his public financial disclosure form that he did not know the identity of the underlying assets held by his blind trusts. See *supra* notes 6–8, 11.

144. Telephone conversation with Katja Eichinger, Counsel, Senate Select Comm. on Ethics (Feb. 23, 2007).

145. 5 U.S.C. §§ 102(f)(3)(C)(iii), 102(f)(4)(B)(i).

146. *Id.* § 102(f)(5)(D).

147. The cost of Senator Frist's 2006 Financial Disclosure Statement was \$5.00. Watchdog organizations have posted some older forms on the Internet, but these might not reflect any amendments that a reporting individual made to those forms. According to the Senate Office of Public Records, each page copied and produced is twenty cents. Telephone conversation with Pamela Gavin, Pub. Records Superintendent, Senate Office of Pub. Records (Feb. 23, 2007). House of Representatives disclosure forms and some blind trust documents may be printed directly from a database located at the Legislative Resource Center for ten cents a page. Author visit to Legislative Res. Ctr. (Apr. 26, 2007). The Honest Leadership and Open Government Act of 2007 requires that financial disclosure reports of Members of the House be posted on the Clerk's website beginning no later than August 1, 2008. Honest Leadership and Open Government Act of 2007, Pub. L. 110-81 §

individual's assets initially placed in the trust have been sold or otherwise disposed of. For this information, a citizen must request, and pay to obtain, the list of assets initially placed in the trust. While this process may be direct in some instances, blind trust agreements that include a list of initial assets are purged after six years from the House of Representatives public data base.¹⁴⁸ Finally, the citizen must request all of the trustee's reports of assets that have been transferred out of the trust for every year the blind trust has existed, again paying a fee for every record obtained. Even with all of this information, a citizen does not know whether the trust holds assets that the supervising ethics office has authorized the trustee to keep in the trust.¹⁴⁹

Requiring annual disclosure of known blind trust assets would more completely fulfill the spirit of the statutory mandate that an initial asset "shall be considered a financial interest of the reporting individual, for the purposes of any applicable conflict of interest statutes, regulations, or rules of the Federal Government (including section 208 of title 18, United States Code), until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than \$1,000."¹⁵⁰ To treat the asset as a "financial interest" would be to disclose its identity annually, as required for other financial interests.¹⁵¹ Annual disclosure would comport more closely with the way

304, 121 Stat. 735, 752–53, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ081.110.pdf.

148. The Legislative Resource Center, under the auspices of the Office of the Clerk of the U.S. House of Representatives, maintains publicly available documents for the House. This author visited the Legislative Resource Center and was not able to retrieve certain blind trust documents from that office because they had been destroyed, pursuant to a policy to purge financial disclosure documents after six years. Interview with Janice Glosson, Registration and Compliance Clerk, Legislative Res. Ctr., Office of the Clerk, U.S. House of Representatives, in Wash., D.C. (Apr. 26, 2007).

149. A citizen could identify that a restricted asset remains in the trust by comparing the list of initial assets and the notices of sale subsequently received in the ethics office. But simply knowing that the trust retains an asset is not enough information to determine whether the asset poses a conflict of interest. The fact that the reporting individual specifically sought to keep the asset in the trust may raise a more significant specter of a conflict. The policymaker's attachment to the asset might point to a potential conflict of interest regarding a related decision.

150. 5 U.S.C. § 102(f)(4)(A).

151. At least one state that authorizes the use of blind trusts to avoid public financial disclosure requires annual disclosure of initial assets remaining in the trust. California requires public officials to disclose investments and interests in real property, as well as the value category and sources of income. CAL. GOV. CODE §§ 87200–87203 (West 2005). An interest in a blind trust need not be disclosed "if those interests or investments are acquired by the trustee *after* the trust complies with subsection (b)." CAL. CODE REGS. tit. 2 § 18235(a) (2000) (emphasis added). Section (b) requires that a blind trust be established with a disinterested trustee with complete discretion who is prohibited from disclosing information "concerning the replacement assets." Tit. 2 § 18235(b)(1)–(4) (2000). The California Fair Political Practices Commission further clarifies that "you must disclose reportable assets originally transferred into the blind trust and income from those original

in which the original drafters of the qualified blind trust rules envisioned that these initial assets would be treated. Indeed, the Senate report on the Ethics in Government bill states that, “[d]uring that transition [between the time a trust is established and the time a trustee transfers the initial assets], the public interest in knowing that financial conflicts of interests do not exist *is satisfied by financial disclosure.*”¹⁵²

Citizen oversight would also be enhanced if the Ethics in Government Act was amended to reflect a more functional approach to the identification of people who must comply with financial disclosure obligations.¹⁵³ Currently, the Ethics in Government Act requires that an official compelled to disclose financial assets must also include those of his spouse and dependent children.¹⁵⁴ This group of individuals is too narrow. No disclosure is required, for example, for dependent parents or parents-in-law, or unmarried partners. Consequently, the financial interests of these individuals need not be disclosed despite the fact that such interests may impair a policymaker’s impartial judgment.

The circle of those required to report should be broadened to include “dependents and members of a reporting individual’s immediate family,” not just a spouse or dependent child. Alaska’s statutes governing standards of conduct define “immediate family” in a manner that would more securely identify financial conflicts, and could be applied to federal officials required to disclose their financial interests. In Alaska, a person’s “immediate family” includes a spouse or domestic partner.¹⁵⁵ “Immediate family member” encompasses parents, children (including stepchildren and adopted children) and siblings who reside with, are financially dependent on, or share a substantial financial interest with the person.¹⁵⁶

assets until they have been disposed of by the trustee.” CAL. FAIR POLITICAL PRACTICES COMM’N, 2006/2007 FORM 700 STATEMENT OF ECONOMIC INTERESTS REFERENCE PAMPHLET 15 (2006), available at <http://www.fppc.ca.gov/forms/700-06-07/refpamphlet06-07.pdf>.

152. SENATE BLIND TRUST REPORT, *supra* note 56, at 14 (emphasis added).

153. Specifically, §§ 102(e)(1), (f)(1), (f)(2)(C), and (e)(3) of Title 5 app. of the U.S. Code should be amended.

154. 5 U.S.C. app. § 102(e)–(f) (2000).

155. ALASKA STAT. § 24.60.990(a)(6)(A) (2004). A “domestic partner” is a “person who is cohabiting with another person in a relationship that is like a marriage but that is not a legal marriage.” ALASKA STAT. § 24.60.990(a)(5) (2004). Alaska, however, does not require everyone in a policymaker’s “immediate family” to disclose financial information. Instead, certain policymakers, their spouses or domestic partners, dependent children, and (for legislators) nondependent children living with the policymaker must disclose. Act of July 9, 2007, ch. 47, sec. 43, § 24.60.200, 2007 Alaska Adv. Legis. Serv. 47 (LexisNexis) (governing legislators); ALASKA STAT. § 39.50.030 (2004) & Act of July 9, 2007, ch. 47, secs. 55, 56, §§ 39.50.030(b), (h), 2007 Alaska Adv. Legis. Serv. 47 (LexisNexis) (governing judicial officers and the executive branch).

156. ALASKA STAT. § 24.60.990(a)(6)(B) (2004).

Some might reason that the entire purpose for blind trusts is to absolve citizens of monitoring responsibilities. In theory, the blind trust is a replacement for citizen oversight. From this perspective, it should not matter if monitoring is difficult. Nonetheless, because an official with a blind trust knows the identity of his initial assets and the assets a trustee is prevented from transferring, some outside monitoring is still in order, as the situation with Senator Frist's HCA stock illustrates. Requiring annual disclosure of assets that a reporting individual knows to be held in a blind trust will facilitate citizen oversight, as will taking a more realistic approach to determining who must comply with reporting duties.

4. Impose Additional Penalties

Enhancing the penalties related to violating blind trust rules will strengthen the blindness provisions and discourage policymakers from inappropriately hiding behind a blind trust that may not truly be blind. Blind trust rules should impose a fine on a reporting individual who publicly issues a statement disavowing knowledge of assets held in a blind trust when the individual knows or has reason to know of those assets. The current Ethics in Government Act authorizes civil and criminal sanctions against anyone who knowingly and willfully falsifies a financial disclosure report.¹⁵⁷ The Act, however, does not penalize reporting individuals for publicly misrepresenting their knowledge of assets held by a blind trust. The absence of a penalty for such misrepresentation allows a reporting individual to perpetuate the myth of blindness even though the underlying initial assets are still quite visible to the policymaker.¹⁵⁸

It is possible that such false statements could already be considered unlawful under the federal statute criminalizing false statements.¹⁵⁹ However, while the statute has been applied to false statements made on

157. Civil penalties are authorized under 5 U.S.C.S. app. § 104(a) (LEXIS through Pub. L. 110-83 (Sept. 20, 2007)). The recent Honest Leadership and Open Government Act of 2007 added a criminal sanction. *See supra* note 81.

158. *See, e.g.*, public statements that Senator Frist made, *supra* notes 9–10 and accompanying text.

159. 18 U.S.C. § 1001 (2000). To constitute a violation, the false statement made directly or indirectly to the government must relate to “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” § 1001(a). “Jurisdiction is bestowed by any statutory basis for the agency’s access to the information and is present wherever a false statement relates in some way to a matter in which a federal agency has the power to act.” Jennifer L. Kraft & David A. Sadoff, *Ninth Survey of White Collar Crime: False Statements*, 31 AM. CRIM. L. REV. 539, 559–60 (1994) (footnote omitted).

a financial disclosure report,¹⁶⁰ it might be a stretch to apply it to a policymaker's statement to the press regarding his knowledge (or lack thereof) of assets held in a blind trust that is reported on a financial disclosure report. If this false statements statute would not apply, the elements of a fraudulent misrepresentation claim could track those of the Restatement (Second) of Torts § 526.¹⁶¹

Given the strong incentive to remove the blindfold from blind trust beneficiaries, the Ethics in Government Act should also include criminal liability for a trustee or reporting individual's knowing and willful violation of blind trust rules related to disclosing or seeking information. The draft ethics bill approved in 1977 by the Senate did call for criminal sanctions of up to one year imprisonment for a knowing and willful violation.¹⁶² Congress eliminated this in the final version passed in 1978.¹⁶³ The specter of criminal liability would strengthen the resolve of a trustee and reporting individual to comply with qualified blind trust rules seeking to limit the flow of information between them.¹⁶⁴ Moreover, adding a criminal penalty would be consistent with Congress's recent bolstering of civil and criminal penalties for other ethics rules violations.¹⁶⁵

160. See, e.g., *United States v. Espy*, 989 F. Supp. 17, 23 (D.D.C. 1997), *rev'd in part on other grounds*, 145 F.3d 1369 (D.C. Cir. 1998) (violation of Ethics in Government Act by making false statements on financial disclosure was basis for criminal charges under 18 U.S.C. § 1001).

161. The Restatement (Second) of Torts states:

A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

RESTATEMENT (SECOND) OF TORTS § 526 (1977).

162. See *supra* note 80 and accompanying text.

163. However, criminal liability follows where an *executive branch* employee has a conflict of interest and there is a "causal link between [the] particular Government matter in which the employee participates and [the] effect on the [employee's] asset or other interest (direct effect)." There must be a "*real possibility of gain or loss* as a result of development in or resolution of that matter (predictable effect)." REVIEWER'S REFERENCE, *supra* note 31, at 5-1 (citing *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986); 5 C.F.R. §§ 2635.402, 2640.103).

164. Congress recently added a criminal sanction for any person who knowingly and willfully falsifies information required under the Ethics in Government Act reporting obligations of § 102. See *supra* note 81. While this will deter false assertions on documents that a trustee and reporting individual must file, it will do nothing to deter unauthorized communication.

165. The Honest Leadership and Open Government Act of 2007 increased civil fines and added criminal sanctions for failure to comply with lobbying disclosure requirements. Honest Leadership and Open Government Act of 2007, Pub. L. 110-81 § 211, 121 Stat. 735, 749, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ081.110.pdf. Similarly, it increased civil fines and added a criminal penalty for knowing and willful falsification of information an individual is required to report under § 102 of the Ethics in Government Act. *Id.* § 702, 121 stat. at 775-76.

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V. CONCLUSION

Policymakers began to use blind trusts as a means of avoiding full disclosure, in some instances, of assets that a policymaker was unwilling to divest. The lack of uniform standards governing blind trusts compelled Congress to debate the device's merit and conclude that it was valuable if properly regulated. Thirty years of regulation under the Ethics in Government Act is sufficient to determine whether blind trusts adequately insulate governmental decisions from decision-makers' financial interests. While blind trusts may allow some individuals with wealth and privacy concerns to engage in public service when they might otherwise have been discouraged from doing so by financial disclosure rules, the potential loss of integrity in decision-making does not counterbalance this advantage. Perhaps it is time to place more value on the sanctity of the decision-making process and determine if full disclosure unacceptably sacrifices a broad pool of talented public servants. In the interim, while this alternative approach is debated, Congress must strengthen the qualified blind trust rules so that the device can deter financial conflicts of interest and enhance public confidence in the integrity of decision-making.