



COMMISSION MEMBERS:
JANET E. McHUGH, *Chair*
ARUNA MILLER
JAMES N. ROBEY, JR.
CRAIG D. ROSWELL
GENEAU M. THAMES

STATE ETHICS COMMISSION

45 CALVERT STREET, 3RD FLOOR
ANNAPOLIS, MARYLAND 21401
410-260-7770 / 1-877-669-6085
FAX: 410-260-7747

MICHAEL W. LORD
Executive Director

Email Address:
michael.lord@maryland.gov

March 3, 2020

House Bill 1404 – Public Ethics – Financial Disclosure – Requirements (Conflicts of Interest Act)

Testimony Before the Environment and Transportation Committee

The State Ethics Commission (“Commission”) takes no position on House Bill 1404 – Public Ethics – Financial Disclosure – Requirements (Conflicts of Interest Act). It is the Commission’s view that because the bill addresses policy matters, it is best to defer to the determination of the Legislature. However, because the bill also imposes certain obligations on the Commission with respect to the execution of its provisions that give rise to some concerns, the Commission does wish to offer comments and highlight those concerns for the members of the Committee.

The bill adds new §5-501 (d) to Subtitle 5 (conflicts of interest) of the Ethics Law. This section, which applies only to the Governor, the Lieutenant Governor, the Attorney General, and the Comptroller, requires them to place certain types of interests in a blind trust that is approved by the Commission in accordance with regulations meeting requirements specified in the bill. As an alternative to establishing a blind trust, the foregoing individuals would be required to divest their private assets and holdings to resolve likely or potential conflicts of interest with their public duties as determined by the Commission. The bill specifies that the following interests must be placed into the blind trust: a business entity, real property, and other investments, and it requires that the blind trust be established and approved by the Commission before the individuals take the oath of office.

The Commission readily admits that it does not possess on staff expertise with respect to blind trusts, and will likely be required to hire outside counsel when a circumstance arises where a blind trust must be set up. As noted in a Findlaw¹ article entitled *What Is a Blind Trust?*: “Most people will never encounter a blind trust, as they’re primarily used by high profile corporate executives and elected officials with substantial financial assets. Regardless, it’s advised that you seek the counsel of a trust attorney if you need to set up a blind trust.”

¹FindLaw is a business of Thomson Reuters that provides online legal information and online marketing services for law firms.

The Commission's research into this topic has suggested that while blind trusts may be a suitable mechanism for dealing with liquid assets such as cash, stocks, bonds, and mutual funds, they are not an appropriate solution for addressing situations involving business interests and real property. As observed in the foregoing Findlaw article: "Business interests and other non-liquid assets generally must be liquidated prior to being transferred to a blind trust. So an elected official who runs a business, for instance, would have to sell that business before the proceeds are transferred. Stocks, bonds, and other financial assets may be transferred directly to the trust." A booklet entitled *Qualified Blind Trusts (2015)* published by the U.S. Senate Select Committee on Ethics includes the following among its "Frequently Asked Questions":

What are some examples of assets that may be placed in a QBT?

Generally, grantors will inject publicly-traded securities (stock, bonds, and mutual funds) and cash into a QBT. Conversely, **real property, a business entity, or assets held in a qualified retirement plan are typically not ideal assets to inject into a QBT** because those types of assets are generally not able to be managed and controlled entirely by the trustee as required by law.

A Congressional Research Service report entitled *The Use of Blind Trusts by Federal Officials* makes the following point:

It is assumed, of course, that persons in or entering into Government service will own and possess financial assets, instruments and property to a somewhat similar extent as those comparably situated in the general population. Federal officers and employees are not, however, expected to divest themselves of all their worldly goods to avoid conflicts of interest. Rather, with respect to a federal official's personal ownership of assets, financial instruments, and income-producing property, the principal methods of conflict of interest regulation under federal law are disqualification and disclosure.²

Before the Legislature enacts this bill mandating that the Governor, Lieutenant Governor, Attorney General, and Comptroller either set up a blind trust or divest themselves of their private assets and holdings, the Commission urges a full consideration of all options that could provide a meaningful way of eliminating or managing possible conflicts of interests. The Commission is concerned that as drafted, HB1404 would require certain individuals to divest their real property or business interests because of the infeasibility of a blind trust in their particular circumstances. Forcing them to make that choice would very likely discourage good candidates from choosing public service.

The Commission has one further concern with the bill as drafted. As discussed in detail above, the bill requires that an affected individual must either place interests in a blind trust that is approved by the Ethics Commission or divest the private assets and holdings to resolve the likely or potential conflicts of interest with the individual's public duties as determined by the Ethics Commission. One of these two options must be accomplished before the individual takes the oath of office, meaning a potentially complex blind trust, or the divestment of all assets, must

²The Commission shares this view with respect to business interests and real property.

be accomplished in well under three months.³ Simply identifying a qualified trustee and working through the details to engage the trustee's services will take a significant amount of the available time, making the timing challenging even if the interests in question involve liquid assets such as stocks and bonds. The timing becomes unworkable where businesses and real property must be sold in order to comply with the bill's requirements.

The Commission shares the Legislature's concerns about eliminating conflicts of interest and would be pleased to assist in this endeavor. Given that the implementation date for the provision requiring either divestment of assets or their placement in a blind trust is not until October 1, 2022, the Commission strongly recommends that this issue be further studied to ensure that the provisions ultimately adopted will address the areas of concern, take into account viable options, and provide meaningful alternatives that will allow as many qualified individuals as possible to seek elected office while satisfying the intent of the Ethics Law.

Thank you for considering the views of the Commission today.

³The Maryland Constitution, Art. II, §1, provides that the Governor's term of office starts on the third Wednesday of January following his or her election. While there is no express start for the Lt. Governor, generally speaking the Lt. Governor follows the same schedule as the Governor (Art. II, §3). Under Art. VI, §5, the Comptroller's term of office starts on the third Monday of January following his or her election. Finally, Art. V, §1 provides that the Attorney General's term of office starts "from the time of his election and qualification."