

"It Wasn't Me": The Invisible Hand of Blind Trusts

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Understanding Blind Trusts

A trust is a legal arrangement in which an asset owner/grantor (the person who creates the trust and can also be a beneficiary) transfers assets and full control over the assets to the trustee, who manages them for the benefit of certain beneficiaries (which can include the grantor themselves). Blind trusts are special trust arrangements—often used by politicians, public figures or high net worth individuals—where the trustees manage assets without any input or knowledge of the beneficiaries or the grantor, thereby preventing conflicts of interest in public and corporate governance.¹

Unlike traditional trusts, where the grantor maintains control and awareness of the assets, blind trusts require the grantor to relinquish both control and knowledge, ensuring decisions are based solely on the trust's interests without influence from the grantor. In these blind trusts, the asset owner has no access to the specific management and performance details of the trust's assets or control over the trust's actions and receives no reports from the trustee until the trust is set to be dissolved.

Benefits of Blind Trusts

Blind trusts provide a range of benefits, positioning them as a tool to address financial and ethical dilemmas:

- **Mitigation of Conflicts of Interest:** Blind trusts obscure asset details from beneficiaries, reducing potential conflicts between personal financial interests and professional responsibilities.
- **Asset Protection:** Blind trusts offer a protective layer against legal claims and lawsuits by ensuring that the assets are held by the trust, not the beneficiaries. This arrangement shields the assets from any personal legal disputes that may involve the asset owner.
- **Reduced Political Pressure:** Blind trusts reduce scrutiny of public officials' personal wealth, enabling them to focus on their duties without public speculation.
- **Flexibility in Asset Management:** Trustees have broad discretion to manage the assets as they see fit, enabling dynamic and responsive investment strategies.
- **Enhancement of Public Confidence:** Implementing blind trusts can significantly enhance public confidence in the ethical standards of leaders, as these trusts show that officials and executives are prioritising the greater good above personal interests.

¹ 'Blind Trust' https://www.law.cornell.edu/wex/blind_trust (accessed on May 11, 2024)

Limitations of Blind Trusts

Although blind trusts provide many benefits, they also come with limitations that can impact their effectiveness:

- **Dependence on Trustee Integrity:** The success of a blind trust is heavily reliant on the trustee's ability to independently manage the assets without any influence from beneficiaries. Any compromise, whether real or perceived, can significantly undermine the trust's purpose.
- **Challenges of Pre-Existing Knowledge:** The grantor's prior knowledge of assets placed in a blind trust can inadvertently influence future decisions, making it challenging to completely eliminate conflicts of interest.
- **Perception as a Loophole for Accountability:** While blind trusts are designed to prevent conflicts of interest, they can be perceived as mechanisms to hide unethical activities, leading to public scepticism.
- **Complexity and High Costs:** Establishing a blind trust involves complex legal procedures that can be time-consuming and expensive, potentially deterring those with limited resources.
- **Limited Control Over Assets:** Placing assets into a blind trust means losing direct control over their management, which can be a deterrent for those who prefer active involvement in their investment decisions.

These constraints highlight that while blind trusts can be a tool to manage ethical conflicts, they are not a one-size-fits-all solution and must be carefully considered.

A Legal Fog: The Need for Clear Regulations in Nigeria

The use of blind trusts, while common in various international jurisdictions, faces a significant hurdle in Nigeria due to the absence of a specific legal framework governing their operation. Schedule 5, Part I, Paragraph 1 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) ("CFRN"), explicitly prohibits public officers² from engaging in activities where personal interests might conflict with official duties.³

² In Nigeria, the term "public officer" includes, but is not limited to: The President, Vice-President, Governor, and Deputy Governor of a State, Members of the National Assembly and of the Houses of Assembly of the States, Ministers of the Government of the Federation and Commissioners of the Governments of the States, Chief Justice of Nigeria, Justices of the Supreme Court, and other judicial officers, Members of statutory corporations, boards, or other government agencies, Staff of educational institutions owned or controlled by the government, and any other person holding any office in the public service of the Federation or the public service of a State. This broad definition ensures that a wide range of individuals serving in different capacities are subject to the rules and regulations that govern public conduct and accountability.

³ Schedule 5, Paragraph 1 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

However, the CFRN does not mention blind trusts as a mechanism to mitigate conflicts between personal interests and official duties. This gap raises concerns about the viability and legality of implementing blind trusts in Nigeria. Without clear regulations, there is a risk that blind trusts could be misused/abused, compromising their role in preventing conflicts of interest. Given these challenges, there is an urgent need for comprehensive regulatory guidance on the use of blind trusts, especially by public officials in Nigeria. This framework would define how blind trusts should be structured, monitored, and disclosed, closing the current legislative gap, and enhancing the integrity of public governance.

Bridging the Gap: Learning from U.S. Blind Trust Policies

In the United States, the creation and maintenance of blind trusts are governed by both state and federal laws. The Ethics in Government Act of 1978, mandates that top government officials disclose their financial assets unless these assets are placed in a qualified blind trust.⁴ The supervisory ethics entity must also approve both the blind trust and the selection of the trustee.⁵ Furthermore, the Transparent Representation Upholding Service and Trust Act requires congress members and their immediate families to place certain assets into blind trusts, effectively preventing them from trading individual stocks or leveraging their legislative roles to influence investment decisions unethically.⁶ This structured approach ensures that U.S. public officials can safeguard their personal assets from public scrutiny while effectively managing potential conflicts of interest. In states lacking specific blind trust regulations, the federal guidelines provide a benchmark.

This framework provides valuable insights for Nigeria, serving as a model to develop regulations that ensure transparent and conflict-free governance.

Real-World Applications: Blind Trust or Blurred Lines?

Blind trusts are designed to protect officials from conflicts of interest, yet real-world examples show they may not be entirely foolproof. Their effectiveness depends on strict regulatory oversight and complete transparency. Consider the following case of:

Fmr. President Olusegun Obasanjo's Blind Trust: Prior to assuming office in 1999, Fmr. President Obasanjo set up a blind trust, Obasanjo Holdings, to manage Obasanjo Farms Nigeria Limited, distancing himself from its operations to avoid potential conflicts of interest. During his tenure, however, Obasanjo Holdings acquired a significant stake in Transcorp, which was involved in controversial dealings, including the acquisition of NITEL. Despite these assets being held in a blind

⁴ Ethics in Government Act of 1978, 5a U.S. Code § 102

⁵ Ethics in Government Act of 1978, 5a U.S. Code § 102 (3)(D)

⁶ <https://www.congress.gov/bill/118th-congress/house-bill/345/text> (accessed on May 11, 2024)

trust, there were public speculations about Obasanjo's involvement in these transactions, suggesting potential conflicts of interest.⁷

This example highlights the nuanced and often flawed execution of blind trusts. It demonstrates that without comprehensive oversight and clear regulations, the purpose of a blind trust—to promote ethical governance and prevent conflicts of interest—can be easily undermined.

Legal Lenses: Focusing on Blind Trust Compliance

In Nigeria, setting up a blind trust involves navigating a complex legal landscape without specific legislation. However, insights from the CFRN and established practices offer some direction on ensuring that blind trusts meet their intended goal of impartial asset management.

- **Restrictions on Foreign Accounts:** According to Schedule 5, Part I, Paragraph 3 of the CFRN, high-ranking officials like the President, Vice-President, Governors, and other key public officers are prohibited from maintaining or operating bank accounts outside Nigeria.⁸ This measure aims to prevent capital flight and facilitate closer monitoring of public officials' assets domestically. This restriction raises significant questions about the inclusion of foreign assets in a blind trust and the legal boundaries of such an arrangement.
- **Disclosure Requirements:** Schedule 5, Part I, Paragraph 11 of the CFRN, also requires public officers to declare their properties, assets, and liabilities at the beginning of their term, every four years thereafter, and at the end of their tenure.⁹ This requirement also extends to the assets and liabilities of their children under eighteen years of age.¹⁰ Furthermore, public officers are required to justify any assets acquired during their tenure through legitimate means such as income, gifts, or approved loans.¹¹ This high standard of transparency shifts the burden of proof to the officers themselves, and implies that any assets placed in a blind trust are declared in accordance with the Constitution. Consequently, blind trusts **cannot** be used to circumvent the disclosure of assets or to illegitimately acquire assets.
- **Legal and Regulatory Requirements:** Establishing a blind trust also involves formalities such as registering the trust with appropriate authorities, handling asset ownership registrations and obtaining tax clearances from regulatory bodies.

⁷ 'Nigeria: Obasanjo's Blind Trust' (August 23, 2006) - <https://allafrica.com/stories/200608230524.html> (accessed on May 11, 2024)

⁸ Schedule 5, Part I, Paragraph 3 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁹ Schedule 5, Part I, Paragraph 11(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

¹⁰ Schedule 5, Part I, Paragraph 11(1)(b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

¹¹ Schedule 5, Part I, Paragraph 11(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Despite these considerations, blind trusts can be used by politicians and high-ranking individuals to showcase their dedication to ethical governance.

Blind Trusts and Trustee Responsibilities

Blind trusts offer substantial security, backed by strict duties outlined in the Trustee Investment Act (TIA) and the Investment and Securities Act (ISA):

- **Proper Investment of Assets** (Section 2, TIA): Trustees are required to invest in low-risk portfolios to ensure asset safety.
- **Prevention of Asset Depletion** (Section 13, ISA): Trustees are required to regularly report all investments to the SEC.
- **Account Separation** (Section 40, ISA): Trustees must maintain separate accounts for each client to prevent commingling of funds.
- **Duty of Care and Diligence** (Section 168, ISA): Trustees are personally liable for the diligent management of assets.
- **Regulatory Inspections** (Section 172, ISA): The SEC has the authority to inspect and investigate the trustee's portfolio management.
- **Record Maintenance** (Section 181(1)(h), ISA): Trustees must keep detailed records of all transactions and decisions within the Trust.

These measures ensure that blind trusts are managed ethically, protecting both the assets and the integrity of the grantors.

Crafting Effective Blind Trusts in Nigeria

In Nigeria, the adoption of blind trusts by public officers is fraught with legal uncertainties, primarily due to the absence of a specific legal framework governing such arrangements. The success of these trusts is heavily dependent on the trust agreements and requires a structured approach. Consequently, there is a need for precision in drafting and executing these arrangements to ensure they meet their intended purpose effectively.

For advice in establishing and managing blind trusts, or navigating any other trust related challenges, please do not hesitate to contact Oluwadara Omoyele at oluwadara.omoyele@scp-law.com or info@scp-law.com.