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Honorable Mike Hill
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State Banking Department
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Banking Department – Officers and
Offices – Conflicts of Interest –
Banks and Banking

The Superintendent of Banks owning stock in the holding company of a state-chartered bank may not utilize the described blind trust, Employee Stock Ownership Plan, or recusal to avoid violating section 5-2A-3 of the Code of Alabama.

Dear Superintendent Hill:

This opinion of the Attorney General is issued in response to the request of your predecessor, Superintendent John D. Harrison, which this Office understands you want to receive as well.

QUESTIONS

(1) May an individual serve as the Superintendent of Banks while owning stock in the holding company of an Alabama state-chartered bank if the individual:

(a) Places the holding company in a blind trust keeping no authority over the stock or the institution, still receiving financial benefit from the trust during the individual's tenure as Superintendent, and

(b) Recuses from participating in any decision making concerning that institution (bank holding company, affiliate, or subsidiary bank) during the individual's tenure as Superintendent?

(2) Would the recusal procedure prevent the Superintendent from issuing guidance or opinions that affect all banks equally?

(3) If the Superintendent recuses from any decision concerning that institution in which the owned stock is held in a blind trust, would this recusal be considered an absence under section 5-2A-15(b) of the Code of Alabama?

(4) Assuming that a blind trust is an appropriate way to not have a "direct or indirect interest" in an institution, would participation by the individual in the bank's Employee Stock Ownership Plan also be an appropriate way to avoid having a such an interest?

FACTS AND ANALYSIS

The State Banking Department is a state agency that administers the laws regulating banks, trust companies, holding companies, and other financial entities chartered by or operating in the state. ALA. CODE § 5-2A-1 (1996); ALA. CODE § 5-2A-12 (Supp. 2015). Serving as the State Banking Department's chief executive officer, the Superintendent is a public officer appointed by the Governor with the consent of the Senate. ALA. CODE § 5-2A-3 (1996); ALA. CODE § 36-25-1(27) (Supp. 2015).

The Superintendent's statutorily created responsibilities include implementing new banking technology and expanding the banking powers of Alabama banks [ALA. CODE § 5-2A-7 (1996)], promulgating and interpreting banking regulations [ALA. CODE § 5-2A-8 (Supp. 2015)], correcting unsafe or unsound banking matters [ALA. CODE § 5-2A-12 (Supp. 2015)], reporting annually to the Governor [ALA. CODE § 5-2A-13 (1996)], and reporting any criminal activities to the grand jury. ALA. CODE § 5-2A-14 (Supp. 2015). To avoid a conflict of interest, the

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Superintendent “shall be neither directly nor indirectly interested in . . . a bank chartered under the laws of this state.” ALA. CODE § 5-2A-3 (1996).

Black’s Law Dictionary defines “blind trust” as “[a] trust in which the settlor places investments under the control of an independent trustee, usu. to avoid a conflict of interest. *The beneficiary has no knowledge of the trust’s holdings* and no right to participate in the trust’s management.” BLACK’S LAW DICTIONARY 1741 (10th ed. 2014) (emphasis added). The question presented presumes that the Superintendent knows that stock from a holding company will be placed into a blind trust.

This issue is one of first impression for this Office and has not been addressed by the Alabama appellate courts. A similar issue, however, was presented to the Judicial Inquiry Commission (“JIC”) when a judge wanted to rent a building he owned to an attorney that practiced before him. Alabama Judicial Ethics Opinion 86-274, 86-275, and 86-276, 1986 WL 1245806 (Sep. 30, 1986). The judge inquired whether placing the asset (office building) into a blind trust would avoid a conflict of interest. The JIC found that a blind trust is ineffective and remains vulnerable to manipulation when the interested party is aware of the assets contained in the blind trust. As with the judge, a Superintendent familiar with the assets placed into a blind trust could promulgate regulations or otherwise administer laws in ways that are favorable to the assets. The federal government recognizes the same potential for wrongdoing and applies conflict-of-interest statutes and regulations to assets placed into a blind trust until the trustee notifies the interested party that the assets are disposed of or drop below the requisite value. 5 C.F.R. § 2634-403(a)(2) (2016).

An Employee Stock Ownership Plan (“ESOP”) is an individual account plan that is “designated to invest primarily in qualifying employer securities.” 26 C.F.R. § 54.4975-11(b) (2016). Unlike a blind trust that has the potential for diversity of investments, an ESOP is designed to invest primarily in the company sponsoring the plan. Likewise, this will not eliminate a conflict of interest if the Superintendent is aware that the assets of the ESOP are primarily stock in a holding company of a state-chartered bank.

Moreover, neither of the aforementioned duties of the Superintendent nor any other Banking Department statute authorizes the Superintendent to recuse from duties. This Office discussed a similar issue in an opinion to Honorable Albert Hall, Member, House of Representatives, dated June 23, 2004, A.G. No. 2004-164. That opinion

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concluded that a member of a board of adjustment would not have to recuse from voting on issues that affect a civic activist organization of which he or she is a member. The *Hall* opinion explained that there is no statutory authority for recusal from the board of adjustment.

Consistent with these authorities, the Superintendent cannot use the described blind trust, ESOP, or recusal as a shield against the conflict-of-interest provision in section 5-2A-3. Based on the above response, Questions 2 and 3 are moot. This Office does not opine on ethical issues and advises you that Superintendent candidates with these issues should also seek an opinion from the Alabama Ethics Commission.

CONCLUSION

The Superintendent of Banks owning stock in the holding company of a state-chartered bank may not utilize the described blind trust, Employee Stock Ownership Plan, or recusal to avoid violating section 5-2A-3 of the Code of Alabama.

I hope this opinion answers your question(s). If this Office can be of further assistance, please contact Wes Shaw of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:



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