

Office of Government Ethics

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trustee or any other designated fiduciary to assist in any capacity to administer the trust or to manage and control the trust assets, unless the following four conditions are met:

(i) When any interested party learns about such employment or consultation, the person must sign the trust instrument as a party, subject to the prior approval of the Director of the Office of Government Ethics;

(ii) Under all the facts and circumstances, the person is determined pursuant to the requirements for eligible entities under § 2634.406 of this subpart to be independent of any interested party with respect to the trust arrangement;

(iii) The person is instructed by the independent trustee or other designated fiduciary not to disclose publicly or to any interested party information which might specifically identify current trust assets which have been sold or disposed of from trust holdings, other than information relating to the sale or disposition of original trust assets under paragraph (b)(6) of this section; and

(iv) The person is instructed by the trustee or other designated fiduciary to have no direct communication with respect to the trust with any interested party, and to make all indirect communications with respect to the trust only through the trustee, pursuant to paragraph (b)(9) of this section;

(15) The trustee shall not acquire by purchase, grant, gift, exercise of option, or otherwise, without the prior written approval of the Director of the Office of Government Ethics, securities, cash, or other property from any interested party;

(16) The existence of any banking or other client relationship between any interested party and an independent trustee or any other designated fiduciary shall be disclosed in schedules attached to the trust instrument, and no other such relationship shall be instituted unless that relationship is disclosed to the Director of the Office of Government Ethics; and

(17) The independent trustee and any other designated fiduciary shall be

compensated in accordance with schedules annexed to the trust instrument.

[57 FR 11814, Apr. 7, 1992; 57 FR 21854, May 22, 1992]

§ 2634.404 Qualified diversified trusts.

(a) *Definition.* A *qualified diversified trust* is any trust in which the filer, his spouse, or his minor or dependent child has a beneficial interest, which is certified pursuant to § 2634.405 of this subpart by the Director of the Office of Government Ethics, which has a portfolio as specified in paragraph (b) of this section, and which includes in the trust instrument the provisions required by paragraph (c) of this section and has an independent trustee as defined in § 2634.406 of this subpart. See section 102(f)(4)(B) of the Act.

(b) *Required portfolio*—(1) *Standards for initial assets.* It must be established, to the satisfaction of the Director of the Office of Government Ethics, that the initial assets of the trust proposed for certification comprise a widely diversified portfolio of readily marketable securities. The reporting individual or other interested party shall provide the Director with a detailed list of the securities proposed for inclusion in the portfolio, specifying their fair market values and demonstrating that these securities meet the requirements of this paragraph. The initial trust portfolio may not contain securities of issuers having substantial activities in the reporting individual's primary area of responsibility. If requested by the Director, the designated agency ethics official for the reporting individual's employing agency shall certify whether the proposed portfolio meets this standard.

(2) *Diversification standards.* For purposes of paragraph (b)(1) of this section, a portfolio will be widely diversified if:

(i) The value of the securities concentrated in any particular or limited industrial, economic or geographic sector is no more than twenty percent of the total; and

(ii) The value of the securities of any single issuer (other than the United States Government) is no more than five percent of the total.

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(3) *Marketability standard.* For purposes of paragraph (b)(1) of this section, a security will be readily marketable if:

(i) Daily price quotations for the security appear regularly in newspapers of general circulation; and

(ii) The trust holds the security in a quantity that does not unduly impair liquidity.

(c) *Required provisions.* The instrument which establishes a diversified trust must adhere substantively to model drafts circulated by the Office of Government Ethics, and must provide that:

(1) The primary purpose of the diversified trust is to confer on the independent trustee and any other designated fiduciary the sole responsibility to administer the trust and to manage trust assets without the participation by, or the knowledge of, any interested party. This includes the duty to decide when and to what extent the original assets of the trust are to be sold or disposed of and in what investments the proceeds of sale are to be reinvested;

(2) The trustee and any other designated fiduciary in the exercise of their authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party;

(3) The trust's initial assets shall comprise a widely diversified portfolio of readily marketable securities, in accordance with the principles of paragraph (b) of this section, and the trustee shall not acquire additional securities in excess of the diversification standards;

(4) Any portfolio asset transferred to the trust by an interested party is free of any restriction with respect to its transfer or sale, except as fully described in schedules attached to the trust instrument, and as approved by the Director of the Office of Government Ethics;

(5) During the term of the trust, the interested parties shall not pledge, mortgage, or otherwise encumber their interests in the property held under the trust;

(6) None of the assets initially placed in the trust's portfolio shall consist of securities of issuers having substantial

activities in the reporting individual's primary area of Federal responsibility;

(7) The trustee or designee shall prepare the trust's income tax return and, on behalf of any interested party, the personal income tax returns and similar tax documents which may contain information relating to the trust. Under no circumstances shall the trustee or any other designated fiduciary disclose publicly or to any interested party, any of the returns prepared by the trustee or his designee, any information relating to those returns, or any information which might specifically identify current trust assets, or those assets which have been sold or disposed of from trust holdings;

(8) An interested party shall not receive any report on trust holding and sources of trust income, except that the trustee shall, without identifying specifically any asset or holding:

(i) Report quarterly the aggregate market value of the assets representing the interested party's interest in the trust; and

(ii) Report annually, for purposes of section 102(a)(1)(B) of the Act, the aggregate amount actually distributed from the trust to such interested party, or applied for the party's benefit;

(9) There shall be no direct or indirect communication with respect to the trust between an interested party and the independent trustee or any other designated fiduciary unless:

(i) Such communication is in writing, with the prior written approval of the Director of the Office of Government Ethics and is filed with the Director in accordance with § 2634.408(c) of this subpart; and,

(ii) It relates only:

(A) To the request for a distribution from the trust, which does not specify whether the distribution shall be made in cash or in kind;

(B) To the general financial interest and needs of the interested party including, but not limited to, a preference for maximizing current income or long-term capital appreciation; or

(C) To information, documents, and funds concerning income tax obligations arising from sources other than the property held in trust, which are required by the trustee to enable him to file, on behalf of an interested party,

the personal income tax returns and similar tax documents which may contain information relating to the trust;

NOTE: By the terms of paragraph (3)(C)(vi) of section 102(f) of the Act, communications which solely consist of requests for distributions of cash or other unspecified assets of the trust are not required to be in writing. Further, there is no statutory mechanism for pre-screening of proposed communications. However, experience of the Office of Government Ethics over the years dictates the necessity of prohibiting any oral communications between the trustee and an interested party with respect to the trust and pre-screening all proposed written communications, to prevent inadvertent prohibited communications and preserve confidence in the Federal qualified trust program. Accordingly, under its authority pursuant to paragraph (3)(D) of section 102(f) of the Act, the Office of Government Ethics will not approve proposed trust instruments which do not contain language conforming to this policy, except in unusual cases where compelling necessity is demonstrated to the Director, in his sole discretion.

(10) The interested parties shall not seek to obtain, and shall take reasonable action to avoid receiving, information with respect to trust holdings and sources of trust income, including a copy of any tax return filed by the trustee, or any information relating to that return, except for the reports and information specified in paragraph (c)(8) of this section;

(11) An independent trustee and any other designated fiduciary shall file, with the Director of the Office of Government Ethics, by May 15 following any calendar year during which the trust was in existence, a properly executed Certificate of Compliance in the form prescribed in appendix B to this part. In addition, the independent trustee and any other designated fiduciary shall maintain and make available for inspection by the Office of Government Ethics, as it may from time to time direct, the trust's books of account and other records and copies of the trust's tax returns for each taxable year of the trust;

(12) Neither the trustee nor any other designated fiduciary shall knowingly and willfully, or negligently:

(i) Disclose to any interested party any information regarding the trust that may not be disclosed pursuant to title I of the Act, the implementing regulations, or the trust instrument;

(ii) Acquire any holding the ownership of which is prohibited by, or not in accordance with, the terms of the trust instrument;

(iii) Solicit advice from any interested party with respect to the trust, if such solicitation is prohibited by title I of the Act, the implementing regulations, or the trust instrument; or

(iv) Fail to file any document required by title I of the Act or by this part;

(13) An interested party shall not knowingly and willfully, or negligently:

(i) Solicit or receive any information regarding the trust that may not be disclosed pursuant to title I of the Act, the implementing regulations, or the trust instrument; or

(ii) Fail to file any document required by title I of the Act or by this part;

(14) No person, including investment counsel, investment advisers, accountants, and tax preparers, may be employed or consulted by an independent trustee or any other designated fiduciary to assist in any capacity to administer the trust or to manage and control the trust assets, unless, the following four conditions are met:

(i) When an interested party learns about such employment or consultation, the person must sign the trust instrument as a party, subject to the prior approval of the Director of the Office of Government Ethics;

(ii) Under all the facts and circumstances, the person is determined pursuant to the requirements for eligible entities under § 2634.406 of this subpart to be independent of any interested party with respect to the trust arrangement;

(iii) The person is instructed by the independent trustee or other designated fiduciary not to disclose publicly or to any interested party information which might specifically identify current trust assets or those assets which have been sold or disposed of from trust holdings; and

(iv) The person is instructed by an independent trustee or other designated fiduciary to have no direct communication with respect to the trust with any interested party, and to make all indirect communications

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with respect to the trust only through the trustee, pursuant to paragraph (c)(9) of this section;

(15) The trustee shall not acquire by purchase, grant, gift, exercise of option, or otherwise, without the prior written approval of the Director of the Office of Government Ethics, any securities, cash, or other property from any interested party;

(16) The existence of any banking or other client relationship between any interested party and an independent trustee or other designated fiduciary shall be disclosed in schedules attached to the trust instrument, and no other such relationship shall be instituted unless that relationship is disclosed to the Director of the Office of Government Ethics; and

(17) The independent trustee and any other designated fiduciary shall be compensated in accordance with schedules annexed to the trust instrument.

(d) *Personal income tax returns.* In the case of a trust to which this section applies, the trustee shall be given power of attorney to prepare, and shall file, on behalf of any interested party, the personal income tax returns and similar tax documents which may contain information relating to the trust. Appropriate Internal Revenue Service power of attorney forms shall be used for this purpose.

[57 FR 11814, Apr. 7, 1992; 57 FR 21854, May 22, 1992]

§ 2634.405 Certification of trusts.

(a) *Standards.* Before a trust may be classified as a qualified blind or a qualified diversified trust, under the provisions of § 2634.403 or § 2634.404 of this subpart, respectively, the trust must be certified by the Director of the Office of Government Ethics.

(1) A trust will be certified for purposes of this subpart only if:

(i) It is established to the Director's satisfaction that the requirements of section 102(f) of the Act and this subpart have been met;

(ii) Certification is in the public interest; and

(iii) Certification is consistent with the policies established by the Act, this subpart and other applicable laws and regulations.

(2) Certification will not be granted in any case in which, in the Director's sole judgment, such action would not be appropriate because of the ready availability of other remedies, the lack of any substantive ethical concern which would warrant the establishment of a qualified trust, or the nature or negligible value of the assets proposed for a trust's initial portfolio.

(b) *Certification procedures.* The interested parties or their representatives should first consult the staff of the Office of Government Ethics concerning the appropriateness of, and requirements for, certification in the particular case. In order to assure timely trust certification, the interested parties shall be responsible for the expeditious submission to the Office of all required documents and responses to requests for information, including a statement that any interested party who will be a party to a certified trust instrument has read and understands the overview of executive branch qualified trusts in § 2634.401(a) of this subpart. Certification shall be indicated by a letter from the Director to the interested parties or their representatives.

(c) *Certification of pre-existing trusts.* In addition to the normally applicable rules of this subpart D, other considerations apply to pre-existing trusts. Generally, in the case of a pre-existing trust whose terms do not permit amendments satisfying the rules of this subpart, all of the relevant parties (including the reporting individual, any other interested parties, the trustee of the pre-existing trust, and all of its other parties and beneficiaries) will be required pursuant to section 102(f)(7) of the Act to enter into an umbrella agreement specifying that the pre-existing (underlying) trust will be administered in accordance with the provisions of this subpart. A parent or guardian may execute the umbrella agreement on behalf of a required participant who is a dependent child. The umbrella agreement will be certified as a qualified trust if all requirements of this subpart are fulfilled under conditions where required confidentiality with respect to the trust can be assured. A copy of the underlying trust instrument, and a list of its assets at