

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2634

RIN 3209-AA00

#### Executive Branch Qualified Trusts

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Government Ethics proposes to amend the executive branch regulation regarding qualified trusts. The proposed amendments would make a few minor substantive changes, but would primarily put the regulation in a more logical order, make it more readable, and eliminate redundant provisions.

**DATES:** Written comments by the agencies and the public on these proposed amendments are welcome and must be received by November 29, 2011.

**ADDRESSES:** You may submit comments in writing to OGE on this proposed rule, identified by RIN 3209-AA00, by any of the following methods:

- *E-Mail:* usoge@oge.gov. Include the reference “Proposed Revisions to the Executive Branch Qualified Trusts Regulation” in the subject line of the message.

• *Fax:* 202-482-9237.

• *Mail/Hand Delivery/Courier:* Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Deborah J. Bortot, Associate Director for Nominee Financial Disclosure, Office of General Counsel and Legal Policy.

**Instructions:** All submissions must include OGE’s agency name and the Regulation Identifier Number (RIN), 3209-AA00, for this proposed rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Deborah J. Bortot, Associate Director for Nominee Financial Disclosure, Office of General Counsel and Legal Policy, Office of Government Ethics; telephone: 202-482-9300; TTY: 800-877-8339; FAX: 202-482-9237.

#### SUPPLEMENTARY INFORMATION:

#### I. Background: History of the Executive Branch Qualified Trusts Program

The Ethics in Government Act established standards for the creation, composition, and administration of two types of qualified trusts for executive branch officials: Qualified blind trusts and qualified diversified trusts. The purpose of these qualified trusts is to reduce the potential for conflicts of interest by generally preventing an employee from knowing the identity and nature of his financial interests.

With a qualified blind trust, the independent trustee will, over time, sell or dispose of some or all of the initial assets placed in the trust. The executive branch employee will be blind with regard to the assets added by the independent trustee. The most significant objective to be achieved through the use of a qualified blind trust is the lack of knowledge, or actual “blindness,” by an executive branch employee with respect to the holdings in his trust.

The same goal may be achieved through the use of a diversified trust, if that trust holds securities from different issuers in different economic sectors, and if the trust’s interest in any one issuer and sector is limited. Under these conditions, it is unlikely that official actions taken by the executive branch employee who holds a beneficial interest in the trust would affect individual securities or sectors to such a degree that the overall value of the trust’s portfolio would be materially enhanced. Additionally, as with the blind trust, the employee is not told what assets the independent trustee adds to the trust.

OGE has implemented the qualified trusts provisions for the executive branch in subparts D and E of 5 CFR part 2634 (see 57 FR 11800-11830, at 11814-11821 (Apr. 7, 1992)).

#### II. Analysis of Proposed Amendments

The primary purpose of proposing to amend 5 CFR part 2634, subparts D and E is to eliminate redundant provisions and to reorganize the provisions into a more logical order. Because of the extensive rewriting and reorganization of the regulation being proposed, we are publishing the full text of the regulation as proposed for revision. The following discussion summarizes some minor substantive changes that OGE is proposing.

**A. Changes to Definitions:** There are several definitions in the current regulation that differ somewhat from the definitions of these terms in the Ethics in Government Act. To establish consistency between the regulation and the statute, we propose to make certain changes. Proposed § 2634.402(d) would modify the definition of “interested party” so that it refers only to the employee, spouse, and minor or dependent child, just as it does in the statute. In the current regulation at § 2634.401(a)(i), the definition also includes the representatives of these individuals. This change would bring the regulation in line with the statute. Where appropriate in the regulation, such as in the provisions relating to communications among parties to the trust, the proposed regulation would add the word “representative” to the phrase “interested party.”

Proposed § 2634.406(b)(2)(i)(A) would modify the description of “widely diversified portfolio” that is currently in § 2634.404(b)(2)(i). Specifically, the proposed regulation would delete the word “industrial” in referring to a particular sector. With this change, the phrase “widely diversified” would have the same meaning as “widely diversified” in § 2634.310(c)(3). Removing the word “industrial” would provide more uniformity in the financial disclosure program by consistently defining terms that are intended to encompass the same concept.

Current § 2634.407(a) uses the language “knowingly or negligently” in connection with the restrictions on fiduciaries and interested parties. However, the statute at 5 U.S.C. app., sec. 102(f)(6)(A) and current §§ 2634.403(b)(12) and 2634.404(c)(12) identify the same restrictions, but use the language “knowingly and willfully, or negligently.” The proposed regulation would modify current § 2634.407(a) by including the word “willfully” in proposed §§ 2634.408(d) and 2634.408(e) to make the regulation consistent with the statute at 5 U.S.C. app., sec. 102(f)(6)(A). It would also make the regulation internally consistent.

The proposed language of 5 CFR 2634.405(c)(3)(ii) is identical to the current regulation at 5 CFR 2634.406(a)(3)(iii)(B). Consistent with practice, OGE interprets the restriction

to apply to an individual who was a trustee for an employee on another trust.

*B. Standardizing the Terminology:* In various places in the current regulation, the terms “government employee,” “reporting individual,” “government official,” “filer,” and “beneficiary” are used interchangeably. OGE would standardize the terminology by using the term “employee” throughout the proposed regulation. The definition of “employee” would make clear to the public that this regulation applies only to trusts created by executive branch employees, not qualified trusts created by employees of the legislative or judicial branches of the Federal Government.

*C. Changes to the Communications Provisions:* The statute allows an employee to communicate with the independent trustee to request distributions of cash or other unspecified assets from the trust. The current regulation at sections 2634.403(b)(9)(ii)(A) and 2634.404(b)(9)(ii)(A) adds a restriction that does not appear in the statute. It does not allow an executive branch employee to specify whether he wants the distribution in cash or other unspecified assets from the trust. OGE can discern no harm to the integrity of the qualified trust program by allowing the employee to specify whether he wants the distribution in cash or in other unspecified assets from the trust. Proposed § 2634.408(a) would amend the regulation by removing this restriction and allowing the employee to specify whether he wants the distribution in cash or other unspecified assets from the trust.

The proposed regulation would add a provision at § 2634.408(c)(2)(iii) about communications between the independent trustee and the interested parties relating to estimated taxes. This provision would clarify that the independent trustee and the interested parties are permitted to provide income information that is necessary to pay estimated income taxes. This communication must be approved in advance by the Director of OGE.

The proposed language of 5 CFR 2634.408(a)(1)(i)(D) is similar to the language of the current regulation at 5 CFR 2634.403(b)(9)(ii)(D), and it tracks the language of the statute at 5 U.S.C. app. IV, sec. 102(f)(3)(C)(vi). The proposed language clarifies that divestiture is not required because an employee can also comply with 18 U.S.C. sec. 208 by recusal or waiver.

The proposed language of 5 CFR 2634.408(a)(2) is similar to the current regulation at 5 CFR 2634.408(c), and it tracks the language of the statute at 5

U.S.C. app. IV, sec. 102(f)(5)(E). The proposed regulation at 5 CFR 2634.408(a)(2) addresses the filing of copies of communications with the Director. OGE interprets the entire regulatory section at 5 CFR 2634.408 as referring to all communications from the interested party or the party’s representative and the independent trustee or any other designated fiduciary. OGE does not read the word “initiating” as applicable only to the communication that begins an exchange between parties. When a party responds to a communication, OGE views that party as “initiating” a responsive communication.

*D. Reorganization:* As part of the reorganization of the regulation, OGE proposes listing in one section, § 2634.413, all of the qualified trust documents that are publicly available. Currently, these references are scattered throughout the regulation. OGE’s proposed new section would additionally indicate the exception from public availability, consistent with the statute at 5 U.S.C. app., secs. 102(f)(5)(A)(i), (f)(5)(D) and (f)(7)(B), of any qualified trust provisions relating to the testamentary disposition of trust assets. Also, the current regulation fails to list the document that identifies the assets that have been sold from a blind trust. However, the statute lists the document as publicly available. Proposed § 2634.413(a)(4) would add that document to the list of publicly available trust documents. In order to clarify that the Certificate of Independence is publicly available, the proposed rule would also add that document to the list of publicly available documents at § 2634.413(a)(5).

*E. Miscellaneous Changes:* The proposed regulation would add a note at § 2634.404(g) about existing qualified trusts. The note would explain that, in accordance with its current practice, OGE does not allow individuals to roll over existing trusts established in another branch of the Federal Government, or under any State law. Therefore, individuals entering the executive branch, nominees for positions appointed by the President and subject to confirmation by the Senate, and candidates for President or Vice President, need to break open any such existing trusts and disclose the trust assets on their financial disclosure report, as appropriate. However, they can establish a new qualified trust in the executive branch if they wish. The proposed regulation, at 5 CFR 2634.404(f), would eliminate the current requirement, at 5 CFR 2634.403(b)(17) and 2634.404(c)(17), in the existing regulation, that the trust instrument

include the compensation schedule of the independent trustee and any other designated fiduciary. This requirement does not appear in the statute. OGE has determined after years of experience that the private proprietary interests of the independent trustee or other designated fiduciary outweighs any public interest in disclosure of the compensation schedule. The proposed regulation would also eliminate the current provisions about OGE maintaining programs to assess, on a frequent basis, the appropriateness of any trustee approval at current § 2634.406(c) and the appropriateness of any trust certification at current § 2634.405(d). This amendment would make the regulation consistent with current practice.

In addition, proposed § 2634.407(d) would eliminate the requirement in the current regulation at § 2634.405(e) that the independent trustee or settlor must get the approval of the Director of OGE before they can revoke the trust.

Finally, in an attempt to keep the qualified trust regulation in one subpart, OGE is proposing to add the financial disclosure reporting requirements for a qualified trust at § 2634.411. The current qualified trusts regulation does not explain the financial disclosure reporting requirements.

*F. Conforming Amendments:* If these proposed changes are adopted as final, various cross-references in other sections of part 2634 will have to be amended. These technical cross-reference amendments would be included in the final rule stage of this rulemaking.

Finally, in accordance with section 402(b) of the Ethics in Government Act, OGE has consulted with the Department of Justice and the Office of Personnel Management on these proposed rule amendments.

### III. Matters of Regulatory Procedure

#### Administrative Procedure Act

Interested agencies and members of the public are invited to submit written comments on these proposed amendments to OGE’s qualified trusts regulation, to be received by November 29, 2011. The comments will be carefully considered and any appropriate changes will be made before a final rule is adopted and published in the **Federal Register** by OGE.

#### Regulatory Flexibility Act

As Acting Director of OGE, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed amending rule will not have a significant economic impact on a

substantial number of small entities because it primarily affects Federal employees.

#### *Paperwork Reduction Act*

No additional clearance is needed under the Paperwork Reduction Act (44 U.S.C. chapter 35) for these proposed rule amendments, because they would not affect the qualified trusts information collection requirements in the regulation that are currently approved under OMB paperwork control number 3209-0007.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed amendatory rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

#### *Congressional Review Act*

The Office of Government Ethics has determined that this proposed rulemaking involves a non-major rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and Government Accountability Office in accordance with that law.

#### *Executive Order 12866*

In promulgating this proposed rulemaking, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These proposed amendments have also been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to this proposed rulemaking, which would revise 5 CFR part 2634, notes the legal basis and benefits of, as well as the need for, the proposed regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering this amended regulation, if it is adopted as final, since the revisions being proposed only make a few minor substantive changes as well as reorganize and improve OGE's qualified trusts regulatory provisions under the Ethics Act. Finally, this proposed rulemaking is not economically significant under the

Executive order and will not interfere with State, local or Tribal governments.

#### *Executive Order 12988*

As Acting Director of the Office of Government Ethics, I have reviewed this proposed amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

#### **List of Subjects in 5 CFR Part 2634**

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

Approved: September 26, 2011.

**Don W. Fox,**

*Acting Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is proposing to amend part 2634 of subchapter B of chapter XVI of title 5 of the Code of Federal Regulations, as follows:

#### **PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE**

1. The authority citation for part 2634 continues to read as follows:

**Authority:** 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Subparts D and E of part 2634 are revised to read as follows:

#### **Subpart D—Qualified Trusts**

Sec.

- 2634.401 Overview.
- 2634.402 Definitions.
- 2634.403 General description of trusts.
- 2634.404 Summary of procedures for creation of a qualified trust.
- 2634.405 Standards for becoming an independent trustee or other fiduciary.
- 2634.406 Initial portfolio.
- 2634.407 Certification of qualified trust by the Office of Government Ethics.
- 2634.408 Administration of a qualified trust.
- 2634.409 Pre-existing trusts.
- 2634.410 Dissolution.
- 2634.411 Reporting on financial disclosure reports.
- 2634.412 Sanctions and enforcement.
- 2634.413 Public access.
- 2634.414 OMB control number.

#### **Subpart E—Revocation of Trust Certificates and Trustee Approvals**

Sec.

- 2634.501 Purpose and scope.
- 2634.502 Definitions.
- 2634.503 Determinations.

#### **Subpart D—Qualified Trusts**

##### **§ 2634.401 Overview.**

(a) *Purpose.* The Ethics in Government Act of 1978 created two types of qualified trusts, the qualified blind trust and the qualified diversified trust, that may be used by employees to reduce real or apparent conflicts of interest. The primary purpose of an executive branch qualified trust is to confer on an independent trustee and any other designated fiduciary the sole responsibility to administer the trust and to manage trust assets without participation by, or the knowledge of, any interested party or any representative of an interested party. This responsibility 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. Because the requirements set forth in the Ethics in Government Act and this regulation assure true "blindness," employees who have a qualified trust cannot be influenced in the performance of their official duties by their financial interests in the trust assets. Their official actions, under these circumstances, should be free from collateral attack arising out of real or apparent conflicts of interest.

(b) *Scope.* Two characteristics of the qualified trust assure that true "blindness" exists: The independence of the trustee and the restriction on communications between the independent trustee and the interested parties. In order to serve as a trustee for an executive branch qualified trust, an entity must meet the strict requirements for independence set forth in the Ethics in Government Act and this regulation. Restrictions on communications also reinforce the independence of the trustee from the interested parties. During both the establishment of the trust and the administration of the trust, communications are limited to certain reports that are required by the Act and to written communications that are pre-screened by the Office of Government Ethics. No other communications, even about matters not connected to the trust, are permitted between the independent trustee and the interested parties.

##### **§ 2634.402 Definitions.**

*Director* means the Director of the Office of Government Ethics.

*Employee* means an officer or employee of the executive branch of the United States.

*Independent trustee* means a trustee who meets the requirements of section 2634.405 of this subpart and who is approved by the Director under this subpart.

*Interested party* means an employee, the employee's spouse, and any minor or dependent child, in any case in which the employee, spouse, or minor or dependent child has a beneficial interest in the principal or income of a trust proposed for certification under this subpart or certified under this subpart.

*Qualified blind trust* means a trust in which the employee, his spouse, or his minor or dependent child has a beneficial interest and which:

(1) Is certified pursuant to § 2634.407 of this subpart by the Director;

(2) Has a portfolio as specified in § 2634.406(a) of this subpart;

(3) Follows the model trust document prepared by the Office of Government Ethics; and

(4) Has an independent trustee as defined in § 2634.405 of this subpart.

*Qualified diversified trust* means a trust in which the employee, his spouse, or his minor or dependent child has a beneficial interest and which:

(1) Is certified pursuant to § 2634.407 of this subpart by the Director;

(2) Has a portfolio as specified in § 2634.406(b) of this subpart;

(3) Follows the model trust document prepared by the Office of Government Ethics; and

(4) Has an independent trustee as defined in § 2634.405 of this subpart.

*Qualified trust* means a trust described in the Ethics in Government Act of 1978 and this regulation and certified by the Director under this subpart. There are two types of qualified trusts, the qualified blind trust and the qualified diversified trust.

#### **§ 2634.403 General description of trusts.**

(a) *Qualified blind trust.* (1) The qualified blind trust is the most universally adaptable qualified trust. An interested party may put most types of assets (such as cash, stocks, bonds, mutual funds or real estate) into a qualified blind trust.

(2) In the case of a qualified blind trust, 18 U.S.C. sec. 208 and other Federal conflict of interest statutes and regulations apply to the assets that an interested party transfers to the trust until such time as he or she is notified by the independent trustee that such asset has been disposed of or has a value of less than \$1,000. Because the employee knows what assets he or she

placed in the trust and there is no requirement that these assets be diversified, the possibility still exists that the employee could be influenced in the performance of official duties by those interests.

(b) *Qualified diversified trust.* (1) An interested party may put only readily marketable securities into a qualified diversified trust. In addition, the portfolio must meet the diversification requirements of § 2634.406(b)(2) of this subpart.

(2) In the case of a qualified diversified trust, the conflict of interest laws do not apply to the assets that an interested party transfers to the trust. Because the assets that an interested party puts into this trust must meet the diversification requirements set forth in this regulation, the diversification achieves "blindness" with regard to the initial assets.

(3) *Special notice for Presidential appointees*—(i) *In general.* In any case in which the establishment of a qualified diversified trust is contemplated with respect to an individual whose nomination is being considered by a Senate committee, that individual shall inform the committee of the intention to establish a qualified diversified trust at the time of filing a financial disclosure report with the committee. There is a section on the public financial disclosure form, the OGE Form 278, for the individual to indicate whether he or she intends to create a qualified diversified trust.

(ii) *Applicability.* Paragraph (b)(3)(i) of this section is not applicable to members of the uniformed services or Foreign Service officers. The special notice requirement of this section shall not preclude an individual from seeking the certification of a qualified blind trust or qualified diversified trust after the Senate has given its advice and consent to a nomination.

(c) *Conflict of interest laws.* In the case of each type of trust, the conflict of interest laws do not apply to the assets that the independent trustee or any other designated fiduciary adds to the trust.

#### **§ 2634.404 Summary of procedures for creation of a qualified trust.**

(a) *Consultation with the Office of Government Ethics.* Any employee, spouse, or minor or dependent child (or that party's representative) who is interested in setting up a qualified blind or qualified diversified trust must contact the Office of Government Ethics prior to beginning the process of creating the trust. The Office of Government Ethics is the only entity that has the authority to certify a

qualified trust. Because an interested party must propose, for the approval of the Office of Government Ethics, an entity to serve as the independent trustee, the Office of Government Ethics will explain the requirements that an entity must meet in order to qualify as an independent trustee. Such information is essential in order for the employee to interview entities for the position of independent trustee. The Office of Government Ethics will also explain the restrictions on the communications between the interested parties and the proposed trustee.

(b) *Selecting an independent trustee.* After consulting with the Office of Government Ethics, the interested party may interview entities who meet the requirements of § 2634.405(a) of this subpart in order to find one to serve as an independent trustee. At an interview, the interested party may ask general questions about the institution, such as how long it has been in business, its policies and philosophy in managing assets, the types of clients it serves, its prior performance record, and the qualifications of the personnel who would be handling the trust. Because the purpose of a qualified trust is to give an independent trustee the sole responsibility to manage the trust assets without the interested party having any knowledge of the identity of the assets in the trust, the interested party may communicate his or her general financial interests and needs to any institution which he or she interviews. For example, the interested party may communicate a preference for maximizing income or long-term capital gain or for balancing safety of capital with growth. The interested party may not give more specific instructions to the proposed trustee, such as instructing it to maintain a specific allocation between stocks and bonds, or choosing stocks in a particular industry.

(c) *The proposed independent trustee.* (1) The entity selected by an interested party as a possible trustee must contact the Office of Government Ethics to receive guidance on the qualified trust program. The Office of Government Ethics will ask the proposed trustee to submit a letter describing its past and current contacts, including banking and client relationships, with the employee, spouse, and minor or dependent children. The extent of these contacts will determine whether the proposed trustee is independent under the Act and this regulation.

(2) In addition, an interested party may select an investment manager or other fiduciary. Other proposed fiduciaries selected by an interested party, such as an investment manager,

must meet the independence requirements.

(d) *Approval of the independent trustee.* If the Director determines that the proposed trustee meets the requirements of independence, the Director will approve, in writing, that entity as the trustee for the qualified trust.

(e) *Confidentiality Agreement.* If any person other than the independent trustee or designated fiduciary has access to information that must not be shared with an interested party or that party's representative, that person must file a Confidentiality Agreement with the Office of Government Ethics. Persons filing a Confidentiality Agreement must certify that they will not make prohibited contacts with an interested party or that party's representative.

(f) *Drafting the trust instrument.* The representative of the interested party will use the model documents provided by the Office of Government Ethics to draft the trust instrument. There are two annexes to the model trust document: An annex describing any current, permissible banking or client relationships between any interested parties and the independent trustee or other fiduciaries and an annex listing the initial assets that the interested party transfers to the trust. Any deviations from the model trust documents must be approved by the Director.

(g) *Certification of the trust.* The representative then presents the unexecuted trust instrument to the Office of Government Ethics for review. If the Director finds that the instrument conforms to one of the model documents, the Director will certify the qualified trust. After certification, the employee and the independent trustee will sign the trust instrument. They will submit a copy of the executed instrument to the Office of Government Ethics within 30 days of execution. The employee will then transfer the assets to the trust.

**Note to paragraph (g):** Existing qualified trusts approved under any State law or by the legislative or judicial branches of the Federal Government of the United States will not be recertified by the Director. Individuals with existing qualified trusts who are required to file a financial disclosure report upon entering the executive branch, becoming a nominee for a position appointed by the President and subject to confirmation by the Senate, or becoming a candidate for President or Vice President must file a complete financial disclosure form that includes a full disclosure of items in the trust. After filing a complete form, the individual may establish a qualified trust under the policies and provisions of this rule.

#### § 2634.405 Standards for becoming an independent trustee or other fiduciary.

(a) *Eligible entities.* An interested party must select an entity that meets the requirements of this regulation to serve as an independent trustee or other fiduciary. The type of entity that is allowed to serve as an independent trustee is a financial institution, not more than 10 percent of which is owned or controlled by a single individual, which is:

- (1) A bank, as defined in 12 U.S.C. 1841(c); or
- (2) An investment adviser, as defined in 15 U.S.C. 80b-2(a)(11).

**Note to paragraph (a):** By the terms of paragraph (3)(A)(i) of section 102(f) of the Act, an individual who is an attorney, a certified public accountant, a broker, or an investment advisor is also eligible to serve as an independent trustee. However, experience of the Office of Government Ethics over the years dictates the necessity of limiting service as a trustee or other fiduciary to the financial institutions referred to in this paragraph, to maintain effective administration of trust arrangements 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 trustees or other fiduciaries who are not financial institutions, except in unusual cases where compelling necessity is demonstrated to the Director, in his or her sole discretion.

(b) *Orientation.* After the interested party selects a proposed trustee, that proposed trustee should contact the Office of Government Ethics for an orientation about the qualified trust program.

(c) *Independence requirements.* The Director shall determine that a proposed trustee is independent if:

(1) The entity is independent of and unassociated with any interested party so that it cannot be controlled or influenced in the administration of the trust by any interested party;

(2) The entity is not and has not been affiliated with any interested party, and is not a partner of, or involved in any joint venture or other investment or business with, any interested party; and

(3) Any director, officer, or employee of such entity:

(i) Is independent of and unassociated with any interested party so that such director, officer, or employee cannot be controlled or influenced in the administration of the trust by any interested party;

(ii) Is not and has not been employed by any interested party, not served as a director, officer, or employee of any organization affiliated with any interested party, and is not and has not

been a partner of, or involved in any joint venture or other investment with, any interested party; and

(iii) Is not a relative of any interested party.

(d) *Required documents.* In order to make this determination, the proposed trustee must submit the following documentation to the Director:

(1) A letter describing its past and current contacts, including banking and client relationships, with the employee, spouse, or minor or dependent child; and

(2) The Certificate of Independence, which must be executed in the form prescribed in appendix A to this part.

(e) *Determination.* If the Director determines that the current relationships, if any, between the interested party and the independent trustee do not violate the independence requirements, these relationships will be disclosed in an annex to the trust instrument. No additional relationships with the independent trustee may be established unless they are approved by the Director.

(f) *Approval of the trustee.* If the Director determines that the proposed trustee meets applicable requirements, the Office of Government Ethics will send the interested parties and their representatives a letter indicating its approval of a proposed trustee.

(g) *Revocation.* The Director may revoke the approval of a trustee or any other designated fiduciary pursuant to the rules of subpart E of this part.

(h) *Adding fiduciaries.* An independent trustee may employ or consult other entities, such as investment counsel, investment advisers, accountants, and tax preparers, to assist in any capacity to administer the trust or to manage and control the trust assets, if all of the following conditions are met:

(1) When any interested party or any representative of 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;

(2) Under all the facts and circumstances, the person is determined pursuant to the requirements for eligible entities under paragraphs (a) through (f) of this section to be independent of an interested party with respect to the trust arrangement;

(3) 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, other than information relating to the sale or disposition of original trust assets in the case of the blind trust; and

(4) The person is instructed by the independent trustee or other designated fiduciary to have no direct communication with respect to the trust with any interested party or any representative of an interested party, and to make all indirect communications with respect to the trust only through the independent trustee, pursuant to section 2634.408(a) of this subpart.

#### **§ 2634.406 Initial portfolio.**

(a) *Qualified blind trust.* (1) None of the assets initially placed in the portfolio of the blind trust shall include assets the holding of which by any interested party would be prohibited by the Act, by the implementing regulations, or by any other applicable Federal law, Executive order, or regulation.

(2) Except as described in paragraph (a)(1) of this section, an interested party may put most types of assets (such as cash, stocks, bonds, mutual funds or real estate) into a qualified blind trust.

(b) *Qualified diversified trust.* (1) The initial portfolio may not contain securities of entities having substantial activities in the employee's primary area of Federal responsibility. If requested by the Director, the designated agency ethics official for the employee's agency shall certify whether the proposed portfolio meets this standard.

(2) The initial assets of a diversified trust shall comprise a widely diversified portfolio of readily marketable securities.

(i) A portfolio will be widely diversified if:

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

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

(ii) A security will be readily marketable if:

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

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

(iii) The interested party or the party's representative shall provide the Director with a detailed list of the securities proposed for inclusion in the portfolio, specifying their fair market value and

demonstrating that these securities meet the requirements of this paragraph. The Director will determine whether the initial assets of the trust proposed for certification comprise a widely diversified portfolio of readily marketable securities.

(iv) The independent trustee shall not acquire additional securities in excess of the diversification standards.

(c) *Hybrid qualified trust.* A qualified trust may contain both a blind portfolio of assets and a diversified portfolio of assets. The Office of Government Ethics refers to this arrangement as a hybrid qualified trust.

#### **§ 2634.407 Certification of qualified trust by the Office of Government Ethics.**

(a) *General.* After the Director approves the independent trustee, the employee or a representative will prepare the trust instrument for review by the Director. The representative of the interested party will use the model documents provided by the Office of Government Ethics to draft the trust instrument. Any deviations from the model trust documents must be approved by the Director. No trust will be considered qualified for purposes of the Act until the Office of Government Ethics certifies the trust prior to execution.

(b) *Certification procedures.* (1) After the Director has approved the trustee, the interested party or the party's representative must submit the following documents to the Office of Government Ethics for review:

(i) A copy of the proposed, unexecuted trust instrument;

(ii) A list of the assets which the employee, spouse, or minor or dependent child proposes to place in the trust; and

(iii) In the case of a pre-existing trust as described in § 2634.409 of this subpart which the employee asks the Office of Government Ethics to certify, a copy of the pre-existing trust instrument and a list of that trust's assets categorized as to value in accordance with § 2634.301(d).

(2) In order to assure timely trust certification, the interested parties and their representatives shall be responsible for the expeditious submission to the Office of Government Ethics of all required documents and responses to requests for information.

(3) The Director will indicate that he or she has certified the trust in a letter to the interested parties or their representatives. The interested party and the independent trustee may then execute the trust instrument.

(4) Within thirty days after the trust is certified under this section by the

Director, the interested party or that party's representative must file with the Director a copy of the executed trust instrument and all annexed schedules (other than those provisions which relate to the testamentary disposition of the trust assets), including a list of the assets which were transferred to the trust, categorized as to value of each asset in accordance with § 2634.301(d).

(5) Once a trust is classified as a qualified blind or qualified diversified trust in the manner discussed in this section, § 2634.310(b) applies less inclusive financial disclosure requirements to the trust assets.

(c) *Certification standard.* A trust will be certified for purposes of this subpart only if:

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

(2) The Director determines that approval of the trust arrangement as a qualified trust is appropriate to assure compliance with applicable laws and regulations.

(d) *Revocation.* The Director may revoke certification of a trust pursuant to the rules of subpart E of this part.

#### **§ 2634.408 Administration of a qualified trust.**

(a) *General rules on communications between the independent fiduciaries and the interested parties.* (1) There shall be no direct or indirect communications with respect to the qualified trust between an interested party or the party's representative and the independent trustee or any other designated fiduciary with respect to the trust unless:

(i) In the case of the blind trust, the proposed communication is approved in advance by the Director and it relates to:

(A) A distribution of cash or other unspecified assets of the trust;

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

(C) Notification to the independent trustee by the employee that the employee is prohibited by a subsequently applicable statute, Executive order, or regulation from holding an asset, and to direction to the independent trustee that the trust shall not hold that asset; or

(D) Instructions to the independent trustee to sell all of an asset which was initially placed in the trust by an interested party, and which in the determination of the employee creates a real or apparent conflict due to duties the employee subsequently assumed

(but nothing herein requires such instructions); or

(ii) In the case of the diversified trust, the proposed communication is approved in advance by the Director and it relates to:

(A) A distribution of cash or other unspecified assets of the trust;

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

(C) Information, documents, and funds concerning income tax obligations arising from sources other than the property held in trust that are required by the independent 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.

(2) The person initiating a communication approved under paragraphs (a)(1)(i) or (ii) of this section shall file a copy of the communication with the Director within five days of the date of its transmission.

**Note to paragraph (a):** 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 that do not contain language conforming to this policy, except in unusual cases where compelling necessity is demonstrated to the Director, in his or her sole discretion.

(b) *Required reports from the independent trustee to the interested parties*—(1) *Quarterly reports*. The independent trustee shall, without identifying specifically an asset or holding, report quarterly to the interested parties and their representatives the aggregate market value of the assets representing the interested party's interest in the trust. The independent trustee must follow the model document for this report and shall file a copy of the report, within five days of the date of its transmission, with the Director.

(2) *Annual report*. In the case of a qualified blind trust, the independent

trustee shall, without identifying specifically an asset or holding, report annually to the interested parties and their representatives the aggregate amount of the trust's income attributable to the interested party's beneficial interest in the trust, categorized in accordance with section 2634.302(b) to enable the employee to complete the public financial disclosure form. In the case of a qualified diversified trust, the independent trustee shall, without identifying specifically an asset or holding, report annually to the interested parties and their representatives the aggregate amount actually distributed from the trust to the interested party or applied for the party's benefit. Additionally, in the case of the blind trust, the independent trustee shall report on Schedule K-1 the net income or loss of the trust and any other information necessary to enable the interested party to complete an individual tax return. The independent trustee must follow the model document for each report and shall file a copy of the report, within five days of the date of its transmission, with the Director.

(3) *Report of sale of asset*. In the case of the qualified blind trust, the independent trustee shall promptly notify the employee and the Director when any particular asset transferred to the trust by an interested party has been completely disposed of or when the value of that asset is reduced to less than \$1,000. The independent trustee shall file a copy of the report, within five days of the date of its transmission, with the Director.

(c) *Communications regarding trust and beneficiary taxes*. The Act establishes special tax filing procedures to be used by the independent trustee and the trust beneficiaries in order to maintain the substantive separation between trust beneficiaries and trust administrators.

(1) *Trust taxes*. Because a trust is a separate entity distinct from its beneficiaries, an independent trustee must file an annual fiduciary tax return for the trust (IRS Form 1041). The independent trustee is prohibited from providing the interested parties and their representatives with a copy of the trust tax return.

(2) *Beneficiary taxes*. The trust beneficiaries must report income received from the trust on their individual tax returns.

(i) For beneficiaries of qualified blind trusts, the independent trustee sends a modified Schedule K-1 summarizing trust income in appropriate categories to enable the beneficiaries to file individual tax returns. The independent

trustee is prohibited from providing the interested parties or their representatives with the identity of the assets.

(ii) For beneficiaries of qualified diversified trusts, the Act requires the independent trustee to file the individual tax returns on behalf of the trust beneficiaries. The interested parties shall give the independent trustee a power of attorney to prepare and file, on their behalf, 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. The beneficiaries must transmit to the trustee materials concerning taxable transactions and occurrences outside of the trust, pursuant to the requirements in each trust instrument which detail this procedure. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(iii) Some qualified trust beneficiaries may pay estimated income taxes.

(A) In order to pay the proper amount of estimated taxes each quarter, the beneficiaries of a qualified blind trust will need to receive information about the amount of income, if any, generated by the trust each quarter. To assist the beneficiaries, the independent trustee is permitted to send, on a quarterly basis, information about the amount of income generated by the trust in that quarter. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(B) In order to pay the proper amount of estimated taxes each quarter, the independent trustee of a qualified diversified trust will need to receive information about the amount of income, if any, earned by the beneficiaries on assets that are not in the trust. To assist the independent trustee, the beneficiaries are permitted to send, on a quarterly basis, information about the amount of income they earned in that quarter on assets that are outside of the trust. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(d) *Responsibilities of the independent trustee and other fiduciaries*. (1) Any independent trustee or any other designated fiduciary of a qualified trust shall not knowingly and willfully, or negligently:

(i) Disclose any information to an interested party or that party's representative with respect to the trust that may not be disclosed under title I

of the Act, the implementing regulations or the trust instrument;

(ii) Acquire any holding:

(A) Directly from an interested party or that party's representative without the prior written approval of the Director; or

(B) The ownership of which is prohibited by, or not in accordance with, title I of the Act, the implementing regulations, the trust instrument, or with other applicable statutes and regulations;

(iii) Solicit advice from any interested party or any representative of that party with respect to such trust, which 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 the implementing regulations or the trust instrument.

(2) The independent 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 or that party's representative.

(3) The independent trustee shall not acquire by purchase, grant, gift, exercise of option, or otherwise, without the prior written approval of the Director, securities, cash, or other property from any interested party or any representative of an interested party.

(4) Certificate of Compliance. An independent trustee and any other designated fiduciary shall file, with the Director by May 15th 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 such 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.

(e) *Responsibilities of the interested parties and their representatives.* (1) Interested parties to a qualified trust and their representatives shall not knowingly and willfully, or negligently:

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

(ii) Fail to file any document required by this subpart or the trust instrument.

(2) The interested parties and their representatives shall not take any action to obtain, and shall take reasonable action to avoid receiving, information with respect to the holdings and the

sources of income of the trust, including a copy of any trust tax return filed by the independent trustee, or any information relating to that return, except for the reports and information specified in paragraphs (b) and (c) of this section.

(3) In the case of any qualified trust, the interested party shall, within thirty days of transferring an asset, other than cash, to a previously established qualified trust, file a report with the Director, which identifies each asset, categorized as to value in accordance with section 2634.301(d).

(4) Any portfolio asset transferred to the trust by an interested party shall be 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.

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

(f) *Amendment of the trust.* The independent trustee and the interested parties may amend the terms of a qualified trust only with the prior written approval of the Director and upon a showing of necessity and appropriateness.

#### **§ 2634.409 Pre-existing trusts.**

An interested party may place a pre-existing irrevocable trust into a qualified trust, which may then be certified by the Office of Government Ethics. This arrangement should be considered in the case of a pre-existing trust whose terms do not permit amendments that are necessary to satisfy the rules of this subpart. All of the relevant parties (including the employee, any other interested parties, the trustee of the pre-existing trust, and all of the other parties and beneficiaries of the pre-existing trust) will be required pursuant to section 102(f)(7) of the Act to enter into an umbrella trust agreement. The umbrella trust agreement will specify that the pre-existing trust will be administered in accordance with the provisions of this subpart. A parent or guardian may execute the umbrella trust agreement on behalf of a required participant who is a minor child. The Office of Government Ethics has prepared model umbrella trust agreements that the employee can use in this circumstance. The umbrella trust agreement will be certified as a qualified trust if all of the requirements of this subpart are fulfilled under conditions where required confidentiality with respect to the trust can be assured.

(1) The executed trust instrument and any amendments (other than those provisions which relate to the testamentary disposition of the trust assets), and a list of the assets which were transferred to the trust, categorized as to the value of each asset;

#### **§ 2634.410 Dissolution.**

Within thirty days of dissolution of a qualified trust, the interested party shall file a report of the dissolution with the Director and a list of assets of the trust at the time of the dissolution, categorized as to value in accordance with § 2634.301(d).

#### **§ 2634.411 Reporting on financial disclosure reports.**

An employee who files a public or confidential financial disclosure report shall report the trust on the financial disclosure report.

(a) *Public financial disclosure report.* If the employee files a public financial disclosure report, the employee shall report the trust as an asset, including the overall category of value of the trust. Additionally, in the case of a qualified blind trust, the employee shall disclose the category of value of income earned by the trust. In the case of a qualified diversified trust, the employee shall report the category of value of income received from the trust by the employee, the employee's spouse, or dependent child, or applied for the benefit of any of them.

(b) *Confidential financial disclosure report.* In the case of a confidential financial disclosure report, the employee shall report the trust as an asset.

#### **§ 2634.412 Sanctions and enforcement.**

Section 2634.702 sets forth civil sanctions, as provided by sections 102(f)(6)(C)(i) and (ii) of the Act and as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act, which apply to any interested party, independent trustee, or other trust fiduciary who violates his obligations under the Act, its implementing regulations, or the trust instrument. Subpart E of this part delineates the procedure which must be followed with respect to the revocation of trust certificates and trustee approvals.

#### **§ 2634.413 Public access.**

(a) *Documents subject to public disclosure requirements.* The following qualified trust documents filed by a public filer, nominee, or candidate are subject to the public disclosure requirements of § 2634.603:

(1) The executed trust instrument and any amendments (other than those provisions which relate to the testamentary disposition of the trust assets), and a list of the assets which were transferred to the trust, categorized as to the value of each asset;

(2) The identity of each additional asset (other than cash) transferred to a

qualified trust by an interested party during the life of the trust, categorized as to the value of each asset;

(3) The report of the dissolution of the trust and a list of the assets of the trust at the time of the dissolution, categorized as to the value of each asset;

(4) In the case of a blind trust, the lists provided by the independent trustee of assets placed in the trust by an interested party which have been sold; and

(5) The Certificates of Independence and Compliance.

(b) *Documents exempt from public disclosure requirements.* The following documents are exempt from the public disclosure requirements of § 2634.603 and also shall not be disclosed to any interested party:

(1) Any document (and the information contained therein) filed under the requirements of § 2634.408(a) and (c) of this subpart; and

(2) Any document (and the information contained therein) inspected under the requirements of § 2634.408(d)(4) of this subpart (other than a Certificate of Compliance).

#### **§ 2634.414 OMB control number.**

The various model trust documents and Certificates of Independence and Compliance referenced in this subpart, together with the underlying regulatory provisions (and appendices A, B and C to this part for the Certificates), are all approved by the Office of Management and Budget under control number 3209-0007.

### **Subpart E—Revocation of Trust Certificates and Trustee Approvals**

#### **§ 2634.501 Purpose and scope.**

(a) *Purpose.* This subpart establishes the procedures of the Office of Government Ethics for enforcement of the qualified blind trust, qualified diversified trust, and independent trustee provisions of title I of the Ethics in Government Act of 1978, as amended, and the regulation issued thereunder (subpart D of this part).

(b) *Scope.* This subpart applies to all trustee approvals and trust certifications pursuant to §§ 2634.405 and 2634.407, respectively.

#### **§ 2634.502 Definitions.**

For purposes of this subpart (unless otherwise indicated), the term “trust restrictions” means the applicable provisions of title I of the Ethics in Government Act of 1978, subpart D of this part, and the trust instrument.

#### **§ 2634.503 Determinations.**

(a) *Violations.* If the Office of Government Ethics learns that

violations or apparent violations of the trust restrictions exist that may warrant revocations of trust certification or trustee approval previously granted under § 2634.407 or § 2634.405, the Director may, pursuant to the procedure specified in paragraph (b) of this section, appoint an attorney on the staff of the Office of Government Ethics to review the matter. After completing the review, the attorney will submit findings and recommendations to the Director.

(b) *Review procedure.* (1) In the review of the matter, the attorney shall perform such examination and analysis of violations or apparent violations as the attorney deems reasonable.

(2) The attorney shall provide an independent trustee and, if appropriate, the interested parties, with:

(i) Notice that revocation of trust certification or trustee approval is under consideration pursuant to the procedures in this subpart;

(ii) A summary of the violation or apparent violations that shall state the preliminary facts and circumstances of the transactions or occurrences involved with sufficient particularity to permit the recipients to determine the nature of the allegations; and

(iii) Notice that the recipients may present evidence and submit statements on any matter in issue within ten business days of the recipient's actual receipt of the notice and summary.

(c) *Determination.* (1) In making determinations with respect to the violations or apparent violations under this section, the Director shall consider the findings and recommendations submitted by the attorney, as well as any written statements submitted by the independent trustee or interested parties.

(2) The Director may take one of the following actions upon finding a violation or violations of the trust restrictions:

(i) Issue an order revoking trust certification or trustee approval;

(ii) Resolve the matter through any other remedial action within the Director's authority;

(iii) Order further examination and analysis of the violation or apparent violation; or

(iv) Decline to take further action.

(3) If the Director issues an order of revocation, parties to the trust instrument will receive prompt written notification. The notice shall state the basis for the revocation and shall inform the parties of the consequence of the revocation, which will be either of the following:

(i) The trust is no longer a qualified blind or qualified diversified trust for any purpose under Federal law; or

(ii) The independent trustee may no longer serve the trust in any capacity and must be replaced by a successor, who is subject to the prior written approval of the Director.

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### **FEDERAL TRADE COMMISSION**

#### **16 CFR Part 435**

##### **Mail or Telephone Order Merchandise Rule**

**AGENCY:** Federal Trade Commission (“Commission” or “FTC”).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The FTC proposes amending the Mail or Telephone Order Merchandise Rule (“MTOR” or “Rule”) to respond to the development of new technologies and changed commercial practices. By doing so, the Commission seeks to accomplish four objectives: clarify that the Rule covers all Internet merchandise orders regardless of whether the buyer accesses the Internet through a telephone line, allow sellers to provide refunds and refund notices to buyers by any means at least as fast and reliable as first class mail, clarify sellers' obligations under the Rule for sales made using payment methods not specifically enumerated in the Rule, and require sellers to process any third party credit card refund within seven working days of a buyer's right to a refund vesting. Additionally, the FTC sets forth its interpretation of “demand drafts” as the functional equivalents of checks for purposes of the Rule.

**DATES:** Written comments must be received on or before December 14, 2011. Parties interested in an opportunity to present views orally, should submit a request to do so, and such requests must be received on or before December 14, 2011.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the

**SUPPLEMENTARY INFORMATION** section below. Write “16 CFR Part 435—Mail or Telephone Order Merchandise” on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/MTORamendmentsNPRM>, by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the