

2634.606 Updated disclosure of advice-and-consent nominees.

(a) General rule. Each individual described in 2634.201(c) who is nominated by the President for appointment to a position that requires advice and consent of the Senate, shall, at or before the commencement of the first Senate committee hearing to consider the nomination, submit to the committee an amendment to the report previously filed under 2634.201(c) and transmit copies of the amendment to the designated agency ethics official referred to in 2634.605(c)(1) of this subpart and to the Office of Government Ethics, which shall update, through the period ending no more than five days prior to the commencement of the hearing, the disclosure of information required with respect to receipt of:

(1) Outside earned income; and

(2) Honoraria, as defined in 2634.105(i).

(b) Additional certification. In each case to which this section applies, the Director of the Office of Government Ethics shall, at the request of the committee considering the nomination, submit to the committee an opinion letter of the nature described in 2634.605(c)(3) of this subpart concerning the updated disclosure. If the committee requests such a letter, the expedited procedure provided by 2634.605(c) of this subpart shall govern review of the updated disclosure, which shall be deemed a report filed for purposes of that paragraph.

2634.607 Advice and opinions.

To assist employees in avoiding situations in which they might violate applicable financial disclosure laws and regulations:

(a) The Director of the Office of Government Ethics shall render formal advisory opinions and informal advisory letters on generally applicable matters, or on important matters of first impression. See also subpart C of part 2638 of this chapter. The Director shall insure that these advisory opinions and letters are compiled, published, and made available to agency ethics officials and the public. Good faith reliance on such opinions shall provide a defense to any penalty or sanction provided by this part for fact situations indistinguishable in all material aspects from those in the opinion.

(b) Designated agency ethics officials will offer advice and guidance to employees as needed, to assist them in complying with the requirements of the Act and this part on financial disclosure.

Subpart G -- Penalties

Source: 57 FR 11824, Apr. 7, 1992, unless otherwise noted.

2634.701 Failure to file or falsifying reports.

(a) Referral of cases. The head of each agency, each Secretary concerned, or the Director of the Office of Government Ethics, as appropriate, shall refer to the Attorney General the name of any

individual when there is reasonable cause to believe that such individual has willfully failed to file a public report or information required on such report, or has willfully falsified any information (public or confidential) required to be reported under this part.

(b) Civil action. The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information required by filers of public reports under subpart B of this part. The court in which the action is brought may assess against the individual a civil penalty in any amount, not to exceed \$10,000, as provided by section 104 of the Act.

(c) Criminal action. An individual may also be prosecuted under criminal statutes for supplying false information on any financial disclosure report.

(d) Administrative remedies. The President, the Vice President, the Director of the Office of Government Ethics, the Secretary concerned, the head of each agency, and the Office of Personnel Management may take appropriate personnel or other action in accordance with applicable law or regulation against any individual for failing to file public or confidential reports required by this part, for filing such reports late, or for falsifying or failing to report required information. This may include adverse action under 5 CFR part 752, if applicable.

2634.702 Breaches by trust fiduciaries and interested parties.

(a) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of 2634.407 of this part. The court in which the action is brought may assess against the individual a civil penalty in any amount, not to exceed \$10,000, as provided by section 102(f)(6)(C)(i) of the Act.

(b) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of 2634.407. The court in which the action is brought may assess against the individual a civil penalty in any amount, not to exceed \$5,000, as provided by section 102(f)(6)(C)(ii) of the Act.

2634.703 Misuse of public reports.

The Attorney General may bring a civil action against any person who obtains or uses a report filed under this part for any purpose prohibited by section 105(c)(1) of the Act, as incorporated in 2634.603(f). The court in which the action is brought may assess against the person a penalty in any amount, not to exceed \$10,000, as provided by section 105 of the Act. This remedy shall be in addition to any other remedy available under statutory or common law.

2634.704 Late filing fee.

(a) In general. In accordance with section 104(d) of the Act, any reporting individual who is required to file a public financial disclosure report by the provisions of this part shall remit a late filing fee of \$200 to the appropriate agency, payable to the U.S. Treasury, if such report is filed more than thirty days after the later of:

(1) The date such report is required to be filed pursuant to the provisions of this part; or

(2) The last day of any filing extension period granted pursuant to 2634.201(f).

(b) Exceptions. (1) The Director of the Office of Government Ethics may waive the late filing fee if he determines that the delay in filing was caused by extraordinary circumstances which made the delay reasonably necessary.

(2) Any request for a waiver of this filing fee provision must be made in writing and submitted with supporting documentation to the designated agency ethics official. That official shall review the request, and then forward it, with an opinion on the merits, to the Office of Government Ethics.

(c) Procedure. (1) The designated agency ethics official shall maintain a record of the due dates for all public reports which the employees of that agency must file, along with the new filing dates under extensions which have been granted. Each report received by the agency shall be marked with the date of receipt. For any report which has not been received by the end of the period specified in paragraph (a) of this section, the agency shall advise the delinquent filer, in writing, that:

(i) Because his financial disclosure report is more than thirty days overdue, a \$200 late filing fee will become due at the time of filing, by reason of section 104(d) of the Act and 2634.704;

(ii) The filer is directed to remit to the agency, with the completed report, the \$200 fee, payable to the United States Treasury;

(iii) If the filer fails to remit the \$200 fee when filing his late report, it shall be subject to agency debt collection procedures; and

(iv) If extraordinary circumstances exist that would justify a request for a fee waiver, pursuant to paragraph (b) of this section, such request and supporting documentation must be submitted immediately.

(2) Upon receipt from the reporting individual of the \$200 late filing fee, the collecting agency shall note the payment in its records, and shall then forward the money to the U.S. Treasury for deposit as miscellaneous receipts, in accordance with 31 U.S.C. 3302 and section 8030.30 of Volume 1 of the Treasury Financial Manual. If payment is not forthcoming, agency debt collection procedures shall be utilized, which may include salary or administrative offset, initiation of a tax refund offset, or other authorized action.

(d) Late filing fee not exclusive remedy. The late filing fee is in addition to other sanctions which may be imposed for late filing. See 2634.701 of this subpart.

(e) Confidential filers. The late filing fee does not apply to confidential filers. Late filing of confidential reports will be handled administratively under 2634.701(d) of this subpart.

Subpart H -- Ethics Agreements

Source: 57 FR 11825, Apr. 7, 1992, unless otherwise noted.

2634.801 Scope.

This subpart applies to ethics agreements made by any reporting individual under either subpart B or I of this part, to resolve potential or actual conflicts of interest.

2634.802 Requirements.

(a) Ethics agreement defined. The term ethics agreement shall include, for the purposes of this subpart, any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest, such as:

- (1) Preparation of a written instrument for recusing (disqualifying) the individual from one or more particular matters or categories of official action;
- (2) Divestiture of a financial interest;
- (3) Resignation from a position with a non-Federal business or other entity;
- (4) Procurement of a waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3); or
- (5) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part.

(b) Time limit. The ethics agreement shall specify that the individual must complete the action which he or she has agreed to undertake within a period not to exceed three months from the date of the agreement (or of Senate confirmation, if applicable). Exceptions to the three-month deadline can be made in cases of unusual hardship, as determined by the Office of Government Ethics, for those ethics agreements which are submitted to it (see 2634.803 (a), (b), or (c) of this subpart), or by the designated agency ethics official for all other ethics agreements.

Example. An official of the ABC Aircraft Company is nominated to a Department of Defense position requiring the advice and consent of the Senate. As a condition of assuming the position, the individual has agreed to divest himself of his ABC Aircraft stock which he recently acquired while he was an officer with the company. However, the Securities and Exchange Commission prohibits officers of public corporations from deriving a profit from the sale of stock in the corporation in which they hold office within six months of acquiring the stock, and directs that any such profit must be returned to the issuing corporation or its stock holders. Since meeting the usual three-month time limit specified in this subpart for satisfying an ethics agreement might entail losing any profit that could be realized on the sale of this stock, the nominee requests that the limit be extended beyond the six-month period imposed by the Commission. Written approval would have to be obtained from the Office of Government Ethics to extend the customary three-month period.

2634.803 Notification of ethics agreements.

(a) Nominees to positions requiring the advice and consent of the Senate. (1) In the case of a nominee referred to in 2634.201(c), the designated agency ethics official shall include with the report submitted to the Office of Government Ethics any ethics agreement which the nominee has made.

(2) A designated agency ethics official shall immediately notify the Office of Government Ethics of any ethics agreement of a nominee which is made or becomes known to the designated agency ethics official after the submission of the nominee's report to the Office of Government Ethics. This requirement includes an ethics agreement made between a nominee and the Senate confirmation committee. The nominee shall immediately report to the designated agency ethics official any ethics agreement made with the committee.

(3) The Office of Government Ethics shall immediately apprise the designated agency ethics official and the Senate confirmation committee of any ethics agreements made directly between the nominee and the Office of Government Ethics.

(b) Incumbents in positions requiring the advice and consent of the Senate. In the case of a position which required the advice and consent of the Senate, the designated agency ethics official shall keep the Office of Government Ethics apprised of any ethics agreements which the incumbent makes, or which become known to the designated agency ethics official during the incumbent's term in his position.

(c) Designated agency ethics officials not holding advice-and-consent positions, and employees of the Offices referred to in 2634.602(c)(1)(v). A designated agency ethics official who has entered into a ethics agreement, and who is neither a nominee to, nor an incumbent in, a position which requires the advice and consent of the Senate, as well as each employee of the Executive Office of the President or the Office of the Vice President who is referred to in 2634.602(c)(1)(v), shall include with his initial financial disclosure report submitted to the Office of Government Ethics any ethics agreement undertaken by such official or employee. He shall also apprise the Office of Government Ethics promptly of any subsequent ethics agreement.

(d) Other reporting individuals. Other reporting individuals desiring to enter into ethics agreement may do so with the designated agency ethics official for the employee's agency. Where an ethics agreement has been made with someone other than the designated agency ethics official, the officer or employee involved shall promptly apprise the designated agency ethics official of the agreement.

[57 FR 11825, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

2634.804 Evidence of compliance.

(a) Requisite evidence of action taken. (1) For ethics agreements of nominees to positions requiring the advice and consent of the Senate, evidence of any action taken to comply with the terms of such ethics agreements shall be submitted by the designated agency ethics official, upon receipt of the evidence, to the Office of Government Ethics and to the Senate confirmation committee.

(2) For ethics agreements of incumbents in positions which required the advice and consent of the Senate, evidence of any action taken to comply with the terms of such ethics agreements shall be submitted promptly by the designated agency ethics official to the Office of Government Ethics. A designated agency ethics official or an employee referred to in 2634.803(c) of this subpart who is neither a nominee to, nor an incumbent in, an advice-and-consent position, must also promptly send evidence of any action taken to comply with the terms of an ethics agreement to the Office of Government Ethics.

(3) In the case of all other reporting individuals, evidence of any action taken to comply with the terms of an ethics agreement must be sent promptly to the designated agency ethics official.

(b) The following materials and any other appropriate information constitute evidence of the action taken:

(1) Recusal. A copy of any recusal instrument listing and describing the specific matters or subjects to which the recusal applies, a statement of the method by which the agency will enforce the recusal, and a list of the positions of those agency employees involved in the enforcement (i.e., the individual's immediate subordinates and supervisors).

Example. A new employee of a Federal safety board owns stock in Nationwide Airlines. She has entered into an ethics agreement to recuse herself from participating in any accident investigations involving that company's aircraft until such time as she can complete a divestiture of the asset. She must give a copy of the recusal instrument to her immediate subordinates and supervisors, and to the designated agency ethics official. The employee has also agreed to recuse herself from any particular matter (as that term is used in 18 U.S.C. 208) that might arise with respect to any of her present or future holdings. There is no requirement to execute a recusal instrument for this type of general recusal, because it is simply a promise to abide by the terms of the statute.

(2) Divestiture or resignation. Written notification that the divestiture or resignation has occurred.

(3) Waivers. A copy of any waivers issued pursuant to 18 U.S.C. 208(b)(1) or (b)(3) and signed by the appropriate supervisory official.

(4) Blind or diversified trusts. Information required by subpart D of this part to be submitted to the Office of Government Ethics for its certification of any qualified trust instrument. If the Office of Government Ethics does not certify the trust, the designated agency ethics official and, as appropriate, the Senate confirmation committee should be informed immediately.

[57 FR 11825, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

2634.805 Retention.

Records of ethics agreements and actions described in this subpart shall be maintained with the individual's financial disclosure report at the agency and additionally, in the case of filers described in paragraphs (a), (b), and (c) of 2634.803 of this subpart, at the Office of Government

Ethics.

[57 FR 11825, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

Subpart I -- Confidential Financial Disclosure Reports

Source: 57 FR 11826, Apr. 7, 1992, unless otherwise noted.

2634.901 Policies of confidential financial disclosure reporting.

(a) The confidential financial reporting system set forth in this subpart is designed to complement the public reporting system established by title I of the Act. High-level officials in the executive branch are required to report certain financial interests publicly to ensure that every citizen can have confidence in the integrity of the Federal Government. It is equally important in order to guarantee the efficient and honest operation of the Government that other, less senior, executive branch employees, whose Government duties involve the exercise of significant discretion in certain sensitive areas, report their financial interests and outside business activities to their employing agencies, to facilitate the review of possible conflicts of interest. These reports assist an agency in administering its ethics program and counseling its employees. Such reports are filed on a confidential basis.

(b) The confidential reporting system seeks from employees only that information which is relevant to the administration and application of criminal conflict of interest laws, administrative standards of conduct, and agency-specific statutory and program-related restrictions. The basic content of the reports required by 2634.907 of this subpart reflects that certain information is generally relevant to all agencies. However, depending upon an agency's authorized activities and any special or unique circumstances, additional information may be necessary. In these situations, and subject to the prior written approval of the Director of the Office of Government Ethics, agencies may formulate supplemental reporting requirements by following the procedures of 2634.103 and 2634.601(b).

(c) This subpart also allows an agency to request, on a confidential basis, additional information from persons who are already subject to the public reporting requirements of this part. The public reporting requirements of the Act address Governmentwide concerns. The reporting requirements of this subpart allow agencies to confront special or unique agency concerns. If those concerns prompt an agency to seek more extensive reporting from employees who file public reports, it may proceed on a confidential, nonpublic basis, with prior written approval from the Director of the Office of Government Ethics, under the procedures of 2634.103 and 2634.601(b).

(d) The reports filed pursuant to this subpart are specifically characterized as "confidential," and are required to be withheld from the public, pursuant to section 107(a) of the Act. Section 107(a) leaves no discretion on this issue with the agencies. See also 2634.604. Further, Executive Order 12674 as modified by Executive Order 12731 provides, in section 201(d), for a system of nonpublic (confidential) executive branch financial disclosure to complement the Act's system of public disclosure. The confidential reports provided for by this subpart contain sensitive commercial and financial information, as well as personal privacy-protected information. These reports and the information which they contain are, accordingly, exempt from being released to

the public, under exemptions 3 (A) and (B), 4, and 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3) (A) and (B), (b)(4), and (b)(6). Additional FOIA exemptions may apply to particular reports or portions of reports. Agency personnel shall not publicly release the reports or the information which these reports contain, except pursuant to an order issued by a Federal court, or as otherwise provided under applicable provisions of the Privacy Act (5 U.S.C. 552a), and in the OGE/GOVT - 2 Governmentwide executive branch Privacy Act system of records, as well as any applicable agency records system. If an agency statute requires the public reporting of certain information and, for purposes of convenience, an agency chooses to collect that information on the confidential report form filed under this subpart, only the special statutory information may be released to the public, pursuant to the terms of the statute under which it was collected.

(e) Executive branch agencies hire or use the paid and unpaid services of many individuals on an advisory or other less than full-time basis as special Government employees. These employees may include experts and consultants to the Government, as well as members of Government advisory committees. It is important for those agencies that utilize such services, and for the individuals who provide the services, to anticipate and avoid real or apparent conflicts of interest. The confidential financial disclosure system promotes that goal, with special Government employees among those required to file confidential reports.

(f) For additional policies and definitions of terms applicable to both the public and confidential reporting systems, see 2634.104 and 2634.105.

2634.902 Transition to the new confidential financial disclosure reporting system.

(a) The new confidential financial disclosure reporting system for executive branch departments and agencies established by this subpart will become effective on October 5, 1992. Until this subpart becomes effective, each executive agency shall continue to comply with its current regulations governing confidential statements regarding employment and financial interests, as promulgated under prior Executive Order 11222, and 5 CFR part 735, 735.106 and subpart D, and as preserved by the savings clause of section 502(a) of Executive Order 12674 as modified by Executive Order 12731.

(b) To the extent feasible, agencies should strive to eliminate overlaps between, or gaps in, reporting periods as the transition to the new confidential reporting system takes place. However, the reporting periods prescribed under the new system, once effective, must be followed.

(c) Once effective, this new subpart and any other portions of this part applicable to confidential reports will supersede 5 CFR 735.106, all of subpart D of part 735 of 5 CFR, and any implementing agency regulations thereunder. See also 2634.103 and 2634.601 and 2634.901 of this subpart concerning requests for new special supplemental agency regulations and forms, where necessary.

(d) As required by applicable law and Executive order, the confidential statements regarding employment and financial interests which were collected and retained under existing confidential financial disclosure reporting systems shall continue to be held in confidence. See section 107(a)(2) of the Act, as effective January 1, 1991 (as well as former section 207(a)(2) thereof, which

was effective through December 31, 1990), section 502(b) of Executive Order 12674 as modified by Executive Order 12731 (and the prior ethics Executive Orders 11222 and 12565), and 2634.901(d) of this subpart.

2634.903 General requirements, filing dates, and extensions.

(a) Incumbents. A confidential filer who holds a position or office described in 2634.904 of this subpart and who performs the duties of that position or office for a period in excess of 60 days during the twelve-month period ending September 30 (including more than 60 days in an acting capacity) shall file a confidential report containing the information prescribed in 2634.907 and 2634.908 of this subpart on or before October 31 immediately following that period. For confidential filers under 2634.904(c) of this subpart, consult agency supplemental regulations.

(b) New entrants. (1) Not later than 30 days after assuming a new position or office described in 2634.904 of this subpart (which also encompasses the reappointment or redesignation of a special Government employee, including one who is serving on an advisory committee), a confidential filer shall file a confidential report containing the information prescribed in 2634.907 and 2634.908 of this subpart. For confidential filers under 2634.904(c) of this subpart, consult agency supplemental regulations.

(2) However, no report shall be required if the individual:

(i) Has, within 30 days prior to assuming his position, left another position or office referred to in 2634.904 of this subpart or in 2634.202, and has previously satisfied the reporting requirements applicable to that former position, but a copy of the report filed by the individual while in that position should be made available to the appointing agency, and the individual must comply with any agency requirement for a supplementary report for the new position;

(ii) Has already filed such a report in connection with consideration for appointment to the position. The agency may request that the individual update such a report if more than six months has expired since it was filed.

(3) Notwithstanding the filing deadline prescribed in paragraph (b)(1) of this section, agencies may at their discretion, require that prospective entrants into positions described in 2634.904 of this subpart file their new entrant confidential financial disclosure reports prior to serving in such positions, to insure that there are no insurmountable ethics concerns. Additionally, a special Government employee who has been appointed to serve on an advisory committee shall file the required report before any advice is rendered by the employee to the agency, or in no event, later than the first committee meeting.

(c) Advisory committee definition. For purposes of this subpart, the term advisory committee shall have the meaning given to that term under section 3 of the Federal Advisory Committee Act (5 U.S.C. app). Specifically, it means any committee, board, commission, council, conference, panel, task force, or other similar group which is established by statute or reorganization plan, or established or utilized by the President or one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. Such term includes any subcommittee or other subgroup of any advisory

committee, but does not include the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, or any committee composed wholly of full-time officers or employees of the Federal Government.

(d) Extensions. The agency reviewing official may, for good cause shown, grant to any employee or class of employees a filing extension or several extensions totaling not more than 90 days.

2634.904 Confidential filer defined.

The term confidential filer includes:

(a) Each officer or employee in the executive branch whose position is classified at GS - 15 or below of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate which is less than 120% of the minimum rate of basic pay for GS - 15 of the General Schedule; each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is less than 120% of the minimum rate of basic pay for GS - 15 of the General Schedule; each member of a uniformed service whose pay grade is less than O - 7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the designated agency ethics official to be of equal classification; if:

(1) The agency concludes that the duties and responsibilities of the employee's position require that employee to participate personally and substantially through decision or the exercise of significant judgment, in taking a Government action regarding:

(i) Contracting or procurement;

(ii) Administering or monitoring grants, subsidies, licenses, or other federally conferred financial or operational benefits;

(iii) Regulating or auditing any non-Federal entity; or

(iv) Other activities in which the final decision or action will have a direct and substantial economic effect on the interests of any non-Federal entity; or

(2) The agency concludes that the duties and responsibilities of the employee's position require the employee to file such a report to avoid involvement in a real or apparent conflict of interest, and to carry out the purposes behind any statute, Executive order, rule, or regulation applicable to or administered by that employee. Positions which might be subject to a reporting requirement under this subparagraph include those with duties which involve investigating or prosecuting violations of criminal or civil law.

Example 1. A contracting officer drafts the requests for proposals for data processing equipment of significant value which is to be purchased by his agency. He works with substantial independence of action. The contracting officer should be required to file a confidential financial disclosure report.

Example 2. An agency environmental engineer inspects a manufacturing plant to ascertain whether the plant complies with a permit to release a certain effluent into a nearby stream. Any violation of the permit standards may result in civil penalties for the plant, and in criminal penalties for the plant's management based upon any action which they took to create the violation. If the agency engineer determines that the plant does not meet the permit requirements, he can require the plant to terminate release of the effluent until the plant satisfies the permit standards. Because the engineer exercises substantial discretion in regulating the plant's activities, and because his final decisions will have a substantial economic effect on the plant's interests, the engineer should be required to file a confidential financial disclosure report.

(b) Unless required to file public financial disclosure reports by subpart B of this part, all executive branch special Government employees as defined in 18 U.S.C 202(a) and 2634.105(s), including those who serve on advisory committees. The term special Government employees does not include an advisory committee member who serves only as a representative of an industry of other outside entity or who is already a Federal employee.

Example 1. A consultant to an agency periodically advises the agency regarding important foreign policy matters. The consultant must file a confidential report if he is retained as a special Government employee and not an independent contractor.

Example 2. An advisory committee member (who is not a private group representative) attends four committee meetings every year to provide advice to an agency about pharmaceutical matters. No compensation is received by the committee member, other than travel expenses. The advisory committee member must file a confidential disclosure report, since she is a special Government employee.

(c) Each public filer referred to in 2634.202 on public disclosure who is required by agency regulations issued in accordance with 2634.907(b) of this subpart to file a supplemental confidential financial disclosure report which contains information that is more extensive than the information required in the reporting individual's public financial disclosure report under this part.

(d) Any employee who, notwithstanding his exclusion from the public financial reporting requirements of this part by virtue of a determination under 2634.203, is covered by the criteria of paragraph (a) of this section.

2634.905 Exclusions from filing requirements.

Any individual or class of individuals, including special Government employees, described in 2634.904 of this subpart, may be excluded from all or a portion of the confidential reporting requirements of this subpart, when the agency head or designee determines that:

(a) The duties of a position make remote the possibility that the incumbent will be involved in a real or apparent conflict of interest;

(b) The duties of a position involve such a low level of responsibility that the submission of a confidential financial disclosure report is unnecessary because of:

- (1) The substantial degree of supervision and review over the position; or
- (2) The inconsequential effect of any potential conflict on the integrity of the Government; or
- (c) The use of an alternative procedure approved in writing by the Office of Government Ethics is adequate to prevent possible conflicts of interest.

Example 1. An agency special Government employee who is a draftsman prepares the drawings to be used by an agency in soliciting bids for construction work on a bridge. Because he is not involved in the contracting process associated with the construction, the likelihood that his actions will create a conflict of interest is remote. The draftsman need not be required by the agency to file a confidential financial disclosure report.

Example 2. An investigator is principally assigned as the field agent to investigate alleged violations of conflict of interest laws. The investigator works under the direct supervision of an agent-in-charge. The agent-in-charge reviews all of the investigator's work product and then uses those materials to prepare the agency's report which is submitted under his own name. The agency may decide not to require the investigator to file a confidential disclosure report.

Example 3. A nonsupervisory auditor at an agency is regularly assigned to cases involving possible loan improprieties by financial institutions. Prior to undertaking each enforcement review, the auditor reviews the file to determine if she, her spouse, minor or dependent child, or any general partner, organization in which she serves as an officer, director, trustee, employee, or general partner, or organization with which she is negotiating or has an agreement or an arrangement for future employment, or a close friend or relative is a subject of the investigation, or will be in any way affected by the investigation. Once she determines that there is no such relationship, she signs and dates a certification which verifies that she has reviewed the file and has determined that no conflict of interest exists. She then files the certification with the head of her auditing division at the agency. On the other hand, if she cannot execute the certification, she informs the head of her auditing division. In response, the division will either reassign the case or review the conflicting interest to determine whether a waiver would be appropriate. This alternate procedure, if approved by the Office of Government Ethics in writing, will suffice for a conflict of interest review. Therefore, the agency may exclude the auditor from filing a confidential disclosure report under this subpart.

[57 FR 11826, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

2634.906 Review of confidential filer status.

The head of each agency, or an officer designated by the head of the agency for that purpose, shall review any complaint by an individual that his position has been improperly determined by the agency to be one which requires the submission of a confidential financial disclosure report pursuant to this subpart. A decision by the agency head or designee regarding the complaint shall be final.

2634.907 Report contents.

(a) Other than the reports of confidential filers described in 2634.904(c), each confidential financial disclosure report filed pursuant to 2634.903 of this subpart shall include on the standard form prescribed by the Office of Government Ethics (see 2634.601 of subpart F of this part) and in accordance with instructions issued by the Office, a full and complete statement of information required to be reported according to the provisions of subpart C of this part, (except for those provisions in subpart C requiring the reporting of the amounts or values of any item), with respect to the following:

(1) Interests in property. All the interests in property specified by 2634.301;

(2) Income. All the income items specified by 2634.302;

(3) Gifts and reimbursements. All gifts and reimbursements specified by 2634.304 (except that new entrants, as described in 2634.903(b) of this subpart, need not report any information on gifts and reimbursements);

(4) Liabilities. All liabilities specified by 2634.305;

(5) Agreements and arrangements. All agreements and arrangements specified by 2634.306; and

(6) Outside positions. All outside positions specified by 2634.307.

(b) For reports of confidential filers described in 2634.904(c) of this subpart, each supplemental confidential financial disclosure report shall include only the supplemental information:

(1) Which is more extensive than that required in the reporting individual's public financial disclosure report under this part; and

(2) Which has been approved by the Office of Government Ethics for collection by the agency concerned, as set forth in supplemental agency regulations and forms, issued under 2634.103 and 2634.601(b) (see 2634.901 (b) and (c) of this subpart).

2634.908 Reporting periods.

(a) Incumbents. Each confidential financial disclosure report filed under 2634.903(a) of this subpart shall include on the standard form prescribed by the Office of Government Ethics and in accordance with instructions issued by the Office, a full and complete statement of the information required to be reported according to the provisions of this subpart for the preceding twelve months ending September 30, or for any portion of that period not covered by a previous confidential or public financial disclosure report filed under this part.

(b) New entrants. Each confidential financial disclosure report filed under 2634.903(b) of this subpart shall include, on the standard form prescribed by the Office of Government Ethics and in accordance with instructions issued by the Office, a full and complete statement of the information required to be reported according to the provisions of this subpart for the preceding twelve months from the date of filing.

2634.909 Procedures, penalties, and ethics agreements.

(a) The provisions of subpart F of this part govern the filing procedures and forms for, and the custody and review of, confidential disclosure reports filed under this subpart.

(b) For penalties and remedial action which apply in the event that the reporting individual fails to file, falsifies information, or files late with respect to confidential financial disclosure reports, see subpart G of this part.

(c) Subpart H of this part on ethics agreements applies to both the public and confidential reporting systems under this part.

Subpart J -- Certificates of Divestiture

Source: 55 FR 14408, Apr. 18, 1990, unless otherwise noted.

2634.1001 Nonrecognition for sales to comply with conflict of interest requirements; general considerations.

(a) Purpose. This subpart establishes the procedures and policies of the Office of Government Ethics with respect to the issuance of Certificates of Divestiture pursuant to section 1043 of the Internal Revenue Code of 1986 (hereinafter in this subpart referred to as ``section 1043").

(b) Scope. Section 1043 and the rules of this subpart provide for nonrecognition of gain in the case of sales to comply with conflict of interest requirements. The rules of this subpart relate to the issuance of Certificates of Divestiture and the permitted property into which a rollover (as such reinvestments are called) must be made in order for nonrecognition to be permitted. The substantive and procedural rules relating to the tax aspects of such sales and rollovers pursuant to the statutory scheme are subject to the jurisdiction of the Internal Revenue Service. Eligible persons should seek the advice of their personal tax advisors for guidance as to the tax aspects of divestiture transactions and whether proposed acquisitions meet the requirements for permitted property. Internal Revenue Service regulations and other guidance should be consulted as to these matters. Internal Revenue Service requirements for reporting dispositions of property and making an election not to recognize gain under section 1043 must be followed by eligible persons wishing to make such an election.

(c) Policy. The Federal purpose reflected in section 1043 of the Internal Revenue Code and these rules is to minimize the burden of Government service resulting from gain on the sale of assets for which divestiture is reasonably necessary because of the conflict of interest laws, in order to attract and retain highly qualified personnel in the executive branch and to ensure the confidence of the public in the integrity of Government officials and decision-making processes.

2634.1002 Issuance of Certificates of Divestiture.

(a) General rule. Pursuant to section 1043, a Certificate of Divestiture with respect to specific property shall be issued by the Director of the Office of Government Ethics pursuant to the procedures of paragraph

(b) of this section upon a determination that such divestiture by an eligible person as defined in paragraph (c) of this section is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order, or pursuant to the request of a congressional committee as a condition of confirmation.

(b) Procedural requirements -- (1) Required submissions. A determination to issue a Certificate of Divestiture may be made by the Director of the Office of Government Ethics only upon the submission by the designated agency ethics official of the agency of employment or proposed employment of the individual referred to in paragraph (c)(1) of this section of full and complete case materials to the Office of Government Ethics. Such case materials shall include:

(i) A copy of the written request from such individual to the designated agency ethics official to pursue certification in the case of the property to be divested;

(ii) In the case of an individual referred to in paragraph (c)(1) of this section who is required by the rules of this part, or part 735 (subpart D) or part 2633 or this title, to file a financial disclosure report, a copy of the latest report which has been filed;

(iii) A detailed description of the specific property as to which divestiture is contemplated;

(iv) Complete statements of: (A) The facts and circumstances relevant to whether there is a reasonable necessity for divestiture (including a description of the position or applicable statutory citation setting forth the duties of the subject position); and

(B) Analysis and opinion from such designated agency ethics official concerning the application of the rules of this subpart in the case of the proposed certification; and

(v) In lieu of the materials described in paragraph (b)(1)(iv) of this section, in the case of the contemplated divestiture of specific property pursuant to the request of a congressional committee as a condition of confirmation, such materials shall include the written acknowledgement of the Chairman of such committee of such request.

(2) Standards for issuance. Certification pursuant to the rules of this subpart relates to the reasonable necessity for the divestiture of specific property pursuant to section 1043. Divestiture is one of the standard remedial actions available to comply with conflict of interest statutes, regulations, rules, and executive orders (see 2634.604(b)(5)), and certification ameliorates the impact of a divestiture. In cases in which the contemplated divestiture is not pursuant to the request of a congressional committee as a condition of confirmation, a Certificate of Divestiture will be issued by the Director of the Office of Government Ethics only if he concurs with the opinion of the designated agency ethics official referred to in paragraph (b)(1)(iv)(B) of this section that such divestiture is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order. Issues relating to whether the terms of a contemplated divestiture constitute a sale or other disposition of the property under Internal Revenue Service Rules and other tax matters are under the jurisdiction of the Internal Revenue Service. See 2634.1001(b).

(3) Documentation of the certification. Certification shall be indicated by a letter from the Director to the eligible party or his representative.

(c) Eligible person. For purposes of section 1043 and this subpart, the term ``eligible person" includes:

(1) Any officer or employee of the Executive branch of the Federal government, except a person who is a special Government employee as defined in 18 U.S.C. 202; and

(2) The spouse and any minor or dependent child of an individual referred to in paragraph (c)(1) of this section whose ownership of property required to be divested is attributable to such person by 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order.

2634.1003 Permitted property.

(a) In general. The categories of permitted property into which rollovers are permitted to be made have been drawn through the rules of this section so as to be neutral in respect of the vast majority of Federal programs and responsibilities. The Internal Revenue Service has jurisdiction with respect to determinations concerning the application of the rules of this section in specific cases (see 2634.1001(b)). However, the ethics program rules applicable to specific agencies and positions may further limit an eligible person's choices. The advice of the designated agency ethics official should be sought in this regard. For example, there are restrictions on the purchases of shares in regulated investment companies by some Securities and Exchange Commission personnel and on purchases of obligations of the United States by some officials of the Department of the Treasury. Additionally, it may not be appropriate for some officials of agencies having international responsibilities to invest in mutual funds which exclusively invest in securities outside of the United States.

(b) Definition of ``permitted property". For purposes of section 1043 and this subpart, the term permitted property means:

(1) Any obligation of the United States; and

(2) Any ``diversified investment fund", as defined in paragraph (c) of this section.

(c) Diversified investment fund -- (1) Definition. The term diversified investment fund means any open-end mutual fund (which is a ``regulated investment company", as defined by section 851 of the Internal Revenue Code of 1986), which by its prospectus, or any common trust fund maintained by a bank (which is a ``common trust fund", as defined by section 584(a) of the Internal Revenue Code of 1986), which by the literature it distributes to prospective and current investors describing its objectives and practices, does not indicate the objective or practice of devoting its investments to particular or limited industrial, economic, or geographic sectors.

(2) Ownership limitation. Notwithstanding any other rule of this paragraph (c), a fund may not be considered to be a diversified investment fund in any case in which the ownership of more than one percent of the market value of the fund would be attributable to an individual referred to in 2634.1002(c)(1) immediately after a rollover.

Example 1: The Alpha Group is a family of funds which markets numerous open-end mutual funds which are typical of those generally available to the general public:

(i) The following funds of the Alpha Group would be presumed to be diversified investment funds for purposes of paragraph (c)(1) of this section, unless their prospectuses indicated an objective or practice of devoting their investments to particular or limited industrial, economic, or geographic sectors: the Common Stock Fund, the Growth Stock Fund, the S&P Index Fund, the Global Fund (investing in common stocks world-wide), the Blue Chip Fund, the Corporate Bond Fund, the Municipal Bond Fund, and the Government Bond Fund (which invests exclusively in obligations of the United States).

(ii) The following funds of the Alpha Group would not be presumed to qualify as diversified investment funds, unless their prospectuses indicated that they do not have an objective or practice of devoting their investments to particular or limited industrial, economic, or geographic sectors for purposes of paragraph (c)(1) of this section: The Pacific fund, the Mexico Fund, the New England Fund, the Gold Fund, the Commodity Futures Fund, the Venture Capital Fund, and the Drug Industry Sector Fund.

Example 2: The Omega Fund is a closed-end mutual fund which is listed on the New York Stock Exchange. The Omega Fund is not a diversified investment fund, as only open-end mutual funds are within the definition of that term pursuant to paragraph (c)(1) of this section.

2634.1004 Special rule.

Public access to Certificates of Divestiture. The Certificates of Divestiture issued pursuant to the provisions of this part shall be available to the public in accordance with the rules of 2634.603 of this part.

Pt. 2634, App. A

Appendix A to Part 2634 -- Certificate of Independence

The Certificate of Independence required by 2634.406(b) shall be executed as follows:

Certificate of Independence

With respect to the trust of XXXXX (Settlor), which has been submitted to the Office of Government Ethics for certification pursuant to the Ethics in Government Act of 1978 (Pub. L. 95 - 521, as amended), the undersigned proposed [Trustee] [XXXXX] of such trust is a financial institution which is eligible to serve in such fiduciary capacity in accordance with section 102(f)(3)(A) of such Act:

FIRST: The undersigned is (check one) --

() a bank, as defined in 12 U.S.C. 1841(c), or

() an investment adviser, as defined in 15 U.S.C. 80b - 2(a)(11),

not more than 10 percent of which is owned or controlled by a single individual.

SECOND: The undersigned --

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

(2) 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.

THIRD: Any director, officer, or employee of the undersigned --

(1) 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;

(2) Is not and has not been employed by any interested party, nor 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 or business with, any interested party; and

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

FOURTH: The undersigned certifies that the statements contained herein are true, complete and correct to the best of such undersigned's knowledge and belief.

DateXXXX

(firm)XXXX

By:XXXX

(title)XXXX

Approved byXXXX

Director, Office of Government Ethics

DateXXXX

Note: See Appendix C of this part for Privacy Act and Paperwork Reduction Act notices.

[57 FR 11829, Apr. 7, 1992]

Pt. 2634, App. B

Appendix B to Part 2634 -- Certificate of Compliance

The Certificate of Compliance required by 2634.408(b) shall be executed as follows:

Certificate of Compliance

With respect to the qualified blind trust (qualified diversified trust) ofXXXX (Settlor), the undersigned, the approved [Trustee] [XXXX] of such trust, pursuant to 5 CFR 2634.406, has served in such fiduciary capacity during the calendar year [or for the period beginningXXXX and endingXXXX] and is eligible to continue in such capacity by virtue of the following:

FIRST: The undersigned (and any director, officer, or employee) has not knowingly or negligently, and will not --

(A) disclose any information to an interested party with respect to the trust that may not be disclosed pursuant to title I of the Act, the implementing regulations (including 5 CFR 2634.403(b)(12)(i) for a qualified blind trust, and 5 CFR 2634.404(c)(12)(i) for a qualified diversified trust), or the trust instrument;

(B) acquire any holding the ownership of which is prohibited by, or not in accordance with, applicable statute, regulation, or the terms of the trust instrument;

(C) solicit advice from any interested party with respect to such trust, which solicitation is prohibited by title I of the Act, the implementing regulations (including 5 CFR 2634.403(b)(12)(iii) for a qualified blind trust and 5 CFR 2634.404(c)(12)(iii), for a qualified diversified trust), or the trust instrument;

(D) fail to file any document required by title I of the Act, the implementing regulations (including 5 CFR 2634.408(b) and (c)), or the trust instrument; or

(E) violate or fail to comply with any provision or requirement of title I of the Act, the implementing regulations, or the trust instrument.

SECOND: The undersigned (and any director, officer, or employee) will not knowingly or negligently engage in the above-mentioned activities.

THIRD: The undersigned certifies that the statements contained herein are true, complete and correct to the best of such undersigned's knowledge and belief.

DateXXXX

(firm)XXXX

By:XXXX

(title)XXXX

Note: See appendix C of this part for Privacy Act and Paperwork Reduction Act notices.

[57 FR 11830, Apr. 7, 1992; 57 FR 21855, May 22, 1992]

Appendix C to Part 2634 -- Privacy Act and Paperwork Reduction Act Notices for Appendixes A and B

Privacy Act Statement

Section 102(f) of the Ethics in Government Act of 1978 as amended (the "Ethics Act") (5 U.S.C. App.) and subpart D of 5 CFR part 2634 of the regulations of the Office of Government Ethics (OGE) require the reporting of this information for the administration of qualified trusts under the Ethics Act. The primary use of the information on this certificate is for review by Government officials of OGE and the agency of the Government employee for whom the trust is established to determine compliance with applicable Federal laws and regulations as regards qualified trusts. Additional disclosures of the information on this certificate may be made:

- (1) to any requesting person in accordance with the access provisions of section 105 of the Ethics Act;
- (2) to a Federal, State or local law enforcement agency if the disclosing agency becomes aware of a violation or potential violation of law or regulation;
- (3) to a court or party in a court or Federal administrative proceeding if the Government is a party or in order to comply with a subpoena;
- (4) to a source when necessary to obtain information relevant to a conflict of interest issue;
- (5) to the National Archives and Records Administration or the General Services Administration in records management inspections;
- (6) to the Office of Management and Budget during legislative coordination on private relief legislation; and
- (7) in response to a discovery request or for the appearance of a witness in a pending judicial or administrative proceeding, if the information is relevant to the subject matter.

Knowing or willful falsification of information on this certificate or failure to file or report information required to be reported under title I of the Ethics Act and 5 CFR part 2634 of the OGE regulations may lead to disqualification as a trustee or other fiduciary as well as possible disqualification of the underlying trust itself. Knowing and willful falsification of information required under the Ethics Act and the regulations may also subject you to criminal prosecution.

Public Burden Information

This collection of information is estimated to take an average of twenty minutes per response.

[57 FR 11830, Apr. 7, 1992]