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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: U.S. Office of Government Ethics Review of Nominees for Presidentially Appointed, Senate-Confirmed Positions

This Legal Advisory provides guidance about the approach the U.S. Office of Government Ethics (OGE) takes while resolving potential conflicts of interest and other ethics issues for nominees for Presidentially appointed, Senate-confirmed positions (PAS positions). The Advisory explains OGE's risk management philosophy and objectives for the nominee process. It also discusses the purpose of the *Guide to Drafting Nominee Ethics Agreements* and standardized ethics agreements, as well as the practices related to drafting and amending those agreements. Finally, the Advisory addresses common questions about OGE's approach to resolving conflicts and ethics issues relating to a nominee's outside positions[1] and assets.

I. OGE's Risk Management Philosophy and Objectives for the Nominee Process

OGE's objectives in the nominee process are twofold. At a basic level, OGE works with agencies to implement measures to prevent conflicts of interest that may lead to a violation of law or regulation. At a higher level, as reflected in regulation, OGE's goal is to increase the public's confidence and trust in the officials at the highest levels of the Executive branch.[2]

Failure to identify a conflict of interest creates both the risk of undermining the mission of the agency as well as the risk of a nominee committing a criminal or regulatory ethics violation. Because of the high stakes involved with identifying prospective risks for nominees, if OGE thinks a particular matter potentially will affect the nominee's financial interest, it is reluctant to rely on the distinction that the effect may not be "direct and predictable."[3] Instead, OGE strives to remove risks that could have serious impacts on the public trust, create personal and organizational liability, or undermine the effectiveness of Government operations, including appearances of conflicts of interest. Accordingly, OGE and agency reviewers must consider

[1] In this Advisory, "outside positions" refer to non-Federal positions.
[2] *See* 5 C.F.R. § 2634.104(a): "Title I of the Act requires that high-level Federal officials disclose publicly their personal financial interests, to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust."
[3] *See* 5 C.F.R. § 2640.103(a)(3).

possible future events and what types of official duties may create potential ethics issues for a nominee. These preventative measures for nominees are necessary because nominees occupy highly visible positions and have a significant amount of authority to act on behalf of the United States.

II. Ethics Agreements

As part of the pre-nomination ethics review process, a nominee for a PAS position enters into an ethics agreement. The agreement outlines the steps that the nominee will take if they are confirmed to resolve any conflicts of interest and appearance concerns that stem from their reported financial interests, outside positions, and employment agreements and arrangements. The language used in each ethics agreement is precise because the agreement is a contract between the nominee and the agency that memorializes key ethics commitments of the nominee and clearly details how any ethics issues will be resolved. In 2008, OGE issued its first guide for drafting ethics agreements, which created standardized language for such agreements, and published the most recent version of the *Guide to Drafting Nominee Ethics Agreements* (EA Guide) in 2020.[4]

When drafting an ethics agreement, ethics officials should start with the EA Guide to ensure that the agreement for each nominee includes all relevant facts relating to the nominee's financial interests, employment agreements and arrangements, and outside positions, and states the applicable legal standards and ethics requirements relating to the same. OGE understands that ethics officials often start an ethics agreement from either an agency template or a prior agreement, which can serve as a helpful starting point for certain standard language that is consistent between ethics agreements. However, OGE has found that this practice can lead to ethics agreement language that is not entirely on point with the factual circumstances of an individual nominee. As such, OGE cautions that ethics officials should take care when starting from a prior agreement and be vigilant about ensuring accuracy in each ethics agreement they prepare.

Ethics officials should also ensure that nominees are familiar with and understand their ethics agreements. In OGE's experience, if a nominee does not understand something in an ethics agreement, the nominee can have difficulty either complying with their commitments or doing so in a timely fashion. Nominees also have had difficulty complying with their ethics agreements when they have not thoroughly investigated the divesture process for assets that are difficult to sell, such as private investment funds and closely held companies. Accordingly, OGE encourages ethics officials to walk nominees through their ethics agreements prior to OGE's pre-nomination (preclearance) review of a nominee's financial disclosure report and ethics agreement by nominee program managers. In particular, the nominee must understand both the actions required and the required timing for those actions, especially for actions that must be taken before the nominee assumes the duties of the position to avoid a possible violation of a criminal law.

[4] U.S. OFF. OF GOV'T ETHICS, ETHICS AGREEMENT GUIDE (2020), https://www.oge.gov/web/oge nsf/0/E4716CFB6F236C1285258610004943C7/$FILE/Ethics%20Agreement%20Guide%20October%202020.docx.

Once the individual is nominated, the Senate committee with jurisdiction over the nomination receives a copy of this agreement so that Senators can understand the nominee's potential conflicts of interest or other ethics concerns. Because OGE has created standard language, OGE receives questions from stakeholders such as Senate committees when the language in a particular nominee's ethics agreement varies from that in the EA Guide. As a result, OGE does not permit nominees to change the standard language in the "General Commitments" and "Public Posting" sections and requires uniformity in the language discussing the applicable legal standards. Finally, the ethics agreement of a nominee who files a public financial disclosure report is available online so the public has access to the same information.[5]

Any changes to a nominee's ethics agreement, even those post-nomination or post-confirmation, must be approved by both the agency and OGE, and will be sent to the Senate and posted on OGE's website.[6] Changes requiring approval include an extension of the timeframe for divestiture, for example. OGE generally will not permit an amendment to an ethics agreement because a nominee changed their mind about divestiture or agreed to divest an asset without fully understanding the divestiture process. In most cases, OGE will require a change in law or a material change in circumstances outside the nominee's control before potentially agreeing to an ethics agreement amendment.[7]

III. Approach to Resolving Conflicts and Ethics Issues Relating to a Nominee's Outside Positions

All ethics agreements for nominees to PAS positions include a section that addresses the nominee's outside positions, all of which the nominee must generally resign from if confirmed to a full-time PAS position. Resignation is required for two reasons:

1. Outside positions often result in the nominee recusing from some particular matters. Resignation, unless there is an accompanying financial interest, reduces the types of particular matters from which the nominee must recuse and the time period of required recusal for the remaining particular matters.[8]
2. The White House often has a policy that precludes PAS officials from holding most outside positions.

Additionally, full-time PAS officials are prohibited from having earned income from any position other than their Executive branch position.[9]

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[5] Public financial disclosure reports and ethics agreements of nominees for PAS positions can be found here: https://www.oge.gov/web/oge nsf/Officials%20Individual%20Disclosures%20Search%20Collection?OpenForm.

[6] *See* 5 C.F.R. § 2634.803(a)(4).

[7] One example of such a circumstance would be the inability to divest because of a new law prohibiting the sale of companies headquartered in a particular country.

[8] Certain positions, such as employee, officer, director, or trustee, will require recusal from all particular matters affecting the financial interests of the entity under 18 U.S.C. § 208, if the nominee does not resign. If the nominee remains an active participant in an organization while they are a Federal employee, they will be required to recuse from matters in which the organization is a party or represents a party under 5 C.F.R. § 2635.502. Once the nominee resigns, the nominee will be required to be recused from particular matters in which the organization is a party or represents a party for one year after resignation under 5 C.F.R. § 2635.502.

[9] *See* 5 C.F.R. § 2635.804; Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989).

OGE's EA Guide provides standard resignation language that begins "Upon confirmation, I will resign from," and OGE has received many questions regarding what "[u]pon confirmation" means in this context. OGE does not require a nominee to resign from outside positions the day of their confirmation, but rather requires nominees to resign before they begin the duties of their PAS position. If a nominee does not resign from their outside positions—particularly paid positions—until after they begin their duties as a PAS official, they place themselves in jeopardy of violating ethics statutes and regulations.[10] As a result, nominees who have been confirmed should not start doing the work of the agency, such as answering emails or having meetings, until they have resigned from their outside positions. In addition, PAS officials generally may not resume any outside position they previously resigned from or begin a new outside position during their appointment.

After their resignation from outside positions, nominees will be recused from certain particular matters involving specific parties (party matters) under the impartiality regulation at 5 C.F.R. § 2635.502. In addition, nominees are often subject to additional recusals under an ethics pledge set forth in an executive order.[11] If the work of the entity with which the nominee had a position overlaps with the work of the agency, OGE reviewers are required to ask the agency about the types of party matters and the approximate percentage of duties from which the nominee will be recused. Although 5 C.F.R. § 2635.502(a) contemplates a reasonable person analysis to determine whether an employee will recuse from party matters involving former employers, nominee ethics agreements remove the reasonable person analysis from the employee. Instead, such recusals are mandatory, unless participation is authorized by the agency designee. Specifically, ethics agreements use the following language:

> Pursuant to the impartiality regulation at 5 C.F.R. § 2635.502, for a period of one year after my resignation from [the entity], I will not participate personally and substantially in any particular matter involving specific parties in which I know [the entity] is a party or represents a party, unless I am first authorized to participate, pursuant to at 5 C.F.R. § 2635.502(d).

In addition, the ethics agreement should inform the Senate committee about any planned, or likely, authorizations to participate pursuant to 5 C.F.R. § 2635.502(d) and waivers of an ethics pledge.[12] Accordingly, if an agency ethics official is planning to issue an authorization under

[10] If the position is paid, the nominee will violate 5 C.F.R. § 2635.804, the outside earned income ban, if they are paid after they assume the duties. If it is a paid fiduciary position, the nominee will violate 5 U.S.C. § 13144(a) and 5 C.F.R. § 2636.305(a). Regardless of whether the position is paid, the nominee is at risk of violating 18 U.S.C. § 208 if they participate in a particular matter affecting the financial interests of the entity. The nominee also risks violating 5 C.F.R § 2635.502 if they participate in a party matter in which the entity with which they have a position is a party or represents a party.

[11] *See e.g.,* Exec. Order No. 13,490, 74 Fed. Reg. 4,673 (Jan. 21, 2009); Exec. Order No. 13,770, 82 Fed. Reg. 9,333 (Jan. 28. 2017); Exec. Order No. 13,989, 86 Fed. Reg. 7,029 (Jan. 20, 2021).

[12] Recent ethics pledges have included a waiver provision. *See, e.g.,* Exec. Order No. 13,770 § 3; Exec. Order No. 13,989 § 3.

§ 2635.502(d) or plans to seek a waiver of an ethics pledge, it is helpful to inform the OGE reviewer as soon as possible.

IV. Approach to Resolving Conflicts and Ethics Issues Relating to a Nominee's Assets

A. Divestiture

When an asset raises potential conflict of interest concerns for a nominee to a PAS position, OGE's preferred, and often required, remedy is divestiture.[13] OGE acknowledges that a common remedy to resolving ethics concerns for most Government employees is recusal from a particular matter. However, because a nominee is entering a senior position and their participation in certain particular matters may be required, it may be necessary for them to take other actions to remedy the potential conflict of interest. Divestiture has the benefit of being a complete remedy that forecloses any possibility that an employee will participate in a particular matter that will affect the employee's financial interest. It also decreases the risk that the public may question the integrity of agency programs and operations. For these reasons, when an asset raises potential conflict of interest concerns, divestiture is strongly preferred in most cases for nominees.

In the atypical situation where recusal, as opposed to divestiture, is used to manage a potential conflict identified during the nominee review process,[14] OGE will ask the agency ethics official about the effect the recusal will have on the nominee's ability to perform the duties of the position if confirmed. The OGE reviewer will request an estimate of the percentage of work from which the nominee will have to recuse as well as information regarding the types of particular matters from which they will have to recuse, and whether the volume and types of recusals are manageable. Additionally, OGE has greater concerns about recusal as a remedy for nominees for board and commission positions, as board members and commissioners are unable to delegate voting on matters before the board or commission to a subordinate.

When divestiture is the remedy for the conflict in an ethics agreement, OGE requires the nominee to commit to a complete divestiture,[15] not a partial divestiture.[16] In addition, OGE requires that the nominee, their spouse, and their dependent children agree to not repurchase any assets that were required to be divested in an ethics agreement for as long as the nominee serves in the Federal position. Nominees must make anyone who is making investment decisions for the

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[13] Additionally, some Presidents also have required officials in the most senior positions to divest all assets not covered by an exemption to 18 U.S.C. § 208 so that the official is recused from as little as possible.

[14] There are exceptions to the general approach of requiring divestiture, such as if the asset is a part of the spouse's compensation package. These exceptions are necessarily fact specific.

[15] When nominees have multiple assets, it is challenging and time consuming to determine which particular matters may affect which assets to arrive at the appropriate amount to sell of each asset. OGE previously permitted nominees to prospectively commit to selling down their assets, but found the process was too difficult and time consuming to manage, and therefore now requires complete divestiture in an ethics agreement.

[16] *See* 5 C.F.R. §§ 2640.201(b), .202(a). If the nominee wishes to rely on a *de minimis* exemption for an asset, they can choose to sell a portion of the asset during preclearance review to divest their interest down to an amount below the level where OGE will permit a nominee to rely on a *de minimis* exemption. *See* discussion in Section IV.B. *infra*.

nominee, their spouse, or their dependent children aware of the obligation to not repurchase divested assets.[17]

B. Application of the De Minimis *Exemptions*

When considering whether divestiture is appropriate for a conflicting asset, OGE often considers the *de minimis* exemptions for securities and sector mutual funds found at 5 C.F.R. §§ 2640.202 and 2640.201(b), respectively. When a nominee holds an asset that is close to the *de minimis* threshold, OGE is concerned that they may be unaware when a rapid increase in price per share of the stock or fund causes the value of the asset to exceed the *de minimis* threshold. Accordingly, for securities and sector funds identified as potential conflicts, OGE reviewers will ask for the approximate value of the asset in question. Although the upper limit for the party matter exemption for securities is $15,000 and the upper limit for the sector fund exemption is $50,000, OGE will only permit a nominee to hold 80% or less of the relevant *de minimis* threshold in the asset or sector at issue. This rule ensures that the nominee will be free to undertake the duties of office without the possibility of inadvertent violations of the conflict of interest laws. Accordingly, OGE requires divestiture if a nominee holds more than $12,000 in a security for which party matters are likely to be a conflict or more than $40,000 in mutual funds in a sector that is likely to be a conflict.[18]

C. Managed Accounts

OGE requires nominees to PAS positions agree in their ethics agreements that any account manager or investment professional will obtain the nominee's prior approval of purchases of any asset except cash, cash equivalents, U.S. Treasury securities, and diversified mutual funds.[19] In addition, OGE and agency ethics officials permit most nominees to allow managers to purchase municipal bonds without the nominee's prior approval.[20] These requirements exist because OGE has found that managed accounts can create significant risk for nominees[21] due to the fact that investment decisions are often made by the account manager

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[17] Each nominee ethics agreement in which the nominee is divesting assets contains the following language: "I (including my spouse and dependent children if applicable) will not repurchase any asset I was required to divest without consulting with my agency ethics official and the U.S. Office of Government Ethics."

[18] As discussed in Section IV.A, OGE requires complete divestiture of any asset being divested pursuant to an ethics agreement; OGE does not permit PAS nominees to agree to divest down to the respective $12,000 and $40,000 limits in their ethics agreements. As noted earlier, if a nominee wishes to be able to rely on a *de minimis* exemption for an asset above the relevant limit, they can divest the asset down to an appropriate amount prior to preclearance, and before the nominee paperwork is sent to the Senate. If the nominee makes that choice, no certificate of divestiture is available, because the nominee is not yet an "eligible person." 5 C.F.R. § 2634.1003(a).

[19] Each nominee ethics agreement contains the following language: "If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the regulatory exemption for diversified mutual funds and unit investment trusts at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds."

[20] There are some positions and agencies where this is not permitted because of the work of the agency or the work of the specific position. For example, there are municipal bonds whose value or income may be affected by the work of the Department of Transportation.

[21] *See* U.S. OFF. OF GOV'T ETHICS, CONFLICTS OF INTEREST CONSIDERATIONS: LEGAL ENTITIES THAT HOLD ASSETS 2 (2021) https://www.oge.gov/Web/OGE nsf/0/7A3DB2F1691E9E42852585B6005A1F8F/$FILE/Legal%20Entities%20that

without consulting the owner of the account. As a result, nominees with managed accounts risk inadvertently participating in particular matters in which they have a personal or imputed financial interest.

D. Other Assets that Pose Significant Risks for Nominees

1. Closely Held Businesses

Closely held businesses[22] can be difficult to divest, and the timing and manner of the divestiture may be dictated by ethics concerns. Consequently, OGE frequently requests that nominees to PAS positions who have an ownership interest in such a business provide a detailed divestiture plan during the preclearance process and an assurance in the ethics agreement that the plan can be executed.

Ethics officials should be aware that closely held businesses can raise ethics concerns for nominees beyond conflict of interest concerns under 18 U.S.C. § 208. Fiduciary businesses[23] and businesses that represent people before the Federal Government[24] are the two most difficult types of businesses from a conflicts-resolution perspective. Although law firms and consulting firms are the most common examples of businesses that are likely to raise such ethics concerns, businesses ranging from medical practices to accounting, engineering, and architectural firms can present similar issues.

If there is a conflict of interest concern under 18 U.S.C. § 208 or a compensation for representation concern under 18 U.S.C. § 203, the nominee will need to divest their interest in the business to avoid running afoul of those criminal prohibitions. If the business is owned solely by the nominee, the nominee may make it dormant instead. Ethics concerns can also dictate the timing and manner of the nominee's action with respect to their closely held business. For example, if there is an 18 U.S.C. § 203 concern, the sale of the business will need to be completed prior to the nominee assuming the duties of the position for which they are nominated to ensure no compensation for representational services is received during Federal employment.[25] In all situations when a closely held business is being sold pursuant to an ethics agreement requirement, OGE will ask for a confirmation that the sale price is based on the fair market value of the business.

Additional ethics considerations may be present if the nominee is selling the business and receiving a promissory note for a portion of the payment. To avoid problems under 18 U.S.C. §§ 203 & 208, 5 U.S.C. § 13144(a)(1), and 5 C.F.R. § 2636.305(a), OGE likely will require a provision in the ethics agreement that the business will not secure the loan and that the business

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%20Hold%20Assets.pdf. In addition, these accounts have created the perception of insider trading for some Government officials. Rebecca Ballhaus et. al, *Federal Officials Trade Stock in Companies Their Agencies Oversee*, WALL ST. J. (Oct. 11, 2022), https://www.wsj.com/articles/government-officials-invest-in-companies-their-agencies-oversee-11665489653.

[22] Closely held businesses are companies that are not publicly traded and, in many cases, are owned by a single person or small number of people.

[23] *See* 5 U.S.C. § 13144(a)(1); 5 C.F.R. § 2636.305(a).

[24] 18 U.S.C. § 203.

[25] Ideally, businesses that pose concerns under 18 U.S.C. § 208 would be sold prior to the official assuming the duties of the position, but if that is not possible, criminal liability can be avoided by the official recusing while they sell their business. However, recusal is not a remedy for criminal liability under 18 U.S.C. § 203.

will not be returned to the nominee if there is a default on the note; instead, there will need to be another remedy for default. Additionally, OGE will consider whether the nominee's Government position could involve particular matters that would affect the buyer's ability or willingness to pay the note, and if so, will confirm that the nominee can be recused from such work. This concern is more likely to be present when the business is small and the nominee's work will be in an area that could affect the business or the buyer. Finally, the nominee will have a covered relationship with the buyer until the note is paid, so OGE will consider whether the required party matter recusals are manageable.

2. Private Investment Funds

Private investment funds can create both conflicts and disclosure challenges for nominees that can lead to nominees being required to divest a fund, which can be both difficult to navigate and costly to accomplish. Because nominees do not control the investment decisions made by private investment funds, if (1) the investor (the nominee, their spouse, or their minor child) in the fund has knowledge of the assets held by the fund; and (2) the fund is acquiring new assets, OGE will require most nominees[26] to divest the fund to avoid the risk that the fund might acquire a conflicting asset during the PAS official's appointment.[27]

If a nominee is unable to properly disclose information about a private investment fund as required by the Ethics in Government Act, OGE will require either divestiture of the fund or certain written representations from the fund manager, as discussed below. When a fund does not qualify as an excepted investment fund (EIF),[28] the nominee will need to disclose each holding of the fund that meets the disclosure thresholds. However, the nominee's ability to disclose this information may be limited in some instances. First, some private investment funds require investors to sign a confidentiality agreement that precludes them from sharing information about the fund holdings. In that case, a nominee will add a note on their financial disclosure form that the fund's assets are not disclosed due to a confidentiality agreement. Moreover, the nominee will be required to divest the fund following confirmation.[29]

Second, some funds do not provide information on the fund holdings to any of the fund's investors. If a nominee has no knowledge of the holdings of a fund that is not an EIF, OGE requires them to obtain a "no knowledge" letter from the manager of the fund that states that:

- The nominee (and nominee's spouse and dependent child) does not direct or control the investments of the fund; and

[26] OGE does not require U.S. Marshals and Ambassadors to divest funds solely because they are acquiring new assets, given the different conflicts risks for these positions.

[27] If the strategy for the fund creates little possibility for conflict, the nominee may be permitted to retain the fund. It is necessarily fact-specific to determine when a strategy might raise conflict of interest concerns, and some strategies are less problematic, such as investing only in debt securities. However, there are PAS positions for which even these less problematic strategies will pose a problem and divestiture will be required.

[28] *See* 5 U.S.C. § 13104(a)(8); 5 C.F.R. § 2634.312(c).

[29] As discussed in LA-14-05, "OGE continues to find divestiture to be the best remedy when a PAS nominee has access to information about a fund's holdings but is unwilling to disclose those holdings because disclosure would violate a preexisting confidentiality agreement. Such divestiture supports the goal of preventing conflicts of interest because the agency's ethics officials and the public are deprived of information that the PAS nominee possesses regarding the potential for conflicts of interest." *See* OGE Legal Advisory LA-14-05, at 2 (Sept. 30, 2014).

- The holdings of the fund are not disclosed to anyone who is solely an investor of the fund.[30]

The letter should be addressed to the investor in the fund, and a copy should be provided to both the agency and OGE.[31] Note that even in instances where a nominee does not know the exact holdings of a fund, the nominee may still have enough information to raise conflict of interest concerns based on the strategy of the fund.[32] In such instances, the potential conflict will need to be managed like any other. For example, if the nominee knows that the fund invests in biotechnology start-up companies and the nominee will work on particular matters affecting the biotechnology sector, the nominee likely will be required to divest even though they do not know any specific holding of the fund.

3. Trusts

Trust interests often raise both reporting issues and conflict of interest concerns. If the nominee, their spouse, or their dependent children either have a vested beneficial interest in a trust or are paying the taxes for the trust, then the trust and its underlying holdings will have to be disclosed on the financial disclosure report, and the underlying holdings of the trust will need to be reviewed to determine if they create a potential conflict of interest. OGE provides written guidance regarding how to disclose a beneficial interest in a standard trust in financial disclosure reports,[33] as well as guidance regarding how to analyze conflicts of interest relating to standard trusts.[34]

Trusts can be problematic for some nominees because (1) in some cases the nominee will not have the ability to control the investment decisions for the trust, and (2) divesting a conflicting asset may not be in the interest of the other beneficiaries of the trust, so the trustee may refuse to divest a conflicting asset. Two kinds of trusts, defective grantor trusts[35] and

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[30] *Id.* Sample language for the letter is provided below:

> I am writing on behalf of Bluebird AB Strategies, LLC, which is the fund manager of Cardinal Distressed Opportunities IV, LP. As requested, this letter confirms that you do not control or direct the investments of Cardinal Distressed Opportunities IV, LP. This letter also confirms that the holdings of Cardinal Distressed Opportunities IV, LP are not disclosed to investors.

[31] If the fund is an EIF, the agency ethics official, pursuant to the policies of the agency, may require the nominee obtain a similar representation from the fund manager in order to complete the agency's conflicts of interest review of the nominee's financial disclosure report.

[32] In the case of a fund of funds, if the nominee knows the strategies of the underlying funds, the nominee similarly may have enough information to raise conflict of interest concerns.

[33] *See* U.S. OFF. OF GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE GUIDE 197-200 (2019), https://www.oge.gov/web/OGE nsf/Resources/Public+Financial+Disclosure+Guide+(2019); U.S. OFF. OF GOV'T ETHICS, CONFIDENTIAL FINANCIAL DISCLOSURE GUIDE 127-129 (2023), https://www.oge.gov/web/OGE nsf/0/11AF3BE8C3A7F42A85258A6200572AC9/$FILE/Confidential%20Fin%20Disc%20Guide%202023%20Accessible.pdf.

[34] *See* U.S. OFF. OF GOV'T ETHICS , CONFLICTS OF INTEREST CONSIDERATIONS: LEGAL ENTITIES THAT HOLD ASSETS 8-10 (2021), https://www.oge.gov/web/OGE nsf/0/7A3DB2F1691E9E42852585B6005A1F8F/$FILE/Legal%20Entities%20that%20Hold%20Assets.pdf.

[35] A defective grantor trust is an irrevocable trust for which the grantor, rather than the trust itself, pays the taxes owed by the trust.

discretionary trusts,[36] elicit the most questions about disclosure and conflicts analysis from nominees and their representatives, and are discussed below.

i. Defective Grantor Trusts

If the nominee, their spouse, or their dependent child is the grantor of a defective grantor trust and, as a result, is still paying the taxes on the assets in the trust, then the trust and all of the assets are reportable on the financial disclosure report. Additionally, all of the assets in the trust will be considered to be owned by the grantor of the trust for purposes of 18 U.S.C. § 208 because the grantor has the tax liability for the assets—even if the grantor (the nominee, their spouse, or the minor child) is not a beneficiary of the trust. The nominee can resolve any conflicts of interest by "curing" the trust so that the trust takes over the responsibility for paying the taxes, as long as neither the nominee nor their spouse or any minor child is a beneficiary. OGE encourages nominees with defective grantor trusts to consult with the trust lawyer who assisted in drafting the trust about possible methods for curing the trust.

ii. Discretionary Trusts

OGE also often encounters nominees who assert that a trust of which they, their spouse, or their dependent child is the beneficiary is a "discretionary trust," and that the trust holdings therefore do not need to be disclosed on their financial disclosure report. However, the mere fact that current or future distributions the beneficiary may be eligible to receive from the trust are discretionary does not conclusively establish that the trust is discretionary for financial disclosure and conflict of interest purposes. To be a discretionary trust for purposes of the ethics statutes and regulations, the trust must meet all of the following requirements:

- The grantor/settlor of the trust may not be the nominee, their spouse, or their dependent child.
- The trustee may not be the nominee, their spouse, or their dependent child.
- The beneficiary in question cannot have an enforceable right to payment, such as for education expenses.
- All distributions of income or principal to the beneficiary must be completely discretionary.
- The beneficiary must not have a vested current or remainder interest in the trust.
- The beneficiary must not have the ability to appoint assets from the trust.[37]

[36] As stated in DO-08-024,

> By "discretionary trust," OGE means a trust whose terms provide that the trustee pays to a beneficiary "only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit." Restatement of the Law (Second) Trusts § 155. It is the essence of a "'true 'discretionary trust' . . . that there is a discretion to give the named beneficiary some benefits under the trust or to give him nothing." G. Bogert, Trusts 160 (1987). In short, a discretionary trust does not give the beneficiary an enforceable right to payment. *See, e.g.*, D.L. v. G.L., 61 Mass. App. Ct. 488, 497, rev. den. 492 Mass. 1108 (2004).

OGE DAEOgram DO-08-024, at 1 (Aug. 6, 2008). *See also* OGE Legal Advisory LA-13-04 (Apr. 9, 2013).

[37] The questions listed in footnote 40 help OGE to ascertain if the trust meets the factors described in the list, provide ethics counseling if the answers to questions indicate the nature may change in the future, and determine if

If the requirements for a discretionary trust are met, the nominee will not be required to disclose the underlying holdings of the trust on their financial disclosure report, although they will have to report the interest in the trust itself and any distributions they receive.[38] Additionally, the nominee will not have a financial interest in the assets of the trust for purposes of 18 U.S.C. § 208.[39] However, if the nominee has knowledge of the assets in the trust and the nominee, their spouse, or their dependent child is receiving distributions from the trust, the assets of the trust may create impartiality concerns under 5 C.F.R. § 2635.502(a) and should be considered before the nominee participates in a party matter in which an entity held by the trust is a party or represents a party.

If a nominee does not want to disclose the holdings of a trust that they believe qualifies as a discretionary trust, OGE will require an opinion letter from a trust attorney providing information about the trust and its trustee, grantor, and beneficiaries, and how the state law that governs the trust applies to the particular facts of the trust.[40] The letter should be addressed to the beneficiary of the trust and a copy must be provided to the agency ethics official and OGE. Without this letter, OGE cannot appropriately address the potential conflict of interest issues raised by the trust and will not be able to preclear the report.

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OGE's overarching goal with nominees to PAS positions is to address and reduce ethics risks for high-level Executive branch officials, thereby increasing public trust and confidence in those officials. To accomplish this, OGE works with agencies to prevent conflicts of interest that may lead to a violation of law or regulation. OGE hopes the information provided in this Legal Advisory provides a greater understanding of OGE's approach and methods to reach that goal. If ethics officials have any questions about this Legal Advisory, they should contact their OGE Desk Officer.

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the nominee will be required to be recused from party matters in which an entity held by the trust, about which they have knowledge, is a party or represents a party. Additionally, in ascertaining whether a trust meets the discretionary trust requirement, OGE seeks to ensure that the facts provided about the trust are aligned with the legal conclusions provided in the opinion letter.

[38] OGE Legal Advisory LA-13-04.

[39] OGE DAEOgram DO-08-024.

[40] Specifically, OGE requires the letter to address the following questions:

- Who is the trustee of the trust? Who is the settlor or grantor of the trust? How was the trust established? How is/was the trust funded? Is the trust irrevocable?
- Does the beneficiary (the nominee, spouse, or dependent child) have an enforceable right to payment under the trust now or in the future?
- Does the trustee have complete discretion in distributing income to the beneficiary from the trust? Does the trustee have complete discretion in distributing principal to the beneficiary from this trust?
- What has been the practice in making distributions from this trust to the beneficiary?
- Can the trustee discontinue the practice at any time?
- Who are the remainder beneficiaries of the trust? Is the nominee, spouse, or dependent child a vested remainder beneficiary under the governing state law?
- Does the nominee, spouse, or dependent child have the ability to appoint assets from the trust?