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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Walter M. Shaub, Jr.
Director

SUBJECT: Reporting Requirements for Discretionary Trusts

This memorandum clarifies guidance concerning the application of the financial disclosure reporting requirements to discretionary trusts, as the term “discretionary trust” is defined in OGE’s only issuance on such trusts, DAEOgram DO-08-024 (2008). In the prior issuance on discretionary trusts, OGE explained that an eligible income beneficiary of a discretionary trust does not have a financial interest in the holdings of the trust for purposes of 18 U.S.C. § 208. OGE indicated that a filer of a financial disclosure report in the Executive Branch need not report the holdings of a discretionary trust based solely on the status of the filer, or the filer’s spouse or dependent child, as an eligible income beneficiary. At the same time, OGE indicated that a filer would need to report the holdings of a discretionary trust from which the filer, or the filer’s spouse or dependent child, received income during the reporting period.

OGE has determined, however, that this instruction to report the holdings of a discretionary trust in certain circumstances is inconsistent with OGE’s applicable regulation, 5 C.F.R. § 2634.310, and earlier guidance regarding the reporting of trust assets. OGE concludes that filers are not required to report the assets of discretionary trusts with respect to which they, or their spouses or dependent children, are eligible income beneficiaries. This is true whether or not a payment was received from the discretionary trust during the relevant reporting period. Any income received from a discretionary trust, nevertheless, would be reportable, with the source identified as the discretionary trust.

The Ethics in Government Act, at 5 U.S.C. app. § 102(f), provides that a filer will report the holdings of a trust from which the filer, or the filer’s spouse or dependent child, receives income to the extent such information is required to be reported under subsections (a), (b), and (c) of section 102. The implementing regulation to section 102(f) provides that, “No information, however, is required about a nonvested beneficial interest in the principal or income of an estate or trust.” 5 C.F.R. § 2634.310(a)(2). Such information is not required to be reported

under subsections (a), (b), and (c) of section 102. Though issues related to the vesting of a beneficial interest are a matter of state trust law for most purposes, the regulation defines “vesting” for the limited purpose of Executive Branch financial disclosure, in pertinent part as follows: “[I]t is not the uncertainty of the time of enjoyment in the future, but the uncertainty of the right of enjoyment (title and alienation), which differentiates a ‘vested’ and a ‘nonvested’ interest.” *Id.*¹ OGE’s guidance on discretionary trusts confirms that, “This distinction applies also in the case of discretionary trusts: Where a trustee is given discretion to refuse all payments to the beneficiary, the beneficiary clearly has a mere expectancy rather than a property interest.” DO-08-024 (2008) (internal quotation marks and case citation omitted). As OGE stated previously, “[A] discretionary trust does not give the beneficiary an enforceable right to payment.” *Id.*

OGE has had opportunity to apply this principal to circumstances in which filers have received income from trusts but have lacked the requisite interest to trigger the reporting requirement of section 102(f). In a note to the implementing regulation for section 102(f), OGE indicated that a filer would not need to report the holdings of a revocable *inter vivos* trust from which the filer, or the filer’s spouse or dependent child, received income, so long as the grantor of the trust is neither the filer nor the filer’s spouse or dependent child. *See* 5 C.F.R. § 2634.310(a) note; *see also* OGE DO-02-015 (2002). The regulatory note emphasizes that reporting such trust holdings is unnecessary even when the recipient of income also has a remainder interest “whether or not [such interest is] vested.” 5 C.F.R. § 2634.310(a) note. Reversing its previous position to the contrary, OGE also issued guidance in 2002 explaining that, absent the requisite interest, a filer would not need to report a trust’s assets following receipt of income for services performed as a trustee. *See* OGE O2 x 1 (2002). The common element in these circumstances, as well as in the circumstance of an eligible income beneficiary of a discretionary trust, is the uncertainty of the right of enjoyment of trust assets. Absent such an interest, a filer is not required to report the holdings of a discretionary trust.

If a filer, or a filer’s spouse or dependent child, receives income from a discretionary trust during the applicable reporting period, the filer must report the income received. The filer must specifically report the exact amount of income received during the reporting period to the extent such income exceeds the dollar threshold established in 5 U.S.C. app. § 102(a)(1)(A). In the event of a distribution of assets to the filer, or the filer’s spouse or dependent child, the filer must also report the information required to be reported under subsections (a), (b), and (c) of section 102 regarding those assets. Receipt of income alone, however, does not require the filer to report the assets of the discretionary trust itself.

Ethics officials are cautioned to note that this legal advisory applies only to discretionary trusts as defined in DO-08-024 (2008).

¹ The full text of the definition reads, “A vested interest is a present right or title to property, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future. This includes a future interest when one has a right, defeasible or indefeasible, to the immediate possession or enjoyment of the property, upon the ceasing of another’s interest. Accordingly, it is not the uncertainty of the time of enjoyment in the future, but the uncertainty of the right of enjoyment (title and alienation), which differentiates a ‘vested’ and a ‘nonvested’ interest.” *Id.*