



August 23, 2018
LA-18-10

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
Director

SUBJECT: Publication of the Final Rule Revising 5 C.F.R. part 2634

On July 18, 2018, the U.S. Office of Government Ethics (OGE) published a final rule amending 5 C.F.R. part 2634, which contains the regulations governing Executive branch financial disclosure, qualified trusts, and certificates of divestiture. *See* Executive Branch Financial Disclosure, Qualified Trusts and Certificates of Divestiture, 83 Fed. Reg. 33980 (July 18, 2018).¹ The final rule will become effective on January 1, 2019. This Legal Advisory highlights some of the significant changes to Part 2634 made in this rulemaking. In addition, attached is a table that details the changes by regulatory section.

Please note that there is only one substantive change from the proposed rule to the final rule. OGE received a comment from a Member of Congress regarding the proposed rule requesting that OGE reinstate the requirement that evidence of ethics agreement compliance be provided to the Senate Committee that previously considered the nomination. The requirement was added to the final rule, but is not a change from the regulation currently in place. *See* 5 C.F.R. § 2634.804(a).

I. Changes Resulting from the STOCK Act

The Stop Trading on Congressional Knowledge Act (STOCK Act) was enacted on April 4, 2012. *See* Pub. L. No. 112-105, 126 Stat. 291 (2012). The STOCK Act imposed additional financial disclosure requirements on individuals required to file public financial disclosure reports pursuant to the Ethics in Government Act (EIGA).² Pursuant to section 402(b) of the EIGA, OGE revised the regulations governing financial disclosure to incorporate the new reporting requirements imposed by the STOCK Act.

OGE revised subparts B and C to include the periodic transaction reporting requirement. *See* 5 C.F.R. §§ 2634.201(f); 2634.309; and 2634.310(d). OGE modified section 2634.305 to

¹ Available at <https://www.federalregister.gov/documents/2018/07/18/2018-15086/executive-branch-financial-disclosure-qualified-trusts-and-certificates-of-divestiture>

² 5 U.S.C. app. §§ 101-11.



add the requirement that certain financial disclosure filers report mortgages secured by a personal residence and also reorganized the section to provide greater clarity. OGE also revised section 2634.601 to reference the disclosure forms developed for transaction reporting.

II. Changes to Establish Consistency with the EIGA

OGE revised the rule to establish consistency between the rule and the EIGA. Section 2634.201(h) was added to include a provision that allows filers to receive an extension of the filing deadline when they are serving in a combat zone, as provided for in section 101(g)(2) of the EIGA. OGE also revised the rule to be more consistent with section 102(a)(1) of the EIGA so both public and confidential disclosure report filers disclose income that is “received,” rather than income that is “received or accrued” or “received or accrued to his benefit.” See 5 C.F.R. §§ 2634.302; 2634.310 (previously 2634.308); 2634.311 (previously 2634.309); 2634.312 (previously 2634.310); 2634.907(b). OGE will consider income received when a reporting individual has the right to exercise control over the income, whether or not the reporting individual has taken actual possession of the income. OGE will provide further guidance regarding reportable income on an asset-by-asset basis in both an updated *Public Financial Disclosure Guide*³ and an updated *Confidential Financial Disclosure Guide*,⁴ which will be released prior to the effective date of the rule, January 1, 2019.

Pursuant to section 101(f)(5) of the EIGA, the revised rule excludes as a group employees from public financial disclosure reporting in positions at the GS-13 level or below if the Designated Agency Ethics Official (DAEO) makes a determination that the position the employee holds meets the criteria set forth in the rule. The final rule retains the requirement that the Director of OGE (Director) make the determination on a case-by-case basis for employees in positions at the GS-14 and GS-15 level.

III. Additional Changes to Public Financial Disclosure Requirements

OGE also made a number of miscellaneous revisions affecting public financial disclosure. Section 2634.201(e) was revised to permit a termination filer to submit a termination report up to 15 days prior to the termination date with an obligation to update the report if there are any changes between the filing date and the termination date. OGE believes this change will result in more timely filings of termination reports because it is often difficult to collect termination reports after an employee has left government service.

In section 2634.304(e), OGE added a method for determining the value of the gift of tickets to an event. The value of the gift is the face value of the ticket. Filers will no longer be able to deduct the cost of food and beverages at an event when determining the value. OGE also clarified that filers are not required to report travel paid for or travel reimbursements in connection with their non-Federal employment. See 5 C.F.R. § 2634.304. OGE considers these travel payments an expense of the business that employs the filer rather than a gift or travel reimbursement to the filer.

³ Current version available at <https://www.oge.gov/Web/278eGuide.nsf>

⁴ Current version available at <https://www.oge.gov/Web/oge.nsf/Resources/Helpful+Resources+for+Confidential+Financial+Disclosure>

OGE added information from the Legal Advisory *Scope of Public Financial Disclosure Reporting Exception for Compensation from an Individual with Whom the Filer is in a Privileged Relationship*, DO-06-011 (2006)⁵ explaining the limited circumstances under which the name of a client is considered confidential for public financial disclosure purposes. *See* 5 C.F.R. § 2634.308 ex. OGE also changed the definition of “widely diversified” so that it tracks the definition of “diversified” used for exemption purposes at Part 2640. *See* 5 C.F.R. § 2634.312(c) (previously 2634.310(c)); and 5 C.F.R. § 2640.102(a). This change permits investment funds that qualify for an exemption under Part 2640 to qualify as excepted investment funds under section 2634.312(c).

Finally, OGE removed the requirement that filers specify that reported sales were made pursuant to a certificate of divestiture. *Compare* 5 C.F.R. § 2634.311 (2018), *with* 5 C.F.R. § 2634.313 (2019). Further, for filers whose reports are not reviewed by OGE, the section was revised to allow attachments to a public financial disclosure report in lieu of restating information in the report, provided that the attachments are approved by the DAEO as being both readily understood and complete as to all required elements. *See* 5 C.F.R. § 2634.313(b). For filers whose reports are reviewed by OGE, the Director must approve the use of attachments. *See id.*

IV. Changes to Confidential Financial Disclosure Requirements

OGE revised provisions related to the confidential reporting requirements with the goal of simplifying confidential financial disclosure filing without losing any of the information necessary to complete a conflicts of interest review. OGE increased the threshold for reportable income from over \$200 to over \$1,000. *See* 5 C.F.R. § 2634.907(b). Filers are no longer required to report the agreement to participate in a defined contribution plan to which the former employer is no longer contributing, and are no longer required to report a diversified fund held in an employee benefit plan. *See* 5 C.F.R. §§ 2634.907(f)(4) and 2634.907(c)(3)(vii)-(viii). In addition, new entrant filers are no longer required to report holdings below the \$1,000 reporting threshold, even if those holdings generated over \$1,000 in income prior to the filing date (*e.g.*, a stock that was sold prior to the filing date that generated \$2,000 in capital gains). *See* 5 C.F.R. § 2634.908(b).

OGE also made additional changes that affect the confidential financial disclosure program generally. For example, OGE revised section 2634.905 to encourage the use of alternative procedures for filing confidential disclosure reports and to remove the Form 450-A as the default alternative procedure. *See* 5 C.F.R. § 2634.905. OGE encourages agencies to consider the information that the agency needs to make a thorough conflicts determination for confidential filers and then to design an alternative form that captures the information required to make such a determination, which must be approved by OGE.

V. Changes to the Certificate of Divestiture Process

OGE made two changes to the regulations governing certificates of divestiture. OGE now requires DAEOs to inform OGE of any circumstances that they believe weigh against

⁵ Available at [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/41C0AA26B05BD52A85257E96005FBDD2/\\$FILE/895f1a69732545e9891b32fc71bc3e4e4.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/41C0AA26B05BD52A85257E96005FBDD2/$FILE/895f1a69732545e9891b32fc71bc3e4e4.pdf?open)

granting a request for a certificate of divestiture. *See* 5 C.F.R. § 2634.1005(b)(3). OGE also modified section 2634.1007 to add OGE's long-standing practice of not granting certificates of divestiture for the sale of assets held in tax-deferred or tax-advantaged accounts that do not incur capital gains. *See* 5 C.F.R. § 2634.1007(b).

VI. Miscellaneous and Technical Changes

OGE revised section 2634.803(a) to notify agencies and filers that an ethics agreement that was approved by OGE during the nomination process for a filer who was nominated by the President and confirmed by the Senate may not be modified without the approval of OGE. In addition, OGE removed the appendices to Part 2634. The model qualified trust documents in Appendix A and Appendix B are available on the OGE website.⁶

OGE also made a number of general technical and non-substantive changes that apply throughout Part 2634 to enhance clarity and readability, and that remove gender-specific terms from the substantive regulatory text. In addition, OGE has added and updated examples throughout Part 2634. These changes do not constitute a substantive change to the regulation.

VII. Questions

Agency ethics officials with questions about the revisions to Part 2634 may contact their OGE Desk Officers.

⁶ Available at <https://www.oge.gov/Web/oge.nsf/Resources/Qualified+Trusts>

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5 CFR part 2634 Revision Table

Section	Revision
201(e)	Added flexibility for termination filers to file 15 days before the filer’s termination date
201(f)	Periodic Transaction Report filing requirement added
201(h)	Added combat zone filing extension
203	Currently, the OGE Director may exclude a position from filing on a case-by-case basis. The revised rule creates a group exclusion from OGE approval for an employee in GS-13 (or lower) position if the DAEO makes a determination regarding the position under the procedure outlined in the rule
301(e)	If a filer is unable to make a good faith estimate of the value of an asset, the filer may indicate on the report that the “value is not readily ascertainable”
302	Changed from “received or accrued” income to just “received” income, to be consistent with the EIGA
303	<p>Added a provision stating that acquiring an asset through inheritance is not a reportable transaction</p> <p>Added a provision stating that filers need not report transactions that occurred when they were not public filers</p> <p>Added a provision stating that filers need not report transactions already reported in a periodic transaction report</p>
304	<p>Added a valuation method (face value) for tickets to events</p> <p>Added a provision that filers do not have to report their outside employer-related travel</p> <p>Updated the procedures for requesting a waiver of gift reporting</p> <p>Revised definition of “readily available in the market” to remove the reference to the metropolitan area nearest to the filer’s official residence</p>
305	<p>Reorganized for clarification</p> <p>Added new mortgage reporting requirement from the STOCK Act</p>
308 <i>(previously 308(b)(6))</i>	<p>This section now only focuses on the disclosure of compensation in excess of \$5,000</p> <p>Added information from the Legal Advisory DO-06-011 to determine when the name of a client is confidential</p>
309	Added the substantive reporting requirements for Periodic Transaction Reports

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Section	Revision
310	<p>The information currently in Section 308 regarding reporting periods can now be found here</p> <p>Revised the explanation of the reporting period for termination reports to track the statutory language more closely</p>
310(b)(2) <i>(previously 308(b)(2))</i>	<p>Changed from “received or accrued” income to just “received” income to be consistent with the EIGA</p>
310(d)	<p>Added transaction report reporting period: “The report must be filed within 30 days of receiving notification of a covered transaction, but not later than 45 days after the date such transaction was executed.”</p>
311(a)(1)(ii) <i>(previously 309(a)(1)(ii))</i>	<p>For income purposes, changed from “honoraria received by or accrued to” to just “honoraria received,” to be consistent with the EIGA</p>
311(d) <i>(previously 309(a)(3))</i>	<p>Revised note and example to clarify and illustrate that spouses and dependent children will rarely be able to utilize this provision</p>
312 <i>(previously section 310)</i>	<p>Clarified the rules regarding which trusts are required to be disclosed, including, with regard to remainder interest, only requiring the disclosure of those remainder interests that are vested under state law</p> <p>Changed from “received or accrued” income to just “received,” to be consistent with the EIGA</p>
312(c)(3) <i>(previously 310(c))</i>	<p>Changed the definition of “widely diversified”: “A fund is widely diversified if it does not have a stated policy of concentrating its investments in any industry, business, or single country other than the United States or bonds of a single state within the United States.”</p>
313 <i>(previously 311)</i>	<p>Removed the requirement that filers specify that reported sales were made pursuant to a certificate of divestiture</p> <p>For filers whose reports are not reviewed by OGE, changed the regulations to allow attachments, such as excel spreadsheets or brokerage statements, to the report in lieu of restating information in the report, provided that the attachments are approved by the DAEO as being both readily understood and complete as to all required elements</p> <p>For filers whose reports are reviewed by OGE, changed to allow attachments if approved by the OGE Director</p>
Subpart D	<p>Modernized language</p>

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Section	Revision
601	Updated to include the 278e and 278-T Removed the OGE Form 450-A
603(b)(1)	The following agencies were added: <ul style="list-style-type: none"> • Office of the Director of National Intelligence • National Geospatial-Intelligence Agency
605	Updated review steps and standards Set deadline for receipt of additional information from filer Revised the review standard to require that each Part of the report is complete
606	Revised the language so that the procedures for the 5-day update letter are easier to understand
607	Updated to include an explanation about the effect of seeking and following ethics advice on potential disciplinary action
803(a)(4)	Added a provision that an agency may not modify, without OGE approval, the ethics agreement of an employee whose 278e is reviewed by OGE
804(b)(1)	Added the following: “A recusal statement is not required for a general affirmation that the filer will comply with ethics laws.”
903(a)	Revised a provision to also excuse employees who remain employed by the Executive branch from filing an annual confidential financial disclosure report if the employee left a filing position prior to the report’s due date
903(d)	Provided extensions of the filing deadline for certain service during a period of national emergency for confidential filers
904(a)(2)	Provided more guidance regarding which SGEs should be filing 450s
905	Added a policy of encouraging the use of alternate procedures in lieu of the 450 if it would better serve an agency’s conflicts of interest analysis Eliminated the 450-A
907(b)	Changed from “received or accrued” income to just “received” income to be consistent with change in public filing requirements Changed the reportable income amount to \$1,000 for confidential filers

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Section	Revision
907(c)(3)(vii) & (viii)	Changed the requirement so that confidential filers are no longer required to report a diversified fund in an employee benefit plan
907(f)(4)	Changed the requirement so that confidential filers are no longer required to report a defined contribution plan to which the former employer is no longer contributing
907(g)	Combined gifts and travel reimbursements into a single reporting threshold for confidential filers
907(i)(1)	Clarified the rules regarding which trusts are required to be disclosed, including, with regard to remainder interests, only requiring the disclosure of those remainder interests that are vested under state law
907(i)(3)	<p>Changed the definition of “widely diversified”:</p> <p>“A fund is widely diversified if it does not have a stated policy of concentrating its investments in any industry, business, or single country other than the United States or bonds of a single state within the United States.”</p>
908	<p>Changed reporting requirements for confidential filers who are new entrants and nominees</p> <ul style="list-style-type: none"> • They do not report any asset not held at the time of filing • They report only those liabilities owed at the time of filing • They report only those agreements and arrangement in place at the time of filing
1005(b)(3)	Added the requirement that the DAEO must identify any facts that would weigh against issuance of a certificate of divestiture
1007(b)	Added a provision that informs employees that they cannot get a certificate of divestiture for assets held in a tax-deferred or tax-advantaged account
Appendices	Removed and will be available as model trust documents on the OGE website