OFFICE OF GOVERNMENT ETHICS

02 x 2

Letter to a Deputy Inspector General
dated May 14, 2002

This is in response to the memorandum that you transmitted to me on April 30, 2002. Your memorandum raises certain questions concerning your financial disclosure obligations with respect to a trust for which you serve as trustee and an estate for which you serve as executor, in light of a recent DAEOgram issued by the Office of Government Ethics (OGE).[1]

On April 24, 2002, OGE issued DAEOgram DO-02-008 [OGE Informal Advisory Memorandum 02 x 1], which explained certain financial disclosure issues pertaining to trustees, executors and administrators. The main purpose of the DAEOgram was to explain OGE's position that filers of financial disclosure statements are not required to report the holdings or income of any trust or estate merely because they serve as trustee, executor or administrator of the trust or estate. We reiterate this advice in connection with the questions posed in your memorandum: the mere fact that you serve as trustee of a trust or executor of an estate does not give rise to an obligation to report the holdings or income of the trust or estate.

Your memorandum points out, however, that trustees and executors--as well as their spouses and dependent children--may have certain beneficial interests in the trust or estate. Consequently, you are concerned that OGE's recent advice is "overbroad," insofar as it does not take into account such beneficial interests.

We want to make clear that nothing in DAEOgram DO-02-008 affects any prior guidance with respect to the reporting of beneficial interests in a trust or estate. As we stated in footnote 1 of that DAEOgram, section 102(f)(1) of the Ethics in Government Act "requires the reporting of trust assets and income where the filer, spouse or dependent child has a beneficial interest in the trust, without regard to whether any of these individuals serves as trustee." DO-02-008, at 2 n.1. The point of

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[1] It is not clear to us which of the facts set out in your memorandum are derived specifically from your own circumstances or which are hypothetical. Because the final sentence in your memorandum specifically refers to "Parts A and B of *my* SF-278," we will assume that you are principally seeking guidance with respect to your own current financial disclosure obligations.

the DAEOgram was not to cast doubt on the express statutory requirement to report beneficial interests under section 102(f)(1), but rather to clarify that section 102(a)(3) of the Act does not require the disclosure of assets and income just because a reporting individual serves as trustee, executor or administrator of a trust or estate, in the absence of any beneficial interest.

Turning to the specifics of your questions, you indicate that you are the trustee of a generation-skipping trust under which your child is a beneficiary. You acknowledge that DO-02-008 does not affect the requirement that you report your trusteeship as an outside position on Schedule D of your SF 278. However, you ask whether there is also a requirement to report information concerning the holdings and income of the trust, on Schedules A and B. You state: "If a dependent child owned the stock outright, the filer would have to report it; but because of the trust, it would seem under DO-02-008 that the filer does not have to report it--even though the filer has immediate authority over the asset as trustee and it affects the financial interest of a child." We do not agree with this statement.

Whether you must report any information about the holdings and income of the trust does not depend on whether you are the trustee. *See* DO-02-008. Rather, it depends on whether you, your spouse or your dependent child has a beneficial interest in (or receives any income from) the trust. *See* 5 U.S.C. app. 102(f)(1); 5 C.F.R. § 2634.310(a). If, as you posit in the sentence quoted above, a *dependent child* is the beneficiary of the trust, then you must report all the appropriate information on Schedules A and B concerning the holdings and income of the trust. However, in a footnote, you raise the further question of how the reporting requirements would apply if the child were *not a dependent*. In this scenario, there would be no reporting obligation, because the Ethics in Government Act does not require filers to disclose the property and income of non-dependent children. Again, the conclusion is not affected, in either scenario, by whether or not you serve as trustee.

Of course, trustee positions still may carry the potential for conflicts of interest under 18 U.S.C. § 208. As we explained more fully in DAEOgram DO-01-029 (December 19, 2001) [OGE Informal Advisory Memorandum 01 x 12], there are some circumstances in which a trustee may be said to have a "personal" financial interest in the property of a trust, whether the trustee is the employee, the employee's spouse, or any other person or organization whose financial interests are imputed to the employee. Furthermore, where the employee is the trustee, he or she always will have an imputed "organizational" interest in any particular matter

affecting the trust property. *See* Memorandum of Edward Whelan III, Acting Assistant Attorney General, to Marilyn L. Glynn, General Counsel, OGE, November 2, 2001 (available on OGE's website under the "Other Ethics Guidance" category in the "Laws and Regulations" section, www.usoge.gov).[2] However, the fact that a particular position may result in personal or imputed financial interests under section 208 does not necessarily mean that those interests must be disclosed under section 102 of the Ethics in Government Act.[3]

You also state that you are the executor of a parent's estate. You ask what the reporting obligations are, "during the term of the executorship," with respect to property in the estate. As we discussed in DO-02-008, the mere fact that a filer is an executor does not itself give rise to any duty to report the holdings or income of an estate, although we noted that filers still must report executorships as outside positions on Schedule D of the SF 278.

Even though a filer has no duty to report the holdings and income of an estate merely because he or she is the executor, we would note that there are situations in which an executor nevertheless could have a personal financial interest in an estate, under 18 U.S.C. § 208. For example, executors sometimes receive fees that are dependent on the value of the estate, *see* OGE Informal Advisory Letter 82 x 6, and such an executor would have a personal financial interest in any particular matter that directly and predictably affects the value of any property in the estate. Unlike trustees, however, executors are not listed in

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[2] In this regard, we do not agree with your characterization of the DAEOgrams and the OLC opinion cited above, with respect to which you state that OGE and OLC "concentrate on the possible imputed interest that might arise from the position of trustee" and "conclude that there is no such interest as a matter of trust law." On the contrary, all of the aforementioned documents emphasize that an employee who serves as trustee has an imputed organizational interest in all particular matters that directly and predictably affect the interests of the trust. *See* DO-02-008, at 2; DO-01-029, at 2; Memorandum of Edward Whalen III, at 2ff.

[3] Although there is substantial overlap between those financial interests that must be reported, under section 102 of the Ethics in Government Act, and those that give rise to potential conflicts of interest, under 18 U.S.C. § 208, the coverage of these two provisions has never been identical. For example, the interests of an employee's general partner or outside employer are covered by section 208 but are not reportable under section 102.

section 208(a) as one of the positions that give rise to an imputed "organizational" interest on the part of an employee. *Compare* 18 U.S.C. § 208(a) (listing trustee but not executor); *with* 18 U.S.C. §§ 203(d), 205(e) (listing both trustee and executor). Therefore, an employee would not have an imputed financial interest in all particular matters affecting an estate which he or she serves as executor. *See* Memorandum of Beth Nolan, Deputy Assistant Attorney General, to Marilyn L. Glynn, General Counsel, OGE, August 24, 1998, at 3 ("We are far from certain that a position other than one specified in § 208–-'officer, director, trustee, general partner or employee'--could be the basis for imputing an organization's financial interest to the employee, even if that other position created a fiduciary duty to the organization.")

You indicate, however, that you are not only the executor but also a beneficiary of the estate. As explained above, filers are required to report any beneficial interest in a financial arrangement, including an estate. *See* 5 U.S.C. app. 102(f)(1); 5 C.F.R. § 2634.310(a).[4] Again, this reporting obligation with respect to beneficial interests does not depend on whether the filer is also the executor.

It has not always been easy for OGE to specify the level of disclosure required for beneficial interests in an estate that is still in probate or otherwise undistributed. At one time, OGE attempted to require filers to report their proportional share of all property and income of the estate, including the specific identity of all assets and the appropriate valuation and income amounts. *See* OGE, *Public Financial Disclosure: A Reviewer's Reference* 7-31 (1996). However, experience has proven this approach to be unworkable in the great majority of cases. In some instances, it has been difficult or impossible to determine which estate assets ultimately will be distributed to the filer, for example, because of potential disputes under the will or the more routine business of satisfying creditors of the estate and paying expenses. In many cases, filers also have reported difficulties in

[4] Please note, however, that a beneficiary has no reportable interest in the estate of a person still living. The beneficiary of a living testator does not have any vested interest but rather a "mere expectancy." *See, e.g., In re Estate of Finlay,* 430 Mich. 590, 600-01 (1988). Likewise, OGE has determined that an employee does not have a disqualifying financial interest, under 18 U.S.C. § 208(a), as a result of being named a beneficiary in the will of a person still living; in such cases, "the employee's interest in the assets to be distributed under the will is merely speculative since he may never inherit them." 60 *Federal Register* 47208, 47209 (September 11, 1995)(preamble to proposed 5 C.F.R. part 2640).

obtaining specific information about the contents of the estate and their particular share of any given asset. Furthermore, privacy interests of other beneficiaries--besides the filer, the filer's spouse and dependent children--sometimes are implicated, thus making it even more difficult to obtain certain information and making the potential public disclosure on an SF 278 more problematic.

As a result of this experience, OGE now requires that the financial disclosure report indicate only that the filer (or the filer's spouse or dependent child) is the beneficiary of a particular estate that has not been distributed. The filer must identify the decedent, but need not attempt to identify specific assets or report specific value or income categories. This level of disclosure recognizes that filers have an interest, and it alerts ethics officials to the need to provide counseling, as appropriate, about possible conflicts issues.[5] However, this approach does not require filers to provide more specific information that may be difficult or impossible to ascertain, or that could even present a misleading picture of the true interest the beneficiary ultimately may receive after distribution of the estate.

We hope this has been helpful in clarifying your financial disclosure obligations. If you have further questions, please do not hesitate to contact me.

Sincerely,

Marilyn L. Glynn
General Counsel

[5] OGE agrees with you that a beneficial interest in an undistributed estate sometimes may present a conflict of interest. In the past, OGE has advised ethics officials and filers that there could be a disqualifying financial interest, under 18 U.S.C. § 208, if the beneficiary has sufficient knowledge of an identified asset in a decedent's estate and sufficient certainty that he or she will receive a distribution affected by the value or income of that asset.