

Rules and Regulations

Federal Register

Vol. 67, No. 105

Friday, May 31, 2002

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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2634

RIN 3209-AA00

Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture; Financial Disclosure Requirements for Interests in Revocable Inter Vivos Trusts

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; clarifying amendment.

SUMMARY: The Office of Government Ethics is issuing a final rule to amend the regulation that describes the financial disclosure requirements of the Ethics in Government Act with respect to trusts in which employees, their spouses and their dependent children have certain interests. The amendment clarifies OGE's interpretation that the Act does not require filers of financial disclosure reports to disclose the holdings or income of a revocable inter vivos trust with respect to which they, their spouses or their dependent children have a beneficial interest or receive a discretionary distribution, provided that neither the filer, the filer's spouse, nor the filer's dependent child is the grantor of the trust.

EFFECTIVE DATE: May 31, 2002.

FOR FURTHER INFORMATION CONTACT: Richard M. Thomas, Associate General Counsel, Office of Government Ethics; Telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

SUPPLEMENTARY INFORMATION:

I. Revocable Inter Vivos Trusts ("Living Trusts")

Revocable inter vivos trusts, so-called "living trusts," have become a popular estate planning device in the last several decades. In the typical living trust, the grantor (or settlor) conveys property in

trust to a trustee (who is often the grantor) and retains a life estate, with the remainder to go to specified beneficiaries upon the termination of the life estate—all *subject to the power of the grantor* to revoke the trust entirely and to make lessor changes, such as substitutions of beneficiaries or trustees. In this regard, revocable living trusts have less in common with traditional irrevocable trusts, in which the grantor no longer retains substantial control over the administration of the trust or the disposition of the property, than with wills, which remain ambulatory until the death of the testator. Therefore, it is widely recognized that living trusts are "will substitutes."

II. Legislative and Regulatory Background of Financial Disclosure Requirements

Section 102(f)(1) of the Ethics in Government Act of 1978, as amended (the Act), sets out the general financial disclosure requirements for beneficiaries of trusts and other financial arrangements:

each reporting individual shall report the information required to be reported pursuant to subsections (a), (b), and (c) of this section with respect to the holdings of and the income from a trust or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, such individual, his spouse, or any dependent child. 5 U.S.C. app. 102(f)(1).

The legislative history indicates several related purposes for this provision. First, there was an intent to prevent filers from avoiding reporting requirements "simply by transferring interests" to a trust or other entity that would still benefit the filer financially. H.R. Rep. No. 95-642, Part 1, at 40 (1977) (reporting on H.R. 6954). Second, there was concern that situations could arise in which there is an actual or apparent conflict of interest because "any impact on the financial status of the * * * trust also impacts significantly upon the financial status of the reporting individual." *Id.* Third, it appears that the trust provision was included at least in part to deal with the fact that Federal officials already had created a variety of "blind" trusts, which did not follow any generally accepted standards, in an attempt to comply with conflict of interest requirements; Congress determined that any such pre-existing trusts should be

subject to full disclosure if the trusts could not be brought into compliance with the new uniform standards for qualified blind trusts under the Act. *See* S. Rep. No. 95-170, at 123-124 (1977) (reporting on S. 555).

In 1980, OGE first published its "final regulations to state in greater detail than the Act the information which must be contained in the financial disclosure report (SF 278)." 45 FR 69776 (October 21, 1980). Included in those regulations was a provision stating in greater detail what kinds of interests in trusts and estates needed to be reported under the Act. Although the Act itself did not specifically address the distinction between vested and nonvested beneficial interests, the OGE regulation specified that nonvested interests in an estate need not be reported and that nonvested interests in certain trusts needed to be evaluated on a case-by-case basis in consultation with OGE. *See* 45 FR 69784. In 1992, this regulation was amended to provide even greater detail with respect to those interests in trusts that were deemed reportable under the Act. *See* 57 FR 11800 (April 7, 1992). In particular, nonvested beneficial interests were excluded altogether, and a definition of vested interests was provided. *See* 5 CFR 2634.310(a)(2). Although there is no discussion of the subject of nonvested interests in the preambles to these two rules, OGE clearly recognized that the statutory phrase "beneficial interest in principal or income" should not be read so broadly as to require the public disclosure of interests the enjoyment of which is so speculative and uncertain: "the uncertainty of the right of enjoyment * * * differentiates a 'vested' and a 'nonvested' interest." 5 CFR 2634.310(a)(2). Furthermore, the reporting of nonvested interests would not further the statutory purpose of disclosing interests that pose a potential conflict of interest, because OGE determined that such interests generally are too uncertain to implicate the financial conflict of interest statute, 18 U.S.C. 208. *See* OGE's Public Financial Disclosure: A Reviewer's Reference 7-30 revised (1996), which is available in the publications section of the OGE Web site (<http://www.usoge.gov>).

On a related subject, OGE also has provided guidance concerning the reporting of potential interests as a beneficiary under a will. Of particular

relevance, OGE determined that section 102(f)(1) of the Act and 5 CFR 2634.310 do not require filers to report the holdings and income of an estate of a living person just because they are named as beneficiaries under that person's will. *Id.* The Office of Government Ethics concluded that any potential beneficial interest created by the will of a living person is not vested, within the meaning of § 2634.310(a)(2). 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 a 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 FR 47207, 47209 (September 11, 1995) (preamble to OGE's proposed financial conflict of interest regulation subsequently codified at 5 CFR part 2640).

III. Treatment of Revocable Living Trusts Under Financial Disclosure Requirements

Until now, OGE's regulations and other written guidance have not explicitly addressed the reporting requirements of beneficiaries under revocable living trusts. However, the approach taken in this final rule is consistent with, and follows from, OGE's prior treatment of nonvested interests in trusts and estates, including OGE's prior treatment of beneficiaries under the will of a living testator.

As a technical matter, it may be open to debate whether a remainder interest in a revocable living trust best should be viewed as vested or nonvested.

Compare Randall v. Bank of America National Trust and Savings Ass'n., 119 P.2d 754 (Cal. App. 1941) (vested), *with Bezzini v. Department of Social Services*, 715 A.2d 791 (Conn. App. 1998) (not vested interest, but mere expectancy). Nevertheless, OGE finds it unnecessary to settle this technical question, in view of the fact that revocable living trusts clearly have evolved into widely accepted will substitutes. The Office of Government Ethics has determined, for purposes of section 102(f)(1) of the Act, that any "interest" in the remainder of a revocable living trust is just as speculative as the mere expectancy enjoyed by the beneficiary of a living testator. The Office of Government Ethics sees little connection between the purposes of section 102(f)(1), as described above, and the disclosure of expectations that are so speculative and subject to the complete control of someone other than the filer, the filer's

spouse or the filer's dependent children. Moreover, such disclosures necessarily would reveal the interests—and estate planning decisions—of persons beyond the filer and the filer's own spouse and dependent children, thus intruding unnecessarily into the private affairs of persons beyond the ordinary scope of financial disclosure under the Act.

Therefore, the final rule adds a note indicating that nothing in § 2634.310 requires the reporting of the holdings or income of a revocable living trust with respect to which the reporting individual has only a remainder interest. Under the language of this note, it is not necessary to determine whether the remainder is vested or nonvested. However, the note makes clear that filers are not excused from reporting the holdings and income of a revocable trust if the filer—or the filer's spouse or dependent child—also is the grantor of the trust. As should be clear from the discussion above, the grantor of a revocable living trust retains such rights of control and enjoyment with respect to the trust property that OGE must view the grantor as the true owner of the property; OGE believes this to be the case whether or not the grantor actually receives any distribution of trust income and whether or not the grantor actually serves as trustee.

The new note also provides that nothing in § 2634.310 requires the reporting of holdings or income of a revocable living trust from which the reporting individual receives any discretionary distribution, provided again that the filer (or the filer's spouse or dependent child) is not the grantor. It is true that section 102(f)(1) of the Act requires the disclosure of trusts "from which income is received" by the reporting individual, and that section 109(7) of the Act defines "income" as including "income from an interest in an estate or trust." However, OGE does not view discretionary distributions to a beneficiary under a revocable living trust as income within the meaning of these provisions. In OGE's view, such a discretionary distribution is no different from a gift, because the distribution is made at the pleasure of the grantor. For purposes of financial disclosure, OGE sees no meaningful distinction between, for example, a gift of money from a filer's parent and a discretionary distribution of money from the parent's revocable living trust. The Act clearly treats income and gifts separately, and gifts are subject to different reporting requirements (and exclusions) than those found in section 102(f). *Compare* 5 U.S.C. app. 102(a)(1) (income), *with* section 102(a)(2) (gifts).

OGE emphasizes that nothing in the final rule changes the reporting requirements with respect to irrevocable trusts. In this connection, it should be noted that revocable living trusts themselves may become irrevocable upon the occurrence of certain events, such as the death of the grantor or circumstances specified in the trust instrument or State law.

IV. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b) and (d), as Director of the Office of Government Ethics, I find good cause exists for waiving the general notice of proposed rulemaking, public comment procedures, and 30-day delay in effectiveness as to this revision. The notice, comment, and delayed effective date are being waived because this minor amendment to OGE financial disclosure regulations is an interpretative rule clarifying OGE's view concerning the scope of section 102(f)(1) of the Ethics in Government Act. Furthermore, it is in the public interest that this amendment become effective promptly, because the amendment has the effect of relieving an unnecessary burden on filers of financial disclosure reports.

Executive Order 12866

In promulgating this final rule amendment, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Review and Planning. This amendment has not been reviewed by the Office of Management and Budget under that Executive order, since it is not deemed "significant" thereunder.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed amendatory rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this final rule amendment does not contain information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and has submitted a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

List of Subjects in 5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

Approved: May 24, 2002.

Amy L. Comstock,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2634 as follows:

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

1. The authority citation for part 2634 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Section 2634.310 is amended by adding a note following paragraph (a)(2) to read as follows:

§ 2634.310 Trusts, estates, and investment funds.

(a) * * *

Note to paragraph (a): Nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust (also known as a "living trust") with respect to which the filer, his spouse or dependent child has only a remainder interest, whether or not vested, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child. Furthermore, nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust from which the filer, his spouse or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child.

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[FR Doc. 02-13734 Filed 5-30-02; 8:45 am]

BILLING CODE 6345-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001-CE-36-AD; Amendment 39-12766; AD 2002-11-05]

RIN 2120-AA64

Airworthiness Directives; Air Tractor, Inc. Models AT-400, AT-401, AT-401B, AT-402, AT-402A, AT-402B, AT-501, AT-802, and AT-802A Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 2001-10-04 R1, which lowered the safe life for the wing lower spar cap on certain Air Tractor, Inc. (Air Tractor) AT-400, AT-500, and AT-800 series airplanes. AD 2001-10-04 R1 resulted from numerous reports of cracks in the 3/8-inch bolthole of the wing lower spar cap on the affected airplanes. This AD retains the safe life for the wing lower spar cap and requires you to eddy-current inspect the wing lower spar cap immediately prior to the replacement/modification in order to detect and correct any crack in a bolthole before it extends to the modified center section of the wing. This AD further reduces the safe life for certain Models AT-401, AT-401B, AT-402, AT-402A, AT-402B, and AT-501 airplanes that incorporate or have incorporated Marburger Enterprises, Inc. winglets and removes the Models AT-502, AT-502A, AT-502B, and AT-503A airplanes from the applicability. We are issuing another AD action to cover these

airplanes. The actions specified by this AD are intended to prevent fatigue cracks from occurring in the wing lower spar cap before the established safe life is reached. Fatigue cracks in the wing lower spar cap, if not detected and corrected, could result in the wing separating from the airplane during flight.

DATES: This AD becomes effective on July 12, 2002.

The Director of the Federal Register previously approved the incorporation by reference of certain publications listed in the regulation as of June 8, 2001 (66 FR 27014, May 16, 2001).

ADDRESSES: You may get the service information referenced in this AD from Air Tractor, Incorporated, P.O. Box 485, Olney, Texas 76374; or Marburger Enterprises, Inc., 1227 Hillcourt, Williston, North Dakota 58801; telephone: (800) 893-1420 or (701) 774-0230; facsimile: (701) 572-2602. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2001-CE-36-AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Direct all questions to:

—For airplanes that do not incorporate and never have incorporated Marburger Enterprises, Inc. winglets: Rob Romero, Aerospace Engineer, FAA, Fort Worth Airplane Certification Office, 2601 Meacham Boulevard, Fort Worth, Texas 76193-0150; telephone: (817) 222-5102; facsimile: (817) 222-5960; and

—For certain Models AT-402, AT-402A, AT-402B, and AT-501 airplanes that incorporate or have incorporated Marburger Enterprises, Inc. winglets: John Cecil, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, 3960 Paramount Boulevard, Lakewood, California 90712; telephone: (562) 627-5228; facsimile: (562) 627-5210.

SUPPLEMENTARY INFORMATION:

Discussion

Has FAA Taken Any Action to This Point?

Several reports of cracked wing lower spar caps on Air Tractor AT-500 series airplanes caused the manufacturer (Air Tractor) to recalculate the fatigue life of the wing lower spar cap on Air Tractor AT-400, AT-500, and AT-800 series airplanes. One report was of an accident where the wing separated from the