

## § 2634.405

(i) When an interested party learns about such employment or consultation, the person must sign the trust instrument as a party, subject to the prior approval of the Director of the Office of Government Ethics;

(ii) Under all the facts and circumstances, the person is determined pursuant to the requirements for eligible entities under § 2634.406 of this subpart to be independent of any interested party with respect to the trust arrangement;

(iii) The person is instructed by the independent trustee or other designated fiduciary not to disclose publicly or to any interested party information which might specifically identify current trust assets or those assets which have been sold or disposed of from trust holdings; and

(iv) The person is instructed by an independent trustee or other designated fiduciary to have no direct communication with respect to the trust with any interested party, and to make all indirect communications with respect to the trust only through the trustee, pursuant to paragraph (c)(9) of this section;

(15) The trustee shall not acquire by purchase, grant, gift, exercise of option, or otherwise, without the prior written approval of the Director of the Office of Government Ethics, any securities, cash, or other property from any interested party;

(16) The existence of any banking or other client relationship between any interested party and an independent trustee or other designated fiduciary shall be disclosed in schedules attached to the trust instrument, and no other such relationship shall be instituted unless that relationship is disclosed to the Director of the Office of Government Ethics; and

(17) The independent trustee and any other designated fiduciary shall be compensated in accordance with schedules annexed to the trust instrument.

(d) *Personal income tax returns.* In the case of a trust to which this section applies, the trustee shall be given power of attorney to prepare, and shall file, on behalf of any interested party, the personal income tax returns and similar tax documents which may contain information relating to the trust. Ap-

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propriate Internal Revenue Service power of attorney forms shall be used for this purpose.

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### § 2634.405 Certification of trusts.

(a) *Standards.* Before a trust may be classified as a qualified blind or a qualified diversified trust, under the provisions of § 2634.403 or § 2634.404 of this subpart, respectively, the trust must be certified by the Director of the Office of Government Ethics.

(1) A trust will be certified for purposes of this subpart only if:

(i) It is established to the Director's satisfaction that the requirements of section 102(f) of the Act and this subpart have been met;

(ii) Certification is in the public interest; and

(iii) Certification is consistent with the policies established by the Act, this subpart and other applicable laws and regulations.

(2) Certification will not be granted in any case in which, in the Director's sole judgment, such action would not be appropriate because of the ready availability of other remedies, the lack of any substantive ethical concern which would warrant the establishment of a qualified trust, or the nature or negligible value of the assets proposed for a trust's initial portfolio.

(b) *Certification procedures.* The interested parties or their representatives should first consult the staff of the Office of Government Ethics concerning the appropriateness of, and requirements for, certification in the particular case. In order to assure timely trust certification, the interested parties shall be responsible for the expeditious submission to the Office of all required documents and responses to requests for information, including a statement that any interested party who will be a party to a certified trust instrument has read and understands the overview of executive branch qualified trusts in § 2634.401(a) of this subpart. Certification shall be indicated by a letter from the Director to the interested parties or their representatives.

(c) *Certification of pre-existing trusts.* In addition to the normally applicable

rules of this subpart D, other considerations apply to pre-existing trusts. Generally, in the case of a pre-existing trust whose terms do not permit amendments satisfying the rules of this subpart, all of the relevant parties (including the reporting individual, any other interested parties, the trustee of the pre-existing trust, and all of its other parties and beneficiaries) will be required pursuant to section 102(f)(7) of the Act to enter into an umbrella agreement specifying that the pre-existing (underlying) trust will be administered in accordance with the provisions of this subpart. A parent or guardian may execute the umbrella agreement on behalf of a required participant who is a dependent child. The umbrella agreement will be certified as a qualified trust if all requirements of this subpart are fulfilled under conditions where required confidentiality with respect to the trust can be assured. A copy of the underlying trust instrument, and a list of its assets at the time the umbrella agreement is certified as a qualified trust (categorized as to value in accordance with § 2634.301(d)), shall be filed with the executed umbrella trust instrument as specified by § 2634.408(a)(1)(i) of this subpart.

(d) *Review of certification.* The Office of Government Ethics shall maintain a program to assess, on a frequent basis, the appropriateness of any trust certification which has been granted.

(e) *Revocation of certification and modification of trust instrument.* Certification of a trust may be revoked pursuant to the rules of subpart E of this part. The terms of a qualified trust may not be revoked or amended, except with the prior written approval of the Director, and upon a showing of necessity and appropriateness.

#### § 2634.406 Independent trustees.

(a) *Standards.* (1) The term *independent trustee* means any entity referred to in paragraph (a)(2) of this section which, under all the facts and circumstances, is determined by the Director of the Office of Government Ethics and in the Director's sole discretion, to be independent of any interested party with respect to a trust proposed for certification under this sub-

part. The term includes, unless the context indicates otherwise, in addition to the party to a trust instrument who is designated to serve as trustee, those parties who are designated to perform fiduciary duties. Approval of a proposed trustee or other designated fiduciary shall be granted only if it is established to the Director's satisfaction that the requirements of section 102 of the Act and this subpart have been met, and that approval in the case is in the public interest and consistent with the policies established by those provisions and other applicable laws and regulations.

(2) *Eligible entities.* Eligibility to serve as a trustee or other fiduciary under this section is limited to a financial institution (not a person), not more than 10 percent of which is owned or controlled by a single individual, which is:

- (i) A bank, as defined in 12 U.S.C. 1841(c); or
- (ii) An investment adviser, as defined in 15 U.S.C. 80b-2(a)(11).

NOTE: By the terms of paragraph (3)(A)(i) of section 102(f) of the Act, an individual who is an attorney, a certified public accountant, a broker, or an investment advisor is also eligible to serve as an independent trustee. However, experience of the Office of Government Ethics over the years dictates the necessity of limiting service as a trustee or other fiduciary to the financial institutions referred to in this paragraph, to maintain effective administration of trust arrangements and preserve confidence in the Federal qualified trust program. Accordingly, under its authority pursuant to paragraph (3)(D) of section 102(f) of the Act, the Office of Government Ethics will not approve proposed trustees or other fiduciaries who are not financial institutions, except in unusual cases where compelling necessity is demonstrated to the Director, in his sole discretion.

(3) *Requirements.* No eligible entity shall be determined to be an independent trustee under this section unless:

- (i) That entity is independent of and unassociated with any interested party so that it cannot be controlled or influenced in the administration of the trust by any interested party; and
- (ii) That entity is not and has not been affiliated with any interested party, and is not a partner of, or involved in any joint venture or other investment or business with, any interested party; and