



United States  
**Office of Government Ethics**  
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April 8, 1998  
DO-98-013

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts  
Director

SUBJECT: Timeliness of Nominee Public Financial Disclosure Reports and Related Certificate of Divestiture Issues

The U.S. Office of Government Ethics (OGE) recently has reviewed its policy with respect to the filing of nominee public financial disclosure reports (SF 278). In cases involving nominees requiring Senate confirmation, the prospective agency of employment is required to submit to this Office a nominee package which includes an opinion letter from the agency, the financial disclosure report of the nominee, and any supplemental material such as an ethics agreement. This Office reviews the package and then forwards it to the appropriate Senate committee along with our opinion letter. (See 5 C.F.R. § 2634.605(c).)

In most cases, by the time a nomination has been announced the nominee's draft financial disclosure report already has been reviewed by and discussed among OGE, agency and White House reviewers. Such reports are not considered to have been "filed" for purposes of the Ethics in Government Act, however, and circulated copies are designated to be drafts of the nominee's report. This review process often begins several months before an individual is nominated, and is finalized only at the time that the report (without a draft designation) is formally transmitted to this Office. As a result, this Office accepts a report that may have been signed and dated by the nominee up to six months prior to its transmittal to the Senate.

Note, however, that the Ethics in Government Act generally requires the reports of nominees to be current to fewer than 31 days of the date on which the report is filed, except for some data which is required to be current as of the date of filing. See 5 U.S.C. app. § 102(b)(1). Accordingly, it has always been OGE's policy that the material in the report be made current by the filer or the agency reviewer (pursuant to specific authorization from the filer) prior to submitting the report to this Office in final form. Most agencies have adopted this practice. This action serves to protect the nominee from possible conflicts and appearance issues that may have arisen during the period between the date he signed the report and submission of the report to the Senate. This practice fulfills the statutory requirements concerning timeliness arising under section 102(b)(1) of the Ethics in Government Act.

To ensure that all agency reviewers consistently adhere to this practice and that there are not ambiguities in particular cases, OGE is now requesting that all agency reviewers note on the cover sheet of the disclosure form that the report is current in accordance with statutory requirements. This statement must then be followed with the date and signature of the agency reviewer. For nominees, this documents that the report is filed at the agency within five days of his nomination by the President, and that the information contained in the report is current in accordance with reporting periods required for each schedule. (Note that the reporting periods have been reproduced on the cover sheet of the public financial disclosure report.) For purposes of meeting this requirement, we suggest that agency reviewers write on the cover sheet of the report:

The filer has been contacted and confirms that the information contained in the report is current per required reporting periods to within five days of his nomination. [signature of agency reviewer and date]

A related matter arises from the commitments of nominees in their ethics agreements to divest certain assets identified either specifically or by category. It is generally understood that this Office does not accept an ethics agreement that makes the divestiture of prohibited or problematic holdings contingent upon receiving a Certificate of Divestiture (CD). We also wish to clarify that in the case of a confirmed nominee, we do not consider assets eligible for CD certification (except under unusual and extraordinary circumstances) unless they are prohibited or otherwise problematic assets which --

(i) were disclosed in the financial disclosure report transmitted to the Senate, and

(ii) were held by the filer at the earlier of --

(A) the date the employee was counseled by his ethics official, or

(B) the date noted on the financial disclosure report by the agency reviewer under the procedure specified in the preceding paragraph.

For purposes of this principle, unusual and extraordinary circumstances do not include inadvertent omissions, mistakes of fact, the acceptance of gifts, or the lack of actual knowledge due to acquisitions of assets through the use of agents or fiduciaries acting under discretionary powers. Such circumstances do include inheritances of attributable property in which a beneficial interest was not previously held.