

Office of Government Ethics

88 x 11 -- 07/23/88

Letter to a Designated Agency Ethics Official dated June 23, 1988

This letter addresses the manner of reporting of employee benefit plans, and pensions in particular, on the SF 278 financial disclosure report as required by the Ethics in Government Act of 1978, as amended. This subject was discussed in the Deputy Director's August 24, 1987 letter [87 x 9] on reporting of interests in non-public entities generally, as well as in your February 17, 1988 letter concerning reporting of pension interests on nominee statements. In addition, we have met twice on this matter with you -- this past December and again last month.

After considering your position and the requirements for and purposes of reporting of assets under Titles II and IV of the Act, this Office has reconsidered its position and states herein the policy governing how employee benefit plans are to be reported. See section 402(a) of the Act. The issue is what constitutes sufficient identification of an interest in a pension to permit legally adequate conflict of interest review.

Section 202(a) of the Act provides that, subject to dollar value thresholds, each financial report "shall include a full and complete statement" of the "source, type, and amount or value of income . . . from any source" as well as the "identity and category of value of any interest in property held . . . in a trade or business, or for investment or the production of income." Pursuant to proper delegation, the relevant regulations for incumbents (5 C.F.R. §§ 734.301(a) & (d)) track the language of the "full and complete" requirement with respect to reporting of income and interests in property. Sections 202(b), (c) & (h) of the Act and 5 C.F.R. § 734.304 require basically the same reporting discipline on income and assets of new entrants, nominees, candidates and those terminating Government employment. Incumbents and terminees must also give "a brief description, the date, and the category of value of any purchase, sale, or exchange" over \$1,000 of reportable assets. See section 202(a) of the Act and 5 C.F.R. § 734.301(b) as well as the previously cited provisions. Similar information is required for the interests of spouses and dependent children. See section 202(e)

of the Act and 5 C.F.R. § 734.303(b).

An analysis of the plain reporting requirements is not sufficient, for some ambiguity is apparent from the "full and complete," "any source," and "any interest in property" phrases. An interpretation of these provisions by the primary administrative authority must reveal an analysis of the purposes for reporting of the interests. Section 402 of the Act reveals those purposes. They are "preventing conflicts of interest" under subsection (a) and "conducting a review . . . to determine . . . possible violations of applicable conflict of interest laws or regulations" and to recommend correction of any "conflict of interest or ethical problems revealed." See subsection (b)(4).

In addition, the legislative history of the Act sheds some light on legislative intent and administrative prerogative in establishing the degree of specificity in reporting pension assets. In Senate Report 95-170 on S. 555 (May 16, 1977), the purpose of disclosure was stated -- "to identify potential conflicts of interest or situations that might present the appearance of a conflict of interest" (at p. 117). The conference report on the same bill stated that the conferees from both houses agreed that for purposes of reporting "their intent was to cover each asset, liability or transaction of a reporting individual even if the asset is not in the individual's name." See Senate Conference Report 95-127 (October 24, 1978) at p. 67. Furthermore, Congress expressly provided for limited reporting in the case of qualified blind or diversified and "excepted" trusts, but did not do so in the case of pensions. See section 202 (f) of the Act.

In light of the foregoing, it is decided that a nominee, incumbent or other filer must show as a separate line item any reportable interest in a pension or other employee benefit plan, including the interest of a spouse in such a plan. If the plan is widely diversified, entering that fact on the report will suffice (unless the filer or spouse has the power to select the particular portfolio assets, see below). Wide diversification exists if a plan holds no more than 5% of the value of its portfolio in the securities of any issuer (other than the United States Government) and no more than 20% in any particular economic or geographic sector (that is, securities of issuers which share an industrial or commercial classification or which principally operate within a single foreign country or foreign countries having a common and distinct geo-political

characteristic such as the European Common Market, emerging nations, OPEC members or the Far East region).

If the portfolio of a benefit plan is not widely diversified, the plan assets and (for the incumbent or terminnee) transactions, to the extent reasonably ascertainable, must be itemized with line-by-line reporting for each asset as if directly held. The values and income for each holding and transaction could be given either for the overall plan with an indication of the percentage interest of the reporting individual or just for the individual's own share. The report must include stocks, bonds, bank accounts and any other reportable assets the plan holds. If a plan is engaged in the business of buying and selling a certain type of asset as a dealer (e.g., real estate or mortgages) by means of a partnership or other business entity, notation of that fact is sufficient without further detail. But if such assets are held for investment, each must be separately listed.

Further, if the nominee, incumbent or other filer (or spouse) has the power to direct that plan investments be made in certain assets, the specific assets and (for the incumbent or terminnee) transactions must likewise be itemized. Itemization is necessary even if the portfolio selected is widely diversified, unless the individual controls only the percentage allocation of assets between broad groupings (such as common stocks and bonds) which themselves are widely diversified. In such case, the groupings and percentages selected must be reported. Individual participant control is more often the case in smaller firm plans, though some of the larger plans, such as TIAA/CREF, are currently offering or are planning to offer investment fund choices to participants.

Such information must be supplied before there can be a final certification by this Office that a nominee's, incumbent's or other filer's financial report satisfies the prophylactic purposes of section 402 of the Act. The reporting individual and agency ethics officials must make reasonable efforts to obtain needed details if they are not already known. For example, the reporting individual or the agency must review benefits brochures or contact the benefits coordinator or plan manager to ascertain the necessary facts.

The substance of the foregoing will be disseminated to all agencies and included as an addendum to the instructions for completing the SF 278 report forms. Thank you for posing this

issue as you have.

Sincerely,

Frank Q. Nebeker
Director