

**OFFICE OF GOVERNMENT ETHICS**

**04 x 16**

**Letter to the Spouse of a Federal Employee  
dated November 16, 2004**

Thank you for your comments about your recent experience in completing your husband's Confidential Financial Disclosure Report, OGE Form 450 (confidential report). You have questioned why your husband has to report assets that are in your name only, including assets that you have put into a separate trust. You also took exception to your husband's having to report assets that are held in your name with your father, and your husband's having to report assets that are owned by a dependent child who is "emancipated or independent."

The confidential financial disclosure system is authorized by Executive Order 12674. It is implemented through regulations published at 5 C.F.R. part 2634. The purpose of the system is to help ensure employees' compliance with conflict of interest restrictions. The confidential reporting system provides for a systematic review of the financial interests of employees who do not file public disclosure reports but who nonetheless occupy positions that involve the exercise of significant discretion in certain sensitive areas. The system assists agency ethics officials in providing counseling to those employees about conflict of interest restrictions. These restrictions include a criminal law that bars an employee from participating in an official Government matter that would affect the employee's, or the employee's spouse's or minor child's, financial interest. Thus, for purposes of this criminal law, the interests of a spouse or minor child are treated as if they were the employee's own interests.

To help protect your husband from violating these restrictions, the financial disclosure rules require that he provide information about himself, his spouse and any dependent child. In general, the fact that you, or his dependent, may hold assets individually does not remove the potential for conflicts of interest if your husband were to participate in official matters affecting those interests. Nor would it be an unwarranted invasion of privacy for him to have to report information about the interests of his spouse and dependents. In this regard, a United States Court of Appeals has ruled in a

lawsuit claiming that the public financial disclosure requirements in the Ethics in Government Act of 1978 unconstitutionally invaded Government officials' personal privacy and that of their spouses and dependents, that legitimate Governmental interests served by disclosure outweighed the privacy interests at stake. *DuPlantier v. United States*, 606 F.2d 654 (5<sup>th</sup> Cir. 1979). The U.S. Supreme Court declined to review the *DuPlantier* decision. 449 U.S. 1076 (1981).

In order for your husband not to have to disclose an interest in property held by you or a dependent child, three specific conditions would have to be met:

- (1) The filer certifies that the item represents the spouse's or dependent child's sole financial interest or responsibility, and that the filer has no specific knowledge regarding that item;
- (2) The item is not in any way, past or present, derived from the income, assets, or activities of the filer; and
- (3) The filer neither derives, nor expects to derive, any financial or economic benefit from the item.

See Title 5, of the Code of Federal Regulations, Section 2634.309(a)(3). It is rare for an employee to meet all of these conditions. Employees who prepare joint tax returns with their spouses could not, for example, meet them. They would be considered to have derived a financial or economic benefit from their spouses' assets. They also would be charged with knowledge of their spouses' assets. Similarly, where an employee and his spouse share household expenses, it would be difficult to establish that the employee would not derive a financial benefit from his spouse's assets. It does not appear from your letter that all of these conditions have been met in the case of your husband.

Separating your assets, by putting them into individual trusts, does not necessarily shield those assets from confidential disclosure. In general, financial disclosure rules require the reporting of trust assets and income where the filer, spouse, or dependent child has a vested beneficial interest in a trust. There is a provision, however, that permits your husband not to report the assets contained in a special type of trust known as an excepted trust. For a trust

to qualify as an excepted trust, you, your husband, or dependent child could not have created the trust. Also, none of you may have any knowledge of the trust's holdings or sources of income.

With respect to your husband's having to report assets held in your name with your father, we note first that it is not clear from your letter if you have an ownership interest in those assets. You can have an ownership interest in an asset if, for example, it is an account held jointly by you with another person. If you have an ownership interest in those assets, then they must be reported on your husband's report. On the other hand, if you have a mere right to access your father's accounts (e.g., through a power of attorney) to pay his bills, then this would not amount to an ownership interest requiring disclosure.

With respect to your husband's having to report the assets of your child, a "dependent child" is defined in the financial disclosure rules as, with respect to a filer, any individual who is a son, daughter, stepson, or stepdaughter, and who:

- (1) Is unmarried, under age 21, and living in the household of the reporting individual; or
- (2) Is a dependent of the reporting individual within the meaning of section 152 of the Internal Revenue Code of 1986, 26 U.S.C. 152.

See Title 5, of the Code of Federal Regulations, Section 2634.105(d). If your child is a dependent child as defined in the rules, then his assets must be reported on your husband's report. You should consult with your husband's agency ethics official if you are ever unsure of what your child's status is for financial disclosure purposes.

We note that you would have liked to have been directly contacted by ethics officials at your husband's agency for information about assets held only in your name. However, it is your husband who is required to file the confidential report, and, accordingly, ethics officials contacted him for the required information. While an ethics official may sometimes speak directly to a person who can more readily provide information on behalf of the employee, there would not be any requirement for the ethics official to do so.

We also note your concern that the time estimated in the report's instructions for filling it out was not accurate in

your case. This estimate represents a good faith assessment of the average time needed for an employee to complete the report. In making this estimate, we considered such factors as the time required to read the instructions, gather the data, and to actually fill out the report. Of course, completion times will vary depending upon how complex an employee's financial situation is and the employee's prior experience with the report.

As described above, confidential financial disclosure helps ethics officials protect employees from violating ethics laws and rules. We are continuously examining our disclosure systems to determine if any improvements can be made. In so doing, you can be certain that we will strive to ensure that any change we do make to our disclosure systems will strike a fair balance between protecting privacy interests and facilitating conflicts prevention. In fact, your comments have come at a time when we are engaged in a review of our confidential reporting rules. Among the changes we are considering is switching the report's filing cycle to one based on a standard calendar year, as you have recommended. Whatever changes are proposed would be announced in the *Federal Register*. Public comments will be welcome.

We thank you again for your comments about your experiences with the confidential report.

Sincerely,

Marilyn L. Glynn  
Acting Director