



# **Public Financial Disclosure**

## **A Guide to Reporting Selected Financial Instruments**

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## **AMERICAN DEPOSITARY RECEIPT**

### **Definition**

An American depositary receipt is a certificate representing shares of foreign securities. It is a form of indirect ownership of the foreign securities that are not traded directly on a national exchange in the United States. Financial institutions purchase the underlying securities on foreign exchanges through their foreign branches, and these foreign branches remain the custodians of the securities. Through these foreign branches, the financial institutions hold legal title to the underlying stock.

Investors who purchase American depositary receipts are able to avoid certain costs that normally would be associated with an international transaction if they purchased the foreign stock directly. Many American depositary receipts are registered with the Securities and Exchange Commission (SEC) and traded on national exchanges, such as the New York Stock Exchange or the American Stock Exchange. However, some American depositary receipts are not registered and traded on national exchanges. Investors have to purchase these non-registered American depositary receipts directly from their issuers or through other private trades (i.e., “over the counter”).

A related term is “American depositary share,” which corresponds to a single share of the underlying security. An American depositary receipt may confer ownership rights to a specified number of American depositary shares, representing the investor’s indirect interest in the underlying foreign security that the issuing institution holds in its foreign branch.

### **Financial Disclosure Requirements**

A filer who holds an American depositary receipt valued at over \$1,000 or with income greater than \$200 should report the following information on **Schedule A**:

- the name of the American depositary receipt;
- the category of value; and
- the type and category of amount of income.

### **Conflicts Analysis**

A filer holding an American depositary receipt has a financial interest in the issuer of the underlying foreign security. Therefore, the conflicts analysis for an American depositary receipt is similar to the conflicts analysis for stock interests. The exemption for financial interests in publicly traded securities at 5 C.F.R. § 2640.202 is available if the American depositary receipt is registered with the SEC and traded on a national exchange. However, the exemption will be unavailable if the receipt is not registered with the SEC and traded on a national exchange.

## CASH BALANCE PENSION PLAN

### **Definition**

A cash balance pension plan is a type of defined benefit pension plan in which the employer makes contributions to the employee's account and guarantees a specific rate of return, regardless of the profitability of the plan's investments. The employer generally makes investment decisions concerning the holdings of the plan and bears the risks of investment.

Each year, the employee receives a pay credit that is equal to a percentage of the employee's salary and an income credit that is a fixed rate of return. The employer defines this retirement benefit as an account balance, and a cash balance pension plan will often allow an employee to choose between an annuity and a lump sum payment. In some cases, an employee can elect to receive a lump sum payment when terminating the employment relationship, even before reaching retirement age.

### **Financial Disclosure Requirements**

A filer who has a cash balance pension plan should report the plan in a manner similar to a traditional defined benefit pension plan. A filer does not need to report the underlying assets of the employer's investments when the employer makes the investment decisions and bears the risks of investment. Instead, the filer should report the following information on **Schedule A**:

- the names of the employer and the plan;
- the category of asset value; and
- the actual amount of any pension benefits received, reported in the "Other Income" column of **Schedule A, Block C**. (If the filer is not currently receiving benefits, the filer should indicate that the amount of income is "None.")

When reporting the category of asset value, the filer should report the current account balance after any employer contributions in the form of "pay credits" and "income credits." If the filer is unable to ascertain the account balance, the filer may report the amount of pension benefits to be received and the age at which the employee will be eligible in the "Other Income" column.

If a filer has a reportable interest in a cash balance pension plan, the filer should also report the following information on **Schedule C, Part II**:

- the name of the employer;
- the type of plan, which is a "cash balance pension plan";
- the date on which the filer began participating in the plan; and
- an indication as to whether the employer is continuing to make contributions.

If a filer's spouse holds an interest in a cash balance pension plan, the filer should disclose the plan on **Schedule A**. However, the filer should not provide any information about a spouse's cash balance pension plan on **Schedule C, Part II**.

## **Conflicts Analysis**

The conflicts analysis for a cash balance pension plan is the same as for a traditional defined benefit plan. Because the employer makes the investment decisions and bears the risks of investment, the filer does not have a financial interest in the underlying assets with which the employer has funded the plan. If the employer is no longer making contributions to the cash balance pension plan, the filer also does not have a financial interest in the employer merely as a result of holding an interest in the cash balance pension plan. Instead, the filer has a financial interest in the employer's ability or willingness to pay benefits under the plan.

## COMMON TRUST FUND OF A BANK

### **Definition**

A common trust fund of a bank is a trust that a bank manages on behalf of a group of participating customers, in order to invest and reinvest their contributions to the trust collectively. A bank customer purchases units of the common trust fund. This arrangement allows the trustee to manage the customer's contributions in a pool of contributions from a number of customers. These customers are the beneficiaries of the common trust fund.

Acting as a fiduciary, the bank commingles the contributions of participating customers in the common trust fund and invests in a variety of underlying holdings. Typically, a preprinted trust agreement will name the trustee, specify the investments and establish other terms of participation in the common trust fund.

### **Financial Disclosure Requirements**

A filer who is a beneficiary of a common trust fund of a bank should report the following information on **Schedule A**:

- the names of the bank and the common trust fund;
- the category of asset value;
- either the type of income or an indication that the common trust fund is an excepted investment fund;
- the category of amount of income; and
- if the fund is not an excepted investment fund, each individual asset that meets the reporting threshold, reported as a separate line item.

A filer may not need to report the trust's underlying assets separately. Common trust funds of banks typically are independently managed, widely held, and publicly available. Therefore, a common trust fund of a bank will likely qualify as an excepted investment fund.

For any transactions over \$1,000 that are related to the common trust fund of a bank, the filer should report the following information on **Schedule B, Part I**:

- a description of any such transaction;
- the transaction type;
- the date of the transaction; and
- the category of value of the transaction.

### **Conflicts Analysis**

A filer has a financial interest in the value of the filer's units in a common trust fund of a bank. The filer will not be able to rely on the regulatory exemptions for mutual funds and unit investment trusts because common trusts funds of banks do not satisfy the regulatory definitions of mutual funds and unit investment trusts at 5 C.F.R. § 2640.102(k), (u).

A filer also has a financial interest in the value of each underlying security of the common trust fund. In contrast to the filer's interest in the common trust fund as a whole, the filer may be able to rely on the regulatory exemptions for *de minimis* interests in publicly traded securities with regard to any qualifying security that is held in the common trust fund.

For these reasons, a filer may be able to participate in a particular matter that has a direct and predictable effect on the financial interests of the issuer of certain individual securities that are held in the common trust fund, if the securities qualify for the exemption. However, the filer will not be able to participate in a particular matter that has a direct and predictable effect on the financial interests of the common trust fund as a distinct legal entity.

## **EMPLOYEE STOCK PURCHASE PLAN**

### **Definition**

An employee stock purchase plan is an employer-sponsored incentive plan that allows employees to purchase company stock. Under such a plan, the employer offers its employees the option to purchase company stock at the end of an “offering period,” which typically ranges between 3 months and 27 months.

When an employee exercises such an option, the employer withholds the cost of purchasing the stock from the employee’s pay in installments during the offering period. The employer holds this money in an account for the employee during the offering period. At the end of the offering period, the employee uses the money withheld to purchase company stock at the specified purchase price. Most employers offer the stock at discounts below fair market value.

Note that employee stock purchase plans should not be confused with employee stock ownership plans. An employee stock ownership plan is a type of defined contribution plan where the employer contributes shares of company stock to the plan.

### **Financial Disclosure Requirements**

A filer who holds an option through an employee stock purchase plan with a value over \$1,000 or with income over \$200 should report the following information on **Schedule A**:

- the name of the underlying stock and an indication that the asset is an option;
- a category of asset value; and
- the category of amount of income, which will usually be “None.”

For stock acquired through an employee stock purchase plan with a value over \$1,000 or with income over \$200, a filer should report the following information on **Schedule A**:

- the name of the issuer;
- the category of asset value; and
- the type and the category of amount of income.

If the filer has not yet purchased the stock but has established an account for withholdings toward the purchase, the filer should report the account if it meets the reporting threshold.

For transactions over \$1,000, filers should report the following information on **Schedule B, Part I**:

- the name of the stock;
- the type of transaction;
- the date of the transaction; and
- the category of amount of the transaction.

If a filer has a reportable interest in an employee stock purchase plan, the filer should also report that plan on **Schedule C, Part II**, including the following information:

- the name of the employer;
- a statement that the plan is an employee stock purchase plan;
- the terms of the plan (including an indication as to when the filer's participation in the plan will terminate, which usually coincides with the termination of the filer's employment); and
- the date on which the filer entered the plan.

The filer should not report a spouse's continued participation in an employee stock purchase plan on **Schedule C, Part II**.

### **Conflicts Analysis**

The conflicts analysis for stock acquired or offered through an employee stock purchase plan is the same as it is for any stock interest. However, the conflict arises when the filer first has the option to purchase the stock, even if the filer has not yet exercised that option. A filer holding either stock or an option to purchase stock through an employee stock purchase plan may not participate personally and substantially in a particular matter that will have a direct and predictable effect on the financial interests of the issuer of that stock, unless the filer first obtains a waiver or qualifies for a regulatory exemption.

If the stock is publicly traded, a filer may qualify for a *de minimis* exemption under 5 C.F.R. § 2640.202 after the filer has purchased the stock. However, the filer may not rely on a *de minimis* exemption if the filer has an option to purchase stock that the filer has not yet actually purchased. The exemptions at 5 C.F.R. part 2640 do not cover a financial interest in a stock option.

### **Special Consideration for Certificates of Divestiture**

Some reviewers may be aware of an issue involving requests for Certificates of Divestiture for stock acquired under an employee stock purchase plan. The issue arose because Certificates of Divestiture are intended for sales of property that produce capital gains, rather than those that produce only ordinary income. However, taxpayers sometimes needed to hold stock acquired under employee stock purchase plans for a period of time before the Internal Revenue Service (IRS) would tax the proceeds of a sale of that stock as capital gains, rather than solely as ordinary income.

This holding period raised a question about the availability of a Certificate of Divestiture whenever an employee needed to divest stock acquired under an employee stock purchase plan before expiration of the holding period. As a result, Congress amended the tax code to accelerate the holding period when stock is sold pursuant to a Certificate of Divestiture. However, provisions of the tax code affect the extent to which an individual may rely upon a Certificate of Divestiture depending on the factual circumstances of a sale, including whether the employee

purchased the stock at a discount. Filers should consult their own tax advisors or the IRS to resolve questions about the applicability of the exception and to determine whether a sale would produce capital gains or only ordinary income.

## **EQUITY INDEX-LINKED NOTE**

### **Definition**

An equity index-linked note is a debt instrument that affords the owner interest payments based on the performance of an equity index and, sometimes, a guaranteed return. The terms of such notes vary, but interest payments are typically based on any increase in the value of a specified equity index (e.g., Standard & Poor's 500 Index). A note may also guarantee the return of the investor's principal, insulating the investor against decreases in the value of the equity index to which the note is linked. In exchange for such protection against risk, a note usually will offer an investor a return that is less than 100% of the value of any increase in the equity index to which it is linked, or a note may establish a maximum return.

### **Financial Disclosure Requirements**

A filer should report the following information about any equity index-linked note with a market value over \$1,000 or income over \$200 on **Schedule A**:

- the names of the note and its issuer;
- the index to which the note is linked;
- the category of asset value; and
- the type and the category of amount of income.

On **Schedule B, Part I**, the filer should report the following information for any transaction with a value over \$1,000:

- a description of any transactions involving the note;
- the transaction type;
- the date of the transaction; and
- the category of value of the transaction.

### **Conflicts Analysis**

A filer who holds an equity index-linked note has a financial interest in the ability or willingness of the issuer to honor any guarantee under the note's contractual terms. Therefore, the filer may not participate in any particular matter that has a direct and predictable effect on the ability or willingness of the issuer to honor its contractual obligation, unless the filer first obtains a waiver or qualifies for a regulatory exemption. As a practical matter, most filers' official duties will not involve particular matters affecting the issuers of equity index-linked notes.

## **EXCHANGE-TRADED FUND**

### **Definition**

An exchange-traded fund is a fund that pools investors' money in a variety of investments with the goal of replicating the rate of return of a specified index (e.g., the Standard & Poors 500 Index). As such, some of these funds are diversified, while others are focused on specific sectors. Like traditional mutual funds, exchange-traded funds are publicly traded on national exchanges. Unlike traditional mutual funds, which are priced only at the end of a trading day, investors can purchase and sell exchange-traded funds like ordinary stock because they are priced continuously throughout the trading day.

### **Financial Disclosure Requirements**

A filer who holds an exchange-traded fund valued over \$1,000 or with income greater than \$200 should report the following information on **Schedule A**:

- the specific name of the exchange-traded fund;
- the category of value;
- an indication that the fund is an excepted investment fund; and
- the category of amount of income.

Because an exchange-traded fund is an excepted investment fund, a filer does not need to report the underlying assets of the exchange-traded fund.

For any transactions over \$1,000, the filer should report the following information on **Schedule B, Part I**:

- the specific name of the exchange-traded fund;
- the transaction type;
- the date of the transaction; and
- the category of value of the transaction.

### **Conflicts Analysis**

Most exchange-traded funds are organized either as open-end investment management companies or as unit investment trusts. They are usually registered with the Securities and Exchange Commission (SEC) under the same statutory authorities as traditional mutual funds that are organized as open-end investment management companies and unit investment trusts. However, exchange-traded funds are not necessarily subject to all requirements of those statutory authorities. For this reason, the SEC does not allow exchange-traded funds to market themselves to consumers as "mutual funds." Nevertheless, most exchange-traded funds qualify for the exemptions in 5 C.F.R. Part 2640 for mutual funds and unit investment trusts. An exchange-traded fund that is organized as an open-end investment management company satisfies OGE's definition of a "mutual fund" at 5 C.F.R. § 2640.102(k), and an exchange-traded fund that is

organized as a unit investment trust satisfies OGE's definition of a "unit investment trust" at 5 C.F.R. § 2640.102(u).

If a filer holds an interest in an exchange-traded fund, the reviewer must determine whether the exchange-traded fund is "diversified" or "sector" focused. Depending on whether the exchange-traded fund is a diversified fund or a sector fund, the filer may qualify for the exemptions at either 5 C.F.R. § 2640.201(a) or 5 C.F.R. § 2640.201(b). These exemptions are applicable without regard to whether the exchange-traded fund is an open-end investment management company or a unit investment trust because OGE has interpreted the sector fund exemption at 5 C.F.R. § 2640.201(b) as being applicable to unit investment trusts even though that regulatory provision does not explicitly mention unit investment trusts.

In most cases, an exchange-traded fund also qualifies for the regulatory exemption for matters affecting mutual funds and unit investment trusts at 5 C.F.R. § 2640.201(d). This exemption addresses particular matters of general applicability affecting a fund as a separate legal entity, rather than the underlying assets of the fund.

## **INCENTIVE STOCK OPTION**

### **Definition**

An incentive stock option is a contract between an employer and an employee that provides the employee with an option to purchase a specified number of shares of the employer's stock at a specified price (the "strike price"). An incentive stock option is a type of "call" option because it provides the right to purchase stock. Unlike some other types of "call" options, however, an incentive stock option is not traded on the open market. Instead, it is part of an employee's compensation.

Incentive stock options can be an attractive form of compensation. Depending on whether an incentive stock option plan satisfies certain requirements of the tax code, the options may qualify for preferential tax treatment. Qualifying incentive stock option plans allow employees to defer taxation until they have exercised the options and subsequently sold the resulting stock. Incentive stock options can also serve the employer's purpose of retaining employees because they often have vesting requirements, and employees typically forfeit such options if they terminate their employment before the options vest.

### **Financial Disclosure Requirements**

A filer who has an incentive stock option should report the following information about an incentive stock option that has a value over \$1,000 on **Schedule A**:

- the name of the underlying stock and an indication that the asset is an option;
- a category of asset value; and
- the category of amount of income, which is "None" in most cases.

The option normally will not produce income. Any income is normally associated with the sale of the underlying stock, not with the option.

The value of an option may not be readily ascertainable if the strike price exceeds the market value of the stock. In this situation, where the filer would lose money by exercising the option, the option is said to be "underwater." When an option is underwater, the filer may write "value not readily ascertainable" across the columns in **Block B of Schedule A**. Instead of reporting a category of asset value in Block B, the filer should report the following in **Block A of Schedule A**:

- the name of the underlying stock and an indication that the asset is an option;
- the number of shares that the filer has an option to purchase;
- the strike price;
- the expiration date;
- an indication as to whether the option is vested; and
- for an unvested option, the date on which the unvested option will vest.

If a filer has exercised an option and received stock through an incentive stock option plan, the filer should also report the stock on **Schedule A**, as a separate line item. Specifically, the filer should report on **Schedule A** the following information about any stock that has a value over \$1,000 or that produced income over \$200 during the reporting period:

- the name of the stock;
- the category of asset value; and
- the type and the category of amount of income.

For transactions over \$1,000 that involve stock acquired through an incentive stock option plan, a filer should report the following information on **Schedule B, Part I**:

- the name of the stock;
- the type of transaction;
- the date of the transaction; and
- the category of amount of the transaction.

The filer should report both the purchase of stock and any subsequent sale of the stock as separate line items. However, the filer should not report the grant of an incentive stock option on Schedule B, Part I, because the grant of an option is not a reportable “transaction” for purposes of Schedule B, Part I.

If the filer is continuing to participate in an incentive stock option plan or if the filer has retained an incentive stock option that the filer has not yet exercised, the filer should report the following information on **Schedule C, Part II**:

- the name of the employer;
- an indication that the plan is an “incentive stock option plan”;
- the terms of the plan, including an indication as to whether the filer will forfeit any unvested options and an indication as to whether the filer will receive any additional grant of options in the future; and
- the date on which the filer entered the plan.

The filer should similarly report a spouse’s incentive stock options on **Schedule A** and any transactions involving the underlying stock on **Schedule B, Part I**. However, the filer should not report a spouse’s continued participation in an incentive stock option plan on **Schedule C, Part II**.

## **Conflicts Analysis**

The conflicts analysis for an incentive stock option is the same as the conflicts analysis for the underlying stock. While the filer holds either an option or the underlying stock, the filer may not participate personally and substantially in a particular matter that will have a direct and predictable effect on the financial interests of the issuer of the underlying stock. The conflict arises when the filer is awarded the stock option, even if the stock option has not vested.

If the stock is publicly traded, the filer may qualify for a *de minimis* exemption under 5 C.F.R. § 2640.202 after the filer has purchased the stock. However, the filer may not rely on a *de minimis* exemption if the filer continues to have any option to purchase stock that the filer has not yet purchased. The exemptions at 5 C.F.R. part 2640 do not cover a financial interest in a stock option.

In some cases, filers who are new entrants or Presidential nominees may have negotiated with their former employer regarding the disposition of unvested incentive stock options. If the employer has agreed to accelerate the vesting schedule in order to enable the employee to exercise the option before entering Government service, it is likely that any acceleration will constitute an “extraordinary payment” under 5 C.F.R. § 2635.503 if the value of either the stock or the option is greater than \$10,000. If an accelerated vesting occurs after the filer enters Government service, the reviewer will need to consider the applicability of 18 U.S.C. § 209.

### **Special Consideration for Certificates of Divestiture**

Some reviewers may be aware of an issue involving requests for Certificates of Divestiture for stock acquired under an incentive stock option plan. The issue arose because Certificates of Divestiture are intended for sales of property that produce capital gains, rather than those that produce only ordinary income. However, taxpayers sometimes needed to hold stock acquired under incentive stock option plans for a period of time before the Internal Revenue Service (IRS) would tax the proceeds of a sale of that stock as capital gains, rather than solely as ordinary income.

This holding period raised a question about the availability of a Certificate of Divestiture whenever an employee needed to divest stock acquired under an incentive stock option plan before expiration of the holding period. As a result, Congress amended the tax code to accelerate the holding period when stock is sold pursuant to a Certificate of Divestiture. However, provisions of the tax code affect the extent to which an individual may rely upon a Certificate of Divestiture depending on the factual circumstances of a sale. Filers should consult their own tax advisors or the IRS to resolve questions about the applicability of the exception and to determine whether a sale would produce capital gains or only ordinary income.

## **MANAGED ACCOUNT**

### **Definition**

In its simplest form, a managed account (sometimes called a “controlled account” or a “separately managed account”) is an investment account that is owned by an individual investor but managed for a fee by a fiduciary. The investor establishes the account in order to give the fiduciary discretion to buy, sell and trade investments on behalf of the investor. The investor owns the investments directly but benefits from professional management of the account. The degree of customization varies from one account to another, ranging from fully personalized accounts to more standardized accounts that charge lower fees.

Brokers can manage accounts on an individual basis for investors, but a variety of managed accounts are commercially available from financial institutions. At the consumer level, a commercially available product from a financial institution may bear some resemblance to a pooled investment, such as a mutual fund, in that it can have a particular investment strategy or sector focus. These products often allow investors to choose among predetermined portfolios, which the financial institutions package with such labels as: “high yield,” “balanced,” “large cap,” “mid cap,” “global small cap,” “international ADR,” “intermediate fixed income,” “strategic fixed income,” “municipal bonds,” “energy,” and others. Unlike pooled investments, however, the investor owns the underlying securities of the managed account directly.

Although some filers have mistakenly characterized their managed accounts as mutual funds, managed accounts are not mutual funds. Like a brokerage account, a managed account is simply an account, not a pooled investment vehicle. As a result, the investor holds legal title to each underlying security. Unlike a mutual fund, which issues shares of an investment company that is the legal owner of the underlying securities, the fiduciary of a managed account purchases each underlying security separately for an investor upon receipt of the investor’s money. Also unlike a mutual fund, an investor can usually customize even the most standardized commercially available managed account. The financial institutions that offer commercially available managed accounts are often willing to honor a certain number of customized instructions from an investor. For example, an investor may instruct the financial institution to refrain from purchasing stocks in alcohol and tobacco companies. Financial institutions may limit the number of instructions they will honor.

### **Financial Disclosure Requirements**

A filer who has invested in a managed account should report the following information for each individual asset of the account valued over \$1,000 or with income over \$200 on **Schedule A**:

- a description of the asset,
- the category of asset value;
- the type of income (or, if the asset is an investment fund, either the type of income or an indication that the asset is an excepted investment fund); and
- the category of amount of income.

Whether or not the filer identifies the managed account, however, the filer must report each individual asset of the managed account that meets the reporting threshold. The filer must disclose these individual assets because a managed account does not qualify as an excepted investment fund.

On **Schedule B, Part I**, the filer should also report the following information about any transaction over \$1,000 involving an asset of the managed account:

- the name of the asset;
- the type of transaction;
- the date of the transaction (or “various” to indicate that transactions involving the asset occurred on various dates during the reporting period); and
- the category of value of the transaction.

### **Conflicts Analysis**

The conflicts analysis for a managed account focuses on the assets in the managed account. A managed account does not qualify for the regulatory exemptions for mutual funds and unit investment trusts. The filer may not participate personally and substantially in a particular matter that will have a direct and predictable effect on the financial interests of any asset in the managed account, unless the filer first obtains a waiver or qualifies for a regulatory exemption with regard to that asset.

## **MARGIN ACCOUNT**

### **Definition**

A margin account is an account with a broker that allows an investor to borrow money to cover part of the cost of purchasing securities. The securities serve as collateral for the loan. Until the loan is repaid, the investor pays the broker interest on the money borrowed.

### **Financial Disclosure Requirements**

#### Margin Account Liabilities

A filer who has a margin account should report margin account liabilities on **Schedule C, Part I** if the aggregate amount owed to any single broker exceeded \$10,000 at any time during the reporting period. The filer should aggregate the amount of all liabilities owed to the same broker, even if the liabilities were attributable to several purchases of a variety of separate securities.

If the filer's aggregate liabilities meet this reporting threshold, the filer should report the following information on **Schedule C, Part I**:

- the name of the lender;
- the type of liability, which is a "margin account";
- the date incurred;
- the interest rate identified in the margin agreement;
- the term, which normally is "on demand"; and
- the category of the highest aggregate value of the liabilities during the reporting period.

#### Related Securities

A filer should also report the securities that the filer purchased, in the same manner as any other securities that the filer owns. Specifically, a filer should report any security with a market value over \$1,000 or income over \$200, as well as any completed transactions over \$1,000. Filers should report the following information about the securities on **Schedule A**:

- the specific name of the security;
- the category of asset value; and
- the type and the category of amount of income.

With regard to an underlying security, the filer should also report the following information about any transactions with a value over \$1,000 on **Schedule B, Part I**:

- the name of the security;
- the type of transaction;

- the date of the transaction (or “various” to indicate that transactions involving the security occurred on various dates during the reporting period); and
- the category of value of the transaction.

### **Conflicts Analysis**

As with other types of commercial loans, a loan through a margin account on terms generally available to the public normally does not give rise to significant financial conflict of interest concerns. Often, the reviewer can confirm that the broker made the loan through the margin account on terms generally available to the public. In cases where the filer has obtained the loan on special terms that are not generally available to the public, reviewers should carefully examine the potential for conflicts of interests, including an analysis of 18 U.S.C. § 209 if the filer was a Federal employee at the time of the loan.

With regard to the securities a filer has purchased with the loan, the conflicts analysis is no different from the conflicts analysis for any other securities that the filer owns. Under 18 U.S.C. § 208, the filer may not participate personally and substantially in a particular matter that will have a direct and predictable effect on the financial interests of the issuers of the securities, unless the filer first obtains a waiver or qualifies for a regulatory exemption.

## MEZZANINE DEBT SECURITY

### **Definition**

A mezzanine debt security is a note establishing debt that is secured only by an entity's future earnings. The investor who holds a note involving this type of debt has assumed the risk that the entity will continue to generate income. Because this form of debt is a negotiated instrument, there is no market for trading mezzanine debt securities.

Agreements establishing mezzanine debt vary, and every note is subject to its own negotiated terms. The terms can include provisions for the borrowing entity to delay repayment of the debt, and they usually provide options for the investor to obtain equity interests, including warrants. (A warrant is a certificate entitling a holder to purchase a specified amount of securities at a specified price. The specified price is usually higher than the current market value of the security, but the holder will benefit if the market value increases above the specified price before the warrant expires.)

The term "mezzanine debt" refers to the priority of this debt obligation for an entity, which lies below senior debt and higher than common stock. The priority of a debt can become relevant when a business entity fails and enters liquidation or in other circumstances.

### **Financial Disclosure Requirements**

A filer who holds a mezzanine debt security valued over \$1,000 or with income over \$200 should report the following information on **Schedule A**:

- the name of the issuer and an indication that the asset is a mezzanine debt security;
- the category of asset value;
- the category of amount of income (i.e., any payments of interest); and
- any related security that meets the reporting threshold, such as a warrant or other equity interest, reported as a separate line item.

A filer should report the following information about any transactions over \$1,000 involving a mezzanine debt security on **Schedule B, Part I**:

- a description of the transaction;
- the transaction type;
- the date of the transaction; and
- the value of the transaction.

### **Conflicts Analysis**

The conflicts analysis for a mezzanine debt security is more like the conflicts analysis for stock than the conflicts analysis for other types of debt instruments. A filer may not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the borrower (i.e., the issuer of the mezzanine debt security). The filer may

not rely on the *de minimis* exemptions for publicly traded securities because mezzanine debt security does not satisfy the definition of a publicly traded security.

A reviewer should be sure to inquire about related equity interests in the borrowing entity that the filer may hold. A variety of equity interests can be associated with mezzanine debt, and they may require the filer's recusal even after the borrowing entity has repaid its debt.

## **MONEY PURCHASE PENSION PLAN**

### **Definition**

A money purchase pension plan is a type of defined contribution plan. It is an arrangement in which an employer makes fixed contributions to a tax-deferred retirement account. Unlike profit-sharing plans in which employer contributions are discretionary, employer contributions to a money purchase pension plan are fixed in advance. Each year, the employer must make fixed contributions based on an employee's annual compensation. Like other defined contribution plans, money purchase pension plans contain underlying assets in which a filer has invested. These assets often include annuities, diversified mutual funds, bond funds and stable value funds.

### **Financial Disclosure Requirements**

A filer who has an interest in a money purchase pension plan valued over \$1,000 or with income greater than \$200 should report the following information on **Schedule A**:

- the name of each asset of the plan that meets the reporting threshold, reported as a separate line item;
- the category of asset value for each asset listed;
- either the type of income for each asset listed or an indication that the asset is an excepted investment fund; and
- the category of amount of income for each asset listed.

If an asset in a money purchase pension plan is a fund that does not qualify as an excepted investment fund, the filer must report all of the underlying assets of that asset. However, many assets in money purchase pension plans qualify as excepted investment funds.

For transactions over \$1,000 involving any asset of the money purchase pension plan, the filer should report the following information on **Schedule B, Part I**:

- a description of any transactions associated with an asset of the plan;
- the transaction type;
- the date of the transaction; and
- the actual value of the transaction.

If a filer has a reportable interest in a money purchase pension plan, the filer should also report the following information on **Schedule C, Part II**:

- the name of the employer;
- the type of retirement plan, which is a "money purchase pension plan";
- the date on which the filer began participating in the plan; and
- an indication as to whether the employer is continuing to make contributions.

If a filer's spouse holds an interest in a money purchase pension plan, the filer should disclose the assets of that plan on **Schedule A** and any transactions related to the plan on **Schedule B, Part I**, to the extent that such assets and transactions meet the reporting thresholds. However, the filer should not provide any information about a spouse's money purchase pension plan on **Schedule C, Part II**.

### **Conflicts Analysis**

As with other types of defined contribution plans, a money purchase pension plan is an arrangement for holding other investments on a tax-deferred basis. The filer has a financial interest in these underlying investments, but the filer may qualify for a regulatory exemption with regard to some or all of them. If a former employer is no longer making contributions to an independently managed money purchase pension plan, the filer does not also have a financial interest in the employer merely as a result of holding an interest in the money purchase pension plan. However, if the money purchase pension plan includes stock in the former employer the filer may not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the employer, unless the filer qualifies for a regulatory exemption.

## **PHANTOM STOCK**

### **Definition**

Phantom stock is a contract between an employer and an employee that grants the employee the right to receive a payment based on the value of the employer's stock. When granting phantom stock, the employer does not grant the employee any shares of the employer's stock. Instead, the employer grants the employee a right that tracks the value of a specified number of shares of the stock.

The employee will have a right to receive a payout equivalent to the value of these tracked shares. Depending on the terms of the employer's phantom stock plan regarding the vesting of phantom stock, the payout may occur on a specified date or upon the occurrence of a certain event, such as retirement, disability or death. If the employee's employment is terminated before the phantom stock vests, the employee normally forfeits the phantom stock.

The plan may provide for a single payment, or it may provide for installment payments over a period of time after the phantom stock vests. In some cases, the employer may let the employee elect to receive the payout in the form of an equivalent amount of stock. In addition to the final payout, under some phantom stock plans, the employee may receive payments equivalent to any dividends that the employer pays to stockholders.

A reviewer should understand some of the key similarities and differences between phantom stock and other types of financial interests in an employer. Phantom stock differs from an employer's stock in that phantom stock does not give the employee an ownership interest in the employer. Unlike stock, phantom stock also may not convey a right to payments based on dividends. Phantom stock differs from a stock appreciation right in that its payout is based on the full value of the stock, while the payout of a stock appreciation right is based only on any increase in the value of the stock over a specified period of time. Phantom stock differs from a stock option because the employee does not need to purchase anything.

### **Financial Disclosure Requirements**

A filer should report the following information about phantom stock valued over \$1,000 or with income over \$200 on **Schedule A**:

- the name of the employer and the type of asset (i.e., "phantom stock");
- the category of asset value, which usually is based on current market value of the employer's stock; and,
- if the filer has received a cash payout, the exact amount of income received in the "Other Income" column.

The filer should report the exact amount of any cash payout because the payout is treated as part of the filer's compensation from employment. If the filer has not yet received the payout, the filer should either check the box in the "None" column for income or write "\$0" in the

“Other Income” column. Alternatively, if the filer has received the payout solely in the form of stock, the filer should report the stock, rather than the phantom stock, as an asset on **Schedule A**.

If the filer continues to hold phantom stock, the filer should report the following information on **Schedule C, Part II**:

- the name of the employer;
- an indication that the arrangement involves phantom stock;
- the date on which the filer began participating in the plan under which the employee received the phantom stock;
- the relevant terms of the phantom stock (including the date of any expected payout or installment payment); and,
- if the employer will make additional grants of phantom stock in the future, an indication that the employer will continue making such grants.

If a filer’s spouse holds phantom stock, the filer should disclose the spouse’s phantom stock on **Schedule A**. However, the filer should not provide any information about a spouse’s phantom stock on **Schedule C, Part II**.

### **Conflicts Analysis**

The conflicts analysis for phantom stock is the same as it would be for a direct stock interest. The conflict arises when the filer first receives a grant of phantom stock, even if the filer has not yet received a payment based on that phantom stock. Absent a waiver, the filer may not participate personally and substantially in any particular matter that will have a direct and predictable effect on the financial interests of the employer that issued the phantom stock. The phantom stock will not qualify for a *de minimis* exemption under 5 C.F.R. § 2640.202.

In some cases, filers who are new entrants or Presidential nominees may have negotiated with their former employer regarding the disposition of unvested phantom stock. If the employer has agreed to accelerate the vesting schedule in order to enable the employee to receive a payment before entering Government service, it is likely that any such payment greater than \$10,000 will constitute an “extraordinary payment” under 5 C.F.R. § 2635.503. If the payment occurs after the filer enters Government service, the reviewer will need to consider the applicability of 18 U.S.C. § 209.

## PUT AND CALL OPTIONS

### **Definition**

A put option is a contract that provides an investor the option to sell a security. Conversely, a call option is a contract that provides an investor the option to purchase a security. With regard to each of these types of contracts, the investor has the right, but not the obligation, to exercise the option at a specified price (the “strike price”) until the contract’s expiration date.

One way in which put and call options differ from certain other types of options, such as employee incentive stock options, is that investors can purchase put and call options on the open market. As an alternative to exercising put and call options, investors can also resell them on the open market before their expiration.

This discussion focuses on the filer who is a typical investor who has purchased a contract for a put or call option from another party. It is possible, however, that a reviewer may encounter a filer who is the other party to the contract; in other words, the filer may be the party who initially granted the option to an investor. This situation is relatively uncommon for filers of financial disclosure reports, and it is not addressed here. However, reviewers may consult OGE for assistance if this situation arises.

### **Financial Disclosure Requirements**

The manner in which a filer should report a put or call option depends on whether the filer currently holds the option, has exercised the option or has resold the option.

#### The Filer Who Currently Holds a Put or Call Option

A filer holding a put or call option that has a fair market value over \$1,000 or that produced income over \$200 during the reporting period should report the following information on **Schedule A**:

- the name of the option;
- a category of asset value of the option; and
- the type and the category of amount of income.

The option normally will not produce income. Unless the filer resells the option, income is associated with the underlying security, not with the option.

A filer who holds a put option may or may not also hold the underlying security that the filer has the right to sell at the specified option price. If the filer holds the underlying security in addition to the option, the filer should separately report the underlying security if it has a fair market value over \$1,000 or if it produced income over \$200 during the reporting period. The filer should report, as a separate line item, the following information on **Schedule A**:

- the name of the underlying security;

- the category of asset value; and
- the type and the category of amount of income.

However, a filer who holds a put option may not currently hold the underlying security. While a put option is the option to sell the underlying security, the filer may still have to acquire the underlying security before the filer can exercise the right to sell it at a specified price. In that event, the filer would not have an underlying security to report.

Sometimes the value of an option will not be readily ascertainable. The value of a put option will not be readily ascertainable if the strike price is less than the market value of the security. The value of a call option will not be readily ascertainable if the strike price exceeds the market value of the security. In either of these situations, where the filer would actually lose money by exercising the option, the option is said to be “underwater.” When an option is underwater, the filer may write “value not readily ascertainable” across the columns in **Block B of Schedule A**. Instead of reporting a category of asset value in Block B, the filer should report the following in **Block A of Schedule A**: (1) the type of option; (2) the strike price; (3) the expiration date; and (4) the name and number of units of the security for which the option exists.

The filer should report the purchase or sale of an option on **Schedule B, Part I**. The filer should also report all transactions related to the exercise of an option on **Schedule B, Part I**. If a filer never exercises an option before its expiration, the option will cease to have any value. However, a filer should not report the expiration of an option on **Schedule B, Part I**, because the expiration of the option is not a “transaction.”

#### The Filer Who Has Exercised a Put Option

If a filer has fully exercised a put option, neither the option nor the underlying security will have any reportable value. In that case, a filer should report only income over \$200. In some cases, the filer may have received income in the form of dividends or interest over \$200 before selling the underlying security. More often, the filer will have capital gains over \$200 to report as a result of selling the underlying security. A filer with reportable income associated with a fully exercised put option or its underlying security should report the following information on **Schedule A**:

- the name of the underlying security that the filer sold;
- the current category of asset value, which will be “None” if the filer has completely sold off the underlying security; and
- the type and the category of amount of income from the underlying security.

If a filer has only partially exercised a put option, the option may still have a reportable value. In that case, the filer should report the option as a separate line item, provided the option meets the reporting threshold.

Finally, a filer who sold an underlying security over \$1,000 related to a put option should report the following information on **Schedule B, Part I**:

- the name of the underlying security sold;
- an indication that the transaction was a sale;
- the date of the transaction; and
- the category of amount of the transaction.

The filer should provide similar information for a prior purchase of the underlying security, if the filer purchased the underlying security during the reporting period prior to exercising the put option.

### The Filer Who Has Exercised a Call Option

If a filer has fully exercised a call option, the option will no longer have a value of its own, but the underlying security that the filer purchased may have reportable value. Normally, the filer should report only the underlying security and not the fully exercised call option on the financial disclosure report. In the typical case, the filer who has fully exercised a call option will report the following information on **Schedule A** for any underlying security that has a fair market value over \$1,000:

- the name of the underlying security;
- the current category of asset value;
- the type and the category of amount of income.

The filer will not have capital gains to report solely as a result of exercising a call option, even if the filer purchased the underlying security at a price below the current market value. It may seem strange that the filer will have no reportable capital gains if the current value of the underlying security exceeds the cost the filer paid for it, but the tax code does not recognize capital gains until a filer sells a security. (In legal terms, this means that the price difference is included in the security's cost basis for tax purposes.)

Although the exercise of the call option will not result in reportable capital gains, a filer may have received reportable income at some point after exercising the call option. After exercising the call option and purchasing the underlying security, the filer may have sold the underlying security for a profit. In that event, the filer will report any capital gains over \$200 associated with this subsequent sale of the underlying security on **Schedule A**. Alternatively, a filer may receive income in the form of dividends or interest from the underlying security after exercising the call option. The filer will report any such dividend or interest income over \$200 on **Schedule A**.

If a filer has only partially exercised a call option, the option may still have a reportable value. In that case, the filer should report the option as a separate line item, provided the option meets the reporting threshold.

Finally, a filer who purchased an underlying security over \$1,000 related to a call option should also report the following information on **Schedule B, Part I**:

- the name of the underlying security purchased;

- an indication that the transaction was a purchase;
- the date of the transaction; and
- the category of amount of the transaction.

The filer should provide similar information for a subsequent sale, if the filer sold the underlying security after purchasing it.

### The Filer Who Resells a Put or Call Option

Instead of exercising a put or call option, an investor can resell it. If a filer has capital gains over \$200 from selling a put or call option during the reporting period, the filer should report the following information on **Schedule A**:

- the name of the option;
- a notation in Block A that the option was sold;
- the category of value, which should be “None”; and
- the category of amount of income that the sale generated; and
- the type of income, which will be “Capital Gains.”

A filer who holds a put option may or may not also hold the underlying security that the filer has the right to sell at the specified option price. If the filer holds the underlying security in addition to the option, the filer should separately report the underlying security if it has a fair market value over \$1,000 or if it produced income over \$200 during the reporting period. The filer should report, as a separate line item, the following information on **Schedule A**:

- the name of the underlying security;
- the category of asset value of the underlying security; and
- the type and the category of amount of income from the underlying security.

Note again that a filer who holds a put option may not actually have acquired the underlying security yet. In that event, the filer would not have an underlying asset to report.

A filer who sells a put or call option over \$1,000 during the reporting period should also report the following information on **Schedule B, Part I**:

- the name of the option sold;
- an indication that the transaction was a sale;
- the date of the transaction; and
- the category of amount of the transaction.

### **Conflicts Analysis**

For both a put option and a call option, the conflicts analysis focuses primarily on the underlying security. While the filer holds either an option or the underlying security, the filer may not participate personally and substantially in a particular matter that will have a direct and predictable effect on the financial interests of the issuer of the underlying security.

If the stock is publicly traded, a filer may qualify for a *de minimis* exemption under 5 C.F.R. § 2640.202 after the filer has purchased the stock. However, the filer may not rely on a *de minimis* exemption if the filer continues to have any option to purchase stock that the filer has not yet purchased. The *de minimis* exemptions for publicly traded securities do not apply to options to purchase or sell publicly traded securities.

## **QUALIFIED TUITION PROGRAM (529 PLAN)**

### **Definition**

A qualified tuition program is a program that offers investors tax-advantaged accounts for the purpose of saving money to cover educational expenses. Qualified tuition programs are often called “529 plans” because they are recognized in the tax code at 26 U.S.C. § 529. There are two types of qualified tuition programs: (1) college savings plans and (2) prepaid tuition plans.

A college savings plan is an investment account in which an individual chooses among various investment options, often consisting of mutual funds. The amount available for future tuition depends solely on the amount that the individual contributes and the performance of the investments.

A prepaid tuition plan is a contract between an individual and the plan’s sponsor that allows the individual to prepay future tuition expenses at current tuition rates. Later, the individual receives a credit for future tuition from the sponsor. The sponsor can either be a state or the Tuition Plan Consortium, LLC, for private institutions (also known as Independent 529 Plan).

### **Financial Disclosure Requirements**

A filer holding an interest in a college savings plan with a value over \$1,000 or with income greater than \$200 should report the following information on **Schedule A**:

- a description of each asset in the plan that meets the reporting threshold, reported as a separate line item;
- the category of asset value for each asset;
- either the type of income received from each asset or an indication that the asset is an excepted investment fund; and
- the category of amount of income from each asset.

As a form of simplified reporting, a filer may in some cases identify the portfolio option that the filer has selected within the college savings plan rather than identifying the underlying assets of the portfolio. This simplified reporting is permissible whenever the underlying assets of the portfolio within the college savings plan are readily available to the public on the internet.

A filer holding an interest in a prepaid tuition plan with a value over \$1,000 or with income greater than \$200 should report the following on **Schedule A**:

- the names of the plan and its sponsor;
- the category of asset value, which is the cost the filer paid for the contract;
- the type of income; and
- the category of amount of income, if any. (A filer usually has no income to report from a prepaid tuition plan.)

A filer should not report the purchase of a prepaid tuition plan on **Schedule B, Part I**. Because the filer's investment in the plan is a contract and not a security, the investment in the plan is not a reportable "transaction." In contrast, a filer who has invested in a college savings plan should report the following information for any transaction over \$1,000 that involves an asset of the plan on **Schedule B, Part I**:

- the name of the asset;
- the type of transaction;
- the date of the transaction; and
- the category of amount of the transaction.

## **Conflicts Analysis**

### College Savings Plan

A college savings plan is a vehicle for investing in various assets, and the plan's sponsor does not guarantee these assets. Therefore, the filer has a financial interest in the plan's assets. Accordingly, the reviewer should analyze these assets for potential conflicts. A filer may qualify for a regulatory exemption under 5 C.F.R. § 2640.201 because the assets of college savings plans are often mutual funds.

### Prepaid Tuition Plan

A prepaid tuition plan is a contractual arrangement with the sponsor of the plan, and the filer has a financial interest in the sponsor's ability or willingness to carry out the terms of the contract. Whether the sponsor of a plan is a state government or the Tuition Plan Consortium, LLC, the plan normally will not give rise to significant financial conflict of interest concerns for most Government employees.

## SHORT SALE

### **Definition**

A short sale is the sale of securities that an investor has borrowed from a broker. The investor, who does not actually own the securities, must eventually purchase an equal number of the same securities and return them to the broker. The investor's goal is to purchase replacement securities at a price lower than the price at which the investor initially sold them. The investor will realize a profit as a result of this price discrepancy if the value of the securities decreases. However, the investor will lose money if the value of the securities increases before the investor purchases them. In either case, the investor must also pay interest on the loan.

When the investor acquires the initial borrowed securities from the broker, but has not yet purchased the replacement securities, the investor is in an "open position." Later, when the investor purchases the replacement securities and returns them to the broker, the investor is said to be in a "closed position."

### **Financial Disclosure Requirements**

Reporting requirements for short sales vary depending on whether a filer is in an "open position" or a "closed position." A filer in a "closed position" with realized gains over \$200 should report the following information on **Schedule A**:

- the name of the security;
- an asset value of "None" (because the filer does not own the security); and
- the category of amount and the type of income earned from the transaction.

A filer in an "open position" should not report the short sale on **Schedule A**. When the filer is in an "open position," the value of the securities is not reportable on **Schedule A** because the securities do not belong to the filer and they have not yet generated any income for the filer.

A filer should report a short sale on **Schedule B, Part I**, only if the filer is in a "closed position." Even then, the filer should not report initial sales of borrowed securities in a short sale because those securities belonged to the broker, not to the filer. Instead, a filer in a "closed position" should report the following information related to the filer's purchase of replacement securities for more than \$1,000:

- the name of the replacement securities and a notation that they were purchased in connection with a short sale;
- an indication that the transaction was a purchase;
- the date of the purchase; and
- the category of amount of the transaction.

When reporting the "Amount of Transaction" on **Schedule B, Part I**, the filer should use the cost of repurchasing the replacement securities, rather than the cost of the securities that the filer originally borrowed from the broker.

The filer should report any liability over \$10,000 owed to a broker during the reporting period on **Schedule C, Part I**. If a short sale that meets this reporting threshold is in an “open position,” the filer should report the following information on **Schedule C, Part I**:

- the name of the broker (in the “Creditors” column);
- the name of the securities (in the “Type of Liability” column);
- a notation that the nature of the liability is a short sale and that the position is open (in the “Type of Liability” column);
- the date when the filer incurred the liability, which is the date on which the filer initially borrowed the securities (in the “Date Incurred” column);
- the interest rate (in the “Interest Rate” column);
- a notation that the term is “on demand” (in the “Term” column); and
- the category of amount.

When valuing an “open position” on **Schedule C, Part I**, the filer may use the cost of repurchasing the replacement securities. Alternatively, the filer may use the cost of the securities that the filer originally borrowed from the broker.

If a short sale that meets the reporting threshold is in a “closed position,” the filer should report the following information on **Schedule C, Part I**:

- the name of the broker (in the “Creditors” column);
- the name of the securities (in the “Type of Liability” column);
- a notation that the nature of the liability was a short sale and that the position has been closed (in the “Type of Liability” column);
- the date when the filer incurred the liability, which is the date on which the filer initially borrowed the securities (in the “Date Incurred” column);
- the interest rate (in the “Interest Rate” column);
- a notation that the term is “on demand” (in the “Term” column); and
- the category of amount.

When valuing a “closed position” on **Schedule C, Part I**, the filer should use the cost of repurchasing the replacement securities, rather than the cost of the securities that the filer originally borrowed from the broker.

## **Conflicts Analysis**

A “closed position” does not pose an ongoing conflict of interest because a filer no longer has a financial interest in a short sale after the position has closed. However, conflicts can arise when a short sale is in an “open position.”

With regard to an “open position,” the conflicts analysis for a short sale focuses primarily on the securities the filer has borrowed for the short sale. For purposes of the conflicts analysis, the filer’s financial interest in these borrowed securities is the same as if the filer actually owned them. Therefore, the filer may not participate personally and substantially in a particular matter

that will have a direct and predictable effect on the financial interests of the issuer of the securities. 18 U.S.C. § 208. The exemptions at 5 C.F.R. part 2640 do not cover a financial interest in a short sale that is in an “open position.”

Because the term of the loan from the broker is “on demand,” a conflict could also potentially arise in connection with particular matters affecting the decision of the broker to demand repayment of an “open position.” As with other routine commercial transactions, however, loans from brokers on terms generally available to the public normally do not give rise to significant financial conflict of interest concerns.

### **Requests for Certificates of Divestiture**

If an agency requires a filer to close out a short sale in order to avoid a potential conflict of interest, the filer will not be able to obtain a Certificate of Divestiture. A Certificate of Divestiture is unavailable in such circumstances because the filer will not be selling the securities, and the applicable statute allows OGE to issue Certificates of Divestitures in connection with sales. Instead, the filer will need to purchase replacement securities, which the filer will return to the broker, in order to close out the short sale.

## **SPLIT-DOLLAR LIFE INSURANCE POLICY**

### **Definition**

A split-dollar life insurance policy is a specific type of life insurance policy that has a cash value. The term “split-dollar” describes the method of paying for life insurance by splitting the premiums and proceeds between an employer and an employee.

There are two main types of split-dollar life insurance policies. In one type of policy, the employer pays the premiums and owns the contract. The employer receives reimbursement of the premiums upon the employee’s death, and the employee’s beneficiary then receives the balance of the insurance proceeds. In the other type of policy, the employer pays the premiums as loans to the employee, but the employee owns the contract. The loans are then repaid to the employer out of the insurance proceeds. The primary differences between these two types of policies are differing tax consequences based on the ownership of the contract.

### **Financial Disclosure Requirements**

A filer who holds a split-dollar life insurance policy should report the following information on **Schedule A**:

- the names of the insurance company and the employer;
- the type of insurance policy;
- a category of asset value; and
- the type and the category of amount of income.

In addition, the filer should report the following information about any continuing ties to a former employer through a split-dollar life insurance policy on **Schedule C, Part II**:

- the name of the employer;
- the type of insurance policy, which is a “split-dollar life insurance policy”;
- an indication as to whether the employer is continuing to make contributions; and
- the date on which the filer began participating in the policy.

If a filer’s spouse holds an interest in a split-dollar life insurance policy, the filer should disclose the policy on **Schedule A**. However, the filer should not provide any information about a spouse’s split-dollar life insurance policy on **Schedule C, Part II**.

## **Conflicts Analysis**

With respect to a split-dollar life insurance policy, the filer has a financial interest in the former employer's ability or willingness to continue paying the premiums. The filer also has a financial interest in the insurer's ability or willingness to pay the policy benefits. Therefore, the filer may not participate personally and substantially in any particular matter that would have a direct and predictable effect on the ability or willingness of either the former employer or the insurer to honor these commitments.

## STABLE VALUE FUND

### **Definition**

A stable value fund is an investment vehicle that is generally offered as an investment option in an employee benefit or retirement plan. Stable value funds typically seek to provide greater returns than money market funds but greater security than other types of investment funds. They typically invest in bonds and interest-bearing contracts. The issuers of the contracts are usually insurance companies that guarantee the value of the assets and a specified minimum rate of return. Some stable value funds are mutual funds that have registered with the Securities and Exchange Commission (SEC), but not all stable value funds are registered mutual funds.

### **Financial Disclosure Requirements**

A filer holding a stable value fund with a value over \$1,000 or with income greater than \$200 should report the following information on **Schedule A**:

- the name of the fund, including either the name of the employer or the name of the entity that manages the fund;
- the category of asset value;
- either an indication that the asset is an excepted investment fund or the type of income;
- the category of income; and,
- if the fund is not an excepted investment fund, each asset of the fund that meets the reporting threshold, reported as a separate line item that identifies:
  - the name of the asset;
  - the category of asset value; and
  - the type and the category of income.

Stable value funds often meet the definition of an excepted investment fund at 5 C.F.R. § 2634.310(c). They tend to satisfy the requirements of being widely held and out of the filer's control because filers usually invest in them through employee benefit or retirement plans. They also often satisfy the requirement of being publicly available, even when they are not available to individual investors, if they are commercially available to institutional investors, such as employers.

On **Schedule B, Part I**, filers should report transactions involving the assets of an employee benefit or retirement plan to the same extent that they would report such transactions if they held these assets directly. For this reason, a filer should report a transaction involving a stable value fund, even if the filer holds an interest in the stable value fund through an employee benefit or retirement plan.

When a filer holds an interest in a stable value fund through an employee benefit or retirement plan, the filer should report the employee benefit or retirement plan on **Schedule C, Part II**, including the following information:

- the name of the employer;
- the type of retirement plan (e.g., defined contribution plan, defined benefit plan, etc.); and
- the date on which the filer began participating in the plan.

If a filer's spouse holds a stable value fund through an employee benefit or retirement plan, the filer should disclose the asset on **Schedule A** and any transaction related to the asset on **Schedule B, Part I**. However, the filer should not provide any information about a spouse's asset on **Schedule C, Part II**.

### **Conflicts Analysis**

As with other pooled investment vehicles, the filer has a financial interest in the assets of the stable value fund. A filer may not be able to participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the issuers of any securities held in the stable value fund. To the extent that the fund holds bonds and interest-bearing contracts, the filer may not be able to participate personally and substantially in any particular matter that has a direct and predictable effect on either (a) the value of the bonds or (b) the ability or willingness of the issuers of the bonds or contracts to make payments to the filer. However, the stable value fund may qualify for one of the exemptions for sector mutual funds at 5 C.F.R. § 2640.201, if the stable value fund is a mutual fund that has registered with the SEC.

If a former employer is no longer making contributions to an independently managed employee benefit or retirement plan that contains the stable value fund, the filer does not have a financial interest in the employer solely as a result of holding an interest in a stable value fund that does not contain employer stock.

## STOCK APPRECIATION RIGHT

### **Definition**

A stock appreciation right is a contract between an employer and an employee that grants the employee the right to receive a payment tied to any increase in the value of employer's stock. When granting a stock appreciation right, the employer does not grant the employee any shares of the employer's stock. Instead, the employer grants the employee a right that *tracks* the value of a specified number of shares over a specified period of time. The employer designates a "grant price," and the employee will have a right in the future to receive a payout equivalent to the difference between the market price of the stock and the grant price.

If the value of the shares increases, the employee can exercise the stock appreciation right by requesting a payment equivalent to the increase in value of the shares. For example, if the employee has a stock appreciation right tied to 100 shares and the value of the shares increases by 50 cents per share, the employee may request a payment of \$50. In some cases, the employer may let the employee elect to receive the payment in the form of \$50 worth of employer stock at current market value.

Like stock options, a stock appreciation right typically has a vesting requirement and an expiration date. The employee may not exercise the stock appreciation right before it vests or after it expires. If the employee's employment is terminated before the stock appreciation right vests, the employee normally forfeits the right.

### **Financial Disclosure Requirements**

A filer should report the following information about any stock appreciation right with a value over \$1,000 or with income over \$200 on **Schedule A**:

- the name of the employer and the type of asset (i.e., "stock appreciation right");
- the category of asset value; and,
- if the filer has exercised the stock appreciation right and received a cash payout, the exact amount of income received in the "Other Income" column.

The filer should report the exact amount of any cash payout because the payout is treated as part of the filer's compensation. If the filer has not exercised the stock appreciation right, the filer should either check the box in the "None" column for income or write "\$0" in the "Other Income" column. If the filer has fully exercised the stock appreciation right and has received the payout solely in the form of stock, the filer should report the stock, rather than the stock appreciation right, as an asset on **Schedule A**.

For purposes of financial disclosure, a filer may value a stock appreciation right based on the difference between the current market value and the grant price. The filer should subtract the grant price from the current market value of the employer's stock. Then, the filer should

multiply this difference by the number of shares that the stock appreciation right is tracking, as follows:

$$\begin{array}{rcl} \text{(current market value - grant price)} & \times & \text{number of shares} = \text{value} \\ (\$1.50 - \$1.00) & \times & 100 \text{ shares} = \$50 \end{array}$$

The stock appreciation right is said to be “underwater” if the value is zero or a negative number. This situation occurs when the current market value of a share is less than the grant price. In other words, the stock decreased in value after the employer granted the stock appreciation right, and the employee would not benefit from exercising the right. When a stock appreciation right is underwater, the filer may write “value unascertainable” across the columns in **Block B of Schedule A**. In that event, the filer should report the following information in **Block A of Schedule A**:

- the name of the employer and the type of asset (i.e., “stock appreciation right”);
- the number of shares;
- the grant price;
- the expiration date;
- an indication as to whether the stock appreciation right is vested; and
- for an unvested stock appreciation right, the date on which the unvested right will vest.

If the filer continues to hold a stock appreciation right, the filer should report the following information on **Schedule C, Part II**:

- the name of the employer;
- an indication that the arrangement involves a stock appreciation right;
- the date on which the filer began participating in the plan under which the employee received the stock appreciation right;
- an explanation regarding the disposition of the stock appreciation right (including an indication as to whether the filer will retain the stock appreciation right, exercise any vested right, forfeit any unvested right, or receive an accelerated payout of any unvested right); and,
- if the employer will make additional grants of stock appreciation rights in the future, an indication that the employer will continue making such grants.

If a filer’s spouse holds a stock appreciation right, the filer should disclose the spouse’s stock appreciation right on **Schedule A**. However, the filer should not provide any information about a spouse’s stock appreciation right on **Schedule C, Part II**.

## **Conflicts Analysis**

The conflicts analysis for a stock appreciation right is the same as it would be for a direct stock interest. The conflict arises when the filer first receives the stock appreciation right, even if the filer has not yet exercised that right. Absent a waiver, the filer may not participate personally and substantially in any particular matter that will have a direct and predictable effect

on the financial interests of the employer that issued the stock appreciation right. The stock appreciation right will not qualify for a *de minimis* exemption under 5 C.F.R. § 2640.202.

In some cases, filers who are new entrants or Presidential nominees may have negotiated with their former employer regarding the disposition of unvested stock appreciation rights. If the employer has agreed to accelerate the vesting schedule in order to enable the employee to receive a payment before entering Government service, it is likely that any such payment greater than \$10,000 will constitute an “extraordinary payment” under 5 C.F.R. § 2635.503. If the payment occurs after the filer enters Government service, the reviewer will need to consider the applicability of 18 U.S.C. § 209.

### **Special Consideration for Certificates of Divestiture**

A filer may not receive a Certificate of Divestiture for the exercise of a stock appreciation right. A Certificate of Divestiture is unavailable because the payout that the employee receives upon exercising the right constitutes ordinary income, rather than capital gains. However, if an employee receives the payout in the form of stock, the employee may be able to receive a Certificate of Divestiture for a subsequent sale of the stock.

## **TAX-SHELTERED ANNUITY (403(b) RETIREMENT PLAN)**

### **Definition**

A tax-sheltered annuity (or 403(b) retirement plan) is a defined contribution retirement plan available primarily to employees of public educational systems and employees of certain non-profit organizations. Certain other individuals are eligible under the tax code to participate in tax-sheltered annuities, as well.

For the purposes of financial disclosure, tax-sheltered annuities are similar to 401(k) retirement plans. The tax-sheltered annuity is an arrangement in which an employee's pre-tax earnings and sometimes employer matching contributions are contributed to a tax-deferred retirement account. Like 401(k) retirement plans, tax-sheltered annuities contain underlying assets in which a filer has invested. These assets often include annuities, diversified mutual funds, bond funds and stable value funds.

### **Financial Disclosure Requirements**

A filer who has an interest in a tax-sheltered annuity valued over \$1,000 or with income greater than \$200 should report the following information on **Schedule A**:

- the name of each individual asset of the tax-sheltered annuity that meets the reporting threshold, reported as a separate line item (including, in the case of an asset that is actually an annuity, the name of the annuity provider);
- the category of asset value for each asset listed;
- either the type of income for each asset listed or an indication that the asset is an excepted investment fund; and
- the category of amount of income for each asset listed.

If an asset in a tax-sheltered annuity is a fund that does not qualify as an excepted investment fund, the filer must report all of the underlying assets of that asset. However, many of the assets in tax-sheltered annuities qualify as excepted investment funds.

For transactions over \$1,000 involving any asset of the tax-sheltered annuity, the filer should report the following information on Schedule B, Part I:

- a description of any transactions associated with an asset of the tax-sheltered annuity;
- the transaction type;
- the date of the transaction (or "various" to indicate that transactions involving a particular asset occurred on various dates during the reporting period); and
- the actual value of the transaction.

If a filer has a reportable interest in a tax-sheltered annuity, the filer should also report the following information on **Schedule C, Part II**:

- the name of the employer;

- the type of retirement plan, which is a tax-sheltered annuity (or “403(b) plan”);
- the date on which the filer began participating in the plan; and
- an indication as to whether the employer is continuing to make contributions.

If a filer’s spouse holds an interest in a tax-sheltered annuity, the filer should disclose the assets of that annuity on **Schedule A** and any transactions related to the tax-sheltered annuity on **Schedule B, Part I**. However, the filer should not provide any information about a spouse’s tax-sheltered annuity on **Schedule C, Part II**.

### **Conflicts Analysis**

As with other types of defined contribution plans, a tax-sheltered annuity is an arrangement for holding other investments on a tax-deferred basis. The filer has a financial interest in these underlying investments, but the filer may qualify for a regulatory exemption with regard to some or all of them. If a former employer is no longer making contributions to an independently managed tax-sheltered annuity, the filer does not have a financial interest in the employer merely as a result of holding an interest in the tax-sheltered annuity.

## TIAA-CREF

### **Definition**

TIAA-CREF (Teachers Insurance and Annuity Association of America – College Retirement Equities Fund) is a non-profit entity that provides a variety of financial services, including retirement plans. TIAA-CREF is one of the largest financial services providers in the United States, and its retirement products typically appear on financial disclosure reports of filers who have worked as professors or teachers. TIAA-CREF offers a variety of plans, including 403(b) retirement plans, simplified employee pension individual retirement accounts (SEP IRA), Keogh plans and college savings plans. TIAA-CREF also offers a variety of specific financial instruments, including annuities, various forms of insurance, cash accounts; and mutual funds.

### **Financial Disclosure Requirements**

A filer who holds a TIAA-CREF product valued at over \$1,000 or with income greater than \$200 should report the asset on **Schedule A** in a manner consistent with the requirements for that type of asset. The filer should identify each asset as a separate line item, rather than identifying only “TIAA-CREF” in Block A (e.g., “TIAA-CREF: TIAA Traditional Annuity”; “TIAA-CREF: TIAA Growth & Income”; “TIAA-CREF: TIAA Inflation-Linked Bond”). For TIAA-CREF defined contribution plans, the filer should report each underlying asset of the defined contribution plan as a separate line item on **Schedule A**.

On **Schedule B, Part I**, the filer should report any transactions over \$1,000 involving a TIAA-CREF product. The filer should be sure to report transactions involving the individual underlying assets of a TIAA-CREF defined contribution to the extent that any such transactions exceed \$1,000.

Filers often have acquired their interests in TIAA-CREF retirement products through their former employers’ retirement plans. A filer should disclose continued participation in such a retirement plan on **Schedule C, Part II**, including the following information:

- the name of the employer;
- the type of retirement plan (e.g., defined contribution plan, fixed annuity, etc.); and
- the date on which the filer began participating in the plan.

If a filer’s spouse holds a TIAA-CREF product, the filer should disclose all related assets on **Schedule A** and all related transactions on **Schedule B, Part I**. However, the filer should not provide any information about a spouse’s holdings on **Schedule C, Part II**.

### **Conflicts Analysis**

The conflicts analysis for an asset that is a TIAA-CREF product is the same as for any other asset that a filer holds. For example, if the filer has invested in a TIAA-CREF defined contribution plan, the conflicts analysis should take into consideration all of the underlying assets of the plan in which the filer has invested.