

Office of Government Ethics

92 x 14 -- 03/26/92

Letter to a Government Attorney dated March 26, 1992

This is in response to your letter (with its enclosures) dated March 18, 1992, requesting a Certificate of Divestiture with respect to certain securities apparently attributable to an employee of [your agency].

Certificates of Divestiture are issued under the rules of section 1043 of the Internal Revenue Code of 1986. Those rules require that the certificate be issued to the specific "eligible individual," as defined in subsection (b) of section 1043, who will be the seller of the property to be divested. Further, the regulations issued by this Office to implement section 1043 require the eligible person to make a written request for the certificate. 5 C.F.R. § 2634.1002(b)(1)(i).

With respect to property held in trust, there are complexities. The April 1990 Technical Corrections to the Ethics Reform Act of 1989 added a new subsection (b)(5) to section 1043, which expanded that section's definition of "eligible person" in subsection (b)(1) of section 1043 to include any trustee of a trust with respect to which a beneficial interest in property or income is either held by, or attributable through a spouse or minor or dependent child by Federal ethics principles to, a Government official.

The legislative history of this provision evidences that the House Committee on Ways and Means did not intend through this amendment the tax benefits of the section's nonrecognition mechanism to be generally available to beneficiaries of a trust other than those referred to by subsection (b)(1)(A) and (B) of section 1043 (that is the Government official and any spouse and minor and dependent children). The concern is that there may be additional parties who are beneficiaries of a trust who would obtain an unintended benefit.

We understand that the committee's intent was that this Office's authority to issue a Certificate of Divestiture be restricted as follows: A Certificate will not be issued unless the parties take those actions which, in the opinion of the Director of the Office of Government Ethics, are appropriate to

exclude parties in addition to those referred to in subsection (b) (1)(A) and (B) of section 1043 from participation in the nonrecognition mechanism. Such measures may include, as permitted by applicable state trust and estate law, division of the trust into separate portfolios, special distributions, dissolution of the trust, or any other method deemed by the Director in his sole discretion, to be feasible under the facts and circumstances to exclude additional parties from benefiting from the nonrecognition mechanism. Notwithstanding the committee's concern, however, in such cases that it is unavoidable that additional parties' interests are benefited by the nonrecognition mechanism, the intent was that Certificates nevertheless be granted.

In view of the further analysis which must be undertaken by this Office in the case of a Certificate of Divestiture request with respect to a trustee, we require that we be furnished with a copy of the trust instrument, full details as to its current portfolio, and a memorandum analyzing all beneficial interests in principal and income. These materials should include an explanation of the relationship of each holder of a vested beneficial interest in the trust to your employee. To the extent that there may be parties with beneficial interests who are not eligible individuals, we will consult with representatives of the Government official, trustee, and other concerned parties, as appropriate, in order to resolve the issues presented.

If there are any questions, you may contact this Office.

Sincerely,

Stephen D. Potts
Director