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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
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SUBJECT: Certificates of Divestiture: The “Reasonably Necessary” Divestiture Standard and the Requirement that Property Covered by a CD be Sold While the Seller is an “Eligible Person”

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on two aspects of the Certificate of Divestiture (CD) Program: (1) whether divestiture is “reasonably necessary” and (2) when divestiture must occur once OGE has issued a CD. Divestiture generally will not be found to be “reasonably necessary” if an Executive branch employee is planning to leave the Government shortly. Additionally, because only an “eligible person” may divest assets pursuant to a CD, only the sale of property by a current Executive branch employee will qualify the employee for the benefits of a CD. A former Executive branch employee who sells property after leaving the Government pursuant to a previously issued CD will not qualify for the benefits of a CD. Agency ethics officials who have questions concerning these aspects of OGE’s CD Program are encouraged to contact their OGE Desk Officer.

“Reasonably Necessary” Divestiture Standard When Planning to Leave Government

In order to obtain a CD, an employee’s request must be accompanied by additional materials, including an opinion from the employee’s Designated Agency Ethics Official (DAEO) “that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule or Executive order.” 5 C.F.R. § 2634.1005(b)(2); *see also* OGE Inf. Adv. Op. 04 x 14 (2004). In general, the “reasonably necessary” requirement is not satisfied where an Executive branch employee knows they will be leaving Government service shortly. For example, it normally would not be “reasonably necessary” for an Executive branch employee to divest if they have an arrangement for future employment to begin in the near future. In that situation, methods other than divestiture for resolving conflicts of interest, such as recusal or reassignment, would usually be more appropriate. OGE Inf. Adv. Op. 92 x 12 (1992). In those circumstances, the Director might also deny the request because “an unfair or unintended benefit would result” if the request were to be granted. 5 C.F.R. § 2634.1007; *see also* OGE Inf. Adv. Op. 93 x 11 (1993). OGE will review eligibility for a CD on a case-by-case basis should an employee know that they will be leaving Government service shortly.



“Eligible Person” at the Time of Divestiture

The IRS statute governing CDs defines an “eligible person” as “an officer or employee of the executive branch, or a judicial officer, of the Federal Government,” or other persons whose ownership of any property is attributable to that officer or employee.¹ 26 U.S.C. § 1043(b)(1); *see also* 5 C.F.R. § 2634.1003. It also states, in relevant part, that capital gains can be deferred “[i]f an *eligible person sells any property* pursuant to a certificate of divestiture.” 26 U.S.C. § 1043(a) (emphasis added); *see also* 5 C.F.R. § 2634.1001. The plain language of the statute requires the sale of any property be undertaken by an “eligible person.” Once an Executive branch employee has left Government service, the former employee and other persons whose ownership is attributable to that former employee are no longer eligible persons. Therefore, the property divested after the employee leaves Government service will not qualify for the benefits of a CD previously issued by OGE.²

¹ *See* 26 U.S.C. § 1043(b)(5) (also allowing a trustee holding property in a trust in which an eligible person has a beneficial interest in principal or income to qualify for a CD).

² OGE has revised the Certificate of Divestiture to more clearly reflect the requirements of 26 U.S.C. § 1043(a).