

## **Office of Government Ethics**

**90 x 13 -- 07/12/90**

### **Letter to a Designated Agency Ethics**

**Official dated July 12, 1990**

In response to your request of June 26, 1990, enclosed is the original Certificate of Divestiture for [an employee] of [your agency]. We would appreciate your forwarding the original certificate to [the employee]. Also enclosed is a copy of the certificate for your files.

You will note that the certificate does not apply to the [number of] shares of [a corporation's stock] which [your employee] received from that company's Employee Stock Ownership Plan. It is not clear whether those interests are appropriate for certification.

The issues involved in cases such as this involving interests in pension, profit-sharing, and stock bonus plans are subject to considerable subtlety and complexity. As a general premise, it must be emphasized that the section 1043 mechanism applies to capital assets (as defined by section 1221 of the Internal Revenue Code) held by an eligible individual (as defined by section 1043(b)). Not all transactions and occurrences which result in the realization of ordinary or capital gains income by an eligible individual fall within the statutory scheme: some transactions and occurrences simply do not fit the statutory requirements; others may present instances where certification would give an unfair and unintended benefit.

With respect to employee benefit plans, such an unfair and unintended benefit would occur upon certification of property held or received during one step of a sequence in avoidance of transferring an otherwise qualifying rollover distribution to an eligible retirement plan within 60 days. In other words, certificates may not be used to achieve a tax-advantaged removal of employee benefit plan funds from the rules which normally pertain to such plans in cases where no capital gains tax would be imposed if those rules were followed.

Accordingly, in the absence of a demonstration that [the employee's] interest in these [corporation] shares is not eligible for rollover treatment, a certificate will not be issued

with respect to his interest in the plan. Such a demonstration must satisfy this Office that the plan administrator could not make a qualifying distribution in [the employee's] case to which the provisions of section 402(f) would apply and that the particular property interest proposed for certification falls within the statutory scheme. However, from the materials transmitted with your letter, the distribution was apparently qualifying since [the employee] has been notified to rollover the proceeds into an IRA within 60 days.

Sincerely,

Donald E. Campbell  
Acting Director

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(Ed. Note: Note that section 1043 of the Internal Revenue Code and the rules of subpart J of 5 C.F.R. Part 2634 provide for nonrecognition of gain in the case of sales to comply with conflict of interest requirements. The rules of Subpart J relate to the issuance of Certificates of Divestiture and the permitted property into which a reinvestment must be made in order for nonrecognition to be permitted. Such reinvestments are called rollovers, and the specific rules regarding the permitted properties into which a rollover may be made are found at 5 C.F.R. § 2634.1003. The substantive and procedural rules relating to the tax aspects of such sales and rollovers pursuant to the statutory scheme are subject to the jurisdiction of the Internal Revenue Service.

Eligible persons should seek the advice of their personal tax advisors for guidance as to the tax aspects of divestiture transactions and whether proposed acquisitions meet the requirements for permitted property. Internal Revenue Service regulations and other guidance should be consulted as to these matters. Internal Revenue Service requirements for reporting dispositions of property and making an election not to recognize gain under section 1043 must be followed by eligible persons wishing to make such an election.)