

Office of Government Ethics

95 x 6 -- 05/22/95

Letter to an Acting Deputy Ethics Counselor May 22, 1995

This is in response to your letter of May 2, 1995. By your letter, you request a formal advisory opinion concerning, in effect, whether this Office has authority to issue Certificates of Divestiture under the provisions of section 1043 of the Internal Revenue Code (as implemented by 5 C.F.R. § 2634.1001 et seq.), in the cases of State government employees (and their spouses, minor children, and resident relatives) and resident relatives of Federal employees.

Pursuant to 5 C.F.R. § 2634.305(a)(2), you are advised that the subject of your request is not a matter upon which this Office issues formal advisory opinions as outlined by section 2634.303. The following factors were taken into consideration in making this determination: the unique nature of the question and its limited precedential value, the limited potential number of officers or employees throughout the Government affected by the question, the infrequent likelihood of this question to arise, and the absence of a likelihood or presence of inconsistent interpretations on the same question by different agencies.

The following information may be helpful to you: Certificates of Divestiture are issued under the mandatory scheme 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).

In the case of a person who is not defined as an "eligible individual" by subsection (b), such as those referred to in your letter, this Office is without authority to issue Certificates of Divestiture.

The type of issue you raise has been considered many times in various contexts. The treatment of a person who is defined as an "eligible individual," but holds a beneficial interest in property held in trust, is instructive as to the approach to these matters which the statutory scheme requires. As first enacted, section 1043 did not apply to the case of property to which title was held by a trustee. It was thought desirable that a Government official, as a specified "eligible individual," would

receive the benefit of the tax-deferral mechanism with respect to property held in trust. However, executive branch experts and the staffs of the House and Senate tax-writing committees were in agreement that the statute did not permit certification in such cases. Accordingly, there was agreement that the only solution was an amendment to the statute. Even after the statutory amendment, significant complexities remain.

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 individual" 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 Certificates 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.

This discussion demonstrates that, beyond the clear language of section 1043, there is an ample history under its scheme that shows Congress to be resolute in limiting its availability to the case of an individual specified in its provision as an "eligible individual." It would be an abuse of discretion for this Office to entertain the certification of other persons, even though their divestitures were required under similar circumstances by Federal ethics principles.

Sincerely,

Stephen D. Potts
Director