

OFFICE OF GOVERNMENT ETHICS

AGENCY: Office of Government Ethics

5 CFR Part 2634

**Public Financial Disclosure, Conflicts of Interest,
and Certificates of Divestiture for Executive
Branch Officials**

RIN 3209-AA06

55 FR 14407

Wednesday, April 18, 1990

ACTION: Interim rule with request for comments.

SUMMARY: This interim regulation implements a provision of the Ethics Reform Act of 1989 which provides for tax-deferral in the case of the sale of property to comply with conflict-of-interest requirements. The regulation announces the Office of Government Ethics' interim procedure for issuing Certificates of Divestiture authorizing such sales, and defines the permitted property into which the proceeds from such sales must be reinvested. The Federal purpose reflected in section 1043 of the Internal Revenue Code and these rules is to minimize the burden of Government service resulting from gain on the sale of assets for which divestiture is reasonably necessary because of the conflict of interest laws, in order to attract and retain desirable personnel in the executive branch and to ensure the confidence of the public in the integrity of Government officials and the Government's decisional processes.

DATES: Interim rule effective April 18, 1990. Comments must be received on or before June 18, 1990.

ADDRESSES: Office of Government Ethics, Suite
500, 1201 New York Avenue NW., Washington, DC 2005-3917, Attention:
Mr. Norman B. Smith.

FOR FURTHER INFORMATION CONTACT: Norman B. Smith, Office
of Government Ethics, telephone (202/FTS) 523-5757,
FAX (202/FTS) 523-6325.

SUPPLEMENTARY INFORMATION: This document promulgates an interim procedural rule with respect to the issuance of Certificates of Divestiture, which permit the nonrecognition of gain upon the disposition of property to comply with conflicts of interest requirements. Section 1043 of the Internal Revenue Code of 1986 was enacted as part of the Ethics Reform Act of 1989 (Pub. L. 101-194). Pursuant to section 1043, the rule provides that a Certificate of Divestiture with respect to specific property may be issued pursuant to the procedures specified, upon a determination that such divestiture by an executive branch official (or spouse or minor/dependent child thereof) is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order, or is requested by a congressional committee as a condition of confirmation, in the case of an "eligible person" as defined in the rule. The rule also defines "permitted property" into which the proceeds from divestitures must be reinvested.

Administrative Procedure Act

Pursuant to sections 553 (b) and (d) of title 5 of the United States Code, the Director of the Office of Government Ethics has found good cause for waiving the general notice of proposed rulemaking and the 30-day delay in effectiveness. As it is essential to the administration of the Executive branch ethics program that these implementing regulations go into effect as soon as possible, the notice and delay in effectiveness are being waived as impractical, unnecessary, and contrary to the public interest. However, these are interim rules with provision for a 60-day comment period. The Office of Government Ethics will review any comments received during the comment period, and consider any modifications to these rules which appear warranted.

E.O. 12291

The Office of Government Ethics has determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only has an affect with respect to financial interests of Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because these regulations do not contain any additional information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501 et seq.

Regulation Identification Number

The Regulation Identification Number (RIN) for this document, 3209-AAO6, is a new number recently assigned to the Office of Government Ethics. The Office of Government Ethics became a separate agency in the Executive branch on October 1, 1989, pursuant to sections 3 and 10 of Public Law 100-598, the Office of Government Ethics' 1988 reauthorization legislation. See, 5 U.S.C. appendix IV, sec. 401. New part 2634 of 5 CFR was recently transferred from the Office of Personnel Management's chapter I of 5 CFR part 734, and redesignated as part 2634. Part 2634 was not listed in the most recently published Unified Agenda in the Federal Register (October 30, 1989), but will be in the forthcoming April 1990 agenda.

List of Subjects in 5 CFR Part 2634

Conflict of interests, Government employees.

Approved: April 2, 1990.

Donald E. Campbell,
Acting Director, Office of Government Ethics.

Accordingly, 5 CFR part 2634 is amended as follows:

**PART 2634 -- EXECUTIVE PERSONNEL FINANCIAL DISCLOSURE
REQUIREMENTS**

1. The authority citation for part 2634 is revised to read as follows:

Authority: 5 U.S.C. appendixes III, IV; 26 U.S.C. 1043.

2. Section 2634.303 is amended by adding a new paragraph (h) to read as follows:

@ 2634.303 Special rules.

* * * * *

(h) Certificates of Divestiture. Each report required by the provisions of this subpart shall include a full and complete statement concerning any Certificate of Divestiture which is contemplated or which has been issued during the period covered by such report. See subpart J of this part (@@ 2634.1001 to 2634.1004) for the rules relating to the issuance of such certificates.

3. A new subpart J is added to part 2634 to read as follows:

Subpart J -- Certificates of Divestiture

2634.1001 Nonrecognition for sales to comply with conflict of interest requirements; general considerations.

2634.1002 Issuance of Certificates of Divestiture.

2634.1003 Permitted property.

562634.1004 Special rule.

Subpart J -- Certificates of Divestiture

@ 2634.1001 Nonrecognition for sales to comply with conflict of interest requirements; general considerations.

(a) Purpose. This subpart establishes the procedures and policies of the Office of Government Ethics with respect to the issuance of Certificates of Divestiture pursuant to section 1043 of the Internal Revenue Code of 1986 (hereinafter in this subpart referred to as "section 1043").

(b) Scope. Section 1043 and the rules of this subpart provide for nonrecognition of gain in the case of sales to comply with conflict of interest requirements. The rules of this subpart relate to the issuance of Certificates of Divestiture and the permitted property into which a rollover (as such reinvestments are called) must be made in order for nonrecognition to be permitted. 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.

(c) Policy. The Federal purpose reflected in section 1043 of the Internal Revenue Code and these rules is to minimize the burden of Government service resulting from gain on the sale of assets for which divestiture is reasonably necessary because of the conflict of interest laws, in order to attract and retain highly qualified personnel in the executive branch and to ensure the confidence of the public in the integrity of Government officials and decision-making processes.

@ 2634.1002 Issuance of Certificates of Divestiture.

(a) General rule. Pursuant to section 1043, a Certificate of Divestiture with respect to specific property shall be issued by the Director of the Office of Government Ethics pursuant to the procedures of paragraph (b) of this section upon a determination

that such divestiture by an eligible person as defined in paragraph (c) of this section is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order, or pursuant to the request of a congressional committee as a condition of confirmation.

(b) Procedural requirements -- (1) Required submissions. A determination to issue a Certificate of Divestiture may be made by the Director of the Office of Government Ethics only upon the submission by the designated agency ethics official of the agency of employment or proposed employment of the individual referred to in paragraph (c)(1) of this section of full and complete case materials to the Office of Government Ethics. Such case materials shall include:

(i) A copy of the written request from such individual to the designated agency ethics official to pursue certification in the case of the property to be divested;

(ii) In the case of an individual referred to in paragraph (c)(1) of this section who is required by the rules of this part, or part 735 (subpart D) or part 2633 or this title, to file a financial disclosure report, a copy of the latest report which has been filed;

(iii) A detailed description of the specific property as to which divestiture is contemplated;

(iv) Complete statements of:

(A) The facts and circumstances relevant to whether there is a reasonable necessity for divestiture (including a description of the position or applicable statutory citation setting forth the duties of the subject position); and

(B) Analysis and opinion from such designated agency ethics official concerning the application of the rules of this subpart in the case of the proposed certification; and

(v) In lieu of the materials described in paragraph (b)(1)(iv) of this section, in the case of the contemplated divestiture of specific property pursuant to the request of a congressional committee as a condition of confirmation, such materials shall include the written acknowledgement of the Chairman of such committee of such request.

(2) Standards for issuance. Certification pursuant to the rules of this subpart relates to the reasonable necessity for the divestiture of specific property pursuant to section 1043. Divestiture is one of the standard remedial actions available to comply with conflict of interest statutes, regulations, rules, and executive orders (see @ 2634.604(b)(5)), and certification ameliorates the impact of a divestiture. In cases in which the contemplated divestiture is not pursuant to the request of a congressional committee as a condition of confirmation, a Certificate of Divestiture will be issued by the Director of the Office of Government Ethics only if he concurs with the opinion of the designated agency ethics official referred to in paragraph (b)(1)(iv)(B) of this section that such divestiture is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order. Issues relating to whether the terms of a contemplated divestiture constitute a sale or other disposition of the property under Internal Revenue Service Rules and other tax matters are under the jurisdiction of the Internal Revenue Service. See @ 2634.1001(b).

(3) Documentation of the certification. Certification shall be indicated by a letter from the Director to the eligible party or his representative.

(c) Eligible person. For purposes of section 1043 and this subpart, the term "eligible person" includes:

(1) Any officer or employee of the Executive branch of the Federal government, except a person who is a special Government employee as defined in 18 U.S.C. 202; and

(2) The spouse and any minor or dependent child of an individual referred to in paragraph (c)(1) of this section whose ownership of property required to be divested is attributable to such person by 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order.

@ 2634.1003 Permitted property.

(a) In general. The categories of permitted property into which rollovers are permitted to be made have been drawn through the rules of this section so as to be neutral in respect of the vast majority of Federal programs and responsibilities. The Internal Revenue Service has jurisdiction with respect to determinations

concerning the application of the rules of this section in specific cases (see @ 2634.1001(b)). However, the ethics program rules applicable to specific agencies and positions may further limit an eligible person's choices. The advice of the designated agency ethics official should be sought in this regard. For example, there are restrictions on the purchases of shares in regulated investment companies by some Securities and Exchange Commission personnel and on purchases of obligations of the United States by some officials of the Department of the Treasury. Additionally, it may not be appropriate for some officials of agencies having international responsibilities to invest in mutual funds which exclusively invest in securities outside of the United States.

(b) Definition of "permitted property". For purposes of section 1043 and this subpart, the term "permitted property" means:

- (1) Any obligation of the United States; and
- (2) Any "diversified investment fund", as defined in paragraph (c) of this section.

(c) Diversified investment fund -- (1) Definition. The term "diversified investment fund" means any open-end mutual fund (which is a "regulated investment company", as defined by section 851 of the Internal Revenue Code of 1986), which by its prospectus, or any common trust fund maintained by a bank (which is a "common trust fund", as defined by section 584(a) of the Internal Revenue Code of 1986), which by the literature it distributes to prospective and current investors describing its objectives and practices, does not indicate the objective or practice of devoting its investments to particular or limited industrial, economic, or geographic sectors.

(2) Ownership limitation. Notwithstanding any other rule of this paragraph (c), a fund may not be considered to be a diversified investment fund in any case in which the ownership of more than one percent of the market value of the fund would be attributable to an individual referred to in @ 2634.1002(c)(1) immediately after a rollover.

Example 1: The Alpha Group is a family of funds which markets numerous open-end mutual funds which are typical of those generally available to the general public:

- (i) The following funds of the Alpha Group would be presumed to

be diversified investment funds for purposes of paragraph (c)(1) of this section, unless their prospectuses indicated an objective or practice of devoting their investments to particular or limited industrial, economic, or geographic sectors: the Common Stock Fund, the Growth Stock Fund, the S&P Index Fund, the Global Fund (investing in common stocks world-wide), the Blue Chip Fund, the Corporate Bond Fund, the Municipal Bond Fund, and the Government Bond Fund (which invests exclusively in obligations of the United States).

(ii) The following funds of the Alpha Group would not be presumed to qualify as diversified investment funds, unless their prospectuses indicated that they do not have an objective or practice of devoting their investments to particular or limited industrial, economic, or geographic sectors for purposes of paragraph (c)(1) of this section: The Pacific fund, the Mexico Fund, the New England Fund, the Gold Fund, the Commodity Futures Fund, the Venture Capital Fund, and the Drug Industry Sector Fund.

Example 2: The Omega Fund is a closed-end mutual fund which is listed on the New York Stock Exchange. The Omega Fund is not a diversified investment fund, as only open-end mutual funds are within the definition of that term pursuant to paragraph (c)(1) of this section.

@ 2634.1004 Special rule.

Public access to Certificates of Divestiture. The Certificates of Divestiture issued pursuant to the provisions of this part shall be available to the public in accordance with the rules of @ 2634.603 of this part.