

§ 2634.1002

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the integrity of Government officials and decision-making processes.

[55 FR 14408, Apr. 18, 1990, as amended at 61 FR 32635, June 25, 1996]

§ 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 a written request from the eligible person who is to divest the property (a Certificate of Divestiture cannot be issued for property which has already been divested) to the designated agency ethics official to pursue certification in the case of the property to be divested, which includes:

(A) A commitment to complete the divestiture on or before a specified date which is no later than the end of the three-month period referred to by § 2634.802(b) (or a similarly structured agreement in any case to which paragraph (b)(1)(ii)(B) of this section applies), or any extension thereof granted, or concurred with in writing, by the Office of Government Ethics; and

(B) Full and complete information concerning the facts and circumstances relating to the acquisition of such property and its contemplated divestiture;

(ii) In the case of an individual referred to in paragraph (c)(1) of this section who:

(A) Is required by the rules of this part or this title, to file a financial disclosure report, a copy of the latest report which has been filed; or

(B) Is not required to file a report referred to in paragraph (b)(1)(ii)(A) of this section, a memorandum from such individual which discloses the information with respect to the specification of interests in property, income, liabilities, agreements and arrangements, and outside positions which are required to be disclosed on such a report;

(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 part in the case of the proposed certification, including specification of the date on which the three-month period referred to by § 2634.802(b) (or a similarly structured agreement in any case to which paragraph (b)(1)(ii)(B) of this section applies), or any extension thereof granted, or concurred with in writing, by the Office of Government Ethics, will lapse; 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, a letter to the committee containing a promise from the nominee to divest specified property in accordance with such request, or a transcript of congressional testimony containing such a commitment by the nominee pursuant to 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;

(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; and

(3) Any trustee holding property in trust required to be divested in which:

(i) An individual referred to in paragraph (c)(1) of this section has a beneficial interest in principal or income; or

(ii) A spouse or any minor or dependent child of an individual referred to in paragraph (c)(2) of this section has a beneficial interest in principal or in-

come which is attributable to a person referred to in paragraph (c)(1) of this section by 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or executive order.

(d) *Special rules in the case of a trustee who is an eligible person.* (1) Notwithstanding any other rule of this subpart, in the case of a trustee who is an eligible person pursuant to paragraph (c)(3) of this section, a Certificate of Divestiture 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 paragraph (c) (1) and (2) of this section 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.

(2) In view of the further analysis which must be undertaken by the Office of Government Ethics in the case of a Certificate of Divestiture request with respect to a trustee, the required submissions in such a case shall include in addition to the materials described in paragraph (b)(1) of this section, a copy of the trust instrument, full details as to its current portfolio, and a memorandum analyzing all beneficial interests in principal and income. To the extent that there may be additional parties with beneficial interests, the staff of the Office of Government Ethics may consult with representatives of the Government official, trustee, and other concerned parties, as appropriate, in order to resolve the issues presented in light of the principles described in paragraph (d)(1) of this section.

(e) *Special rules in the case of employees; unfair and unintended benefits—(1) In general.* Notwithstanding any other rule of this subpart, a Certificate of Divestiture will not be issued in any case in which, in the opinion of the Director of the Office of Government Ethics, in

his sole discretion, an unfair or unintended benefit would be conferred on an eligible person. Paragraphs (e)(2) through (e)(6) of this section give examples of the application of the general rule of this paragraph (e)(1).

(2) *Employee benefit plans.* With respect to interests in pension, profit-sharing, stock bonus and other employee benefit plans, such an unfair or 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 of Divestiture 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 an interest in an employee benefit plan is not eligible for rollover treatment, a certificate will not be issued with respect to such an interest. Such a demonstration must satisfy the Office of Government Ethics that the plan administrator cannot make a qualifying distribution in the case of the eligible person to which the provisions of section 402(f) of the Internal Revenue Code of 1986 would apply and that the particular property interest proposed for certification falls within the statutory scheme.

(3) *Certain property received as compensation for services.* Such an unfair and unintended benefit would occur upon certification of property received as compensation for services, the gain from which would otherwise be treated as earned income. For example, with respect to the contemplated exercise of a stock option granted by an employer, such an unfair and unintended benefit would occur upon certification if such exercise or the sale of the resultant stock would otherwise result in earned income to the employee.

(4) *Nontimely divestitures.* With respect to any contemplated divestiture, such an unfair or unintended benefit would occur upon certification after the three-month period referred to by § 2634.802(b) (or a similarly structured agreement in any case to which para-

graph (b)(1)(ii)(B) of this section applies) has lapsed, unless there is an extension of time in a case of unusual hardship as determined pursuant to such section by the Office of Government Ethics or the designated agency ethics official (with the written concurrence of the Office of Government Ethics). In the case of such an agreement to implement a divestiture required by statute, regulation, rule, or executive order, such three-month period shall be deemed, for purposes of this subpart, to have started no later than 10 days after such requirement had become applicable.

(5) *Similar or related interests.* With respect to any contemplated divestiture, such an unfair or unintended benefit would occur unless all similar or related interests in property were also subject to a divestiture commitment.

(6) *Property acquired under improper circumstances.* With respect to any contemplated divestiture, such an unfair advantage or unintended benefit would occur if the property was acquired at a time when the holding of such property was prohibited by any law or regulation or under circumstances which otherwise would create the appearance of a conflict with the conscientious performance of governmental responsibilities.

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§ 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