

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.

[55 FR 14408, Apr. 18, 1990, as amended at 61 FR 32635, June 25, 1996; 61 FR 40145, Aug. 1, 1996]

#### § 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.

#### APPENDIX A TO PART 2634—CERTIFICATE OF INDEPENDENCE (FORM APPROVED: OMB CONTROL NO. 3209-0007)

The Certificate of Independence required by §2634.406(b) shall be executed as follows:

##### CERTIFICATE OF INDEPENDENCE

With respect to the trust of \_\_\_\_\_ (Settlor), which has been submitted to the Office of Government Ethics for certification pursuant to the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended), the undersigned proposed [Trustee] [\_\_\_\_\_] of such trust is a financial institution which is eligible to serve in such fiduciary capacity in accordance with section 102(f)(3)(A) of such Act:

FIRST: The undersigned is (check one)—

( ) a bank, as defined in 12 U.S.C. 1841(c), or

( ) an investment adviser, as defined in 15 U.S.C. 80b-2(a)(11),

not more than 10 percent of which is owned or controlled by a single individual.

SECOND: The undersigned—

(1) Is independent of and unassociated with any interested party so that the undersigned cannot be controlled or influenced in the administration of the trust by any interested party; and