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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
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SUBJECT: Divesting “Similar or Related Property” for Purposes of the Certificate of Divestiture Program

As part of the Ethics Reform Act of 1989, Congress authorized the U.S. Office of Government Ethics (OGE) to issue Certificates of Divestiture to employees and other eligible persons who are directed to sell property to ensure compliance with the ethics laws. 26 U.S.C. § 1043; 5 C.F.R. § 2634.1001, *et seq.* A Certificate of Divestiture allows an eligible person to defer capital gains taxes associated with the sale of such property. 26 U.S.C. § 1043(a). To qualify for a Certificate of Divestiture, the requesting employee must follow the procedures set out in OGE’s implementing regulations, 5 C.F.R. § 2634.1001, *et seq.* In particular, a Certificate of Divestiture will be issued by OGE pursuant to 26 U.S.C. § 1043(b)(2) only if all “similar or related property that presents a conflict of interest” will also be divested. 5 C.F.R. § 2634.1007. This Legal Advisory is being issued to assist agency ethics officials in the process of identifying “similar or related” property. As described further in this memorandum, OGE utilizes a functional approach to identifying “similar or related” properties. As a result, properties are considered “similar or related” if they pose the same or similar conflict of interest concerns.

As described in OGE’s regulations, an eligible person can seek a Certificate of Divestiture to defer capital gains taxes associated with the sale of property that is “reasonably necessary to comply with 18 U.S.C. § 208, or any other Federal conflict of interest statute, regulation, rule, or Executive Order.” 26 U.S.C. § 1043; 5 C.F.R. § 2634.1001(a); OGE Inf. Adv. Op. 04x14 (2004). To qualify for a tax-deferral, a requesting employee must obtain a Certificate of Divestiture from OGE prior to selling the property. OGE’s regulations set forth procedures for requesting a Certificate of Divestiture from OGE, which include certain safeguards intended to protect against the issuance of a Certificate of Divestiture in circumstances that would lead to an unfair or unintended benefit. 5 C.F.R. § 2634.1007. For example, to qualify for a Certificate of



Divestiture, an employee must divest of all “similar or related property.” *Id.*¹ By requiring the sale of such property, the regulations prevent employees from using the Certificate of Divestiture program to receive favorable tax treatment without fully resolving the underlying conflict of interest concerns. *See, e.g.*, OGE Inf. Adv. Op. 93x11 (1993) (employee could not retain performance-based contingency interest in company whose stock he was required to sell, as the interest posed similar conflict of interest concerns).²

Sometimes, identifying “similar or related” property can be straightforward. For example, if an employee is required to sell assets per a statute or regulation prohibiting the ownership of such assets, OGE treats all such property as “similar or related.” As a result, OGE will only issue a Certificate of Divestiture if all such assets will be divested. On the other hand, when an employee is divesting property because of a potential conflict of interest under 18 U.S.C. § 208(a), the analysis may be more complicated. When considering whether any other property is “similar or related” to the original property that is being divested for purposes of 18 U.S.C. § 208, agency ethics officials should consider the reason that the original property is being divested and whether the same reason for divestiture would apply to any other property. *See* 5 C.F.R. §§ 2634.1004(a)(1); 2634.1007(b); OGE Inf. Adv. Op. 93x11. If it would also be “reasonably necessary” to divest the other property to resolve the conflict of interest, OGE will treat the other property as “similar or related” for purposes of 5 C.F.R. § 2634.1007(b).

In practice, this means that if it is foreseeable that the duties of an employee’s position could have a potential financial effect on an entire business area or industry sector, he or she will likely need to divest of all investments in that business area or industry sector. At the same time, if an employee’s duties are such that he or she only works on matters affecting some companies in a given sector, it might not be necessary for the employee to sell off investments in all companies in that sector.

Example 1: Employee has been selected to be the Assistant Secretary for Fossil Energy at the Department of Energy. Employee holds \$30,000 of stock in Oil Company X and \$27,000 of stock in Oil Company Z. Because the Assistant Secretary participates in particular matters that affect the entire oil and gas sector,

¹ Although the focus of this Legal Advisory is on the requirement that an employee divest of all “similar or related property” to be eligible for a Certificate of Divestiture, the failure to divest of all “similar or related property” is not the only reason that OGE may deny a Certificate of Divestiture. *See* 5 C.F.R. § 2634.1007.

² A full accounting of the employee’s interests is necessary to allow agency ethics officials and OGE to analyze all possible conflicting financial investments, and to ensure that the employee has “agreed to divest all similar interests that create a conflict of interest.” 69 Fed. Reg. 1954 (2004). As a result, OGE’s regulations also require that an employee submit a copy of his or her latest financial disclosure report as part of the employee’s request for a Certificate of Divestiture. 5 C.F.R. § 2634.1005(b)(1). In the event that “the employee is not required to file a financial disclosure report, he or she must provide a listing of the employee’s interests that would be required to be disclosed on a confidential financial disclosure report excluding gifts and travel reimbursements.” *Id.*

Employee would not be eligible for a Certificate of Divestiture for the sale of Oil Company X, unless he also agreed to sell Oil Company Z.³

Example 2: Employee is the Ambassador to the Republic of Tunisia. Employee owns \$45,000 of stock in Retail Company X and \$30,000 of stock Retail Company Z. Both companies sell very similar products. Retail Company X has a large presence in Tunisia and is currently working on a number of projects with the U.S. Embassy in Tunisia. Retail Company Z has no presence in Tunisia and has no announced plan to engage in business in Tunisia in the near future. Because Company X is currently working with the Embassy, the State Department has determined that it is “reasonably necessary” for Employee to sell his stock in Company X to avoid the potential implication of 18 U.S.C. § 208. Although Company X and Company Z sell very similar products and are in the same industry, it is unlikely that Employee’s investment in Company Z will lead to his disqualification from particular matters. As a result, Employee would not be required to sell Company Z if he sought a Certificate of Divestiture for his sale of Company X.

Example 3: Employee is hired as the Chief Acquisition Officer of the Air Force. Employee owns \$17,000 of stock in Company Q, an aerospace company. Employee also owns \$16,000 of stock in Company Y, a company that produces global positioning systems (GPS). Company Q has indicated that it plans to use Company Y as a subcontractor in response to a recent request for proposals (RFP) issued by the Air Force. The Air Force has determined that it is necessary for Employee to work on the RFP. Although Company Q and Company Y are in separate industries, employee’s stock in Company Q and Company Y are considered “similar or related property” on the basis that Employee has a disqualifying financial interest in the request for proposals arising from her investment in both stocks. For Employee to participate in the RFP, she must sell both assets. As a result, Employee would not be eligible for a Certificate of Divestiture for the sale of Company Q, unless she also agreed to sell Company Y.

As is clear from the above examples, what constitutes “similar or related” property will generally depend on the nexus between the employee’s duties and the type of disqualifying financial interests presented by the employee’s financial assets and relationships. Agency ethics officials who have questions concerning this Legal Advisory should feel free to contact their OGE Desk Officer.

³ This is true even if the employee would not receive a Certificate of Divestiture for Company Z on the basis that the sale will not result in any capital gains.