

OFFICE OF GOVERNMENT ETHICS

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**Letter to an Alternate Designated Agency
Ethics Official dated July 2, 1998**

This is in response to your letter dated May 14, 1998, in which you request a reconsideration of the application of our Certificate of Divestiture policy to [an employee of your Department] who has an attributable financial interest in a prohibited security through his spouse's acceptance of the security as a gift. As discussed below, we believe that our Certificate of Divestiture policy has been correctly applied to [the employee].

The Certificate of Divestiture program was established for the primary purpose of easing, in appropriate circumstances, the financial burden on employees when it is necessary for them to divest their financial interests as a result of the ethics laws. However, the Certificate of Divestiture was not intended as a tax-planning device. Thus, Certificates of Divestiture are not issued to employees who receive problematic securities through gifts. You suggest in your letter that our Certificate of Divestiture policy should not apply to [the employee] because, while he is a senior official, he is not a Presidential Appointee in a position requiring Senate confirmation (PAS). As you note in your letter, we addressed our Certificate of Divestiture policy with respect to PAS employees specifically in our April 8, 1998, DAEOgram DO-98-013. However, our policy outlined in DO-98-013 was intended to be a restatement of our general policy, and therefore applies to executive branch employees whether or not they are PAS employees.

In your letter, you assert that PAS employees should be held to a higher standard than non-PAS employees with respect to the application of our Certificate of Divestiture rules. Your reasoning for this is that PAS employees "are in unique positions which require special vigilance to avoid even appearances of impropriety, including misuse of position, and therefore make some very specific commitments." We do not believe that is an adequate basis for making a distinction between PAS and non-PAS employees in the context of the issuance of Certificates of Divestiture. The fact that PAS employees may face a higher level of scrutiny does not dictate that the Office of Government Ethics' Certificate of Divestiture policy should be

applied differently for other employees. Furthermore, application of our rules based on this distinction would be impracticable.

In applying the Certificate of Divestiture rules, we do distinguish between property received through inheritance and property received as gifts. As stated in DO-98-013, we consider issuance of Certificates of Divestiture under circumstances including "inheritance of attributable property in which a beneficial interest was not previously held." The application of our policy in this manner is based on the fact that an employee who receives property through an inheritance does not have an opportunity to "negotiate" with the deceased concerning the timing of the event nor generally regarding the contents of the inheritance.

On the other hand, gifts received by an employee in an inter vivos transaction raise other issues. We disagree with your statement that certain types of abuses are "not possible with regard to receipt of a gift, which is beyond the control of the employee." First, an employee could abuse the Certificate of Divestiture program by requesting or selecting a gift he knows he would be required to divest because of a conflict of interest. Second, the gift transaction requires affirmative conduct on the part of the grantee in an inter vivos transaction with the grantor. Our experience demonstrates that the grantee necessarily has the option of refusing the gift in the form of prohibitory property and suggesting an alternate gift.

You recommend that we make case-by-case determinations as to whether an employee may receive a Certificate of Divestiture when he receives a particular gift, and imply that a Certificate of Divestiture could be issued "where the employee's actions are not improper." We believe that making case-by-case determinations would not be practicable. First, we would have difficulty probing into the circumstances surrounding an employee's receipt of a gift and determining whether there has been any "improper action" by the employee. Second, we believe that adhering to a consistent approach for our Certificate of Divestiture policy is more effective than using the case-by-case method for ensuring fairness to all employees. We are concerned that the use of a case-by-case method in determining whether an employee should receive a Certificate of Divestiture for a particular gift could result in arbitrary decisions.

For the reasons stated above, we believe that our Certificate of Divestiture policy has been correctly applied to [the employee], even though he is not a Presidential Appointee in a position requiring Senate confirmation and his interest in the prohibited property stems from an unsolicited gift to his spouse.

Sincerely,

Stephen D. Potts
Director