

Office of Government Ethics

90 x 14 -- 07/13/90

Letter to a Deputy Designated Agency Ethics Official dated July 13, 1990

In response to your request of July 12, 1990, enclosed is the original Certificate of Divestiture for [an employee] of [your] Department. We would appreciate your forwarding the original certificate to [the employee]. Also enclosed is a copy of the certificate for your files.

You will note that the certificate does not apply to the [number of] shares of [a corporation's stock] held by [the employee] as co-trustee of one or more trusts. The issuance of a Certificate of Divestiture to a trustee is not a simple matter. The April 1990 Technical Corrections to the Ethics Reform Act of 1989 did add a new subsection (b)(5) to section 1043 of the Internal Revenue Code of 1986, which expanded that section's definition of "eligible person" in subsection (b)(1) of section 1043 to include any trustee of a trust with respect to which a beneficial interest in property or income is either held by, or attributable through a spouse or minor or dependent child by Federal ethics principles to, a Government official.

The legislative history of this provision evidences that the House Committee on Ways and Means did not intend through this amendment the tax benefits of the section's nonrecognition mechanism to be generally available to beneficiaries of a trust other than those referred to by subsection (b)(1)(A) and (B) of section 1043 (that is, the Government official and any spouse and minor dependent children); the concern is that there may be additional parties who are beneficiaries of a trust who would obtain an unintended benefit.

We understand that the committee's intent was that this Office's authority to issue Certificates of Divestiture be restricted as follows: A Certificate 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 subsection (b)(1)(A) and (B) of section 1043 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. Notwithstanding the committee's concern, however, in such cases that it is unavoidable that additional parties' interests are benefited by the nonrecognition mechanism, the intent was that Certificates nevertheless be granted. This Office is required to report to the House Committee on Ways and Means and to the Senate Finance Committee concerning those instances in which a Certificate of Divestiture is issued under such circumstances.

In view of the further analysis which must be undertaken by this Office in the case of a Certificate of Divestiture request with respect to a trustee, we require that we be furnished with 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, we will consult with representatives of the Government official, trustee, and other concerned parties, as appropriate, in order to resolve the issues presented.

Not all transactions and occurrences which result in the realization of ordinary or capital gains income by parties effectuating ethics agreements fall within the statutory scheme of section 1043: some transactions and occurrences simply do not fit the statutory requirements; others may present instances where certification would give an unfair and unintended benefit. This Office has a policy against issuing a Certificate of Divestiture in a case where the effect would be to grant an unfair and unintended benefit. From the materials transmitted with your request, it appears that none of the beneficiaries of the trusts involved in this matter will be parties referred to in subsection (b)(1)(A) and (B) of section 1043. It would not seem appropriate to issue a certificate in these circumstances. That the securities did not appear on the public financial disclosure report of a public filer heightens our concerns in this matter. It seems that [the employee] has the alternative of divesting the [corporation's] securities without the benefit of a Certificate of Divestiture, or removing himself as trustee. We realize that in some cases parties may suffer considerable inconvenience in arranging their affairs to conform to Federal conflicts of

interest requirements.

Sincerely,

Donald E. Campbell
Acting Director