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PROGRAM ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Certificates of Divestiture for Conflicting Property Held in a Legal Entity or
Being Divested Through a Private Sale or Installment Sale

This Program Advisory provides information to help agencies when submitting requests for Certificates of Divestiture (CDs) to the U.S. Office of Government Ethics (OGE) that involve (1) the divestiture of property held in a limited liability company (LLC)¹ or similar legal entity, (2) the divestiture of certain forms of illiquid property, such as carried interest or family-owned companies, through a private sale of such property, or (3) the divestiture of property through an installment agreement. It may be necessary for agencies to provide additional information to OGE to help ensure that the issuance of a CD complies with the relevant statute² and regulations,³ and does not result in an unfair or unintended tax benefit.

I. Divestiture of Property Held in an LLC

OGE is permitted by statute to issue CDs only to eligible persons.⁴ When an eligible person holds conflicting property in an LLC, OGE cannot issue the CD to the LLC. Rather, OGE may only issue the CD to the eligible person. Accordingly, prior to issuing a CD for conflicting property held in an LLC or other entity, OGE will seek to confirm that the property will be divested by an eligible person. In these situations, divestiture is typically accomplished by:

- the employee (or other eligible person) directly selling their entire interest in the LLC (common course of action when the eligible person is a partial owner of the entity); or

¹ This Program Advisory refers to property held in an LLC; however, the guidance found herein is generally applicable to property held in other entities, such as limited partnerships and family-owned corporations.

² 26 U.S.C. § 1043.

³ 5 C.F.R. pt. 2634, subpt. J.

⁴ The term “eligible person” includes employees (other than special Government employees), their spouses and dependent children, and the trustees of trusts for the benefit of an eligible person. 5 C.F.R. § 2634.1003(a) (implementing 26 U.S.C. § 1043(b)(1)).



- the LLC transferring the conflicting property⁵ to the employee (or other eligible person), and having that person sell the conflicting assets directly (common course of action when the eligible person is the sole owner of the entity).⁶

There are, of course, circumstances in which neither method may be available, in which case ethics officials should coordinate with OGE’s CD program manager. In any case, the CD must be issued to the eligible person selling the conflicting property, and not a legal entity, in order to comply with statutory requirements.

II. Divestiture of Certain Illiquid Property

In the event that an employee is requesting a CD for certain illiquid assets that can only be sold through private transactions (such as private companies or carried interest), OGE may ask that the employee provide further information concerning how the price is being set for the sale of the conflicting property. While such information is not normally required for CD requests for sales of assets that are marketable – such as stocks, bonds, mutual funds, and ETFs – private sales of illiquid property can create opportunities for an “unfair or unintended benefit” to the employee because the market value is more difficult to ascertain.⁷ As a result, OGE may ask agencies for additional information from the requesting employee to confirm that an objective valuation method has been used to establish the sale price.

III. Divestiture of Property Through an Installment Agreement

An eligible person has sixty days from the date of sale of property divested pursuant to a CD to reinvest the proceeds into “permitted property.”⁸ Accordingly, property sales that involve an agreement to receive the cash proceeds from the sale in installments over a period of time that exceeds sixty days can present unique challenges to receiving the full benefit of the CD issued for the property. OGE recommends that agencies consult OGE in advance of submitting a CD request for a property sale that will involve an installment agreement in order to discuss how the eligible person may or may not be able to benefit from a CD.

IV. Conclusion

OGE has a responsibility to ensure that CDs are only issued to those eligible to receive a CD under the applicable law and in circumstances in which no unfair or unintended benefit will result. As set out in this Program Advisory, OGE may request additional information when a CD involves property held in an LLC or other entity or when the divestiture involves a private sale,

⁵ A CD can only be issued for property sold to comply with conflict of interest requirements. *See* 26 U.S.C. § 1043.

⁶ Note that if a legal entity transfers property to an employee or another eligible person, it might constitute a taxable event. As such, OGE encourages employees to work with a tax professional prior to deciding which course to undertake. OGE cannot answer questions related to the tax implications of any transfer of property.

⁷ Employees are not eligible for a CD in circumstances in which the employee sells conflicting property at a price that is in excess of its fair market value. In such circumstances, the amount paid over the fair market value of the property could result in an “unfair or unintended benefit” to the employee. *See* 5 C.F.R. § 2634.1007; *cf.* OGE Inf. Adv. Op. 99x1 (Jan. 5, 1999) (discussing situations in which an employee who paid less than fair market value for an item was treated as receiving a gift).

⁸ 5 C.F.R. § 2634.1006(a).

and recommends that agencies consult OGE when a property sale will involve an installment agreement.

Questions concerning this Program Advisory and any other questions an agency may have when preparing to submit a CD request may be directed to CD@OGE.gov.