

Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2634

RIN 3209-AA00

Proposed Revisions to the Certificates of Divestiture Regulation

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule amendments.

SUMMARY: The Office of Government Ethics is proposing a plain language revision of its regulation concerning Certificates of Divestiture. The proposed rule also would revise certain procedures for issuing Certificates of Divestiture and the definition of permitted property into which proceeds of the sale of property are reinvested.

DATES: Comments are invited and must be received in writing on or before March 15, 2004.

ADDRESSES: Send comments to the Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917. Attention: Deborah J. Bortot. Comments also may be sent electronically to OGE's Internet E-mail address: *usoge@oge.gov*. For E-mail messages, the subject line should include the following reference: "Comments on proposed revisions to the Certificates of Divestiture regulation."

FOR FURTHER INFORMATION CONTACT: Deborah J. Bortot, Office of Government Ethics; Telephone: 202-482-9300; TDD: 202-482-9293; FAX: 202-482-9237.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1043 of the Internal Revenue Code of 1986, 26 U.S.C. 1043, was enacted as part of the Ethics Reform Act of 1989 (Pub. L. 101-194). Section 1043 authorizes OGE to issue a Certificate of Divestiture to an eligible person who is divesting property in order to comply with a Federal conflict of interest law, regulation, rule, or Executive order, or if requested by a congressional committee as a condition of confirmation. A person

who receives a Certificate of Divestiture may defer payment of capital gains tax as long as he or she timely purchases certain permitted property with the proceeds of the sale. OGE published an interim rule on April 18, 1990 (at 55 FR 14407-14409) implementing section 1043. On June 25, 1996, the Office of Government Ethics published a final rule at 61 FR 32633-32636. The final rule was based on comments to the interim rule and on OGE's experience under the interim rule and the May 1990 Technical Corrections to the Ethics Reform Act of 1989 (Pub. L. 101-280), which amended section 1043 of the Internal Revenue Code of 1986. The Certificates of Divestiture regulation is now codified at subpart J of 5 CFR part 2634. After reevaluating the regulation to see whether changes might be needed, OGE has decided to publish these proposed revisions to make certain improvements.

II. Discussion of Proposed Changes

We are proposing to improve the current Certificates of Divestiture regulation by: Organizing the material more logically; using shorter sentences; eliminating unnecessary technical language; and stating the rule's requirements more clearly. We invite your comments as to whether this proposed rule would be easier to understand and how we could further improve its clarity. The following discussion summarizes the most important changes that OGE is proposing.

To add more harmony and uniformity to ethics program rules, OGE is proposing a change to the meaning of "diversified investment fund." In order to qualify for deferral of capital gains, an eligible person must reinvest proceeds from the sale of property pursuant to a Certificate of Divestiture into "permitted property" during the 60-day period beginning on the date of such sale. "Permitted property" must consist only of obligations of the United States or "diversified investment funds." Subpart J defines what constitutes a "diversified investment fund" for this purpose.

Proposed § 2634.1002 would change the meaning of a "diversified investment fund," in paragraph (2) of the definition of permitted property, to track the definition of "diversified mutual fund" and "diversified unit investment trust" as those terms are

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used in 5 CFR 2640.102. However, similar to current § 2634.1003(a), proposed § 2634.1002 would continue to explain that ethics program requirements applicable to specific agencies and positions might, in some cases, limit the choices of "permitted property," including the specific "diversified investment fund" in which an employee may reinvest.

Several changes are proposed that would streamline the procedures OGE uses to issue a Certificate of Divestiture. Unlike the current regulation, the proposed rule would permit an employee to submit a written request for a Certificate of Divestiture on behalf of another eligible person such as a spouse or minor child. Under proposed § 2634.1004(a)(3), the employee would have to state in the request that the eligible person holding the property required to be divested has agreed to divest the property.

Proposed § 2634.1004(b)(1) would clarify the information related to financial disclosure that OGE needs to receive as part of the Certificate of Divestiture request in the case of a Government employee who is not required to file a financial disclosure report. Whereas current § 2634.1002(b)(1)(ii)(B) refers generally to information required to be disclosed on a financial disclosure report, a parallel provision in proposed § 2634.1004(b)(1) would require an employee who does not file a financial disclosure report to submit 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. Further, while the current regulation is silent as to the timing and length of the period for reporting this information, the proposed rule would clarify that the reporting period is the preceding twelve months from the date the requirement to divest first applied or the date the employee first agreed that the property would be divested. In the case of an employee who is required to file a financial disclosure report, the proposed rule would continue to require that OGE receive a copy of the latest report filed by the employee. The submission of information related to financial disclosure ensures that OGE can determine whether the employee has

agreed to divest all similar interests that create a conflict of interest.

In addition, the proposed rule would simplify the procedure for issuing a Certificate of Divestiture where a congressional committee requests divestiture of the property as a condition of confirmation and the request is consistent with a custom of the committee. To substantiate the request of a committee, proposed § 2634.1004(c) would allow the designated agency ethics official to submit a statement that shows a custom of the committee requires the property be divested as a condition of confirmation.

Finally, the proposed rule would also simplify the procedure related to the timing of a submission of a request to OGE. OGE will continue to consider requests submitted beyond the applicable time period for divestiture. However, proposed § 2634.1004(e) would require the designated agency ethics official to provide OGE with an explanation for the delay if the request is not submitted within the applicable time period specified in proposed § 2634.1004(e).

III. Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments to OGE on this proposed regulation, to be received on or before March 15, 2004. The Office of Government Ethics will review all comments received and consider any modifications to this rule as proposed which appear warranted before adopting the final rule on this matter.

Executive Order 12866

In promulgating this proposed rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Review and Planning. In addition, these proposed amendments have been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to these proposed revisions, to be codified once finalized in a revised subpart J of 5 CFR part 2634, notes the legal basis and benefits of as well as the need for the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering this regulation, once finalized, since the proposed provisions would only clarify and improve the Certificates of Divestiture regulatory procedures.

Finally, this proposed rulemaking is not economically significant under the Executive order and will not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed amendatory rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees and members of their immediate families.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed amended regulation because it does not contain any information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

List of Subjects in 5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

Approved: January 7, 2004.

Marilyn L. Glynn,

Acting Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend subpart J of 5 CFR part 2634 as follows:

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

1. The authority citation for part 2634 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Subpart J of part 2634 is revised to read as follows:

Subpart J—Certificates of Divestiture

Sec.

2634.1001 Overview.
2634.1002 Definitions.
2634.1003 General rule.
2634.1004 How to obtain a Certificate of Divestiture.
2634.1005 Rollover into permitted property.
2634.1006 Cases in which Certificates of Divestiture will not be issued.
2634.1007 Public access to a Certificate of Divestiture.

Subpart J—Certificates of Divestiture

§ 2634.1001 Overview.

(a) *Purpose.* 26 U.S.C. 1043 and the rules of this subpart allow an eligible person to defer the payment of capital gains tax on property that is sold in order to comply with conflict of interest requirements. In order to defer the gains, an eligible person must obtain a Certificate of Divestiture from the Director of the Office of Government Ethics before the sale of the property. This subpart describes the circumstances when a Certificate of Divestiture may be obtained and establishes the procedure that the Office of Government Ethics uses to issue Certificates of Divestiture.

(b) *Scope.* The Internal Revenue Service has jurisdiction over the tax aspects of a divestiture made pursuant to a Certificate of Divestiture. Internal Revenue Service requirements for reporting dispositions of property and making an election under section 1043 not to recognize capital gains must be followed by eligible persons wishing to make such an election. An eligible person seeking a Certificate of

Divestiture should consult his personal tax advisor and the Internal Revenue Service for guidance on these matters.

(c) *Policy.* The purpose of section 1043 and the rules of this subpart is to minimize the burden that would result from the payment of capital gains tax on the sale of assets to comply with conflict of interest requirements. Minimizing this burden will aid in attracting and retaining highly qualified personnel in the executive branch and will ensure the confidence of the public in the integrity of Government officials and decision-making processes.

§ 2634.1002 Definitions.

For purposes of this subpart:

Eligible person means:

(1) Any officer or employee of the executive branch of the Federal Government, except a person who is a special Government employee as defined in 18 U.S.C. 202;

(2) The spouse or any minor or dependent child of the individual referred to in paragraph (1) of this definition; and

(3) Any trustee holding property in a trust in which an individual referred to in paragraph (1) or (2) of this definition has a beneficial interest in principal or income.

Permitted property means:

(1) An obligation of the United States; or

(2) A diversified investment fund. A diversified investment fund is a diversified mutual fund or diversified unit investment trust, as defined in 5 CFR 2640.102(a), (k) and (u);

(3) Provided, however, a permitted property cannot be any holding prohibited by statute, regulation, rule, or Executive order. As a result, requirements applicable to specific agencies and positions may limit an eligible person's choices of permitted property. An employee seeking a Certificate of Divestiture should consult the appropriate designated agency ethics official to determine whether a statute, regulation, rule, or Executive order may limit choices of permitted property.

§ 2634.1003 General rule.

The Director of the Office of Government Ethics may issue a Certificate of Divestiture for specific property in accordance with the procedures of § 2634.1004 of this subpart if the Director determines that divestiture of the property by an eligible person is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order, or if divestiture is required by a

congressional committee as a condition of confirmation. A Certificate of Divestiture cannot be issued for property that already has been sold.

Example 1 to § 2634.1003: An employee is directed to divest shares of stock, a limited partnership interest, and foreign currencies. If the sale of these assets will result in capital gains under the Internal Revenue Code, the employee may request and receive a Certificate of Divestiture.

Example 2 to § 2634.1003: An employee of the Department of Commerce is directed to divest his shares of XYZ stock acquired through the exercise of options held in an employee benefit plan. His gain from the sale of the stock will be treated as ordinary income. Because only capital gains realized under Federal tax law are eligible for deferral under section 1043, a Certificate of Divestiture cannot be issued for the sale of the XYZ stock.

Example 3 to § 2634.1003: During her Senate confirmation hearing, a nominee to a Department of Defense (DOD) position is directed to divest stock in a DOD contractor as a condition of her confirmation. Eager to comply with the order to divest, the nominee sells her stock immediately after the hearing and prior to being confirmed by the Senate. Once she is a DOD employee, she requests a Certificate of Divestiture for the stock. Because the Office of Government Ethics cannot issue a Certificate of Divestiture for property that has already been divested, the employee's request for a Certificate of Divestiture will be denied.

Example 4 to § 2634.1003: After receiving a Certificate of Divestiture, the spouse of a Food and Drug Administration employee sold stock in a regulated company. Between the time of the request for the Certificate of Divestiture and the sale of the stock, the stock price dropped and the spouse sold the stock at a loss. Because the sale of the stock did not result in capital gains, the spouse has no need for the Certificate of Divestiture and cannot submit it to the Internal Revenue Service for deferral of gains. No further action need be taken by the employee or the employee's spouse in connection with the Certificate of Divestiture.

§ 2634.1004 How to obtain a Certificate of Divestiture.

(a) *Employee's request to the designated agency ethics official.* An employee seeking a Certificate of Divestiture must submit a written request to the designated agency ethics official at his or her agency. The request must contain:

(1) A full and specific description of the property that will be divested. For example, if the property is corporate stock, the request must include the number of shares for which the eligible person seeks a Certificate of Divestiture;

(2) A brief description of how the eligible person acquired the property;

(3) A statement that the eligible person holding the property has agreed to divest the property; and

(4)(i) The date that the requirement to divest first applied; or
(ii) The date the employee first agreed that the eligible person would divest the property in order to comply with conflict of interest requirements.

(b) *Designated agency ethics official's submission to the Office of Government Ethics.* The designated agency ethics official must forward to the Director of the Office of Government Ethics the employee's written request described in paragraph (a) of this section. In addition, the designated agency ethics official must submit:

(1) A copy of the employee's latest financial disclosure report. If the employee is not required to file a financial disclosure report, the designated agency ethics official must obtain from the employee, and submit to the Office of Government Ethics, 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. For purposes of this listing, the reporting period is the preceding twelve months from the date the requirement to divest first applied or the date the employee first agreed that the eligible person would divest the property;

(2) An opinion that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order; and

(3) A brief description of the employee's position or a citation to a statute that sets forth the duties of the position.

(c) *Divestitures required by a congressional committee.* In the case of a divestiture required by a congressional committee as a condition of confirmation, the designated agency ethics official must submit appropriate evidence that the committee requires the divestiture. A transcript of congressional testimony or a written statement from the designated agency ethics official concerning the committee's custom regarding divestiture are examples of evidence of the committee's requirements.

(d) *Divestitures for property held in a trust.* In the case of divestiture of property held in a trust, the employee must submit a copy of the trust instrument, as well as a list of the trust's current holdings, unless the holdings are listed on the employee's most recent financial disclosure report. In certain cases involving divestiture of property held in a trust, the Director may not issue a Certificate of Divestiture unless the parties take actions which, in the

opinion of the Director, are appropriate to exclude, to the extent practicable, parties other than eligible persons from benefitting from the deferral of capital gains. Such actions may include, as permitted by applicable State law, division of the trust into separate portfolios, special distributions, dissolution of the trust, or anything else deemed feasible by the Director, in his or her sole discretion.

Example 1 to paragraph (d): An employee has a 90% beneficial interest in an irrevocable trust created by his grandfather. His four adult children have the remaining 10% beneficial interest in the trust. A number of the assets held in the trust must be sold to comply with conflicts of interest requirements. Due to State law, no action can be taken to separate the trust assets. Because the adult children have a small interest in the trust and the assets cannot be separated, the Director may consider issuing a Certificate of Divestiture to the trustee for the sale of all of the conflicting assets.

(e) *Time requirements.* A request for a Certificate of Divestiture does not extend the time in which an employee otherwise must divest property required to be divested pursuant to an ethics agreement, or prohibited by statute, regulation, rule, or Executive order. Therefore, an employee must submit his or her request for a Certificate of Divestiture as soon as possible once the requirement to divest becomes applicable. The Office of Government Ethics will consider requests submitted beyond the applicable time period for divestiture. If the designated agency ethics official submits a request to the Office of Government Ethics beyond the applicable time period for divestiture, he must explain the reason for the delay. (See 5 CFR 2634.802 and 2635.403 for rules relating to the time requirements for divestiture.)

(f) *Response by the Office of Government Ethics.* After reviewing the materials submitted by the employee and the designated agency ethics official, and making a determination that all requirements have been met, the Director will issue a Certificate of Divestiture. The certificate will be sent to the designated agency ethics official who will then forward it to the employee.

§ 2634.1005 Rollover into permitted property.

(a) *Reinvestment of proceeds.* In order to qualify for deferral of capital gains, an eligible person must reinvest the proceeds from the sale of the property divested pursuant to a Certificate of Divestiture into permitted property during the 60-day period beginning on the date of the sale. The proceeds may

be reinvested into one or more types of permitted property.

Example 1 to paragraph (a): A recently hired employee of the Department of Transportation receives a Certificate of Divestiture for the sale of a large block of stock in an airline. He may split the proceeds of the sale and reinvest them in an S&P Index Fund, a diversified Growth Stock Fund, and U.S. Treasury bonds.

Example 2 to paragraph (a): The Secretary of Treasury sells certain stock after receiving a Certificate of Divestiture and is considering reinvesting the proceeds from the sale into U.S. Treasury securities. However, because the Secretary of the Treasury is prohibited by 31 U.S.C. 329 from being involved in buying obligations of the United States Government, the Secretary cannot reinvest the proceeds in such securities. However, she may invest the proceeds in a diversified mutual fund. See the definition of *permitted property* at § 2634.1002.

(b) *Internal Revenue Service reporting requirements.* An eligible person who elects to defer the recognition of capital gains from the sale of property pursuant to a Certificate of Divestiture must follow Internal Revenue Service rules for reporting the sale of the property and the reinvestment transaction.

§ 2634.1006 Cases in which Certificates of Divestiture will not be issued.

The Director of the Office of Government Ethics, in his or her sole discretion, may deny a request for a Certificate of Divestiture in cases where an unfair or unintended benefit would result. Examples of such cases include:

(a) *Employee benefit plans.* The Director will not issue a Certificate of Divestiture if the property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan and can otherwise be rolled over into an eligible tax-deferred retirement plan within the 60-day reinvestment period.

(b) *Complete divestiture.* The Director will not issue a Certificate of Divestiture unless the employee agrees to divest all of the property that presents a conflict of interest, as well as other similar or related property that also presents a conflict of interest under a Federal conflict of interest statute, regulation, rule, or Executive order. However, any property that qualifies for a regulatory exemption at 5 CFR part 2640 need not be divested for a Certificate of Divestiture to be issued.

Example 1 to paragraph (b): A new senior official at the Federal Aviation Administration owns stock in several airlines. The official is expected to participate in a matter dealing with the imposition of new safety standards on commercial airlines. The employee must divest his interest in all of the airline stock that exceeds the amounts he is permitted to

retain under the exemptions to 18 U.S.C. 208, which are described at 5 CFR part 2640.

Example 2 to paragraph (b): A Department of Agriculture employee owns shares of stock in Better Workspace, Inc. valued at \$25,000. As part of his official duties, the employee is assigned to evaluate bids for a contract to renovate office space at his agency. The Department's designated agency ethics official discovers that Better Workspace is one of the companies that has submitted a bid and directs the employee to sell his stock in the company. Because Better Workspace is a publicly traded security, the employee could retain up to \$15,000 of the stock under the regulatory exemption for interests in securities at 5 CFR 2640.202(a). He would be able to request a Certificate of Divestiture for the \$10,000 of Better Workspace stock that is not covered by the exemption. Alternatively, he could request a Certificate of Divestiture for the entire \$25,000 worth of stock. If he chooses to sell his stock down to an amount permitted under the regulatory exemption, the Office of Government Ethics will not issue additional Certificates of Divestiture if the value of the stock goes above \$15,000 again.

(c) *Property acquired under improper circumstances.* The Director will not issue a Certificate of Divestiture:

(1) If the eligible person acquired the property at a time when its acquisition was prohibited by statute, regulation, rule, or Executive order; or

(2) If circumstances would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities.

§ 2634.1007 Public access to a Certificate of Divestiture.

A Certificate of Divestiture issued pursuant to the provisions of this subpart is available to the public in accordance with the rules of § 2634.603 of this part.

[FR Doc. 04-685 Filed 1-12-04; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1135

[Docket No. AO-380-A18; DA-01-08-W]

Milk in the Western Marketing Area; Proposed Termination of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed termination of order.

SUMMARY: This document invites written comments on the proposed termination of the order regulating the handling of milk in the Western marketing area. A proposal amending the Western order failed to receive the required two-thirds