

Office of Government Ethics

91 x 12 -- 04/09/91

Letter to a Designated Agency Ethics Official dated April 9, 1991

This is in response to your letter (with its enclosures) of April 3, 1991. By your letter, you raise issues involving distributions to [an employee] from both [a corporation] Long Term Savings Plan For Management Employees [LTSP] and the [corporation] Employee Stock Ownership Plan [ESOP]. Your letter requests an amendment with respect to these distributions of [a] previously issued Certificate of Divestiture.

Certificates of divestiture pertain to the case of eligible individuals who sell property at a gain pursuant to a Certificate of Divestiture issued by this Office. The authority of this Office to issue certificates with respect to property already divested in those limited circumstances referred to in section 6(a)(2) and (3) of the 1990 Technical Amendments to the Ethics Reform Act of 1989, ceased as of June 18, 1990.

The LTSP and ESOP, however, are both employee benefit plans. Even if [the employee's] interests in the two plans had been retained until now, it appears that Certificates of Divestiture could not be issued. The issues involved in cases such as this involving interests in pension, profit-sharing, and stock bonus plans are subject to considerable subtlety and complexity. As a general premise, it must be emphasized that the section 1043 mechanism applies to capital assets (as defined by section 1221 of the Internal Revenue Code) held by an eligible individual (as defined by section 1043(b)). Not all transactions and occurrences which result in the realization of ordinary or capital gains income by an eligible individual fall within the statutory scheme: some transactions and occurrences simply do not fit the statutory requirements; others may present instances where certification would give an unfair and unintended benefit.

With respect to employee benefit plans, such an unfair and unintended benefit would occur upon certification of property held or received during one step of a sequence in avoidance of transferring an otherwise qualifying rollover distribution to an eligible retirement plan within 60 days. In other words, certificates may not be used to achieve a tax-advantaged removal

of employee benefit plan funds from the rules which normally pertain to such plans in cases where no capital gains tax would be imposed if those rules were followed.

Accordingly, even if the interests were still held, in the absence of a demonstration that [the employee's] interests were not eligible for rollover treatment, a certificate would not be issued with respect to his interests in the plans. Such a demonstration must satisfy this Office that the plan administrator could not make a qualifying distribution in [the employee's] case to which the provisions of section 402(f) would apply and that the particular property interest proposed for certification falls within the statutory scheme -- that is, [the employee] would have incurred capital gains treatment with respect to the distributions. This could have only occurred if no tax-free rollover were possible, and [the employee] would realize capital gains upon withdrawal from the plans or upon the sale of securities receivable upon distributions in-kind from the plans. However, from the materials transmitted with your letter, and general inquiries to the [corporation] LTSP and ESOP Administrator, it appears that the plans are qualifying and that [the employee] would have been eligible to rollover his distributions into an IRA within 60 days.

Sincerely,

Stephen D. Potts
Director