

OFFICE OF GOVERNMENT ETHICS

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**Letter to an individual
dated September 21, 2004**

This is in reference to your letter dated September 16, 2004, regarding whether your client, a Federal Government employee, may obtain Certificates of Divestiture (CDs) for all of his holdings, including holdings for which divestiture has not been deemed to be reasonably necessary to comply with Federal conflict of interest requirements. In accordance with applicable law and regulations, a CD may be issued only when the Director of the Office of Government Ethics (OGE) determines that divestiture of specific property is reasonably necessary to comply with conflict of interest requirements.

Section 1043 of the Internal Revenue Code (26 U.S.C. § 1043), as implemented by the Certificate of Divestiture regulation (5 C.F.R. § 2634.1001 *et seq.* (2004)), allows an eligible person to defer paying capital gains tax on property sold to comply with conflict of interest requirements. Whereas the Internal Revenue Service (IRS) has jurisdiction over the tax aspects of a divestiture, it is OGE's Director who has the authority to issue a CD. The Director of OGE may issue a CD only in accordance with the standards and procedures applicable to our CD program. The Internal Revenue Code and OGE implementing regulations make clear that divestiture of specific property because of conflict of interest requirements is a prerequisite to the issuance of a CD.

Specifically, to issue a CD, OGE's Director must determine that the CD 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 is pursuant to the request of a Congressional committee as a condition of confirmation. See 5 C.F.R. § 2634.1004(a). The Director of this Office does not have discretion to grant a CD merely because divestiture of some, but not all, property may create perceived "cost, tax or diversification problems." Thus, your client's holdings that are required to be divested to comply with ethics program requirements may be appropriate for a CD. In contrast, the holdings that are not required to be divested because of conflicts reasons are ineligible for a CD.

We appreciate the seriousness of the issues you have raised with respect to your client's investment portfolio, and we recognize that there are potential legal, tax or investment consequences to each of the possible options you identify. We hope that the ability to defer capital gains tax on the sale of the property that is required to be divested will mitigate, in part, the concerns you have articulated on behalf of your client.

Sincerely,

Judith A. Kim
Deputy General Counsel
for Financial Disclosure