

Office of Government Ethics

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Letter to an Attorney dated May 7, 1993

This is in response to your letter of May 4, 1993. By your letter, you request advice concerning the applicability of IRC § 1043 (relating to certificates of divestiture) with regard to a contemplated sale by [a Government official] of interests in [an] Asset Management Company to [an investment company].

This matter has previously been the subject of several conversations in which [an attorney] of this Office and you and other representatives of [the Government official] and the prospective purchaser participated.

As you should be aware, there is an underlying requirement of administrative discretion in the implementation of the certificate of divestiture program. The administrative rules for the program are contained in the regulations at 5 C.F.R. § 2634 (subpart J). Paragraph (b)(2) of section 2634.1002 mandates that, in the absence of a request of a congressional committee as a condition of confirmation, the designated agency ethics official must have the opinion that the divestiture is "reasonably necessary" to comply with applicable laws and regulations relating to conflicts of interest and standards of conduct. Further, a certificate may be issued only if the Director of the Office of Government Ethics concurs with that opinion. This standard is embedded in the statutory language. Accordingly, the exercise of a significant degree of administrative discretion by senior ethics program officials is an integral component of the regulatory scheme.

One principle that has been adopted by this Office is that certificates will not be granted in instances where certification would give an unfair or unintended benefit. Such certification would not be reasonable under such circumstances. We have recommended this approach in consultations with agency officials concerning certificate matters. Such an unfair or unintended benefit would occur upon certification of property interests attributable to an individual if divestiture of all of such interests, or other similar or related property interests, were not also required and agreed to by the interested parties. Similarly, such an unfair or unintended benefit would occur if the property interests were acquired under circumstances which

were improper. Under such conditions, we would not be able to concur with a designated agency ethics official's opinion that the divestiture contemplated by a request for a certificate is reasonably necessary, nor would we think that such an opinion by the ethics official was appropriate.

In the case of the contemplated sale of [the asset management company], we have had an opportunity to review the "offer" document. One component of the offer, to which you allude in your letter, is a conditional payment of up to \$100,000 as part of the total of up to \$420,000 provided for by the offer. The conditional payment is premised upon the [Government official's] "past relationship with clients", and payable at .025% of the growth of existing clients' account balances at two future measuring dates over the amount of such balances on the closing date for the sale transaction.

The existence of the conditional payment precludes the contemplated sale from being a divestiture to which the certification procedure of section 1043 can pertain. If a divestiture is reasonably necessary for purposes of the statute, the divestiture cannot leave the official with a substantive stake in the company which is subject to the future performance of its business affairs. Under such circumstances, certification would give an unfair or unintended benefit to the Government official.

Sincerely,

Stephen D. Potts
Director