

A Primer on Certificates of Divestiture

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Overview

- The Basics
- The Process
- Specific Circumstances

THE BASICS

Purpose of CD Program

“to minimize the burden that would result from paying capital gains tax on the sale of assets to comply with conflict of interest requirements” –
5 CFR 2634.1001(b)

Authority

- 26 USC 1043
- 5 CFR 2634.1001 - 1008

Definitions

- Definitions – 5 CFR 2634.1003
 - Eligible person
 - Permitted property

Eligible Person

- Executive branch employee, but not an SGE
- Spouse
- Minor or dependent child
- Trustee holding property in trust in which an executive branch employee, the spouse, or the minor or dependent child has an interest

Permitted Property

- An obligation of the United States (e.g., Treasury note)
- A diversified investment fund
 - Diversified mutual fund
 - Diversified unit investment trust
- Reinvest proceeds within 60 days of sale –
5 CFR 2634.1006

Timeliness of Request

- Employee must request CD within 90 days of:
 - the date that the property became a prohibited holding (if basis of divestiture is agency's prohibited holding reg), or
 - the date of the order to divest

No Certificate of Divestiture

- Property has already been divested
- CD request is not timely
- Eligible person is donating the property – CD does not defer gift tax
- Request is for everything in a managed account – unless everything in the account is a conflict

THE PROCESS

Documents to Submit

- Letter from eligible person to DAEO requesting CD
- Letter from DAEO to OGE Director requesting CD
- Certified copy of employee's latest financial disclosure report
- Employee's position description
- If applicable, copy of trust instrument

Content of Employee's Letter

- Acquisition – how and when
- Complete description of property
 - Name of company
 - Number of shares
 - Name of owner
- Additional info

Description of the Property	Quantity or Percentage Owned	Owner(s) of the Property	Relationship to the Employee
McDonald's Corp. Play Toys, LP	57 shares 12.24% interest	John A. Jones	self
General Electric, Co.	251 shares	John A. Jones (joint) Mary B. Jones	self spouse
The Home Depot, Inc.	165 shares	Mary B. Jones	spouse
Merck & Co., Inc.	33 shares	William C. Smith	trustee
Coca-Cola, Co.	55 shares	John A. Jones (as custodian) Robert D. Jones	self dependent child

Content of DAEO's Letter

- OGE Format - OGE DAEOgram DO-07-035
- Alternative: Letter
- Some repetition of info in employee's letter

Content of DAEO's Letter

- Complete description of the property
- Statement that requester is an eligible person
- Statement that property is not held in employer benefit plan or retirement plan or tax-deferred account

Content of DAEO's Letter

- Description of how the property was acquired
 - Purchase
 - Inheritance
 - Gift
- Unconditional statement that the eligible person will divest
- If CD request is late, statement explaining why the request is late

SPECIFIC CIRCUMSTANCES

Financial Disclosure Report

- Ethics official sends an uncertified copy of the financial disclosure report
- Explain why you did not certify the report

Similar or Related Property

- OGE looks for similar or related property on the financial disclosure report
- If employee is not divesting all similar or related property, provide an explanation
 - For example, a regulatory exemption applies
 - Be specific: the value of the employee's stock in Shell Oil Co. is \$5,125.

Prohibited Holdings

- Problem often arises with timeliness of direction to divest
- Explain how/when agency informs employees of prohibited holdings
- Explain how/when agency informs employees of new prohibited holdings

Property Also Held in Tax-Deferred Account

- Eligible person requests CD for shares of stock in J&J, which is held in a brokerage account
- Also holds J&J stock in an IRA (tax-deferred account)
- State that eligible person:
 - is requesting a CD only for the shares in the brokerage account
 - will be divesting the shares in the IRA
 - understands that he will not receive CD for shares in IRA

Not Eligible, But Employee Insists

- Employee insists that you send CD request to OGE when you believe that OGE will not issue CD
- What do you do?
 - Submit the request and make your strongest argument for a CD, but
 - Let OGE know that employee insisted on submitting the request

Key Resources

- OGE Informal Advisory Memorandum 99 x 9 (OGE DAEOgram DO-99-019)
- Smooth Sales – Beginner's Guide to Certificates of Divestiture (OGE DAEOgram DO-99-019A)
- Procedures for Requesting a Certificate of Divestiture (OGE DAEOgram DO-06-030)
- Suggested Format for Requesting a Certificate of Divestiture (OGE DAEOgram DO-07-035)

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



Preventing Conflicts of Interest
in the Executive Branch

Requesting a Certificate of Divestiture Quick Reference Guide for Employee

This document will help you compose your request for a certificate of divestiture (CD). Each request is different; your designated agency ethics official may request additional information, depending upon the complexity of an individual case.

In your written request to the designated agency ethics official, include the following information:

1. A full and specific description of the property for which you are requesting a CD

- a. A description of the property for which you are requesting a CD (full name of the company)
- b. In the case of stock, the number of shares of stock that you are divesting
- c. In the case of a limited partnership or similar entity, the percentage of the limited partnership that you are divesting
- d. The name of the owner of the property

This table contains examples of the information that must be provided:

Description of the Property	Quantity or Percentage Owned	Owner(s) of the Property	Relationship to the Employee
McDonald's Corp. Play Toys, LP	57 shares 12.24% interest	John A. Jones	self
General Electric, Co.	251 shares	John A. Jones (joint) Mary B. Jones	self spouse
The Home Depot, Inc.	165 shares	Mary B. Jones	spouse
Merck & Co., Inc.	33 shares	William C. Smith	trustee
Coca-Cola, Co.	55 shares	John A. Jones (as custodian) Robert D. Jones	self dependent child

A blank version of this table appears at the end of this handout. You may use it to help you organize your information.

2. A statement that the property for which you are requesting a CD is not held in a pension, profit-sharing, stock bonus, or other employee benefit plan that can be rolled over into an eligible tax-deferred retirement plan

- If you own the asset in both a tax-deferred account and a taxable account (such as a brokerage or managed account), state the number of shares that you hold in each account. The number of shares that you hold outside of the tax-deferred account must match the number of shares for which you are requesting a CD.

3. A statement describing how and when you acquired the property. Be specific. For example:

- I purchased the shares of GE on the open market on May 21, 2002.
- I purchased some shares of GE on the open market on May 21, 2002, and I acquired other shares when the stock split on January 5, 2004.
- I inherited the shares of GE from my grandfather on December 5, 1998.

- My mother gave me the shares of GE on March 19, 2000.
4. **The date that you became an employee of the agency**
 5. **If the asset became a conflict because you moved into a new position at your agency or because your job responsibilities changed, provide the date that this change occurred.**
 6. **A brief description of the duties of your position**
 7. **A statement that you unconditionally agree to divest the property**
Not acceptable: I will divest the property if I receive a CD.
Acceptable: I will divest the property not later than 90 days after the date that divestiture was first directed by the agency unless I am granted an extension of time.
 8. **The date that you were first directed to divest the asset**
 9. **A commitment that you will complete divestiture on or before the date specified in the request but in any event not later than 90 days from the earliest of:**
 - The date that the property became a prohibited holding (in the case of an agency that prohibits employees from owning certain holdings), or
 - The date of an order to divest

Reminders:

- If you request a CD, do not sell the property until OGE has made a decision about issuing the CD.
- If OGE issues a CD, do not sell the property until you have received the CD. Divest by the date specified by your agency.
- Within 60 days of the date of the sale of the property, you must reinvest the proceeds from the sale in “permitted property.”
 - An obligation of the United States (for example, a Treasury bond)
 - A diversified mutual fund or a diversified unit investment trust, as defined in 5 CFR 2640.102(a), (k), and (u)

Description of the Property	Quantity or Percentage Owned	Owner(s) of the Property	Relationship to the Employee

Requesting a Certificate of Divestiture Quick Reference Guide for Agency

This document will help you compose the request for a certificate of divestiture (CD) on behalf of your employee. Each request is different; OGE may request additional information, depending upon the complexity of an individual case.

Part I Documents

Include the following documents in the submission you send to OGE:

- Letter from the eligible person to the DAEO
- Letter from the DAEO to the OGE Director (or OGE's CD Request Format or a combination of a letter and the OGE Request Format)
- A certified copy of the employee's most recent financial disclosure report
 - If the employee is not a filer, the employee must submit a memorandum disclosing all of the information required on a confidential financial disclosure report except gifts and travel reimbursements. **Best practice:** have the employee complete the OGE Form 450 for purposes of the CD request.
- The employee's position description
 - In lieu of the position description, the DAEO may describe the employee's position in the letter to the OGE Director or provide the citation to the statute setting forth the duties of the position.
- If the property to be divested is held in a trust, include:
 - A copy of the trust instrument and
 - A list of the current holdings of the trust (a listing of the holdings on the financial disclosure report satisfies this requirement)

Part II

Contents of DAEO Letter to OGE

Include the following information in your written request to OGE:

- ▶ A statement that the person who will benefit from the CD is an eligible person under 5 CFR 2634.1001
 - An employee of the agency
 - The spouse or the dependent or minor child of an employee
 - The trustee holding property in a trust in which only the employee, the spouse, or the minor or dependent child has a beneficial interest
- ▶ A complete description of the property that will be divested. The table below illustrates the type of information that must be included.

Description of the Property	Quantity or Percentage Owned	Owner(s) of the Property	Relationship to the Employee
McDonald's Corp. Play Toys, LP	57 shares 12.24% interest	John A. Jones	self
General Electric, Co.	251 shares	John A. Jones (joint) Mary B. Jones	self spouse
The Home Depot, Inc.	165 shares	Mary B. Jones	spouse
Merck & Co., Inc.	33 shares	William C. Smith	trustee
Coca-Cola, Co.	55 shares	John A. Jones (as custodian) Robert D. Jones	self dependent child

- ▶ A statement that the property is not held in a tax-deferred retirement plan (such as employer-sponsored retirement plan or an IRA)
- ▶ A statement that the property was not acquired through an employee benefit plan (such as stock options or restricted stock acquired under a plan with a former employer)
- ▶ A specific description of how and when the property was acquired
 - Avoid using the word "acquire."
 - State, for example, that the employee purchased the property on the open market prior to becoming an employee of the agency or inherited the property from a relative prior to becoming an employee of the agency.
- ▶ One of the following dates:
 - The date on which the requirement to divest first applied, or
 - The date on which the applicant first agreed that the applicant or another eligible person would divest the property in order to comply with conflict of interest requirements
- ▶ If the request for the CD is late, the reason why the request is late
 - Usually, OGE will not issue a CD if the request is late.

- ▶ A statement that the person has unconditionally agreed to divest the property
- ▶ The date by which divestiture will be completed. Divestiture must be completed within 90 days of:
 - The date that the property became a prohibited holding (in the case of an agency that prohibits employees from owning certain holdings), or
 - The date of an order to divest
- ▶ The basis of the divestiture
 - 18 USC 208, or
 - The prohibited holdings provision of an agency supplemental, or
 - The request of a Congressional confirmation committee, or
 - Other Federal conflict of interest statute, regulation, rule, or executive order
- ▶ An analysis of how the divestiture is reasonably necessary to comply with:
 - 18 USC 208, or
 - The prohibited holdings provision of a supplemental agency regulation, or
 - The request of a Congressional confirmation committee, or
 - Other Federal conflict of interest statute, regulation, rule, or executive order
- ▶ A statement that the filer has been recused, pending divestiture, from participating in particular matters affecting the financial interests of the property that is being divested
- ▶ The signature of the DAEO on the request (only the DAEO of the agency may sign the request to OGE)
- ▶ The e-mail address of the agency POC to whom OGE can e-mail a scanned copy of the CD
 - OGE will send the original CD by regular mail.
 - The eligible person may sell the property once he or she receives the scanned copy of the CD.

Part III

Additional Information for Specific Circumstances

Include the following information to address specific circumstances:

- ▶ If the property for which a CD is requested is held both in a tax-deferred retirement account/employer-sponsored benefit plan and outside of such an account or plan:
 - Specify the number of shares that the employee holds both inside and outside of the account/plan, and
 - State that the employee is requesting a CD only for the shares held outside of the account/plan
- ▶ If the employee and the spouse own shares of the property in separate accounts and the spouse has already divested his or her shares:
 - State that both the employee and the spouse own shares of the property in separate accounts
 - State that the spouse has divested his or her shares

- State that the employee is not requesting a CD for the shares of the property that have already been divested
 - State that the shares for which the employee is requesting a CD have not been sold
- If the eligible person is not divesting all similar or related property because the value of the property he or she is keeping is below the *de minimis*:
- Identify the property that is below the *de minimis*
 - State that the property the eligible person is keeping is below the *de minimis*
 - If the eligible person owns stock in more than one company in the sector that poses a conflict, the aggregate value of the stock in all companies in the sector must be below the *de minimis*.
- If the eligible person owns stock options:
- State whether the stock options are
 - Incentive stock options, or
 - Non-statutory stock options, or
 - Acquired through an employee stock purchase plan
 - Confirm that the sale will generate capital gains
 - Provide the number of shares of stock that the eligible person will receive when he or she exercises the stock options, not the number of stock options that he or she owns
 - See the flowchart for help in analyzing stock options
- In the case of a trust, state who the beneficiaries of the trust are and indicate their relationship to the employee.
- Only eligible persons may benefit from the CD.
 - The situation is problematic if someone other than an eligible person is a beneficiary along with the eligible person.

Part IV

Review of Request for Consistency

Review your letter to the OGE Director before you send it. Ensure that the statement of facts and the written conflicts analysis support the conclusions listed below. If not, redraft your letter to eliminate any ambiguities or inconsistencies.

The information provided in the letter to the OGE Director must support the conclusions that:

- the property was not acquired at a time when its acquisition was prohibited.
- the property was not acquired under circumstances that would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities.
- with regard to “similar or related” property, either
 - the employee is resolving the entire conflict by divesting all “similar or related” property that is directly and predictably affected by the same particular matter, or
 - the employee is relying on an exemption under 5 CFR Part 2640 (for example, the “similar or related” property that the eligible person is keeping is below the *de minimis*)

Certificates of Divestiture:
Asking whether profit from the sale of stock acquired through employee stock options will be recognized as capital gains (CG) or as ordinary income (OI).

