

# Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct

Pt. C: Ethics Statutes, Regulations, and Judicial Conference Resolutions

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## § 210 Overview

### § 210.10 History

These regulations became effective on September 18, 2007 ([JCUS-SEP 2007](#), p. 11).

### § 210.20 Authority

Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, Div. A, § 418, *amending* [26 U.S.C. \(I.R.C.\) § 1043 \(2000\)](#).

### § 210.30 Purpose and Scope

- (a) These regulations implement 26 U.S.C. (I.R.C.) § 1043, which allows an eligible person to defer paying capital gains tax on property sold to comply with conflict of interest requirements. To defer the gains, an eligible person must obtain a Certificate of Divestiture before selling the property.

Pursuant to a delegation from the Judicial Conference, the Committee on Codes of Conduct (Committee) is authorized to take dispositive action on requests for Certificates of Divestiture relating to judges and judicial officers other than the Chief Justice of the United States and the associate justices of the Supreme Court. These regulations describe the circumstances when an eligible person may obtain a Certificate of Divestiture and establish the procedures that the Committee uses to issue Certificates of Divestiture.

- (b) The purpose of 26 U.S.C. (I.R.C.) § 1043 and these regulations is to minimize the burden that would result from paying capital gains tax on the sale of assets to comply with conflict of interest requirements. Minimizing this burden aids in attracting and retaining highly qualified personnel in the judicial branch and strengthens the confidence of the public in the integrity of the federal judiciary ([JCUS-SEP 2007](#), p. 11; and [JCUS-MAR 2007](#), p. 6).

## § 210.40 Definitions

For purposes of this chapter:

(a) Eligible Person

- (1) A judge of a United States court of appeals, a district court (including a bankruptcy, magistrate, or territorial judge), the Court of International Trade, the Tax Court (including a special trial judge), the Court of Federal Claims, the Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Armed Forces;
- (2) The spouse or any minor or dependent child of the individual referred to in subparagraph (1) of this definition; and
- (3) Any trustee holding property in a trust in which an individual referred to in subparagraph (1) or (2) of this definition has a beneficial interest in principal or income.

(b) Permitted Property

Any obligation of the United States or any diversified investment fund approved by regulations issued by the Office of Government Ethics (OGE). **See:** [OGE Regulations, 5 CFR 2634.1003](#).

**Note:** Not all forms of permitted property under the OGE regulations will necessarily avoid subsequent conflicts under Canon 3C(3)(c). Judges

may seek guidance from the Committee as to recusal considerations arising from subsequently acquired permitted property.

## § 220 Availability of Certificates of Divestiture

- (a) The Committee may issue a Certificate of Divestiture for specific property as provided by these regulations if the Committee determines that divestiture of the property by an eligible person is reasonably necessary to comply with [28 U.S.C. § 455](#), Canon 3C of the Code of Conduct for United States Judges, or any other federal conflict of interest statute, regulation, rule, or judicial canon.
- (b) The Committee may issue a Certificate of Divestiture in the following circumstances:
  - (1) **Current Conflict**

To divest property presenting a conflict of interest in a proceeding that is currently before the judge;
  - (2) **Preemptive Divestiture**

To divest property likely to result in a conflict of interest in proceedings that may come before the judge. **See:** [§ 240.10](#).

**Example #1:** A circuit judge owns shares in a number of companies that often have appeals in the judge's court. A Certificate of Divestiture may be issued to permit the judge to divest all shares in those companies, provided that the judge agrees to divest shares in all companies that present the same likely conflict. The judge may retain stock in companies that do not present the same likely conflict.

**Example #2:** A district judge owns a pooled stock investment through a broker in which the judge has no prior knowledge of or control over the trades, which occur frequently and result in unavoidable financial conflicts. A Certificate of Divestiture may be issued to permit the judge to divest all similar pooled stock investments.

**Example #3:** A bankruptcy judge and the judge's spouse both own stock in local banks that appear regularly as parties in bankruptcy cases. A Certificate of Divestiture may be issued to permit the judge and spouse to divest all stock in local banks and similar financial institutions.

## § 230 Unavailability of Certificates of Divestiture

- (a) Federal law does not provide for issuance of a Certificate of Divestiture in the following circumstances:
  - (1) Sale of the property will not give rise to capital gains (e.g., because any gain is ordinary income or because no gain results);
  - (2) The property owner is not an eligible person;
  - (3) The property was sold before issuance of a Certificate of Divestiture.
  
- (b) The Committee, in its sole discretion, may deny a request for a Certificate of Divestiture, including in the following circumstances:
  - (1) The Committee concludes that divestiture is not reasonably necessary to comply with conflict of interest requirements within the meaning of [26 U.S.C. \(I.R.C.\) § 1043](#);
  - (2) The entire conflict of interest (either current or preemptive) will not be resolved because an eligible person has not agreed to divest all similar or related property that presents the same conflict;
  - (3) The property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan or retirement plan and the eligible person can otherwise roll over the property into an eligible tax-deferred retirement plan within the 60-day reinvestment period;
  - (4) The property was acquired voluntarily (e.g., by purchase or gift, but not by inheritance) at a time when ownership of the property created a conflict in the proceeding that gives rise to the request for a Certificate of Divestiture;
  - (5) The eligible person received a preemptive Certificate of Divestiture under [§ 220\(b\)\(2\)](#) and subsequently acquired the property voluntarily (e.g., by purchase or gift, but not by inheritance) at a time when acquisition of the property presented the same likely conflict addressed in the earlier Certificate of Divestiture.

## § 240 How to Obtain a Certificate of Divestiture

A judge seeking a Certificate of Divestiture must submit a written request to the Committee. (Application for Certificate of Divestiture (Form AO 308) is available for this purpose). The request must contain the following:

- (a) A full and specific description of the property to be divested (e.g., if the property is corporate stock, the number of shares for which the Certificate of Divestiture is sought).
- (b) A brief description of how and when the eligible person acquired the property.
- (c) A certification that divestiture of the property will resolve the entire conflict.
- (d) A statement from the eligible person(s) (or legal representative) holding the property agreeing to divest the property within a reasonable time.
- (e) A copy of the judge's latest financial disclosure report and a statement indicating the section and line number of the report where the property to be divested is reported. If the property is not reported in the latest financial disclosure report, a statement explaining why it is not.
- (f) In the case of property held in a trust, a copy of the trust instrument, as well as a list of the trust's current holdings, unless the holdings are listed on the most recent financial disclosure report.

**(Note:** In certain cases involving divestiture of property held in a trust, the Committee may decline to issue a Certificate of Divestiture unless the parties take actions which, in the opinion of the Committee, 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 Committee, in its sole discretion.)

- (g) A statement that describes why divestiture of the property is reasonably necessary to comply with a federal conflict of interest statute, regulation, rule, or judicial canon, including a certification that divestiture is sought for conflict reasons and not for purposes of financial management.
- (h) In the case of divestiture under [28 U.S.C. § 455\(f\)](#) and/or Canon 3C(4), a statement indicating that the judge does not believe the property to be divested could be substantially affected by the outcome of the matter giving rise to the conflict of interest.

**(Note:** If the property to be divested could be substantially affected by the outcome of the matter at issue, divestiture would not be available under Canon 3C(4) to enable the judge to continue participating in the matter. Recusal would still be necessary even after a divestiture of such property. In this situation, a certificate would not issue.)

- (i) Any additional information requested by the Committee.

After reviewing the materials submitted and making a determination that all requirements have been met, the Committee may issue a Certificate of Divestiture.

### **§ 240.10 Factors Considered Related to Preemptive Divestiture**

- (a) In making a decision on an application for preemptive divestiture the Committee will consider all of the relevant circumstances, including, where the property consists of shares in a company:
  - (1) the number of times a conflict of interest may arise if the property is not divested, including:
    - (A) the legal or physical presence of the company in the judicial circuit or district;
    - (B) the actual litigation history of the company in the judicial circuit or district; and
    - (C) any recent merger, acquisition, or other activity indicating the company may become engaged in litigation in the judicial circuit or district;
  - (2) the availability of other judges on the court to hear cases when the requesting judge has a conflict of interest due to the property for which divestiture is sought;
  - (3) whether the disqualification of the requesting judge would unduly burden judicial resources in the judicial circuit or district;
  - (4) the length of time the requesting judge (or eligible person) has owned the property;
  - (5) whether granting the preemptive divestiture would give rise to an appearance of impropriety.
- (b) As a general matter, preemptive divestiture of the property should be sought no later than 18 months following:
  - (1) the date of the appointment;
  - (2) the date the judge (or eligible person) acquires the property; or
  - (3) the date on which it becomes apparent that facts about the property (e.g., in the case of shares in a company, the company's legal or

physical presence in the judicial circuit or district) have changed so as to substantially increase the likelihood of a conflict of interest.

## **§ 250 Divestiture and Reinvestment in Permitted Property**

An eligible person who receives a Certificate of Divestiture must divest the property within a reasonable time (not to exceed 90 days, absent special circumstances). 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.

## **§ 260 Confidentiality**

Requests for Certificates of Divestiture and the Committee's responses thereto are confidential and will be disclosed only when the eligible person consents by waiving confidentiality, either expressly or impliedly, or when required by law. For the purposes of this section, disclosure to the Internal Revenue Service (IRS) does not constitute a waiver of confidentiality.

## **§ 270 Role of the Internal Revenue Service**

The IRS has jurisdiction over the tax aspects of a divestiture made pursuant to a Certificate of Divestiture. An eligible person who elects to defer capital gains from the sale of property pursuant to a Certificate of Divestiture must follow IRS requirements for reporting the sale of the property, the reinvestment transaction (including whether the proposed acquisition meets the requirement for permitted property), and the election under [26 U.S.C. \(I.R.C.\) § 1043](#) not to recognize capital gains. An eligible person should consult a personal tax advisor or the IRS for guidance on these matters.