



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

September 4, 2018

Brent J. McIntosh
General Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Secretary Mnuchin's Interest in the Vanguard Treasury Money Market Fund

Dear Brent:

You have asked for our views as to whether 31 U.S.C. § 329(a)(1)(D) permits Secretary of the Treasury Mnuchin to continue holding shares in his 401(k) account in the Vanguard Treasury Money Market Fund. *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Brent J. McIntosh, General Counsel, Department of the Treasury (July 5, 2018) ("*Treasury Letter*"). We believe that Secretary Mnuchin may lawfully continue to hold shares in this fund.

In addition, you have asked how section 329 applies to two expected transactions by the investment manager of the 401(k) account. Pursuant to an established plan, the investment manager is liquidating two other investments and using the proceeds to buy additional shares of the Vanguard Treasury Money Market Fund. You have asked whether Secretary Mnuchin would violate section 329 when these purchases take place, and if so, how he might avoid such a violation. On the facts presented, we do not believe that the investment manager's purchases will violate section 329.

We rely on the statements of fact in the *Treasury Letter* and its attachment, a letter from the Secretary's private counsel. Letter for Brent J. McIntosh, General Counsel, Department of the Treasury, from Robert Rizzi, Steptoe & Johnson LLP, *Re: Money Market Fund* at 1 (June 1, 2018) ("*Steptoe Letter*"). We also rely on additional information supplied by your office, as noted below.

Under 31 U.S.C. § 329(a)(1)(D), the Secretary of the Treasury "may not . . . be involved in buying or disposing of obligations of a State or the United States Government." Significantly, this provision "reaches trading in bonds but not the mere holding of them." Memorandum for Marilyn L. Glynn, General Counsel, Office of Government Ethics, from Steven G. Bradbury, Acting Assistant Attorney General, Office, Office of Legal Counsel, *Re: Divestiture of Stock and Purchase of Government Bonds by an Incoming Secretary of the Treasury*, 30 Op. O.L.C. 84, 90 (2006). In enacting the original version of the statute in 1789, Act of Sept. 2, 1789, 1 Stat. 65, 67, Congress sought to prevent the Secretary from "speculating in the public funds," 1 *Annals of*

Congress 635 (1789) (statement of the sponsor, Aedanus Burke). The Secretary does not speculate in the public funds merely by holding on to assets acquired prior to taking office.

When Secretary Mnuchin was about to take office, he held a 401(k) account administered by Goldman Sachs. *See Steptoe Letter* at 1 (June 1, 2018). The account included an investment in a money market fund, known as Treasury Money Market-GSAM, which had a portfolio of Treasury bonds. With respect to the 401(k) account, however, Goldman Sachs erroneously advised his accountants that this investment was in the Goldman Sachs Financial Square Treasury Obligations Fund, and because of that error, Secretary Mnuchin did not sell the shares. On December 1, 2017, Vanguard became the investment manager of the 401(k) account and converted the Treasury Money Market-GSAM fund into the Vanguard Treasury Money Market Fund. On May 8, 2018, the Secretary learned that he continued to own shares in a money market fund with a portfolio of Treasury bonds. *Id.* at 1-2. We understand that the holding currently amounts to about \$770,000.

We have previously concluded that if a mutual fund's portfolio consists of Treasury bonds, then "[t]he fund and its underlying holdings . . . would be practically indistinguishable," and a Secretary who "bought or sold shares in such a fund . . . would appear to 'be involved in buying or disposing of obligations of . . . the United States.'" Letter for Arnold I. Havens, General Counsel, Department of the Treasury, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel at 3 (July 5, 2006) ("*2006 Letter*"). Nevertheless, as with Treasury bonds, section 329 does not forbid the Secretary of the Treasury from merely holding a mutual fund whose portfolio consists of such bonds. Furthermore, the Secretary is merely holding the mutual fund even though such a fund may buy and sell the underlying bonds in its portfolio. A Secretary holding shares in the fund is not himself "involved in buying or disposing of" these bonds, so long as he has "no control over the transactions of the fund or over the persons who manage the fund." E-mail for Virginia A. Seitz, Office of Legal Counsel, from Daniel Koffsky, Office of Legal Counsel, *Re: Recording Advice to the Treasury Department* (Jan. 18, 2013 7:43 a.m.) (*2013 Koffsky E-mail*).

For these reasons, Secretary Mnuchin's simple holding of shares in the Vanguard Treasury Money Market Fund presents no problem. Secretary Mnuchin has no control over the transactions of the fund or its investment manager. In fact, the fund is static, in the sense that the income of the fund is not used to buy additional shares: "[I]nvestors do not acquire additional shares of the fund through reinvestment of the fund's earnings. All earnings generated by the fund go to increase the Net Asset Value of the fund." *Treasury Letter* at 1. Nor, as your office has informed us, does the fund perform a "sweep" function, receiving the proceeds from other investments in the 401(k) account and holding those proceeds until they are used for purchases. In the ordinary operations of the fund, therefore, shares in the fund would not be bought or sold on Secretary Mnuchin's behalf, and he would merely hold, but not trade in, Treasury bonds. Goldman Sachs' error in identifying the fund in Secretary Mnuchin's 401(k) account, from this standpoint, made no difference, because he could have lawfully held the treasury fund in the first place.

Nevertheless, we have been advised that the plan's investment manager has made, and will make, additional share purchases of the Vanguard Treasury Money Market Fund on Secretary Mnuchin's behalf, for reasons unrelated to the shares that were converted from the Treasury Money Market-GSAM fund. According to your office, before Secretary Mnuchin took office, participants in Goldman Sachs' 401(k) plan received notice by mail that the proceeds from the liquidation of two other investments in the 401(k) account would be used to buy shares in the Treasury Money Market-GSAM fund and that there may be two additional such payments. After Secretary Mnuchin took office, proceeds from the continuing liquidations were used to buy approximately \$16,000 of additional shares in the successor Vanguard Money Market Fund. It is anticipated that one or two additional liquidation payments will be in the same range. We are advised that, under ERISA, the Secretary could not have avoided the past, and cannot now avoid the future, payments even by rolling over his 401(k) account or by attempting to renounce his right to the payments, nor has he ever had the power to direct the payments into an account other than a fund of Treasury bonds, as required by the past and present investment managers. Even if the Secretary now divested himself of his holding in the Vanguard Treasury Money Market Fund, the 401(k) investment manager would still use the liquidation proceeds to purchase new shares in the fund.

Under these circumstances, we do not believe that Secretary Mnuchin will violate section 329 when the investment manager buys the required shares in the Vanguard Treasury Money Market Fund. First, Secretary Mnuchin does not have any control over the upcoming purchases. *See 2013 Koffsky E-mail*. He has no power to stop these purchases or to influence their timing, and the purchases will be performed by the investment manager based upon a determination that was made before Secretary Mnuchin's assumption of his office. It is highly unlikely that Secretary Mnuchin could engage in "speculation," the chief evil that the statute seeks to address, when he has no control over the person who will make the transactions or over their particular timing. We therefore do not believe that he may be deemed to "be involved in buying or disposing of obligations" under section 329(a)(1)(D) when those purchases take place.

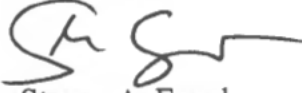
Second, we do not believe that Secretary Mnuchin will have the *mens rea* required to violate section 329. Because "[s]ection 329 is 'highly penal,'" we have read section 329 to require a "*mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *2006 Letter* at 2 (citations omitted). We went on to say that, "[a]t the least, a violation would require 'knowledge with respect to the *actus reus* [i.e. the wrongful act] of the crime'" *Id.* (citations omitted). But the only action by Secretary Mnuchin that could have avoided the purchases of shares in a fund of Treasury bonds would have been somehow not to participate in the Goldman 401(k) plan in the first place, and he did not know, at the time he began his participation, that the investment manager would use the proceeds of a future liquidation to buy shares in a Treasury bond fund, much less that, at the time these purchases would occur, he would be the Secretary of the Treasury.

Furthermore, although Secretary Mnuchin did not knowingly place himself in the position where the administrator will purchase these fund shares on his behalf, any direction he could give now, rather than allowing events to play themselves out, would knowingly involve

him in the sale of Treasury bonds. If he were to sell his holding in the Vanguard Treasury Money Market Fund, he would add a much larger transaction to the smaller purchases that he cannot avoid. If he were to direct that upon future receipt of the proceeds into the fund, he immediately perform a compensating sale, then he would add a sale to each of the purchases. These transactions would appear only to complicate the issues posed by the anticipated liquidation payments.

We appreciate that the 401(k) investment manager could determine to substitute another Treasury fund for the Vanguard Treasury Money Market Fund, just as that fund was substituted for the Treasury Money Market-GSAM fund, and that such a substitution might be said to result in sales and purchases of Treasury bonds for Secretary Mnuchin's account. *See Treasury Letter* at 1. Although Secretary Mnuchin might avoid this future possibility by directing the sale of his holding in the Vanguard Treasury Money Market Fund, we do not believe that it would make any sense for the Secretary to avoid the possibility of a future transaction, over which he would have no control, by affirmatively directing that a similar transaction actually take place now.

Please let us know if we may be of further assistance.

Sincerely,

Steven A. Engel