UNITED STATES OFFICE OF
GOVERNMENT ETHICS

January 23, 2023
LA-23-02

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
Director

SUBJECT: Application of the Outside Earned Income Limitations to Mining, Staking, and Delegated Staking of Cryptocurrency

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on when cryptocurrency transaction fees and block rewards[1] are "compensation for services" subject to the outside earned income limitations applicable to covered non-career officials.[2] As described more fully below, cryptocurrency transaction fees and block rewards are considered "compensation for services" when they derive from activities such as mining or staking in which the employee is validating transactions. By contrast, an employee who receives transaction fees or block rewards from delegated staking—an arrangement in which the

[1] As discussed below, block rewards are incentives, generally in the form of newly generated cryptocurrency, which are provided to parties who successfully validate transactions on a blockchain. *See* U.S. DEP'T OF TREASURY, CRYPTO-ASSETS: IMPLICATIONS FOR CONSUMERS, INVESTORS, AND BUSINESSES 12 (2022), https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf.

[2] A covered noncareer employee is an employee, other than a special Government employee, who occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule, and who is:

> (1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:
>> (i) A position within the uniformed services; or
>> (ii) A position within the foreign service below the level of Assistant Secretary or Chief of Mission;
>
> (2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;
> (3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in § 213.3301 of this title for Schedule C positions; or
> (4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for noncareer executive assignment positions.

5 C.F.R. § 2636.303(a).

employee does not engage in validation of transactions—has not received "compensation for services" covered by the outside earned income limitations.

I. Outside Earned Income Limitations

The Ethics in Government Act limits the amount of outside earned income covered noncareer employees may receive from any non-federal source in a single year.[3] For calendar year 2023, this amount is $31,815, prorated for the number of days the employee serves during the year.[4] Executive Order 12674 expands on this limitation and outright prohibits covered noncareer employees who hold full-time positions requiring Presidential appointment (PA or PAS) from receiving any outside earned income.[5]

For purposes of both the outside earned income limitation found in the Ethics in Government Act and the Presidential outside earned income ban, the term "outside earned income" is defined as "wages, salaries, honoraria, commissions, professional fees, and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government."[6] To be considered outside earned income, therefore, a payment must be "compensation for services" provided by the employee.[7] Accordingly, passive income does not trigger the outside earned income limitation or ban.[8]

II. Cryptocurrency Validation

Purchases and sales of digital assets, such as cryptocurrencies, are recorded using distributed ledger technology, or "blockchains."[9] Each transaction is separately recorded in the blockchain, which generally provides the owner with both evidence of ownership and access to the digital asset. Prior to being recorded, a transaction must be validated. Transactions are validated to protect against fraudulent practices, such as double spending. Only after a transaction is validated can the transaction—along with batches of other transactions, known colloquially as "blocks"—be recorded and thereby become part of the blockchain. Validation of

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[3] 5 U.S.C. § 13143(a); 5 C.F.R. § 2636.304.
[4] *See* OGE Legal Advisory LA-23-01 (Jan. 5, 2023).
[5] Exec. Order No. 12,674 § 102(a), 54 Fed. Reg. 15,159 (Apr. 12, 1989), *as modified by* Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990); 5 C.F.R. § 2635.804(a).
[6] 5 C.F.R. § 2636.303(b).
[7] Although the law does not define the term "service," it is generally understood as "[l]abor performed in the interest or under the direction of others; specif., the performance of some useful act or series of acts for the benefit of another, usu. for a fee." *Service,* BLACK'S LAW DICTIONARY (11th ed. 2019).
[8] *See* 5 C.F.R. § 2636.303(b)(4) (excluding from the definition of outside earned income "[i]ncome from investment activities where the individual's services are not a material factor in the production of income"). Of course, income that is generally characterized as "passive," such as interest or dividends, would constitute "outside earned income" if it was in fact provided in exchange for services provided by a covered noncareer employee. OGE Inf. Adv. Op. 90x20 (Nov. 2, 1990).
[9] For a more detailed explanation of the processes involved in the creation and exchange of digital assets, *see generally* U.S. DEP'T OF TREASURY, *supra* note 1; U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104625, BLOCKCHAIN: EMERGING TECHNOLOGY OFFERS BENEFITS FOR SOME APPLICATIONS BUT FACES CHALLENGES (2022), https://www.gao.gov/assets/gao-22-104625.pdf; KRISTEN BUSCH, CONG. RSCH. SERV., R47064, BLOCKCHAIN: NOVEL PROVENANCE APPLICATIONS (2022), https://crsreports.congress.gov/product/pdf/R/R47064.

cryptocurrency transactions is not centralized. Rather, individual validators are chosen from a pool of eligible candidates.

a. Mining and Staking

Currently, two primary methods exist for determining who will be selected to validate a transaction. The first method is proof-of-work, often referred to as "mining"; the second is proof-of-stake, often referred to as "staking."

- When a blockchain uses mining, validators (called "miners") compete to be the first to solve complex math problems in order to win the right to create and validate new blocks. Miners who are successful create a block and validate the transactions on that block. In exchange, they generally receive block rewards. Miners may also charge transaction fees for validating transactions.

- When a blockchain uses staking, validators (called "stakers") deposit cryptocurrency onto the blockchain as collateral in exchange for the right to be selected to create and validate blocks. The more cryptocurrency deposited (or "staked") by a staker, the more likely that they will be selected to validate a block of transactions. Stakers selected to validate a transaction may receive transaction fees or block rewards.

Regardless of the process used, validators provide the same service: reviewing transactions for legitimacy and recording validated transactions to the blockchain.

b. Delegated Staking

In a delegated staking arrangement, individual cryptocurrency owners (delegators) agree to lend their cryptocurrency to another person (delegate) to enhance the delegate's likelihood of being selected to create and validate blocks on a blockchain that uses staking. In exchange, the delegators are entitled to receive part of the transaction fees or block rewards received by the delegate. The delegators do not personally engage in the creation or validation of blocks. That responsibility lies with the delegate.

III. When Transaction Fees and Block Rewards Qualify as Outside Earned Income

Transaction fees and block rewards are outside earned income when received as "compensation for services." Employees who validate cryptocurrency transactions, e.g., by mining or staking, are providing a service to others on the blockchain. Transaction fees and block rewards received for validating transactions are therefore considered outside earned income.[10]

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[10] For purposes of both the Ethics in Government Act and Executive Order 12674, outside earned income is deemed to have been received in the year in which the services were provided. 5 C.F.R. § 2635.804(c)(1); 5 C.F.R. §§ 2636.303(c), .304(d). For that reason, delays in payment or temporary limitations on availability or alienability

Employees who are merely delegators in a delegated staking arrangement, on the other hand, are not engaging in services; rather, they are loaning their assets to another party in the hopes of receiving a financial return. A delegated staking arrangement is therefore more akin to an investment agreement resulting in passive income. As such, block rewards and transaction fees received by a delegator in a delegated staking arrangement are not "compensation for services" and would not constitute outside earned income for purposes of either the Ethics in Government Act or Executive Order 12674, as modified.

IV. Conclusion

As set forth above, whether cryptocurrency transaction fees and block rewards qualify as outside earned income depends on whether they are "compensation for services." Employees are encouraged to consult with their agency ethics officials if they have questions about how their cryptocurrency activities may implicate the ethics laws. Agency ethics officials who have questions about this Legal Advisory should reach out to their OGE Desk Officer.

(such as may occur during lock-in periods) are immaterial for purposes of determining when transaction fees and block rewards are received for purposes of the outside earned income limitations.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

June 18, 2018
LA-18-06

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
Acting Director and General Counsel

SUBJECT: Guidance for Reporting Virtual Currency on Financial Disclosure Reports

This Legal Advisory clarifies that the U.S. Office of Government Ethics (OGE) has determined that virtual currency[1] is "property held . . . for investment or the production of income" for purposes of public and confidential financial disclosure, pursuant to the Ethics in Government Act (EIGA).[2] OGE does not consider virtual currency a "real" currency or legal tender.[3] Executive branch employees are therefore required to report their holdings of virtual currency on their public or confidential financial disclosure report, subject to applicable reporting thresholds for property held for investment or the production of income. Further, the reporting and conflict of interest principles set forth herein apply equally to other digital assets, such as "coins" or "tokens" received in connection with initial coin offerings or issued or distributed using distributed ledger or blockchain technology.

OGE recognizes that virtual currencies are experiencing a surge in use and access, and as a result, employees who hold virtual currencies are increasingly seeking guidance from their ethics officials concerning their financial disclosure reporting obligations. OGE also recognizes that virtual currency is a relatively new and still evolving financial instrument whose final form and function may yet change. Accordingly, we are issuing this guidance to address reporting requirements for employees who hold virtual currency and note that we may need to issue further guidance as the nature of virtual currency becomes better defined.

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[1] *See* I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014), wherein the IRS describes virtual currency as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value." Significantly, a result of this definition means the IRS treats virtual currency as property (and not a real currency) for U.S. federal tax purposes. Note that virtual currency is a term used synonymously with terms such as "cryptocurrency" and "digital currency."

[2] 5 U.S.C. app. § 102(a)(3).

[3] The Financial Crimes Enforcement Network (FinCEN) noted that "[i]n contrast to real currency, 'virtual' currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction." *See* U.S. DEP'T OF THE TREASURY, FIN.CRIMES ENF'T NETWORK, FIN-2013-G001, "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies," (2013), https://www.fincen.gov/sites/default/files/guidance/FIN-2013-G001.pdf.

Background

Virtual currencies have existed for a number of years, but more recently have gained prominence in investor circles and the media for their fluctuations in value. There is general consensus within industry and government that virtual currency can function in different ways, i.e., it can serve as a store of value, a medium of exchange, and/or an investment asset.[4] Federal agencies have recognized that virtual currencies have largely been held for investment purposes:

- The Internal Revenue Service (IRS) treats virtual currency as property (and not as real currency) for U.S. federal tax purposes.[5]
- The Commodity Futures Trading Commission (CFTC) views certain virtual currency as a commodity and involving a commodity derivative contract in specific situations.[6]
- Officials at both the CFTC and the Securities and Exchange Commission (SEC) recently noted that many digital assets, including virtual currencies, are being promoted as investment assets.[7]

Financial Disclosure Reporting

The EIGA requires employees to report "any interest in property held . . . for investment or the production of income . . . ."[8] While virtual currency may act as a medium of exchange or substitute for real currency, it may also function as a commodity, the basis for a derivative contract, security, or other investment instrument, depending on how it is designed, issued, promoted, distributed, and used by participants in the community.[9] In fact, a significant characteristic of digital assets, including virtual currencies, is their capacity to act as an

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[4] *See* I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014); *see also Investor Bulletin: Initial Coin Offerings*, U.S. SECS. & EXCH. COMM'N (July 25, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings; Public Statement from Jay Clayton, Chairman, U.S. Secs. & Exch. Comm'n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017); CHRIS BURNISKE & ADAM WHITE, BITCOIN: RINGING THE BELL FOR A NEW ASSET CLASS (2017), http://research.ark-invest.com/bitcoin-asset-class.

[5] *See* I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014).

[6] *See* BFXNA INC. d/b/a BITFINEX, CFTC Docket No. 16-19 (2016); *see also* Coinflip, Inc. d/b/a Derivabit, CFTC Docket No. 15-29 (2015).

[7] "[C]ryptocurrencies are now being promoted, pursued and traded as investment assets, with their purported utility as an efficient medium of exchange being a distant secondary characteristic." Jay Clayton & J. Christopher Giancarlo, *Regulators Are Looking at Cryptocurrency: At the SEC and CFTC, We Take Our Responsibility Seriously*, WALL ST. J., Jan. 24, 2018, https://www.wsj.com/articles/regulators-are-looking-at-cryptocurrency-1516836363; *see also Investor Bulletin: Initial Coin Offerings*, U.S. SECS. & EXCH. COMM'N (July 25, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings; Public Statement from Jay Clayton, Chairman, U.S. Secs. & Exch. Comm'n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017).

[8] 5 U.S.C. app. § 102(a)(3).

[9] *See supra* notes 5-8 (noting how some regulatory agencies treat virtual currency). For an industry perspective, see BURNISKE & WHITE, *supra* note 4, at 9, 13, wherein the authors observed that "[a] comparison of bitcoin's global trading volume to its transactional volume highlights that the use of bitcoin as an investment medium is increasing faster than its transactional applications" and that "[w]ith each month, bitcoin cements its role as a tradeable and investable asset, drawing second looks from many investors who wrote it off as fraud or fad."

investment asset through which holders may expect to generate investment income.[10] OGE therefore regards a holding in virtual currency as an interest in property held for investment or the production of income. Consistent with the reporting requirements in the EIGA and OGE's regulations, such an interest must be reported on an employee's public or confidential financial disclosure report if it meets the income or value reporting thresholds for such property.[11]

In connection with this Legal Advisory, OGE is incorporating this guidance into its guide for financial disclosure reporting.[12] In brief, filers report their holdings in a virtual currency if the value of the virtual currency holding exceeded $1,000 at the end of the reporting period or if the income produced by the virtual currency holding exceeded $200 during the reporting period. Filers are required to identify the name of the virtual currency and, if held through an exchange or platform, the exchange or platform on which it is held.[13]

Annual Transaction and Periodic Transaction Reports

The EIGA requires public filers to file annual and periodic reports of transactions in certain investment assets, i.e., "stocks, bonds, commodity futures, and other forms of securities."[14] As discussed above, it is clear to OGE that virtual currencies are interests in property held for investment or the production of income; however, it is not clear under the EIGA whether particular virtual currencies may or may not qualify as one of the investment terms specified in the law for transaction reporting. The term with the most likely application is "other forms of securities." However, while the term "securities" appears in the EIGA, it is not therein defined. For purposes of the federal securities laws, the determination of whether a particular virtual currency or digital asset is a "security" depends on the facts and circumstances.[15]

As interpreted by the U.S. Supreme Court, assets are "investment contracts," and therefore meet the definition of "security," if they involve an investment of money in a common enterprise with a reasonable expectation of profits derived from the entrepreneurial or managerial

[10] *See Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission*: *Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 115th Cong. (2018) (statements of Jay Clayton, Chairman, U.S. Securities & Exchange Commission, and J. Giancarlo, Chairman, U.S. Commodity and Futures Trading Commission); *see also* Order re Petition to Enforce IRS Summons, United States v. Coinbase, Inc., Case No. 17-CV-01431-JSC (N.D. Cal. Nov. 28, 2017).
[11] *See* 5 U.S.C. app. § 102(a); *see also* 5 C.F.R. pt. 2634, subpt. C; 5 C.F.R. § 2634.907.
[12] *See* U.S. OFF. GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/Web/278eGuide.nsf.
[13] Filers should report the exchange or platform because of the close relationship between a virtual currency and the electronic platform on which it is held. Historically, the stability of the exchange or platform can have meaningful financial consequences for the virtual assets held there. The exchange or platform identity provides a sufficient description to adequately review for conflict of interest purposes. As virtual currencies and the exchanges or platforms on which they trade become subject to greater regulatory oversight and stability, OGE may revisit this description requirement.
[14] 5 U.S.C. app. §§ 102(a)(5)(B), 103(*l*).
[15] *See SEC v. Edwards,* 540 U.S. 389, 393 (2004); *SEC v. W.J. Howey Co.,* 328 U.S. 293, 301 (1946).

efforts of others.[16] Recent investments where an asset was determined to be a security involved digital tokens or coins offered in connection with an initial coin offering.[17]

If a virtual currency or digital asset is a security, filers should report purchases, sales, or exchanges of that asset. In circumstances where an employee is uncertain whether a particular virtual currency holding is a security, we recommend ethics officials advise the employee to report transactions of that asset on periodic transaction reports if the value of the transaction exceeds the reporting threshold. In the case of Bitcoin, the CFTC has determined it to be a commodity.[18] The Ethics in Government Act does not require transactions of commodities to be reported.[19]

Virtual Currency as a Potential Conflict of Interest

Virtual currency is an investment asset and, like other property held for investment, it may create a conflict of interest for employees who own it. Furthermore, it is not subject to the conflict of interest exemptions in 5 C.F.R. part 2640. Agency ethics officials should therefore analyze whether their employees' official duties would have an effect on the value of their virtual currency, just as they would any other property held for investment or the production of income. They should also alert their employees to the potential conflict of interest risk posed by ownership of virtual currency.

Additional Information

In light of the developing state of virtual currencies, the foregoing advice is not intended to be comprehensive. Given the evolving nature of virtual currency, other regulatory agencies may issue additional findings or guidance that provide further insight into how these assets should be treated for the purposes of the EIGA. Should such additional information become available, OGE may revisit the guidance offered in this Legal Advisory and update it as necessary. Agency ethics officials with questions regarding the financial disclosure reporting requirements for employees acquiring, selling, or trading virtual currencies, or regarding conflicts of interests for such assets, may contact their assigned OGE Desk Officers.

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[16] *See W.J. Howey Co.,* 328 U.S. at 301. This test turns on the particular facts and circumstances.
[17] *See, e.g.*, Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934: The DAO, Exchange Act Release No. 81,207, 117 SEC Docket 5 (July 25, 2017); In re Munchee, Inc., Securities Act Release No. 10,445, 118 SEC Docket 5 (Dec. 11, 2017).
[18] *See supra* note 6. Note also that Bitcoin has not been determined by the SEC to be a security. *See* interview by Bob Pisani with Jay Clayton, Chairman, U.S. Secs. & Exch. Comm'at Sandler O'Neill Global Exchange and Brokerage Conference, New York, NY. (Jun.6, 2018), https://www.cnbc.com/video/2018/06/06/sec-chairman-cryptocurrencies-like-bitcoin--not-securities.html.
[19] *See supra* note 14.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

July 5, 2022
LA-22-04

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
Director

SUBJECT: Application of the Securities and Mutual Fund Exemptions to Cryptocurrency, Stablecoins, and Related Investments

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to address the application of the regulatory exemptions for *de minimis* holdings of publicly traded securities and mutual funds, found at 5 C.F.R. part 2640, subpart B, to cryptocurrencies, stablecoins, and companies involved in blockchain technology and related services.[1]

As described further below: (1) cryptocurrency and stablecoins are not "publicly traded securities" for purposes of OGE's regulations and therefore do not qualify for the securities exemptions at 5 C.F.R. § 2640.202; and (2) mutual funds[2] that have a stated purpose of concentrating investments in cryptocurrencies, stablecoins, cryptocurrency or stablecoin derivatives, or cryptocurrency or stablecoin services[3] are sector mutual funds for purposes of the mutual fund exemptions at 5 C.F.R. § 2640.201.

[1] Cryptocurrency is a "digital asset, which may be a medium of exchange, for which generation or ownership records are supported through a distributed ledger technology that relies on cryptography, such as a blockchain." Exec. Order No. 14,067, § (9)(c), 87 Fed. Reg. 14,143 (Mar. 14, 2022). Stablecoins are "a category of cryptocurrencies with mechanisms that are aimed at maintaining a stable value, such as by pegging the value of the coin to a specific currency, asset, or pool of assets or by algorithmically controlling supply in response to changes in demand in order to stabilize value." *Id.* § (9)(e). Cryptocurrency and stablecoins are "investment asset[s] and, like other property held for investment . . . may create a conflict of interest for employees who own it." OGE Legal Advisory LA-18-06, at 4 (June 18, 2018). This Legal Advisory does not discuss when such investments may pose conflicts of interest; rather it focuses only on whether certain regulatory exemptions to the conflict of interest law, 18 U.S.C. § 208(a), are available.
[2] OGE's regulatory exemptions apply to both "mutual funds" and "unit investment trusts." *See* 5 C.F.R. § 2640.201. Although this Legal Advisory refers to "mutual funds" only, the guidance is also applicable to unit investment trusts. For purposes of OGE's regulatory exemptions, the term "mutual fund" means an "entity which is registered as a management company under the Investment Company Act of 1940" and includes "open-ended" and "closed-end" mutual funds and "registered money market funds." *Id.* § 2640.102(k). The term also includes exchange-traded funds (ETFs) that are registered under the Investment Company Act of 1940. A "unit investment trust" is an "investment company as defined in 15 U.S.C. 80a-4(2) that is a regulated investment company under 26 U.S.C. 851." *Id.* § 2640.102(u).
[3] For purposes of this Legal Advisory, "cryptocurrency and stablecoin services" include developing, issuing, or promoting cryptocurrency or stablecoin tokens; mining, staking, or otherwise validating cryptocurrency or

I. Application of the Exemptions for Publicly Traded Securities at 5 C.F.R. § 2640.202 to Cryptocurrency, Stablecoins, and Related Companies

Employees may participate in any particular matter in which they would otherwise have a disqualifying financial interest arising from ownership of "publicly traded securities" that are below relevant *de minimis* thresholds.[4] For purposes of these regulatory exemptions, the term "security" "means common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest."[5] A security is "publicly traded" if it is:

> (1) Registered with the Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) and listed on a national or regional securities exchange or traded through NASDAQ;
> (2) Issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940, as amended (15 U.S.C. 80a-8); or
> (3) A corporate bond registered as an offering with the Securities and Exchange Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) and issued by an entity whose stock is a publicly traded security.[6]

As OGE has previously advised, cryptocurrencies and stablecoins do not meet the definition of "publicly traded securities" for purposes of these exemptions.[7] This is true even if individual cryptocurrencies or stablecoins constitute securities for purposes of the Federal or state securities laws.[8] Because cryptocurrency and stablecoins are not "publicly traded securities," no *de minimis* exemption applies to these assets. As a result, an employee who holds any amount of a cryptocurrency or stablecoin may not participate in a particular matter if the employee knows that particular matter could have a direct and predictable effect on the value of their cryptocurrency or stablecoins.

Example 1. Employee is asked to work on a regulation that would require all stablecoins to be fully backed by United States currency. Employee owns $100 in stablecoin XYZ

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stablecoin transactions; creating or managing a platform for digital asset exchange; providing custodial services for cryptocurrency or stablecoins; and other decentralized finance (DeFi) services.

[4] The regulation establishes three different thresholds depending on whether the particular matter is one of general applicability or involving specific parties, and if the entity in which the employee has a disqualifying ownership interest is party to the matter. 5 C.F.R. § 2640.202(a)-(c).

[5] *Id.* § 2640.102(r).

[6] *Id.* § 2640.102(p).

[7] *See* OGE Legal Advisory LA-18-06, at 4. Non-fungible tokens likewise will not constitute publicly traded securities for purposes of the regulatory exemption. OGE has not been called on to consider whether asset-backed tokens that represent direct or derivative rights in corporate stock or securitized tokens would meet the criteria of a "publicly traded security" under 5 C.F.R. § 2640.102(p). Whether such tokens qualify for the securities exemptions will depend both on their registration status and whether they constitute the types of securities listed in the regulation.

[8] The definition of "security" for purposes of the securities laws, including the Securities Act of 1933, is significantly broader than the definition of "publicly traded security" used in 5 C.F.R. § 2640.102(p). *See* 15 U.S.C. § 77b(a)(1).

that is not backed by United States currency. Because the regulation is anticipated to have a financial impact on the value of stablecoin XYZ and no regulatory exemption applies, Employee cannot participate in the regulation until and unless they divest their interests in stablecoin XYZ.

On the other hand, stock interests in companies engaged in the development of cryptocurrency or stablecoins or related services are covered by these regulatory exemptions, so long as they are "publicly traded securities." However, these regulatory exemptions do not apply to equity ownership in private companies engaged in the cryptocurrency and stablecoin field.

II. Application of the Exemptions for Mutual Funds at 5 C.F.R. § 2640.201 to Cryptocurrency and Stablecoin Investment Funds

Employees may participate in certain particular matters in which they have a disqualifying financial interest arising from holdings in a mutual fund under regulatory exemptions.[9] An employee may participate in any particular matter affecting one or more holdings of a diversified mutual fund when the disqualifying financial interest arises from ownership of the fund.[10] In addition, an employee may participate in a particular matter affecting one or more holdings of a sector mutual fund when the disqualifying financial interest arises from ownership of the fund so long as the aggregate value of all sector funds held by the employee in the same sector is less than $50,000.[11]

For purposes of these regulatory exemptions, OGE has determined that mutual funds with a stated purpose of concentrating investments in cryptocurrencies,[12] stablecoins, cryptocurrency or stablecoin derivatives, or cryptocurrency or stablecoin services are sector funds .[13] Mutual funds with a stated purpose of investing broadly in companies that would benefit from or use blockchain technology, on the other hand, are considered diversified funds.

Example 2. Employee owns the Bitcoin Investment Strategy fund. The fund's prospectus states that it invests principally in "digital currency" and "digital currency futures contracts." The fund is a sector fund.

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[9] 5 C.F.R. § 2640.201.

[10] 5 C.F.R. § 2640.201(a).

[11] 5 C.F.R. § 2640.201(b). Pooled investment funds that are not registered under the Investment Company Act of 1940—such as funds exempt from the registration pursuant to Securities and Exchange Commission Regulation D (17 C.F.R. §§ 230.500-.508)—do not qualify as "mutual funds" or "unit investment trusts" for purposes of the regulatory exemptions at 5 C.F.R. § 2640.201. OGE Legal Advisory LA-21-02, at 2 n.3 (Jan. 6, 2021); OGE Legal Advisory LA-19-06 (Aug. 15, 2019). As a result, an employee who holds an interest of any amount in an unregistered pooled investment fund that holds cryptocurrency, stablecoins, or related companies may not participate in any particular matter that could have a direct and predictable effect on those holdings.

[12] It is OGE's understanding that, as of the date of publication, there are no mutual funds registered under the Investment Company Act of 1940 that have a stated policy of concentrating investments directly in cryptocurrencies (generally referred to as "spot cryptocurrency funds") as opposed to in cryptocurrency derivatives.

[13] OGE has previously advised that mutual funds and unit investment trusts with a stated investment policy of concentrating in "digital currency software" constitute sector funds. OGE Legal Advisory LA-19-06, at 2-3 (Aug. 15, 2019). OGE is aware of no mutual funds with a stated policy of concentrating investment in other forms of digital assets, such as non-fungible tokens, or in companies engaged in activities such as the production of smart contracts or consumer transactions in virtual worlds (also known as a "metaverse"). OGE will address such mutual funds if, and when, they arise.

Example 3. Employee owns the FutureSight PoW Mining fund. The fund's prospectus states that it seeks to track the performance of the Global Digital Assets Mining Index, which tracks the performance of companies involved in cryptocurrency mining operations. The fund is a sector fund.

Example 4. Employee owns the Blockchain and Innovative Technology Transformation fund. The fund's prospectus states that it invests in companies in the natural resources, transportation, and energy sectors that will benefit from blockchain and distributed ledger technology. The fund is diversified.

For purposes of applying the sector fund exemption, OGE has determined that mutual funds with a stated purpose of concentrating investments in cryptocurrencies, stablecoins, cryptocurrency or stablecoin derivatives, or cryptocurrency or stablecoin services are within the financial services sector.[14] As a result, an employee who owns such a fund may only participate in a particular matter affecting one or more of the underlying holdings of the fund if the employee has less than $50,000 in all mutual funds "that concentrate in the same [financial services] sector and have one or more holdings that may be affected by the particular matter."[15]

Example 5. Employee owns the Bitcoin Investment Strategy fund and FutureSight PoW Mining funds described in Examples 1 and 2. These are sector funds within the financial services sector.

Example 6. Employee owns $45,000 in the FutureSight PoW Mining fund and $20,000 in the J.S. Select Financial Sector Fund. Employee is asked to work on a regulation establishing mandatory Know Your Customer (KYC) requirements that will affect entities that accept cryptocurrency and companies that validate cryptocurrency. Employee must aggregate both funds for purposes of determining the sector fund threshold, as both funds are in the financial services sector and both funds have underlying holdings that may be affected by the regulation.

Example 7. Employee has the same investments as set forth in Example 6, above. Employee is asked to work on a regulation that would incentivize private sector insurance companies to provide low-cost wildfire insurance options. Employee is not required to recuse from working on the regulation because no underlying holdings of the FutureSight PoW Mining would be affected by the regulation and Employee's interest in J.S. Select Financial Sector Fund is below $50,000.

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[14] In determining whether a mutual fund concentrates on any given sector, OGE considers the "degree of relatedness and overlapping interests and operations" of companies in the sector as well as whether "Government decisions affecting one type of company would be expected to affect the other, given their interdependence or competition with each other." OGE Inf. Adv. Op. 00x8, at 7 (Aug. 25, 2000); *see also* Proposed Exemption Amendments Under 18 U.S.C. 208(b)(2) for Financial Interests in Sector Mutual Funds, De Minimis Securities, and Securities of Affected Nonparty Entities in Litigation, 65 Fed. Reg. 53,942, 53,943 (Sept. 6, 2000).

[15] Employees are only required to aggregate "affected funds in the same sector." 65 Fed. Reg. at 53,943 (emphasis added). Because "sectors are not mutually exclusive but may overlap to a significant degree or even subsume others," it is possible that certain particular matters would not have a potential effect on the underlying holdings of mutual funds that focus on separate sub-sectors of the financial services sector. OGE Inf. Adv. Op. 00x8, at 12.

OGE has separately determined that mutual funds with a stated focus of investing in computer hardware used in cryptocurrency services, such as Application-Specific Integrated Circuit (ASIC) hardware, will be considered computer hardware sector funds.[16]

Example 8. Employee owns the Celeritas Mining Rig Hardware fund. The fund's prospectus states that it invests principally in companies that manufacture specialized hardware for use in digital asset mining. This is a computer hardware sector fund.

Finally, OGE wants to emphasize that, although it is sometimes possible to identify whether a fund is a diversified or sector fund based on the fund name,[17] a number of similarly-named blockchain and digital asset funds have adopted widely divergent investment strategies, resulting in some qualifying as sector funds and some as diversified funds. As a result, agencies will "need to look beyond the fund name to the prospectus" to determine the actual investment strategy of the fund.[18]

Agency ethics officials who have questions concerning this Legal Advisory should reach out to their Desk Officer.

[16] OGE Legal Advisory LA-19-06, at 2-3.
[17] OGE Inf. Adv. Op. 00x8, at 8 & n.4.
[18] *Id*. at 13.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

July 15, 2022
LA-22-05

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
Director

SUBJECT: Financial Disclosure Reporting Considerations for Collectible Non-Fungible Tokens and Fractionalized Non-Fungible Tokens

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on the public[1] financial disclosure reporting requirements applicable to non-fungible tokens ("NFTs") that represent collectible virtual items ("collectible NFTs") and fractionalized non-fungible tokens ("F-NFTs").[2] As described below, public financial disclosure filers must disclose ownership of collectible NFTs and F-NFTs when those assets are held for investment or production of income and are worth more than $1,000 at the end of the reporting period, or if they produce over $200 in income in the reporting period. Public financial disclosure filers must also disclose purchases, sales, and exchanges of collectible NFTs and F-NFTs that qualify as securities.

I. Background on Collectible Non-Fungible Tokens (NFTs) and Fractionalized Non-Fungible Tokens (F-NFTs)

NFTs were created as an alternative to traditional "fungible" digital assets[3] such as cryptocurrencies and stablecoins.[4] Fungible digital assets, such as cryptocurrencies, are not

[1] The financial disclosure guidance contained in this Legal Advisory is focused on public financial disclosure obligations. However, the guidance related to reporting of collectible non-fungible tokens and fractionalized non-fungible tokens as interests in property is equally applicable to employees who file confidential financial disclosure reports. *See* 5 C.F.R. § 2634.907 (describing information required to be reported on a confidential financial disclosure report). Confidential financial disclosure filers are not, however, required to report purchases, sales, and exchanges of any security, unless required through agency-specific supplemental financial disclosure regulations and alternative confidential filing obligations. *Id.*

[2] The technology behind non-fungible tokens permits a wide-variety of use cases beyond representing ownership of collectible virtual items. This Legal Advisory focuses on NFTs and F-NFTs that represent collectible virtual items.

[3] For purposes of this Legal Advisory, the term "digital assets" refers to assets generated and transferred using blockchain or distributed ledger technology, including cryptocurrencies, stablecoins, and non-fungible tokens.

[4] Cryptocurrency is a "digital asset, which may be a medium of exchange, for which generation or ownership records are supported through a distributed ledger technology that relies on cryptography, such as a blockchain." Exec. Order No. 14,067, § (9)(c), 87 Fed. Reg. 14,143 (Mar. 14, 2022). Stablecoins are "a category of cryptocurrencies with mechanisms that are aimed at maintaining a stable value, such as by pegging the value of the

unique; rather, each token of a specific type of cryptocurrency is fundamentally the same as any other token of that cryptocurrency. NFTs, on the other hand, are not identical. Rather, they represent ownership of a specific and unique property or property right.[5]

Because NFTs are "non-fungible" they can be used to represent ownership of a wide variety of properties and property rights, from ownership of unique collectible virtual items (collectible NFTs) to ownership of physical or real property, equity in a company, or even a right to a revenue stream from a business. This Legal Advisory focuses on collectible NFTs that take the form of virtual artwork, music, video files, trading cards, digital real estate, or items in a virtual world.

Ownership of NFTs, including collectible NFTs, can be "fractionalized."[6] Fractionalized NFTs are often referred to as "shards" or "F-NFTs." Through fractionalization, individuals are able to purchase partial ownership of an NFT.[7] Fractionalization allows investment in NFT assets that would otherwise be too expensive to purchase individually.[8] Unlike full ownership, the owner of an F-NFT does not enjoy exclusive use or the full benefits of the underlying NFT.

II. When Financial Disclosure Filers Are Required to Report Ownership of NFTs and F-NFTs

a. NFTs and F-NFTs are Required to be Reported if The NFT or F-NFT is Property Held for Investment or Production of Income or Actually Produces Over $200 of Investment Income

Public financial disclosure filers must disclose an "interest in property held . . . for investment or the production of income" that has a value of $1,000 or more at the end of the

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coin to a specific currency, asset, or pool of assets or by algorithmically controlling supply in response to changes in demand in order to stabilize value." *Id.* § (9)(e).

[5] *See, e.g.*, Lynne Lewis et al., *Non-Fungible Tokens and Copyright Law*, 33 NO. 8 INTELL. PROP. & TECH. L.J. 18 (2021); Katya Fisher, *Once Upon A Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine*, 37 CARDOZO ARTS & ENT. L.J. 629, 631 (2019); 10 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 111:3 (5th ed. 2020); Anskika Bhall, *A Beginner's Guide to* Non-Fungible Tokens, BLOCKCHAIN COUNSEL, INSIGHTS & RESOURCES, https://www.blockchain-council.org/blockchain/a-beginners-guide-to-non-fungible-tokens-nft/ (last visited July 6, 2022);.Werner Vermaak, *What Is a* Non-*F*ungible Token *(NFT)?*, COINMARKETCAP, https://coinmarketcap.com/alexandria/article/what-is-a-non-fungible-token-nft (last visited July 6, 2022).

[6] *See* Karen J. Garnett et al., *NFTs Are Interesting but Fractionalized Non-Fungible Tokens (F-NFTs) May Present Even More Challenging Legal Issues*, PROSKAUER: BLOCKCHAIN & THE L. BLOG (Apr. 22, 2021), https://www.proskauer.com/blog/nfts-are-interesting-but-fractionalized-non-fungible-tokens-f-nfts-may-present-even-more-challenging-legal-issues; *see also* An P. Doan et al., *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, 24 NO. 3 FINTECH L. REP. NL 1 (May/June 2021).

[7] Ekin Genç, *How Can You Share an NFT? Fractional NFTs Explained*, COINDESK.COM (May 6, 2022), https://www.coindesk.com/learn/how-can-you-share-an-nft-fractional-nfts-explained/#:~:text=What%20are%20fractional%20NFTs%3F,shared%20%E2%80%93%20ownership%20of%20an%20NFT.

[8] *See, e.g.*, Filippo Bertocchi, *Fractionalised NFTs—Making Non-Fungible Tokens Affordable*, COINBUREAU (July 31, 2021), https://www.coinbureau.com/defi/fractionalised-nfts/.

reporting period.[9] Filers must also report property that actually produces more than $200 in investment income in the reporting period, even if the filer determined originally that it was not "held for investment or the production of income."

Assets that are held solely for personal, family, or household use are not held for investment or production of income. For example, OGE has previously advised that household furniture or fixtures, personal goods—such as clothing, electronics, or family photos— and perishable items like food and beverages that are purchased and used for personal, family, or household use are not reportable.

On the other hand, OGE has determined that certain assets are always held for investment or production of income. For example, stocks, bonds, investment funds, annuities, and deferred compensation such as a defined contribution or defined benefit plans are all property held for investment or production of income. Cryptocurrencies[10] such as Bitcoin, Litecoin, and Ether have also been determined to be held for investment or production of income.[11]

Other assets may be held for investment or production or income or not, depending on the circumstances. Items like artwork are often owned for display and use within one's home, but also may be purchased as an investment. The same is true of collectibles, such as trading cards or rare coins, as well as items such as cars or jewelry. If these items are purchased for personal, family, or household use, a filer would not be required to report the items on the filer's financial disclosure report. If, however, they are purchased for investment or production of income, they are required to be reported.[12]

b. Whether Collectible NFTs are Property Held for Investment or the Production of Income is a Factual Question

Determining whether any specific collectible NFT is considered held for investment or production of income is a factual question. Financial disclosure filers and agency ethics officials may consider some or all of the following relevant factors:

1. Was the NFT purchased principally for personal or family use or aesthetic reasons? *(If yes, suggests NFT is not held for investment or production of income)*

2. Was the NFT purchased principally for its potential future value? *(If yes, suggests NFT is held for investment or production of income)*

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[9] 5 U.S.C. app. § 102(a)(3); 5 C.F.R. § 2634.301(a). In addition, a public disclosure filer must report the source of any income received during the reporting period, if the income (such as capital gains) exceeded $200. 5 U.S.C. app. § 102(a)(1)-(2); 5 C.F.R. § 2634.302.

[10] OGE has previously used the term "virtual currencies," a term that is technically broad enough to encompass both cryptocurrencies and stablecoins. *See* U.S. OFF. OF GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE GUIDE 203, 334 (2019), https://www.oge.gov/web/oge.nsf/0/11E9ABAF6E128FF1852585B6005A2030/$FILE/Public%20Fin%20Disc%20Guide_Jan2019.pdf [hereinafter OGE PUBLIC FD GUIDE].

[11] OGE Legal Advisory LA-18-06 (June 18, 2018); OGE PUBLIC FD GUIDE, *supra* note 10, at 203.

[12] OGE PUBLIC FD GUIDE, *supra* note 10, at 338.

3. Will the NFT be used by the filer or the filer's family members or displayed in the home, office, or virtual property of the filer or filer's family members?
   (If yes, suggests NFT is not held for investment or production of income)

4. Is the NFT considered rare, expensive, or is it currently highly sought after?
   (If yes, suggests NFT is held for investment or production of income)

5. Did the filer pool resources with other investors or non-family members to purchase the NFT?
   (If yes, suggests NFT is held for investment or production of income)

6. Is the NFT owned by the filer indirectly, for example is it held by a limited liability company or limited partnership?
   (If yes, suggests NFT is held for investment or production of income)

7. Does the filer have a pattern of purchasing and selling collectible NFTs?
   (If yes, suggests NFT is held for investment or production of income)

None of the above factors are dispositive, but must be considered under the totality of the circumstances. To assist agency ethics officials and filers in considering whether any given collectible NFT needs to be reported, OGE is providing the below examples of reportable and non-reportable collectible NFTs:

> Example 1. Employee purchases a limited edition NFT of the artist Leandra Garcia's *Paper Moon*. The original *Paper Moon* is a pastel drawing by Garcia. Garcia offers the original drawing, limited run lithograph prints, and limited run NFTs for sale on her website. Employee purchased the NFT from Garcia for $1,100. Employee intends to display the drawing at home and at work using an NFT digital display frame. Employee purchased the NFT solely because Employee enjoys Garcia's artwork. Employee has no plans to sell the NFT. Under the circumstances, Employee is not holding the NFT for investment or production of income and therefore need not report ownership on their annual financial disclosure report.

> Example 2. Employee purchases a limited edition NFT of the artist Leandra Garcia's *Hieroglyph,* a one-off project that was listed for $55,000. Employee purchased the NFT artwork based on a belief that it will appreciate in value. Employee has previously purchased and sold artwork NFTs and plans to sell the NFT once it has appreciated in value. Under the circumstances, Employee is holding the NFT for investment or production of income and therefore must report ownership on their annual financial disclosure report.

> Example 3. Employee has a hobby of collecting baseball cards. Employee has decided to branch out and purchases thirty NFT baseball cards. These are "common" variations of the cards. The cost for each card was less than $50. Employee has no past history of selling baseball cards or NFTs and intends to keep the NFT baseball cards indefinitely, but may choose to sell them in the future. Under the circumstances, Employee is not

holding the NFTs for investment or production of income and therefore need not report ownership on their annual financial disclosure report.

Example 4. Employee purchases an "ultra-rare" NFT baseball card. The cost of the NFT is $12,600. Employee does not plan on keeping the NFT indefinitely, but rather is hoping that it will appreciate in value so that it can be resold for a profit. Under the circumstances, Employee is holding the NFT for investment or production of income and therefore must report ownership on their annual financial disclosure report.

Example 5. Employee purchases an NFT virtual jacket worth $2,000 for Employee's character in an immersive virtual world (or "metaverse").[13] The jacket is one of a variety of similar jackets sold by a third-party vendor. Although there is a secondary marketplace for virtual jackets in the metaverse, Employee plans on keeping the jacket as part of their personal collection. Under the circumstances, Employee is not holding the NFT for investment or production of income and therefore need not report ownership of the virtual jacket on their annual financial disclosure report.

A collectible NFT that is held for investment or production of income must be reported if the NFT was valued at $1,000 or more at the end of the reporting period. Filers can determine the fair market value of the NFT by reference to prices for similar collectible NFTs (e.g., collectible NFTs produced in the same series) posted to digital-asset trading platforms at the end of the reporting period. Filers may also determine the good faith value based on one of the methods set out in 5 C.F.R. § 2634.301(e).

As noted above, filers must also report collectible NFTs even if they are not "held for investment or the production of income," if they actually produced more than $200 in investment income in the reporting period. For example, an employee who purchased an NFT artwork for display in the employee's home but later decided to sell it would be required to report the NFT as a source of income if the sale resulted in more than $200 in income.

c. F-NFTs are Almost Always Held for Investment or Production of Income and Therefore Must Generally be Reported

F-NFTs will almost always be property held for investment or the production of income. Therefore, absent extraordinary cases, filers must report their ownership of F-NFTs if they are valued at over $1,000 at the end of the reporting period. Likewise, filers must report income from F-NFTs that exceeds $200 in the reporting period. Filers who believe that their specific F-NFT is not property held for investment or production of income should consult with an agency ethics official.

Example 1. Employee has purchased four F-NFTs that each represent a 10% share in artist Leandra Garcia's one-off project *Pictograph #7*. Each F-NFT is currently valued at $3,000. The F-NFTs constitute property held for investment or production of income and therefore must be reported on Employee's annual financial disclosure report.

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[13] Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 101 (2005) (providing background on the concept of the "metaverse").

III. When Financial Disclosure Filers Are Required to Report the Purchase, Sale, or Exchange of Collectible NFTs and F-NFTs

a. Public Financial Disclosure Filers Are Required to Report Transactions of Securities

Public financial disclosure filers are required to report, using the Periodic Transaction report form (OGE Form 278-T), the purchase, sale, or exchange of "stocks, bonds, commodities futures, and other forms of securities" that exceed $1,000.[14]Filers must disclose transactions of securities within 30 days of receiving confirmation of the transaction, but in no case later than 45 days from the date of the transaction.[15] A purchase, sale, or exchange of securities is also reportable on an Annual or Termination report form (OGE Form 278e), unless that transaction has previously been reported on a Periodic Transaction report.

The term "securities" is not defined in the Ethics in Government Act. As a result, OGE has interpreted the term as used in the public financial disclosure provisions of the Ethics in Government Act consistently with Federal securities laws, such as the Securities Act of 1933 and the Securities Exchange Act of 1934.[16] For purposes of the Federal securities laws, the determination of whether a particular digital asset is a "security" depends on the facts and circumstances.[17]

b. Transactions of Collectible NFTs and F-NFTs are Required to be Reported if the NFT or F-NFT is a Security

Public financial disclosure filers must report the purchase, sale, or exchange of a collectible NFT or F-NFT if the NFT or F-NFT is a security. Whether any given collectible NFT or F-NFT qualifies as a security is a fact-based determination. Because the status of collectible NFTs and F-NFTs as securities is a matter of securities law outside of OGE's jurisdiction, neither OGE nor agency ethics officials are authorized to provide advice as to whether any given collectible NFT or F-NFT is a security. Filers who are planning to purchase, sell, or exchange collectible NFTs or F-NFTs valued at over $1,000 may wish to consult with a financial advisor or securities attorney.

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[14] 5 U.S.C. app. §§ 103(*l*), .102(a)(5)(B); 5 C.F.R. §§ 2634.201(f), .303. Confidential disclosure filers are not required to disclose purchases, sales, and exchanges of securities, unless an agency has adopted supplemental financial disclosure requirements. *See* 5 C.F.R. § 2634.907 (describing confidential financial disclosure contents).

[15] 5 U.S.C. app. § 103(*l*); 5 C.F.R. § 2634.309(a).

[16] OGE's regulations establishing exemptions from the criminal conflict of interest law, 18 U.S.C. § 208(a), found at 5 C.F.R. part 2640, refer to "publicly traded securities," which constitute a narrower subset of assets than would qualify as securities for purposes of the Federal securities laws or the financial disclosure laws. OGE Legal Advisory LA-22-04 (July 6, 2022).

[17] *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946); SECURITIES AND EXCHANGE COMMISSION, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn1.

IV. How Filers Should Report NFT and F-NFT Ownership and Transactions

Public financial disclosure filers[18] must include, on a report using the OGE Form 278e, a brief description of any interest held in NFTs and F-NFTs held for investment or production of income that exceed $1,000 in value at the end of the reporting period or that produce income over $200 during the reporting period.[19] The filer must provide a "full and complete" description of the NFT or F-NFT, which can be accomplished by identifying the name of the asset; that the digital asset is an NFT or F-NFT; and, if held through an exchange or platform, the exchange or platform on which it is held. Collectible NFTs should be marked as N/A in the "Excepted Investment Fund" column.[20] Filers should provide the value of the collectible NFT or F-NFT as well as amount of income received (if any) and the type of income (if any). The sample below shows two entries for a collectible NFT that is currently held, an NFT that was sold with capital gains in the reporting period, and an F-NFT that is currently held.

a. Sample OGE Form 278e Part 6 Entry

#	Description	EIF	Value	Income Type	Income Amount
1	"Hieroglyph," NFT Artwork (Trust Wallet account)	N/A	$50,001-$100,000		None (or less than $201)
2	K.C. Apple, *Frisbee Sports* Ultra Rare Collectible Card NFT (MetaMask account)	N/A	None (or less than $1,001)	Capital gains	$201 - $1,000
3	"MiniCryptoWerewolf" (F-NFT representing 1% stake in "CryptoWerewolf" NFT) (Coinbase account)	N/A	$1,001- $15,000		None (or less than $201)

Public financial disclosure filers must report the purchase, sale, or exchange of collectible NFTs or F-NFTs that are securities when the value of the transaction is over $1,000. Public financial disclosures are not required to report the purchase, sale, or exchange of collectible NFTs of F-NFTs that are not securities.

Filers should report sales, purchases, and exchanges of collectible NFTs and F-NFTs using the OGE Form 278-T. Filers should provide a brief description of the collectible NFT or F-NFT, the type of transaction, the date of the transaction, and the amount of the transaction. Filers who use money to purchase or sell a collectible NFT or F-NFT that is a security are treated as having engaged in a "purchase" or "sale." Filers who trade cryptocurrencies, stablecoins, or other

[18] Agency ethics officials assisting confidential financial disclosure filers should modify the guidance provided herein to ensure confidential disclosures report only that information required by 5 C.F.R. § 2634.907.
[19] Public filers should generally report collectible NFT and F-NFT interests on Part 6 of the OGE Form 278e. If the collectible NFT or F-NFT is related to the filer or filer's spouse's current, former, or prospective outside employment, it should be reported instead on Part 2 or 5, respectively. Confidential filers should report collectible NFT and F-NFT interests in Part I of the OGE Form 450.
[20] It is possible that certain NFTs and F-NFTs may be structured as investment funds, in which case a filer must determine whether the NFT or F-NFT constitutes an Excepted Investment Fund and mark the correct category on the OGE Form 278e. Employees who own such assets are encouraged to consult with an ethics official.

digital assets for collectible NFTs or F-NFTs are treated as having engaged in an "exchange."[21] An employee must report an exchange when at least one of the exchanged assets is a security, and should note the cryptocurrency, stablecoin, or other digital asset used to acquire the collectible NFT or F-NFT. The below sample represents the purchase of one collectible NFT and the exchange of one F-NFT for cryptocurrency. The received asset should be listed first.

b. Sample OGE Form 278-T Report

#	Description	Type	Notification Received Over 30 Days Ago	Date	Amount
1	"Hieroglyph," NFT Artwork (Trust Wallet account)	Purchase		11/12/2022	$50,001-$100,000
2	"MiniCryptoWerewolf" (F-NFT representing 1% stake in "CryptoWerewolf" NFT) (Coinbase account) (received in exchange for ether (ETH))	Exchange	Yes	11/12/2022	$15,001 - $50,000

V. Conclusion

Collectible NFTs and F-NFTs are relatively new types of digital assets. OGE will continue to evaluate advances in digital asset technology and changes to the regulatory environment as they arise and may modify this guidance as appropriate in the future. Agency ethics officials who have questions concerning this Legal Advisory should contact their OGE Desk Officer.

[21] I.R.S. Publ'n 544 (Feb. 16, 2022).

September 27, 2023
LA-23-12

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson
Acting Director

SUBJECT: Identifying and Preventing Violations of 18 U.S.C. § 208 Arising from Digital Asset Ownership

The U.S. Office of Government Ethics ("OGE") is issuing this Legal Advisory to assist agency ethics officials in identifying when an employee has a disqualifying financial interest under 18 U.S.C. § 208 arising from ownership of digital assets.[1] As described further below, this Legal Advisory explains that an employee who owns digital assets will have a disqualifying financial interest in a particular matter when there is a real possibility that the matter will result in a gain or loss to the employee's digital assets. Given the enhanced risk of possible conflicts of interest, this Legal Advisory also describes steps agency ethics officials are encouraged to take to proactively assist employees who are regularly assigned to work on particular matters involving digital assets.

I. Disqualifying Financial Interests under 18 U.S.C. § 208(a)

Section 208(a) prohibits an employee from "participat[ing] personally and substantially as a Government officer or employee . . . in a . . . particular matter . . . in which, to [the employee's] knowledge, [the employee] has a financial interest." As the implementing regulations explain, "the term financial interest means the *potential* for gain or loss . . . as a result of governmental action on the particular matter."[2] Because "[t]he statute is . . . directed not only at dishonor, but also at conduct that tempts dishonor,"[3] it reaches any particular matter in which

[1] For purposes of this Legal Advisory, the term "digital assets" (also known as "crypto assets") refers to any digital representation of value generated and transferred using blockchain or distributed ledger technology, including assets commonly known as "cryptocurrencies," "stablecoins," and "non-fungible tokens" ("NFTs"). *See, e.g.,* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 8003(b)(1)(B), 135 Stat. 429, 1340 (2021) (to be codified at 26 U.S.C. § 6045(g)(3)(D)).
[2] 5 C.F.R. § 2640.103(b) (emphasis added).
[3] *United States v. Nevers*, 7 F.3d 59, 62 n. 7 (5th Cir. 1993) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961)).

the "temptation to put a finger on the scale" exists because the "employee has a financial reason to prefer a particular outcome."[4]

Under longstanding executive branch interpretation,[5] an employee is disqualified from participating in a particular matter when there is a direct and predictable "link between [the] governmental matter and a pecuniary gain or loss to the employee or specified entity."[6] As described in OGE's implementing regulations, a "direct" effect exists where "there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest."[7] Although a "direct" effect need not be immediate, the chain of causation cannot be "attenuated or . . . contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter."[8] Additionally, the effect must be "predictable," meaning there is a "*real*, as opposed to speculative, possibility that the matter will affect the financial interest."[9]

Under the "direct and predictable effect" test, "[g]ain or loss need not be probable for the prohibition against official action to apply."[10] Rather, an employee is required to recuse as soon as they are aware there is a "real [as opposed to speculative] possibility of gain or loss as a result of developments in or resolution of [the] matter."[11]

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[4] *Financial Interests of Nonprofit Organizations for Purposes of 18 U.S.C. § 208*, 30 Op. O.L.C. 64, 80 (2006).
[5] *See, e.g., Memorandum for the Heads of Executive Departments and Agencies from the President*, 28 Fed. Reg. 4,539, 4,543 (May 7, 1963) (establishing that an employee is disqualified from a matter when the matter could directly and predictably affect their interests); *Ethics Issues Raised by Retention and Use of Flight Privileges by FAA Employees*, 28 Op. O.L.C. 237, 240 (2004) ("The 'direct and predictable effect' requirement reflects the longstanding view of this Office."); *see also United States v. White Eagle*, 721 F.3d 1108, 1119 (9th Cir. 2013) ("While an employee need not personally stand on either side of an underlying transaction, the link between the employee's interest and the public act must be direct and predictable.").
[6] *Financial Interests of Nonprofit Organizations*, 30 Op. O.L.C. at 67; *see also* 5 C.F.R. § 2640.103(a)(3)(ii) (describing that whether a financial interest arises directly from a matter is based on the "chain of causation" and "expected effect of the matter on the financial interest"); *id.* § 2635.402(b)(1); *Ethics Issues Raised by Retention and Use of Flight Privileges by FAA Employees*, 28 Op. O.L.C. at 240 ("To constitute a disqualifying financial interest in a matter, the OGE regulations explain, a governmental matter must have more than a mere potential to affect the employee financially; rather, there must be 'a direct and predictable effect.'").
[7] 5 C.F.R. §§ 2635.402(b)(1), 2640.103(a)(3).
[8] 5 C.F.R. §§ 2635.402(b)(1)(i), 2640.103(a)(3)(i).
[9] 5 C.F.R. §§ 2635.402(b)(1)(ii) (emphasis added), 2640.103(a)(3)(ii).
[10] *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986) *cert. denied*, 484 U.S. 815 (1987). As OGE said in 1995, "[t]he statute does not require that the amount of gain or loss be of any particular size, *or likelihood*." 60 Fed. Reg. 47,208, 47,209 (Sept. 11, 1995) (emphasis added).
[11] *Gorman,* 807 F.2d at 1303; *Air Line Pilots Ass'n, Int'l v. U.S. Dep't of Transp.*, 899 F.2d 1230, 1232 (D.C. Cir. 1990). *See also* 5 C.F.R. § 2640.103(a)(3)(ii); *United States v. Mississippi Valley Generating Co*., 364 U.S. 560 (1961) ("[T]he question is not whether [the employee] was certain to benefit from [participating in] the contract, but whether the likelihood that he might benefit was [s]o great that he would be subject to those temptations which the statute seeks to avoid. That there was more than a mere likelihood in this case has already been shown."); *Conflict of Interest—Financial Interest (18 U.S.C. § 208)—Husband and Wife*, 3 Op. O.L.C. 236, 238 (1979) (stating that employee would need to recuse "if a situation [arose] in which the outcome of a matter might have a direct and predictable effect on his income from the union or on any other personal financial interest").

II. Relevant Characteristics of Digital Assets

Determining whether a particular matter may result in a financial gain or loss to the value of an employee's digital assets can be challenging, and ethics officials often must undertake a highly fact-intensive analysis, given the following characteristics of digital assets and the digital asset marketplace:

First, there are no generally accepted standards that apply to classifying digital assets. Although digital assets are often classified within broad categories, such as "stablecoins," "cryptocurrencies," or "NFTs," it is often the case that digital assets within those categories have significant differences from each other.[12] As a result, employees cannot treat all cryptocurrencies, stablecoins, or NFTs the same. Second, information about material risks to digital asset values often is not easily accessible to normal investors. Information that is available, such as whitepapers created by the developers of a token, may not contain negative information or investment risks.[13] Moreover, digital assets that are not registered under the Federal securities laws are not required to provide publicly available prospectuses that would disclose information concerning material risks to the asset and its value.[14] As a result, research shows that investors often base their decisions on public and market sentiment.[15] Third, digital asset values are highly volatile and vulnerable to significant price fluctuations.[16] Over the past

[12] For example, although many digital assets are labeled "stablecoins" – which suggests they try to maintain consistent values – there is significant variety in how such digital assets attempt to do so. While some stablecoins claim to be backed by off-chain reserves such as cash or commodities, others may not be backed by any off-chain assets, and others may claim to maintain price stability by other mechanisms. *See* Garth Baughman, et al., *The Stable in Stablecoins*, FEDS NOTES (Dec. 16, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/the-stable-in-stablecoins-20221216.html.

[13] *See* FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON DIGITAL ASSET FINANCIAL STABILITY RISKS AND REGULATION 28 (2022), https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf (explaining that disclosures by crypto-asset promoters "may lack information that is commonly relied upon for valuing investments, such as the rights of holders and obligations of issuers, information about the management team, a project plan or timeline, financial statements, or disclosures about funding sources"); Shuyu Zhang, et al., *Positive Tone and Initial Coin Offering*, 62 ACCT. & FIN. 2237 (2021).

[14] Digital assets may be securities for purposes of Federal securities laws. *See, e.g.,* SEC. & EXCH. COMM'N, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_ednref9.

[15] *See* Jose Almeida & Tiago Cruz Goncalves, *A Systematic Literature Review of Investor Behavior in the Crypotcurrency Markets*, 37 J. BEHAV. & EXPERIMENTAL FIN. (2023), https://www.sciencedirect.com/science/article/pii/S2214635022001071#b197.

[16] *See* FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 13, at 23, 28.

few years, digital assets across the marketplace have demonstrated a susceptibility to speculative bubbles and to financial contagion.[17]

III. Determining Whether Digital Assets Pose a Disqualifying Financial Interest

Employees' ownership of digital assets may present conflicts for their work, similar to other investment property.[18] Accordingly, employees must consider whether their "official duties would have an effect on the value of their virtual currency, just as they would any other property held for investment or the production of income."[19] Given the relevant characteristics of digital assets discussed above, determining whether recusal is required from any given particular matter will require a consideration of all relevant facts and circumstances. Although OGE is not able to prospectively provide bright line rules, OGE is providing the following general guideposts, based on consultations with agency ethics officials, as to when an employee might have a disqualifying financial interest in a particular matter:

First, an employee who owns digital assets will often have a disqualifying financial interest in a particular matter of general applicability[20] that would establish new regulatory requirements for all digital assets, or a subset of digital assets that includes digital assets owned by the employee.[21] That employee would also typically have a disqualifying financial interest in any particular matter that would increase, prohibit, or impair the marketability of all digital assets, or a subset of digital assets that includes digital assets owned by the employee.

> **Example 1:** A policy analyst in the Treasury Department is asked to assist in drafting a proposed regulation that would prevent the sale, purchase, or exchange of certain digital assets absent a permit. The analyst owns *Digital Asset XYZ*. If adopted, the regulation would functionally prohibit all transactions of *Digital Asset XYZ* in the United States. Because the regulation poses a realistic possibility of impacting the value of the analyst's *Digital Asset XYZ*, they are required to recuse from this particular matter unless they first divest of *Digital Asset XYZ*, or receive a waiver under 18 U.S.C. § 208(b)(1).

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[17] Pablo D. Azar, et al., *The Financial Stability Implications of Digital Assets*, FIN. & ECON. DISCUSSION SERIES (Aug. 2022), https://www.federalreserve.gov/econres/feds/the-financial-stability-implications-of-digital-assets.htm; *see* BD. GOVERNORS FED. RSRV. SYS., FED. DEPOSIT INS. CORP., & OFF. COMPTROLLER CURRENCY, JOINT STATEMENT ON CRYPTO-ASSET RISKS TO BANKING ORGANIZATIONS (Jan. 3, 2023), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20230103a1.pdf (warning of "[c]ontagion risk within the crypto-asset sector").

[18] OGE Legal Advisory LA-18-06, at 4 (June 18, 2018). *See also* OGE Legal Advisory LA-22-04, at 2 (July 5, 2022).

[19] OGE Legal Advisory LA-18-06, at 4. OGE has previously used the term "virtual currencies" to refer to certain digital assets, such as cryptocurrencies and stablecoins. *See*, *e.g.*, U.S. OFF. GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE GUIDE 203, 334 (2019), https://www.oge.gov/web/OGE.nsf/Resources/Public+Financial+Disclosure+Guide+(2019).

[20] *See* 5 C.F.R. § 2640.102(m) (defining "particular matter of general applicability" as a "particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties").

[21] *See, e.g.,* Ahmed Choker and Elise Alferi, *Long and Short-Term Impacts of Regulation in the Cryptocurrency Market*, 81 Q. REV. ECON. & FIN. 157 (2022) (finding that increased possibility of regulation of cryptocurrency markets is associated with decreased cryptocurrency values).

Second, an employee who owns a digital asset will not generally have a disqualifying financial interest in a particular matter involving specific parties, such as an enforcement action, merely because the particular matter may result in the forfeiture, freezing, or repatriation of another user's tokens of the same digital asset. In these cases, the financial impact of the particular matter will generally be limited to the subject of the action.[22]

> **Example 2:** An employee in the Department of Justice's Asset Forfeiture Program is part of a team that is initiating proceedings to seize the assets of an alleged drug dealer. The drug dealer's assets include *Bitcoin* with a total value of approximately $150,000, which is an extremely small amount of all *Bitcoin* in the market. The employee also owns *Bitcoin*. Because the discrete seizure of the alleged drug dealer's *Bitcoin* poses no realistic possibility of moving the market price of *Bitcoin*, the employee is not prohibited from participating in the seizure.

On the other hand, employees should be mindful that certain enforcement matters may involve issues that could impact all, or a substantial subset of all, digital assets.[23] Employees who own digital assets should recuse from such particular matters, unless it is clear the matter will not affect the value of their digital assets. Similarly, employees should be mindful that enforcement matters that involve a substantial percentage of a single digital asset may impact the value of all tokens of that digital asset, and in some cases might also affect the value of other digital assets in the marketplace.[24]

> **Example 3:** An attorney with the Securities and Exchange Commission ("SEC") is asked to work on an enforcement action claiming Company Z is operating as an unlicensed securities broker. The case is the first of its kind. If the SEC were to win, it is expected that it would affect the liquidity of most digital assets, including *Digital Asset XYZ*. The attorney owns *Digital Asset XYZ*. Because there is a realistic possibility that the case could impact the value of *Digital Asset XYZ*, the attorney is required to recuse from this particular matter unless they first divest of the asset, or receive a waiver under 18 U.S.C. § 208(b)(1).

> **Example 4:** An employee of the Department of Homeland Security is part of a task force focused on illegal drug trafficking activities. As part of the employee's duties, they work with the Department of Justice to prepare court documents seeking to freeze the digital asset accounts of a drug cartel. The cartel is estimated to own or control over 8.57% of

[22] *See* 5 C.F.R. § 2635.402(b)(1), note ("If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party . . . .").
[23] *See, e.g., In re Munchee Inc.*, S.E.C. Release No. 10445 (Dec. 11, 2017) (finding that digital assets offered in an Initial Coin Offering were securities).
[24] The risk that digital assets other than those subject to the enforcement action might be affected by the action will depend on a number of factors, including, for example, whether the assets are issued by the same issuer, operate over the same blockchain, or have similar functions or characteristics.

circulating tokens of *Digital Asset XYZ*.[25] The employee owns *Digital Asset XYZ*. Seizure of such a significant number of tokens presents a realistic possibility of affecting the value of the employee's *Digital Asset XYZ*. As such, they are required to recuse from this particular matter unless they first divest of the asset, or receive a waiver under 18 U.S.C. § 208(b)(1).

Beyond these general guideposts, whether an employee has a disqualifying financial interest arising from digital asset holdings depends heavily on the individual facts and circumstances of the particular matter.[26] As such, employees who own digital assets must exercise caution prior to participating in any particular matter focused on digital assets or digital asset-related individuals or entities.

IV. Proactive Steps Agencies Can Take to Avoid Conflicts of Interest

While a case-by-case analysis is appropriate for many employees who own digital assets, certain employees are at a heightened risk of having financial conflicts of interest arising from digital asset ownership because of the nature of their duties. OGE encourages agencies to proactively identify those employees who are assigned duties focusing on digital asset policy, regulation, enforcement, or investigation. For these employees, agencies should consider establishing appropriate controls to reduce their risk of a conflict of interest. This could include screening arrangements, setting limits on the types of particular matters the employee will be able to participate in, or directed and voluntary divestiture from those categories of digital assets likely to be the focus of, or affected by, the employee's official duties.[27] In particular, OGE reminds agency ethics officials that they may direct divestiture by an individual employee if digital asset ownership would require disqualification from "matters so central or critical to the performance of [the employee's duties]" that the employee's ability to perform the duties of their position would be "materially impaired."[28]

Agency ethics officials with questions regarding this Legal Advisory or the application of section 208 to digital asset holdings are encouraged to contact their OGE Desk Officer.

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[25] Ethics officials will need to assess the actual facts and circumstances of each case to determine the likelihood that an enforcement action involving a substantial amount of a digital asset will have a realistic possibility of affecting the value of an employee's digital asset holdings.

[26] Ethics officials should also keep in mind that employees may have stock, equity, or debt interests in digital asset-related companies or financial products. For example, employees may own stock in companies that are part of the digital asset sector, such as trading platforms or digital asset mining companies. In such cases, ethics officials should review the facts and circumstances of the particular matter to determine whether a realistic possibility of a financial gain or loss to the company exists in the same manner they would for other similar stock and equity interests. OGE Legal Advisory LA-20-03 (May 1, 2020).

[27] *See* 5 C.F.R. §§ 2635.403(d), 2638.104(c)(6); OGE Inf. Adv. Op. 92x12, at 2 (Mar. 17, 1992). Employees who divest digital assets to ensure compliance with Federal ethics statutes or regulations may be eligible for a certificate of divestiture for capital gains resulting from the required divestiture. *See* 26 U.S.C. § 1043; 5 C.F.R. pt. 2634, subpt. J.

[28] 5 C.F.R. § 2635.403(b)(1). Additionally, 5 C.F.R. § 2635.403(b)(2) permits agencies to "prohibit or restrict an individual employee from acquiring or holding a financial interest" if the holding of that interest would "[a]dversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified."

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

January 31, 2024
LA-24-02

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson
Acting Director

SUBJECT: Bitcoin Exchange-Traded Products

On January 10, 2024, the Securities and Exchange Commission ("SEC") approved the listing and trading of a number of spot Bitcoin exchange-traded products ("Bitcoin ETPs").[1] The U.S. Office of Government Ethics ("OGE") is issuing this Legal Advisory to advise that these Bitcoin ETPs (1) are not covered by the mutual fund exemptions found at 5 C.F.R. § 2640.201; (2) are not covered by the exemptions for certain publicly traded securities found at 5 C.F.R. § 2640.202; and (3) are Excepted Investment Funds ("EIFs")[2] for purposes of public and confidential financial disclosure reporting. The conclusions found in this Legal Advisory are limited to the Bitcoin ETPs listed below or other similarly structured investments.[3]

I. Background

The SEC recently approved three national securities exchanges—NASDAQ, NYSE Arca, and Cboe BZX—to list and trade shares of the following Bitcoin ETPs:

- Grayscale Bitcoin Trust
- Bitwise Bitcoin ETF
- Hashdex Bitcoin ETF (a series of Tidal Commodities Trust I)
- iShares Bitcoin Trust
- Valkyrie Bitcoin Fund
- ARK 21Shares Bitcoin ETF
- Invesco Galaxy Bitcoin ETF
- VanEck Bitcoin Trust

[1] Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Securities Exchange Act Release No. 34-99306 (Jan. 10, 2024), https://www.sec.gov/files/rules/sro/nysearca/2024/34-99306.pdf.
[2] The definition of Excepted Investment Fund is found in both the public and confidential financial disclosure regulations. *See* 5 C.F.R. §§ 2634.309(b)(2), .312(c), .907(i)(3).
[3] The conclusions found in this Legal Advisory relating to the status of the Bitcoin ETPs for purposes of the ethics laws have no bearing on the status of these assets for any other law, including the Federal securities laws.

- WisdomTree Bitcoin Fund
- Fidelity Wise Origin Bitcoin Fund
- Franklin Bitcoin ETF (a series of Franklin Templeton Digital Holdings Trust)[4]

These Bitcoin ETPs are established as Delaware Statutory Trusts (or as a series of Delaware Statutory Trusts) that invest principally in Bitcoin.[5] Each share of the respective Bitcoin ETP represents a fractional undivided beneficial interest in the ETP. Shares of these Bitcoin ETPs are securities for purposes of the securities laws, such as the Securities Act of 1933 and the Securities Exchange Act of 1934 ("1934 Act"). Although each of the above Bitcoin ETPs uses the terms "fund," "ETF," or "trust" in their product names, none are currently registered under the Investment Company Act of 1940 ("1940 Act").

II. Discussion

A. The Bitcoin ETPs are not covered by the mutual fund exemptions found at 5 C.F.R. § 2640.201

OGE has created several regulatory exemptions to the financial conflict of interest prohibition found at 18 U.S.C. § 208 for disqualifying financial interests arising from ownership of investment companies, such as mutual funds and unit investment trusts.[6] To qualify for these exemptions, the fund or trust must be registered under the 1940 Act.[7]

None of the Bitcoin ETPs listed above are currently registered under the 1940 Act. As a result, the exemptions for mutual funds found at 5 C.F.R. § 2640.201 are not available for any of the Bitcoin ETPs. Any individual Bitcoin ETP will not qualify for the mutual fund exemptions unless and until such time as it registers as an investment company under the 1940 Act.

B. The Bitcoin ETPs are not covered by the exemptions for certain publicly traded securities found at 5 C.F.R. § 2640.202

OGE has also created several exemptions to the financial conflict of interest prohibition found at 18 U.S.C. § 208 for disqualifying financial interests arising from ownership of certain publicly traded securities.[8] To qualify for these exemptions, a financial asset must both be publicly traded[9] and must qualify as one of the enumerated securities listed in 5 C.F.R.

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[4] Order Granting Accelerated Approval of Proposed Rule Changes, *supra* note 1.
[5] Although Hashdex Bitcoin ETF was included in the approval referenced above, it currently does not invest in Bitcoin but rather in Bitcoin futures. All information related to the structure of the Bitcoin ETPs is derived from their registration statements, available through the SEC's public Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") database at https://www.sec.gov/edgar.
[6] *See* 5 C.F.R. § 2640.201(a)-(d).
[7] *Id.* § 2640.102(k), (u).
[8] *See id.* § 2640.202(a)-(d).
[9] *Id.* § 2640.102(p). A "security" is "publicly traded" if it is:

> (1) Registered with the Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) and listed on a national or regional securities exchange or traded through NASDAQ;

§ 2640.102(r). The only covered securities are "common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest" as well as "'mutual fund[s]' for [the limited] purposes of § 2640.202(e) and (f) and § 2640.203(a)."[10] Other securities, even those registered with the SEC and traded on national securities exchanges, are not covered by the publicly traded securities exemptions.[11]

Although Bitcoin ETP shares are publicly traded, registered under the 1934 Act, and are securities for purposes of the securities laws, they do not meet OGE's regulatory definition of a "security" set out at 5 C.F.R. § 2640.102(r). As a result, shares in the Bitcoin ETPs are not eligible for the publicly traded security exemptions at 5 C.F.R. § 2640.202.

C. The Bitcoin ETPs are considered Excepted Investment Funds (EIFs) for financial disclosure purposes

Public and confidential financial disclosure filers are obligated to report the underlying holdings of a "trust or other financial arrangement" in which they have a "beneficial interest."[12] In addition, public financial disclosure filers must generally disclose the purchase, sale, or exchange of "stocks, bonds, commodity futures, and other forms of securities"[13] within 30 days of notification, but no later than 45 days after the transaction occurs.[14] These requirements do not apply to EIFs.[15] To be an EIF, an investment fund must be (1) independently managed; (2) widely held; and (3) either (a) publicly traded, (b) publicly available, or (c) its assets must be widely diversified.[16]

The Bitcoin ETPs are pooled investment vehicles that provide investors with indirect exposure to Bitcoin. Because shares of Bitcoin ETPs are publicly traded, widely held, and in almost all cases will be considered independently managed, OGE has determined that these

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(2) Issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940, as amended (15 U.S.C. 80a–8); or

(3) A corporate bond registered as an offering with the Securities and Exchange Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) and issued by an entity whose stock is a publicly traded security.

[10] *Id.* § 2640.102(r).

[11] For example, OGE has advised that warrants, options, futures contracts, and other securities not listed in 5 C.F.R. § 2635.102(r) are not eligible for the publicly traded securities exemptions found at 5 C.F.R. § 2635.102(p). *See* U.S. OFF. OF GOV'T ETHICS, CONFLICTS OF INTEREST CONSIDERATIONS: ASSETS 6 n.7, 12, 16 (2021), https://www.oge.gov/web/OGE.nsf/0/25DFFA704AC2BA8C852585B6005A1F8A/$FILE/Assets.pdf.

[12] 5 C.F.R. §§ 2634.312(a), .907(i)(1)(i).

[13] As OGE has previously advised, the term "securities" as used in the financial disclosure reporting laws and regulations is understood to track the broad definition of "security" used in the Federal securities laws. *See* OGE Legal Advisory LA-18-06, at 3-4 (June 18, 2018). "The definition of 'security' for purposes of the securities laws [and the financial disclosure laws] . . . is significantly broader than the definition of 'publicly traded security' used in 5 C.F.R. § 2640.102(p)." OGE Legal Advisory LA-22-04, at 2 n.8 (July 5, 2022). Bitcoin ETPs fall within the broader definition of security as used in the financial disclosure regulations.

[14] 5 C.F.R. § 2634.310(d).

[15] *Id.* §§ 2634.309(b)(2), .312(c), .907(i)(3). While the periodic reporting requirement for securities transactions does not apply to EIFs, purchases, sales, and exchanges of EIFs must still be reported on a public financial disclosure filer's next annual or termination report. *Id.* § 2634.301(b).

[16] *Id.* §§ 2634.312(c), .907(i)(3).

Bitcoin ETPs are eligible to be treated as EIFs for purposes of public and confidential financial disclosure reporting.[17]

III. Conclusion

As described above, the Bitcoin ETPs discussed in this Legal Advisory will not qualify for the financial conflict of interest exemptions that exist for mutual funds and certain publicly traded securities. These Bitcoin ETPs do, however, qualify as EIFs for purposes of the financial disclosure laws. The above guidance is based on the facts as they currently exist and may change if the underlying facts change. Agency ethics officials will need to separately analyze any other cryptocurrency and cryptocurrency-related products to determine whether they qualify for one or more exemptions listed in 5 C.F.R. part 2640 or as EIFs. Further discussion of the application of the 5 C.F.R. part 2640 exemptions to cryptocurrency and cryptocurrency-related products can be found in OGE Legal Advisory LA-22-04.[18]

Agency ethics officials who have questions about this Legal Advisory may contact their OGE Desk Officer.

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[17] Note that a Bitcoin ETP will not be an EIF to any filer who "exercises control over [or] has the ability to exercise control over the financial interests held by" the ETP. *See id.* §§ 2634.312(c)(2)(ii), .907(i)(3)(ii)(B).
[18] OGE Legal Advisory LA-22-04 (July 5, 2022).