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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Real Estate Investment Trusts, Master Limited Partnerships, and Business Development Companies: Financial Disclosure Reporting and Conflicts of Interest Considerations

This Legal Advisory briefly describes Real Estate Investment Trusts (REITs), Master Limited Partnerships (MLPs), and Business Development Companies (BDCs), and provides guidance on the financial disclosure reporting requirements and conflicts of interest analysis applicable to each of these assets. Ethics officials should consider REITs and MLPs as operating businesses and BDCs as investment funds, and report and analyze them accordingly. The appendices to this document serve as a quick reference for disclosure guidance and conflicts of interest analysis for these assets.

I. Introduction

REITs, MLPs, and BDCs can cause confusion for purposes of disclosure and conflicts of interest analysis because they all have underlying holdings and share some characteristics with both operating businesses and investment funds.¹ Operating businesses make goods or provide services to clients or customers. Investment funds finance operating business and invest in other assets rather than operating the asset as a business. Disclosure of REITs, MLPs, and BDCs turns on two questions. First, is the asset an operating business or an investment fund? Second, if it is an investment fund, does it qualify as an excepted investment fund (EIF)? The first question will be answered by this Legal Advisory. The second question is resolved by ethics officials on an asset-by-asset basis, but this Legal Advisory will provide disclosure guidance for each possible outcome.

¹ These assets may be referred to as “pooled investment funds” in the financial community.



Ethics officials also will need to complete a conflicts of interest analysis for these assets and determine if the *de minimis* securities exemptions² or the mutual fund exemptions³ apply. This Legal Advisory will indicate which exemptions can be considered for each type of asset, and ethics officials should analyze each relevant asset to determine if it qualifies for a particular exemption.

II. Financial Disclosure Reporting and Conflicts Analysis for Real Estate Investment Trusts, Master Limited Partnerships, and Business Development Companies

A. Real Estate Investment Trusts

a. Definition

A REIT is a specific type of real estate holding company, which owns or finances income-producing real estate or mortgages. They are organized as corporations with at least 100 investors⁴ and can be publicly traded or privately held. In addition, REITs may focus on the ownership of properties in a particular property sector, such as shopping malls or office buildings, or they may focus on ownership of properties in a range of different sectors.

Although REITs are a type of real estate holding company, they have specific legal requirements that distinguish them from other real estate holding companies. In particular, REITs are required to derive at least 75% of their gross income from rents generated by real property, interest on mortgages financing real property, or from sales of real estate.⁵ The Investment Company Act of 1940 (1940 Act) excludes an entity that is primarily engaged in “purchasing or otherwise acquiring mortgages and other liens on or interests in real estate” from the definition of “investment company”⁶ and, as a result, REITs will never qualify as mutual fund.⁷ Because of

² 5 C.F.R. § 2640.202(a)-(c). To qualify under the securities exemptions, an asset must be a “publicly traded security” as that term is defined at 5 C.F.R. § 2640.102(p), which references the Securities Exchange Act of 1934 in its requirements. A “publicly traded security” must meet one of the following criteria:

1. Be registered under the Securities Exchange Act of 1934 (Exchange Act) and listed on a national or regional securities exchange;
2. Be issued by an “investment company” as defined by the Investment Company Act of 1940 (the 1940 Act); or
3. Be a corporate bond registered under the Exchange Act that is issued by an entity whose stock is a publicly traded security.

³ 5 C.F.R. § 2640.201. To qualify for either of these two mutual fund exemptions at 5 C.F.R. § 2640.201, an entity must first be a “mutual fund” as that term is defined at 5 C.F.R. § 2640.102(k). A mutual fund is defined, in pertinent part, as “an entity which is registered as a management company under the 1940 Act,” and includes “open-end” and “closed-end” mutual funds and “registered money market funds.” Many investment funds or “pooled investment funds” are not registered under the 1940 Act and, as a result, the fund will not qualify for either mutual fund exemption.

⁴ See SEC. & EXCH. COMM’N, INVESTOR BULLETIN: REAL ESTATE INVESTMENT TRUSTS (REITS) (2011), <https://www.sec.gov/files/reits.pdf>.

⁵ See *id.*

⁶ 15 U.S.C. § 80a-3(c)(5)(C).

⁷ See *supra* note 3.

these legal requirements, OGE views REITs as operating businesses engaged in the real estate industry, rather than funds that have underlying holdings.

For identification purposes, REITs often have the acronym “REIT” or the word “Trust” in the title of the asset. The name of the asset, however, is not dispositive. Mutual funds that invest solely in REITs also often have REIT in the fund name and are disclosed like other mutual funds.⁸ Ethics officials can determine whether an asset is 1) a REIT, 2) another type of real estate holding company, or 3) a mutual fund that invests in REITs, by reviewing information on the asset’s website, or by looking up the asset on an online financial website (*e.g.*, Yahoo! Finance or Google Finance) or the U.S. Securities and Exchange Commission’s company filing search engine, EDGAR.⁹

b. *Financial Disclosure Reporting*

The classification of REITs as operating businesses means that filers are not required to disclose the underlying holdings of these businesses. Consequently, as illustrated in Appendix I, the name, value, and income of REITs are disclosed in the same manner as other operating business.¹⁰ The determination that REITs are not funds and therefore cannot be EIFs means that public financial disclosure filers are required to file periodic transaction reports (OGE Form 278-T) for purchase, sale, or exchange transactions of these assets in excess of \$1,000. However, as with other operating businesses, filers are not required to report the transactions of underlying investments held by the REIT.

c. *Conflicts of Interest*

Under 18 U.S.C. § 208, an employee who holds an interest in a REIT is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interest of the REIT.¹¹ Many REITs register their securities under the Securities Exchange Act of 1934 (Exchange Act) and thereafter list and publicly trade those securities on national exchanges. If the REIT’s shares are publicly

⁸ See *Mutual Fund*, U.S. OFF. OF GOV’T ETHICS: PUB. FIN. DISCLOSURE GUIDE, <https://www.oge.gov/Web/278eGuide.nsf/2f96d42716636dbf85257f490052263c/0f10df3d39c64e6585257f45006c150b?OpenDocument> (last visited Dec. 23, 2020); see also U.S. OFF. OF GOV’T ETHICS, CONFIDENTIAL FIN. DISCLOSURE GUIDE 87 (2019),

[https://www.oge.gov/web/OGE.nsf/0/A685AEC70F057115852585B6005A202F/\\$FILE/Confidential%20Fin%20Disc%20Guide_Jan2019.pdf](https://www.oge.gov/web/OGE.nsf/0/A685AEC70F057115852585B6005A202F/$FILE/Confidential%20Fin%20Disc%20Guide_Jan2019.pdf). The conflicts analysis for mutual funds invested in REITs and other real estate holdings is discussed in OGE Legal Advisory [LA-15-09](#) (June 30, 2015).

⁹ SEC. & EXCH. COMM’N: EDGAR, <https://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Dec. 23, 2020).

¹⁰ OGE’s guidance for Real Estate Holding Companies has indicated that the EIF determination for a REIT should be “Yes” or “No.” See *Real Estate Holding Companies (including REITs)*, U.S. OFF. OF GOV’T ETHICS: PUB. FIN. DISCLOSURE GUIDE, <https://www.oge.gov/Web/278eGuide.nsf/2f96d42716636dbf85257f490052263c/d712c20a23f7aa2485257ffc0056c6d1?OpenDocument> (last visited Dec. 23, 2020). This Legal Advisory changes that guidance and the EIF column for REITs should be marked “N/A.”

¹¹ See U.S. OFF. OF GOV’T ETHICS, CONFLICTS OF INTEREST CONSIDERATIONS: LEGAL ENTITIES THAT HOLD ASSETS 7 (2018), [https://www.oge.gov/web/OGE.nsf/0/7A3DB2F1691E9E42852585B6005A1F8F/\\$FILE/Legal%20Entities%20that%20Hold%20Assets.pdf](https://www.oge.gov/web/OGE.nsf/0/7A3DB2F1691E9E42852585B6005A1F8F/$FILE/Legal%20Entities%20that%20Hold%20Assets.pdf).

traded securities as defined at 5 C.F.R. § 2640.102(p), the exemptions at 5 C.F.R. § 2640.202 for *de minimis* interests in securities may be available. Because REITs are not registered as investment companies under the 1940 Act, they are not mutual funds and the exemptions for diversified or sector mutual funds and unit investment trusts found in section 2640.201 are not available.

For a REIT that does not qualify for the *de minimis* securities exemptions, agency ethics officials will need to evaluate the REIT for conflicts of interest. If, for example, an employee at the U.S. Department of Health and Human Services owned a REIT that invested in nursing home properties, the ethics official and employee would need to consider the employee's job duties to determine if there are any particular matters in which the employee could participate personally and substantially that the employee knows would have a direct and predictable effect on the REIT's financial interest.

B. Master Limited Partnerships

a. *Definition*

MLPs are companies that are generally focused on the exploration, development, mining, processing, or transportation of minerals or natural resources.¹² They are business entities in the form of publicly-traded partnerships and often contain the acronym "MLP" or the word "Partners" in the title of the business.¹³ Employees may suggest they own stock in an MLP when, in reality, employees hold a partnership interest in the MLP. MLPs have two classes of partners: general partners, who run the business; and limited partners, who invest in the business. Because of the interaction between the 1940 Act and the Internal Revenue Code, MLPs cannot register as an "investment companies" because that registration would remove the favorable tax treatment accorded to MLPs.¹⁴ As a result, an MLP will never be a mutual fund. Because of these reasons, OGE views MLPs as operating businesses in the energy and natural resources industries, rather than funds that own assets, like pipelines.

b. *Financial Disclosure Reporting*

The classification of MLPs as operating businesses means that filers are not required to disclose the underlying holdings of these businesses. Consequently, as illustrated in Appendix I, the name, value, and income of MLPs are disclosed in the same manner as other operating businesses. The determination that MLPs are not funds and therefore cannot be EIFs means that

¹² See *Updated Investor Bulletin: Master Limited Partnerships – An Introduction*, SEC. & EXCH. COMM'N (Nov. 3, 2017), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_mlpintro.html.

¹³ See *id.* Note that mutual funds that invest solely in MLPs also often have MLP in the fund name. Ethics officials can determine if an asset is an MLP or a fund that holds MLPs through the assets website, an online financial website, or EDGAR.

¹⁴ See *Beyond Schrödinger's Cat: Why an Operating Company Can't be an "Investment Company" at the Same Time*, LATHAM & WATKINS: WORDS OF WISDOM (Jan. 1, 2017), <https://wow.lw.com/Article/Index/154?refertype=Topic&refname=Investment%20Company%20Act&refid=0#:~:text=MLPs%20are%20not%20subject%20to,only%20at%20the%20partner%20level.&text=In%20other%20words%20C%20a%20registered,generally%20cannot%20be%20an%20MLP>.

public financial disclosure filers are required to file periodic transaction reports (OGE Form 278-T) for purchase, sale, or exchange transactions of these assets in excess of \$1,000. However, as with other operating businesses, filers are not required to report the transactions of underlying investments held by the MLP.

c. Conflicts of Interest

Under 18 U.S.C. § 208, an employee who holds an interest in an MLP is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the partnership's financial interests.¹⁵ As noted above, an MLP is a type of publicly traded partnership and employees hold a partnership interest. As a result of the partnership interest in the MLP, section 208 also will impute the financial interests of a general partner to the employee, to the extent those interests are known to the employee. However, most MLPs will have at least 100 limited partners and, therefore, the exemption at 5 C.F.R. § 2640.202(f) will apply and the interests of the general partner that are unrelated to the partnership will not be imputed to the limited partners. Note that because 18 U.S.C. § 208 imputes only the interests of the *employee's* general partner to the employee, the interests of a general partner of an MLP need not be examined if the employee's spouse or child is the one who has the investment interest in the MLP.

Many MLPs register their securities under the Exchange Act and thereafter list and publicly trade those securities on national exchanges. If the MLP's partnership units are publicly traded securities as defined at 5 C.F.R. § 2640.102(p), the exemptions at 5 C.F.R. § 2640.202 for *de minimis* interests in securities may be available. Because MLPs are not registered as investment companies under the 1940 Act,¹⁶ the exemptions for diversified or sector mutual funds and unit investment trusts found in section 2640.201 are not available.

For an MLP that does not qualify for the *de minimis* securities exemptions, agency ethics officials will need to evaluate the MLP for conflicts of interest. If, for example, an employee at the Federal Energy Regulatory Commission owned an MLP that operated pipelines in Texas, the ethics official and employee would need to consider the employee's job duties to determine if there are any particular matters in which the employee could participate personally and substantially that the employee knows would have a direct and predictable effect on the MLP's financial interests.

¹⁵ U.S. OFF. OF GOV'T ETHICS, CONFLICTS OF INTEREST CONSIDERATIONS: ASSETS 10 (2018), [https://www.oge.gov/web/OGE.nsf/0/25DFFA704AC2BA8C852585B6005A1F8A/\\$FILE/Assets.pdf](https://www.oge.gov/web/OGE.nsf/0/25DFFA704AC2BA8C852585B6005A1F8A/$FILE/Assets.pdf).

¹⁶ 15 U.S.C. § 80a-3(c)(9) exempts businesses that consist of "owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests" from registering as investment companies.

C. Business Development Company

a. *Definition*

A BDC is a type of closed-end investment fund that often makes investments in developing and financially-distressed companies, which do not have access to other financing options like issuing bonds.¹⁷ BDCs invest for income as well as for capital appreciation, and often hold debt securities as well as stocks (private or public) in their investment portfolios. Investors may equate BDCs to private equity funds, but unlike private equity funds, many BDCs are open to retail investors and are publicly traded.¹⁸ OGE views BDCs as investment funds. Many of the publicly traded BDCs have “capital corporation,” “finance corporation,” or “investment corporation” as part of their name, but often are not as easy to identify by name as REITs or MLPs. An ethics official can ascertain if an employee owns a BDC by researching the BDC using the online resources discussed above.

b. *Financial Disclosure Reporting*

BDCs are funds, so filers and ethics officials need to consider whether the BDC in question meets the EIF requirements. An asset is an EIF if:

1. It is widely held;
2. It is publicly traded or available or the assets are widely diversified; and
3. The employee does not exercise control or have the ability to exercise control over the financial interests of the asset.¹⁹

If the BDC is open to investment by retail investors, it is likely to meet the EIF requirements. If the BDC is an EIF, the filer does not report the underlying holdings of the fund. In addition, the filer is not required to file periodic transaction reports (OGE Form 278-T).

If the BDC is not an EIF, the filer must report the underlying holdings of the fund. As illustrated in Appendix I, this reporting may vary depending on whether the value and income of the underlying holdings are ascertainable. Additionally for BDCs that are not EIFs, the filer is required to file periodic transaction reports (OGE Form 278-T) for both transactions of the fund itself (when the filer buys/sells their interest or part of their interest in the fund) and transactions of the fund’s underlying holdings (when the fund manager buys, sells, or exchanges all or part of the fund’s interest in an underlying holding of the fund).

¹⁷ See 15 U.S.C. §§ 80a-2(a)(48), 80a-5.

¹⁸ There are currently about 45 to 50 publicly-traded BDCs. See *Business Development Company (BDC) Universe*, CLOSED-END FUND ADVISORS, <https://cefdata.com/bdc/> (Dec. 22, 2020).

¹⁹ 5 C.F.R. § 2634.312(c).

c. *Conflicts of Interest*

Under 18 U.S.C. § 208, an employee who holds an interest in a BDC is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interest of the BDC, for example, by affecting one of its underlying holdings. As noted above, a BDC is an investment fund. BDCs may elect to be regulated as business development companies under the 1940 Act; however, they are not required to register as investment companies under the 1940 Act.²⁰ Unless a business development company registers as an investment company under the 1940 Act, it will not qualify for the mutual fund exemptions in 5 C.F.R. § 2640.201.

BDCs typically register their securities under both the Securities Act of 1933 and the Exchange Act, whether or not they also are registered under the 1940 Act.²¹ Some BDCs are thereafter listed and publicly traded on national exchanges.²² If a BDC is registered under the Exchange Act and is publicly traded on a national or regional exchange, the securities exemptions for *de minimis* holdings under 5 C.F.R. § 2640.202 will be available for the fund. Ethics officials can determine how a fund is registered by reviewing its filings with the U.S. Securities and Exchange Commission.²³

For a BDC that does not qualify for the mutual fund exemptions or the *de minimis* securities exemptions, agency ethics officials will need to evaluate the fund itself and the individual holdings of the BDC for conflicts of interest, just as they would for any private investment fund. For example, if an employee at the U.S. Department of Commerce owned a BDC, the ethics official will need to determine if there is a conflict with the fund itself and with each asset held by the fund.

III. Conclusion

Employees and ethics officials should consider REITs and MLPs as operating businesses for purposes of financial disclosure reporting and, as a result, they will be reported in a manner similar to stock. For the conflicts of interest review purposes, the ethics official needs to consider conflicts with the financial interests of the asset. In addition, the ethics official should consider whether a particular REIT and MLP holding qualifies for any of the securities exemptions.

BDCs are investment funds, so the first step in determining proper disclosure is to decide if the BDC qualifies as an EIF. If it is an EIF, report it in a manner similar to mutual funds. If it is not an EIF, report both the fund and its underlying holdings. For the conflicts of interest review of BDCs, the ethics official needs to consider conflicts with the fund itself and its underlying holdings. The BDC will qualify for the applicable mutual fund exemption if it is registered as an investment company under the 1940 Act. In addition, if a BDC is registered

²⁰ 15 U.S.C. § 80a-6(f). Note that a BDC's election to be regulated as a BDC under the 1940 Act does not mean it is registered as an investment company under the 1940 Act. Companies registering as investment companies under the 1940 Act submit a separate registration as required in section 8 of the 1940 Act.

²¹ See 15 U.S.C. § 80a-54.

²² There are currently about 45 to 50 publicly traded BDCs. See *supra* note 17.

²³ See *supra* note 9.

under the Exchange Act and is publicly traded on an exchange, the BDC will qualify for a *de minimis* securities exemptions.

DAEOs should contact their OGE Desk Officers if they have any questions about the reporting of, or the conflicts of interest analysis for, REITs, MLPs, or BDCs.

Appendix I: Financial Disclosure Reporting Guidance for REITs, MLPs, and BDCs.

Appendix II: Summary Reference Table of REITs, MLPs, and BDCs.

Appendix I

Public financial disclosure filers will report the ownership of these assets in Part 2 (filer's employment assets and income), Part 5 (spouse's employment assets and income), or Part 6 (other assets and income), depending on whether the asset is tied to the current or former employment of the filer or spouse. The employee will report both the asset and the income received from the asset in the appropriate Part. Confidential financial disclosure filers will report the asset in Part I. Explanatory text for each of these examples will be provided when the Public Financial Disclosure and the Confidential Financial Disclosure Guide are updated.

Disclosure Examples for REITs¹

OGE Form 278e

Description	EIF	Value	Income Type	Income Amount
Blackhawk Commercial Realty Portfolio	N/A	\$100,001 - \$250,000	dividends	\$5,001 - \$15,000
Highland Healthcare REIT	N/A	\$50,001 - \$100,000		None (or less than \$201)

OGE Form 450

1	Blackhawk Commercial Realty Portfolio
2	Highland Healthcare REIT

Disclosure Examples for MLPs

OGE Form 278e

Description	EIF	Value	Income Type	Income Amount
Texas Pipeline MLP	N/A	\$50,001 - \$100,000	dividends	\$2,501 - \$5,000
Energy Country MLP	N/A	\$50,001 - \$100,000		None (or less than \$201)

OGE Form 450

1	Texas Pipeline MLP
2	Energy Country MLP

¹ In the Public Financial Disclosure and Confidential Financial Disclosure Guides, REITs will be removed from the Real Estate Holding Company guidance and will be given their own entry.

Disclosure Examples for BDCs

EIF BDC:

OGE Form 278e

#	Description	EIF	Value	Income Type	Income Amount
1	Positron Investments XI, LLC	Yes	\$100,001 - \$250,000		\$5,001 - \$15,000

OGE Form 450

1	Positron Investments XI, LLC
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Non-EIF BDC

OGE Form 278e

Option 1: In this example, the value of and income from the underlying holdings are not readily ascertainable. As a result, the filer may report the value and income at the fund level.

#	Description	EIF	Value	Income Type	Income Amount
1	Smith Capital Ventures, LLC	No	\$50,001 - \$100,000	capital gains	\$5,001 - \$15,000
1.1	Hydroponics Unlimited, LLC (agricultural products)	N/A			
1.2	BMSL Propulsion, Inc. (rocket fuel research)	N/A			
1.3	ABC Optics (medical devices)	N/A			

Option 2: In this example, the value of and income from the underlying holdings are ascertainable. As a result, the filer reports the value and income at the asset level.

#	Description	EIF	Value	Income Type	Income Amount
1	Smith Capital Ventures, LLC	No			
1.1	Hydroponics Unlimited, LLC (agricultural products)	N/A	\$15,001 - \$50,000		None (or less than \$201)
1.2	BMSL Propulsion, Inc. (rocket fuel research)	N/A	\$15,001 - \$50,000		None (or less than \$201)
1.3	ABC Optics (medical devices)	N/A	\$1,001 - \$15,000	capital gains	\$5,001 - \$15,000

Option 3: In this example, the value of the underlying holdings is ascertainable but the income from the assets is not. As a result, the filer reports the value at the asset level and the income at the fund level.

#	Description	EIF	Value	Income Type	Income Amount
1	Smith Capital Ventures, LLC	No		capital gains	\$5,001 - \$15,000
1.1	Hydroponics Unlimited, LLC (agricultural products)	N/A	\$15,001 - \$50,000		
1.2	BMSL Propulsion, Inc. (rocket fuel research)	N/A	\$15,001 - \$50,000		
1.3	ABC Optics (medical devices)	N/A	\$1,001 - \$15,000		

OGE Form 450

1	Smith Capital Ventures, LLC
1.1	Hydroponics Unlimited, LLC (agricultural products)
1.2	BMSL Propulsion, Inc. (rocket fuel research)
1.3	ABC Optics (medical devices)

Appendix II

	REIT	MLP	BDC
Characterization	Operating business	Operating business	Investment fund
Disclosure	<p>Because it is not a fund, it is never an EIF and should be marked “N/A”.</p> <p>287e/450: Disclose the REIT. Do not disclose the underlying holdings.</p> <p>278T: Disclose transaction of the REIT. Do not disclose transactions of the underlying holdings.</p>	<p>Because it is not a fund, it is never an EIF and should be marked “N/A”.</p> <p>287e/450: Disclose the MLP. Do not disclose the underlying holdings.</p> <p>278T: Disclose transaction of the MLP. Do not disclose transactions of the underlying holdings.</p>	<p>Some BDCs may qualify as EIFs.</p> <p><u>If BDC is an EIF</u> 278e/450: Disclose the BDC. Do not disclose the underlying holdings.</p> <p>278T: Not required.</p> <p><u>If BDC is not an EIF</u> 278e/450: Report the BDC and underlying holdings.</p> <p>278T: Disclose transactions of the BDC and the transactions of underlying holdings.</p>
<i>De Minimis Securities Exemptions (5 C.F.R. § 2640.202(a)-(c))</i>	Available if REIT is registered under the Exchange Act.	Available if MLP is registered under the Exchange Act.	Available if BDC is registered under the Exchange Act.
Mutual Fund Exemptions (5 C.F.R. § 2640.201)	Never available because REITs cannot register under the 1940 Act.	Never available because MLPs cannot register under the 1940 Act.	Available if BDC is registered under the 1940 Act.
Exemption for Certain Interests of General Partners (5 C.F.R. § 2640.202(f))		Frequently available because most MLPs have 100+ limited partners.	