



January 31, 2024
LA-24-02

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson
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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 traded⁹ and must qualify as one of the enumerated securities listed in 5 C.F.R.

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. 78l) 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

(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. 78l) 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/OGEnsf/0/25DFFA704AC2BA8C852585B6005A1F8A/\\$FILE/Assets.pdf](https://www.oge.gov/web/OGEnsf/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.

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).