

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



May 5, 2015  
LA-15-06

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Employee Benefit Plans Through Which Employees Hold Diversified Pooled Investment Funds and Employee Benefit Plans Established or Maintained Outside of the United States

The U.S. Office of Government Ethics (OGE) is providing guidance on the meaning of language in the exemption for employee benefit plans at 5 C.F.R. § 2640.201(c)(1)(iii). Specifically, agencies have asked whether the exemption is applicable to (1) employee benefit plans through which employees hold diversified pooled investment funds, and (2) employee benefit plans that are established or maintained outside of the United States. This Legal Advisory explains that the exemption applies to both of these types of employee benefit plans, provided that the criteria of the exemption are met.

An executive branch employee is generally prohibited by 18 U.S.C. § 208(a) from participating in an official capacity in any particular matter in which, to the employee's knowledge, the employee or another person specified in the statute has a financial interest, if the particular matter would have a direct and predicable effect on that interest. 5 C.F.R. § 2640.103(a). Therefore, absent a written waiver pursuant to 18 U.S.C. § 208(b)(1), or a regulatory exemption pursuant to 18 U.S.C. 208(b)(2), section 208(a) would prohibit an employee from participating in an official capacity in a particular matter that directly and predictably affects assets that the employee or other person specified in section 208(a) holds through an employee benefit plan.

OGE is authorized to promulgate regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to the prohibition found in section 208(a). 18 U.S.C. § 208(b)(2). Pursuant to this authority, OGE promulgated the regulatory exemption at 5 C.F.R. § 2640.201(c)(1)(iii), permitting employees to participate in particular matters affecting the holdings in employee benefit plans if certain criteria are met. 61 Fed. Reg. 66830, 66834 (1996).

## **I. Employee Benefit Plans Through Which Employees Hold Diversified Pooled Investment Funds**

OGE has been asked whether the employee benefit plan exemption applies to diversified pooled investment funds that employees or other persons specified in 18 U.S.C. § 208(a) hold through qualifying employee benefit plans. The regulatory language at issue requires that “the employee, or other person specified in section 208(a) does not . . . designate specific plan investments (except for directing that contributions be divided among several different categories of investments, such as stocks, bonds or mutual funds, which are available to plan participant).” 5 C.F.R. § 2640.201(c)(1)(iii)(A). However, the preamble accompanying the notice of proposed rulemaking for the regulatory exemption explains that the prohibition on participation in selecting plan investments would not bar an employee or other person specified in 18 U.S.C. § 208(a) from directing the division of employer or employee contributions among a variety of types of investments or among a group of specific investment vehicles chosen by the plan trustee or manager. 60 Fed. Reg. 47208, 47214 (1995). The preamble further indicates that, “[p]articipants may choose to divide their investments among the various funds.” 60 Fed. Reg. at 47215.

OGE is issuing this Legal Advisory to clarify that, where a particular pooled investment fund meets the definition of “diversified” in part 2640, *see* 5 C.F.R. § 2640.102(a), an employee may rely on the exemption as to that fund when the employee or other person specified in 18 U.S.C. § 208(a) holds the fund through a qualifying employee benefit plan. Provided that the criteria of the exemption are met, the employee or other person specified in 18 U.S.C. § 208(a) may also designate that contributions be divided among a variety of diversified pooled investment funds.

In contrast, an employee may not rely on the employee benefit plan exemption with regard to any non-diversified pooled investment fund or other individual asset (*e.g.*, common stock of the plan’s sponsor or another issuer, individual municipal or corporate bonds, etc.) that the employee or other person specified in 18 U.S.C. § 208(a) has designated for allocation of contributions. Where such person has specifically designated a non-diversified asset for an allocation of contributions, the employee benefit plan exemption will be unavailable as to that asset. For example, if a plan participant designates that contributions be divided between a diversified pooled investment fund and a non-diversified company stock fund, the employee benefit plan exemption will be available as to the diversified pooled investment fund, but will be unavailable as to the non-diversified company stock fund. In that case, if the designated non-diversified asset presents a conflict of interest under 18 U.S.C. § 208(a), the employee would have to recuse from a particular matter directly and predictably affecting that asset or roll out of that asset and into a qualifying diversified pooled investment fund or another qualifying category within the plan.

## **II. Plans that are Established or Maintained Outside of the United States**

OGE has been asked whether a plan that otherwise meets the applicable criteria qualifies for the employee benefit plan exemption if the plan is established or maintained outside of the

United States. The circumstance that tends to raise questions about the applicability of the exemption to employee benefit plans established or maintained outside of the United States is that these plans generally are not covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(3). The question arises because the definition of “employee benefit plan” in part 2640 explicitly refers to ERISA. *See* 5 C.F.R. § 2640.102(c).

OGE previously resolved this issue in a preamble to the final rulemaking by confirming that ERISA coverage is not necessary:

OGE confirms that employee benefit plans that meet the definition at § 2640.102(c) are covered by the exemption even if they are not covered by the Employee Retirement Income Security Act of 1974 (ERISA).

61 Fed. Reg. at 66834. Consequently, an employee benefit plan maintained outside of the United States may qualify for the exemption at 5 C.F.R. 2640.201(c)(1)(iii). As with any employee benefit plan, however, the plan would need to satisfy the criteria set forth at section 2640.201(c)(1)(iii) and the definition at section 2640.102(c) to qualify for the exemption. The definition of “diversified” is particularly relevant when considering a foreign employee benefit plan, *see* 5 C.F.R. § 2640.102(a), because that definition precludes a trustee from concentrating in a single country other than the United States, and the trustee of a foreign fund is more likely to have a written policy of concentrating its investments in the foreign fund’s home country.