



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.<sup>1</sup>

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<sup>2</sup> that have a stated purpose of concentrating investments in cryptocurrencies, stablecoins, cryptocurrency or stablecoin derivatives, or cryptocurrency or stablecoin services<sup>3</sup> are sector mutual funds for purposes of the mutual fund exemptions at 5 C.F.R. § 2640.201.

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup> 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;
- (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.<sup>6</sup>

As OGE has previously advised, cryptocurrencies and stablecoins do not meet the definition of “publicly traded securities” for purposes of these exemptions.<sup>7</sup> This is true even if individual cryptocurrencies or stablecoins constitute securities for purposes of the Federal or state securities laws.<sup>8</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> *Id.* § 2640.102(r).

<sup>6</sup> *Id.* § 2640.102(p).

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

For purposes of these regulatory exemptions, OGE has determined that mutual funds with a stated purpose of concentrating investments in cryptocurrencies,<sup>12</sup> stablecoins, cryptocurrency or stablecoin derivatives, or cryptocurrency or stablecoin services are sector funds.<sup>13</sup> 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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<sup>9</sup> 5 C.F.R. § 2640.201.

<sup>10</sup> 5 C.F.R. § 2640.201(a).

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup>

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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<sup>14</sup> 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).

<sup>15</sup> 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.<sup>16</sup>

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,<sup>17</sup> 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.<sup>18</sup>

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

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<sup>16</sup> OGE Legal Advisory LA-19-06, at 2-3.

<sup>17</sup> OGE Inf. Adv. Op. 00x8, at 8 & n.4.

<sup>18</sup> *Id.* at 13.