

2640 Exemptions That All Nominee Reviewers Should Know

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18 U.S.C. § 208

Government employees are prohibited from participating personally and substantially in a **particular government matter** that will have a direct and predictable effect on **their financial interests, including the financial interests of others**, which are attributed to the federal employee.

Purpose: To prevent an employee's personal interests from influencing Government decisions

A few words about exemptions

- ▣ Only OGE is authorized to issue
- ▣ They are housed in 5 CFR 2640
- ▣ They apply automatically (unless you have a statute or regulation that trumps them)
- ▣ They mitigate both the conflict AND any appearance concerns

Analysis Process

1. Will the outcome of the Government matter have an effect upon the identified interest?
2. Can you identify a potential exemption?
3. Does the exemption cover this type of financial interest?
4. Does the exemption cover this type of particular matter (if applicable)?
5. Where applicable, does the \$ value of the interest meet the de minimis thresholds of the exemption?

MUTUAL FUNDS AND UNIT INVESTMENT TRUSTS

Applying the Exemptions

Exercise 1

An employee of the FDA will be working on reviewing and approving requests by drug companies for new medicines. The employee's investment portfolio consists of:

- \$100,000 invested in the Janus Emerging Markets Fund
- \$55,000 invested in the Fidelity Japan Fund
- \$20,000 invested in Vanguard Health Care Fund
- \$75,000 invested in Ishares US Consumer Goods Fund

1

Will the outcome of the matter affect the holding?

Matters:

Drug approvals

Interests:

Pooled investment vehicles

2

Which exemption might apply?

5 CFR 2640.201

Exemptions for interests in mutual funds, unit investments trusts and employee benefit plans

3

Is it a mutual fund?

Mutual fund means an entity which is registered as a management company under the Investment Company Act of 1940, as amended (15 U.S.C. 80a–1 et seq.). For purposes of this part, the term mutual fund includes open-end and closed-end mutual funds and registered money market funds.



5 CFR § 2640.102(k)

Dow ↑ 1.02% Nasdaq ↑ 0.97%

More On JMFDX

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Janus Emerging Markets (JMFDX)

9.06 ↑ 0.04 (0.44%) Aug 15, 2014

Prev Close:	9.06	Net Assets*:	35.36M
YTD Return*:	7.65%	Yield*:	2.50%

* As of 31-Jul-14

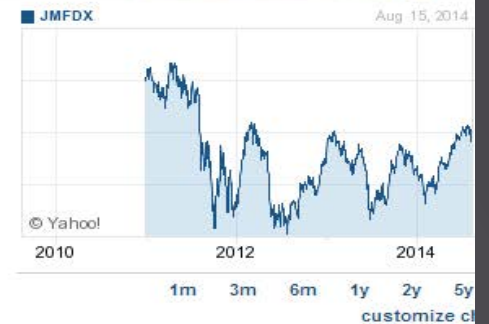
Quotes delayed, except where indicated otherwise. Currency in USD.

Headlines

- No Headlines available for JMFDX at this time.

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Top Holdings

Symbol	% Assets	YTD Return
TSM.TW	4.63	18.0
SSNLF.KS	3.19	1.0
SMSOF	2.20	5.0
ITUB.SA	2.09	26.0
600104	2.05	22.0

» [More Fund Holdings](#)

Fund Basics

Morningstar Overall Rating:	★
Total Assets:	35.36M
Category:	Diversified Emerging Mk
Annual Report Expense Ratio (net):	1.30%
Fund Profile Holdings	

Fidelity Japan

MUTF: **FJPNX** - NAV as of Sept 4 4:00
PM ET

15.43+0.23 (1.51%)



vghcx

Finance

Vanguard Health Care Fund Investor Shares (MUTF:VGHCX)

Mutual fund

[Summary](#)

[Purchase information](#)

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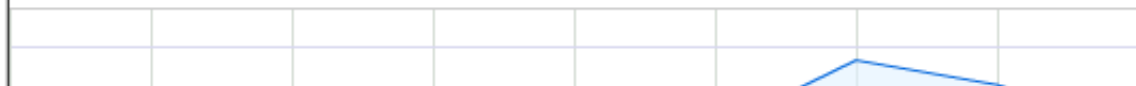
207.39 +0.08(0.04%)

g+1 8

Aug 15, 4:00PM EDT Overall Morningstar Rating™ ★★★★★☆

Compare:

Zoom: [1m](#) [3m](#) [6m](#) [YTD](#) [1y](#) [5y](#) [10y](#) [All](#)



IYK: 99.65 +0.70 (+0.71%) x

finance.yahoo.com/q?s=IYK

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Mon, Aug 18, 2014, 4:53pm EDT - US Markets are closed [Report an Issue](#)

↑1.06% Nasdaq ↑0.97%

More On IYK

NOTES

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iShares US Consumer Goods (IYK) - NYSEArca

99.65 ↑0.70 (0.71%) 4:00PM EDT

Prev Close:	98.95	Day's Range:	99.51 - 99.73
Open:	99.51	52wk Range:	87.01 - 100.87
Bid:	99.51 x 600	Volume:	107,682
Ask:	101.34 x 900	Avg Vol (3m):	30,227
NAV ¹ :	98.85	P/E (ttm) ² :	18
Net Assets ² :	454.12M	Yield (ttm) ² :	1.94
YTD Return (Mkt) ² :	0.77%		

¹As of Aug 15, 2014

²As of Jul 31, 2014

Quotes delayed, except where indicated otherwise. Currency in USD.

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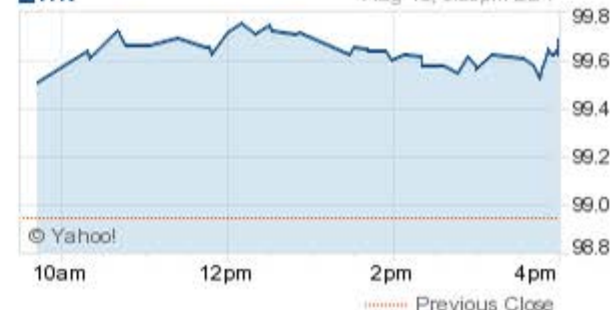
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iShares U.S. Consumer Goods ETF

IYK

Aug 18, 3:59pm EDT



1d 5d 1m 3m 6m 1y 2y 5y max
customize chart

Exchange Traded Funds (ETFs)

Most exchange-traded funds are:

- **organized either as open-end investment management companies or as unit investment trusts**
- **registered with the Securities and Exchange Commission (SEC) under the same statutory authorities as traditional mutual funds**
- **qualify for the exemptions in 5 C.F.R. Part 2640 for mutual funds and unit investment trusts.**

Source: Public Financial Disclosure: A Guide to Reporting Selected Financial Instruments

Caution:

ETFs invested in commodities and commodity futures usually do not meet the definitions for mutual fund or unit investment trust

Is it a mutual fund?



Janus Emerging Markets Fund



Fidelity Japan Fund



Vanguard Health Care Fund



iShares U.S. Consumer Goods

status check

4

Is it diversified or sector?

Does the mutual fund have a stated policy of concentrating its investments in **an industry, business, single country other than the United States, or bonds of a single State** within the United States?

5 CFR § 2640.102(a)

Diversified vs. EIF

Diversified	Excepted Investment Fund
<u>Conflict of Interest Concept</u> Determines if Fund is Exempted from 18 USC 208	<u>Financial Disclosure Concept</u> Determines if Holdings of Fund are Reportable under the EIGA Financial Disclosure requirements
Defined in 5 CFR § 2640.102(a)	Defined in 5 CFR 2634.310(c)(2)
A mutual fund registered with the SEC that has no stated policy of concentrating investments in any one industry, business, country other than the US, or bonds of a single State within the US	3-prong test: 1) Widely held 2) Publicly traded or available, OR widely diversified 3) Independently managed

Important: Just because something qualifies as an EIF **does not mean** that it automatically qualifies as a diversified mutual fund that is exempt from 18 U.S.C. § 208. You must check to see that it qualifies for the diversified mutual fund exemption.

REMEMBER

EIF = Reporting

Diversified = Conflicts

EIF \neq No Conflicts

but may overlap to a significant degree or even subsume others, depending on how the fund manager defines the concentration policy. For example, depending on the focus described in the prospectus, a biotechnology fund might significantly overlap with the health sciences or life sciences sector, or a utilities fund might significantly overlap with either the energy or telecommunications sector. In some cases, therefore, ethics officials and employees still may need to look beyond the fund name to the prospectus, in order to determine whether there is a conflict between the sector fund's actual focus and an employee's expected duties.

B. Diversified Fund Examples

The following types of funds generally have been found by OGE to be diversified for purposes of the exemptions in Part 2640:

Leisure/Entertainment
Research
Generic "Science"/"Technology"⁶
Venture Capital
Pacific/European/South Asian/etc.
Generic "Index"/"S&P"/etc.
Generic "Growth"/"Income"/"Capital Appreciation"/"High Yield"/"Value"/etc.
Generic "Equity"/"Bond"
Generic "Municipal"
Generic "Tax-Free"
Emerging Markets
Cyclicals
Small Cap/Mid Cap/Large Cap
Balanced
Consumer Products/Services

⁶ But note the caution at footnote 4 above.

Janus Emerging Markets Fund

- ▣ The investment seeks long-term growth of capital. The fund pursues its investment objective by investing, under normal circumstances, at least 80% of its net assets in securities of issuers in emerging market countries. It normally invests in securities of issuers that (i) are primarily listed on the trading market of an emerging market country; (ii) are incorporated or have their principal business activities in an emerging market country; or (iii) derive 50% or more of their revenues from, or have 50% or more of their assets in, an emerging market country.

Fidelity Japan Fund

- The investment seeks long-term growth of capital. The fund normally invests at least 80% of assets in securities of Japanese issuers and other investments that are tied economically to Japan.

Vanguard Health Care Fund

- ▣ The investment seeks long-term capital appreciation. The fund invests at least 80% of its assets in the stocks of companies principally engaged in the development, production, or distribution of products and services related to the health care industry. These companies include, among others, pharmaceutical firms, medical supply companies, and businesses that operate hospitals and other health care facilities. It may also consider companies engaged in medical, diagnostic, biochemical, and other research and development activities. The fund may invest up to 50% of its assets in foreign stocks.

Ishares US Consumer Goods

- ▣ The investment seeks to track the investment results of an index composed of U.S. equities in the consumer goods sector. The fund generally invests at least 90% of its assets in securities of the underlying index and in depositary receipts representing securities of the underlying index. It seeks to track the investment results of the Dow Jones U.S. Consumer Goods Index), which measures the performance of the consumer goods sector of the U.S. equity market. The fund is non-diversified.

Ishares US Consumer Goods

- ▣ The Fund seeks investment results that correspond generally to the price and yield performance, before fees and expenses, of United States consumer goods stocks, as represented by the Dow Jones United States Consumer Goods Index. The Underlying Index measures the performance of the consumer goods sector of the United States equity market. The Underlying Index includes companies in a range of industry groups, which include automobiles and parts, beverages, food producers, household goods, leisure goods, personal goods and tobacco.

Is the fund diversified?



Janus Emerging Markets Fund



Fidelity Japan Fund

Sector fund not eligible for diversified exemption



Vanguard Health Care Fund

Sector fund not eligible for diversified exemption



iShares U.S. Consumer Goods

status check

5

Does the value of the interest meet the *de minimis*?

Is the **aggregate** market value of the employee's interests in **all sector mutual funds** that concentrate in the same sector and have one or more holdings that might be affected by the particular matter **\$50,000 or less**?

5 CFR § 2640.201(b)(2)

Exemptions for mutual funds



Janus Emerging Markets Fund



Fidelity Japan Fund

\$55,000 is above the *de minimis* for sector funds



Vanguard Health Care Fund

\$20,000 is below the *de minimis* for sector funds



iShares U.S. Consumer Goods

status check

Top 10 Holdings – Fidelity Japan

JAPAN TOBACCO INC

ASTELLAS PHARMA INC

EAST JAPAN RAILWAY CO

HOYA CORP

HONDA MOTOR CO LTD

RAKUTEN INC (TOKYO)

MITSUBISHI UFJ FINL GRP INC

MITSUI FUDOSAN CO

SOFTBANK CORP

MITSUI & CO LTD

Astellas and FDA interactions

- Astellas and Medivation Receive Priority Review from FDA for XTANDI® (Enzalutamide) Capsules In Chemotherapy-Naive Advanced Prostate Cancer
- FDA Grants QIDP Designation to Astellas Candidiasis Treatment
- FDA Grants Astellas Qualified Infectious Disease Product Designation for Isavuconazole for the Treatment of Invasive Aspergillosis

PUBLICLY TRADED SECURITIES

Applying the Exemptions

Exercise 2

One of your employees will be assigned to work on a regulation banning the use of phthalates in children's products.

The employee's spouse and 12 year old son own \$5,000 each in Mattel stock. The employee also has \$4,000 worth of stock in Toys R Us.

1

Will the outcome of the matter affect the holding?

Matter:

Regulation banning phthalates in children's toys.

Interests: Stock

Mattel (toy manufacturer)

Toys "R" Us: (sells toys and markets their own toy brand)

2

Which exemption might apply?

5 CFR 2640.202

Exemptions for interests in securities

3

Is it a publicly traded security?

A security is... 5 CFR 2640 .102(r)

Security means common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest...

Publicly traded... 5 CFR 2640.102(p)

means a *security* (as defined in (r)) that is..."Registered with the Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78) and **listed on a national or regional securities exchange or traded through NASDAQ"**





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Finance

Mattel, Inc. (NASDAQ:MAT)

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Financials

34.92

+0.41 (1.20%)

Real-time: 12:20PM EDT

NASDAQ real-time data - Disclaimer

Currency in USD

Range	34.51 - 34.94	Dividend	0.38/4.35
52 week	34.30 - 47.94	EPS	2.32
Open	34.52	Shares	337.70M
Vol / Avg	654,607.00/2.48M	Beta	0.73
Mkt cap	11.80B	Inst. own	93%
P/E	15.04		

g+1 21

Dow Jones	17,126.96	0.29%	
Nasdaq	4,590.94	0.40%	
Cyclical Co...		0.70%	
MAT	34.92	1.20%	

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- A** [An Overview Of The Three Worst-Performing Stocks This Year](#)
Bidness ETC - Sep 2, 2014
- B** [Critical Alerts For bluebird bio Inc., United Therapeutics Corporation, Matte...](#)
Wall Street Journal - Sep 2, 2014
- C** [Mattel Inc.: Mattel Named Founding Champion and Official Partner of Special ...](#)
The Wall Street Transcript - 21 hours ago
- D** [Mattel Inc. To Launch Barbie-Inspired Lines With Forever21, Lord & Taylor...](#)
Fashion Times - Aug 15, 2014
- E** [Mattel, Inc. \(MAT\) Ex-Dividend Date Scheduled for August 25, 2014](#)
NASDAQ - Aug 22, 2014

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Events

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Oct 14, 2014
Q3 2014 Mattel Inc Earnings Release (Estimated)

Toys "R" Us, Inc.

Kids rule the aisles while parents tag along for the ride at Toys "R" Us. The company is one of the world's largest toy retailers, but in the US it has lost its top position to retailing behemoth Wal-Mart. Toys "R" Us sells its wares in more than 1,575 stores worldwide, as well as online. In addition to about 865 US Toys "R" Us and Babies "R" Us stores, the retailer operates more than 400 side-by-side stores, which sell both toys and juvenile products, 245 juvenile stores, and about 265 Express stores. Toys "R" Us is privately held by investment companies KKR and Bain Capital and real estate firm Vornado Realty Trust. In 2013 the company finally withdrew its IPO filed back in 2010.

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Related companies

Name	Exchange	Symbol	Last trade	Change	Mkt cap
Toys "R" Us, Inc.	Private				
Quidsi, Inc.	Private				
Bluestem Brands, Inc.	Private				
SHOP.COM	Private				
Learning Express, Inc.	Private				
The Hobby Hub	Private				
Extex, Inc.	Private				
U.S. Toy Co., Inc.	Private				
SmartBargains, Inc.	Private				
QVC, Inc.	Private				
American Girl Brands, LLC	Private				

Other Privately Held Companies

- ▣ Dell
- ▣ Bechtel
- ▣ Mars
- ▣ Ernst & Young LLP
- ▣ Wegmans Food Markets, Inc.
- ▣ S.C. Johnson & Son, Inc.

Publicly traded securities



Mattel



Toys “R” Us - private

status check

4

What is the “particular matter”?

- Particular matters involving specific parties (contracts, grants, litigation, etc.)
- Particular matters of general applicability (regulations, policies, etc. that focus on the interests of a discrete and identifiable class of persons)

5

Does the value meet the *de minimis*?

Specific Parties

- No more than \$15,000 aggregate in all affected parties
- No more than \$25,000 aggregate in all affected parties and non-parties.

General Applicability

- No more than \$25,000 in one affected entity; no more than \$50,000 aggregate in all affected entities.

Matter of General Applicability:

A regulation to ban phthalates in toys

Interests:

~~\$4,000~~ in Toys “R” Us stock

(No exemption; another remedy needed)

\$10,000 in Mattel stock



\$25,000 or less in any single affected entity



\$50,000 or less in all affected entities

EMPLOYEE BENEFIT PLANS

Applying the Exemptions

Exercise 3

You are a scientist at DoE, and have been since 2014. Before that you worked at University of Maryland for 30 years. U of M provided you with a 401(k) plan, through which you are invested in a fund with hundreds of assets. One of the assets is \$16,000 of EnergyOne, Inc. stock. You have been asked by DoE to review applications for an alternative energy research grant, and one of the applications is from EnergyOne.



Which exemption might apply?

5 CFR 2640.201(c)

Exemptions for interests in **employee benefit plans**

5 C.F.R. 2640.201(c)

5 CFR 2640.201(c) houses four exemptions related to retirement plans.

First: You may participate in **any matter** where the disqualifying financial interest arises from the **underlying holdings** of the **Thrift Savings Plan**.

5 C.F.R. 2640.201(c)(1)(ii)

You may participate in **any matter** where the disqualifying financial interest arises from the **underlying holdings** of **pension plan** established by a **State Government** or a **subdivision** of the State for State/local employees.

Applying the Exemptions

Exercise 4

You are an employee at the Department of Justice. Your spouse works for Aberdeen consulting firm that provides her with a 401(k) plan. Through that 401(k) the spouse has selected to invest in an Aberdeen created and managed fund that holds 10 individual stocks focused on the energy sector. The spouse currently holds \$20,000 in one of the holdings in the fund, the XYZ Corp. DOJ has asked you to participate in litigation against XYZ Corp.

Does the Exemption Apply Now?

You are an employee at the Department of Justice. Your spouse works for the Aberdeen consulting firm that provides her with a 401(k) plan. Through that 401(k) the spouse has selected to invest in a fund managed by Integrity, Inc. that holds 50 individual stocks that track the Russell Top 50 Index . The spouse holds \$20,000 in one of the holdings in the fund, the XYZ Corp. DOJ has asked you to participate in litigation against XYZ Corp.

5 C.F.R. 2640.201(c)(1)(iii)

You may participate in **any matter** where the disqualifying financial interest arises from the **underlying holdings** of a **diversified employee benefit plan** that:

- (1) is administered by an **Independent Trustee**, and
- (2) doesn't have a **profit-sharing** or **stock bonus component**, so long as
- (3) You, or a **person named in 208(a)**, doesn't select or designate specific portfolio investments.

Diversified under 2640.102

Does not have a stated policy of concentrating its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States and, in the case of an employee benefit plan, means that the plan's trustee has a written policy of varying plan investments.

Resources

www.oge.gov

5 C.F.R. part 2640 (§ 208 Interpretation, exemptions, waivers)

DAEOgrams

DO-00-030 Diversified and Sector Mutual Funds

DO-06-029 “Particular Matter Involving Specific Parties,” “Particular Matter,”
“Matter”

DO-07-006 Waivers Under 18 U.S.C. § 208

Financial Instruments

Nominee & New Entrant 278 Guide

Public Financial Disclosure: A Guide to Reporting Selected Financial Instruments