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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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Director

SUBJECT: Financial Disclosure Reporting Considerations for Collectible Non-Fungible Tokens and Fractionalized Non-Fungible Tokens

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on the public¹ financial disclosure reporting requirements applicable to non-fungible tokens (“NFTs”) that represent collectible virtual items (“collectible NFTs”) and fractionalized non-fungible tokens (“F-NFTs”).² As described below, public financial disclosure filers must disclose ownership of collectible NFTs and F-NFTs when those assets are held for investment or production of income and are worth more than \$1,000 at the end of the reporting period, or if they produce over \$200 in income in the reporting period. Public financial disclosure filers must also disclose purchases, sales, and exchanges of collectible NFTs and F-NFTs that qualify as securities.

I. Background on Collectible Non-Fungible Tokens (NFTs) and Fractionalized Non-Fungible Tokens (F-NFTs)

NFTs were created as an alternative to traditional “fungible” digital assets³ such as cryptocurrencies and stablecoins.⁴ Fungible digital assets, such as cryptocurrencies, are not

¹ The financial disclosure guidance contained in this Legal Advisory is focused on public financial disclosure obligations. However, the guidance related to reporting of collectible non-fungible tokens and fractionalized non-fungible tokens as interests in property is equally applicable to employees who file confidential financial disclosure reports. *See* 5 C.F.R. § 2634.907 (describing information required to be reported on a confidential financial disclosure report). Confidential financial disclosure filers are not, however, required to report purchases, sales, and exchanges of any security, unless required through agency-specific supplemental financial disclosure regulations and alternative confidential filing obligations. *Id.*

² The technology behind non-fungible tokens permits a wide-variety of use cases beyond representing ownership of collectible virtual items. This Legal Advisory focuses on NFTs and F-NFTs that represent collectible virtual items.

³ For purposes of this Legal Advisory, the term “digital assets” refers to assets generated and transferred using blockchain or distributed ledger technology, including cryptocurrencies, stablecoins, and non-fungible tokens.

⁴ 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



unique; rather, each token of a specific type of cryptocurrency is fundamentally the same as any other token of that cryptocurrency. NFTs, on the other hand, are not identical. Rather, they represent ownership of a specific and unique property or property right.⁵

Because NFTs are “non-fungible” they can be used to represent ownership of a wide variety of properties and property rights, from ownership of unique collectible virtual items (collectible NFTs) to ownership of physical or real property, equity in a company, or even a right to a revenue stream from a business. This Legal Advisory focuses on collectible NFTs that take the form of virtual artwork, music, video files, trading cards, digital real estate, or items in a virtual world.

Ownership of NFTs, including collectible NFTs, can be “fractionalized.”⁶ Fractionalized NFTs are often referred to as “shards” or “F-NFTs.” Through fractionalization, individuals are able to purchase partial ownership of an NFT.⁷ Fractionalization allows investment in NFT assets that would otherwise be too expensive to purchase individually.⁸ Unlike full ownership, the owner of an F-NFT does not enjoy exclusive use or the full benefits of the underlying NFT.

II. When Financial Disclosure Filers Are Required to Report Ownership of NFTs and F-NFTs

a. NFTs and F-NFTs are Required to be Reported if The NFT or F-NFT is Property Held for Investment or Production of Income or Actually Produces Over \$200 of Investment Income

Public financial disclosure filers must disclose an “interest in property held . . . for investment or the production of income” that has a value of \$1,000 or more at the end 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).

⁵ See, e.g., Lynne Lewis et al., *Non-Fungible Tokens and Copyright Law*, 33 NO. 8 INTEL. PROP. & TECH. L.J. 18 (2021); Katya Fisher, *Once Upon A Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine*, 37 CARDOZO ARTS & ENT. L.J. 629, 631 (2019); 10 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 111:3 (5th ed. 2020); Anskika Bhall, *A Beginner's Guide to Non-Fungible Tokens*, BLOCKCHAIN COUNSEL, INSIGHTS & RESOURCES, <https://www.blockchain-council.org/blockchain/a-beginners-guide-to-non-fungible-tokens-nft/> (last visited July 6, 2022); Werner Vermaak, *What Is a Non-Fungible Token (NFT)?*, COINMARKETCAP, <https://coinmarketcap.com/alexandria/article/what-is-a-non-fungible-token-nft> (last visited July 6, 2022).

⁶ See Karen J. Garnett et al., *NFTs Are Interesting but Fractionalized Non-Fungible Tokens (F-NFTs) May Present Even More Challenging Legal Issues*, PROSKAUER: BLOCKCHAIN & THE L. BLOG (Apr. 22, 2021), <https://www.proskauer.com/blog/nfts-are-interesting-but-fractionalized-non-fungible-tokens-f-nfts-may-present-even-more-challenging-legal-issues>; see also An P. Doan et al., *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, 24 NO. 3 FINTECH L. REP. NL 1 (May/June 2021).

⁷ Ekin Genç, *How Can You Share an NFT? Fractional NFTs Explained*, COINDESK.COM (May 6, 2022), <https://www.coindesk.com/learn/how-can-you-share-an-nft-fractional-nfts-explained/#:~:text=What%20are%20fractional%20NFTs%3F,shared%20%E2%80%93%20ownership%20of%20an%20NFT.>

⁸ See, e.g., Filippo Bertocchi, *Fractionalised NFTs—Making Non-Fungible Tokens Affordable*, COINBUREAU (July 31, 2021), <https://www.coinbureau.com/defi/fractionalised-nfts/>.

reporting period.⁹ Filers must also report property that actually produces more than \$200 in investment income in the reporting period, even if the filer determined originally that it was not “held for investment or the production of income.”

Assets that are held solely for personal, family, or household use are not held for investment or production of income. For example, OGE has previously advised that household furniture or fixtures, personal goods—such as clothing, electronics, or family photos— and perishable items like food and beverages that are purchased and used for personal, family, or household use are not reportable.

On the other hand, OGE has determined that certain assets are always held for investment or production of income. For example, stocks, bonds, investment funds, annuities, and deferred compensation such as a defined contribution or defined benefit plans are all property held for investment or production of income. Cryptocurrencies¹⁰ such as Bitcoin, Litecoin, and Ether have also been determined to be held for investment or production of income.¹¹

Other assets may be held for investment or production or income or not, depending on the circumstances. Items like artwork are often owned for display and use within one’s home, but also may be purchased as an investment. The same is true of collectibles, such as trading cards or rare coins, as well as items such as cars or jewelry. If these items are purchased for personal, family, or household use, a filer would not be required to report the items on the filer’s financial disclosure report. If, however, they are purchased for investment or production of income, they are required to be reported.¹²

b. Whether Collectible NFTs are Property Held for Investment or the Production of Income is a Factual Question

Determining whether any specific collectible NFT is considered held for investment or production of income is a factual question. Financial disclosure filers and agency ethics officials may consider some or all of the following relevant factors:

1. Was the NFT purchased principally for personal or family use or aesthetic reasons?
(If yes, suggests NFT is not held for investment or production of income)
2. Was the NFT purchased principally for its potential future value?
(If yes, suggests NFT is held for investment or production of income)

⁹ 5 U.S.C. app. § 102(a)(3); 5 C.F.R. § 2634.301(a). In addition, a public disclosure filer must report the source of any income received during the reporting period, if the income (such as capital gains) exceeded \$200. 5 U.S.C. app. § 102(a)(1)-(2); 5 C.F.R. § 2634.302.

¹⁰ OGE has previously used the term “virtual currencies,” a term that is technically broad enough to encompass both cryptocurrencies and stablecoins. See U.S. OFF. OF GOV’T ETHICS, PUBLIC FINANCIAL DISCLOSURE GUIDE 203, 334 (2019), [https://www.oge.gov/web/oge.nsf/0/11E9ABAF6E128FF1852585B6005A2030/\\$FILE/Public%20Fin%20Disc%20Guide_Jan2019.pdf](https://www.oge.gov/web/oge.nsf/0/11E9ABAF6E128FF1852585B6005A2030/$FILE/Public%20Fin%20Disc%20Guide_Jan2019.pdf) [hereinafter OGE PUBLIC FD GUIDE].

¹¹ OGE Legal Advisory LA-18-06 (June 18, 2018); OGE PUBLIC FD GUIDE, *supra* note 10, at 203.

¹² OGE PUBLIC FD GUIDE, *supra* note 10, at 338.

3. Will the NFT be used by the filer or the filer's family members or displayed in the home, office, or virtual property of the filer or filer's family members?
(If yes, suggests NFT is not held for investment or production of income)
4. Is the NFT considered rare, expensive, or is it currently highly sought after?
(If yes, suggests NFT is held for investment or production of income)
5. Did the filer pool resources with other investors or non-family members to purchase the NFT?
(If yes, suggests NFT is held for investment or production of income)
6. Is the NFT owned by the filer indirectly, for example is it held by a limited liability company or limited partnership?
(If yes, suggests NFT is held for investment or production of income)
7. Does the filer have a pattern of purchasing and selling collectible NFTs?
(If yes, suggests NFT is held for investment or production of income)

None of the above factors are dispositive, but must be considered under the totality of the circumstances. To assist agency ethics officials and filers in considering whether any given collectible NFT needs to be reported, OGE is providing the below examples of reportable and non-reportable collectible NFTs:

Example 1. Employee purchases a limited edition NFT of the artist Leandra Garcia's *Paper Moon*. The original *Paper Moon* is a pastel drawing by Garcia. Garcia offers the original drawing, limited run lithograph prints, and limited run NFTs for sale on her website. Employee purchased the NFT from Garcia for \$1,100. Employee intends to display the drawing at home and at work using an NFT digital display frame. Employee purchased the NFT solely because Employee enjoys Garcia's artwork. Employee has no plans to sell the NFT. Under the circumstances, Employee is not holding the NFT for investment or production of income and therefore need not report ownership on their annual financial disclosure report.

Example 2. Employee purchases a limited edition NFT of the artist Leandra Garcia's *Hieroglyph*, a one-off project that was listed for \$55,000. Employee purchased the NFT artwork based on a belief that it will appreciate in value. Employee has previously purchased and sold artwork NFTs and plans to sell the NFT once it has appreciated in value. Under the circumstances, Employee is holding the NFT for investment or production of income and therefore must report ownership on their annual financial disclosure report.

Example 3. Employee has a hobby of collecting baseball cards. Employee has decided to branch out and purchases thirty NFT baseball cards. These are "common" variations of the cards. The cost for each card was less than \$50. Employee has no past history of selling baseball cards or NFTs and intends to keep the NFT baseball cards indefinitely, but may choose to sell them in the future. Under the circumstances, Employee is not

holding the NFTs for investment or production of income and therefore need not report ownership on their annual financial disclosure report.

Example 4. Employee purchases an “ultra-rare” NFT baseball card. The cost of the NFT is \$12,600. Employee does not plan on keeping the NFT indefinitely, but rather is hoping that it will appreciate in value so that it can be resold for a profit. Under the circumstances, Employee is holding the NFT for investment or production of income and therefore must report ownership on their annual financial disclosure report.

Example 5. Employee purchases an NFT virtual jacket worth \$2,000 for Employee’s character in an immersive virtual world (or “metaverse”).¹³ The jacket is one of a variety of similar jackets sold by a third-party vendor. Although there is a secondary marketplace for virtual jackets in the metaverse, Employee plans on keeping the jacket as part of their personal collection. Under the circumstances, Employee is not holding the NFT for investment or production of income and therefore need not report ownership of the virtual jacket on their annual financial disclosure report.

A collectible NFT that is held for investment or production of income must be reported if the NFT was valued at \$1,000 or more at the end of the reporting period. Filers can determine the fair market value of the NFT by reference to prices for similar collectible NFTs (e.g., collectible NFTs produced in the same series) posted to digital-asset trading platforms at the end of the reporting period. Filers may also determine the good faith value based on one of the methods set out in 5 C.F.R. § 2634.301(e).

As noted above, filers must also report collectible NFTs even if they are not “held for investment or the production of income,” if they actually produced more than \$200 in investment income in the reporting period. For example, an employee who purchased an NFT artwork for display in the employee’s home but later decided to sell it would be required to report the NFT as a source of income if the sale resulted in more than \$200 in income.

c. F-NFTs are Almost Always Held for Investment or Production of Income and Therefore Must Generally be Reported

F-NFTs will almost always be property held for investment or the production of income. Therefore, absent extraordinary cases, filers must report their ownership of F-NFTs if they are valued at over \$1,000 at the end of the reporting period. Likewise, filers must report income from F-NFTs that exceeds \$200 in the reporting period. Filers who believe that their specific F-NFT is not property held for investment or production of income should consult with an agency ethics official.

Example 1. Employee has purchased four F-NFTs that each represent a 10% share in artist Leandra Garcia’s one-off project *Pictograph #7*. Each F-NFT is currently valued at \$3,000. The F-NFTs constitute property held for investment or production of income and therefore must be reported on Employee’s annual financial disclosure report.

¹³ Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 101 (2005) (providing background on the concept of the “metaverse”).

III. When Financial Disclosure Filers Are Required to Report the Purchase, Sale, or Exchange of Collectible NFTs and F-NFTs

a. Public Financial Disclosure Filers Are Required to Report Transactions of Securities

Public financial disclosure filers are required to report, using the Periodic Transaction report form (OGE Form 278-T), the purchase, sale, or exchange of “stocks, bonds, commodities futures, and other forms of securities” that exceed \$1,000.¹⁴ Filers must disclose transactions of securities within 30 days of receiving confirmation of the transaction, but in no case later than 45 days from the date of the transaction.¹⁵ A purchase, sale, or exchange of securities is also reportable on an Annual or Termination report form (OGE Form 278e), unless that transaction has previously been reported on a Periodic Transaction report.

The term “securities” is not defined in the Ethics in Government Act. As a result, OGE has interpreted the term as used in the public financial disclosure provisions of the Ethics in Government Act consistently with Federal securities laws, such as the Securities Act of 1933 and the Securities Exchange Act of 1934.¹⁶ For purposes of the Federal securities laws, the determination of whether a particular digital asset is a “security” depends on the facts and circumstances.¹⁷

b. Transactions of Collectible NFTs and F-NFTs are Required to be Reported if the NFT or F-NFT is a Security

Public financial disclosure filers must report the purchase, sale, or exchange of a collectible NFT or F-NFT if the NFT or F-NFT is a security. Whether any given collectible NFT or F-NFT qualifies as a security is a fact-based determination. Because the status of collectible NFTs and F-NFTs as securities is a matter of securities law outside of OGE’s jurisdiction, neither OGE nor agency ethics officials are authorized to provide advice as to whether any given collectible NFT or F-NFT is a security. Filers who are planning to purchase, sell, or exchange collectible NFTs or F-NFTs valued at over \$1,000 may wish to consult with a financial advisor or securities attorney.

¹⁴ 5 U.S.C. app. §§ 103(l), 102(a)(5)(B); 5 C.F.R. §§ 2634.201(f), .303. Confidential disclosure filers are not required to disclose purchases, sales, and exchanges of securities, unless an agency has adopted supplemental financial disclosure requirements. *See* 5 C.F.R. § 2634.907 (describing confidential financial disclosure contents).

¹⁵ 5 U.S.C. app. § 103(l); 5 C.F.R. § 2634.309(a).

¹⁶ OGE’s regulations establishing exemptions from the criminal conflict of interest law, 18 U.S.C. § 208(a), found at 5 C.F.R. part 2640, refer to “publicly traded securities,” which constitute a narrower subset of assets than would qualify as securities for purposes of the Federal securities laws or the financial disclosure laws. OGE Legal Advisory LA-22-04 (July 6, 2022).

¹⁷ *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946); SECURITIES AND EXCHANGE COMMISSION, FRAMEWORK FOR “INVESTMENT CONTRACT” ANALYSIS OF DIGITAL ASSETS (2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn1.

IV. How Filers Should Report NFT and F-NFT Ownership and Transactions

Public financial disclosure filers¹⁸ must include, on a report using the OGE Form 278e, a brief description of any interest held in NFTs and F-NFTs held for investment or production of income that exceed \$1,000 in value at the end of the reporting period or that produce income over \$200 during the reporting period.¹⁹ The filer must provide a “full and complete” description of the NFT or F-NFT, which can be accomplished by identifying the name of the asset; that the digital asset is an NFT or F-NFT; and, if held through an exchange or platform, the exchange or platform on which it is held. Collectible NFTs should be marked as N/A in the “Excepted Investment Fund” column.²⁰ Filers should provide the value of the collectible NFT or F-NFT as well as amount of income received (if any) and the type of income (if any). The sample below shows two entries for a collectible NFT that is currently held, an NFT that was sold with capital gains in the reporting period, and an F-NFT that is currently held.

a. Sample OGE Form 278e Part 6 Entry

| # | Description | EIF | Value | Income Type | Income Amount |
|---|---|-----|-----------------------------|---------------|---------------------------|
| 1 | “Hieroglyph,” NFT Artwork (Trust Wallet account) | N/A | \$50,001-\$100,000 | | None (or less than \$201) |
| 2 | K.C. Apple, <i>Frisbee Sports</i> Ultra Rare Collectible Card NFT (MetaMask account) | N/A | None (or less than \$1,001) | Capital gains | \$201 - \$1,000 |
| 3 | “MiniCryptoWerewolf” (F-NFT representing 1% stake in “CryptoWerewolf” NFT) (Coinbase account) | N/A | \$1,001- \$15,000 | | None (or less than \$201) |

Public financial disclosure filers must report the purchase, sale, or exchange of collectible NFTs or F-NFTs that are securities when the value of the transaction is over \$1,000. Public financial disclosures are not required to report the purchase, sale, or exchange of collectible NFTs or F-NFTs that are not securities.

Filers should report sales, purchases, and exchanges of collectible NFTs and F-NFTs using the OGE Form 278-T. Filers should provide a brief description of the collectible NFT or F-NFT, the type of transaction, the date of the transaction, and the amount of the transaction. Filers who use money to purchase or sell a collectible NFT or F-NFT that is a security are treated as having engaged in a “purchase” or “sale.” Filers who trade cryptocurrencies, stablecoins, or other

¹⁸ Agency ethics officials assisting confidential financial disclosure filers should modify the guidance provided herein to ensure confidential disclosures report only that information required by 5 C.F.R. § 2634.907.

¹⁹ Public filers should generally report collectible NFT and F-NFT interests on Part 6 of the OGE Form 278e. If the collectible NFT or F-NFT is related to the filer or filer’s spouse’s current, former, or prospective outside employment, it should be reported instead on Part 2 or 5, respectively. Confidential filers should report collectible NFT and F-NFT interests in Part I of the OGE Form 450.

²⁰ It is possible that certain NFTs and F-NFTs may be structured as investment funds, in which case a filer must determine whether the NFT or F-NFT constitutes an Excepted Investment Fund and mark the correct category on the OGE Form 278e. Employees who own such assets are encouraged to consult with an ethics official.

digital assets for collectible NFTs or F-NFTs are treated as having engaged in an “exchange.”²¹ An employee must report an exchange when at least one of the exchanged assets is a security, and should note the cryptocurrency, stablecoin, or other digital asset used to acquire the collectible NFT or F-NFT. The below sample represents the purchase of one collectible NFT and the exchange of one F-NFT for cryptocurrency. The received asset should be listed first.

b. Sample OGE Form 278-T Report

| # | Description | Type | Notification Received Over 30 Days Ago | Date | Amount |
|---|--|----------|--|------------|---------------------|
| 1 | “Hieroglyph,” NFT Artwork (Trust Wallet account) | Purchase | | 11/12/2022 | \$50,001-\$100,000 |
| 2 | “MiniCryptoWerewolf” (F-NFT representing 1% stake in “CryptoWerewolf” NFT) (Coinbase account) (received in exchange for ether (ETH)) | Exchange | Yes | 11/12/2022 | \$15,001 - \$50,000 |

V. Conclusion

Collectible NFTs and F-NFTs are relatively new types of digital assets. OGE will continue to evaluate advances in digital asset technology and changes to the regulatory environment as they arise and may modify this guidance as appropriate in the future. Agency ethics officials who have questions concerning this Legal Advisory should contact their OGE Desk Officer.

²¹ I.R.S. Publ’n 544 (Feb. 16, 2022).