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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Treatment of Information Technology and Internet Funds for Purposes of the  
Regulatory Exemptions to 18 U.S.C. § 208

Executive branch employees are generally prohibited from participating in particular Government matters in which they have a personal or imputed financial interest.<sup>1</sup> Through regulation, OGE has provided a limited number of exemptions that allow employees to participate in particular matters in which they would otherwise have a conflict of interest.<sup>2</sup> Two of these exemptions allow employees to participate in matters in which they would have a disqualifying financial interest arising from investments in mutual funds.<sup>3</sup> The first exemption applies to the underlying holdings of “diversified” mutual funds<sup>4</sup> and the second set of exemptions applies to the underlying holdings of “sector” mutual funds.<sup>5</sup>

This Legal Advisory clarifies that mutual funds that have an investment strategy focused broadly on information technology or internet companies are “diversified” mutual funds for purposes of the regulatory exemptions.<sup>6</sup> On the other hand, mutual funds with an investment strategy focused on specific information technology products or services or on a particular

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<sup>1</sup> 18 U.S.C. § 208(a).

<sup>2</sup> 5 C.F.R. § 2640 subpart B. OGE is authorized to promulgate these exemptions pursuant to 18 U.S.C. § 208(b)(2).

<sup>3</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 applicable to unit investment trusts as well. 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.

<sup>4</sup> 5 C.F.R. § 2640.201(a). A “diversified” mutual fund is one that “does not have a policy of concentrating its investments in an industry, business, country other than the United States, or single State within the United States.” *Id.* § 2640.102(a).

<sup>5</sup> 5 C.F.R. § 2640.201(b)(1)-(3). For purposes of the regulatory exemptions a “sector” mutual fund is one that has a stated policy of concentrating its investments in “an industry, business, country other than the United States, or single State within the United States.” *Id.* § 2640.102(q).

<sup>6</sup> The term “information technology” is broadly defined as “technology involving the development, maintenance, and use of computer systems, software, and networks for the processing and distribution of data.” *See, e.g., Information Technology*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/information%20technology> (last visited Aug. 8, 2019).



segment of the information technology or internet field are “sector” mutual funds for purposes of the regulatory exemptions.

## **I. Guidance Regarding Information Technology and Internet Funds**

OGE previously opined that funds “expressly focused on computers and electronics” or “computer and related companies” are sector funds.<sup>7</sup> Similarly, OGE advised that an “internet fund” with a stated concentration in “companies . . . engaged in the research, design, development or manufacturing, or engaged to a significant extent in the business of distributing products, processes or services for use with Internet or Intranet related businesses” was a sector fund.<sup>8</sup> OGE noted that the division between sector and diversified funds is not always easily defined; therefore, OGE’s advice was “necessarily tentative and incomplete,” subject to further refinement in the future.<sup>9</sup>

After further consideration, OGE now believes that the information technology and internet fields are too broad to be considered a discrete “business” or “industry” under the test previously articulated by OGE for determining when a mutual fund is a sector fund for purposes of the regulatory exemptions to 18 U.S.C. § 208.<sup>10</sup> This conclusion recognizes that companies from all sectors of the economy are now participating in the digital marketplace, and that information technology and internet use have become embedded and prevalent across the American economy. Business activities as distinct as manufacturing semiconductors to operating social media networks could all be described as being in the information technology field. Companies involved in such diverse activities do not have the “degree of relatedness and overlapping interests and operations” that are common of other sectors.<sup>11</sup> Moreover, such companies do not share the type of “common regulatory environment” in which it would be expected that “Government decisions affecting one type of company would . . . affect the other.”<sup>12</sup>

As such, mutual funds that have a stated policy of investing broadly across the information technology or internet field are now considered “diversified” for purposes of the regulatory exemptions. Examples of mutual funds that would now be seen as diversified include funds that invest generally in technology, “high” technology, or information technology; funds that invest broadly in companies that do business primarily over the internet; and funds that invest in companies engaged in online retail.

On the other hand, mutual funds that have a stated investment policy of concentrating more narrowly on particular information technology products or services, or on a specific or specialized segment of interrelated information technology or internet-based companies, will continue to be considered “sector” funds. Examples of mutual funds that would generally be

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<sup>7</sup> OGE Inf. Adv. Op. 00x8, at 8 n.4 (Aug. 25, 2000). This advisory was also issued as OGE DAEOgram DO-00-030 (Aug. 25, 2000).

<sup>8</sup> OGE Inf. Adv. Op. 00x8, at 12 (alteration in original).

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *See id.* at 7-8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 8 (noting that a primary factor in whether companies are part of “one industry or business sector” is whether “given their interdependence or competition with each other” they share a “common regulatory environment”).

considered sector funds include those that have a policy of concentrating their investments in companies that produce computer hardware, semiconductors, or software, or that provide specific information technology services or products such as cybersecurity, social media networks, or digital currency software. Similarly, mutual funds that have a policy of investing in information technology in a specific sector, such as health-related information technology mutual funds, would be considered sector funds. These examples are not exhaustive.

## **II. Conclusion**

Mutual funds that have an investment strategy focused broadly across the information technology or internet field are “diversified” for purposes of the regulatory exemptions to 18 U.S.C. § 208. To determine whether a mutual fund that invests in the information technology or internet field is diversified, employees and agency ethics officials should review the prospectus or other summary of investment strategy produced by the fund. If questions remain, OGE encourages agency ethics officials to contact their agency’s Desk Officer for assistance.