UNITED STATES OFFICE OF
GOVERNMENT ETHICS

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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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Director

SUBJECT: Application of the Outside Earned Income Limitations to Mining, Staking, and Delegated Staking of Cryptocurrency

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on when cryptocurrency transaction fees and block rewards[1] are "compensation for services" subject to the outside earned income limitations applicable to covered non-career officials.[2] As described more fully below, cryptocurrency transaction fees and block rewards are considered "compensation for services" when they derive from activities such as mining or staking in which the employee is validating transactions. By contrast, an employee who receives transaction fees or block rewards from delegated staking—an arrangement in which the

[1] As discussed below, block rewards are incentives, generally in the form of newly generated cryptocurrency, which are provided to parties who successfully validate transactions on a blockchain. *See* U.S. DEP'T OF TREASURY, CRYPTO-ASSETS: IMPLICATIONS FOR CONSUMERS, INVESTORS, AND BUSINESSES 12 (2022), https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf.

[2] A covered noncareer employee is an employee, other than a special Government employee, who occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule, and who is:

> (1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:
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> (i) A position within the uniformed services; or
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> (ii) A position within the foreign service below the level of Assistant Secretary or Chief of Mission;
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> (2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;
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> (3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in § 213.3301 of this title for Schedule C positions; or
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> (4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for noncareer executive assignment positions.

5 C.F.R. § 2636.303(a).

employee does not engage in validation of transactions—has not received "compensation for services" covered by the outside earned income limitations.

I. Outside Earned Income Limitations

The Ethics in Government Act limits the amount of outside earned income covered noncareer employees may receive from any non-federal source in a single year.[3] For calendar year 2023, this amount is $31,815, prorated for the number of days the employee serves during the year.[4] Executive Order 12674 expands on this limitation and outright prohibits covered noncareer employees who hold full-time positions requiring Presidential appointment (PA or PAS) from receiving any outside earned income.[5]

For purposes of both the outside earned income limitation found in the Ethics in Government Act and the Presidential outside earned income ban, the term "outside earned income" is defined as "wages, salaries, honoraria, commissions, professional fees, and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government."[6] To be considered outside earned income, therefore, a payment must be "compensation for services" provided by the employee.[7] Accordingly, passive income does not trigger the outside earned income limitation or ban.[8]

II. Cryptocurrency Validation

Purchases and sales of digital assets, such as cryptocurrencies, are recorded using distributed ledger technology, or "blockchains."[9] Each transaction is separately recorded in the blockchain, which generally provides the owner with both evidence of ownership and access to the digital asset. Prior to being recorded, a transaction must be validated. Transactions are validated to protect against fraudulent practices, such as double spending. Only after a transaction is validated can the transaction—along with batches of other transactions, known colloquially as "blocks"—be recorded and thereby become part of the blockchain. Validation of

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[3] 5 U.S.C. § 13143(a); 5 C.F.R. § 2636.304.
[4] *See* OGE Legal Advisory LA-23-01 (Jan. 5, 2023).
[5] Exec. Order No. 12,674 § 102(a), 54 Fed. Reg. 15,159 (Apr. 12, 1989), *as modified by* Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990); 5 C.F.R. § 2635.804(a).
[6] 5 C.F.R. § 2636.303(b).
[7] Although the law does not define the term "service," it is generally understood as "[l]abor performed in the interest or under the direction of others; specif., the performance of some useful act or series of acts for the benefit of another, usu. for a fee." *Service,* BLACK'S LAW DICTIONARY (11th ed. 2019).
[8] *See* 5 C.F.R. § 2636.303(b)(4) (excluding from the definition of outside earned income "[i]ncome from investment activities where the individual's services are not a material factor in the production of income"). Of course, income that is generally characterized as "passive," such as interest or dividends, would constitute "outside earned income" if it was in fact provided in exchange for services provided by a covered noncareer employee. OGE Inf. Adv. Op. 90x20 (Nov. 2, 1990).
[9] For a more detailed explanation of the processes involved in the creation and exchange of digital assets, *see generally* U.S. DEP'T OF TREASURY, *supra* note 1; U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104625, BLOCKCHAIN: EMERGING TECHNOLOGY OFFERS BENEFITS FOR SOME APPLICATIONS BUT FACES CHALLENGES (2022), https://www.gao.gov/assets/gao-22-104625.pdf; KRISTEN BUSCH, CONG. RSCH. SERV., R47064, BLOCKCHAIN: NOVEL PROVENANCE APPLICATIONS (2022), https://crsreports.congress.gov/product/pdf/R/R47064.

cryptocurrency transactions is not centralized. Rather, individual validators are chosen from a pool of eligible candidates.

a. Mining and Staking

Currently, two primary methods exist for determining who will be selected to validate a transaction. The first method is proof-of-work, often referred to as "mining"; the second is proof-of-stake, often referred to as "staking."

- When a blockchain uses mining, validators (called "miners") compete to be the first to solve complex math problems in order to win the right to create and validate new blocks. Miners who are successful create a block and validate the transactions on that block. In exchange, they generally receive block rewards. Miners may also charge transaction fees for validating transactions.

- When a blockchain uses staking, validators (called "stakers") deposit cryptocurrency onto the blockchain as collateral in exchange for the right to be selected to create and validate blocks. The more cryptocurrency deposited (or "staked") by a staker, the more likely that they will be selected to validate a block of transactions. Stakers selected to validate a transaction may receive transaction fees or block rewards.

Regardless of the process used, validators provide the same service: reviewing transactions for legitimacy and recording validated transactions to the blockchain.

b. Delegated Staking

In a delegated staking arrangement, individual cryptocurrency owners (delegators) agree to lend their cryptocurrency to another person (delegate) to enhance the delegate's likelihood of being selected to create and validate blocks on a blockchain that uses staking. In exchange, the delegators are entitled to receive part of the transaction fees or block rewards received by the delegate. The delegators do not personally engage in the creation or validation of blocks. That responsibility lies with the delegate.

III. When Transaction Fees and Block Rewards Qualify as Outside Earned Income

Transaction fees and block rewards are outside earned income when received as "compensation for services." Employees who validate cryptocurrency transactions, e.g., by mining or staking, are providing a service to others on the blockchain. Transaction fees and block rewards received for validating transactions are therefore considered outside earned income.[10]

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[10] For purposes of both the Ethics in Government Act and Executive Order 12674, outside earned income is deemed to have been received in the year in which the services were provided. 5 C.F.R. § 2635.804(c)(1); 5 C.F.R. §§ 2636.303(c), .304(d). For that reason, delays in payment or temporary limitations on availability or alienability

Employees who are merely delegators in a delegated staking arrangement, on the other hand, are not engaging in services; rather, they are loaning their assets to another party in the hopes of receiving a financial return. A delegated staking arrangement is therefore more akin to an investment agreement resulting in passive income. As such, block rewards and transaction fees received by a delegator in a delegated staking arrangement are not "compensation for services" and would not constitute outside earned income for purposes of either the Ethics in Government Act or Executive Order 12674, as modified.

IV. Conclusion

As set forth above, whether cryptocurrency transaction fees and block rewards qualify as outside earned income depends on whether they are "compensation for services." Employees are encouraged to consult with their agency ethics officials if they have questions about how their cryptocurrency activities may implicate the ethics laws. Agency ethics officials who have questions about this Legal Advisory should reach out to their OGE Desk Officer.

(such as may occur during lock-in periods) are immaterial for purposes of determining when transaction fees and block rewards are received for purposes of the outside earned income limitations.