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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
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SUBJECT: Thrift Savings Plan Mutual Fund Window; Financial Disclosure and Conflicts of Interest Considerations

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory¹ to advise agency ethics officials on how the financial disclosure and conflict of interest rules apply to employees who purchase mutual funds through the recently announced Thrift Savings Plan (TSP) mutual fund window.²

As set out below, mutual funds purchased through the TSP are not required to be reported on an employee's public or confidential financial disclosure report. In addition, such investments are excluded from coverage of 18 U.S.C. § 208(a) under the employee benefit plan exemption for investments in the TSP. Agencies may, however, have supplemental ethics regulations that require confidential disclosure of mutual funds purchased through the TSP or that prohibit employees of the agency, or a bureau or office of the agency, from owning certain mutual funds purchased through the TSP.

I. Background

In 2009, Congress authorized the Federal Retirement Thrift Investment Board (Board) to offer a mutual fund window to TSP participants.³ The mutual fund window allows participants to invest a portion of their TSP balances in individual mutual funds. The Board voted in 2015 to establish the window,⁴ and final regulations were promulgated on May 10, 2022, that allow TSP participants to begin investing through the window on June 1, 2022.⁵ The final regulations also

¹ OGE consulted with the staff of the Federal Retirement Thrift Investment Board prior to issuance of this Legal Advisory.

² Mutual Fund Window, 87 Fed. Reg. 27,917 (May 10, 2022) (to be codified at 5 C.F.R. pt. 1601).

³ Thrift Savings Plan Enhancement Act of 2009, Pub. L. No. 111-31, div. B, tit. I, § 104(b), 123 Stat. 1776, 1854 (codified as amended at 5 U.S.C. § 8438(b)(5)(A)).

⁴ Fed. Ret. Thrift Inv. Bd., Minutes of the Meeting of the Board Members 5-6 (July 27, 2015), https://www.frtib.gov/meeting_minutes/2015/2015Jul.pdf.

⁵ Mutual Fund Window, 87 Fed. Reg. at 27,917.



codify the terms and conditions for investment in the mutual fund window, including a limit on the portion of a participant's TSP balance that may be invested through the window.⁶ TSP participants may only invest 25% of their total plan holdings through the mutual fund window;⁷ the remaining 75% must be maintained in one or more of the TSP core funds.⁸ As described in more detail in the preamble to the Board's final rule, the term "TSP core funds" refers to the G Fund, F Fund, C Fund, S Fund, and I Fund, as well as the L Funds.⁹

II. Financial Disclosure Reporting

Employees are not required to report mutual funds held through the TSP mutual fund window on their public or confidential financial disclosure reports. Congress has expressly excluded from public financial disclosure the reporting of "financial interests in or income derived from . . . any retirement system under title 5, United States Code (including the Thrift Savings Plan under subchapter III of chapter 84 of such title)."¹⁰ OGE's confidential financial disclosure program regulations similarly exclude from reporting "[f]inancial interests in any retirement system of the United States (including the Thrift Savings Plan)."¹¹ These exclusions apply broadly to all investments in Federal retirement plans, including all investment options in such plans.

III. Financial Conflicts of Interest (18 U.S.C. § 208)

Mutual funds purchased through the TSP mutual fund window qualify for the regulatory exemption to 18 U.S.C. § 208(a) for "employee benefit plans" found at 5 C.F.R. § 2640.201(c)(1). This exemption permits an employee to participate in "[a]ny particular matter affecting one or more holdings of an employee benefit plan, where the disqualifying financial interest in the matter arises from membership in . . . [t]he Thrift Savings Plan for Federal employees described in 5 U.S.C. 8437."¹² This exemption covers the entirety of the TSP, and, similar to the employee benefit plan exemption for "[a] pension plan established or maintained by a State government or any political subdivision of a State government for its employees,"¹³ makes no differentiation based on investment options.¹⁴

IV. Agency Supplemental Ethics Regulations

Agencies that have adopted prohibited holdings restrictions or additional confidential financial disclosure requirements through supplemental ethics regulations must determine if

⁶ *Id.*

⁷ 5 C.F.R. § 1601.52(a)(4).

⁸ *Id.*

⁹ Mutual Fund Window, 87 Fed. Reg. at 27,917; 5 U.S.C. § 8438(b)(1)(A)-(E), (c)(2).

¹⁰ 5 U.S.C. app. § 102(i)(1)(A); 5 C.F.R. § 2634.301(c)(4). Similarly, employees are not required to report purchases, sales, or exchanges of mutual funds held in the TSP.

¹¹ 5 C.F.R. § 2634.907(c)(3)(vi).

¹² 5 C.F.R. § 2640.201(c)(1)(i).

¹³ *Id.* § 2640.201(c)(1)(ii); *see also id.* § 2640.102(n) (defining "pension plan" to include "any plan, fund or program maintained by an employer or an employee organization, or both, to provide retirement income to employees, or which results in deferral of income for periods extending to, or beyond, termination of employment").

¹⁴ OGE will evaluate the TSP mutual fund window to determine whether changes to the employee benefit plan exemption at 5 C.F.R. § 2640.201(c)(1)(i) are appropriate or necessary.

those regulations apply to mutual fund investments in the Thrift Saving Plan and, if they do, advise their employees of the relevant requirements.¹⁵ Agencies who may wish to adopt supplemental regulations that prohibit investment in certain mutual funds held through the TSP or that require confidential disclosure of funds purchased through the TSP should contact their OGE Desk Officer to discuss the supplemental regulation process.¹⁶

V. Conclusion

Introduction of the TSP mutual fund window may result in agency ethics officials receiving questions concerning the application of the Federal ethics laws to those investments. Mutual funds held within the TSP are not required to be reported on an employee's public or confidential financial disclosure report. In addition, mutual funds held in the TSP are exempt from coverage of 18 U.S.C. § 208(a) pursuant to the employee benefit plan exemption for TSP holdings. Agency supplemental ethics regulations may, however, require an employee to either avoid investing in certain mutual funds offered through the TSP mutual fund window or to disclose investment in such mutual funds through supplemental confidential reporting. Agency ethics officials who have questions about this Legal Advisory should contact their OGE Desk Officer.

¹⁵ Agencies may only impose additional supplemental ethics regulations as authorized by OGE. 5 C.F.R. §§ 2634.103, 2635.105.

¹⁶ The Ethics in Government Act does not authorize OGE or agencies to expand the public financial disclosure requirements.