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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Conflicts of Interest Considerations and Financial Disclosure Reporting Requirements for Managed Investment Accounts

This Legal Advisory highlights the potential increased conflicts of interest risks and financial disclosure reporting burdens that exist for executive branch employees who invest in managed accounts, including those managed by robo-advisors. Specifically, this Advisory describes managed accounts and provides guidance about the application of the criminal conflict of interest law and financial disclosure reporting requirements to those accounts.

The U.S. Office of Government Ethics ("OGE") has found that managed accounts can create significant risks for employees because they frequently invest in a large number of stocks, the investment decisions are often made without consulting with the account holder, and the accounts do not qualify for the mutual fund exemptions.[1] When employees hold such accounts they risk inadvertently participating in particular matters in which they have a personal or imputed financial interest, thereby violating the criminal conflict of interest law, 18 U.S.C. § 208.[2] In addition, managed accounts may significantly increase the reporting burden on those employees who file financial disclosure reports because they are required to disclose all underlying assets of the accounts that meet the relevant monetary thresholds, as described and illustrated through the examples below. Therefore, OGE urges employees to consult with their agency ethics officials to discuss their individual risks in light of their job duties and reporting obligations before opening or continuing to hold a managed account.

[1] Whether a managed account creates conflicts of interest risks for an employee and the level of that risk is largely determined by the employee's job duties.
[2] *See also* U.S. OFF. OF GOV'T ETHICS, CONFLICTS OF INTEREST CONSIDERATIONS: LEGAL ENTITIES THAT HOLD ASSETS 2 (2021), https://www.oge.gov/web/OGE.nsf/0/7A3DB2F1691E9E42852585B6005A1F8F/$FILE/Legal%20Entities%20that%20Hold%20Assets.pdf.

I. What is a Managed Account and a Robo-Advisor Account?

A managed account (also called a "separately managed account" or "controlled account") is an account that is owned by the investor but managed for a fee by a financial advisor.[3] The owner of a managed account gives the financial advisor the discretion to buy, sell, and trade investments on their behalf. The account owner may choose among predetermined "portfolios" for the managed account, which often have names similar to mutual funds, including descriptors such as high yield, balanced, large cap, global small cap, strategic fixed income, and other similar descriptors, or hold the exact same assets as a specific mutual fund.[4] The account owner also may be able to customize the portfolio to some extent, although this is not necessarily the case with all managed accounts. A robo-advisor account is a specific type of managed account. A robo-advisor[5] is a digital platform that trades on behalf of an investor's account based on an algorithm that has little to no human supervision.[6]

A managed account, including a robo-advisor account, is not an investment fund even if the account owner selects an established portfolio of investment choices. Notably, with a managed account, the account owner has not "pooled" their money with that of other investors. Rather, each account owner holds each of the assets in the portfolio individually and directly in their own name.

II. Application of the Financial Conflict of Interest Law to Managed Accounts

A. Managed Accounts Do Not Qualify for the Mutual Fund Exemptions

Although an employee may assume because of the characteristics of their managed account that it qualifies for one of the mutual fund exemptions to the financial conflict of interest law found at 5 C.F.R. § 2640.201, the account does not qualify because managed accounts are not funds. Despite appearing to many employees to be the equivalent of a mutual fund because it may track the investments of a mutual fund, be invested in a strategy that is used for multiple investors, or offer similar investment benefits as mutual funds, such as diversification, a managed account is not a fund.

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[3] *See Managed Account*, U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Definitions#_Managed_Account (last visited Mar. 7, 2024).

[4] Through its review of financial disclosure reports, OGE has found that the following words in the description of the asset may indicate that the employee has a managed account rather than a mutual fund: "account," "strategy," and "portfolio" (specifically, when the word "portfolio" is used for assets other than a variable annuity). OGE encourages ethics officials who see one of these terms on a financial disclosure report to follow up with the employee to determine whether the reported asset is in fact a managed account.

[5] This website provides a directory of established robo-advisors: *Robo-Advisor List*, ROBO-ADVISOR FINDER, https://www.robo-advisorfinder.com/list (last visited Mar. 7, 2024). It includes companies that are only robo-advisors as well as those that offer a variety of investment services.

[6] *See What Is a Robo-Advisor?,* INVESTOPEDIA, https://www.investopedia.com/terms/r/roboadvisor-roboadviser.asp (Feb. 26, 2024).

B. A Managed Account Holding May Qualify for An Exemption

An employee who has a managed account owns each asset in the account directly. Therefore, each asset in the account must be analyzed under 18 U.S.C. § 208 using the guidance appropriate for that type of asset (*e.g.*, stock, mutual fund, etc.).[7] An employee with a managed account may be able to use regulatory exemptions for individual assets held in the account, specifically the exemptions for securities found in 5 C.F.R. § 2640.202 and the exemptions for mutual funds and unit investment trusts found in 5 C.F.R. § 2640.201. However, determining whether an exemption applies may be more challenging for an employee and ethics officials if the account has a significant number of holdings that change in value daily. Additionally, whether it is manageable from an ethics risk perspective for the employee to keep the account will depend on the employee's job duties.

> **Example:** An employee owns a managed account with a strategy focused on large-cap stocks. The account holds over 100 diverse individual stocks, and those stock holdings are the only ones held by the employee, their spouse, and their minor children. The employee would be able to utilize the *de minimis* securities exemption found at 5 C.F.R § 2640.202(a) for party matters for any holding worth $15,000 or less. The *de minimis* exemption for matters of general applicability found at 5 C.F.R § 2640.202(c) is also available.

III. Financial Disclosure Reporting Requirements for Managed Accounts

Filers who hold managed accounts are required to disclose on their financial disclosure reports all underlying assets of the accounts that meet the relevant monetary thresholds.[8] Just as managed accounts themselves do not qualify for the regulatory exemptions for mutual funds because they are not funds,[9] they also do not meet the "excepted investment fund" definition for reporting purposes,[10] which would exempt a filer from reporting the individual holdings of the account. Accordingly, the required disclosures may be extensive, as managed accounts often hold a significant number of assets, sometimes in the hundreds. If a filer, for instance, had to disclose the account in the example above, the filer would need to report each of the hundred-plus stocks in the account that meet the reporting thresholds. Additionally, if they are a public financial disclosure filer, they will have to file transaction reports for each reportable stock transaction.

The sections below discuss the reporting requirements for managed accounts and provide reporting examples. For purposes of simplicity, the illustrative reporting examples below only

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[7] For information regarding the conflicts of interest analysis on an asset-by-asset basis, *see Analyzing Potential Conflicts of Interest,* U.S. OFF. OF GOV'T ETHICS, https://www.oge.gov/Web/OGE.nsf/Financial%20Conflicts%20of%20Interest/931A1B0819F5E884852582200075ECC8?opendocument (last visited Mar. 11, 2024).

[8] To find how to disclose a particular type of holding not included below, see the *Public Financial Disclosure Guide* or the *Confidential Financial Disclosure Guide*.

[9] *See infra* Section II.A.

[10] *See Excepted Investment Fund (EIF),* U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Definitions#:~:text=a%20maximum%20return.-,Excepted%20Investment%20Fund%20(EIF),-Definition (last visited Mar. 7, 2024).

list a small number of holdings. For most managed accounts, however, the amount of assets and transactions reported is substantially higher, creating a greater filing burden for the employee.

A. OGE Form 278e and OGE Form 278-T Reporting

1. Asset and Income Reporting

A public financial disclosure filer reports each asset in their managed account that (a) is worth more than $1,000 at the end of the reporting period or (b) generated more than $200 in income during the reporting period.[11] If the managed account is a retirement account, the filer will report the account and its underlying assets in Part 2 or, if held by their spouse, Part 5 of the OGE Form 278e.[12] Filers should report all other accounts and their assets in Part 6.[13]

Part 2 and Part 5 Example

#	Description	EIF	Value	Income Type	Income Amount
1	IRA:	No			
1.1	ABC Diversified Bond Fund (ABCDX)	Yes	$1,001-$15,000		None (or less than $201)
1.2	Xylophone Technologies Corporation (XYZ)	N/A	$1,001-$15,000		None (or less than $201)
1.3	Flower Corp. (FLW)	N/A	$1,001-$15,000		None (or less than $201)
1.4	Arlington, VA Bond	N/A	$1,001-$15,000		None (or less than $201)

[11] *See* 5 U.S.C. § 13104(a)(1), (3); 5 C.F.R. §§ 2634.301-302.
[12] For reporting the filer's retirement account assets, *see OGE Form 278e: Part 2*, U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Part_2 (last visited Mar. 11, 2024). For reporting the filer's spouse's retirement accounts assets, *see OGE Form 278e: Part 5*, U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Part_5 (last visited Mar. 11, 2024).
[13] For reporting other assets and income, *see OGE Form 278e: Part 6,* U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Part_6 (last visited Mar. 11, 2024).

Part 6 Example

#	Description	EIF	Value	Income Type	Income Amount
1	Brokerage account:	No			
1.1	ABC Diversified Bond Fund (ABCDX)	Yes	$50,001-$100,000		$1,001-$2,500
1.2	Xylophone Technologies Corporation (XYZ)	N/A	None (or less than $1,001)	Dividends/capital gains	$2,501-$5,000
1.3	Flower Corp. (FLW)	N/A	$1,001-$15,000	Dividends	$201-$1,000
1.4	Arlington, VA Bond	N/A	$1,001-$15,000	Interest	$201-$1,000

2. *Transaction Reporting*

Filers report each securities transaction of more than $1,000 on Part 7 of the OGE Form 278e.[14] In addition, they report each transaction of more than $1,000 in stocks, bonds, or other securities that are not excepted investment funds on an OGE Form 278-T.[15] In OGE's experience, managed accounts—and robo-advisor accounts in particular—frequently trade securities, which can result in extremely burdensome transaction reporting obligations for a public financial disclosure filer.

Part 7 Example

Description	Type	Date	Amount
ABC Diversified Bond Fund (ABCDX)	purchase	5/1/2023	$1,001-$15,000
Xylophone Technologies Corporation (XYZ)	sale	7/15/2023	$15,001-$50,000
Flower Corp. (FLW)	purchase	7/10/2023	$1,001-$15,000
Arlington, VA Bond	purchase	7/17/2023	$1,001-$15,000

[14] *See* 5 U.S.C. § 13104(a)(5); 5 C.F.R. § 2634.303. For instructions regarding how to report transactions, *see OGE Form 278e: Part 7,* U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Part_7 (last visited Mar. 11, 2024).

[15] *See* 5 U.S.C. § 13105(l); 5 C.F.R. § 2634.309. For instructions regarding how to report periodic transactions, *see OGE Form 278-T*, U.S. OFF. OF GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Form_278-T (last visited Mar. 11, 2024).

278-T Example

Description	Type	Date	Notification Received Over 30 Days Ago[16]	Amount
Xylophone Technologies Corporation (XYZ)	sale	7/15/2023	No	$15,001-$50,000
Flower Corp. (FLW)	purchase	7/10/2023	No	$1,001-$15,000
Arlington, VA Bond	purchase	7/17/2023	No	$1,001-$15,000

B. OGE Form 450 Reporting

Confidential financial disclosure filers report each asset that is worth more than $1,000 at the end of the reporting period or that produced more than $1,000 of income during the reporting period, unless the asset is excepted from reporting.[17] The filer reports the underlying assets of a managed account on Part I of the OGE Form 450.

Part I Example

1	Brokerage account:
2	- ABC California Bond Fund (ABCCX)
3	- Xylophone Technologies Corporation (XYZ)
4	- Flower Corp. (FLW)
5	- Arlington, VA Bond

IV. Conclusion

OGE urges employees to consult with their agency ethics officials to discuss their individual risks in light of their job duties and reporting obligations before opening or continuing to hold a managed account. Employees who have a managed account will need to take steps to ensure they avoid conflicts and meet their financial disclosure reporting obligations, such as regularly monitoring the account. Additionally, if the employee cannot prevent a managed account from acquiring potentially conflicting assets, the employee may need to exit the account.

Agency ethics officials who have questions about this Legal Advisory may contact their OGE Desk Officer.

[16] This column is not included in Part 7 of the OGE Form 278e.
[17] For exceptions from reporting, *see* 5 C.F.R. § 2634.907(c)(3). New entrant filers are only required to report assets that they hold on the date of filing. *See* 5 C.F.R. § 2634.908(b).