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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Identifying and Preventing Violations of 18 U.S.C. § 208 Arising from Digital Asset Ownership

The U.S. Office of Government Ethics (“OGE”) is issuing this Legal Advisory to assist agency ethics officials in identifying when an employee has a disqualifying financial interest under 18 U.S.C. § 208 arising from ownership of digital assets.¹ As described further below, this Legal Advisory explains that an employee who owns digital assets will have a disqualifying financial interest in a particular matter when there is a real possibility that the matter will result in a gain or loss to the employee’s digital assets. Given the enhanced risk of possible conflicts of interest, this Legal Advisory also describes steps agency ethics officials are encouraged to take to proactively assist employees who are regularly assigned to work on particular matters involving digital assets.

I. Disqualifying Financial Interests under 18 U.S.C. § 208(a)

Section 208(a) prohibits an employee from “participat[ing] personally and substantially as a Government officer or employee . . . in a . . . particular matter . . . in which, to [the employee’s] knowledge, [the employee] has a financial interest.” As the implementing regulations explain, “the term financial interest means the *potential* for gain or loss . . . as a result of governmental action on the particular matter.”² Because “[t]he statute is . . . directed not only at dishonor, but also at conduct that tempts dishonor,”³ it reaches any particular matter in which

¹ For purposes of this Legal Advisory, the term “digital assets” (also known as “crypto assets”) refers to any digital representation of value generated and transferred using blockchain or distributed ledger technology, including assets commonly known as “cryptocurrencies,” “stablecoins,” and “non-fungible tokens” (“NFTs”). *See, e.g.*, Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 8003(b)(1)(B), 135 Stat. 429, 1340 (2021) (to be codified at 26 U.S.C. § 6045(g)(3)(D)).

² 5 C.F.R. § 2640.103(b) (emphasis added).

³ *United States v. Nevers*, 7 F.3d 59, 62 n. 7 (5th Cir. 1993) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961)).



the “temptation to put a finger on the scale” exists because the “employee has a financial reason to prefer a particular outcome.”⁴

Under longstanding executive branch interpretation,⁵ an employee is disqualified from participating in a particular matter when there is a direct and predictable “link between [the] governmental matter and a pecuniary gain or loss to the employee or specified entity.”⁶ As described in OGE’s implementing regulations, a “direct” effect exists where “there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest.”⁷ Although a “direct” effect need not be immediate, the chain of causation cannot be “attenuated or . . . contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.”⁸ Additionally, the effect must be “predictable,” meaning there is a “*real*, as opposed to speculative, possibility that the matter will affect the financial interest.”⁹

Under the “direct and predictable effect” test, “[g]ain or loss need not be probable for the prohibition against official action to apply.”¹⁰ Rather, an employee is required to recuse as soon as they are aware there is a “real [as opposed to speculative] possibility of gain or loss as a result of developments in or resolution of [the] matter.”¹¹

⁴ *Financial Interests of Nonprofit Organizations for Purposes of 18 U.S.C. § 208*, 30 Op. O.L.C. 64, 80 (2006).

⁵ See, e.g., *Memorandum for the Heads of Executive Departments and Agencies from the President*, 28 Fed. Reg. 4,539, 4,543 (May 7, 1963) (establishing that an employee is disqualified from a matter when the matter could directly and predictably affect their interests); *Ethics Issues Raised by Retention and Use of Flight Privileges by FAA Employees*, 28 Op. O.L.C. 237, 240 (2004) (“The ‘direct and predictable effect’ requirement reflects the longstanding view of this Office.”); see also *United States v. White Eagle*, 721 F.3d 1108, 1119 (9th Cir. 2013) (“While an employee need not personally stand on either side of an underlying transaction, the link between the employee’s interest and the public act must be direct and predictable.”).

⁶ *Financial Interests of Nonprofit Organizations*, 30 Op. O.L.C. at 67; see also 5 C.F.R. § 2640.103(a)(3)(ii) (describing that whether a financial interest arises directly from a matter is based on the “chain of causation” and “expected effect of the matter on the financial interest”); *id.* § 2635.402(b)(1); *Ethics Issues Raised by Retention and Use of Flight Privileges by FAA Employees*, 28 Op. O.L.C. at 240 (“To constitute a disqualifying financial interest in a matter, the OGE regulations explain, a governmental matter must have more than a mere potential to affect the employee financially; rather, there must be ‘a direct and predictable effect.’”).

⁷ 5 C.F.R. §§ 2635.402(b)(1), 2640.103(a)(3).

⁸ 5 C.F.R. §§ 2635.402(b)(1)(i), 2640.103(a)(3)(i).

⁹ 5 C.F.R. §§ 2635.402(b)(1)(ii) (emphasis added), 2640.103(a)(3)(ii).

¹⁰ *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986) *cert. denied*, 484 U.S. 815 (1987). As OGE said in 1995, “[t]he statute does not require that the amount of gain or loss be of any particular size, or likelihood.” 60 Fed. Reg. 47,208, 47,209 (Sept. 11, 1995) (emphasis added).

¹¹ *Gorman*, 807 F.2d at 1303; *Air Line Pilots Ass’n, Int’l v. U.S. Dep’t of Transp.*, 899 F.2d 1230, 1232 (D.C. Cir. 1990). See also 5 C.F.R. § 2640.103(a)(3)(ii); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 560 (1961) (“[T]he question is not whether [the employee] was certain to benefit from [participating in] the contract, but whether the likelihood that he might benefit was [s]o great that he would be subject to those temptations which the statute seeks to avoid. That there was more than a mere likelihood in this case has already been shown.”); *Conflict of Interest—Financial Interest (18 U.S.C. § 208)—Husband and Wife*, 3 Op. O.L.C. 236, 238 (1979) (stating that employee would need to recuse “if a situation [arose] in which the outcome of a matter might have a direct and predictable effect on his income from the union or on any other personal financial interest”).

II. Relevant Characteristics of Digital Assets

Determining whether a particular matter may result in a financial gain or loss to the value of an employee’s digital assets can be challenging, and ethics officials often must undertake a highly fact-intensive analysis, given the following characteristics of digital assets and the digital asset marketplace:

First, there are no generally accepted standards that apply to classifying digital assets. Although digital assets are often classified within broad categories, such as “stablecoins,” “cryptocurrencies,” or “NFTs,” it is often the case that digital assets within those categories have significant differences from each other.¹² As a result, employees cannot treat all cryptocurrencies, stablecoins, or NFTs the same. Second, information about material risks to digital asset values often is not easily accessible to normal investors. Information that is available, such as whitepapers created by the developers of a token, may not contain negative information or investment risks.¹³ Moreover, digital assets that are not registered under the Federal securities laws are not required to provide publicly available prospectuses that would disclose information concerning material risks to the asset and its value.¹⁴ As a result, research shows that investors often base their decisions on public and market sentiment.¹⁵ Third, digital asset values are highly volatile and vulnerable to significant price fluctuations.¹⁶ Over the past

¹² For example, although many digital assets are labeled “stablecoins” – which suggests they try to maintain consistent values – there is significant variety in how such digital assets attempt to do so. While some stablecoins claim to be backed by off-chain reserves such as cash or commodities, others may not be backed by any off-chain assets, and others may claim to maintain price stability by other mechanisms. *See* Garth Baughman, et al., *The Stable in Stablecoins*, FEDS NOTES (Dec. 16, 2022), <https://www.federalreserve.gov/econres/notes/feds-notes/the-stable-in-stablecoins-20221216.html>.

¹³ *See* FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON DIGITAL ASSET FINANCIAL STABILITY RISKS AND REGULATION 28 (2022), <https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf> (explaining that disclosures by crypto-asset promoters “may lack information that is commonly relied upon for valuing investments, such as the rights of holders and obligations of issuers, information about the management team, a project plan or timeline, financial statements, or disclosures about funding sources”); Shuyu Zhang, et al., *Positive Tone and Initial Coin Offering*, 62 ACCT. & FIN. 2237 (2021).

¹⁴ Digital assets may be securities for purposes of Federal securities laws. *See, e.g.*, SEC. & EXCH. COMM’N, FRAMEWORK FOR “INVESTMENT CONTRACT” ANALYSIS OF DIGITAL ASSETS (2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_ednref9.

¹⁵ *See* Jose Almeida & Tiago Cruz Goncalves, *A Systematic Literature Review of Investor Behavior in the Cryptocurrency Markets*, 37 J. BEHAV. & EXPERIMENTAL FIN. (2023), <https://www.sciencedirect.com/science/article/pii/S2214635022001071#b197>.

¹⁶ *See* FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 13, at 23, 28.

few years, digital assets across the marketplace have demonstrated a susceptibility to speculative bubbles and to financial contagion.¹⁷

III. Determining Whether Digital Assets Pose a Disqualifying Financial Interest

Employees' ownership of digital assets may present conflicts for their work, similar to other investment property.¹⁸ Accordingly, employees must consider whether their "official duties would have an effect on the value of their virtual currency, just as they would any other property held for investment or the production of income."¹⁹ Given the relevant characteristics of digital assets discussed above, determining whether recusal is required from any given particular matter will require a consideration of all relevant facts and circumstances. Although OGE is not able to prospectively provide bright line rules, OGE is providing the following general guideposts, based on consultations with agency ethics officials, as to when an employee might have a disqualifying financial interest in a particular matter:

First, an employee who owns digital assets will often have a disqualifying financial interest in a particular matter of general applicability²⁰ that would establish new regulatory requirements for all digital assets, or a subset of digital assets that includes digital assets owned by the employee.²¹ That employee would also typically have a disqualifying financial interest in any particular matter that would increase, prohibit, or impair the marketability of all digital assets, or a subset of digital assets that includes digital assets owned by the employee.

Example 1: A policy analyst in the Treasury Department is asked to assist in drafting a proposed regulation that would prevent the sale, purchase, or exchange of certain digital assets absent a permit. The analyst owns *Digital Asset XYZ*. If adopted, the regulation would functionally prohibit all transactions of *Digital Asset XYZ* in the United States. Because the regulation poses a realistic possibility of impacting the value of the analyst's *Digital Asset XYZ*, they are required to recuse from this particular matter unless they first divest of *Digital Asset XYZ*, or receive a waiver under 18 U.S.C. § 208(b)(1).

¹⁷ Pablo D. Azar, et al., *The Financial Stability Implications of Digital Assets*, FIN. & ECON. DISCUSSION SERIES (Aug. 2022), <https://www.federalreserve.gov/econres/feds/the-financial-stability-implications-of-digital-assets.htm>; see BD. GOVERNORS FED. RSRV. SYS., FED. DEPOSIT INS. CORP., & OFF. COMPTROLLER CURRENCY, JOINT STATEMENT ON CRYPTO-ASSET RISKS TO BANKING ORGANIZATIONS (Jan. 3, 2023), <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20230103a1.pdf> (warning of "[c]ontagion risk within the crypto-asset sector").

¹⁸ OGE Legal Advisory LA-18-06, at 4 (June 18, 2018). See also OGE Legal Advisory LA-22-04, at 2 (July 5, 2022).

¹⁹ OGE Legal Advisory LA-18-06, at 4. OGE has previously used the term "virtual currencies" to refer to certain digital assets, such as cryptocurrencies and stablecoins. See, e.g., U.S. OFF. GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE GUIDE 203, 334 (2019), [https://www.oge.gov/web/OGE.nsf/Resources/Public+Financial+Disclosure+Guide+\(2019\)](https://www.oge.gov/web/OGE.nsf/Resources/Public+Financial+Disclosure+Guide+(2019)).

²⁰ See 5 C.F.R. § 2640.102(m) (defining "particular matter of general applicability" as a "particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties").

²¹ See, e.g., Ahmed Choker and Elise Alferi, *Long and Short-Term Impacts of Regulation in the Cryptocurrency Market*, 81 Q. REV. ECON. & FIN. 157 (2022) (finding that increased possibility of regulation of cryptocurrency markets is associated with decreased cryptocurrency values).

Second, an employee who owns a digital asset will not generally have a disqualifying financial interest in a particular matter involving specific parties, such as an enforcement action, merely because the particular matter may result in the forfeiture, freezing, or repatriation of another user's tokens of the same digital asset. In these cases, the financial impact of the particular matter will generally be limited to the subject of the action.²²

Example 2: An employee in the Department of Justice's Asset Forfeiture Program is part of a team that is initiating proceedings to seize the assets of an alleged drug dealer. The drug dealer's assets include *Bitcoin* with a total value of approximately \$150,000, which is an extremely small amount of all *Bitcoin* in the market. The employee also owns *Bitcoin*. Because the discrete seizure of the alleged drug dealer's *Bitcoin* poses no realistic possibility of moving the market price of *Bitcoin*, the employee is not prohibited from participating in the seizure.

On the other hand, employees should be mindful that certain enforcement matters may involve issues that could impact all, or a substantial subset of all, digital assets.²³ Employees who own digital assets should recuse from such particular matters, unless it is clear the matter will not affect the value of their digital assets. Similarly, employees should be mindful that enforcement matters that involve a substantial percentage of a single digital asset may impact the value of all tokens of that digital asset, and in some cases might also affect the value of other digital assets in the marketplace.²⁴

Example 3: An attorney with the Securities and Exchange Commission ("SEC") is asked to work on an enforcement action claiming Company Z is operating as an unlicensed securities broker. The case is the first of its kind. If the SEC were to win, it is expected that it would affect the liquidity of most digital assets, including *Digital Asset XYZ*. The attorney owns *Digital Asset XYZ*. Because there is a realistic possibility that the case could impact the value of *Digital Asset XYZ*, the attorney is required to recuse from this particular matter unless they first divest of the asset, or receive a waiver under 18 U.S.C. § 208(b)(1).

Example 4: An employee of the Department of Homeland Security is part of a task force focused on illegal drug trafficking activities. As part of the employee's duties, they work with the Department of Justice to prepare court documents seeking to freeze the digital asset accounts of a drug cartel. The cartel is estimated to own or control over 8.57% of

²² See 5 C.F.R. § 2635.402(b)(1), note ("If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party . . .").

²³ See, e.g., *In re Munchee Inc.*, S.E.C. Release No. 10445 (Dec. 11, 2017) (finding that digital assets offered in an Initial Coin Offering were securities).

²⁴ The risk that digital assets other than those subject to the enforcement action might be affected by the action will depend on a number of factors, including, for example, whether the assets are issued by the same issuer, operate over the same blockchain, or have similar functions or characteristics.

circulating tokens of *Digital Asset XYZ*.²⁵ The employee owns *Digital Asset XYZ*. Seizure of such a significant number of tokens presents a realistic possibility of affecting the value of the employee's *Digital Asset XYZ*. As such, they are required to recuse from this particular matter unless they first divest of the asset, or receive a waiver under 18 U.S.C. § 208(b)(1).

Beyond these general guideposts, whether an employee has a disqualifying financial interest arising from digital asset holdings depends heavily on the individual facts and circumstances of the particular matter.²⁶ As such, employees who own digital assets must exercise caution prior to participating in any particular matter focused on digital assets or digital asset-related individuals or entities.

IV. Proactive Steps Agencies Can Take to Avoid Conflicts of Interest

While a case-by-case analysis is appropriate for many employees who own digital assets, certain employees are at a heightened risk of having financial conflicts of interest arising from digital asset ownership because of the nature of their duties. OGE encourages agencies to proactively identify those employees who are assigned duties focusing on digital asset policy, regulation, enforcement, or investigation. For these employees, agencies should consider establishing appropriate controls to reduce their risk of a conflict of interest. This could include screening arrangements, setting limits on the types of particular matters the employee will be able to participate in, or directed and voluntary divestiture from those categories of digital assets likely to be the focus of, or affected by, the employee's official duties.²⁷ In particular, OGE reminds agency ethics officials that they may direct divestiture by an individual employee if digital asset ownership would require disqualification from "matters so central or critical to the performance of [the employee's duties]" that the employee's ability to perform the duties of their position would be "materially impaired."²⁸

Agency ethics officials with questions regarding this Legal Advisory or the application of section 208 to digital asset holdings are encouraged to contact their OGE Desk Officer.

²⁵ Ethics officials will need to assess the actual facts and circumstances of each case to determine the likelihood that an enforcement action involving a substantial amount of a digital asset will have a realistic possibility of affecting the value of an employee's digital asset holdings.

²⁶ Ethics officials should also keep in mind that employees may have stock, equity, or debt interests in digital asset-related companies or financial products. For example, employees may own stock in companies that are part of the digital asset sector, such as trading platforms or digital asset mining companies. In such cases, ethics officials should review the facts and circumstances of the particular matter to determine whether a realistic possibility of a financial gain or loss to the company exists in the same manner they would for other similar stock and equity interests. OGE Legal Advisory LA-20-03 (May 1, 2020).

²⁷ See 5 C.F.R. §§ 2635.403(d), 2638.104(c)(6); OGE Inf. Adv. Op. 92x12, at 2 (Mar. 17, 1992). Employees who divest digital assets to ensure compliance with Federal ethics statutes or regulations may be eligible for a certificate of divestiture for capital gains resulting from the required divestiture. See 26 U.S.C. § 1043; 5 C.F.R. pt. 2634, subpt. J.

²⁸ 5 C.F.R. § 2635.403(b)(1). Additionally, 5 C.F.R. § 2635.403(b)(2) permits agencies to "prohibit or restrict an individual employee from acquiring or holding a financial interest" if the holding of that interest would "[a]dversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified."