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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
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SUBJECT: Guidance for Reporting Virtual Currency on Financial Disclosure Reports

This Legal Advisory clarifies that the U.S. Office of Government Ethics (OGE) has determined that virtual currency¹ is “property held . . . for investment or the production of income” for purposes of public and confidential financial disclosure, pursuant to the Ethics in Government Act (EIGA).² OGE does not consider virtual currency a “real” currency or legal tender.³ Executive branch employees are therefore required to report their holdings of virtual currency on their public or confidential financial disclosure report, subject to applicable reporting thresholds for property held for investment or the production of income. Further, the reporting and conflict of interest principles set forth herein apply equally to other digital assets, such as “coins” or “tokens” received in connection with initial coin offerings or issued or distributed using distributed ledger or blockchain technology.

OGE recognizes that virtual currencies are experiencing a surge in use and access, and as a result, employees who hold virtual currencies are increasingly seeking guidance from their ethics officials concerning their financial disclosure reporting obligations. OGE also recognizes that virtual currency is a relatively new and still evolving financial instrument whose final form and function may yet change. Accordingly, we are issuing this guidance to address reporting requirements for employees who hold virtual currency and note that we may need to issue further guidance as the nature of virtual currency becomes better defined.

¹ See I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014), wherein the IRS describes virtual currency as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” Significantly, a result of this definition means the IRS treats virtual currency as property (and not a real currency) for U.S. federal tax purposes. Note that virtual currency is a term used synonymously with terms such as “cryptocurrency” and “digital currency.”

² 5 U.S.C. app. § 102(a)(3).

³ The Financial Crimes Enforcement Network (FinCEN) noted that “[i]n contrast to real currency, ‘virtual’ currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction.” See U.S. DEP’T OF THE TREASURY, FIN.CRIMES ENF’T NETWORK, FIN-2013-G001, “Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies,” (2013), <https://www.fincen.gov/sites/default/files/guidance/FIN-2013-G001.pdf>.



Background

Virtual currencies have existed for a number of years, but more recently have gained prominence in investor circles and the media for their fluctuations in value. There is general consensus within industry and government that virtual currency can function in different ways, i.e., it can serve as a store of value, a medium of exchange, and/or an investment asset.⁴ Federal agencies have recognized that virtual currencies have largely been held for investment purposes:

- The Internal Revenue Service (IRS) treats virtual currency as property (and not as real currency) for U.S. federal tax purposes.⁵
- The Commodity Futures Trading Commission (CFTC) views certain virtual currency as a commodity and involving a commodity derivative contract in specific situations.⁶
- Officials at both the CFTC and the Securities and Exchange Commission (SEC) recently noted that many digital assets, including virtual currencies, are being promoted as investment assets.⁷

Financial Disclosure Reporting

The EIGA requires employees to report “any interest in property held . . . for investment or the production of income”⁸ While virtual currency may act as a medium of exchange or substitute for real currency, it may also function as a commodity, the basis for a derivative contract, security, or other investment instrument, depending on how it is designed, issued, promoted, distributed, and used by participants in the community.⁹ In fact, a significant characteristic of digital assets, including virtual currencies, is their capacity to act as an

⁴ See I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014); see also *Investor Bulletin: Initial Coin Offerings*, U.S. SECS. & EXCH. COMM’N (July 25, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings; Public Statement from Jay Clayton, Chairman, U.S. Secs. & Exch. Comm’n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017); CHRIS BURNISKE & ADAM WHITE, BITCOIN: RINGING THE BELL FOR A NEW ASSET CLASS (2017), <http://research.ark-invest.com/bitcoin-asset-class>.

⁵ See I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014).

⁶ See BFXNA INC. d/b/a BITFINEX, CFTC Docket No. 16-19 (2016); see also Coinflip, Inc. d/b/a Derivabit, CFTC Docket No. 15-29 (2015).

⁷ “[C]ryptocurrencies are now being promoted, pursued and traded as investment assets, with their purported utility as an efficient medium of exchange being a distant secondary characteristic.” Jay Clayton & J. Christopher Giancarlo, *Regulators Are Looking at Cryptocurrency: At the SEC and CFTC, We Take Our Responsibility Seriously*, WALL ST. J., Jan. 24, 2018, <https://www.wsj.com/articles/regulators-are-looking-at-cryptocurrency-1516836363>; see also *Investor Bulletin: Initial Coin Offerings*, U.S. SECS. & EXCH. COMM’N (July 25, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings; Public Statement from Jay Clayton, Chairman, U.S. Secs. & Exch. Comm’n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017).

⁸ 5 U.S.C. app. § 102(a)(3).

⁹ See *supra* notes 5-8 (noting how some regulatory agencies treat virtual currency). For an industry perspective, see BURNISKE & WHITE, *supra* note 4, at 9, 13, wherein the authors observed that “[a] comparison of bitcoin’s global trading volume to its transactional volume highlights that the use of bitcoin as an investment medium is increasing faster than its transactional applications” and that “[w]ith each month, bitcoin cements its role as a tradeable and investable asset, drawing second looks from many investors who wrote it off as fraud or fad.”

investment asset through which holders may expect to generate investment income.¹⁰ OGE therefore regards a holding in virtual currency as an interest in property held for investment or the production of income. Consistent with the reporting requirements in the EIGA and OGE's regulations, such an interest must be reported on an employee's public or confidential financial disclosure report if it meets the income or value reporting thresholds for such property.¹¹

In connection with this Legal Advisory, OGE is incorporating this guidance into its guide for financial disclosure reporting.¹² In brief, filers report their holdings in a virtual currency if the value of the virtual currency holding exceeded \$1,000 at the end of the reporting period or if the income produced by the virtual currency holding exceeded \$200 during the reporting period. Filers are required to identify the name of the virtual currency and, if held through an exchange or platform, the exchange or platform on which it is held.¹³

Annual Transaction and Periodic Transaction Reports

The EIGA requires public filers to file annual and periodic reports of transactions in certain investment assets, i.e., "stocks, bonds, commodity futures, and other forms of securities."¹⁴ As discussed above, it is clear to OGE that virtual currencies are interests in property held for investment or the production of income; however, it is not clear under the EIGA whether particular virtual currencies may or may not qualify as one of the investment terms specified in the law for transaction reporting. The term with the most likely application is "other forms of securities." However, while the term "securities" appears in the EIGA, it is not therein defined. For purposes of the federal securities laws, the determination of whether a particular virtual currency or digital asset is a "security" depends on the facts and circumstances.¹⁵

As interpreted by the U.S. Supreme Court, assets are "investment contracts," and therefore meet the definition of "security," if they involve an investment of money in a common enterprise with a reasonable expectation of profits derived from the entrepreneurial or managerial

¹⁰ See *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 115th Cong. (2018) (statements of Jay Clayton, Chairman, U.S. Securities & Exchange Commission, and J. Giancarlo, Chairman, U.S. Commodity and Futures Trading Commission); see also Order re Petition to Enforce IRS Summons, *United States v. Coinbase, Inc.*, Case No. 17-CV-01431-JSC (N.D. Cal. Nov. 28, 2017).

¹¹ See 5 U.S.C. app. § 102(a); see also 5 C.F.R. pt. 2634, subpt. C; 5 C.F.R. § 2634.907.

¹² See U.S. OFF. GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, <https://www.oge.gov/Web/278eGuide.nsf>.

¹³ Filers should report the exchange or platform because of the close relationship between a virtual currency and the electronic platform on which it is held. Historically, the stability of the exchange or platform can have meaningful financial consequences for the virtual assets held there. The exchange or platform identity provides a sufficient description to adequately review for conflict of interest purposes. As virtual currencies and the exchanges or platforms on which they trade become subject to greater regulatory oversight and stability, OGE may revisit this description requirement.

¹⁴ 5 U.S.C. app. §§ 102(a)(5)(B), 103(l).

¹⁵ See *SEC v. Edwards*, 540 U.S. 389, 393 (2004); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

efforts of others.¹⁶ Recent investments where an asset was determined to be a security involved digital tokens or coins offered in connection with an initial coin offering.¹⁷

If a virtual currency or digital asset is a security, filers should report purchases, sales, or exchanges of that asset. In circumstances where an employee is uncertain whether a particular virtual currency holding is a security, we recommend ethics officials advise the employee to report transactions of that asset on periodic transaction reports if the value of the transaction exceeds the reporting threshold. In the case of Bitcoin, the CFTC has determined it to be a commodity.¹⁸ The Ethics in Government Act does not require transactions of commodities to be reported.¹⁹

Virtual Currency as a Potential Conflict of Interest

Virtual currency is an investment asset and, like other property held for investment, it may create a conflict of interest for employees who own it. Furthermore, it is not subject to the conflict of interest exemptions in 5 C.F.R. part 2640. Agency ethics officials should therefore analyze whether their employees' 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. They should also alert their employees to the potential conflict of interest risk posed by ownership of virtual currency.

Additional Information

In light of the developing state of virtual currencies, the foregoing advice is not intended to be comprehensive. Given the evolving nature of virtual currency, other regulatory agencies may issue additional findings or guidance that provide further insight into how these assets should be treated for the purposes of the EIGA. Should such additional information become available, OGE may revisit the guidance offered in this Legal Advisory and update it as necessary. Agency ethics officials with questions regarding the financial disclosure reporting requirements for employees acquiring, selling, or trading virtual currencies, or regarding conflicts of interests for such assets, may contact their assigned OGE Desk Officers.

¹⁶ See *W.J. Howey Co.*, 328 U.S. at 301. This test turns on the particular facts and circumstances.

¹⁷ See, e.g., [Report of Investigation Pursuant to Section 21\(a\) of the Securities and Exchange Act of 1934: The DAO, Exchange Act Release No. 81,207, 117 SEC Docket 5 \(July 25, 2017\)](#); [In re Munchee, Inc., Securities Act Release No. 10,445, 118 SEC Docket 5 \(Dec. 11, 2017\)](#).

¹⁸ See *supra* note 6. Note also that Bitcoin has not been determined by the SEC to be a security. See interview by Bob Pisani with Jay Clayton, Chairman, U.S. Secs. & Exch. Comm'at Sandler O'Neill Global Exchange and Brokerage Conference, New York, NY. (Jun.6, 2018), <https://www.cnbc.com/video/2018/06/06/sec-chairman-cryptocurrencies-like-bitcoin--not-securities.html>.

¹⁹ See *supra* note 14.