



September 11, 2024  
LA-24-10

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson  
Acting Director

SUBJECT: Determining Whether a “Thematic” Fund is a Sector or Diversified Fund for  
Purposes of the Regulatory Exemptions Applicable to Mutual Funds

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on when “thematic” mutual funds<sup>1</sup> are “sector” or “diversified” funds under the regulatory exemptions to the primary criminal conflict of interest statute, 18 U.S.C. § 208.<sup>2</sup> The application of the two mutual fund exemptions turns on whether the thematic fund at issue is a sector or diversified fund.<sup>3</sup> As explained further below, a thematic mutual fund must be analyzed in the same way as other mutual funds when determining whether the fund is a sector or diversified fund. Specifically, a thematic mutual fund is a sector fund only if it “concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.”<sup>4</sup> A thematic mutual fund that does not have such a concentration is a diversified fund.<sup>5</sup>

---

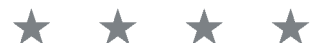
<sup>1</sup> OGE’s regulatory exemptions apply to both “mutual funds” and “unit investment trusts.” *See* 5 C.F.R. § 2640.201(a)-(b), (d). Although this Legal Advisory refers to “mutual funds” only, the guidance is applicable to unit investment trusts as well. For purposes of OGE’s regulatory exemptions, the term “mutual fund” means “an entity which is registered as a management company under the Investment Company Act of 1940” and includes “open-end” and “closed-end” mutual funds and “registered money market funds.” *Id.* § 2640.102(k). The term “mutual fund” also includes exchange-traded funds (ETFs) that are registered under the Investment Company Act of 1940. A “unit investment trust” is “an investment company as defined in 15 U.S.C. 80a-4(2) that is a regulated investment company under 26 U.S.C. 851.” *Id.* § 2640.102(u).

<sup>2</sup> Section 208 prohibits executive branch employees from participating in their official capacity in a particular matter in which, to the employee’s knowledge, the employee (or persons or organizations whose interests are imputed to the employee) has a financial interest. OGE has issued exemptions to 18 U.S.C. § 208 under the authority of 18 U.S.C. § 208(b)(2).

<sup>3</sup> *See* 5 C.F.R. § 2640.201. The exemption for diversified funds permits an employee to participate in any particular matter affecting any of the underlying holdings of a diversified fund without regard to the value of the employee’s financial interest in the fund. *See id.* § 2640.201(a). In contrast, the narrower exemption for sector funds permits an employee to participate in a particular matter affecting one or more holdings of a sector fund only if the aggregate value of the employee’s financial interest in funds concentrated in that sector is not more than \$50,000, the “de minimis amount.” *See id.* § 2640.201(b)(2).

<sup>4</sup> *See id.* § 2640.102(q).

<sup>5</sup> *See id.* § 2640.102(a).



## **I. Background on Thematic Funds**

In recent years, some financial institutions have introduced new mutual funds that they describe as “thematic” funds.<sup>6</sup> These funds focus their investment strategies on a popular business trend, a new technology, a personal or societal value, or other theme.<sup>7</sup> Thematic funds are generally titled to reflect their thematic focus (e.g., “Renewable Energy Fund”) and can invest based on their themes in a variety of ways. For example, a thematic fund may invest primarily in companies that develop products or services in the fund’s thematic area, such as by concentrating its investments on energy companies that produce and sell clean energy to consumers and businesses. Another way that a thematic fund may invest is by focusing on companies that do not produce but instead use or benefit from a product or service in the thematic area, such as investing in companies using artificial intelligence to improve their services or products. There are also thematic funds focused on a personal or societal value. For instance, a fund may concentrate its investments on companies with women in key leadership positions. These examples are not an exhaustive list and reflect only a few ways that a fund can concentrate its investments based on its theme. As discussed below, while a thematic fund’s title or description may reference a particular business sector or industry, the fund may or may not meet the definition of a sector fund for purposes of the regulatory exemptions applicable to mutual funds.

## **II. Identifying Whether Thematic Funds are Sector or Diversified Funds**

When analyzing whether a thematic mutual fund is a sector or diversified fund, ethics officials should determine whether the fund has “a policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States.”<sup>8</sup> Consistent with longstanding OGE guidance, the name of a fund is not determinative, and relevant factors for making sector fund determinations include information beyond the title of the fund, such as the fund’s investment strategy, which can be found in the fund’s prospectus.<sup>9</sup> When reviewing a fund’s investment strategy, ethics officials should consider the degree to which the interests and operations of the companies that fall within the fund’s investment focus are related or overlap.<sup>10</sup> Ethics officials may also consider “whether the companies share a common regulatory environment or whether a government decision affecting one type of company would also affect other companies in the fund.”<sup>11</sup> OGE recognizes that there is no “universally accepted criterion for what constitutes an ‘industry’ or ‘business’”<sup>12</sup> and, in OGE DAEOgram DO-00-030, shared a non-comprehensive list of concentrations that OGE

---

<sup>6</sup> See Investment Company Names, 88 Fed. Reg. 70,436, 70,439 (Oct. 11, 2023) (noting that mutual funds and ETFs with “thematic” strategies, such as artificial intelligence, big data, or health innovation, have surged in recent years).

<sup>7</sup> See *id.*

<sup>8</sup> OGE DAEOgram DO-00-030, at 5-6 (Aug. 25, 2000).

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 7.

<sup>11</sup> OGE Legal Advisory LA-15-09, at 2 (June 30, 2015) (citing OGE DAEOgram DO-00-030).

<sup>12</sup> OGE DAEOgram DO-00-030, at 6.

has generally determined to be sectors.<sup>13</sup> The following examples provide additional guidance on determining whether a thematic fund is a sector or diversified fund, and some also address how the aggregation principle applies.<sup>14</sup>

**Example 1:** An employee purchased a mutual fund titled “Renewable Energy Fund” that, according to the fund’s prospectus, focuses its investments on companies that produce renewable energy. The fund would meet the definition of a sector fund because it has a policy of investing in businesses operating in the energy sector. The employee also owns a general energy sector fund titled “U.S. Energy ETF.” As a result, the value of the employee’s interest in the two energy sector funds should be aggregated for purposes of applying the regulatory exemption for sector funds. This is because funds in the same sector are likely to have some overlap in their holdings and may at times have one or more holdings affected by the same particular matter.

**Example 2:** If the investment strategy of the Renewable Energy Fund in Example 1 was focused instead on companies that, regardless of their industries, have a goal of fifty percent or more of their total energy consumption coming from renewable sources of energy, the fund would meet the definition of a diversified fund because it is not concentrating its investments on companies in a particular industry. Because the fund is diversified, the aggregation principle for sector funds would not apply.

**Example 3:** An employee owns two mutual funds focused on women’s leadership. The first fund is titled “Women’s Leadership Fund” and focuses its investments on U.S. companies where women hold key leadership positions. This fund would be considered diversified because it does not have a policy of concentrating its investments in an industry. The employee’s other fund is titled “Women’s Leadership Financial Services ETF” and, according to the fund’s prospectus, focuses its investments on businesses in the financial services industry with women in key leadership roles. This fund is a sector fund because it has a stated policy of concentrating its investments in the financial services industry, which OGE has determined is a sector for purposes of the mutual fund exemptions.

**Example 4:** An employee invests in two mutual funds focused on artificial intelligence, one called “Artificial Intelligence Advances Fund” and the other called “Artificial Intelligence Revolution Fund.” The investment strategy of the Artificial Intelligence Advances Fund focuses on software companies developing and producing efficient generative AI applications. Based on this investment strategy, the fund would be considered a sector fund, because it focuses on companies within the software industry that seek to advance the capabilities of artificial intelligence software. The investment strategy of the Artificial Intelligence Revolution Fund, however, concentrates on companies in any business sector that use artificial intelligence to improve the quality of

---

<sup>13</sup> *Id.* at 13-14. Agencies may also consult OGE Legal Advisories LA-15-09 and LA-19-06 that address real estate funds and information technology and internet funds, respectively.

<sup>14</sup> *See* 5 C.F.R. § 2640.201(b)(2)(ii).

their products or services. This fund would meet the definition of a diversified fund because its investment strategy does not focus on companies in a particular industry.

**Example 5:** An employee invests in a mutual fund titled “Space Exploration Fund.” The fund’s prospectus identifies several categories of companies in which the fund primarily invests, including 1) companies that make and operate platforms for use in space exploration, such as satellites and launch vehicles, and 2) companies that develop technologies used by space exploration companies, such as artificial intelligence, robotics, and 3D printing. Considering that the fund’s investment strategy does not focus on a particular industry—rather, it invests in companies spanning several business sectors that relate to the fund’s theme of space exploration—the fund would be considered diversified.

### **III. Conclusion**

A mutual fund that is titled, categorized, or marketed as a thematic fund must be analyzed the same way other mutual funds are analyzed when determining whether the fund is a sector or diversified fund for purposes of the regulatory exemptions to 18 U.S.C. § 208. If agency ethics officials have any questions about this Legal Advisory, they should contact their OGE Desk Officer.