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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Financial Disclosure Requirements for Pooled Investment Funds

This Legal Advisory addresses financial disclosure reporting requirements for pooled investment funds held by individuals nominated by the President to Senate-confirmed positions (PAS nominees).¹ Specifically, this Legal Advisory addresses the situation in which a PAS nominee is unable to disclose the holdings of a pooled investment fund that does not qualify for a commonly used exception to the reporting requirements. OGE addressed this situation in a previous issuance, but that issuance did not draw a distinction that OGE now finds meaningful. This Legal Advisory clarifies OGE's previous issuance by identifying certain circumstances under which OGE will certify the financial disclosure report of a PAS nominee who is unable to disclose the holdings of a non-excepted investment fund.

I. Reporting and Certification Requirements for Financial Arrangements

Under the Ethics in Government Act (EIGA), a PAS nominee needs to report a financial arrangement, including a pooled investment fund, if the PAS nominee's interest exceeds the dollar threshold for value or income. *See* 5 U.S.C. app. §§ 102(a)(1), (a)(3); 102(e)(1); 102(f)(1). Section 102(f) of the EIGA also requires the PAS nominee to report the holdings of the financial arrangement, unless it qualifies for one of several exceptions in paragraph 2 of that section. 5 U.S.C. app. § 102(f)(1). Those exceptions include an exception for widely held investment funds. *See* 5 U.S.C. app. §§ 102(f)(2)(C), (f)(8). OGE's implementing regulations establish the

¹ OGE notes that neither this Legal Advisory nor OGE's earlier guidance on the subject, DAEOgram DO-08-022 (2008), applies to PAS nominees who will serve as special Government employees in their positions for no more than 60 calendar days per year or to candidates for the positions of President or Vice President of the United States.

criteria that a fund must meet in order to qualify for this exception, defining a qualifying fund as an “excepted investment fund” (EIF). *See* 5 C.F.R. §§ 2634.301(a), 2634.310(c).²

In 2008, OGE issued a DAEOgram discussing reporting requirements for pooled investment funds. DAEOgram DO-08-022 (2008). The DAEOgram noted that many pooled investment funds could qualify as excepted investment funds and acknowledges that a PAS nominee need not report the holdings of a fund that does qualify as an excepted investment fund. On the other hand, the DAEOgram explains that a PAS nominee must report the holdings of a fund that does not qualify for the reporting exception. When a PAS nominee is unable to report the holdings of a non-excepted fund, the DAEOgram indicates that OGE’s policy is to require divestiture of the fund in most cases. The DAEOgram draws no distinction between non-excepted funds that provide investors with information about the fund’s holdings and non-excepted funds that do not provide investors with such information, requiring the divestiture of both.

Based on OGE’s experience with such funds since 2008, OGE now finds that this distinction is meaningful and warrants different treatment. As a preliminary matter, it bears noting that funds initially reported by PAS nominees as non-excepted are often revealed to be excepted investment funds after agency ethics officials conduct reasonable inquiries into their nature. Such inquiries usually also reveal the extent to which PAS nominees have access to information about the holdings of the funds they report. In many cases, PAS nominees lack information about fund holdings because fund managers do not provide such information to investors. In these cases, there is little if any potential for conflicts of interest because knowledge is a critical element of a conflict of interest. *See* 18 U.S.C. § 208. Thus, it seems reasonable to conclude that the question of divestiture should turn primarily on whether a PAS nominee is unable to disclose a fund’s holdings due to a lack of knowledge regarding those holdings.

In the 2008 DAEOgram, OGE acknowledges that its policy decision to require divestiture rests on a determination regarding the best way to address situations in which compliance with the literal language of the statute is not possible. OGE continues to find divestiture to be the best remedy when a PAS nominee has access to information about a fund’s holdings but is unwilling to disclose those holdings because disclosure would violate a preexisting confidentiality agreement. Such divestiture supports the goal of preventing conflicts of interest because the agency’s ethics officials and the public are deprived of information that the PAS nominee possesses regarding the potential for conflicts of interest.

On the other hand, where the PAS nominee has reported all available information about the fund and its holdings, the agency’s ethics officials and the public can fully assess the potential for conflicts. This is true even where the PAS nominee’s access to information is limited because the potential for conflicts of interest is restricted to known holdings of the fund. Therefore, OGE will in appropriate circumstances certify the reports of PAS nominees who cannot ascertain information about the holdings of non-excepted funds.

² The criteria are that: (a) the fund is widely held; (b) the filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund; and (c) the fund either is publicly traded or available or is widely diversified. 5 U.S.C. app. § 102(f)(2)(C); 5 C.F.R. §§ 2634.310(c)(2).

This refinement of the policy is consistent with the primary focus of the EIGA. *See, e.g.,* S. COMM. ON GOV'T AFFAIRS, PUBLIC OFFICIALS INTEGRITY ACT OF 1977, S. REP. 95-170, at 117 (1977) (“[T]he purpose of the disclosure of holdings, liabilities and transactions is to identify potential conflicts of interest or situations that might present the appearance of a conflict of interest”). This policy is also consistent with the principal objective of OGE’s review of PAS nominee reports. As illustrated in the excerpt below, OGE’s regulations implementing the EIGA’s certification provision specifically as to PAS nominees indicate that the primary focus necessarily is conflicts of interest:

If the Director is satisfied that no unresolved conflicts of interest exist, then the Director shall sign and date the [PAS nominee’s] report form. The Director shall then submit the report with a letter to the appropriate Senate committee, expressing the Director’s opinion whether, on the basis of information contained in the report, the nominee has complied with all applicable conflict laws and regulations.

5 C.F.R. § 2634.605(c)(3). OGE’s regulations establish the same focus more broadly for all filers of public financial disclosure reports, as follows:

(a) Title I of the Act requires that high-level Federal officials disclose publicly their personal financial interests, to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust....

(b) Public and confidential financial disclosure serves to prevent conflicts of interest and to identify potential conflicts, by providing for a systematic review of the financial interests of both current and prospective officers and employees. These reports assist agencies in administering their ethics programs and providing counseling to employees.

(c) Financial disclosure reports are not net worth statements. Financial disclosure systems seek only the information that the President, Congress, or OGE as the supervising ethics office for the executive branch has deemed relevant to the administration and application of the criminal conflict of interest laws, other statutes on ethical conduct or financial interests, and Executive orders or regulations on standards of ethical conduct.

5 C.F.R. § 2634.104(c) (“Policies.”). Moreover for the pooled investment funds at issue, where underlying holdings are: (1) inaccessible; (2) the fund manager retains control of information dissemination; and (3) the filer cannot purposely avoid disclosure through self-blinding mechanisms, requiring divestiture can conflict, for no substantive reason, with the goal of attracting and placing talented professionals in public service. Therefore,

mandatory divestitures of pooled investment funds for failure to report inaccessible underlying assets do not meaningfully further the purposes of the EIGA.³

II. Reporting Procedure for Non-EIF Pooled Investment Funds When Underlying Assets Are Inaccessible

To receive certification from the Director of OGE, a filer who is required to report a pooled investment fund that does not qualify as an excepted investment fund may work with OGE to determine what documentation is administratively necessary to establish the filer's lack of knowledge and inability to access the holdings of the fund.⁴ Generally, the filer will submit a letter to OGE from a representative of the pooled investment fund, such as a trustee, custodian, fund manager, or managing partner of the financial arrangement. This letter will confirm that the filer, the filer's spouse, and the filer's dependent children are not able to control or direct the investments made by the fund and that the filer, the filer's spouse, and dependent children are not entitled to receive information about the underlying assets of the fund.⁵

For the purposes of the OGE Form 278, OGE recognizes that the filer's inability to acquire information about the underlying holdings will limit the type of information that the filer can disclose. On the OGE Form 278, the filer will include both the name of the financial arrangement and a notation that "underlying assets are not ascertainable" in the description of the asset. Additionally, the PAS nominee must provide any reportable information about the fund or its underlying assets to the extent the filer can access this information. For example, if the fund's manager provides investors with a list of the fund's ten largest holdings, the PAS nominee must disclose those holdings in the financial disclosure report. If the filer gains access to information about the underlying holdings, the filer must report this information in subsequent reports.

Ethics officials should direct questions about a particular nominee's report to the OGE reviewer assigned to the report.

³ Although OGE is not bound by the policies of its fellow supervising ethics offices in Congress, this refinement of OGE's policy is consistent with the policies of the Senate Select Committee on Ethics and House Committee on Ethics. *See* S. SELECT COMM. ON ETHICS, 113TH CONG., PUBLIC FINANCIAL DISCLOSURE REPORT FOR THE UNITED STATES SENATE eFD INSTRUCTIONS 11 (2014); H.R. COMM. ON ETHICS, 113TH CONG., INSTRUCTION GUIDE FOR COMPLETING FINANCIAL DISCLOSURE STATEMENTS AND PERIODIC TRANSACTION REPORTS 18 (2014).

⁴ These conditions apply whether the financial interest in the pooled investment fund is held by the PAS nominee, the PAS nominee's spouse, or the PAS nominee's dependent child.

⁵ This final item is not intended to require the PAS nominee to initiate legal action against a fund that is unwilling to disclose information about its holdings to the PAS nominee.