

# Office of Government Ethics Guidance on Hedge Fund and Other Pooled Investment Fund Asset Reporting for Presidential Appointees

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Election and Political Law

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As the President-elect begins to nominate individuals for Senate-confirmed positions in his administration, one of the major hurdles these individuals face is the statutory requirement that the Director of the Office of Government Ethics (“OGE”) review and certify a public disclosure of each source of income exceeding \$200 and each property interest exceeding \$1,000 in value. While for many classes of assets, identifying and disclosing the relevant assets is relatively straightforward, it is often much more difficult to file a compliant report for pooled investment fund assets, such as hedge funds, since the details of the underlying assets are often undisclosed to the investor by the fund manager or subject to a confidentiality agreement between the investor and the fund manager. This client alert summarizes the most recent OGE guidance applicable to pooled investment fund holdings.

There are three major exceptions to the reporting requirement, two of which require that the assets be structured as a trust. The third exception, for “excepted investment funds,” allows nominees to file limited information on their disclosure reports under certain circumstances described below.

However, many pooled investment funds do not qualify for “excepted” status, which prevents OGE from certifying compliance. Prior to 2014, OGE maintained a strict “disclose or divest” policy, requiring a nominee to divest their undisclosed assets, regardless of whether or not the filer had access to information about the fund’s underlying holdings. This strict policy, OGE recognized, “can conflict, for no substantive reason, with the goal of attracting and placing talented professionals in public service.” Thus, in 2014, OGE revised its guidance on how to report hedge fund or pooled investments in a manner more favorable to nominees with certain types of holdings.

Under the revised policy, the investor may not be required to “disclose or divest” if either (1) a fund is an “excepted investment fund” or (2) if the investor has no access to information on certain underlying assets, which allows OGE to certify that the investor may report only what is known about the fund.

## What is an “Excepted Investment Fund”?

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Whether a given hedge fund or other pooled investment fund is an “excepted investment fund” is a fact-intensive inquiry that depends on the nature of the fund and the terms of the investor’s

agreement with the fund manager. However, OGE acknowledges that often these types of investments do qualify for the exception, which releases the nominee from the obligation to report the fund's underlying assets.

An investment fund will qualify as an "excepted investment fund" if it is:

1. "widely held,"
2. either (a) "publicly traded or available" or (b) "widely diversified," and
3. independently managed.

5 C.F.R. § 2634.310(c)(2). The regulation and OGE guidance provide additional detail on each of these terms:

1. *Widely held.* A fund that involves at least 100 natural persons as direct or indirect investors is "widely held." See OGE, [Excepted Investment Fund](#).
2. (a) *Publicly traded or available.* "Publicly traded" means listed on a national exchange, which is not likely the case here, but "publicly available" simply means a fund that "is, or was, open to anyone who wants to become an investor. A fund is not disqualified solely because it has net worth or income requirements or if an investor must be an 'accredited investor.'" See OGE, [Excepted Investment Fund](#).  
  
(b) *Widely diversified.* A fund that is not publicly traded or available can still qualify for this exception if it is widely diversified. This applies to a fund that (1) holds no more than 5% of the value of its portfolio in the securities of any issuer (other than the United States Government) and (2) holds no more than 20% of the value of its portfolio in any particular economic or geographic sector. 5 C.F.R. § 2634.310(c)(3).
3. *Independently managed.* This requirement will be satisfied where the investor lacks the ability to control the fund or any of its investments. See OGE, [Excepted Investment Fund](#).

Although this guidance is helpful in determining whether a holding is an "excepted investment fund," there are often fund-specific questions that do not squarely fit within the guidance provided. Nominee investors should work with their vetting counsel to determine whether this exception applies.

## **Funds that Do Not Qualify as "Excepted Investment Funds"**

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OGE's 2014 revised advice addresses the possibility that some filers will hold assets in funds that do not qualify for the exception, but where the investor still has no visibility into the underlying assets in the fund. As long as the investor can prove to OGE that information about the underlying fund assets are not accessible to them, OGE may still certify the disclosure.

In 2008, OGE had advised that a nominee who invested in a hedge fund, but who could not disclose the assets contained in the fund, could file an initial disclosure report that did not disclose the assets. However, the filer would be required to divest ownership of the fund because this disclosure was not consistent with the requirements of the disclosure law, which required disclosure of assets that did not qualify as excepted investment funds. See OGE [DO-08-022](#).

OGE updated its guidance in 2014 to loosen the rules on reporting hedge funds and other pooled investment funds. OGE recognized that many investors do not have access to information about the underlying assets in such funds, which effectively mitigates concerns about conflicts of interest arising out of the ownership of these assets. See OGE [LA-14-05](#). Thus, in these circumstances, OGE has determined that the investor need not divest their interest in the fund in order to comply with the disclosure requirements.

To receive a certification without divestiture, the filer must demonstrate to OGE that the information is inaccessible. OGE guidance states that typically “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.” The filer also cannot “purposely avoid disclosure through self-blinding mechanisms” imposed after the filer knows he or she is under consideration for a presidential appointment.

Ultimately, the purpose of the letter is to obtain a certification from the Director of OGE that the resulting disclosure satisfies the statutory reporting requirements. Any filer seeking such a certification can expect to engage with OGE regarding the scope of the disclosure.

The OGE guidance does still require the filer to disclose whatever information about the fund that the manager provides, or to which the filer otherwise has access. For example, OGE explains that if a hedge fund manager provides investors with a list of the top ten holdings in the fund, the filer must disclose those holdings. The filer must also disclose on future reports any additional information he or she might learn about the fund’s holdings after the initial disclosure. As with many aspects of this process, the scope of disclosure must be evaluated on a case-by-case basis. It is helpful to discuss the nature and structure of specific investment vehicles with counsel before entering the process in order to better understand what might lie ahead.

Covington & Burling LLP has one of the leading vetting and confirmation practices, with a multi-disciplinary team of government ethics law, tax law, and government affairs professionals.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law practice:

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