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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Scope of the Exceptions to 18 U.S.C. §§ 203 and 205 Permitting Employees to Represent Others as a Personal Fiduciary

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on when an employee qualifies as a “personal fiduciary” for a person or estate for purposes of the exceptions at 18 U.S.C. §§ 203(d) and 205(e). As described below, an employee is operating as a “personal fiduciary” for a person or estate if they have been granted the legal authority to manage a person’s affairs or estate. Examples of personal fiduciary relationships include those listed in the statute — guardian, trustee, administrator, and executor — as well as conservatorships, curatorships, personal representatives, and powers of attorney. This Legal Advisory further clarifies that the exceptions are limited to representational activity undertaken in the course of service as a *personal* fiduciary, and do not permit representation of organizations.

Employees seeking to represent an individual or estate before the Government as a personal fiduciary should be aware that they may do so only if they have received prior authorization from the appropriate official within their agency.<sup>1</sup> Employees should therefore consult with their ethics officials well in advance of any proposed representational activity to ensure enough time for agency review and authorization.<sup>2</sup>

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<sup>1</sup> Employees must receive authorization from the “Government official responsible for appointment to [their] position” before undertaking representational activities described in 18 U.S.C. §§ 203(d) and 205(e). Agencies can redelegate this responsibility, so employees should consult with their supervisor and ethics official to determine who in the organization has the authority to approve employees’ representational activities under 18 U.S.C §§ 203(d) and 205(e).

<sup>2</sup> This Legal Advisory only discusses the application of 18 U.S.C. §§ 203 and 205. Representational contacts must also accord fully with all other laws, including the other criminal conflict of interest laws (18 U.S.C. ch. 11), the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635), and the limitations on receipt of outside earned income by covered noncareer employees (5 C.F.R. part 2636). Moreover, this Legal Advisory provides only a summation of the applicable provisions of 18 U.S.C. §§ 203 and 205. Employees and agency ethics officials should refer to the text of these laws.



## I. Background on the Personal Fiduciary Representation Exceptions

Employees of the executive branch are subject to two criminal prohibitions — 18 U.S.C. §§ 203 and 205 — that prohibit representation of any other person before the Federal Government. Together, these laws generally prohibit employees from acting as agent or attorney, either compensated or uncompensated, for any other person or organization in a covered matter in which the United States is a party or has a direct and substantial interest.<sup>3</sup>

In “recognition that Government employees will on occasion have family and other personal responsibilities that may be thoroughly proper but would, without special statutory recognition, be prohibited by the broad rules of Section 203 and 205,”<sup>4</sup> Congress promulgated 18 U.S.C. §§ 203(d) and 205(e), which permit an employee, with prior authorization, to act:

with or without compensation, as agent or attorney for, or otherwise represent[ ][the employee’s] parents, spouse, child, or any person for whom, or for any estate for which, [the employee] is serving as guardian, executor, administrator, trustee, or *other personal fiduciary*, [unless the covered matter is one that the employee participated in personally and substantially or that is under the employee’s official responsibility].<sup>5</sup>

Accordingly, the limited statutory exceptions at 18 U.S.C. § 203(d) and § 205(e) permit employees to engage in otherwise prohibited representational activity when acting as a “personal fiduciary” for another. These exceptions reflect Congress’s careful tailoring of the rules to permit representational contacts of a “personal or family nature not involving ordinary business relations,”<sup>6</sup> while also reducing the potential risk that an employee may abuse their office for private gain.

## II. Scope of Personal Fiduciary Representation Exceptions

The term “other personal fiduciary” is not defined in 18 U.S.C. §§ 203(d) or 205(e), or the general definitions section for the conflict-of-interest statutes, 18 U.S.C. § 202. Moreover, the term is not widely used either in the Federal ethics laws or in related fields. As a result, OGE has looked to the text, structure, and legislative history of sections 203 and 205 to determine the appropriate scope of the exceptions.

The collective phrase “other personal fiduciary” is preceded by a list of four specific roles: “guardian,” “trustee,” “administrator,” and “executor.”<sup>7</sup> When a general term — such as “other personal fiduciary” — follows a list of more specific terms, “the general term should be construed to encompass only subjects similar in nature to those subjects enumerated by the

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<sup>3</sup> See 18 U.S.C. §§ 203(a)(1), 205(a)(1)-(2).

<sup>4</sup> BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 95-96 (1964).

<sup>5</sup> 18 U.S.C. §§ 203(d), 205(e) (emphasis added).

<sup>6</sup> *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7189 Before the Antitrust Subcomm. (Subcomm. No. 5) of the H. Comm. on the Judiciary*, 87th Cong. 60 (1961) (excerpted from “Explanation of Proposed Bill Entitled ‘Executive Employees’ Standards Act”).

<sup>7</sup> 18 U.S.C. §§ 203(d), 205(e).

specific words.”<sup>8</sup> In this context, the phrase “other personal fiduciary” refers only to relationships that involve functions and responsibilities similar to those of a guardian, trustee, administrator, or executor.<sup>9</sup> While there are some differences among these four roles, each share in common the legal authority to exercise another’s rights, duties, and privileges on their behalf, often as a result of that person’s incapacity or death.<sup>10</sup> Individuals in these roles act in lieu of the principal in making decisions about the principal’s care, affairs, and financial arrangements. Common types of “other personal fiduciary” relationships are conservatorships,<sup>11</sup> curatorships,<sup>12</sup> guardian ad litem,<sup>13</sup> personal representatives,<sup>14</sup> and powers of attorney.<sup>15</sup>

**Example 1:** A Department of Health and Human Services employee has recently been appointed conservator for a friend’s child. As conservator, the employee may seek a Federal grant on behalf of the child so long as the employee has received prior authorization from their appointing official and does not personally work on or supervise the grant in their official capacity.

### A. Representation of Organizations Not Covered

Both 18 U.S.C. § 203(d) and § 205(e) permit only representation as a “*personal* fiduciary.”<sup>16</sup> Consistent with the legislative history,<sup>17</sup> the use of the term “personal” makes clear

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<sup>8</sup> NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (5th ed. 1992); *see also* *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018); *Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199 (2012).

<sup>9</sup> A guardian is “[s]omeone who has the legal authority and duty to care for another’s person or property, esp. because of the other’s infancy, incapacity, or disability.” *Guardian*, BLACK’S LAW DICTIONARY (11th ed. 2019). A trustee, is “[s]omeone who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.” *Trustee*, BLACK’S LAW DICTIONARY (11th ed. 2019). An administrator is a “person appointed by the court to manage the assets and liabilities of an intestate decedent.” *Administrator*, BLACK’S LAW DICTIONARY (11th ed. 2019). An executor is “a person named by a testator to carry out the provisions in the testator’s will.” *Executor*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>10</sup> Although personal fiduciary relationships often arise because of another person’s incapacity or death, that is not always the case, and is not necessary for a personal fiduciary relationship to be established for purposes of 18 U.S.C. § 203(d) or § 205(e).

<sup>11</sup> A conservator “is the modern equivalent of the common-law guardian. Judicial appointment and supervision are still required, but a conservator has far more flexible authority than a guardian, including the same investment powers that a trustee enjoys.” *Conservator*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>12</sup> As used in this context, a curator is a person appointed by a court to make personal decisions concerning a person’s estate, property, business, and other personal decisions. *See, e.g.*, LA. CIV. CODE ANN. art. 392 (2001).

<sup>13</sup> A guardian ad litem is “[a] guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.” *Guardian*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>14</sup> A personal representative is “[s]omeone who manages the legal affairs of another because of incapacity or death, such as the executor of an estate.” *Representative*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>15</sup> A power of attorney is “[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor.” *Power of Attorney*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>16</sup> 18 U.S.C. §§ 203(d), 205(e) (emphasis added).

<sup>17</sup> *See Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7189 Before the Antitrust Subcomm. (Subcomm. No. 5) of the H. Comm. on the Judiciary*, 87th Cong. 60 (1961) (justifying, in “Explanation of Proposed Bill Entitled ‘Executive Employees’ Standards Act,” the exceptions on the basis that the representational activities allowed are of a “personal or family nature not involving ordinary business relations”).

that the exceptions apply only to representation of individuals (or their estates).<sup>18</sup> Representational activities taken either for, or on behalf of any organization, such as a corporation, limited liability company, or other entity are therefore not covered by either exception.<sup>19</sup> Sections 203(d) and 205(e) do not, however, prohibit an employee from interacting with the Government on matters concerning the principal’s business affairs when the employee is acting solely in their role as personal fiduciary for an individual or their estate.

**Example 2:** A Department of Transportation employee holds an outside position as chief operating officer of a cattle farm owned by Cattle Ridge Farm, LLC (CRF). The exception at 18 U.S.C. § 205(e) does not permit the employee to file an application with the U.S. Department of Agriculture on behalf of CRF seeking a grant that would be used to expand the meat processing capabilities of the farm.

**Example 3:** A Department of Commerce employee’s niece granted the employee a durable power of attorney (POA) and subsequently became incapacitated. Prior to the niece’s incapacitation, the niece established a single-member LLC that held a loan from the Small Business Administration (SBA). After the niece’s incapacitation, the Department of Justice (DOJ) contacted the employee as the niece’s agent under the POA in relation to a fraud investigation of the SBA loan held by the niece’s LLC. Provided that the employee has received the required authorization under 18 U.S.C. § 205(e), the employee may interact with DOJ about the investigation and may provide information to DOJ about the LLC because in doing so, the employee is acting in their capacity as personal fiduciary for the niece.

## **B. Actions Taken Outside of the Scope of the Personal Fiduciary Relationship Not Covered**

The exceptions for service as a “guardian, executor, administrator, trustee, or other personal fiduciary” are inherently limited to actions taken within the grant of authority establishing the relationship. As a result, the exceptions do not permit employees to engage in representational activity that extends beyond the bounds of their grant of authority.

**Example 4:** A Department of Defense employee’s uncle is incapacitated. The employee was granted a limited power of attorney (POA) to manage the uncle’s financial affairs during the period of incapacitation. So long as the employee has received prior authorization, and consistent with the limited POA, the employee may coordinate with the Social Security Administration regarding Supplemental Security Income benefits for the employee’s uncle.

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<sup>18</sup> See, e.g., *Personal*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/personal> (last visited Apr. 12, 2024) (“relating or belonging to a single or particular person rather than a group or organization”); *Personal*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“of or affecting a person”); *Personal*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“of, relating to, or affecting a person as a private individual (rather than as a member of a group or the public, or in a public or professional capacity)”; *Personal*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016) (“of, relating to, or affecting a particular person”); *Personal*, WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY (1979) (defining “personal” as “belonging to human beings, not to things or abstractions”).

<sup>19</sup> Other statutory exceptions may permit an employee to act as an agent or attorney for an outside organization, notwithstanding the general ban on doing so. For example, under such as 18 U.S.C. § 205(d)(1)(B), an employee may act as an uncompensated agent or attorney of a nonprofit organization if most of the members are current officers of the Federal or D.C. governments, or their spouses or dependent children.

The employee could not, however, rely on the personal fiduciary exception with respect to non-financial decisions because those representations are outside of the limited POA granted to the employee.

### **III. Conclusion**

As described above, the limited statutory exceptions at 18 U.S.C. §§ 203(d) and 205(e) permit employees to engage in otherwise prohibited representational activity when acting as a personal fiduciary for another person or their estate. Employees who are serving or wish to serve as a personal fiduciary, as described above, and anticipate representational activities before the Government should consult with an ethics official as soon as possible to ensure that they receive the necessary prior approval.

Agency ethics officials who have questions concerning this Legal Advisory should contact their OGE Desk Officer.