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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
Director

SUBJECT: Additional Guidance on the E.O. 13989 Ethics Pledge Restrictions that Apply to Appointees Entering Government

This Legal Advisory provides additional guidance to agency ethics officials on the ethics pledge (“the Pledge”) found in [E.O. 13989](#). Specifically, this Advisory memorializes OGE’s previous interpretations of language common to this ethics pledge and prior ethics pledges and explains new language in the Pledge that pertains to incoming appointees.¹ In this Advisory, OGE (1) provides further guidance on who signs the Pledge; (2) discusses speeches and similar appearances; (3) explains how to obtain information on registrations filed pursuant to the Lobbying Disclosure Act and the Foreign Agents Registration Act; and (4) discusses the golden parachute ban. This is the fourth in a series of OGE Advisories that provides guidance on E.O. 13989; the Advisory is being issued after consultation with the White House Counsel’s Office.²

I. Who Signs the Pledge (E.O. 13989, sec. 1)

The guidance below memorializes OGE’s longstanding advice under [E.O. 13490](#) and [E.O. 13770](#) as to who must sign the Pledge.³ [Section 1](#) of E.O. 13989 states that “[e]very appointee in every executive agency appointed on or after January 20, 2021” must sign the Pledge. The guidance found in OGE DAEOgram [DO-09-010](#), which addressed the signing requirements for the E.O. 13490 ethics pledge, is also applicable to E.O. 13989. That DAEOgram advised that individuals appointed in a prior administration who are asked to stay on in their position (“holdover appointees”) beyond 100 days must sign the new Pledge, while Presidential appointees to positions with a fixed term of office (“term appointees”) do not need to sign the new Pledge. OGE has received several questions regarding how certain categories of employees should be treated under the Pledge in light of this distinction.

¹ See Exec. Order No. 13,989, [sec. 2\(b\)](#) (defining “appointee”).

² OGE’s three earlier Legal Advisories that provide guidance on E.O. 13989 are [LA-21-03: Executive Orders on Ethics Commitments by Executive Branch Personnel](#) (Jan. 22, 2021), [LA-21-04: Waiver Authority and Making Waivers Public under Section 3 of Executive Order 13989, “Ethics Commitments by Executive Branch Personnel”](#) (Feb. 18, 2021), and [LA-21-05: Comparison of Ethics Pledge Commitments in Executive Order 13989 to Past Ethics Pledges](#) (Feb. 23, 2021).

³ The White House Counsel’s Office has confirmed that OGE’s longstanding advice that is discussed in this Advisory is also consistent with the language of E.O. 13989.



a. Commissioners Later Designated as Chairs

Commissioners of agencies who were appointed to a fixed term prior to January 20, 2021, but who have been designated by the current administration to serve as Chair, must sign the Pledge because they are, in effect, receiving a new appointment.

b. Inspectors General and U.S. Attorneys

Those inspectors general and U.S. Attorneys who were appointed before January 20, 2021, and who remain in their position in the new administration, are not required to sign the Pledge because they are not considered to be holdover appointees.⁴

c. Appointees Hired by Term Appointees

As stated above, term appointees who were appointed by a prior Presidential administration do not sign the Pledge. Similarly, neither Schedule C nor noncareer members of the Senior Executive Service hired by a term appointee during the prior administration sign the Pledge. However, if a term appointee hires a new appointee, such as a confidential assistant, on or after January 20, 2021, that new appointee is required to sign the Pledge, provided that the new appointee is required to file a public financial disclosure report.⁵

d. Ambassadors and Senior Foreign Service Officers

Career SES and career officers of “SES-type systems” (such as the Senior Foreign Service) are not considered to be “appointees” within the definition of the Pledge, as discussed in OGE DAEOgram DO-09-010. In that Advisory, OGE explained that “the essentially political nature of a given appointment is the touchstone” for ascertaining whether a particular appointment triggers the requirement to sign the Pledge.⁶ A significant number of career Senior Foreign Service officers and, in some instances, career members of the SES at the State Department are routinely selected to serve as Ambassadors. Career members of the Senior Foreign Service, who switch positions every two to four years, are also selected for other State Department PAS positions with some frequency. These are viewed as career assignments, and OGE noted that many such officials “rotate through multiple Ambassadorial assignments and other posts” before retiring from Government.⁷ Officials selected in this manner for an appointment as part of a career progression do not sign the Pledge. On the other hand, political appointees for an Ambassadorial position do sign the Pledge. In addition, career officials sign the Pledge when they are selected through a political process for an appointment that is ordinarily viewed as non-career.

⁴ See also OGE DAEOgram DO-09-010 (Mar. 16, 2009).

⁵ See *id.* at 3.

⁶ *Id.* at 2.

⁷ *Id.* at 2-3.

II. Speeches and Similar Appearances

Speeches and similar appearances, including media appearances, generally do not create a “former client” relationship under the Pledge. [Paragraph 2](#) of the Pledge prohibits appointees from “participat[ing] in any particular matter involving specific parties that is directly and substantially related to [the appointee’s] former employer or former clients” for a period of two years from the date of appointment.⁸ Under the Pledge, a “former client” is defined as “any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of [] appointment, but excluding instances where the service provided was limited to speeches or similar appearances.”⁹ E.O. 13490 contained nearly identical language; however, the words “speech” and “appearance” were singular (“limited to a speech or similar appearance”).¹⁰ E.O. 13989 makes clear that merely giving multiple speeches does not make the person for whom the appointee gave the speeches a former client.

Similarly, media appearances provided prior to appointment are also not the type of services intended to create a disqualification requirement under the Pledge once the appointee begins Government service. As with speeches, multiple media appearances alone do not create a significant working or client relationship with the media outlet. As a result, the exclusion for speeches or similar appearances encompasses media appearances, unless the engagements were also part of a continuing agent, attorney, or consulting arrangement. More comprehensive guidance on analyzing whether an activity fits within the exclusion in the definition of “former client” can be found in OGE DAEOgram [DO-09-011](#).

Example 1: During the two years before joining the administration, an incoming appointee appeared approximately a dozen times on a cable television network, but was otherwise not engaged by the network as an agent, attorney, or consultant. Because there was no continuing agent, attorney, or consulting arrangement, she does not have a recusal requirement under Pledge paragraph 2.

Example 2: Prior to joining the administration, an incoming appointee had been on retainer as a political consultant for a cable television network. He not only made multiple on-air appearances, but he also provided advice to the network. Because he had a continuing consulting arrangement with the network, and his services were not limited to on-air television appearances, he has a recusal requirement under Pledge paragraph 2.

Additionally, with regard to on-air media appearances made in an official capacity, OGE, in consultation with the White House Counsel’s Office, has determined that the restrictions in paragraph 2 of the Pledge are not intended to prohibit an appointee from making an on-air appearance.¹¹ At the same time, appointees should be cautioned that the impartiality regulation at 5 C.F.R. § 2635.502 will apply. Therefore, the employee should not participate in a media appearance if a reasonable person would question the employee’s impartiality, absent an authorization under section 2635.502(d). Questions concerning an employee’s impartiality likely

⁸ Exec. Order No. 13,989, sec. 1, para. 2.

⁹ *Id.* [sec. 2\(l\)](#).

¹⁰ Exec. Order No. 13,490, [sec. 2\(j\)](#).

¹¹ See OGE DAEOgram [DO-09-020](#) (May 26, 2009).

would arise if the employee decided to use their former client or employer “as a preferred forum for repeated appearances when other comparable forums are available.”¹²

III. Restrictions on Former Lobbyists and Former Registered Agents (E.O. 13989, sec. 1, para. 3)

In order to assist ethics officials in applying [paragraph 3](#) of the Pledge, OGE is providing guidance on the databases that contain registration information on lobbyists and foreign agents. Paragraph 3 contains a three-part restriction that applies to any appointee who “was registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 *et seq.*, or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 *et seq.*, within the 2 years before the date of [their] appointment.”¹³ Similar restrictions, which applied only to appointees who had been registered under the Lobbying Disclosure Act (LDA), appeared in E.O. 13490 and E.O. 13770.¹⁴

In most cases, the appointee will be able to provide information about their history as a registered lobbyist or registered foreign agent. Ethics officials also may consult public databases for both LDA and FARA registrations. Guidance on use of these databases is provided in the Appendix to this Legal Advisory.

IV. Golden Parachute Ban (E.O. 13989, sec. 1, para. 7)

E.O. 13989 introduces a new restriction in [paragraph 7](#) that prohibits appointees from accepting, either before or after entering Government, a “golden parachute.” This term refers to “any salary or other cash payment from [a] former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government.”¹⁵ It also includes “any non-cash benefit from [a] former employer that is provided in lieu of such a prohibited cash payment.”¹⁶

The golden parachute ban operates in addition to other restrictions, notably 5 C.F.R. § 2635.503 (which creates a two-year recusal obligation when an incoming employee receives a covered payment prior to entering Government service) and 18 U.S.C. § 209 (which prohibits employees from receiving a supplementation of salary during Government service). Unlike the recusal provision and the criminal prohibition, the golden parachute ban is fundamentally a bar to employment with the administration. This employment bar arises when the eligibility for the payment or benefit is limited to individuals accepting a position in the U.S. Government. Therefore, ethics officials should be aware that even if a payment or other benefit is permissible under 18 U.S.C. § 209 and would not create a need to recuse under 5 C.F.R. § 2635.503, it may nevertheless prevent an individual from entering the administration if it meets the criteria for a golden parachute under the Pledge.

¹² *Id.* at 2.

¹³ Exec. Order No. 13,989, sec. 1, para. 3. By its terms, paragraph 3 only applies to appointees who were actually registered under the LDA or the FARA. If an appointee was registered under the FARA, the scope of the appointee’s restrictions under subparagraphs 3(a) and 3(c) will be determined based on the “registrable activity” in which the appointee engaged.

¹⁴ See Exec. Order No. 13,770, sec. 1, [para. 7](#); Exec. Order No. 13,490, sec. 1, [para. 3](#).

¹⁵ Exec. Order No. 13,989, sec. 1, para. 7.

¹⁶ *Id.*

Example: An incoming appointee is eligible to receive a \$9,500 severance payment from her former employer. This severance payment may only be offered to individuals who are entering positions in the U.S. Government, and it would be paid prior to entering federal service. Although the severance payment is not prohibited by 18 U.S.C. § 209, and it does not meet the threshold for an extraordinary payment under 5 C.F.R. § 2635.503, the payment is considered a golden parachute under the Pledge because such a payment is limited only to individuals entering positions in the U.S. Government. As such, the Pledge would bar the incoming appointee from accepting a position in the administration if she received the payment.

Attachment

Appendix: Obtaining Registration Information from the Databases for the Lobbying Disclosure Act and the Foreign Agents Registration Act

OGE is providing the following information about registration under the Lobbying Disclosure Act (LDA) and the Foreign Agents Registration Act (FARA) to assist agency ethics officials in identifying which appointees are subject to the restrictions of paragraph 3 of the Pledge.¹⁷ OGE does not interpret either of these laws.

1. Lobbying Disclosure Act

The LDA generally requires lobbyists to file their initial registrations within 45 days after making a lobbying contact or being retained to make a lobbying contact.¹⁸ Following their initial registration, lobbyists must file quarterly activity reports detailing their lobbying activities during the preceding quarter.¹⁹ Once filed, initial registrations and quarterly activity reports are retained by the House of Representatives²⁰ and the Senate,²¹ and are made publicly available online.

In many cases, LDA quarterly reports will be filed by lobbying firms, not by the individuals involved in lobbying. These reports will, however, list each individual who engaged in lobbying activities during the period covered by the report.²² Therefore, if an appointee engaged in lobbying activities less than two years before their appointment, that appointee's name should appear in the LDA disclosures filed during the two years preceding their appointment. It follows that a two-year search of the LDA databases is sufficient to determine whether an appointee is subject to restrictions as a former registered lobbyist.²³

2. Foreign Agents Registration Act

Like the LDA, the FARA contains requirements regarding registration and periodic filing. As discussed below, however, the optimal search procedures for the FARA database are somewhat different from those for the LDA.

¹⁷ OGE acknowledges the assistance it received from employees of the Justice Department and the Office of the Clerk of the United State House of Representatives in developing this appendix.

¹⁸ 2 U.S.C. § 1603(a). The terms “lobbyist” and “lobbying contact” are defined at 2 U.S.C. § 1602(10) and (8), respectively.

¹⁹ 2 U.S.C. § 1604(a). “Lobbying activities” is defined at 2 U.S.C. § 1602(7).

²⁰ *Lobbying Disclosures*, U.S. HOUSE OF REPRESENTATIVES: OFF. OF THE CLERK, <https://disclosurespreview.house.gov> (last visited June 1, 2021).

²¹ *Lobbying Disclosure Act (LDA) Reports*, U.S. SENATE, <https://lda.senate.gov/system/public/> (last visited June 1, 2021).

²² In the current electronic quarterly report form, known as the LD-2, this list of individual lobbyists appears in Line 18.

²³ It is possible for a person who stopped lobbying more than two years ago to appear in records filed less than two years ago. This can happen if the person is listed on Line 23 of an LD-2, indicating a cessation of lobbying activities during the preceding quarter. An appointee who stopped lobbying more than two years prior to their appointment should not be subjected to restrictions under paragraph 3 merely because their name was included in an LDA filing indicating a cessation of lobbying activities during the two-year lookback period.

The FARA generally requires a person to file an initial registration within 10 days after becoming the agent of a foreign principal.²⁴ Following initial registration, a registered agent must file supplemental statements at six-month intervals for as long as the agency relationship continues.²⁵ Furthermore, if the registrant is a business entity,²⁶ then individuals performing foreign-agent functions as employees of the registered entity (and certain other individuals) must file short-form registrations.²⁷ The short-form registration is filed when the individual begins acting as a foreign agent; no further filings are required unless the nature of the services or compensation changes.

The Department of Justice maintains an online database containing FARA materials, including initial registrations, short-form registrations, and supplemental statements.²⁸ Among other functions, this database has a “Search by Field” option that makes it possible to limit a search to a particular category of documents. An efficient way to determine whether an appointee was a registered foreign agent in the two years preceding their appointment is to conduct two searches for the appointee’s name, with one search covering all documents in the applicable two-year period and a separate search limited to short-form registrations (but without any date restriction).²⁹ An appointee will be subject to restrictions as a former registered foreign agent if (1) the appointee filed an initial registration or a supplemental statement within the two years preceding their appointment or (2) the individual filed a short-form registration at any time and the registration was terminated less than two years before the Government appointment (or has not been terminated at all).³⁰

²⁴ 22 U.S.C. § 612(a). Section 611 provides definitions of “person,” “foreign principal,” and “agent of a foreign principal.”

²⁵ 22 U.S.C. § 612(b); *see also* 28 C.F.R. § 5.203(b).

²⁶ Under the FARA, “person[s]” acting as agents of foreign principals are required to register, 22 U.S.C. § 612(a), and the term *person* includes “an individual, partnership, association, corporation, organization, or any other combination of individuals.” 22 U.S.C. § 611(a).

²⁷ 28 C.F.R. § 5.202.

²⁸ *Foreign Agents Registration Act: Search Filings*, U.S. DEP’T OF JUST., <https://efile.fara.gov/ords/f?p=1235:10> (last visited June 1, 2021).

²⁹ The reason for conducting two searches is that there may be gaps in the database involving individuals who file short-form registrations and then act as foreign agents for several years without making additional filings. By running a search for short-form registrations, an ethics official can generate a table that shows an appointee’s registrations with termination dates (for registrations that have been terminated). Meanwhile, a separate search of all documents will capture individuals who filed their own initial registrations and supplemental statements, instead of operating under a short-form registration filed in conjunction with a business entity’s registration.

³⁰ With the FARA database, as with the LDA database, there can be filings that are less than two years old that declare that a person ceased engaging in registrable activities more than two years ago. Appointees who ended their engagements with foreign principal more than two years prior to their appointments should not be subjected to restrictions under paragraph 3 merely because their names were included in FARA filings indicating a cessation of registrable foreign agent activities during the two-year lookback period.