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LA-22-07

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Post-Government Employment Guidance on Executive Order 13989 (The Ethics Pledge)

The U.S. Office of Government Ethics (OGE), following consultation with the White House Counsel's Office, is issuing this Legal Advisory to provide guidance relevant to appointees¹ who signed the ethics pledge ("the Pledge") contained in Executive Order 13989 and are now leaving or considering leaving Government employment. This Advisory addresses the post-employment restrictions established by Paragraphs 4, 5, and 6 of the Pledge.² Specifically, it highlights earlier guidance that remains applicable to Paragraphs 4 and 6, and provides a detailed analysis of Paragraph 5, which is new to this Pledge. Finally, the attached reference table, which is similar to that contained in OGE Legal Advisory LA-21-05 (Feb. 23, 2021), directs ethics officials to past guidance that remains applicable.

The post-employment restrictions discussed in this Legal Advisory augment, rather than replace, the post-employment restrictions imposed by provisions outside the Pledge, such as 18 U.S.C. § 207.³ Section 207 and other post-employment provisions⁴ continue to apply to appointees who sign the Pledge. OGE therefore recommends that ethics officials counsel appointees on these other provisions, when applicable, in addition to discussing Paragraphs 4, 5, and 6 of the Pledge.

¹ The term "appointee" is defined in section 2(b) of Executive Order 13989. *See* Exec. Order No. 13,989, 86 Fed. Reg. 7,029, 7,030 (Jan. 25, 2021).

² OGE has provided additional guidance that may be relevant in interpreting Paragraphs 4, 5, and 6. *See* OGE Legal Advisory LA-21-05 (Feb. 23, 2021); *see also* OGE Legal Advisory LA-21-03 (Jan. 22, 2021).

³ *See* OGE Legal Advisory LA-16-08 attach. (Sept. 23, 2016) (summarizing the 18 U.S.C. § 207 restrictions that apply to former executive branch employees).

⁴ There are several other authorities that impose restrictions and requirements on former employees. *See, e.g.*, 18 U.S.C. § 203(a)(1) (barring a former employee from accepting any share of compensation for certain representational services provided while the former employee was in Government service); 41 U.S.C. § 2104 (barring former employees who were involved in certain contracting activities from accepting compensation from prime contractors); 5 U.S.C. app. § 101(e) (requiring certain former employees to file financial disclosure reports after terminating Government service).



I. Paragraph 4: Post-Employment Cooling-Off Period for “Senior” Appointees

Paragraph 4 of the Pledge applies to an appointee who is a senior employee as defined by 18 U.S.C. § 207(c).⁵ Section 207(c) generally bars a former senior employee from communicating, with the intent to influence, on behalf of any other person before any employee of the agency in which they worked during the one year period before the termination of their service. This § 207(c) restriction lasts for a period of one year after their departure from the senior position.⁶ Paragraph 4 of the Pledge states:

If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, and its implementing regulations, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. I will abide by these same restrictions with respect to communicating with the senior White House staff.

Paragraph 4 expands upon the § 207(c) restriction in two ways. First, the duration of the § 207(c) restriction is extended from one year to two years.⁷ This restriction is substantively identical to the restriction in Executive Order 13490;⁸ therefore, ethics officials and departing senior appointees may continue to rely on OGE’s earlier guidance regarding this language.⁹ Second, Paragraph 4 expands § 207(c) by extending the coverage of prohibited communications to “senior White House staff” in addition to employees at the appointee’s former agency. The term “senior White House staff” is defined as “any person appointed by the President to a position under sections 105(a)(2)(A) or (B) of title 3, United States Code, or by the Vice President to a position under sections 106(a)(1)(A) or (B) of title 3.”¹⁰

II. Paragraph 5: Lobbying Restrictions for “Senior” and “Very Senior” Appointees

Paragraph 5 of the Pledge is a new “shadow lobbying” provision not found in prior ethics pledges. As the title of Paragraph 5 states, the restrictions apply only to a senior or very senior employee¹¹ who signed the Pledge. The paragraph states:

If, upon my departure from the Government, I am covered by the post-employment restrictions set forth in sections 207(c) or 207(d) of title 18, United States Code, and those sections’ implementing regulations, I agree that, in addition, for a period of 1 year following

⁵ 18 U.S.C. § 207(c)(2).

⁶ See generally 5 C.F.R. § 2641.204 (interpreting 18 U.S.C. § 207(c)).

⁷ For information regarding the timing of the commencement of the Paragraph 4 restriction, see *infra* note 12.

⁸ Exec. Order No. 13,490, sec. 1, para. 4, 74 Fed. Reg. 4,673, 4,673 (Jan. 26, 2009).

⁹ See OGE DAEogram DO-10-004, at 1-4 (Feb. 22, 2010).

¹⁰ Exec. Order No. 13,989, sec. 2(r), 86 Fed. Reg. 7,029, 7,031 (Jan. 25, 2021). The White House publishes an [annual report](#) to Congress on White House personnel. All staff listed in this report who are listed as “employee” and making \$155K and above are considered “senior White House staff.” However, because this report is only published annually, agencies may reach out to the White House Office if there are questions about whether a specific person is a “senior staff” member.

¹¹ “Senior employee” is defined in 18 U.S.C. § 207(c)(2), and “very senior employee” is defined in 18 U.S.C. § 207(d)(1).

the end of my appointment, I will not materially assist others in making communications or appearances that I am prohibited from undertaking myself by (a) holding myself out as being available to engage in lobbying activities in support of any such communications or appearances; or (b) engaging in any such lobbying activities.

Paragraph 5 includes several elements that must be analyzed when assessing whether certain conduct violates a restriction contained in the paragraph. Below, OGE has provided additional guidance and examples to clarify the types of activities that are covered by Paragraph 5.

a. Timing of the Restrictions

The restrictions in Paragraph 5 last for a period of one year after the termination of a senior or very senior appointee's Government service. The White House has advised that the Paragraph 5 restrictions, like the restrictions of 18 U.S.C. § 207(c) and § 207(d), begin upon the termination of service as a senior or very senior appointee.¹²

Example 1: An appointee who served as a senior employee was about to leave the Government for employment in the private sector, but the Administration convinced them to serve another two months, this time as a Schedule C (non-senior) employee. The appointee served the two months in the Schedule C position and then terminated their Government service. Under 18 U.S.C. § 207(c), the former appointee's prohibition against communicating with or appearing before officials at their former agency on behalf of another person will last for the next ten months, because the one year prohibition under § 207(c) began at the termination of the senior position. The Paragraph 5 restriction will last for the same ten months.¹³

b. Lobbying Activities

The restrictions in Paragraph 5 prohibit a senior or very senior appointee from: (1) holding themselves out as being available to engage in lobbying activities in support of communications or appearances that an appointee is prohibited from undertaking themselves under 18 U.S.C. § 207 or (2) engaging in any such lobbying activities. Paragraph 5 relies on the definition of "lobbying activities" in the Lobbying Disclosure Act (LDA).¹⁴ The LDA defines that term to include both "lobbying contacts"¹⁵ with covered executive branch officials and efforts in support of such contacts.¹⁶ Each example below involves an appointee who was a senior or very senior employee and has left the Government to join a firm that provides various representational services involving communications with Federal officials.

¹² For senior appointees, the start of the restriction period for Paragraphs 4 and 5 are the same, with each commencing when the appointee's 18 U.S.C. § 207(c) cooling-off period begins. Similarly, for very senior appointees, the start of the restriction period for Paragraph 5 begins when the appointee's 18 U.S.C. § 207(d) cooling-off period begins.

¹³ If the appointee instead terminated Government service as a senior employee, the Paragraph 5 restrictions would last for one year after termination of Government service, which would be the same time period as the appointee's restrictions under § 207(c).

¹⁴ See Exec. Order No. 13,989, sec. 2(g), 86 Fed. Reg. 7,029, 7,031 (Jan. 25, 2021).

¹⁵ See 2 U.S.C. § 1602(8)(A).

¹⁶ See *id.* § 1602(7).

Example 1: An appointee’s firm represents a Government contractor that is aggrieved by a decision of the appointee’s former agency. The firm intends to ask a covered executive branch official to reverse the decision in question. This intended communication will constitute a “lobbying contact” because the request will be made to an individual who is a “covered executive branch official” under the LDA.¹⁷ Accordingly, Paragraph 5 restricts a former senior or very senior appointee from making this communication.

Example 2: An appointee’s firm represents a contractor that is seeking a modification to its contract with a particular agency. The firm’s communications to a career GS-15 contracting officer regarding the proposed modification do not involve lobbying contacts because the contracting officer is not a “covered executive branch official” under the LDA.¹⁸ Accordingly, Paragraph 5 does not restrict a former senior or very senior appointee’s activities with respect to these communications (although senior and very senior appointees’ activities are still subject to the restrictions in 18 U.S.C. § 207 and Paragraph 4 of the Pledge).

Example 3: An employee of the firm plans to make a public speech calling for an executive branch agency to change a particular policy. The speech is covered by an exception in the LDA for speeches distributed to the public.¹⁹ Accordingly, Paragraph 5 does not restrict a former senior or very senior appointee’s activities with respect to this speech, because the communication is not a lobbying contact under the LDA.

c. Prohibited Communication or Appearance

Paragraph 5 refers to “communications or appearances” that a senior or very senior appointee is prohibited from undertaking. This encompasses all communications and appearances prohibited by all provisions of 18 U.S.C. § 207, not just communications and appearances prohibited under § 207(c) or § 207(d).

Example 1: An appointee recently left a position as a senior employee at the Department of Education. The appointee now works for a nonprofit organization. Under § 207(c), the appointee—for the first year after they leave Government service—may not communicate with or appear before anyone serving in the Department of Education, with intent to influence on behalf of their current employer, with respect to any matter on which the employer seeks official action. Because these communications and appearances would be prohibited under 18 U.S.C. § 207(c), they also trigger the Paragraph 5 restrictions. Therefore, during the first year after leaving Government service, the former appointee also may not materially assist others in making any communications that the former appointee is prohibited from making themselves under § 207(c) by holding themselves out as being available to engage or engaging in lobbying activities in support of any such communications or appearances.²⁰

Example 2: The position description for an Assistant Secretary of Housing and Urban Development, a senior employee position, specifies that the Assistant Secretary is responsible for XYZ grants, which are handled by an office under the Assistant

¹⁷ See *id.* § 1602(3).

¹⁸ *Id.*

¹⁹ See *id.* § 1602(8)(B)(iii).

²⁰ For more information on what constitutes a lobbying activity, see section II.a. above.

Secretary's supervision. Because the Assistant Secretary has official responsibility for all XYZ grants, a senior appointee who leaves Government after holding this position is subject to a two-year post-employment restriction on certain communications and appearances relating to these grants.²¹ Because these communications and appearances are prohibited under 18 U.S.C. § 207(a)(2), they also trigger the material assistance lobbying restrictions under Paragraph 5.

Example 3: An appointee left their position as a very senior employee in order to run for governor of a state and won. After inauguration, but still within one year after leaving the very senior position, a controversy arose between the state and a Federal department. The appointee may contact a covered executive branch official at the White House about this controversy. This contact would be permissible under § 207(d) because it is covered by the 18 U.S.C. § 207(j)(1)(A) exception making § 207 inapplicable to acts done in carrying out official duties as an elected official of a state or local government. Because § 207 would not prohibit the former appointee from undertaking the communication themselves, Paragraph 5 would not prohibit the former appointee from engaging in lobbying activities to assist others representing the state in the pending controversy.

d. Material Assistance

An appointee who is subject to Paragraph 5 may not “materially assist” others in making certain communications or appearances. “Materially assist” is defined as providing “substantive assistance but does not include providing background or general education on a matter of law or policy based upon an individual’s subject matter expertise, nor any conduct or assistance permitted under section 207(j) of title 18, United States Code.”²² In the following examples, the firm identified is planning a lobbying campaign that will involve communications and appearances that would be prohibited for a former appointee.²³

Example 1: An appointee previously worked for the Department of Commerce (DOC).²⁴ If the firm’s lobbying team asks the appointee whether a particular office within DOC handles matters relevant to the lobbying campaign, the appointee may answer this question and provide contact information for relevant personnel. These actions do not constitute substantive assistance, but instead involve an administrative or peripheral issue. Therefore, they do not constitute material assistance prohibited by Paragraph 5. However, the appointee may not assist in facilitating the meeting by, for example, reaching out to a former colleague to ask them to take the meeting.

Example 2: An appointee may not draft or edit talking points for a meeting or provide feedback to the firm as to whether certain facts or arguments would be likely to persuade a particular covered executive branch official within DOC. Such actions would be

²¹ See 18 U.S.C. § 207(a)(2).

²² See Exec. Order No. 13,989, sec. 2(h), 86 Fed. Reg. 7,029, 7,031 (Jan. 25, 2021).

²³ The lobbying campaign’s communications and appearances would be prohibited because they would be considered lobbying contacts under the Lobbying Disclosure Act (LDA). See OGE DAEOgram DO-10-004, at 6 (Feb. 22, 2010) (stating that the LDA definition of lobbying contact is broad, including oral or written communications made on behalf of a client with regard to Federal legislation and executive branch programs and policies).

²⁴ When, under 18 U.S.C. § 207(h), OGE has designated separate departmental and agency components for purposes of 18 U.S.C. § 207(c), the Paragraph 5 restrictions for those senior appointees will also only apply to the component agency for which the appointee’s one-year post-employment restriction under § 207(c) applies.

material assistance because they are substantive assistance intended at the time performed for use in a lobbying contact.

Example 3: An appointee was directly involved in the creation of a particular public-private partnership at their former agency that will be the focus of a lobbying campaign. The former appointee may provide publicly available information to the firm about the history of public-private partnerships at the agency because it is background or general education on a matter of law or policy based upon the appointee's subject matter expertise. The former appointee may not, however, discuss non-public deliberations that occurred within the agency at the time this particular partnership agreement was signed. Providing information about these deliberations, with the intent that this information be used in lobbying contacts, would be material assistance because it is substantive, having significance to the particular matter.

e. Holding Oneself Out

Paragraph 5 also contains a restriction on a senior or very senior appointee holding themselves out as being available to engage in lobbying activities in support of certain communications or appearances. In the following examples, an appointee who is subject to Paragraph 5 now works for a private sector firm which provides various representational services involving communications with Federal officials. Each of the scenarios below involves potential communications or appearances before Federal officials that would be prohibited for the appointee.

Example 1: Based on the work done during their Government appointment, an appointee is barred under § 207 from communicating with or appearing before the Department of Energy (DOE) with respect to management of national laboratories. Nevertheless, the former appointee drafts a biography, which is then posted on the firm's website and states that the former appointee is "available to assist clients seeking to revise DOE policies to expand opportunities for small and mid-sized companies at national labs." The former appointee has violated Paragraph 5 by holding themselves out as available to materially assist potential lobbying activities relating to DOE policies affecting national labs.

Example 2: An appointee previously had responsibility for the Department of Agriculture's meat inspection operations. The former appointee now leads seminars about the meat inspection process. In support of this activity, they prepare marketing materials stating that the seminars cover the history of Federal meat inspections, along with current laws and procedures. These materials offer general education, rather than assistance that will support specific lobbying contacts, and therefore do not hold the former appointee out as being available to materially assist in lobbying contacts and would not violate Paragraph 5. The former appointee may distribute these marketing materials to any potential audience, including trade associations that engage in lobbying relating to meat inspections.

Example 3: While interviewing for their current private sector job, an appointee represents to their then-prospective employer that they can engage in the lobbying activities prohibited by Paragraph 5 after their one-year cooling-off period ends. Because the appointee is not holding themselves out as being able to engage in these lobbying activities while such activities are prohibited, this representation is permissible.

III. Paragraph 6: Lobbying and Foreign Agent Restrictions for All Appointees

Paragraph 6 of the Pledge applies to all appointees. It states:

In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under [the Foreign Agents Registration Act], for the remainder of the Administration or 2 years following the end of my appointment, whichever is later.

This paragraph combines language from two earlier ethics pledges. The lobbying restrictions mirror those in Executive Order 13490.²⁵ Ethics officials and departing appointees may rely on OGE's earlier guidance regarding the lobbying restrictions,²⁶ except with respect to the duration of the restriction. Under Paragraph 6 of the Pledge, the lobbying prohibition lasts for a minimum of two years. However, any appointee who leaves more than two years before the end of the Administration must comply with the restriction until the Administration ends.

The foreign agent restrictions in Paragraph 6 largely mirror the restriction in Executive Order 13770.²⁷ However, the duration of the restriction has been modified. As with the lobbying restrictions, the foreign agent restrictions will last until the Administration ends or for two years after an appointee's appointment ends, whichever is later. In all other respects, ethics officials and appointees may rely on OGE's earlier guidance regarding foreign agent restrictions.²⁸

IV. Conclusion

The Pledge provisions discussed in this Legal Advisory subject appointees to significant post-employment restrictions beyond those already contained in statutes such as 18 U.S.C. § 207 and vary in scope from prior ethics pledges. OGE encourages ethics officials to counsel appointees on all relevant post-employment restrictions before they terminate Government service and as needed thereafter. To further assist ethics officials, OGE has included a reference table that highlights the post-employment restrictions in previous ethics pledges and directs ethics officials to guidance that remains applicable. Agency ethics officials with questions about the Pledge post-employment restrictions are encouraged to contact their OGE Desk Officers for guidance.

Attachment

²⁵ Exec. Order No. 13,490, sec. 1, para. 5, 74 Fed. Reg. 4,673, 4,673 (Jan. 26, 2009).

²⁶ See OGE DAEOgram DO-10-004, at 4-8.

²⁷ Exec. Order No. 13,770, sec. 1, para. 4, 82 Fed. Reg. 9,333 (Feb. 3, 2017).

²⁸ See OGE Legal Advisory LA-20-09, at 3 & attach. 2 (Oct. 29, 2020).

Comparison of Post-Employment Restrictions in Executive Order 13490, Executive Order 13770, and Executive Order 13989¹
Attachment to LA-22-07

E.O. 13490	E.O. 13770	E.O. 13989
<p>Sec. 1, para. 4. <i>Revolving Door Ban—Appointees Leaving Government.</i> If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.</p>	<p>Sec. 1, para. 2. If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.</p>	<p>Sec. 1, para. 4. <i>Revolving Door Ban—Appointees Leaving Government.</i> If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, <u>and its implementing regulations</u>, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. <u>I will abide by these same restrictions with respect to communicating with the senior White House staff.</u></p> <p>The following guidance may be relied upon with respect to the restriction on communicating with employees of the appointee’s former agency in E.O. 13989:</p> <ul style="list-style-type: none"> • Guidance on post-employment cooling-off period: DO-10-004, LA-16-08 <p><u>NEW:</u> The restriction on <u>communicating with the senior White House staff</u> did not appear in E.O. 13490 or E.O. 13770. Section 2(r) defines this term as follows: “Senior White House staff” means any person appointed by the President to a position under sections 105(a)(2)(A) or (B) of title 3, United States Code, or by the Vice President to a position under sections 106(a)(1)(A) or (B) of title 3.”</p>

¹ Language in **bold type** in the text of the Pledge language highlights similar language across the different Pledges; language in **bold and underlined type** in the text of the Pledge language highlights language that is new to E.O. 13989 and does not appear in prior Pledges.

E.O. 13490	E.O. 13770	E.O. 13989
<p>The post-government employment restrictions in paragraphs 4 and 5 of E.O. 13490 are addressed elsewhere in this chart.</p>	<p>Sec. 1, para. 1. I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.</p>	<p>Sec. 1, para. 5. <u>Revolving Door Ban — Senior and Very Senior Appointees Leaving Government.</u> If, upon my departure from the Government, I am covered by the post-employment restrictions set forth in sections 207(c) or 207(d) of title 18, United States Code, and those sections' implementing regulations, I agree that, in addition, for a period of 1 year following the end of my appointment, I will not materially assist others in making communications or appearances that I am prohibited from undertaking myself by (a) holding myself out as being available to engage in lobbying activities in support of any such communications or appearances; or (b) engaging in any such lobbying activities.</p> <p><u>NEW:</u> The restriction that applies to senior and very senior appointees leaving Government did not appear in E.O. 13490 or E.O. 13770.</p> <p><u>NEW:</u> This paragraph introduces new language, "<u>materially assist others,</u>" which did not appear in E.O. 13490 or E.O. 13770. Section 2(h) defines this term as follows: "Materially assist' means to provide substantive assistance but does not include providing background or general education on a matter of law or policy based upon an individual's subject matter expertise, nor any conduct or assistance permitted under section 207(j) of title 18, United States Code."</p>

E.O. 13490	E.O. 13770	E.O. 13989
<p>Sec. 1, para. 5. <i>Revolving Door Ban—Appointees Leaving Government to Lobby.</i> In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.</p>	<p>Sec. 1, para. 3. In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.</p> <p>Sec. 1, para. 4. I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.</p>	<p>Sec. 1, para. 6. <i>Revolving Door Ban—Appointees Leaving Government to Lobby.</i> In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under FARA, for the remainder of the Administration <u>or 2 years following the end of my appointment, whichever is later.</u></p> <p>The following guidance may be relied upon with respect to the restriction on lobbying any covered executive branch official or non-career Senior Executive Service appointee in E.O. 13989:</p> <ul style="list-style-type: none"> • Guidance on the post-employment lobbying ban: DO-10-004, LA-16-08 <p>The following guidance may be relied upon with respect to the restriction on engaging in any activity on behalf of any foreign government or foreign political party in E.O. 13989:</p> <ul style="list-style-type: none"> • Summary of the post-employment restrictions concerning foreign governments and foreign political parties: LA-20-09 <p><u>NEW:</u> The extension of the restriction to “<u>2 years following the end of my appointment</u>” if later than the end of the Administration did not appear in E.O. 13490 or E.O. 13770.</p>