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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: The Standards of Conduct and 18 U.S.C. § 208 as Applied to Official Social Media Use

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on how the Federal ethics rules and conflict of interest statute at 18 U.S.C. § 208 apply to executive branch employees' use of official social media.[1] As described further below, employees who are entrusted with the operation of official social media accounts must prevent unauthorized use of those accounts and avoid improper endorsements of private organizations on such accounts. While operating official accounts, employees also have an obligation to act impartially and to not participate in decisions and actions in which they have a disqualifying financial interest.[2] Finally, employees must remember that they are responsible for taking affirmative steps to "avoid any actions creating the appearance that they are violating the law or the ethical standards."[3]

I. Use of Government Property

Employees have an obligation to "protect and conserve Federal property and shall not use it for other than authorized activities."[4] Official social media accounts[5]—i.e., accounts that agencies use for the purpose of conducting official outreach on behalf of the agency—are Government property for purposes of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct).[6] As a result, OGE has previously advised that:

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[1] This Legal Advisory is a companion to OGE Legal Advisory LA-15-03, which addressed the application of ethics rules to personal use of social media by executive branch employees.
[2] In addition, employees must be mindful that many non-ethics laws apply to the operation and maintenance of official social media accounts. *See infra* Part IV.
[3] 5 C.F.R. § 2635.101(b)(14).
[4] 5 C.F.R. § 2635.101(b)(9).
[5] Agencies may have both organizational accounts that are in the agency's name and individual-specific official social media accounts, which oftentimes bear the name or title of an employee at the agency.
[6] *See* OGE Legal Advisory LA-15-03 (Apr. 9, 2015).

Subject to applicable legal authorities, each agency determines the purposes for which its official accounts may be used. When employees use these official accounts, they must do so in accordance with applicable agency directives, regulations, and policies. Put simply, official accounts are for official purposes.[7]

OGE encourages agencies to establish and maintain policies that identify authorized uses of official social media accounts, and create procedures and processes that mitigate the risk of unauthorized or inappropriate use.

Example 1: An employee is part of the social media communications team at Agency X. Agency X has established a policy prohibiting any employee from reposting content originally posted by a commercial for-profit entity. The employee reposts content from Company Y. The employee's unauthorized use of the official account is a misuse of Government property under the Standards of Conduct.

The duty to protect and conserve Government property also extends to preventing unauthorized access and use of official accounts by non-authorized persons,[8] including former employees. OGE has occasionally received questions about the propriety of allowing former employees to convert an official account to a personal account, or to otherwise maintain or access an official account for non-Governmental purposes after they leave Government service. Federal employees who oversee official social media accounts are responsible for protecting those assets and preventing unauthorized use. As a result, OGE encourages agencies to adopt policies that explicitly prohibit former employees from using the official social media accounts of the agency after their departure.[9]

Example 2: The Deputy Secretary of a Cabinet-level agency was provided with an official social media account to engage in agency-sanctioned outreach. The employee is now planning to leave Government service and has requested permission to maintain the account in a private capacity. The employees responsible for oversight of the official social media account should deny the request. Actions the agency can take to prevent unauthorized access include changing the account password.

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[7] *Id.* at 5-6 (citations omitted).

[8] OGE is aware that some agencies use contractors to maintain their social media accounts. Because social media accounts are considered Government property for purposes of the Standards of Conduct, OGE encourages agencies to take steps to prevent former contractors and others who are not authorized to act on behalf of the agency from accessing or modifying official social media accounts.

[9] *See* Arian D. Ravanbakhsh, *Transition Post 3: Managing Official Email and Social Media Accounts*, NAT'L ARCHIVES & RECORDS ADMIN.: RECORDS EXPRESS (Oct. 21, 2020), https://records-express.blogs.archives.gov/2020/10/21/transition-post-3-managing-official-email-and-social-media-accounts/ ("Social media accounts created or used for official agency business must stay under the control of the agency."). Former employees may visit and interact with the official social media accounts of an agency to the same extent as members of the public, so long as their communications do not violate the post-employment prohibitions. *See* 5 C.F.R. § 2635.704(b)(2) (defining the authorized purposes for which Government property may be used as "those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation"); *see also* 18 U.S.C. § 207 (setting out prohibited post-employment communications and appearances made on behalf of another).

II. Endorsements

Employees may not use or permit the use of their Government position, title, or any authority associated with their public office for the endorsement of any product, service, or enterprise except:

> (1) In furtherance of statutory authority to promote products, services or enterprises; or
> (2) As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.[10]

Content posted by employees to official accounts that appears to endorse a product, service, or enterprise must meet one of the above-stated regulatory exceptions provided at 5 C.F.R. § 2635.702(c). In general, agencies are in the best position to understand the scope of their statutory authorities to promote products, services, and enterprises and to advise agency staff on whether it is appropriate to use these authorities in the social media context.

Occasionally employees may wish to use an official account to share, "like," repost, link, or otherwise reference content created by external organizations. Likewise, employees may occasionally wish to share information on an official account concerning work that the agency is conducting in concert with external organizations. While engaging in these activities, employees should take into consideration whether the content could reasonably be construed as an endorsement. Because the line between endorsement and mere reference is narrow and fact dependent, OGE encourages agencies to either incorporate limitations on references to non-Governmental products, services, and enterprises in social media policies, or establish procedures for reviewing such references in proposed social media content to ensure that the references do not constitute impermissible endorsements under the Standards of Conduct. OGE is aware that some agencies incorporate disclaimers on their official social media accounts. In many cases, such disclaimers may dispel the impression that merely sharing, "liking," reposting, linking, or otherwise referencing content created by an external organization is an endorsement. However, a disclaimer may not be sufficient to dispel such an impression when the context otherwise leads to a reasonable inference that a post or other activity constitutes endorsement.

> Example 3: An employee has a personal social media account that they use to endorse products in their personal capacity. The employee may not use an official social media account to express their personal opinion of a company's products or to promote their personal social media account, e.g., by reposting or linking to personal posts.

> Example 4: An agency is authorized by statute to recognize companies that produce consumer goods that meet certain environmental standards under a certification program. An employee may post an announcement on an official social media account stating that a product produced by Company X is the first product of its class to meet the certification standards.

[10] 5 C.F.R. § 2635.702(c)(1)-(2).

Example 5: An employee may announce that Company X is the winner of an agency prize challenge held to provide funding for innovative designs in structural engineering. The employee's mere recognition that Company X won the prize challenge is an acknowledgement of the Company's successful award and notice to the public regarding the allocation of appropriated funds and financial assistance. Merely noting that Company X won the agency prize challenge is not an endorsement of the Company, its products, or its services.

Example 6: An employee may not include in the post described in Example 5 a statement that Company X is a "fantastic company" that provides "world-class services" or that their "products and ideas are consistently top notch." The employee also may not provide other descriptions that could be understood as implying preference for or endorsement of Company X's other products or services.

Example 7: An environmental agency has an official social media account that includes a disclaimer stating that reposting information does not qualify as an endorsement. The employee reposts an informational post from a national environmental group, Nonprofit Y, that discusses recent research concerning the effect of clean energy projects on long-term pollution levels. The employee does not otherwise reference Nonprofit Y or make statements that could be construed as endorsing the work of Nonprofit Y. In this case, reposting for an informational purpose and the use of a disclaimer makes clear that the repost is not an endorsement of Nonprofit Y.

Example 8: The employee in the preceding example subsequently proceeds to repost informational posts exclusively from the national environmental group numerous times in a week. Notwithstanding the inclusion of a disclaimer, the frequency of reposting could reasonably be construed as an endorsement of the national environmental group.

III. Conflicts of Interest and Impartiality

The criminal conflict of interest statute at 18 U.S.C. § 208 prohibits employees from participating personally and substantially in any particular matter that they know would have a direct and predictable effect on their own financial interest or financial interests imputed to them. As a result, employees who own stock or other equity in a social media network may not participate in any particular matter that would directly and predictably affect the financial interests of the social media network.[11] In addition, employees are required to "act impartially and not give preferential treatment to any private organization or individual."[12] At times, involvement in certain official social media activities—such as establishing, operating, and retiring official social media accounts—may raise conflicts of interest and impartiality concerns.

A. Opening and Closing Accounts

Employees have raised questions related to the propriety of opening or closing official social media accounts if they have an investment interest in the social media network. At this

[11] *See, e.g.*, OGE Legal Advisory LA-20-03 (May 1, 2020).
[12] 5 C.F.R. § 2635.101(b)(8).

point in time, most major social media networks provide free accounts. Instead of charging users, these social media networks generally raise revenue through separately negotiated advertising contracts with third parties. Some social media platforms may, however, offer or require a subscription service—e.g., payment of a recurring fee—or offer or require users to otherwise pay a cost associated with using the site.

1. Social Media Sites that Provide Free Accounts

Employees who have an equity interest in a social media platform that provides users with free accounts may participate in agency decisions to open or close a free account on that platform without implicating 18 U.S.C. § 208. Although the decision to open or close a free account with a platform is a particular matter, OGE has determined that merely opening or closing a free account will not have a direct and predictable[13] effect on the social media network. First, the social media network is neither entitled to receive nor required to disburse money as a result of any given individual free account being opened. Second, any effect on advertising contracts or advertising revenue would be "contingent upon the occurrence of events that are speculative" and that "are independent of, and unrelated to, the matter,"[14] such as increased interest in advertising on the social media network or increased social media traffic.

At the same time, employees who have an equity interest in a social media platform that provides free accounts may not participate in the decision to establish a free official account on the social media platform if doing so first requires substantive negotiations and changes to the Terms of Service.[15] Contract negotiations to modify Terms of Service or for additional services would have a direct and predictable effect on the financial interests of the social media platform which must, at the least, expend resources in both money and staff time to participate in the negotiation process.

> <u>Example 9</u>: An employee is tasked with opening a new social media account with Social Media Network (SMN). Accounts on SMN are free to open. The accompanying Terms of Service agreement for the new account is one that the employee's agency previously negotiated with SMN and it requires no further modification. The employee may open an official SMN social media account as part of their official duties, notwithstanding that the employee owns SMN stock in excess of the regulatory *de minimis* found in 5 C.F.R. § 2640.202(a).

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[13] The term "direct and predictable effect" as used in OGE's regulations implementing 18 U.S.C. § 208 is defined at 5 C.F.R. § 2640.103(a)(3).

[14] 5 C.F.R. § 2640.103(a)(3).

[15] Opening an account on a social media platform will require an agency to enter into a contract with the platform. Agencies that do not use a Federal-compatible Terms of Service agreement will need to ensure that the contract that they enter into is consistent with applicable laws, regulations, and agency policies. The U.S. General Services Administration (GSA) has developed Federal-compatible Terms of Service agreements with many major social media platforms. GSA's Terms of Service program is no longer active; however, many previously negotiated agreements remain available for agency use or modification. *See Negotiated Terms of Service Agreements*, DIGITAL.GOV, https://digital.gov/resources/negotiated-terms-of-service-agreements/ (last updated July 29, 2022, 6:27 PM).

Example 10: An employee is tasked with opening a new social media account with SMN. As currently written, SMN's Terms of Service include an open-ended indemnification clause. Because this term is impermissible for a Government contract, the employee is asked to negotiate removal of this term with SMN's Government liaison. The employee may not engage in these negotiations if the employee owns SMN stock in excess of the regulatory *de minimis* found in 5 C.F.R. § 2640.202(a).

2. Social Media Sites that Charge Users

An employee who has an equity interest in a social media platform could not participate in a decision to open or close an account that relies on a subscription service or otherwise charges users without being in jeopardy of violating 18 U.S.C. § 208(a).

Example 11: An employee is tasked with opening a new social media account with KnowledgeGram (KG). Accounts on KG are provided on a subscription service. The employee may not open an official KG social media account if the employee owns KG stock in excess of the regulatory *de minimis* found in 5 C.F.R. § 2640.202(a).

Example 12: An employee is tasked with deciding whether their agency should establish a verified social media account with KG. Although KG does provide free accounts, there is a monthly cost associated with operating a verified account. The employee may not participate in the decision as to whether to open a verified account if the employee owns KG stock in excess of the regulatory *de minimis* found in 5 C.F.R. § 2640.202(a).

3. Impartiality

Even if an employee's participation in creating or closing an official social media account would not implicate 18 U.S.C. § 208 because the particular matter would not directly and predictably affect the financial interests of the platform, the employee must still take into consideration impartiality concerns if the employee has a "covered relationship" with the social media platform.[16] Employees who have a covered relationship with a social media platform must consider whether the circumstances would cause a reasonable person with knowledge of the relevant facts to question their participation in the decision to create or close an official account on the platform.[17] An employee who is concerned about other circumstances that would give rise to questions regarding their impartiality should use the procedures identified at 5 C.F.R. § 2635.502 to determine whether they should participate.

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[16] *See* 5 C.F.R. § 2635.502. In general, § 2635.502 bars an employee from participating in a particular matter involving specific parties if [a] the employee has a "covered relationship," as defined at § 2635.502(b)(1), with a party, and [b] the circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality.

[17] Employees will not have a covered relationship with a social media platform merely because they have a personal account on the platform. However, an employee who receives payments from a social media platform (e.g., for content produced by the employee) will have a "business, contractual or other financial relationship that involves other than a routine consumer transaction" with the platform, resulting in a covered relationship. *See id.* § 2635.502(b)(1)(i).

B. Participation in the Preparation of Official Content

Generally, employees who hold stock in a social media network will not violate 18 U.S.C. § 208 merely by creating or editing content that will be posted on an official social media account on that network. The effect of any given social media post on the revenue of a network typically will be highly speculative and contingent on the actions of independent parties, including third-party advertisers and other users. As a result, an employee who is asked to create or edit content for an agency's official social media account does not have a disqualifying financial interest arising from stock ownership in the social media network, absent unusual circumstances.[18]

Although official social media posts are unlikely to effect the financial interests of the platform, employees must be careful when they create or edit content that references third parties in which they have an investment interest. Creating, editing, or posting content that discusses Government action is a non-substantive "administrative or peripheral issue"[19] to the Government action. Employees may therefore participate in the preparation of official content that references a particular matter so long as they did not personally and substantially participate in the underlying particular matter.[20] Of course, employees would have a disqualifying financial interest in substantial participation that goes beyond merely creating, editing, or posting content on a social media account, e.g., through any approval, disapproval, recommendation, or rendering of advice on the underlying particular matter.

> Example 13: An employee who is a Public Affairs Specialist in their agency's communications office was asked to compose a post for their agency's official account announcing the agency's decision to award a contract to Company X. The employee owns stock in Company X. The employee had no involvement in awarding, nor will have any involvement in administering, the contract. Since the employee did not participate personally and substantially in the contract, they may work on official social media content announcing the contract.

> Example 14: An employee is the head of an enforcement agency. The employee owns $67,000 worth of stock in a company that operates an application that permits users to send each other money. Recent news articles suggest that the company may have engaged in fraudulent practices. The employee announces over social media that their agency will not pursue enforcement actions against the company. The employee's decision and announcement of that decision constitute personal and substantial participation in a particular matter that will have a direct and predictable effect on the financial interests of the company in which they own stock.

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[18] OGE is aware that some social media platforms will promote content generated by users in exchange for a fee. Preparing a social media post that involves payment to the platform, or when there is otherwise a cost associated with posting content, are examples of cases in which creating content would have a direct and predictable effect on the financial interests of the network.

[19] 5 C.F.R. § 2640.103(a)(2) (explaining that substantial participation "requires more than . . . involvement on an administrative or peripheral issue").

[20] *See id.*; *cf.* 5 C.F.R. § 2641.201(i)(3) ex. 6 (noting that a computer programmer who simply enters data into and runs a program without taking a position on the data does not participate substantially in the particular matter).

Of course, even when an employee's involvement in the creation of social media content would not result in an 18 U.S.C. § 208 violation, an employee who believes that their participation would give rise to appearance concerns should use the procedures set forth at 5 C.F.R. § 2635.502 to determine whether they should participate.[21]

> Example 15: An employee is asked to prepare a message announcing the agency's partnership with a local organization. The employee is actively involved in the organization. Under these circumstances, the employee may justifiably conclude that a reasonable person with knowledge of the relevant facts would question their impartiality if they were to participate in publicizing the partnership.

IV. Other Compliance Concerns When Agencies Use Social Media

In addition to the ethics issues discussed in this Legal Advisory, there are a number of compliance concerns relating to official social media accounts that fall outside of OGE's jurisdiction. It is incumbent upon agencies to ensure that official social media accounts are administered in compliance with other legal authorities. These legal authorities include, but are not limited to, the Federal Records Act,[22] the Paperwork Reduction Act,[23] the Antideficiency Act,[24] the Hatch Act,[25] Section 508 of the Rehabilitation Act of 1973,[26] the Federal Advisory Committee Act,[27] the Federal Acquisition Regulation,[28] the Anti-Lobbying Act,[29] and any applicable provisions in appropriations acts.

OGE will continue to update its guidance as the social media environment evolves. Agency ethics officials may contact their OGE Desk Officers if they have any questions about ethics and social media or if they have suggestions for additional guidance.

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[21] *See* 5 C.F.R. § 2635.101(b)(14).
[22] 44 U.S.C. §§ 3101-3107.
[23] 44 U.S.C. §§ 3501-3521; *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, SOCIAL MEDIA, WEB-BASED INTERACTIVE TECHNOLOGIES, AND THE PAPERWORK REDUCTION ACT (2010).
[24] 31 U.S.C. § 1341; *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-13-10, ANTIDEFICIENCY ACT IMPLICATIONS OF CERTAIN ONLINE TERMS OF SERVICE AGREEMENTS (2013).
[25] 5 U.S.C. §§ 7321-7326; *see also* OFF. OF SPECIAL COUNSEL, HATCH ACT GUIDANCE ON SOCIAL MEDIA (revised 2018), https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Social%20Media%20Guidance.pdf.
[26] 29 U.S.C. § 794d; *see also Federal Social Media Accessibility Toolkit Hackpad*, DIGITAL.GOV, https://digital.gov/resources/federal-social-media-accessibility-toolkit-hackpad/ (last updated Dec. 29, 2022, 10:16 AM).
[27] 5 U.S.C. §§ 1001-1014.
[28] 48 C.F.R. pt. 1. Another issue in the acquisition area is that contractors working on official social media must operate under proper Government oversight. *See* Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011).
[29] 18 U.S.C. § 1913.