

OGE – as Part of an Active 2023 – Publishes Proposed Rule Revising the Standards of Ethical Conduct for Executive Branch Employees

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OGE – the federal executive branch Office of Government Ethics – has had a busy start to 2023. On February 21, 2023 OGE published a proposed rule revising the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. § 2635). As discussed in more detail below, most of the many changes set forth in this proposed rule are “technical”; but the proposed rule would also accomplish several more substantive changes. In addition to this proposed rule revision, since the start of 2023 OGE has: announced the recodification of the Ethics in Government Act of 1978; issued a Legal Advisory on the “Application of the Outside Earned Income Limitations to Mining, Staking, and Delegated Staking of Cryptocurrency”; and issued a Legal Advisory on “The Standards of Conduct and 18 U.S.C. § 208 as Applied to Official Social Media Use.” And in the closing months of 2022, OGE issued an important Legal Advisory on the post-government employment provisions (paragraphs 4, 5, and 6) of Executive Order 13989, the “Biden Ethics Pledge.”

Through the amendments to the Standards of Ethical Conduct set forth in the February 21st proposed rule, OGE “seeks[s] to update the Standards based on [its] experience gained from application of the regulations since its inception.” As described by OGE, the “proposed amendments also would incorporate past interpretive guidance, add and update regulatory examples, improve clarity, update citations, and make technical corrections.”

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“Technical,” “clarifying,” and “updating” are the right words to describe most of the many changes proposed to the Standards. But the proposed amendments would include some more substantive changes as well. For example, the current regulation on “Impartiality in Performing Official Duties” provides that a federal executive branch employee has a “covered relationship” with a “person for whom the employee’s spouse, parent or *dependent child* is . . . serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contract or employee.” (5 C.F.R. § 2635.502(b); emphasis added.) Under the proposed rule, “dependent” would be removed before “child,” meaning “that an employee will have a covered relationship with a person for whom *any child*” is serving, or seeking to serve, in one of the listed affiliation capacities. According to OGE, this change would acknowledge “that there may be impartiality concerns relating to certain business relations of an employee’s child regardless of whether that child is dependent, just as the [regulation] presently acknowledges that there could be impartiality concerns relating to certain business relations of an employee’s parent without any dependency predicate.”

Also substantively, the proposed rule would amend 5 C.F.R. § 2635. 503 (currently titled “extraordinary payments from employers” but, under the proposed rule, to be changed to “covered payments from former employers”). The current rule imposes on an executive branch employee a requirement to disqualify (or, under the proposed rule, “recuse”) herself for two years “from participating in any particular matter in which a former employer is a party or represents a party if [the employee] received an extraordinary payment from that [employer] prior to entering Government service.” (Emphasis added.) Under the proposed rule, the limitation on application of the regulation to payments received “prior to entering Government service” would be removed. The rationale offered by OGE for this proposed change is quite simple: “the potential ethics concerns and issues relating to current payments from former employers can arise regardless of whether a payment is received before or after an individual begins Government service.”

The proposed rule to modernize and update the Standards of Ethics Conduct for Employees of the Executive Branch” may be found here. Written comments to the proposed rule must be received by OGE on or before April 24, 2023.

Earlier this year – on January 5, 2023 – OGE noted that the President had recently signed a bill recodifying, but making no substantive changes to, the Ethics in Government Act of 1978 (“EIGA”). As noted in OGE’s Program Advisory, PA-23-01, on this subject: “The recodification moves the EIGA from the Appendix of title 5 of the U.S. Code to a new chapter 131 of title 5. It also makes minor technical changes to the EIGA, including the addition of new headings and subheadings, and the reorganization of a number of sections (e.g., moving definitions sections ahead of substantive sections).”

On January 23, 2023, OGE issued Legal Advisory LA-23-02 , on “Application of the Outside Earned Income Limitations to Mining, Staking, and Delegated Staking of Cryptocurrency.” OGE issued this Advisory “to provide guidance on when cryptocurrency transaction fees and block rewards are ‘compensation for services’ subject to the outside earned income limitations applicable to covered non-career officials” in the executive branch of the federal government. In short, per the Advisory, “cryptocurrency transaction fees and block rewards are considered ‘compensation for services’ when they derive from activities such as mining or staking in which the

employee is validating transactions.” This Advisory may be accessed [here](#).

On January 30, 2023, OGE issued Legal Advisory LA-23-03, on “The Standards of Conduct and 18 U.S.C. § 208 as Applied to Official Social Media Use,” “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.” As summarized by OGE, this Advisory clarifies that:

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. 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.”

This Advisory may be accessed [here](#).

Although issued in November 2022, rather than as part of OGE’s busy early 2023, Legal Advisory LA-22-07 provides important, supplemental “Post-Government Employment Guidance on Executive Order 13989,” the Biden Ethics Pledge. This Advisory “addresses the post-employment restrictions established by Paragraphs 4, 5, and 6 of the Pledge,” most significantly providing a detailed analysis of Paragraph 5, the new “shadow lobbying” provision of the Pledge applicable to “senior” and “very senior” appointees to the Biden Administration. Pledge Paragraph 5 imposes prohibitions that are not only novel but multi-layered. An appointee covered by the post-employment restrictions under either § 207(c) or § 207(d) of Title 18, must also agree under Paragraph 5 that, for one-year after leaving 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.

The Advisory defines such new terms of art as “materially assist” and “hold oneself out” and explains the interplay between the statutory restrictions under Title 18 and key terms of the Lobbying Disclosure Act (“LDA”). This interplay is somewhat complicated. Readers interested in understanding further how OGE describes the scope and application of Paragraph 5 may access the Advisory [here](#).

If you are interested in the application of this “shadow lobbying” provision of the Biden Ethics Pledge to a specific scenario, please see our Election Law & Government Ethics practice page for contact information for our attorneys.