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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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Director

SUBJECT: Employees May Submit Certain Applications and Forms on Behalf of Another Person Without Violating the 18 U.S.C. § 205(a)(2) Prohibition on Representing Others Before the Government

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on certain types of communications, made without an intent to influence, that executive branch employees may make to the Government on behalf of others, notwithstanding the representational restrictions of 18 U.S.C. § 205(a)(2). For the reasons set forth below, an employee who submits certain applications or forms to the Government on behalf of another person does not violate 18 U.S.C. § 205(a)(2) when the submission consists of factual information and seeks routine action that does not contain an appreciable element of dispute. However, ethics officials should counsel employees that an intent to influence could be present in subsequent communications about such applications or forms after they are submitted. These communications continue to be prohibited by the statute.

I. What Types of Communications Contain an “Intent to Influence”?

Executive branch employees are prohibited from acting as an agent or attorney, with or without compensation, before the executive and judicial branches in particular matters in which the United States is a party or has a direct and substantial interest.¹ In order to act as an agent or attorney, a person has to: (1) have actual or apparent authority;² (2) make a direct communication;³ and (3) have an intent to influence.⁴

¹ 18 U.S.C. § 205(a)(2) (prohibiting executive branch officers or employees from “act[ing] as agent or attorney for anyone before any department agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest”).

² *O’Neill v. Dep’t of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000).

³ OGE Inf. Adv. Op. 04x12, at 2-3 (Sept. 9, 2004); OGE DAEOgram DO-02-018 (July 15, 2002); OGE Inf. Adv. Op. 94x15, at 1-2 (Sept. 28, 1994).

⁴ OGE Inf. Adv. Op. 05x2(1), at 1-2 (Feb. 10, 2005); OGE DAEOgram DO-02-018; *cf.* Former Officers and Employees—Conflict of Interest (18 U.S.C. § 207)—Contract—Disqualification Connected With Former Duties or Official Responsibilities, 2 Op. O.L.C. 313, 316 (1978) (discussing the term “agent” as it appeared in an earlier version of 18 U.S.C. § 207 and noting that there must be “differing or potentially differing views,” “an ingredient of at least inchoate adversariness,” or “some adversariness (in the sense of urging a point of view)”).



Since 18 U.S.C. § 205 was passed into law in 1962, OGE and the U.S. Department of Justice (DOJ) have published many opinions discussing what it means to communicate with the intent to influence.⁵ DOJ has explained that, for an employee’s representation of another party to violate 18 U.S.C. § 205, they must have “dealings with the [G]overnment in an adversary context—that is, any contacts about a matter in which the Government and the party on whose behalf the employee is acting have inconsistent or potentially inconsistent interests.”⁶ Likewise, OGE has found no intent to influence in “contacts or communications with the Government that do not involve potentially adversarial or controversial matters with respect to a contract or other particular matter.”⁷ Similarly, “requesting factual information or responding to requests from the Government for factual information” does not violate 18 U.S.C. § 205(a)(2).⁸

OGE has previously discussed the statute’s “implied exception . . . for self-representation” when employees submit certain applications or forms on their own behalf.⁹ Although OGE acknowledged that the self-representation exception “does not extend to the representation of a distinct legal entity such as a corporation,”¹⁰ OGE did not reach the question of whether the submission of an application or form on behalf another would necessarily include an intent to influence.

II. Government Applications and Forms Consisting of Factual Information That Seek Routine Action Involving No or Minimal Discretion Do Not Contain an “Intent to Influence”

An employee’s submission of applications or forms, even if the employee is making such a communication on behalf of another person, will not violate 18 U.S.C. § 205(a)(2) if the submission consists of factual information and seeks routine action involving either no or minimal discretion.¹¹ Such submissions do not involve an appreciable element of dispute and

⁵ Some of the guidance cited in this Legal Advisory examined 18 U.S.C. § 205 and other guidance examined the post-employment prohibition at 18 U.S.C. § 207. Because both statutes have similar terms and concepts, the guidance applicable to one is often applicable to the other. *See* OGE Inf. Adv. Op. 06x9, at 5 & n.6 (Oct. 4, 2006) (understanding the term “covered matter” in 18 U.S.C. § 205 to be functionally equivalent to “particular matter” as used in 18 U.S.C. §§ 203, 207, and 208); *see also* 5 C.F.R. § 2641.201(e)(1) (describing the meaning of “intent to influence” as it appears in 18 U.S.C. § 207); OGE Inf. Adv. Op. 94x7, at 2 (Feb. 7, 1994) (referring to the treatment of “direct and substantial interest” in 18 U.S.C. § 207’s implementing regulations when analyzing the same language in 18 U.S.C. § 205).

⁶ Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments, 4 Op. O.L.C. 498, 499-500 (1980); *see also* OGE Inf. Adv. Op. 01x1 (Mar. 14, 2001) (prosecuting a patent application violates the prohibition); OGE Inf. Adv. Op. 91x11 (Apr. 4, 1991); 2 Op. O.L.C. at 316-17 (providing examples of communications that all possess “at least potentially divergent views” in the context of 18 U.S.C. § 207).

⁷ OGE Inf. Adv. Op. 80x4, at 9-11 (June 13, 1980) (opining on this element in relation to 18 U.S.C. § 207); *see also* 5 C.F.R. § 2641.201(e)(2)(ii) (stating that “[m]aking factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action” are not communications with the intent to influence); *supra* note 6 and accompanying text.

⁸ OGE Inf. Adv. Op. 94x15, at 2. Similarly, DOJ has said that merely furnishing scientific data does not amount to acting as an “agent” as the term appeared in an earlier version of 18 U.S.C. § 207. 2 Op. O.L.C. at 317.

⁹ OGE Inf. Adv. Op. 84x14, at 2 (Oct. 31, 1984) (stating an employee could apply for a Small Business Administration loan for himself because it fell within the self-representation exception).

¹⁰ *Id.*

¹¹ Some routine actions that do involve discretion may also not amount to an intent to influence. *See* 5 C.F.R. § 2641.201(e)(2)(i) (stating that “[m]aking a routine request not involving a potential controversy, such as a

therefore do not amount to an intent to influence.¹² For example, OGE has determined previously that “by simply signing another’s income tax return as the preparer, you are not acting as an agent but [are] simply stating a fact” and that employees may answer direct factual questions from the Government, such as answering which taxpayer records were used to compile the tax return.¹³ Further, filing a registration statement with the Securities and Exchange Commission on behalf of an outside organization does not violate 18 U.S.C. § 205(a)(2), even though the employee was doing so on behalf of another person, because it is merely the “submission of facts without advocating that the facts should be interpreted in a particular way.”¹⁴ These communications consist of factual information and seek routine action involving no or, at most, minimal discretion; therefore, they do not contain an appreciable element of dispute and, in turn, no intent to influence.

Over time, OGE has applied the analysis outlined above to additional applications and forms for participation in Government programs or the receipt of benefits. OGE has analyzed applications that may be submitted on behalf of another person, specifically Small Business Administration loans, the Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code (IRS Form 1023), the Application for a U.S. Passport (Form DS-11), and the Application for a Social Security Card (Form SS-5).¹⁵ Because employees completing such submissions are merely providing the required factual information, are not urging any point of view as to how those facts are to be understood or interpreted, and are seeking routine action with no or minimal discretion, the communications contained in these forms are not being made with the intent to influence. Accordingly, these communications do not violate 18 U.S.C. § 205(a)(2).¹⁶ Other types of communications that an employee might submit on behalf of another, such as the submission of a proposal for competitive grant funding or a bid for a Government contract, remain prohibited as they are made with the intent to influence.

III. Actions Subsequent to Submitting an Application Could Involve an “Intent to Influence”

The initial submission of the applications or forms described above on behalf of another person may not be the end of the process. If additional communications with the Government are required regarding those submissions, they may involve arguing the merits of a request and

request for publicly available documents or an inquiry as to the status of a matter” is not a communication made with the intent to influence). However, seeking any special or non-routine treatment, such as expedited review, could implicate 18 U.S.C. § 205(a)(2).

¹² Circumstances that do involve an appreciable element of dispute still might not meet the definition of “acting as an agent or attorney” if other required elements are not met—namely, the presence of (1) actual or apparent authority and (2) a direct communication. *See supra* notes 2-3 and accompanying text.

¹³ OGE Inf. Adv. Op. 00x11, at 1-2 (Oct. 4, 2000); *see also* OGE Inf. Adv. Op. 85x3, at 1 (Mar. 8, 1985).

¹⁴ OGE Inf. Adv. Op. 05x2(1), at 2.

¹⁵ This is not an exhaustive list of permissible applications and forms. Ethics officials should carefully review other applications and forms consistent with the analysis outlined in this Legal Advisory and in consultation with OGE when needed.

¹⁶ Executive branch employees should not include their title or position in such submissions. Additionally, employees should not seek any special or non-routine treatment, such as expedited review. 5 C.F.R. § 2635.702(a) (“An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person . . . to provide any benefit, financial or otherwise . . .”).

might be made with the intent to influence.¹⁷ In such situations, an employee should be prepared for another individual, who is not also an employee, to engage in such communications.¹⁸ Before employees submit applications or forms on behalf of another person, agency ethics officials should counsel employees about these limitations and contact their OGE Desk Officer if they have any questions regarding the application of 18 U.S.C. § 205(a)(2).

¹⁷ Using one's title or position to attempt to influence the Government at this stage would also implicate the misuse of position prohibitions of the Standards of Ethical Conduct for Employees of the Executive Branch. 5 C.F.R. pt. 2635, subpt. G.

¹⁸ The statute, however, would not prohibit an executive branch employee from providing behind-the-scenes assistance to another in such circumstances. *See* OGE DAEOgram DO-02-018.