September 28, 2021
LA-21-09

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Letter to a Designated Agency Ethics Official regarding an agency program to have employees use their personal social media accounts to promote agency programs

This letter responds to your office's request for guidance regarding two social media programs. Your office's written request, received by the U.S. Office of Government Ethics (OGE) on October 17, 2019, seeks an opinion from OGE regarding the application of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) to two proposed social media programs (the Programs) that [your agency] is considering or in the process of implementing. OGE staff previously provided [your agency] with initial advice concerning one of the Programs on December 19, 2018. [Your agency] is now seeking additional guidance on whether either of these programs would violate the Standards.[1]

As discussed below, and consistent with our prior advice, it is OGE's view that the structure of the Programs will place [your agency's] employees at an increased risk of ethics violations. In addition, we have concerns that administration of the Programs may implicate a variety of laws outside of OGE's jurisdiction.

1. Background

The two proposed Programs described in your request both involve employees using their personal social media accounts to benefit [your agency].

The first Program, [Program #1], is in a pilot phase …. Participation in this program is voluntary. Members of [an employee team at your agency] who choose to participate will use their personal LinkedIn accounts to gather business intelligence and distribute [content approved by your agency]. Your office also provided some guidelines for participation and some sample posts that contain a variety of content, ranging from general observations about American business to outreach directed at individual potential customers [. . .].

[1] In the October 17, 2019, request, [your agency] identified that it was seeking a formal opinion. Your office has since clarified that [your agency] is seeking written advice from the OGE Director or General Counsel, but not a "formal opinion" as that term is used in § 402(b)(8) of the Ethics in Government Act and 5 C.F.R. § 2638.209. As a result, we are issuing this informal advisory opinion to you pursuant to our authority at 5 C.F.R. § 2638.208(c).

The second Program, [Program #2], has not been launched yet. Under this program, employees who choose to participate will post [content curated by your agency] on their personal social media accounts. Participation in the program would be voluntary, and the extent of participation is completely optional. The sample posts you provided contain general positive statements about [your agency]. According to the provided description, [Program #2] will use [a commercially available software application] to facilitate the posting of content across multiple platforms and track responses to employees' posts [. . .].

As noted above, your office previously had some general discussions with OGE about conducting marketing activities through employees' personal social media accounts. These conversations related primarily to [Program #1]. In October, your office sent OGE descriptions of the two Programs listed above, along with a request for guidance.

2. Ethics Analysis

As set out in your request for guidance, you have asked whether either [. . .] Program would "be in violation of the Standards of Ethical Conduct for Employees of the Executive Branch" and, if so, for "explanations as to how the [S]tandards would be violated, and how the programs possibly could be changed to comply with the Standards."

The Standards of Conduct apply to actions by individual federal employees, not to agency programs. For [your agency's] employees who participate in the Programs, their participation would increase the likelihood of violations of multiple provisions. The greatest risk involves misuse of public office under 5 C.F.R. § 2635.702.

(A) Heightened Risk of Misuse of Public Office (5 C.F.R. § 2635.702)

Section 2635.702 prohibits a federal employee from using a "public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity."[2] Employees are also prohibited from engaging in conduct creating the appearance that they are misusing their public office.[3] As described below, [your agency's] employees who participate in the Programs will face risks arising from the interplay of different types of content on their personal social media accounts – some personal, some official, and some ambiguous.

When employees post Program-related material on their social media accounts, there will be uncertainty about whether this material is posted in official capacity or personal capacity. [Program #1] appears to be official; the purpose of the Program is to help [promote certain activities of your agency], and the representatives who participate are required to use official resources when doing so. With respect to [Program #2], however, there is considerable ambiguity about the capacity in which people will participate. According to the information provided to OGE, employee participation in [Program #2] will be completely voluntary, employees will use their own equipment, and [your agency] will classify employee activities under the Program as a personal use of social media. Further, employees will be expected to "use

[2] 5 C.F.R. § 2635.702.
[3] *See* OGE DAEOgram DO-07-023, at 2-3 (Aug. 1, 2007).

language when necessary to ensure that it is clear that the views expressed are their own, and not those of [your agency] as an institution." Nevertheless, when posting under [Program #2], employees will be limited to [content curated by your agency] and will be required to post through [a specific software application], which [your agency] will use to track the posts and responses [. . .].

Under these circumstances, much of the material posted under either Program, which will include information actually developed by [your agency], is likely to be perceived as official, whether [your agency] designates it as official or not. Once [an employee of your agency] begins mixing these apparently official posts with personal posts, readers are likely to be confused about the capacity in which the employee is posting.[4] In particular, readers are likely to perceive that opinions expressed on social media, intended to be personal, are depicted as having official endorsement, in violation of § 2635.702.[5] For example, an employee who sticks a recommendation for a particular [product] between posts used to promote [your agency's activities] may appear to be endorsing the [product] in an official capacity.

The distinction between official capacity and personal capacity is also important with respect to other social media functions, such as "liking" and sharing. As the Second Circuit recently noted, "Liking a tweet conveys approval or acknowledgment."[6] Although employees are permitted to endorse outside entities in their personal capacity,[7] they are generally prohibited from acting in a way that suggests that the Government sanctions or endorses outside parties.[8] Likewise, employees may not endorse any person, product, or enterprise in their official capacity without legal authority to do so.[9] Yet, it would be nearly impossible in some cases to know whether employees in either Program are "liking," commenting on, or sharing content in their official or personal capacity. In those situations in which liking amounted to an endorsement, there are real possibilities that the employee could be in jeopardy of violating the Standards.

(B) Additional Ethics Risks and Considerations

In OGE's view, the greatest risks created by the Programs are those associated with misuse of position; however, they also create other possible ethics risks due to the uncertainty about

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[4] There is generally a presumption that communications through official channels are official and communications through personal channels are personal. *See* OGE Legal Advisory LA-15-03, at 2-3 (Apr. 9, 2015); *see also* OGE DAEOgram DO-07-023, at 6. This presumption does not fit the circumstances created by the Programs, under which [your agency] has expressly asked its employees to communicate official information through personal social media accounts.

[5] Section 2635.702 is not the only provision that could be violated in this manner. Guidance from the Office of Special Counsel suggests that there could also be Hatch Act implications for certain types of content that has the appearance of official sanction. *See* U.S. OFF. OF SPECIAL COUNS., HATCH ACT SOCIAL MEDIA GUIDANCE FOR FEDERAL EMPLOYEES, https://osc.gov/Documents/Outreach%20and%20Training/Handouts/Hatch%20Act%20Social%20Media%20Guidance%20Handout.pdf (stating that federal employees may not use their social media accounts "in … official capacity to engage in political activity at any time").

[6] *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019); *see also Mattocks v. Black Ent. Television, LLC*, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014) ("'[L]iking' a Facebook Page simply means that the user is expressing his or her enjoyment or approval of the content.").

[7] 5 C.F.R. § 2635.702(b); OGE Legal Advisory LA-15-03, at 3.

[8] 5 C.F.R. § 2635.702(b).

[9] *Id.* § 2635.702(c).

whether an employee's activities conducted within the Programs are carried out in their official or personal capacity. Two additional risks are highlighted below.

- Employees who have arrangements to be paid for social media posts could violate 18 U.S.C. § 209 by accepting compensation for items posted as part of the employee's official duties, to the extent that employees act in an official capacity while participating in the Programs.

- Employees could be induced to violate 5 C.F.R. § 2635.705 by using official time or other official resources for activities that [your agency] deems to be personal in nature, such as posting non-[agency] material that the employee believes will advance the goals of the Programs.

With respect to all of these provisions, moreover, there is an increased risk of apparent violations as well as actual violations. It is well established that federal employees have an obligation to avoid even appearing to violate ethical statutes and principles.[10]

In light of all these risks, another important question for you to consider is whether there are ways for [your agency] to reduce the risk of government ethics violations by employees participating in the Programs. In this regard, [your agency] could offer its employees boilerplate disclaimers with phrasing delicate enough to distinguish among the various personal, official, and quasi-official posts that will appear on employees' social media pages. Also, targeted training is always recommended for employees facing unusual ethical hazards.[11] It is up to your agency's discretion to determine what mitigation techniques are appropriate. Of course, OGE would be happy to assist, as desired. We note, however, that it is not clear that any of the measures listed above can totally cure the confusion created by the planned mixing of [your agency's] sponsored activity and personal activity on the employees' personal social media pages.

3. Non-Ethics, Compliance Issues

As OGE staff noted in our previous discussions, many of the most important issues raised by the proposed Programs are outside of OGE's jurisdiction. Although these issues "are serious and, indeed, possibly determinative," we simply note them here for your consideration.[12] Inevitably these compliance questions must be resolved by the agency.

In particular, there are a large number of legal compliance questions that may arise in the context of the proposed Programs. For example, the Programs would need to be administered in a way that is consistent with the Federal Records Act,[13] the Paperwork Reduction Act,[14] the Anti-Lobbying Act[15] and the related restrictions that are routinely included in appropriations

[10] *Id.* § 2635.101(b)(14); OGE Inf. Adv. Op. 91x26, at 2 (July 22, 1991).
[11] *See* 5 C.F.R. § 2638.309.
[12] OGE Inf. Adv. Op. 95x8, at 2 (July 10, 1995).
[13] 44 U.S.C. §§ 3101-3107.
[14] 44 U.S.C. §§ 3501-3521.
[15] 18 U.S.C. § 1913.

acts,[16] the Information Quality Act,[17] and any other applicable laws related to recordkeeping and data protection. It is also possible that orchestrating the use of personal accounts for official (or quasi-official) actions will implicate rights of covered employees under the Federal Service Labor-Management Relations Act.[18]

Finally, we note that employees are contractually bound by the terms of service entered into when they established their social media accounts. Depending on how the programs are established and administered, activities envisioned by [your agency] may implicate clauses in the social media platform's terms of service, may create legal liability for an employee, or may purportedly subject the government to contractual terms that are not acceptable to the Federal government.

4. Conclusion

Your office has asked OGE to consider whether the Programs would violate the Standards of Conduct. By participating in the Programs, [your agency's] employees will generate considerable confusion as to whether and when they are acting in an official capacity, which has serious implications for various ethics regulations, as discussed. Moreover, as mentioned, it remains uncertain whether contemplated mitigation strategies will be able to sufficiently manage the risks to [your agency's] employees. In short, participation in the Programs will place [your agency's] employees in jeopardy of violating or appearing to violate the Standards of Conduct. Compounding this concern is the fact that the Programs may implicate a multitude of legal authorities outside of OGE's jurisdiction. As [your agency] considers the implementation of these Programs, we urge your office to ensure that individual employees are not asked to take steps that would violate their obligations to uphold the Standards of Conduct [. . .].

Sincerely,

David J. Apol
General Counsel

[16] *See, e.g.*, Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. A, tit. V, § 503, 133 Stat. 2534, 2605-06 (2019).
[17] Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, app. C, tit. V, § 515, 114 Stat. 2763, 2763A-153 to 2763A-154 (2000).
[18] 5 U.S.C. §§ 7101-7151.