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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Effect of Retroactive Pay Adjustments on Ethics Provisions for Calendar Year 2019

This Legal Advisory updates the three statutory pay-level thresholds for calendar year 2019, which are used to: (1) determine which senior employees are subject to the post-employment restrictions at 18 U.S.C. § 207(c)(1); (2) identify which officers and employees must file public financial disclosure reports pursuant to title I of the Ethics in Government Act, 5 U.S.C. app. § 101 *et seq.*; and (3) implement the outside employment and outside earned income restrictions for certain covered noncareer employees pursuant to title 5 of the Ethics in Government Act, 5 U.S.C. app. § 501 *et seq.*

The President signed Executive Order 13866 on March 28, 2019, adjusting the 2019 pay schedules for certain Federal civilian employees, retroactive to the first day of the first applicable pay period beginning on or after January 1, 2019.¹

Although the Consolidated Appropriations Act, 2019 “allows for an increase of up to 1.9 percent in the preexisting payable (frozen) rate for covered [senior political] officials,” the pay rates for those officials, including those serving in Executive Level positions, remain below the official rates established for those positions.² Office of Personnel Management guidance is that the rates of pay officially established by the Executive Schedule remain in effect for these

¹ Although the pay rates for 2019 were initially frozen at 2018 levels pursuant to Executive Order 13856, issued on December 28, 2018, Congress authorized a pay increase, retroactive to the first pay period beginning on or after January 1, 2019, pursuant to the Consolidated Appropriations Act, 2019.

² Office of Personnel Mgmt., CPM 2019-14, Memorandum for Heads of Executive Departments and Agencies, Modified Pay Freeze for Certain Senior Political Officials (2019), <https://chcoc.gov/content/modified-pay-freeze-certain-senior-political-officials>. These pay rates were previously frozen pursuant to the Continuing Appropriations Amendments Act, 2018; the Bipartisan Budget Act of 2018; Further Continuing and Security Assistance Appropriations Act, 2017; the Consolidated Appropriations Act, 2016; the Consolidated and Further Continuing Appropriations Act, 2015; and the Consolidated Appropriations Act, 2014.



positions regardless of any pay freeze.³ As such, OGE’s threshold calculation guidance below reflects the officially established rates of pay for level II of the Executive Schedule.

The following threshold levels for the various ethics provisions have risen for calendar year 2019:

- The post-employment restrictions applicable to “senior employees” are described at 18 U.S.C. § 207(c)(1). The statutory pay threshold for a “senior employee,” provided at 18 U.S.C. § 207(c)(2)(A)(ii), is “equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule.”⁴ Effective January 6, 2019, that threshold is **\$166,340**.⁵
- Title I of the Ethics in Government Act, 5 U.S.C. app. § 101(f), identifies which officers and employees must file public financial disclosure reports. Among those required to file are individuals who occupy a position “not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule.”⁶ 5 U.S.C. app. § 101(f)(3). Effective January 6, 2019, that threshold is **\$127,914**.
- Title V of the Ethics in Government Act, 5 U.S.C. app. § 501 *et seq.*, sets forth outside employment and outside earned income restrictions for certain covered noncareer employees,⁷ barring them from earning in any calendar year outside earned income “which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule.” 5 U.S.C. app. § 501(a). Both section 501(a) and OGE’s regulation at 5 C.F.R. § 2636.304(a) require the use of the Executive pay level in effect on January 1 of the year in consideration. As of January 1, 2019, the annual rate of basic pay for level II of the Executive Schedule was \$189,600. Fifteen percent of that rate of basic pay is **\$28,440**.

³ *Id.* For example, positions at level II of the Executive Schedule, 5 U.S.C. § 5313, have been subject to the pay freeze and are paid at 2013 levels, plus the 1.9 percent increase noted above. Their official rate of pay, however, is \$192,300 as identified in the Executive Schedule.

⁴ For the purpose of determining whether an employee’s pay exceeds this threshold, 18 U.S.C. § 207(c) requires the use of the employee’s base amount of actual pay, excluding locality-based pay adjustments or additional pay such as bonuses, awards, and various allowances. OGE Inf. Adv. Op. 98 x 2 at 2 (1998). For example, for purposes of 18 U.S.C. § 207(c), the rate of basic pay for a GS-15, Step 8, effective on the first day of the first pay period beginning on or after January 1, 2019, is \$131,466. Therefore, an employee in the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Locality Pay Area is not considered a “senior employee” for purposes of 18 U.S.C. § 207(c) even though the employee’s pay, with locality adjustments, is \$166,500.

⁵ See Office of Personnel Mgmt., CPM 2019-11, Memorandum for Heads of Executive Departments and Agencies, Retroactive 2019 Pay Adjustment (2019), <https://chcoc.gov/content/retroactive-2019-pay-adjustment>.

⁶ Note that the term “rate of basic pay” as used in the Ethics in Government Act differs from the term “rate of basic pay” as used in 18 U.S.C. § 207(c). OGE Inf. Adv. Op. 98 x 2. For purposes of financial disclosure, “the term ‘rate of basic pay’ has been interpreted to mean the lowest level of pay authorized for a position’s pay grade.” *Id.* at 3. For financial disclosure purposes, the rate of basic pay for employees in the Senior Executive Service (SES) and in Senior-Level (SL) and Scientific or Professional (ST) positions is \$127,914 effective January 6, 2019; therefore they are required to file public financial disclosure reports.

⁷ The same threshold for determining who must file public financial disclosure reports (\$127,914) also determines, in part, whether an individual is a “covered noncareer employee” for the purposes of the statute and the outside earned income and employment restrictions of 5 C.F.R. § 2636.303.