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Office of Government Ethics
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MEMORANDUM FOR DESIGNATED AGENCY ETHICS OFFICIALS

FROM: STEPHEN D. POTTS
DIRECTOR

SUBJECT: Additional guidance on confidential disclosure

The new confidential financial disclosure system became effective on October 5, 1992, by the terms of our regulation which was published at 57 Federal Register 11800-11830 on April 7, 1992. The new reporting form, SF 450, which is now stocked and available through the Federal Supply Service, is the only form authorized for general use by executive branch employees in confidential filing positions. Details on ordering supplies of the SF 450 were contained in our DAEO-gram of September 2, 1992.

THE ANNUAL REPORTING PERIOD

At our recent Ethics Conference in Virginia Beach, some agencies expressed reservations about the new period of coverage for annual incumbent confidential filers, which is October 1 through September 30 (see § 2634.908(a) of the regulation). Previously, we had received written comments from only nine agencies on this issue. In response to the renewed concern, we have again reviewed the circumstances to determine whether a calendar year alternative should be permitted. After careful consideration, we have decided that the new fiscal year period of coverage should remain uniformly applicable for at least the 1992 cycle of incumbent filings.

The uniform coverage period deserves a fair trial period before being discarded or modified. It was established to eliminate concerns of several agencies about the administrative burdens associated with collecting and reviewing both public and confidential disclosure reports simultaneously. That legitimate goal remains; however, we invite your additional feedback on this matter after you have completed the current annual filing cycle, so that we can determine whether any significant difficulties actually do arise and whether changes might still be warranted.

We are attempting to establish uniformity in all our various ethics programs, including the financial disclosure system. While that may involve short-term disruptions for some agencies, it should be beneficial in the long run. If events prove otherwise, we stand ready to reexamine this issue next year.

NEWLY DESIGNATED POSITIONS

Some agencies have voiced confusion over how to classify employees already serving in positions which are being designated for the first time as requiring confidential reports. Should

they be considered new entrant or incumbent filers? Even though the regulation in § 2634.903(b) defines new entrants as those assuming a covered position, our intent was to include employees whose positions are designated subsequent to their position assignment. To view them instead as incumbents could delay their initial reports for several months in some instances, which would ill-serve the purposes of financial disclosure.

We recognize that a few agencies may find it less confusing during this year of transition into the new system to treat such employees as incumbent filers for the current filing cycle, along with employees occupying positions of longstanding designation. Therefore, for purposes of this transition year only, we have no objection if an agency chooses to characterize these employees as incumbent filers. As a practical matter, the due date and coverage for reports from employees who occupy positions which were first designated when the regulation became effective on October 5 will nearly coincide with the due date and coverage for reports from employees in previously designated positions.

However, for the future, employees serving in a position which is newly designated for confidential filing after they enter the position should be reporting as a new entrant, within 30 days of the designation. This will comport with the spirit of the regulation and our intent in defining the term new entrant. It will also help ensure that potential conflicts of those serving in sensitive positions are detected in a timely manner.

SPECIAL GOVERNMENT EMPLOYEES (SGE'S)

Section 2634.903(b) of the regulation requires SGE's to file a new entrant report at the time of their initial one-year appointment and again upon any reappointment or redesignation for an additional year as an SGE. This requirement was established because SGE's generally perform the duties of their position for less than 60 days in a year, and therefore they do not trigger the annual reporting requirement of § 2634.903(a) as an incumbent.

However, for those SGE's who do perform the duties of their position for more than 60 days in a year and are subsequently reappointed, this would result in two filings during a one-year period, a burden more onerous than for regular employees. In order to eliminate that unintended result, we plan to amend the final regulation to exempt all SGE's from the annual incumbent reporting requirement of § 2634.903(a). Agencies may cite this DAEO-gram as authority to immediately begin applying that exemption.

This change will ensure that confidential disclosure reporting applies equally to all SGE's, without regard to the number of days on which they actually perform the duties of their position. They will file a new entrant report at the time of initial appointment and another new entrant report under § 2634.903(b) if they are reappointed or redesignated to serve beyond their initial one-year appointment, but they will not be required to file incumbent reports.

TERM APPOINTEES

We understand that some employees who perform the duties of their position for only a few days each year are nonetheless not reappointed or redesignated annually as SGE's, because they serve under a statute or other authority for a fixed term exceeding one year. Certain commissioners and board members appointed by the President may be serving in this manner.

The same confidential disclosure requirements should apply to these term appointees as to any other SGE. Therefore, we plan to amend the final regulation to require that term appointees who serve as SGE's (that is, they are not expected to perform the duties of their position for more than 130 days in a year) must file additional new entrant reports each year throughout their term of service upon the anniversary of their initial appointment, even though they are not formally reappointed or redesignated. Agencies may cite this DAEO-gram as authority to immediately begin applying that requirement. Like all other SGE's, they will be exempt from filing incumbent reports under § 2634.903(a) of the regulation, even if they perform their duties for more than 60 days in a year, as discussed above.

EMPLOYEES ASSIGNED TO FILL POSITIONS IN AN ACTING CAPACITY

Employees assigned in an acting capacity to fill a position are subject to any financial disclosure reporting requirements of that position. See example 2 following § 2634.201(a) of the regulation, and § 2634.903(a). For incumbent filers in both public and confidential reporting positions, the regulation clearly excludes those who perform the duties of a position for 60 days or less during the reporting period. For new entrant filers, expectation of service in a position for more than 60 days during a twelve month period should likewise be a prerequisite, so that those who serve for short periods, such as in an acting capacity, will not be subjected to the filing requirement. That triggering event is clearly stated for public filers in § 2634.204(a). It was intended but not clearly stated in Subpart I of the regulation for confidential filers.

Therefore, we plan to amend Subpart I to specifically exempt regular employees from the new entrant confidential filing requirement if the agency determines that they are not reasonably expected to perform the duties of a confidential filing position for more than 60 days in the ensuing twelve month period. Agencies may cite this DAEO-gram as authority to immediately begin applying that exemption. Note that SGE's may not avail themselves of this exemption; all SGE's are required to file new entrant confidential reports without regard to anticipated length of service, because of their unique status (unless excluded under § 2634.904(b) or § 2634.905).

THE SF 450: BREVITY VERSUS COMPREHENSIVENESS; GIFT GUIDANCE

One of the major objectives in crafting a standard form for confidential financial disclosure was to maintain the simple, straightforward structure of agency forms which were in use previously. An early draft of the SF 450 contained comprehensive instructions similar to those on the standard public disclosure form. That concept was ultimately rejected as too expansive and unnecessary for the middle grade employees who would be filing confidential forms. This characteristic brevity of the SF 450 may, in some instances, require agency ethics officials to offer supplementary guidance to their filers on particular aspects of confidential disclosure. In doing so, the new regulation provides a primary source of information.

One matter which has already come to our attention concerns disclosure of gifts and reimbursements. Only partial guidance on the numerous exclusions could be included in the instructional notes which accompany Part V of the SF 450. You may want to supplement filers' knowledge by disseminating more complete information on the definitional limits of the terms gift and reimbursement from §§ 2634.105(h) and (n) of the new regulation. Additionally, the regulation states exclusions at § 2634.304(c), valuation methods (for determining thresholds) at

§ 2634.304(e), a waiver rule in unusual circumstances at § 2634.304(f), and an exception for certain items received by a spouse or dependent child at § 2634.309(a)(2).

The latter exception may be of particular interest, since it excludes from required disclosure any gifts or reimbursements of a spouse which are received totally independent of the relationship to the filer. For example, gifts or reimbursements which spouses receive solely because of their own professional pursuits need not be reported.

DETAILEES

The new regulation requires in § 2634.602(a) that detailees file confidential financial disclosure reports with their primary agency, and § 2634.605(b) directs that reports of employees detailed to another agency in excess of 60 days during a reporting period shall be referred for intermediate review to the agency where the employee serves as a detailee. These provisions rest on the assumption that it is the detailee's position at the parent agency which is designated for confidential disclosure.

However, it is possible that a detailee to another agency may become a confidential filer solely by reason of a position occupied at the receiving agency. An employee in that situation should file with the receiving agency, since it is there that the filing obligation has arisen and that the report will be most meaningful. Such reports may, at the discretion of the receiving agency, be referred to the parent agency for additional review.

We believe that the receiving agency's authority to designate a detailee's position for confidential filing is fully supported by the new regulation. Section 2634.904(a) specifies that it is the position, not an individual incumbent, which is subject to designation for confidential filing, based on the duties and responsibilities of that position. Any occupant of a designated position, whether primarily employed by the agency which controls the position or detailed from another agency, should be required to file. An agency does not relinquish control over the requirements of a position simply because it chooses to accept a detailee as an incumbent.

ADDITIONAL GUIDANCE

For additional guidance on implementing the new confidential disclosure system, please see our DAEO-grams earlier this year, dated April 9, June 25, and August 25, or consult your OGE desk officer or our general counsel staff.