United States
Office of Government Ethics
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MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Determining the Public Financial Disclosure Requirements for Non-Standard Pay Systems

In recent years, a number of agencies have contacted the Office of Government Ethics (OGE) for help in determining how the public financial disclosure requirements apply to employees in non-standard pay systems (e.g. pay systems other than the familiar General Schedule and Senior Executive Service systems). Until recently, OGE answered these questions on a case-by-case basis. However, in 2006, this Office conducted a more comprehensive review of this issue. Below is a summary of that review and the conclusions that were reached.

Background

Under the Ethics in Government Act of 1978 (the Act) at 5 U.S.C. app., § 101(f)(3), officers and employees in the executive branch 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" must file a public financial disclosure report (public report or SF 278). In prior guidance, OGE interpreted the phrase "rate of basic pay" for public financial disclosure purposes to mean the "lowest step or entry level pay authorized for a particular pay grade or range." See Office of Government Ethics (OGE) Informal Advisory Letter 98 x 2. In that opinion, OGE noted that according to the legislative history of the Act, determining who should file an SF 278 is

based on "an employee's level of responsibility as indicated by the grade within which his pay is set."[1]

Because non-standard pay systems generally are designed to give agencies flexibility in assigning a rate of pay to its employees, the structure of the systems varies from agency to agency. Some non-standard pay systems provide higher pay to assist in the recruitment and retention of employees with specialized expertise. Other pay systems are designed to implement pay for performance principles. OGE has been concerned that under these systems, it may no longer be clear whether pay is still an accurate indicator of level of responsibility.

In addition, some of the agencies which have sought OGE's assistance have pay structures that contain broad pay ranges with minimum and maximum pay levels, but no steps in-between. Other agencies have pay systems that do not distinguish clearly between executive and lower level employees. For example, one agency has a pay band within its pay system that starts at approximately $95,000 and ends at approximately $175,000. No one in this band is required to file an SF 278 because the entry level pay is below the public filing threshold, which is $111,675.60 for 2007. Yet, it is possible that some of the employees receiving the higher salaries have significant executive responsibilities. In this type of a non-standard pay system, it might be hard to say what is really "entry level pay" for a particular position because the pay scale is relatively broad and the agency has significant discretion on where to place its employees within the band.

Over the years, OGE has advised agencies with non-standard pay systems to ask for an equal classification determination in cases where they believe an employee in a particular position should be required to file a public report. See section 101(f)(3). Under the equal classification provision, an agency may request that OGE determine that a position is the equivalent of other positions for which filing is required.

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[1] By contrast, the actual amount of an individual employee's pay dictates whether the employee will be considered a "senior employee" for purposes of 18 U.S.C. § 207(c). See OGE 98 x 2.

Once OGE makes such a determination, the incumbent of the position must file an SF 278.

OGE's Review

Because of the increase in the number of non-standard pay systems, OGE decided to survey a sampling of Federal agencies to determine how agencies with non-standard pay systems have decided which employees are required to file public reports. A follow-up survey was conducted, which focused on approximately 14 agencies with non-standard pay systems. In addition to the survey data, OGE had discussions with various ethics officials who also shared copies of their pay schedules.

According to the information we gathered, in most instances pay continues to have a correlation with level of responsibility. Most agencies are able to identify specific pay grades or bands that are reserved for senior management. For example, the non-GS pay system at one department includes some relatively broad pay bands, but the entire system is deemed a replacement for only the GS system and the department has created a separate system for senior management.

Other agencies that have both executive level employees and lower level employees in the same pay system have been able to carve out an executive level pay band within their non-standard pay systems. These agencies have identified at least one pay band where the lowest step or entry level pay exceeds the public filing threshold amount. They have placed most of their executive level employees who have duties and responsibilities typically associated with public filers within that pay band, and require all employees in that band to file public reports.

Based on the discussions OGE had with several agency ethics officials, OGE concluded that it is unlikely a single alternative solution will address the various issues encountered by all agencies with non-standard pay systems, particularly given the variety of systems that have been designed specifically to meet individual agency needs. Nevertheless, OGE decided to explore other possible approaches to determining filer status that could lessen the impact of some of the issues certain agencies are encountering in determining which employees should file public reports.

Alternatives Considered

Below is a brief discussion of the three primary alternatives that OGE considered.

1. **Filing Based on Actual Pay**. One alternative OGE considered would be to revise the interpretation in OGE 98 x 2 to make actual pay the criterion for determining who should file public reports. Under this approach, the phrase "rate of basic pay" would be interpreted to mean the actual amount of pay received by a given employee.

If this type of system were adopted, filing based on actual pay would make it easier to determine who should file a public report. In addition, it would create a more consistent approach in the interpretation of the phrase "rate of basic pay" between the public financial disclosure filing requirements and the post-employment requirements at 18 U.S.C. § 207(c).

However, the information we reviewed indicated that such a change in OGE policy would vastly increase the number of filers at several agencies with non-standard pay systems because non-executive level employees at these agencies receive salaries above the public filing threshold amount. The higher pay at these agencies is not a reflection of the level of employees' responsibilities, but is typically a means for recruiting and retaining personnel. One way to mitigate this impact would be to seek position exemption authority that would allow agencies to exempt the higher paid non-executives from the public filing requirements. However, an exemption system would be extremely burdensome and would likely result in large disparities among agencies with similarly-situated employees.

2. **Senior Executive Service (SES) & SES Equivalent Systems**. Another alternative that was considered would require only employees in the Senior Executive Service (SES), SES equivalent systems, and SES-type positions to file public reports. Because an employee's duties and level of responsibility continue to be the best indicator of whether he or she should file a public report, this type of system would more closely tie the public financial disclosure reporting requirements to the employee's duties and responsibilities.

One major disadvantage to this approach is that some agencies with non-standard systems simply have not identified SES-equivalent pay systems or bands. Criteria would have to be developed to determine what an SES equivalent system is and who SES equivalent employees are within a non-standard system. Moreover, there would always be some inconsistency among the agencies regarding who should file because of how the criteria would be applied.

3. **Position Designation System**. Under this alternative, OGE would establish guidelines for each agency to use in determining the positions and/or employees who should file public financial disclosure reports. OGE rejected this alternative because of our prior experience with a similar position designation system for 18 U.S.C. § 207(c).[2] That system was very difficult to manage and was abolished by Congress in 1989. A similar system for public financial disclosure filing could lead to wide disparities among the agencies on who should

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[2] Originally, 18 U.S.C. § 207(c) specified that employees at a certain level, as well as employees holding positions designated by OGE would be subject to a one-year cooling-off period. In response to this requirement, OGE established a position designation system that identified positions that would be covered by section 207(c). Because the designation system required yearly updating to reflect position changes at the agencies, the system created a significant administrative burden and led to inconsistent application throughout the executive branch. In 1989, Congress eliminated the need for an OGE designation. In a January 2006 report to the President and to Congress on Conflict of Interest Laws Relating to Executive Branch Employees, OGE noted its strong opposition to a return of a designation system for post-employment purposes "whether the positions would be designated by OGE or by individual agencies." OGE further explained that "the Department of Justice has expressed concern that uneven designation of positions across the executive branch would create the potential for misunderstanding on the part of employees, particularly employees who move between agencies or have significant interaction with peers at other agencies." See Office of Government Ethics Report to the President and to Congressional Committees on Conflicts of Interest Laws Relating to the Executive Branch, 21 (2006).

file public reports even with OGE-established criteria. In addition, this system would require continuous oversight and review because agency positions are always being added, abolished and changed.

Conclusion

After considering the various alternatives and their advantages and disadvantages, OGE has determined that the current policy as articulated in OGE 98 x 2, which defines the phrase “rate of basic pay” for public financial disclosure purposes to mean the “lowest step or entry level pay authorized for a particular pay grade or range,” is the best approach at this time. Our discussions with the various agencies generally indicated that they understand the current policy and have been able to work with it as they develop and interpret their non-standard pay systems.

Accordingly, agencies with alternative pay systems should continue to designate executive level employees as public filers if the lowest pay for their grade or range is equal to or greater than 120 percent of the minimum rate of basic pay payable for a GS-15.

However, agencies that have executive level employees in non-standard systems or bands whose minimum level of pay is below the public filing threshold should take steps to ensure that those employees file public reports. This issue can be addressed through the equal classification provision described above. Attached to this memorandum is additional guidance on how to request an equal classification determination from OGE for a specific position. If your agency has a non-standard pay system, OGE will discuss how you are addressing public financial disclosure issues in its next program review.

OGE recognizes that this approach does not remedy every issue your agency may encounter under the current system. However, it believes this is the best way at this time to achieve the goal of balancing the need to identify who should file a public report with the least disruption to current reporting methods. Please do not hesitate to contact Elaine Newton at 202-482-9265 if you have any questions.

Attachment