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Office of Government Ethics
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DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning which officials must sign the Ethics Pledge required under Executive Order 13490. Therefore, OGE is issuing this guidance to help agency ethics officials determine which officials are subject to the Pledge requirement.

Definition of Appointee

Section 1 of the Executive Order states that "[e]very appointee in every executive agency appointed on or after January 20, 2009" shall sign the Ethics Pledge. Executive Order 13490, sec. 1, 74 Federal Register 4673 (January 26, 2009). The Order defines "appointee" as follows:

'Appointee' shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

Id., sec. 2(b).

In broad terms, the Pledge was intended to apply to full-time "political" appointees of all types. *Cf.* OGE Informal Advisory Letter 04 x 10 ("when we identify a position as 'noncareer,' we are typically referring to a political appointment"). The term appointee generally includes, but is not limited to, all appointees to positions described as "covered noncareer" in 5 C.F.R. § 2636.303(a) and all full-time Presidential appointees subject to section 102 of Executive

Order 12371. However, the term is not limited by any salary thresholds, and it covers political employees appointed other than by the President. *See* DAEOgram DO-09-003.

In response to questions from several agencies, OGE wants to emphasize that the term appointee does not include every excepted service employee. Non-career is not synonymous with excepted service. *See* Detailed Explanation, Ethics Reform Act of 1989: Technical Amendments, 136 Cong. Rec. H 1646 (1990) (ethical limitations on "noncareer" appointees do not cover "for example, attorneys hired under Schedule A" of the excepted service). Rather, as the definition of appointee makes clear, the Pledge applies to appointees excepted from the competitive service "by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria)." Executive Order 13490, sec. 2(b); *see* 5 C.F.R. part 213, subpart C (excepted schedules). Again, the essentially political nature of a given appointment is the touchstone. *See* 04 x 10 (discussing the criteria for Schedule C and comparable appointments).

Categories of Officials

OGE has received questions about the coverage of several categories of officials under the Pledge. These categories are discussed briefly below.

1. Special Government Employees

As explained in DAEOgram DO-09-005, special Government employees (SGEs) are not required to sign the Pledge. SGEs are described at 18 U.S.C. § 202(a), and for most purposes the term refers to employees who are expected to perform temporary duties on no more than 130 days during a period of 365 days. The definition of SGE and the process for determining who is an SGE are discussed in detail in various OGE documents. *E.g.*, OGE Advisory Memoranda 00 x 1; 01 x 2.

2. Foreign Service and Similar Positions

The definition of appointee excludes persons appointed as members of the Senior Foreign Service, but at the same time it includes "non-career" appointees in any "SES-type system." OGE elsewhere has determined that non-career Senior Foreign Service appointees are an example of what is meant by non-career members of an SES-type system. 5 C.F.R. § 2636.303(a)(2). The Executive Order carries forward this distinction and is intended to cover those Senior Foreign Service members who are considered non-career or political appointees, but not those who are deemed career officers. The same distinction applies with regard to any agency-specific or other categories of foreign service officials: those positions that are filled by political appointees are subject to the Pledge, whereas those positions that are not viewed as political are not subject to the Pledge. Likewise, this distinction will apply to Ambassadors: career Ambassadors (many of whom rotate through multiple Ambassadorial assignments and

other posts throughout their Government careers during successive administrations) will not be subject to the Pledge, but non-career or political Ambassador appointees must sign the Pledge.

3. Career Officials Appointed to Confidential Positions

OGE has received questions from several agencies about whether the Pledge applies to career staff who are appointed to serve as confidential assistants to Commissioners and other agency leaders. Some of these questions have come from independent agencies headed by a collegial body comprised of members with staggered, fixed terms. Apparently, it has been a regular practice at certain agencies to appoint regular career staff to serve in confidential positions with a given Commissioner, with the expectation that the confidential assistant will return to a career staff position at the end of the Commissioner's term or earlier. In consultation with the White House Counsel's Office, OGE has determined that the Pledge is not intended to apply to such employees, *provided* that the right of return to a career position is established by statute, regulation, or written agency personnel policy. Under such circumstances, a confidential "rotation" would be viewed as part of an established career pattern, and imposing the exacting requirements of the Pledge could create unintended disincentives for career employees to accept such rotations.

4. Career SES Members Given Presidential Appointments

The Pledge requirement does apply, however, to career SES members (or other career SES-equivalent employees) who are appointed to positions requiring Senate confirmation (PAS) or to other Presidentially-appointed positions (PA) that ordinarily are viewed as non-career. Career SES members may elect to retain certain benefits of career SES status, *see* 5 U.S.C. § 3392(c), and they also have certain reinstatement rights upon the completion of a separate Presidential appointment, *see* 5 C.F.R. § 317.703. However, PAS or PA appointments are of a different character and magnitude, and career SES members who accept such appointments become an important part of the political leadership in the administration. Therefore, they must sign the Pledge.

5. Schedule C Employees with No Policymaking Role

Certain Schedule C employees who have no policymaking role, such as chauffeurs and private secretaries, have been exempted from public financial disclosure requirements. *See* 5 U.S.C. app. § 101(f)(5); 5 C.F.R. § 2634.203(b). These positions have been excluded from public filing based on OGE's determination "that such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government." 5 C.F.R. § 2634.203(a). For the same reasons, the Pledge is not intended to cover these individuals, *provided* that the agency has followed the procedures prescribed in section 2634.203(c). Apart from appointees under Schedule C and comparable authorities, the same result obtains with respect to employees, appointed under 3 U.S.C. §§ 105-108, who have similar non-policymaking duties, as determined by the White House Counsel's Office.

6. Acting Officials and Detailees

The Pledge requirement does not apply to career officials who are acting temporarily in the absence of an appointee to a non-career position. This includes career officials acting in the absence of a Senate-confirmed Presidential appointee under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.* Similarly, a career appointee who is temporarily detailed to a position normally occupied by a non-career appointee is not subject to the Pledge. *Cf.* 68 Federal Register 7844, 7848 (February 18, 2003)(employees detailed to a senior employee position do not become senior employees under 18 U.S.C. § 207(c)).

7. Holdover Appointees

On its face, the Pledge requirement does not apply to individuals appointed prior to January 20, 2009, and the administration will not for 100 days ask anyone held over to complete the Pledge. The administration has not yet determined whether it will extend that 100 day grace period or at what point it will ask holdovers to complete the Pledge. Please bear in mind that in some cases the new administration may ask a holdover to remain in the position, not merely as a caretaker until some other choice for the position can be appointed, but as the President's choice for that position. In the latter situations, the appointees will be asked to sign the Pledge when they agree to remain even though there is not a new appointment.

8. Term Appointees

Presidential appointees to positions with a fixed term of office typically are non-career appointees, even if they are removable only for cause as specified by statute. *See* OGE Informal Advisory Letter 89 x 16. Therefore, non-career term appointees are subject to the Pledge if they are full-time and were appointed on or after January 20, 2009.

Term appointees appointed prior to January 20, 2009 are not required to sign the Pledge. As a practical matter, however, agency ethics officials should counsel such individuals to follow the Pledge to the extent feasible, particularly paragraphs 1, 2, 3 and 6 of the Pledge. Doing so will help to prevent the confusion and questions that could result if these appointees, especially those in visible positions, do not abide by the same gift, recusal, and hiring rules that apply to fellow appointees at the same agency.

A term appointee whose term has expired, but who is permitted by statute to holdover for some period of time, is not subject to the Pledge, provided the appointment preceded January 20, 2009. Where the President has nominated such a term appointee for reappointment for an additional term, the individual must sign the Pledge after Senate Confirmation but prior to reappointment. *See* DAEOgram DO-09-005. Again, as described in the previous paragraph, such term appointees should be counseled to follow the Pledge where practicable.

Conclusion

Given the great variety of appointment authorities in the executive branch, it is not possible for OGE to address every possible category of appointee in this Memorandum. OGE, in consultation with the White House Counsel's Office, can assist agency ethics officials as necessary in addressing any questions on a case-by-case basis.