

**OFFICE OF GOVERNMENT ETHICS**

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**Memorandum dated March 15, 2001,  
from Amy L. Comstock, Director,  
to Designated Agency Ethics Officials  
Regarding Ethical Requirements Applicable  
to Potential PAS Appointees Employed as  
"Advisors" or "Counselors"**

On January 26, 2001, the White House issued a memorandum to all cabinet members and agency heads, titled "Employment Guidelines for Potential Presidential Appointees" (White House Memorandum). The White House Memorandum and its attachment address the procedures and guidelines under which "potential future PAS" appointees for sub-Cabinet positions may be employed as "an advisor or counselor" to the secretary or agency head of their prospective agency.

Under the White House Memorandum, such individuals may be employed "prior to announcement, nomination and confirmation but after being selected" for a PAS position. From discussions with the White House, we understand that these advisors and counselors are not expected to be hired as such until there has been an announcement of the President's intention to nominate them for a position requiring Senate confirmation. Consequently, it is intended that these individuals will serve only for relatively brief periods of time in their positions as advisor or counselor, until final Senate action on their nomination for a full-time sub-Cabinet position. The White House Memorandum specifies two alternative mechanisms by which these short-term appointments may be effected: (1) the individuals may be "brought in as an advisor/counselor, with a salary limited to a GS-15/step 10, without benefits;" and (2) they may be appointed as "a provisional limited-term SES, with benefits and a salary range up to \$133,700."

Certain "standards of behavior" are prescribed by the White House Memorandum for potential PAS appointees hired as advisors or counselors. Among these standards is the requirement that they "comply with all applicable ethics rules." Therefore, the Office of Government Ethics is providing the following guidance to assist agency ethics officials in determining which ethical requirements are applicable to these employees.

## STATUS OF ADVISORS AND COUNSELORS UNDER THE ETHICS LAWS AND RULES

It is important to emphasize at the outset that potential PAS appointees hired under either mechanism described above are employees of the United States. As Federal employees, they are generally subject to all Federal ethics laws and regulations, unless they meet any specific exemptions or exceptions.<sup>1</sup> Among other things, these advisors and counselors are subject to any relevant provisions of: (1) the criminal conflict of interest laws in chapter 11 of title 18, United States Code; (2) the restrictions on gifts in 5 U.S.C. §§ 7351 and 7353; (3) the financial disclosure requirements of 5 U.S.C. app. § 101, et seq.; (5) Executive Order 12731; and (6) the Standards of Ethical Conduct for Employees of the Executive Branch in 5 C.F.R. part 2635.

Nevertheless, it is expected that the advisors or counselors hired pursuant to the White House Memorandum will qualify for treatment as special Government employees (SGEs) until appointment in a Senate confirmed position. As SGEs, these individuals will be subject to somewhat less restrictive requirements under many of the ethics statutes and rules.

For most purposes, an SGE is an officer or employee "who is retained, designated, appointed or employed to perform, with or without compensation, for not to exceed one hundred and thirty days, temporary duties either on a full-time or intermittent basis." 18 U.S.C. § 202(a). We understand that the White House expects that any advisors or counselors normally would be employed in such positions for 130 or fewer days prior to final Senate action on their nomination for a PAS position. The fact that such individuals ultimately may be confirmed and appointed to a full-time PAS position at some later point does not preclude their

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<sup>1</sup> This is true even with respect to employees who work without compensation, although uncompensated employees may be subject to somewhat less restrictive requirements under certain ethics provisions. See generally 6 Op. O.L.C. 644 (1982). It is not apparent from the White House Memorandum whether it is contemplated that any advisors or counselors will be appointed to serve without compensation, for example, pursuant to 5 U.S.C. § 3109. See 5 C.F.R. § 304.104(c) (temporary or intermittent expert or consultant hired pursuant to 5 U.S.C. § 3109 may be employed without pay, provided individual agrees in advance in writing to waive claim for compensation). If agency ethics officials encounter advisors or counselors serving without compensation, they should feel free to discuss any specific ethics questions with this Office.

designation as SGEs for their prior position as advisor or counselor. In situations involving successive appointments to different positions, we have advised that the individual may be viewed as an SGE until such time as a second appointment occurs that would disqualify the individual from enjoying continued SGE status. See, e.g., "Conflict of Interest and the Special Government Employee," at 4 (attachment to DAEOgram DO-00-003, February 15, 2000 [OGE Informal Advisory Memorandum 00 x 1]). Of course, once an advisor or counselor is appointed to a full-time position, he or she no longer may be treated as an SGE but will become subject to the stricter ethical requirements applicable to all regular employees serving in a full-time PAS position.

It is beyond the scope of this Memorandum to explain in detail all of the relevant ethical requirements applicable to SGEs. These requirements, particularly those involving special exceptions and exemptions for SGEs, are discussed at length in DAEOgram DO-00-003 and its attachment, "Conflict of Interest and the Special Government Employee," which may be found on our web site at [www.usoge.gov](http://www.usoge.gov) [OGE 00 x 1]. A few basic points, however, are worth noting here. First, SGEs are not subject to the restrictions on "covered noncareer employees" with respect to certain outside activities, compensation and affiliations, as set out in 5 U.S.C. app. §§ 501-505 and 5 C.F.R. part 2636.<sup>2</sup> Similarly, SGEs are not subject to the prohibition on outside earned income applicable to certain Presidential appointees, under section 102 of Executive Order 1273. Furthermore, although SGEs typically are subject to the criminal conflict of interest statutes (even if under less restrictive provisions), they are not subject to the criminal supplementation of salary statute at all. See 18 U.S.C. § 209(c).

Finally, with very limited exceptions, all SGEs must file either a public financial disclosure report or a confidential financial disclosure report. See "Conflict of Interest and the Special Government Employee," at 19-21. As a practical matter, we expect that any individual appointed as an advisor or counselor, under the White House Memorandum, will be submitting a draft SF 278 in connection with the standard pre-nomination review process for potential PAS appointees. Such reports will be subject to extensive evaluation and revision, as well as the identification of any necessary remedial measures, through the usual course of review

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<sup>2</sup> Please note, however, that advisors and counselors remain subject to numerous other restrictions on their outside compensation and activities, pursuant to the criminal conflict of interest statutes and the Standards of Ethical Conduct for Employees of the Executive Branch in 5 C.F.R. part 2635.

by the Designated Agency Ethics Official, the White House Counsel's Office, the Office of Government Ethics, and ultimately the Senate. We have determined that this process will satisfy any financial disclosure obligations of advisors or counselors who are potential PAS appointees. In the ordinary case, it is expected that the final nominee report will be filed within the time frame (including any appropriate extensions) for filing any report required for the same individual's position as advisor or counselor, so there should be no need to file two separate forms.