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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
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SUBJECT: Effect of Pay Adjustments on Ethics Provisions for Calendar Year 2018

This Legal Advisory updates the three statutory pay-level thresholds for calendar year 2018, 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 13819 on December 22, 2017, adjusting the 2018 pay schedules for certain Federal civilian employees, effective on the first day of the first applicable pay period beginning on or after January 1, 2018.

The pay rates for certain senior political officials, including those serving in Executive Level positions, have been frozen pursuant to the Further Continuing and Security Assistance Appropriations Act, 2017, as well as the Consolidated Appropriations Act, 2016; the Consolidated and Further Continuing Appropriations Act, 2015; and the Consolidated Appropriations Act, 2014. The pay freeze continues in calendar year 2018 through January 19, 2018, unless extended by new legislation.¹ Office of Personnel Management guidance is that the rates of pay officially established by the Executive Schedule remain in effect regardless of any pay freeze.² As such, OGE's threshold calculation guidance below reflects the officially

¹ Office of Personnel Mgmt., CPM 2018-02, Memorandum for Human Resources Directors, Continued Pay Freeze for Certain Senior Political Officials (2018), <https://www.chcoc.gov/content/continued-pay-freeze-certain-senior-political-officials-1>.

² *Id.*; Office of Personnel Mgmt., CPM 2017-18, Memorandum for Heads of Executive Departments and Agencies, January 2018 Pay Adjustments (2017), <https://www.chcoc.gov/content/january-2018-pay-adjustments>. For example, positions at Level



established rates of pay for level II of the Executive Schedule.

The following threshold levels will rise for calendar year 2018:

- 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.” Effective January 7, 2018, that threshold will be **\$164,004**.³
- 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.”⁴ 5 U.S.C. app. § 101(f)(3). Effective January 7, 2018, that threshold will be **\$126,148**.
- 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,⁵ 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

II of the Executive Schedule, 5 U.S.C. § 5313, have been subject to the pay rate freeze and are paid at 2013 levels. They are treated, however, as though they are paid \$189,600 as identified in the Executive Schedule.

³ For the purpose of determining whether an employee’s pay exceeds this threshold, 18 U.S.C. § 207(c) requires the use of the individual’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 5, effective on the first day of the first pay period beginning on or after January 1, 2018, is \$119,139.

⁴ 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 will be \$126,148 on January 7, 2018; therefore they are required to file public financial disclosure reports.

⁵ The same threshold for determining who must file public financial disclosure reports (\$126,148) 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.

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, 2018, the annual rate of basic pay for level II of the Executive Schedule was \$187,000. Fifteen percent of that rate of basic pay is **\$28,050**.