

DUTY TO FILE PUBLIC FINANCIAL DISCLOSURE REPORT

A member of a commission in the Executive Branch need not file a public financial disclosure report in circumstances where the employee's salary is set by administrative action within a range specified by statute, is below the statutory salary threshold for such reports, but could have been set at a level making a public report necessary.

The financial disclosure obligations of Legislative Branch officials should be construed similarly, because the statutory language applicable to officials in the Executive Branch is, in relevant part, identical to that applicable to officials in the Legislative Branch.

December 19, 2002

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether an employee in the Executive Branch, by virtue of his salary, must file a public financial disclosure report. You have asked us to assume that the employee's salary is set by administrative action within a range specified by statute, is below the statutory salary threshold for such reports, but could have been set at a level making a public report necessary. We believe that, in such circumstances, no public report is required. We further believe that the financial disclosure obligations of Legislative Branch officials should be construed similarly, because the statutory language applicable to officials in the Executive Branch is, in relevant part, identical to that applicable to officials in the Legislative Branch. The present opinion confirms our oral advice.

I.

You have asked us to consider what rules as to salary thresholds would apply to members of a commission in the Executive Branch whose salaries were to be set as follows:

[e]ach member of the Commission may be compensated at not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day during which that member is engaged in the actual performance of the duties of the Commission.

The Ethics in Government Act of 1978 requires the filing of a public financial disclosure report by, among others,

each officer or employee in the executive branch . . . who occupies a position . . . , in the case of positions 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.

5 U.S.C. app. 4 § 101(f)(3) (2000). *See also* 5 C.F.R. § 2634.202(c) (2002) (positions "the rate of basic pay for which is fixed . . . at a rate equal to or greater than 120% of the minimum rate of

basic pay for GS-15”). At present, the current minimum rate of basic pay for GS-15 is \$82,580, and 120 percent of that rate would be just under \$99,100. The maximum salary that could be set for a member of the Commission is the rate for level IV of the Executive Schedule, currently \$130,000.

We address only public financial disclosure requirements. Employees who are not required to file public disclosures may have to file confidential forms. *See* 5 C.F.R. § 2634.904 (2002).

II.

The Executive Branch has taken two approaches to determining whether “the rate of basic pay [for a position] is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule.” The position about which you ask would not qualify under either approach.

The first approach is illustrated by the application of the financial disclosure requirements to Assistant United States Attorneys, whose salaries are set under a statute that is nearly identical to the provision you have asked us to consider. Under 28 U.S.C. § 548 (2000), the Attorney General “shall fix the annual salary” of Assistant United States Attorneys and certain other officials “at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.” We are informed that Assistant United States Attorneys file public financial disclosure reports if their pay exceeds the threshold. The evident rationale is that the position does not have a “rate of basic pay” until one is set administratively. Thus, Assistant United States Attorneys do not all escape the filing requirement because the statute would permit setting their pay at zero, and, conversely, it is not the case that, because the statute calls for a salary “not to exceed” a level at which a public financial disclosure report would be required, every Assistant United States Attorney must file a public report. *See* United States Attorneys’ Manual § 1-4.200 (2002).¹

Under the second approach, where the salary of individual employees is set administratively within a statutory range that is not divided by grades or steps, the Office of Government Ethics (“OGE”) has interpreted the “rate of basic pay” to be the lowest level of that range. OGE Informal Advisory Op. 98x2 (1998) (“1998 Opinion”). In the 1998 Opinion, OGE was asked about a component in an agency whose employees’ pay was “determined by the Secretary, in an amount not less than the minimum rate payable for GS-15 nor more than the rate payable for level I of the Executive Schedule.” *Id.* at 1. Under the implementing regulations, “no

¹ We have confirmed with the Departmental Ethics Office that those Assistant United States Attorneys whose pay exceeds the threshold file public forms and those whose pay is below do not. We are further informed that the pay of supervisory Assistant United States Attorneys is intentionally set above the threshold to ensure that they file.

