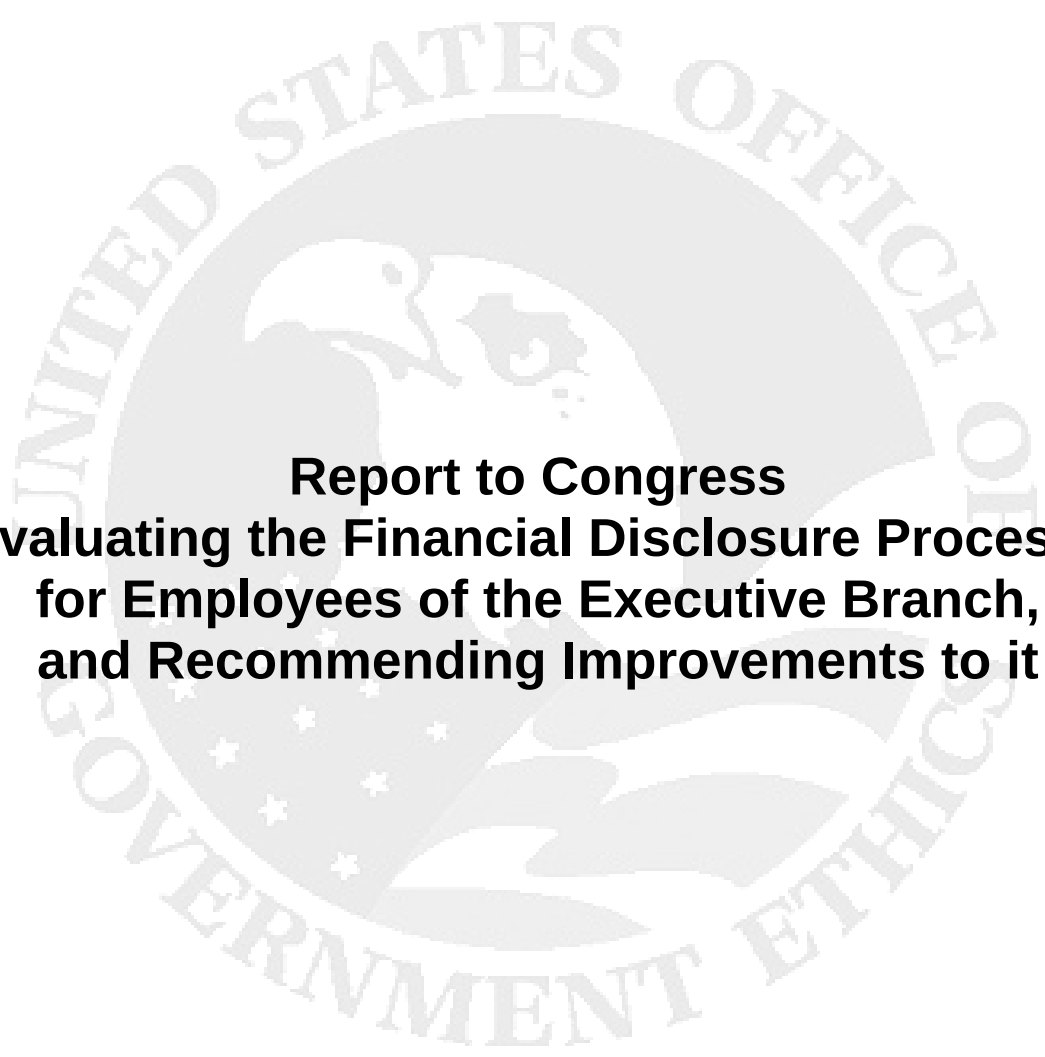


Office of Government Ethics



Report to Congress Evaluating the Financial Disclosure Process for Employees of the Executive Branch, and Recommending Improvements to it

March 2005

I. INTRODUCTION

The Ethics in Government Act (EIGA), Pub L. 95-521, was enacted in 1978 as part of a comprehensive legislative initiative to improve public confidence in the integrity of Government operations. The EIGA, as amended by the Ethics Reform Act of 1989, Pub. L. 101-194, requires senior officials in all three branches of Government to file public financial disclosure reports.¹ In general, filers must provide information about: their assets and the income derived from them; the income that they earned for performing services; the purchase, sale and exchange of certain assets; gifts of food, lodging, transportation, or entertainment, and reimbursements that they received; certain of their liabilities; their agreements for future employment, as well as their continuing agreements and arrangements, such as continued participation in the employee benefit plans of former employers; the positions that they hold, or recently have held, outside the Government; and the identities of those who recently paid compensation over \$5000 for their personal services.²

¹ In the executive branch, much attention, historically, has been given to the effect of the filing requirements on Presidential appointees. Such filers, however, are only a small subset of the approximately 20,000 executive branch public filers. The largest group of designated filers is comprised of career SES-level employees. The current law covers those who occupy positions classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, positions “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.” Recently, statutory changes allowing the Departments of Defense and Homeland Security to create new personnel pay systems and converting the Senior Executive Service pay system to a pay for performance system have raised questions about ethics laws’ continued reliance on “basic pay” concepts to trigger reporting and certain other ethics requirements. These pay system changes are likely to affect who is covered by these ethics requirements, and may require changes in the ethics laws to ensure that the appropriate employees continue to be covered. However, none of these new systems is fully in place yet and many key decisions about the design of these systems are still being made. For this reason, the Office of Government Ethics (OGE) has concluded that it is too early to make recommendations for new or additional categories of filers.

² Filers also must report the assets, income and transactions of, as well as the gifts received by, their spouses and dependent children. As will be discussed below, the reporting periods for these various categories of information currently vary.

As originally envisioned by Congress, the public financial disclosure requirement was intended to provide a tool for identifying and resolving potential conflicts of interest, and also to:

- increase public confidence in the Government.
- demonstrate the high level of integrity of the vast majority of Government officials;
- deter conflicts of interest from arising because official activities would be subject to public scrutiny;
- deter persons whose personal finances would not bear up to public scrutiny from entering public service; and
- better enable the public to judge the performance of public officials in light of their outside financial interests.³

OGE believes that all of these goals remain valid today. The information that the EIGA requires generally relates to statutory and regulatory conflict of interest requirements. Thus, financial disclosure contributes significantly to the goal of maintaining the integrity of Government operations and programs by facilitating ethics officials' conflict of interest reviews. Moreover, making this information publicly available ensures outside scrutiny, which contributes to public confidence in Government and helps to deter officials from becoming involved in official matters in which they hold conflicting financial interests. The Government's and the public's interests in public financial disclosure, however, must be balanced against the privacy interests of, and burden on, filers. Considering these sometimes competing interests, we have concluded that the current public financial disclosure system requires reporting more information than is useful or necessary to achieve its fundamental goals of preventing conflicts of interest and maintaining the public's confidence in Government. It is not the general subject of the information requested, but rather the level of detail required, that is burdensome and overly intrusive. Such unnecessary detail could be eliminated without reducing compliance with applicable conflict of interest requirements

³ Senate Report No. 95-170, at 21-22, reprinted in 1978 U.S.C.C.A.N. 4237-4238.

and without harming the public interest in disclosure. Our recommendations reflect OGE's views on how best to achieve this balance.

II. BACKGROUND

In section 8403 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458 (December 17, 2004), Congress directed the Office of Government Ethics to submit this report, within 90 days, evaluating the financial disclosure process for employees of the executive branch, and making recommendations for improving that process.⁴ This report makes a number of recommendations for amending the Ethics in Government Act, based on our experience regarding their potential effect on the executive branch.

⁴ The Presidential Transition Act of 2000, Pub. L. 106-293, also had directed OGE to study the public financial disclosure process. This charge, however, was significantly different from the current one. Specifically, the Presidential Transition Act charged OGE with proposing ways to: (1) streamline, standardize, and coordinate the financial disclosure process for Presidential nominees under the Ethics in Government Act of 1978; (2) avoid duplication of effort and reduce the burden of financial disclosure filings; and (3) address other matters OGE deemed appropriate, without making any proposal that would have the effect of lessening substantive compliance with any conflict of interest requirement. OGE submitted its Report on Improvements to the Financial Disclosure Process for Presidential Nominees to the House Committee on Government Reform and to the Senate Committee on Governmental Affairs in April 2001. That report included a number of recommendations for non-legislative improvements to the financial disclosure process. For example, we recommended that all of the Senate committees request only an OGE Form 450 (a much less detailed financial disclosure form that typically is filed by certain GS level employees) from individuals who are nominated to part-time positions on boards, commissions, or committees and who, thus, are not statutorily required to file public reports. In addition, we discussed the concern that each potential nominee must submit at least four forms or questionnaires requiring similar and overlapping information. We continue to believe that revising these non-legislative procedures would streamline the Presidential appointment process and we recommend that these non-legislative improvements be adopted. In that regard, however, this report focuses on improvements that would affect all executive branch employees, not just Presidential appointees requiring Senate confirmation.

In developing this report, OGE solicited written input from a number of interested parties.⁵ Specifically, we:

- requested the views of those non-Governmental organizations (NGOs) that we knew to be interested in transition and Presidential appointment issues;

- requested the views of a number of individuals who have been involved in the White House clearance process for Presidential appointments; and

- placed a notice in the Federal Register seeking comments from agencies and the public.

The majority of the individuals and organizations who submitted comments in response to our outreach efforts believe that the public financial disclosure system should be modernized and streamlined. While some favor more extreme measures, such as wholly eliminating the transactions reporting requirement, or permitting most public filers to instead file confidential reports, others favor more modest changes, such as standardizing the covered reporting periods for all required information, or reducing the number of valuation categories.

The myriad of published studies on the public financial disclosure process represents an even broader spectrum of views.⁶ For example, some argue that a public reporting system is unnecessary and that requiring the filing and review of confidential reports would sufficiently prevent financial conflicts of interest. Others believe that public scrutiny is essential to deterring potential conflicts of interest and to encouraging confidence in Government. Even among those who favor a public disclosure system, there are very different opinions about the items of information that filers should be required to disclose. For example, some believe that filers should be required to report the identities of their assets, but not their values, under the theory that the magnitude of the financial interest is irrelevant to the question whether it creates an actual conflict of interest. Others believe that the value of an asset is a critical predictor of whether it will

⁵ Appendix A contains a detailed listing of the outreach efforts that we made in preparing this report.

⁶ The studies and related materials on the financial disclosure process that we consulted are listed in Appendix B.

cause a conflict of interest. Thus, they advocate requiring filers to indicate the values of their assets with a great deal of specificity, for instance by creating an even greater number of valuation categories.

Since 2001, OGE has implemented a number of non-legislative improvements to the executive branch financial disclosure review process. For example, OGE has delegated authority for an agency ethics official to grant to a public filer a second 45-day filing extension, as well as to grant a request for a late filing fee waiver. This has allowed the officials who are most familiar with the merits of these requests to grant or deny them directly, and more expeditiously. We also have determined that filers need not report their beneficial interests in revocable inter vivos trusts, commonly known as “living trusts.” Because these instruments are fully revocable, like wills, their beneficiaries have no more than speculative financial interests in their holdings, which pose no conflicts under the rules or criminal statutes. Although OGE has modified a number of other rules and policies in an effort to streamline the public financial disclosure process, and we will continue to do so as needed, most of the additional improvements that we consider necessary at this time can only be achieved through legislative amendments to the Ethics in Government Act.

We advance what we believe is a balanced proposal for streamlining the process. While recognizing that many potential legislative amendments to the EIGA likely would improve the public financial disclosure system, we have eschewed proposals that would result in a complete overhaul of the system. Rather, the amendments that we propose would leave the current system intact while eliminating certain of its more burdensome requirements. In general, we recommend amending the EIGA to improve the public financial disclosure reporting requirements by: (1) raising certain monetary reporting thresholds; (2) reducing the number of valuation categories prescribed for assets, income, transactions, and liabilities; (3) shortening certain reporting time-periods; and (4) eliminating the requirement to report information that is unnecessary for conflicts analyses. We also propose a number of technical amendments that we believe are needed.

III. RECOMMENDATIONS

1. Limit the Scope of Reporting by Raising Certain Dollar Thresholds

- a) Do not require filers to disclose assets valued at or below \$5000

The current asset reporting threshold of \$1000, 5 U.S.C. app. § 102(a)(3), was established in 1978 and has never been adjusted for inflation. A financial holding of between \$1000 and \$5000 is much less significant to most filers than it was over 25 years ago. In addition, because OGE has established a regulatory de minimis exemption from 18 U.S.C. § 208 (the criminal conflict of interest statute regarding financial interests) allowing participation in a matter in which the employee's financial interest arises from the ownership of publicly-traded securities worth \$15,000 or less, there is little need for ethics reviewers or the public to be aware that filers hold such securities worth less than \$5000.⁷

As noted above, we believe that providing for public scrutiny of the holdings of financial disclosure filers promotes conflict of interest deterrence and increased public confidence in Government. These interests, however, seem best served by disclosure of assets in the higher value categories, and it is difficult to imagine that raising the threshold from \$1000 to \$5000 would decrease either deterrence or public confidence. Conversely, raising the threshold from \$1000 to \$5000 would decrease the filing burden and respect the filer's privacy, while not damaging the conflict of interest review process. Thus, we believe that, on balance, setting the reporting threshold at \$5000 would satisfy the various goals of the financial disclosure system.

⁷ Some ethics officials believe that the reporting threshold for these assets should be set at \$15,000, to mirror the amount of this regulatory exemption. OGE is not adopting this recommendation because the regulatory exemption in question, 5 C.F.R. § 2640.202(a), applies to the employee's ownership of stock in all companies affected by a Government matter. If the matter involves several parties, and the employee holds financial interests in more than one, the total value of the employee's interest in the matter may aggregate over \$15,000 even if, individually, each asset is worth less than \$15,000.

b) Do not require filers to disclose transactions valued at or below \$5000

We recommend that the reporting thresholds for transactions continue to match those for assets. 5 U.S.C. app. § 102(a)(5). Just as we believe that it is no longer necessary for filers to report assets worth \$5000 or less, we also believe that it is unnecessary to report transactions of those assets valued at \$5000 or less. In the absence of any demonstrated need for different thresholds, it would be simpler and more logical to maintain consistent categories.

c) Do not require filers to disclose Government securities holdings, or deposit accounts with financial institutions, valued at or below \$100,000

Current law requires filers to report deposit accounts in financial institutions aggregating \$5000 or more. 5 U.S.C. app. § 102(a)(3). Deposits in financial institutions valued at or below \$100,000, however, are FDIC insured and thus rarely raise conflict of interest concerns. In addition, requiring their disclosure increases the filing burden and infringes on filers' privacy concerns. Because the risk is so small that an employee will have a financial conflict of interest with a financial institution in which he has placed a deposit of \$100,000 or less, we believe that the public interest would be served adequately by requiring filers to report deposit accounts holding over \$100,000.

Similarly, the ownership of Government securities, which currently are subject to the general asset reporting threshold of \$1000, potentially creates conflicts of interest only for a few executive branch officials, who generally are prohibited from holding them at all. In fact, Government securities so infrequently raise conflicts of interest that they are designated as "permitted properties" for reinvestment when employees sell conflicting assets pursuant to a Certificate of Divestiture (5 C.F.R. § 2634.1001 et seq.). We also believe that raising the reporting threshold to \$100,000 would reduce significantly the burden of filing a public report and would not undermine the goals of public disclosure. Accordingly, we recommend requiring that such investments be reported only if valued over \$100,000.

d) Do not require filers to disclose income (whether earned or from investments) of \$500 or less

The current threshold for reporting earned and investment income was fixed at \$200 in 1989, 5 U.S.C. app. § 102(a)(1)(A), (except for a spouse's earned income,

where the threshold is \$1000, 5 U.S.C. app. § 102(e)(1)(A)). As we did in our April 2001 report, we recommend raising this threshold to \$500. For ease of reporting, we recommend that this single threshold be applied both to the income of the filer and of the spouse.⁸ This change would reduce the burden on filers, who currently must examine their finances for small investment earnings, small payments for services, and other relatively insignificant financial dealings. Eliminating the requirement to report income of less than \$500 also would not harm an ethics official's ability to conduct a thorough conflict of interest review and, presumably, would not minimize the benefits of public scrutiny.

e) Do not require filers to disclose liabilities of \$20,000 or less

Like the asset reporting threshold, the liability reporting threshold (\$10,000) was set in 1978, and has not been adjusted for inflation. 5 U.S.C. app. § 102(a)(4). As filers' incomes have risen steadily during the past 27 years, so too have their liabilities. For example, because it has become more common for a family to hold a credit card balance of over \$10,000 at some point during the reporting period, filers more often are required to report standard consumer and credit card debt. Experience has shown that this information is of little or no use to reviewing officials and that, generally, it does not serve the public interest in promoting public confidence in Government or in preventing conflicts of interest. In order to help restore the balance that was intended in 1978, we propose raising the reporting threshold for liabilities to \$20,000. We believe that this would provide enough information for reviewers to analyze potential financial conflicts of interest, and that it respects both the public interest in disclosure and the filer's privacy interests.

f) Do not require filers to disclose clients and other sources of individual compensation of \$25,000 or less involving personal services

The current \$5,000 threshold for reporting sources of compensation received by nominees and new entrants also was set in 1978. 5 U.S.C. app. § 102(a)(6)(B). We believe that this provision was intended to require a listing of the filer's major clients.

⁸ Although implementing this recommendation would result in increasing the level of detail required to be reported about a filer's spouse's financial interests, we believe that the advantages to be gained by simplifying the financial disclosure requirements and making them more consistent would justify this result.

The combination of inflation and increasing fees for personal services, such as attorney fees, argue in favor of raising this threshold substantially.

A recent study indicates that the national median attorney billing rate for partners with 20-plus years of experience in firms with over 150 lawyers is \$330 per hour. The comparable rate at firms of 41-75 lawyers is \$250 per hour. Altman Weil, Inc., www.altmanweil.com/news/release.cfm?PRID=43. Even assuming a lower rate of \$200 per hour, it would take only 25 hours of work for a particular client to reach the current reporting threshold. We do not believe that everyone for whom a professional has performed 25 hours of work should be considered a major client since, at this rate, a professional who bills at least 1800 hours per year could have over 70 clients per year that meet the reporting threshold.

We believe that raising the reporting threshold to \$25,000 would properly reflect the filer's list of major clients at this time. In the average case, even a \$25,000 threshold would be met after performing only about 75-125 hours of work, and a filer would still have as many as 24 reportable clients. In addition, the public's interest in knowing the individual's most significant income sources would continue to be served, while helping to protect the privacy of the filer and his less significant clients.

2. Reduce the Number of Valuation Categories Throughout

a) Reduce the current eleven value categories for assets and transactions to three

The current EIGA requires a filer to identify the value of an asset either purchased, sold, or exchanged during the reporting period, or held at the close of the reporting period, by indicating one of eleven value categories. This requirement is intended primarily to identify a filer's financial interests. However, it is important to note that an executive branch employee is considered to have a financial interest in any particular matter in which he participates personally and substantially if the matter would have a direct and predictable effect on his own financial interests, or on those of a person or entity whose financial interests are imputed to him, including his spouse or minor child, *regardless of the value of the asset*, that creates the financial interest. 18 U.S.C. § 208. The size of the asset is relevant only for purposes of determining whether the interest is exempted by regulation, or whether to issue a waiver of the financial conflict. Thus, it is sufficient for an ethics official, and the public, to know an asset's approximate value.

Taking these points into consideration, as well as the filer's interests in privacy and ease of filing, OGE recommends that Congress amend the EIGA to require only three valuation categories: \$5,001-\$15,000; \$15,001-\$100,000; and over \$100,000. As discussed above, the first category (\$5,001-\$15,000) would encompass a commonly used regulatory exemption issued by OGE under 18 U.S.C. § 208, which allows an employee to participate in a matter involving specific parties in which he has a financial interest arising from the ownership of publicly-traded securities, the aggregate market value of which does not exceed \$15,000. 5 C.F.R. § 2640.202(a)(2). Thus, this category bears a direct relationship to an ethics official's ability, as well as the ability of an informed member of the public, to review a report for possible conflicts of interest. We believe that setting the uppermost category of asset value at "over \$100,000" would sufficiently represent what we believe would be considered a significant asset by most filers and the public. Further detail is not necessary for an accurate conflict of interest analysis and we believe that this proposal would respect the filer's interest in personal privacy.

With respect to reporting transactions, we simply recommend that the number and breakdown of valuation categories continue to be consistent with those for reporting assets. Accordingly, we recommend that the same three value categories be required for reporting transactions. As noted above, in the absence of any demonstrated need for different valuation categories, it would be simpler and more logical to maintain consistent categories.

b) Reduce the current eleven categories of income amount to three

Information reflecting the amount of income received from investments normally is of very limited use in conflicts analyses. Generally, any conflict of interest will arise by virtue of the employee's holding a particular investment, rather than because of the employee's receipt of income from that investment. Even in the unusual circumstance where the receipt of investment income is relevant to a conflict of interest review, the degree of detail required by the current statute, with its eleven categories of income amount, is not needed. 5 U.S.C. app. § 102(a)(1)(B). Likewise, for earned income, the current requirement to report the exact dollar figure earned during the reporting period is unnecessary. In an effort to balance the public interest in specific information about a filer's investment and earned income with a desire to protect the filer's privacy, we propose three categories of income -- \$501-\$20,000; \$20,001-\$100,000; and over \$100,000. We recommend that the investment income of the filer's spouse be reported

using these same value categories. (See our separate recommendation, discussed below, for eliminating the requirement to report exact amount of income earned.)

c) Reduce the current eleven categories of liability amount to three

As we did in 2001, we believe that three value categories (\$20,001-\$100,000; \$100,001-\$1,000,000; and over \$1,000,000) would provide sufficient information about the amount of a filer's liabilities to ensure a complete conflict of interest review and to satisfy the public interest. Current law specifies eleven categories. 5 U.S.C. app. § 102(d)(1). On balance, we believe that eliminating the four currently existing categories that reflect values of over \$1,000,000 would show significant respect for filers' privacy interests, while still maintaining the information needed to review for conflicts of interest. Because we also believe that fewer categories are necessary with respect to liabilities of under \$1,000,000, we recommend reducing them from six to two. We also recommend that the separate liabilities of the filer's spouse and dependent children be reported using these same value categories.

3. Reduce the Covered Reporting Periods for Disclosing Outside Positions Held and Sources of Compensation Received

At present, the EIGA requires new entrants and nominees to report information about the assets and liabilities that they held, and the income that they received, during the previous one calendar year and the current year up to the date of filing. 5 U.S.C. app. §§ 102(a)(1); 102(a)(3) and 102(a)(4). In contrast, it requires them to report the outside positions that they held, and their sources of earned income, during the previous two years, and the current year up to the date of filing. 5 U.S.C. app. §§ 102(a)(6)(A)&(B). For example, a nominee or new entrant report filed on October 31, 2005 would have to include assets, liabilities, and income for January 1, 2004-October 31, 2005, but would have to include outside positions held and sources of compensation received between January 1, 2003 and October 31, 2005. The different reporting periods have created a great deal of confusion and have produced no readily apparent informational value either for ethics officials or for the public. Indeed, our experience has shown that this discrepancy serves no meaningful purpose.

The applicable executive branch ethics rule on impartiality establishes that an employee has a "covered relationship" with a former client, or with an entity that he served in one of several other capacities, within the previous one year after termination of the client or employment relationship. See 5 C.F.R. § 2635.502. Thus, requiring

filers to disclose their outside positions and sources of compensation for one calendar year and the current year up to the date of filing would provide ample information for a reviewer to undertake a conflict of interest review. Moreover, doing so likely would increase the efficiency of conflict of interest reviews because reviewers would spend less time determining which former clients create an impartiality concern under the applicable regulations. Reducing the reporting period also would lessen substantially the current filing burden.

4. Reduce Descriptive Details that are Unnecessary for Conflicts Analysis

Current law requires filers to provide a great deal of detail regarding the receipt of income, reimbursed travel, and their outstanding agreements and arrangements. We do not believe that the public interest demands information with this level of detail. Moreover, it typically adds little or nothing to the quality of conflict of interest reviews and is a burden for filers. In the unlikely event that an ethics official needs additional detail in order to resolve a potential conflict of interest, he can request the relevant information from the filer.

- a) Eliminate the currently prescribed descriptions of income and substitute three basic types: “investment income,” “earned income” and “honoraria”

We believe that the reporting of investment income has limited value since it rarely provides any insights regarding potential conflicts of interest that are not already apparent from other data on the report. Even on the rare occasion that investment income is relevant to a conflict of interest analysis, the reviewing ethics official does not need to know whether this income took the form of “dividends,” “rents and royalties,” “interest,” or “capital gains,” as it is required to be reported by current law. 5 U.S.C. app. § 102(a)(1)(B). This requirement is confusing and burdensome for filers, and we do not believe that there is significant public interest in knowing the specific type of investment income received. Thus, we believe that “investment income” is a sufficient description.

Current law also requires that the source, type, and amount of earned income be reported. 5 U.S.C. app. § 102(a)(1)(A). Although it is important for reviewers and the public to know the sources and approximate amounts of such income, the specific type of income, such as “salary,” “fees,” “commissions,” or “wages,” is irrelevant. The simple characterization as “earned income” would be sufficient to enable a full conflict of interest review and to satisfy the public interest. Thus, as we did in our April 2001

report, we continue to recommend that income be required to be described only as “investment income,” “earned income,” or “honoraria.” We also recommend that filers be permitted to report their spouses’ and dependent children’s income using these same three basic types.

b) Eliminate the requirement to report exact amounts of income, except for honoraria

Current law requires filers to report the exact amount of income received (except for income from interest, dividends, capital gains, rent, and royalties, which is to be reported by indicating one of eleven value categories). 5 U.S.C. app. § 102(a)(1). As noted above, some argue that there is a legitimate public interest in knowing the exact amount of income that a filer received during the reporting period, while others argue that the public interest is fully served by requiring filers to report the identities of their income sources, without reporting the amounts of income received. We recommend requiring filers only to specify that reported income fell within one of the three income amount categories: \$501-\$20,000; \$20,001-\$100,000; and over \$100,000. We believe that this approach would serve the public interest, while also respecting filers’ privacy interests, and facilitating full conflict of interest analyses.⁹

We recommend, however, retaining the EIGA requirement to report the exact amount of honoraria received during Government service. While exact amounts of honoraria probably are not necessary for purposes of identifying conflicts of interest, we acknowledge this to be an area where Congress and the public have longstanding concerns regarding potential conflicts of interest. Given this concern, we believe that it is appropriate to continue requiring filers to report the exact amounts of honoraria payments that they received during Government service. We recommend, however, that honoraria received by filers prior to Government service, as well as honoraria received by filers’ spouses, be required to be reported only by value category.

⁹ The amount of outside earned income that many non-career employees can earn during their appointments is restricted by statute. 5 U.S.C. app. § 501(a); 5 C.F.R. § 2636.304. Thus, in order to conduct a complete conflict of interest review, ethics officials may need to know exact amounts of earned income received by these officials. If so, they can ask the filers for this information.

c) Eliminate the requirement to report dates of transactions

The EIGA requires an annual filer to report “a brief description, the date, and category of value” of any asset transacted during the reporting period. 5 U.S.C. app. § 102(a)(5). Some agency ethics officials, however, believe that the report of purchases, sales, or exchanges of securities contributes little to their conflict of interest analyses. Many of them believe that it would be sufficient to require filers to identify the assets held at the end of the reporting period, as well as those that generated reportable income during the reporting period, without specifying whether they were purchased or sold during that period. Although we are sensitive to this point of view, we do not recommend deleting wholesale the requirement to report transactions or assets that are reflected elsewhere on the report. We believe that, at the very least, this information provides a valuable tool for reviewers to track filers’ assets from year to year, and that eliminating all reporting of transactions would increase significantly the number of follow-up questions that reviewers would need to pose to filers. We also acknowledge that subjecting securities transactions to public scrutiny may serve the public interest in deterring conflicts of interest and promoting the public’s confidence in Government. We believe, however, that there is no measurable benefit to requiring filers to report the actual dates of the transactions in question.

Reviewers rarely need to know the specific dates of transactions in order to perform their conflict of interest analyses. Additionally, we do not believe that this information is of specific interest to the public. Finally, for two reasons, the requirement to report the date of each transaction often is a burden on filers. First, they sometimes must perform research in order to ascertain the precise dates of their purchases and sales. Second, this requirement prohibits a filer from aggregating on one line multiple purchases or sales of the same security during the reporting period. Thus, a filer who trades securities frequently may be required to report the name of a single security repeatedly on the “transactions” section of one annual financial disclosure report. Eliminating the date requirement would permit filers to report on one line all purchases or sales during the reporting period of a particular security, and to report an aggregate amount of those purchases or sales. On balance, we believe that the minimal utility of, and public interest in, knowing the actual date of a transaction is outweighed by the potential filing burden. In the unlikely event that a reviewer needs to know the exact date of a particular transaction, the reviewer can seek that information from the filer.

d) Eliminate the requirement to provide an itinerary in connection with the reporting of travel reimbursements

Current law requires filers to provide itineraries when reporting the acceptance of travel expense reimbursements, in addition to reporting the source and value of those reimbursements. 5 U.S.C. app. § 102(a)(2)(B). True itineraries, however, are rarely provided by filers, and experience has shown that information beyond the identity of the reimbursement source, and the trip's destination and purpose, is not needed in order for ethics officials to conduct thorough conflict of interest reviews. In addition, requiring true "itineraries" would create a significant burden on filers who would have to recreate itineraries for trips that they took long ago (sometimes over one year before the filing deadline). Moreover, in some cases, requiring the reporting of specific details, such as the traveler's choice of hotel, may even implicate security concerns. Thus, on balance, we believe that Congress should reflect current practice by eliminating the itinerary requirement.

e) Eliminate the requirement to report the dates on which most agreements and arrangements have been entered

Current law requires filers to report the date on which each reportable agreement or arrangement was entered, in addition to reporting the agreement's parties and terms. 5 U.S.C. app. § 102(a)(7). Because it sometimes is difficult for a filer to determine the date on which an agreement was entered, this requirement can be a burden. For example, a long-time employee of a private company typically has been enrolled in the company's pension and 401K programs for many years and, thus, it may be a challenge to identify the particular date on which he enrolled in the various programs.

We recognize that there is substantial public interest in the timing of agreements that employees enter into during their Government service, as well as in their agreements for future employment, whether or not entered into during their Government service. These types of agreements are considered particularly susceptible to possible conflicts of interest. Aside from these items, however, knowledge of the dates on which agreements were entered is unnecessary for most conflicts analyses. On the rare occasion that a date is needed in order to analyze a possible conflict of interest, the ethics reviewer can request that information. We also do not believe that there typically is a high level of public interest in the precise dates on which filers entered most reportable agreements or arrangements. Thus, on balance, we believe that Congress

should eliminate this requirement, *except* with respect to agreements for future employment and agreements entered into during Government service.

5. Technical Amendments

- a) Eliminate the requirement for a new entrant or nominee to report a former employer as a source of individual compensation if that former employer is already reported as a source of earned income

Nominees' and new entrants' employers are, and should continue to be, required to be reported as sources of income (on Schedule A). Current law also requires, however, that they be reported as sources of individual compensation if they paid the filer more than \$5000 during the reporting period (on Schedule D, Part II.) 5 U.S.C. app. § 102(a)(6)(B). There is no reason to require filers to report their employers twice, provided that both entries would reflect the performance of the same services. This duplicative information contributes to neither the reviewer's conflict of interest analysis nor to the public interest, and it is a burden on filers. In fact, it is one of the current provisions that often causes new filers to criticize the financial disclosure system. As noted above, Schedule D, Part II is intended to provide a listing of the filer's major clients, information that will not ordinarily appear elsewhere on the report. Accordingly, we recommend that the law be amended to require nominees and new entrants to report their employers on Schedule D, Part II only if those income sources do not appear elsewhere on the report.

- b) Clarify the exception that permits nominees and new entrants to exclude the identity of certain compensation sources where such information is confidential

Current law provides an exception to the requirement that nominees and new entrants report their major clients on Schedule D, Part II of the SF 278. Under this exception, the filer need not report "any information which is considered confidential as a result of a privileged relationship, established by law, between such individual and any person" 5 U.S.C. app. § 102(a)(6)(B). Filers sometimes are confused about the scope of this exception. Some filers interpret the term "privileged relationship" very broadly, to include, for example, the identity of any person with whom they have an attorney-client relationship.

It is important that nominees and new entrant filers identify their major clients so that these relationships can be analyzed for conflict of interest purposes. A filer should be able to exclude this information only if the filer was not directly involved in his firm's provision of services to the client, or the client's identity is protected by a court order, is under seal, or is considered confidential because: (1) the client is the subject of a pending grand jury proceeding or other non-public investigation in which there are no public filings, statements, appearances, or reports that identify him; (2) disclosure is prohibited by a rule of professional conduct that can be enforced by a professional licensing body; or (3) a privileged relationship was established by a written confidentiality agreement, entered into at the time that the filer's services were retained, which expressly prohibits disclosure of the client's identity. These situations are distinguishable from a standard attorney-client retainer agreement, which commonly treats as confidential any personal or business information disclosed during the relationship, but does not treat the identity of the client itself as confidential. Thus, we recommend clarifying the limits of this exception. In order to help reviewing officials ensure that filers are applying this exception accurately, we also recommend requiring filers to indicate, by checking a box that would be added to the SF 278 form, that they have excluded the name of a client pursuant to this exception.

- c) Amend terms regarding qualified blind trusts, and require the filer to provide the agency ethics official with a list of assets upon dissolving such a trust

The provision of the current law that defines a qualified blind trust, 5 U.S.C. app. § 102(f)(3), contains several concepts that are described using inconsistent terms. Specifically, section 102(f)(3)(A)(i)(I) refers to an individual who is “not *associated* with any interested party” and section 102(f)(3)(A)(i)(II) refers to someone who is “not *affiliated* with any interested party.” Likewise, section 102(f)(4)(B)(i) refers to a “*well-diversified* portfolio” while section 102(f)(8)(A)(ii) refers to the same concept using the term “*widely diversified*.” In order to avoid confusion and increase consistency, we recommend changing the term “associated” to “affiliated” and changing the term “well diversified” to “widely diversified.” These terms are more consistent with common usage within the financial disclosure system.

The qualified blind trust provision also requires a filer to file with OGE, within thirty days of dissolving a qualified blind trust, a list of the trust's assets and each asset's category of value. 5 U.S.C. app. § 102(f)(5)(C). We recommend amending this provision to require that an executive branch filer also provide such a list to his agency's designated agency ethics official (DAEO) because, if a trust is dissolved while an

individual remains a Government employee, the DAEO typically is in the best position to perform the necessary conflict of interest analysis.

- d) Increase the fee for filing a financial disclosure report late, and increase the civil penalty for failing to file, as well as for disclosing or soliciting information about a qualified blind trust

The EIGA currently provides a civil penalty of \$10,000 for knowingly and willingly falsifying or failing to file a public financial disclosure report, 5 U.S.C. app. § 104(a), or for knowingly and willfully: disclosing information to an interested party about a qualified blind trust; acquiring a holding the ownership of which is prohibited by a trust instrument; soliciting advice from an interested party with respect to such trust that may not be disclosed; and failing to file any document required by the blind trust section. 5 U.S.C. app. § 102(f)(6)(A). However, the Department of Justice, on September 29, 1999, increased the civil penalty for these violations from \$10,000 to \$11,000, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134. This law provides a mechanism for agencies to increase civil monetary penalties for violations of laws that fall within their jurisdictions. We recommend amending the EIGA to reflect these increases. Rather than substituting \$11,000 for \$10,000 in these provisions, however, we recommend that they be amended to automatically incorporate future adjustments that DOJ makes under the Federal Civil Penalties Inflation Adjustment Act.

The current law also provides that any individual who files a required report more than thirty days after it is due, including any filing extensions, shall pay a fee of \$200. 5 U.S.C. app. § 104(d)(1). This figure should be raised in order to better deter late filing. We recommend raising it to \$500. We also recommend, however, amending the provision that permits the supervising ethics official to waive the fee “in extraordinary circumstances,” 5 U.S.C. app. § 104(d)(2), to allow such a waiver, instead, “for good cause shown.” We believe that providing more flexibility to waive the late fee should balance any hardship that results from increasing it.

- e) Provide statutory authority for filers not to disclose the underlying assets of certain investments, in specific circumstances

The EIGA currently requires filers to report the underlying holdings of a trust or other instrument unless the asset is a qualified trust or an “excepted investment fund.” 5 U.S.C. app. § 102(f).¹⁰ Private investment vehicles, such as hedge funds, are covered by this requirement. These funds are becoming increasingly common, and filers sometimes have difficulty obtaining listings of their underlying holdings. Under current practice, a filer who can not report the underlying holdings of such a fund generally must divest it. It is sometimes difficult, however, to divest these funds because they are not exchange-traded. In addition, their transfer to other investors often is restricted in various ways. For example, potential buyers often must qualify by demonstrating that they have particular incomes or net worths. Trading also is sometimes restricted to particular date ranges.

It is counter-intuitive to require investors to divest these assets when their lack of knowledge of the investments’ underlying holdings will mitigate concerns about potential conflicts of interest arising from those holdings. Thus, we recommend adding a provision to this section that would permit a new entrant or nominee not to disclose the assets of the fund if: (1) the identity of such assets and sources of income is not provided to investors; (2) the filer has no actual knowledge of, and neither exercises control over nor has the ability to exercise control over, the fund’s holdings; and (3) either the filer has provided written certification by the fund manager that assets are not disclosed to investors, or the filer has executed a written ethics agreement that contains a commitment to divest the interest within 90 days.

- f) Miscellaneous amendments

The EIGA’s definition of “gift,” 5 U.S.C. app. § 109(5), currently contains six exceptions. We recommend adding a seventh exception – for gifts that were accepted and reported by the filing individual under the Foreign Gifts Act. 5 U.S.C. § 7342. This change would eliminate a duplicative filing requirement, since the Foreign

¹⁰ An excepted investment fund is “a widely held investment fund” that is either “publicly traded” or “widely diversified”, and that is independently managed (meaning that “the reporting individual neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.”) 5 U.S.C. app. § 102(f)(8).

Gifts Act already requires employees to report the receipt of such gifts, and these reports ultimately are made public.

Section 101 of the EIGA lists the officers and employees who must file public financial disclosure reports. We recommend amending subsection 101(f)(6), 5 U.S.C. app. § 101(f)(6), to clarify which United States Postal Service employees must file. As this section is currently written, the individual's rate of basic pay determines his filing status. Filing status should be determined, instead, by reference to the individual's level in the Postal Career Executive Service. This is because, although the responsibilities associated with the various levels are comparable to those of the SES, the PCES pay scale is lower than the SES scale.

IV. CONCLUSION

The public financial disclosure system is critical to maintaining the integrity of Government operations and ensuring public confidence in Government. However, we believe that its goals could be achieved with a simpler and more streamlined filing process. Reducing the number of valuation categories, shortening some of the reporting time-periods, raising the dollar thresholds, and eliminating unnecessary detail would continue to honor these goals while also respecting filers' time and privacy.

Appendix A

Outreach

The following is a list of organizations and individuals whose opinions we solicited to aid us in writing this report.

Letters

Non-Governmental Organizations:

American Enterprise Institute
American Society for Public Administration
Brookings Institution
Center for the Study of the Presidency
Common Cause
Council for Excellence in Government
Ethics Resource Center
Heritage Foundation
National Academy of Public Administration
Senior Executives Association

Former White House Counsels:

C. Boyden Gray
Abner Mikva
Beth Nolan
Bernard Nussbaum
John Quinn

Former Directors of White House Personnel:

Veronica Biggins
Constance Horner
Bruce R. Lindsey
Robert J. Nash
Chase Untermeyer

Telephone Contacts

OGE telephoned other organizations that might have had an interest in commenting on this study, or whose members might have had an interest, to apprise them of the notice in the *Federal Register*. Those organizations included:

Center for Public Integrity
Campaign Legal Center

Additional Outreach

Federal Register, Volume 70, Number 9, Thursday, January 13, 2005 – Asking for comments on study.

January 14, 2005 listserve message to all executive branch ethics officials seeking input and recommendations.

Appendix B

Studies and Related Materials Reviewed

American Bar Association Committee on Governmental Standards. "Keeping Faith: Government Ethics & Government Ethics Regulations." Administrative Law Review, Volume 45, No. 3, Summer 1993.

Cain, Daylian M., George Loewenstein, and Don Moore. "The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest." Journal of Legal Studies, Volume 34, No.1, January 2005.

Council for Excellence in Government and The Presidential Appointee Initiative. A Survivor's Guide for Presidential Nominees. The Presidential Appointee Initiative, a Project of the Brookings Institution funded by the Pew Charitable Trusts. Washington, DC: November 2000.

Donilon, Thomas and Norman Ornstein. "The Confirmation Clog." Foreign Affairs, November/December 2000.

Hearing Before a Subcommittee of the Committee on Appropriations, United States Senate. Avoiding Conflicts of Interest at the National Institutes of Health. 108th Congress, 2d Session, January 22, 2004.

Hearings Before the Committee on Governmental Affairs, United States Senate. The State of the Presidential Appointment Process. 107th Congress, 1st Session, April 4-5, 2001.

Hearings Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives. NIH Ethics Concerns: Consulting Arrangements and Outside Awards. 108th Congress, 2d Session, May 12, May 18, and June 22, 2004.

Hess, Stephen. First Impressions: Presidents, Appointments, and the Transition. The Presidential Appointee Initiative, a Project of the Brookings Institution funded by The Pew Charitable Trusts. Washington, DC: September 2000.

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National Commission on Public Service (Volcker Commission). Urgent Business for America: Revitalizing the Federal Government for the 21st Century. January 2003.

Partnership for Public Service. Homeland Insecurity: Building the Expertise to Defend America from Bioterrorism. Washington, DC: 2003.

Partnership for Public Service and Hart Teeter. Survey: Recruitment Problem Remains, Despite Increasing Respect for Government's Work Since 9/11. Washington, DC: 2002.

The Presidential Appointee Initiative. To Form a Government: A Bipartisan Plan to Improve the Presidential Appointments Process. The nonpartisan Presidential Appointee Initiative, a Project of the Brookings Institution funded by The Pew Charitable Trusts. Washington, DC: April 2001.

The Presidential Appointee Initiative. Staffing a New Administration: A Guide to Personnel Appointments in a Presidential Transition. The nonpartisan Presidential Appointee Initiative, a Project of the Brookings Institution funded by The Pew Charitable Trusts. Washington, DC: November 2000.

President's Commission on the Federal Appointment Process. The Report of the President's Commission on the Federal Appointment Process. Washington, DC: December 1990.

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Report of the Committee On Governmental Affairs, United States Senate. Presidential Appointments Improvement Act of 2002. S. Rep. 152, 107th Congress., 2d Session, May 16, 2002.

Stark, Andrew. Conflict of Interest in American Public Life. Cambridge, MA: Harvard University Press 2000.

Transition to Governing Project. The Lengthening Appointment Process and Proposals for Reform. American Enterprise Institute in conjunction with the Brookings Institution and the Hoover Institution, funded by The Pew Charitable Trusts.

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Trattner, John H. "Presidential Appointments." The 1997 Prune Book: Making the Right Appointments to Manage Washington's Toughest Jobs. Council for Excellence in Government. Washington, DC: 1997.

Trattner, John H. The 2000 Prune Book: How to Succeed in Washington's Top Jobs. Council for Excellence in Government. Washington, DC: Brookings Institution Press, 2000.