

Office of Government Ethics

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**Memorandum dated December 9, 2002,
to Designated Agency Ethics Officials
from Amy L. Comstock, Director, Regarding
Application of the Financial Disclosure
Requirements to Detailees under the
Intergovernmental Personnel Act (IPA)**

This memorandum offers guidance regarding the application of the financial disclosure requirements to detailees under the Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371-3376.

In December 2001, the IPA was amended to make State and local government employees who are detailed to Federal agencies, "employees" of the Federal agency for purposes of the Ethics in Government Act (EIGA).¹ Accordingly, some IPA detailees now may be required to file financial disclosure reports. Whether a particular detailee has to file a public report, a confidential report, or any report at all depends upon the nature of the detailee's position as well as the detailee's duties and rate of pay.

We have consulted with the Office of Personnel Management (OPM) and reviewed the OPM handbook on the IPA Mobility Program. According to OPM, agencies have a great deal of discretion with respect to the assignment of persons on detail under the IPA. A detailed employee "may be assigned to an established, classified position in the Federal agency, or may be given a set of ad hoc, unclassified duties, relevant only to the specific assignment project."² The following guidance is provided in light of this information.

¹ The National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 (2001), amended 5 U.S.C. § 3374(c)(2) of the Intergovernmental Personnel Act.

² Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management, *A Handbook on the Intergovernmental Personnel Act Mobility Program*, 14 (1998).

PUBLIC FINANCIAL DISCLOSURE REQUIREMENTS

Section 101 of the EIGA requires certain Federal Government employees to file public financial disclosure forms, including:

- (1) those whose positions are classified above GS-15 under the General Schedule;
- (2) those in positions outside the General Schedule, for which the rate of basic pay is equal to or greater than 120% of the minimum rate of basic pay payable for GS-15; and
- (3) those in any other position determined by the Director of OGE to be of equal classification.

5 U.S.C. app. § 101(f)(3). Because IPA detailees now are considered Federal employees under the EIGA, those who occupy positions that fit one of these categories are required to file public financial disclosure reports.

An IPA detailee who is assigned to an "established, classified position," with a rate of basic pay equal to or greater than 120% of the minimum rate of basic pay for a GS-15, and is reasonably expected to perform the duties of his position for more than 60 days in a calendar year, is required to file a Public Financial Disclosure Report under section 101(f)(3). As we have stated in prior OGE opinions, it is the position that controls the public financial disclosure reporting requirement.³ In OGE 98 x 2, we cited a 1977 Senate Governmental Affairs Committee report which noted that determining who should file a public report is based on the level of responsibility for the position, as indicated by the lowest level of pay for the position.

An IPA detailee who is "given a set of ad hoc, unclassified duties, relevant only to the specific assignment project" is not required to file a Public Financial Disclosure Report. These IPA detailees do not have clearly defined positions and many of them retain their non-Federal salaries, which may not reflect the level of responsibility for their Government duties and often may be higher than the salary paid other Government employees for similar

³ In the Office of Government Ethics (OGE) Informal Advisory Letters 81 x 3 and 98 x 2, OGE looked at both the wording of the Ethics in Government Act and its legislative history and concluded that "it is the position and not the individual which controls the public financial disclosure reporting requirements."

work. However, in unusual cases, under section 101(f)(3), an agency may request that this Office issue a determination that the detailee's position is of equal classification to those required to file SF 278s.

EQUAL CLASSIFICATION DETERMINATION

A request for an equal classification determination may be made for either a detailee who is assigned to an established, classified position that does not require the submission of an SF 278 under the standard at section 101(f)(3), or for an IPA detailee who is given a set of ad hoc, unclassified duties. To the extent possible, a request for an equal classification determination should address the following criteria, as applicable:

1. Nature of the position's responsibilities, such as managerial or policy-making;
2. Type of work required by the position, such as fiscal, scientific research, law enforcement, teaching;
3. Scope of duties and authority associated with the position, such as interaction with the agency head, liaison with private sector executives, contact with foreign governments;
4. Any special qualification requirements of the position, such as skills, expertise, experience, educational level;
5. Relative standing of the position in an agency's organizational hierarchy or chart;
6. The position description and title;
7. The agency's own assessment that a position has a pay grade equivalency at a higher level, such as Senior Executive Service, and the basis for that conclusion;
8. Difficulty filling the position at a higher level, such as attempts to have it reclassified that are unsuccessful because of grade ceiling or other factors;
9. Whether the position has previously been filled by employees at a higher pay grade;

10. Actual pay level for the position's incumbents, such as those in a special pay schedule who have been selected to receive pay at the high end of that grade scale;
11. Number of other employees in the particular pay system (or in the agency or department generally) that are paid at a comparably high level but who are not public filers, and why the positions requested for designation are considered unique; and
12. Any compelling special circumstances, such as a high-visibility position with significant potential for conflict.

We will apply these criteria in determining whether an IPA detailee's position warrants equal classification under section 101(f)(3).

CONFIDENTIAL FINANCIAL DISCLOSURE REQUIREMENTS

The EIGA authorizes each branch of the Government to collect confidential financial disclosure reports from its employees, where appropriate. See 5 U.S.C. app. § 107. Therefore, IPA detailees who are "assigned to an established, classified position" but are not required to file SF 278s and detailees who are "given a set of ad hoc, unclassified duties, relevant only to the specific assignment project," may be required to file a Confidential Financial Disclosure Report if their duties and responsibilities meet the criteria at 5 C.F.R. § 2634.904(a)(1).

FILING DEADLINES

The filing deadlines for individuals filing a public form are set forth in 5 C.F.R. § 2634.201. For those filing a confidential form, the filing deadlines are described at 5 C.F.R. § 2634.903. If there are IPA detailees in your agency who have never filed a financial disclosure report, but who you believe now should file either a public or confidential report, we recommend that they be allowed to file the report within 30 days of being notified of the requirement to do so.

If you have any questions, please contact my Office.