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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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Director

SUBJECT: Limitations on Outside Compensation and Affiliation Applicable to Presidential Appointees and Covered Noncareer Employees

Ensuring that new noncareer appointees are familiar with the ethics rules is imperative to ensuring a smooth transition between presidential administrations. Because many noncareer appointees are subject to strict limits on their outside employment and activities, the U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to assist ethics officials in providing guidance on the limitations on outside compensation<sup>1</sup> and affiliations that apply to full-time Presidential appointees (PA), including Presidential appointees requiring Senate confirmation (PAS), and to covered noncareer employees (CNC). As explained below, most full-time PA and PAS are subject to a total prohibition on receipt of any outside compensation. CNC who are not full-time PA and PAS are subject to a cap on their total outside compensation. Moreover, CNC are barred from receiving compensation for certain outside activities, such as performing professional duties involving a fiduciary relationship, and permitting the use of their name by certain outside entities, as discussed below.<sup>2</sup>

The outside earned income and affiliation restrictions discussed in this Legal Advisory are in addition to limits imposed on outside compensation and outside activities that apply more generally to all Government employees.<sup>3</sup>

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<sup>1</sup> The term “compensation” as used in this Legal Advisory includes wages, salary, honoraria, commissions, professional fees, as well as any other form of compensation for services, other than those expressly excluded by statute. 5 C.F.R. §§ 2635.804(b)(1), 2636.303(b). Compensation is not limited to cash or cash equivalents but can include anything of value provided because of services rendered or to be rendered. *See* OGE Inf. Adv. Op. 90x20 (Nov. 2, 1990).

<sup>2</sup> 5 U.S.C. §§ 13143(a)(1), 13144(a); 5 C.F.R. § 2636 subpt. C. Failure to abide by these limitations may result in a civil penalty. 5 U.S.C. § 13145(a)(1); 5 C.F.R. § 2636.104(a). As of January 15, 2025, the maximum civil penalty for violation of the outside earned income and affiliation statutes is \$25,132.

<sup>3</sup> Additional laws include the criminal prohibitions on bribery, illegal gratuities, and conflicts of interest, 18 U.S.C. §§ 201-209, as well as the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. Some agency ethics officials also may need to consider the effect of any agency supplemental regulations or statutory restrictions that may apply to a CNC’s ability to undertake outside activities.



## **I. Who is Covered by the Outside Compensation and Affiliation Restrictions for PA, PAS, and CNC?**

Generally, any officer or employee who is appointed by the President to a full-time position is considered a full-time PA or PAS as described in this Legal Advisory.<sup>4</sup> Certain exemptions apply for members in the uniformed and foreign services and for employees in the White House who are paid less than GS-9, step 1, or who are in a position that does not normally change as a result of a presidential transition.<sup>5</sup>

An employee is a CNC if they occupy one of the non-career positions listed in OGE's regulations, such as a non-career SES,<sup>6</sup> and the position is one "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."<sup>7</sup> The term CNC does not include special Government employees, as defined at 18 U.S.C. § 202(a).<sup>8</sup>

Note that although many full-time PA and PAS are CNCs, and vice versa, that is not always the case.<sup>9</sup> Agency ethics officials should consult both sets of definitions when assessing which outside compensation and affiliation laws apply to a particular employee.

## **II. What Outside Compensation and Affiliation Restrictions Apply to PA, PAS, and CNC?**

### *A. Outside Compensation Limitations Applicable only to Full-time PA and PAS*

Full-time PA, including PAS, are prohibited from receiving *any* outside compensation.<sup>10</sup> This prohibition applies to compensation arising from any outside activity, including compensation related to services provided as an employee, an independent contractor, or a sole

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<sup>4</sup> 5 C.F.R. § 2635.804(b)(2); Exec. Order No. 12,674, § 102, 54 Fed. Reg. 15,159 (Apr. 14, 1989), *as modified by* Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 19, 1990).

<sup>5</sup> *Id.*

*See* 5 C.F.R. § 2635.804(b)(2).

<sup>6</sup> 5 C.F.R. § 2636.303(a). A full listing of covered "noncareer" positions includes:

- 1) Any position that, by statute or as a matter of practice, is filled by Presidential appointment other than:
  - a. Positions in the uniformed services;
  - b. Positions in the foreign service that are below the level of Assistant Secretary or Chief of Staff;
- 2) Any noncareer position in the SES;
- 3) Any noncareer position in an SES-type system, such as the Senior Foreign Service;
- 4) Any position that is appointed pursuant to Schedule C or to a position under an agency-specific statute that establishes appointment criteria essentially the same as for a Schedule C;
- 5) Any position in a noncareer executive assignment position or in a position under an agency-specific statute that establishes appointment criteria essentially the same as for a noncareer executive assignment position.

<sup>7</sup> *Id.* In 2025, this means that the minimum rate of pay for the position must be equal to or greater than \$150,160.

<sup>8</sup> *Id.*

<sup>9</sup> For example, employees of the White House who make in excess of the minimum rate of basic pay for a GS-9, but less than 120 percent of the minimum rate of basic pay payable for GS-15, would be covered by the restrictions applicable to PA and PAS, but not the restrictions applicable to CNC.

<sup>10</sup> 5 C.F.R. § 2635.804; Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (Apr. 14, 1989), *as modified by* Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 19, 1990).

proprietor. For those PA and PAS who are also CNC, this prohibition is in addition to the limitations that apply to all CNC discussed below.

*B. Outside Compensation Limitations Applicable to all CNC*

*1. CNC are Prohibited from Receiving Any Outside Compensation Related to Professions Involving a Fiduciary Relationship*

All CNC are prohibited from receiving any outside compensation for “practicing a profession which involves a fiduciary relationship” or for “affiliating with, or being employed by, any entity which provides professional services involving a fiduciary relationship.”<sup>11</sup> A profession involves a fiduciary relationship if it requires clients to place substantial trust and confidence in the integrity of the practitioner, even if the practitioner is not considered a legal fiduciary to their clients.<sup>12</sup> Thus, practitioners in the legal, insurance, medical, architectural, financial services, and accounting fields are considered to practice a profession which involves a fiduciary relationship for purposes of the prohibition.<sup>13</sup>

Agency ethics officials should be mindful that CNC are prohibited from receiving compensation for affiliating with or being employed to perform professional duties by a company that provides professional services involving a fiduciary relationship, even if they themselves are not directly providing professional services involving a fiduciary relationship.<sup>14</sup> Note that a CNC is not statutorily prohibited by the outside earned income limitations from providing *uncompensated* services to an entity that provides professional services involving a fiduciary relationship.

*2. CNC are Prohibited from Receiving any Outside Compensation for Officer or Board Service*

All CNC are prohibited from receiving any outside compensation for serving as an officer or member of the board of any entity.<sup>15</sup> This restriction applies to service as an officer or a board member of for-profit organizations as well as non-profit organizations, professional associations, and any unit of state or local government. It does not, however, prevent a CNC from receiving actual and necessary expenses arising in connection with otherwise uncompensated board service.<sup>16</sup> For example, a CNC who is an officer of a homeowners association could not accept compensation for their service, but could accept reimbursement for supplies purchased for the association’s annual picnic.

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<sup>11</sup> 5 U.S.C. § 13144(a)(1), (3); 5 C.F.R. § 2636.305(a).

<sup>12</sup> 5 C.F.R. § 2636.305(b)(2).

<sup>13</sup> *Id.* This listing is not exhaustive.

<sup>14</sup> *See* 5 U.S.C. § 13144(a)(1); 5 C.F.R. § 2636.305(a)(1)(ii).

<sup>15</sup> 5 U.S.C. § 13144(a)(4); 5 C.F.R. § 2636.306(a).

<sup>16</sup> *See* 5 C.F.R. § 2636.303(b)(6).

### 3. *CNC are Prohibited from Receiving any Compensation for Teaching, Absent Prior Authorization*

All CNC are prohibited from receiving compensation for formal or informal teaching, absent prior authorization.<sup>17</sup> “Teaching” includes any presentation or interaction with the goal of instructing or imparting knowledge or skills.<sup>18</sup> For example, absent prior authorization, a CNC could not receive compensation for teaching a single course on applied physics at a local community center. OGE’s regulations provide the process agency ethics officials must use in determining whether it is appropriate to authorize compensated teaching.<sup>19</sup> Importantly, the regulations require that the final authorization be made by the DAEO or the ADAEO.<sup>20</sup> In addition, authorized compensation cannot exceed the cap discussed below and must conform to all other applicable laws and regulations.<sup>21</sup>

### 4. *CNC are Subject to a Cap on Outside Compensation for Other Activities*

CNC, other than full-time PA or PAS,<sup>22</sup> may receive outside compensation for activities other than those that are completely prohibited, as described above. However, compensation for all permissible outside activities is capped at “15 percent of the annual rate of basic pay for level II of the Executive Schedule . . . as of January 1 of such year,” prorated for the number of days the individual serves in Government.<sup>23</sup> OGE annually publishes a table that provides the limitation amount applicable (rounded to the nearest full dollar), depending on the date in the calendar year an individual becomes a CNC.<sup>24</sup> For example, a CNC who is not a full-time PA or PAS could provide weekend tours of a local museum on a compensated basis, so long as the amount of outside compensation did not exceed the statutory cap.

#### *C. Outside Affiliation Limitations Applicable to all CNC*

In addition to the above pay limitations, all CNC are also prohibited from permitting their name to be used by any outside entity that provides professional services involving a fiduciary relationship.<sup>25</sup> This restriction applies whether the CNC is compensated for the use of their name or not.<sup>26</sup> For example, a CNC would be prohibited from allowing a former law firm to use their

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<sup>17</sup> 5 U.S.C. § 13144(a)(5); 5 C.F.R. § 2636.307.

<sup>18</sup> 5 C.F.R. § 2636.307(b). The definition of “teaching” as used in the prior approval statute is broad and does not require that the teaching be related to the employee’s duties or the invitation to teach be offered to the employee on the basis of their official position. *Compare id. with* 5 C.F.R. § 2635.807 (prohibiting compensation for teaching, speaking, and writing that relates to an employee’s official duties).

<sup>19</sup> *Id.* § 2636.307(e).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 2636.307(d)(2).

<sup>22</sup> *See supra* Part I.

<sup>23</sup> 5 U.S.C. § 13143(a)(1)-(2).

<sup>24</sup> *See* OGE Legal Advisory LA-25-01, at 2 (Jan. 7, 2025).

<sup>25</sup> 5 U.S.C. § 13144(a)(2); 5 C.F.R. § 2636.305(a)(2).

<sup>26</sup> *See* 5 C.F.R. § 2636.305(a)(2).

last name as part of the firm name, even if the CNC received no compensation from the firm. Likewise, a CNC could not permit a hospital to use their name in advertising materials.<sup>27</sup>

### **III. Conclusion**

This Legal Advisory serves to remind agency ethics officials about the various limitations on outside earned income and affiliations that apply to PA, PAS, and CNC employees. OGE encourages ethics officials to work with CNC to resolve any potential outside compensation or affiliation issues before they enter Government service. Agency ethics officials who have questions concerning this Legal Advisory should contact their OGE Desk Officer.

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<sup>27</sup> In addition, CNC, like other employees, are also generally prohibited from using their official title, position, or authority of office to endorse any outside enterprise or service. 5 C.F.R. § 2635.702(c). Note that Federal law also prohibits any “individual, firm, or corporation practicing before an agency of the United States [from] using the name of . . . an individual in the service of the United States in advertising the business.” 5 U.S.C. § 501.