ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Listing Agency Officials

## Committee on Administration and Management

## Proposed Recommendation | December 12, 2019

1   Presidential appointees and the members of the Senior Executive Service (SES) who

2   perform significant leadership responsibilities sit at the highest levels of federal agencies.[1] In

3   December 2016, the federal government included 1,242 Senate-confirmed, presidentially-

4   appointed positions (PAS positions) and 472 other presidentially-appointed positions (PA

5   positions).[2] The SES included 8,156 individuals in 2016 (7,321 career SES, 737 noncareer SES,

6   and 96 limited-term/limited-emergency SES), many of whom act as agency leaders.[3] This group

7   of agency officials helps direct a federal workforce of more than two million employees.[4]

8   PAS officials make or advocate policy for a presidential administration and serve at the

9   pleasure of the President.[5] These officials at the top of federal agencies are often the most visible

10   political appointments and require the occupant to be nominated by the President and confirmed

11   by the Senate. PAS positions are part of the Executive Schedule, which prescribes the basic pay

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[1] This Recommendation uses the Administrative Procedure Act's broad definition of "agency." 5 U.S.C. § 551(1).

[2] SEN. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 216 (THE PLUM BOOK) (Comm. Print 2016), *available at* https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf.

[3] OFF. OF PERSONNEL MGMT., 2016 SENIOR EXECUTIVE SERVICE REPORT 3 (2017), *available at* https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2016.pdf.

[4] Bobby Ochoa, Listing Agency Officials 1, 6–8, 48 (Nov. 13, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-listing-agency-officials.

[5] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-249, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED 8 (2019), *available at* https://www.gao.gov/assets/700/697593.pdf; Ochoa, *supra* note 4, at 7–8.

12   schedule and salaries of most presidential appointees.[6] These officials are among the highest-

13   paid civilian government officials,[7] and a number of statutes and regulations establish special

14   rules, obligations, and restrictions on their activities.[8] These officials may be asked to resign or

15   be dismissed at any time, "[t]hey are not covered by standard civil service removal

16   procedures[,]" and they "customarily resign at the request of the new incoming administration"

17   during a presidential transition.[9]

18      The President directly appoints PA officials, who also serve at his or her pleasure. These

19   positions are typically located within the Executive Office of the President and multi-member

20   boards, commissions, and committees.[10] PA positions are not part of the General Schedule pay

21   system, and they may fall within the scope of several other pay systems, including the Executive

22   Schedule.[11] Similar to Senate-confirmed officials, PA officials may also be subject to special

23   rules, obligations, and restrictions on their activities, and they also typically resign during a

24   presidential transition.[12]

25      The SES is a government-wide personnel system covering senior management,

26   supervisory, and top-level policy positions in most federal agencies, and these positions are not

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[6] 5 U.S.C. §§ 5311 *et seq.*; *see also* OFF. OF PERSONNEL MGMT., PRESIDENTIAL TRANSITION GUIDE TO FEDERAL HUMAN RESOURCES MANAGEMENT MATTERS 19 (2016), *available at* https://www.opm.gov/about-us/our-people-organization/office-of-the-director/executive-secretariat/presidential-transition-guide-2016.pdf.

[7] *See* 2019 Executive & Senior Level Employee Pay Tables, OFF. OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2019/executive-senior-level/ (last visited Nov. 22, 2019) (Salary Table No. 2019-EX, listing salaries ranging from Level V at $156,000 to Level I at $213,600).

[8] *See, e.g.*, 18 U.S.C. § 207 (establishing various communications restrictions on former government officials, including additional restrictions on certain "very senior personnel" and certain restrictions relating to foreign entities); 5 U.S.C. §§ 7321 *et seq.* (The Hatch Act, prescribing rules regulating political activities of federal employees and establishing special provisions and exemptions applicable to PAS officials); 5 C.F.R. § 2634.202 (describing persons required to file public financial disclosure reports); 5 C.F.R. § 2636.303 (describing noncareer officials subject to fifteen-percent limitation on outside earned income); 5 C.F.R. § 2638.305 (describing additional ethics briefing required for PAS appointees within 15 days of appointment).

[9] OPM, PRESIDENTIAL TRANSITION GUIDE, *supra* note 6, at 7, 10.

[10] THE PLUM BOOK, *supra* note 2, at 213–16. Those PA officials within the Executive Office of the President are outside the scope of this Recommendation.

[11] Ochoa, *supra* note 4, at 8, 11.

[12] OPM, PRESIDENTIAL TRANSITION GUIDE, *supra* note 6, at 7.

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27    part of the General Schedule pay system.[13] These SES officials often direct and monitor the

28    activities of agencies; supervise the work of federal employees; exercise "important policy-

29    making, policy-determining, or other executive functions[;]" and are held accountable for the

30    success of programs and projects.[14] Approximately half of SES positions are reserved for career

31    employees, and the other half are classified as general SES positions, which may be filled by a

32    career appointee, a political appointee, a limited-emergency appointee, or a limited-term

33    appointee.[15] The Office of Personnel Management (OPM) allots and closely regulates the total

34    number of SES positions for each agency.[16] By law, the number of political appointees may not

35    exceed ten percent of government-wide SES positions and may not exceed twenty-five percent

36    of a single agency's total SES positions.[17]

37        The public often learns the identities of cabinet secretaries, heads of other agencies, and a

38    handful of other very high-ranking officials, if only through news coverage of the individuals.

39    But the public knows far less about the next layers of the executive branch, in part because

40    information can be difficult to locate in a centralized, updated, and comprehensive format.[18] A

41    recent report by the U.S. Government Accountability Office concluded that "there is no single

42    source of data on political appointees serving in the executive branch that is publicly available,

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[13] THE PLUM BOOK, *supra* note 2, at 217–18; 5 U.S.C. §§ 3131 *et seq.*; JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 64, 67–68 (2d ed. 2018), *available at* https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition. There are other, also significant government officials that do not fall within the PAS, PA, or SES. *See* Ochoa, *supra* note 4, at 4–14. For purposes of this Recommendation, we have focused on PAS, PA, and SES officials because the PAS and PA are presidential appointments and the SES is the government-wide personnel system for leadership positions. This Recommendation does not address other executive personnel systems. *See, e.g.*, 5 U.S.C. § 3132 (listing exclusions).

[14] 5 U.S.C. § 3132(a)(2).

[15] THE PLUM BOOK, *supra* note 2, at 217; Ochoa, *supra* note 4, at 6–7.

[16] THE PLUM BOOK, *supra* note 2, at 217–18; 5 U.S.C. §§ 3132 *et seq.*; SELIN & LEWIS, *supra* note 13, at 67.

[17] 5 U.S.C. § 3134.

[18] GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 5, at 10–14; Ochoa, *supra* note 4, at 1, 40–42, 50–51.

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43 comprehensive, and timely."[19] Much of this information is available in private-sector

44 publications, but they are expensive and not readily available to the public.

45       To be sure, various resources, including *United States Government Policy and*

46 *Supporting Positions* (the so-called "Plum Book"),[20] the *Official Congressional Directory*,[21] and

47 the *United States Government Manual*,[22] provide periodic snapshots of the occupants of certain

48 high-level agency positions. But these publications serve distinct purposes and objectives and, in

49 all events, given turnover, can quickly become out-of-date.[23] Likewise, although OPM maintains

50 extensive lists of federal employees, those lists are not readily available to the public.[24] Finally,

51 although some agencies provide current information about high-ranking officials on their

52 websites, practices vary significantly.[25] Detailed information about appointment terms, vacant

53 offices, acting officials, and delegated authority is often even more difficult to find.[26]

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[19] GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 5 (summarizing "What GAO Found").

[20] THE PLUM BOOK, *supra* note 2.

[21] UNITED STATES CONGRESS, JOINT COMMISSION ON PRINTING, OFFICIAL CONGRESSIONAL DIRECTORY: 115TH CONGRESS (2017).

[22] NAT'L ARCHIVES & REC. ADMIN., THE UNITED STATES GOVERNMENT MANUAL (2016).

[23] *See* GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 5, at 13 ("Until the names of political appointees and their position, position type, agency or department name, start and end dates are publicly available at least quarterly, it will be difficult for the public to access comprehensive and reliable information."); Ochoa, *supra* note 4, at 19–39.

[24] *See* Ochoa, *supra* note 4, at 46–49. OPM's data from agencies is based on the person, rather than based on the specific position or job. As a result, the agency stops sending information about a person and their position when they separate from an agency. With respect to PAS, PA, and SES officials, OPM's data includes information about the name, agency, job title, start date, and type of appointment (PAS, PA, career SES, noncareer SES, limited-term SES, and limited-emergency SES). For these data-related reasons—and because agencies are best positioned to make determinations about which SES officials perform significant leadership responsibilities—the Recommendation to OPM includes all SES officials. OPM's workforce information-reporting function under Civil Service Rule 9 excludes certain agencies and positions. 5 C.F.R. §§ 9.1, 9.2 (2019).

[25] *Id.* at 36–37.

[26] *See, e.g.*, Anne Joseph O'Connell, Acting Agency Officials and Delegations of Authority 16–18 (Dec. 1, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-acting-agency-officials (describing significant data-quality issues).

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54       Knowing the identities of those who help lead federal agencies is important for

55  promoting transparency and facilitating public participation in the work of government.[27] For

56  instance, members of the public (including reporters and academic researchers), congressional

57  members and staff, White House officials, and officials at other federal and state agencies all

58  sometimes have reasons to know this information.[28]

59       One of this Recommendation's purposes is to advance the Conference's recent efforts to

60  promote greater access to relevant agency information.[29] This Recommendation is a companion

61  to Recommendation 2019-__, *Acting Agency Officials and Delegations of Authority*, which

62  promotes compliance with the Federal Vacancies Reform Act of 1998 and other agency-specific

63  succession statutes and encourages federal agencies to improve transparency regarding the use of

64  acting officials and agency delegations of authority in the face of staffing vacancies.[30]

## RECOMMENDATION

### Recommendations Applicable to Agencies Generally

65    1.  Agencies should prominently display on their websites updated information about each

66        PAS and PA position, and any SES position that is assigned significant leadership

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[27] *See* GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 5, at 13; Ochoa, *supra* note 4, at 3.

[28] *See* GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 5, at 13. The Conference has previously addressed related issues. In 1968, the Conference recommended changes to the *U.S. Government Organization Manual*, specifically pointing out deficiencies with the "narrative text submitted" by agencies and encouraging agencies to improve these entries. Admin. Conf. of the U.S., Recommendation 68-2, *U.S. Government Organization Manual* (Dec. 11, 1968). This Recommendation goes much further, offering specific recommendations for making agency information publicly available.

[29] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017). Earlier Conference recommendations in accord include Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).

[30] Admin. Conf. of the U.S., Recommendation 2019-_, *Acting Agency Officials and Delegations of Authority*, __ Fed. Reg. _____ (_____).

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67    responsibilities, including the name and contact information of the current or acting
68    official, as well as whether it is a PAS, PA, or SES position (and whether it is a career or
69    noncareer position). Vacancies for such positions should also be prominently displayed.

**Recommendations Applicable to the Office of Personnel Management**

70    2.  The Office of Personnel Management (OPM) should publish data about PAS, PA, and
71        SES officials on a monthly basis on a public website and ensure the information is easily
72        accessible. This data should include the following fields, if applicable, for each listed
73        PAS, PA, and SES official: Name (first and last); Agency; Job Title; Start Date; and Type
74        of Appointment.
75    3.  OPM should create a separate list of former PAS officials to the extent feasible.

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