

§ 2636.301

5 CFR Ch. XVI (1–1–21 Edition)

TABLE 1 TO § 2636.104

Date of violation	Penalty
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	\$11,000
Violation occurring after Nov. 2, 2015	20,489

(b) *Disciplinary and corrective action.* An agency may initiate disciplinary or corrective action against an employee who violates any provision of this part, which may be in addition to any civil penalty prescribed by law. When an employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an agency may not initiate disciplinary or corrective action for violation of this part. Disciplinary action includes reprimand, suspension, demotion and removal. Corrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution or termination of an activity. It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, the Director of the Office of Government Ethics may order corrective action or recommend disciplinary action under the procedures at part 2638 of this subchapter. The imposition of disciplinary action is at the discretion of the employing agency.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998; 64 FR 47097, Aug. 30, 1999; 81 FR 41790, June 28, 2016; 82 FR 8133, Jan. 24, 2017; 83 FR 2331, Jan. 17, 2018; 84 FR 6055, Feb. 26, 2019; 85 FR 2281, Jan. 15, 2020]

Subpart B [Reserved]

Subpart C—Outside Earned Income Limitation and Employment and Affiliation Restrictions Applicable to Certain Noncareer Employees

§ 2636.301 General standards.

A covered noncareer employee shall not:

- (a) Receive outside earned income in excess of the 15 percent limitation described in § 2636.304 of this subpart;
- (b) Receive compensation or allow the use of his name in violation of the restrictions relating to professions in-

volving a fiduciary relationship described in § 2636.305 of this subpart;

(c) Receive compensation for serving as an officer or board member in violation of the restriction described in § 2636.306 of this subpart; or

(d) Receive compensation for teaching without having first obtained advance authorization as required by § 2636.307 of this subpart.

§ 2636.302 Relationship to other laws and regulations.

The limitations and restrictions contained in this section are in addition to any limitations and restrictions imposed upon an employee by applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interest. Even though conduct or the receipt of compensation is not prohibited by this subpart, an employee should accept compensation or engage in the activity for which compensation is offered only after determining that it is otherwise permissible. In particular, a covered noncareer employee should accept compensation only after determining that its receipt does not violate section 102 of Executive Order 12674, as amended, which prohibits a covered noncareer employee who is also a Presidential appointee to a full-time noncareer position from receiving *any* outside earned income for outside employment or for any other activity performed during that Presidential appointment.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43069, Aug. 12, 1998]

§ 2636.303 Definitions.

For purposes of this section:

(a) *Covered noncareer employee* means an employee, other than a Special Government employee as defined in 18 U.S.C. 202, who occupies a position classified above GS-15 of the General Schedule or, 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, and who is:

- (1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a

matter of practice, is filled by Presidential appointment, other than:

(i) A position within the uniformed services; or

(ii) A position within the foreign service below the level of Assistant Secretary or Chief of Mission;

(2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;

(3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in § 213.3301 of this title for Schedule C positions; or

(4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for non-career executive assignment positions. For purposes of applying this definition to an individual who holds a General Schedule or other position that provides several rates of pay or steps per grade, his rate of basic pay shall be the rate of pay for the lowest step of the grade at which he is employed.

Example 1. A Schedule C appointee to a position with the United States Information Agency who holds a GS-15 position and who is compensated at the rate for GS-15, Step 9 is not a covered noncareer employee even though the pay he receives in a calendar year exceeds the annual pay for a position above GS-15. Notwithstanding that he is compensated at Step 9, the basic rate of pay for the GS-15 position he holds is the rate in effect for GS-15, Step 1 of the General Schedule, which is lower than the rate for a position above GS-15.

Example 2. An employee of the Environmental Protection Agency who has been a career GS-15 employee for 10 years and who is offered a non-career SES position with the Federal Aviation Administration will, if he accepts the offer, become a covered non-career employee by reason of that appointment, regardless of his former status.

Example 3. A Department of Justice employee who holds a Schedule A appointment is not a covered noncareer employee even though he does not have competitive status within the meaning of § 212.301 of this title.

(b) *Outside earned income and compensation* both mean wages, salaries, honoraria, commissions, professional fees and any other form of compensation for services other than salary,

benefits and allowances paid by the United States Government. Neither term includes:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Income attributable to service with the military reserves or national guard;

(3) Income from pensions and other continuing benefits attributable to previous employment or services;

(4) Income from investment activities where the individual's services are not a material factor in the production of income;

(5) Copyright royalties, fees, and their functional equivalent, from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights;

(6) Actual and necessary expenses incurred by the employee in connection with an outside activity. Where such expenses are paid or reimbursed by another person, the amount of any such payment shall not be counted as compensation or outside earned income. Where such expenses are not paid or reimbursed, the amount of compensation or earned income shall be determined by subtracting the actual and necessary expenses incurred by the employee from any payment received for the activity; or

(7) Compensation for:

(i) Services rendered prior to January 1, 1991, or prior to becoming a covered noncareer employee;

(ii) Services rendered in satisfaction of a covered noncareer employee's obligation under a contract entered into prior to January 1, 1991; or

(iii) Services which the covered non-career employee first undertook to provide prior to January 1, 1991, where the standards of the applicable profession require the employee to complete the case or other undertaking.

Example 1. A covered noncareer employee is a limited partner in a partnership that invests in commercial real estate. Because he does not take an active role in the management of the partnership, his share of the partnership income is neither "outside earned income" nor "compensation."

§ 2636.304

5 CFR Ch. XVI (1-1-21 Edition)

Example 2. A covered noncareer employee of the Civil Rights Commission serves without compensation as a member of the Board of Visitors for a university. The roundtrip airfare and hotel expenses paid by the university to permit him to attend quarterly meetings of the Board are neither “outside earned income” or “compensation.”

Example 3. Where a covered noncareer employee pays for transcripts of a hearing in which he is providing pro bono legal representation, reimbursements for those expenses by a legal aid organization are neither “outside earned income” nor “compensation.”

Example 4. During the term of his appointment, a Deputy Assistant Secretary of Labor enters into a contract to write a book of fictional short stories. Royalties based on actual sales of the book after publication are investment income attributable to the property interest he retains in the book and, as such, are neither “outside earned income” nor “compensation.”

(c) *Receive* means that the employee has the right to exercise dominion and control over the compensation or outside earned income and direct its subsequent use. Compensation or outside earned income is received by an employee if it is for his conduct and:

- (1) If it is paid to any other person on the basis of designation, recommendation or other specification by the employee; or
- (2) If, with the employee’s knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Compensation that is prohibited by § 2636.305 through § 2636.307 of this subpart is received while an individual is an employee if it is for conduct by him that occurs while an employee, even though actual payment may be deferred until after Federal employment has terminated. Also, compensation or outside earned income donated to a charitable organization is received by the employee.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43069, Aug. 12, 1998; 64 FR 2422, Jan. 14, 1999; 72 FR 16987, Apr. 6, 2007]

§ 2636.304 The 15 percent limitation on outside earned income.

(a) *Limitation applicable to individuals who are covered noncareer employees on January 1 of any calendar year.* A covered noncareer employee may not, in any calendar year, receive outside

earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. The effective date of a change in the rate for level II of the Executive Schedule shall be the date on which a new rate of basic pay for level II first becomes applicable to any level II position.

NOTE: Notwithstanding the 15 percent limitation described in this section, a covered noncareer employee who is a Presidential appointee to a full-time noncareer position is prohibited by section 102 of Executive Order 12674, as amended, from receiving *any* outside earned income for outside employment or any other activity performed during that Presidential appointment.

Example 1. Notwithstanding that the compensation he will receive would not exceed 15 percent of the rate for level II of the Executive Schedule, a covered noncareer employee of the Department of Energy may not receive any compensation for teaching a university course unless he first receives the authorization required by § 2636.307 of this subpart.

(b) *Limitation applicable to individuals who become covered noncareer employees after January 1 of any calendar year.* The outside earned income limitation that applies to an individual who becomes a covered noncareer employee during a calendar year shall be determined on a pro rata basis. His outside earned income while so employed in that calendar year shall not exceed 15 percent of the annual rate of basic pay for level II of the Executive Schedule in effect on January 1 of the calendar year divided by 365 and multiplied by the number of days during that calendar year that he holds the covered noncareer position.

Example 1. A former college professor received an appointment to a noncareer Senior Executive Service position on November 1, 1991. The rate of basic pay in effect for Executive Level II on January 1, 1991 was \$125,100. For the 61 day period from November 1, 1991 through December 31, 1991, the amount of outside income he may earn is limited to \$3,129. That amount is determined as follows:

Step 1. The rate of basic pay for Executive Level II as in effect on January 1 of that year (\$125,100) is divided by 365. That quotient is \$342;

Step 2. The dollar amount determined by Step 1 (\$342) is then multiplied by the 61 days