

C, of this chapter for the appraisal period must have been "Fully Successful" or higher.

(2) Individuals eligible for a performance award include:

(i) A former SES career appointee who elected to retain award eligibility under 5 CFR part 317, subpart H. If the salary of the individual is above the ES-6 pay rate, the ES-6 rate is used for crediting the agency award pool under paragraph (b) of this section and the amount the individual may receive under paragraph (c) of this section.

(ii) A reemployed annuitant with an SES career appointment.

(iii) An SES career appointee who is on detail. If the detail is to another agency, eligibility is in the individual's official employing agency, i.e., the agency from which detailed. If the appointee is on a reimbursable detail, the agency to which the appointee is detailed may reimburse the employing agency for some or all of any award, as agreed upon by the two agencies; but the reimbursement does not affect the award pool for either agency as calculated under paragraph (b) or this section.

\* \* \* \* \*

(4) The agency head must consider the recommendations of the Performance Review Board (PRB), but the agency head has the final authority as to who is to receive a performance award and the amount of the award.

\* \* \* \* \*

(c) \* \* \* The rate of basic pay does not include locality-based comparability payments under 5 U.S.C. 5304 and 5 CFR part 531, subpart F, or special law enforcement adjustments under section 404 of the Federal Employees Pay Comparability Act of 1990 and 5 CFR part 531, subpart C.

\* \* \* \* \*

(f) \* \* \* The full performance award, however, is charged against the agency bonus pool under paragraph (b) of this section for the fiscal year in which the initial payment was made.

31. Section 534.405 is added to subpart D to read as follows:

**§ 534.405 Restrictions on premium pay and compensatory time.**

(a) Under 5 U.S.C. 5541(2)(xvi) and 5 CFR 550.101(b)(18), members of the Senior Executive Service (SES) are excluded from premium pay, including overtime pay.

(b) Since SES members are not eligible for overtime pay, they also are not eligible for compensatory time in lieu of overtime pay for work performed as an SES member. SES members are eligible, however, for compensatory

time off for religious purposes under 5 U.S.C. 5550a and 5 CFR part 550, subject J.

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**OFFICE OF GOVERNMENT ETHICS**

**5 CFR Part 2635**

RINS 3209-AA04, 3209-AA15

**Further Grace Period Extension for Certain Existing Agency Standards of Conduct**

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Office of Government Ethics is granting a further grandfathering grace period extension for up to eleven months for certain existing executive agency standards of conduct, dealing with financial interest prohibitions and prior approval for outside employment and activities, which have been temporarily preserved. This further action (one previous extension was granted last year) is necessary because many agencies have not been able to issue, with OGE concurrence and co-signature, interim or final supplemental regulations during the first two years' grace period. This further extension will help ensure that agencies which have submitted draft supplementals to OGE will have adequate time to issue, if they so desire, successor regulatory provisions to replace grandfathered financial interest prohibitions and prior approval requirements.

**EFFECTIVE DATE:** February 3, 1995.

**FOR FURTHER INFORMATION CONTACT:**

William E. Gressman, Office of Government Ethics, telephone: 202-523-5757, FAX: 202-523-6325.

**SUPPLEMENTARY INFORMATION:** The Office of Government Ethics is granting under the executive branch standards of ethical conduct a further extension of time for up to eleven months, until January 3, 1996, for certain agencies' existing conduct standards dealing with prohibited financial interests and prior approval for outside employment and activities. When OGE published its ethical conduct standards for executive branch employees in the **Federal Register** on August 7, 1992 (as now codified at 5 CFR part 2635), it provided that most existing individual agency standards of conduct would be superseded once the executive branch-wide standards took effect on February

3, 1993. However, OGE also provided, by means of notes following 5 CFR 2635.403(a) and 2635.803, that any existing agency standards dealing with the two types of restrictions noted above would be preserved for one more year, until February 3, 1994, or until the agency concerned issued (with OGE concurrence and co-signature) a supplemental regulation, whichever occurred first. See 57 FR 35006-35067, as corrected at 57 FR 48557 and 52583. Last year, OGE extended that original grace period for an additional year, until February 3, 1995 (or until agency issuance of a supplemental regulation), for those executive branch departments and agencies that had not yet had a chance to issue final or interim final successor rules. See 59 FR 4779-4780 (February 2, 1994) and, in particular, appendix A which was added to part 2635 at that time.

Through OGE's liaison efforts, the Office of the Federal Register (OFR) has assigned new chapters, including parts, at the end of title 5 of the Code of Federal Regulations to accommodate agencies' future supplemental standards regulations (on these two and other appropriate subject areas), as well as any supplemental agency regulations under OGE's executive branch-wide financial disclosure provisions at 5 CFR part 2634. Some 60 agencies have had such chapters reserved, including those which have by now already issued, with OGE concurrence and co-signature, interim final or final supplemental ethics regulations. However, many agencies have still not yet had the time to issue their planned supplemental standards regulations in interim or final form.

The Office of Government Ethics has therefore determined to permit a further preservation of existing agency regulatory standards of conduct setting forth financial interest prohibitions and outside employment and activities prior approval requirements for up to eleven more months, until January 3, 1996 (or until issuance by each agency of its supplemental regulation, whichever comes first), for those agencies which submitted draft supplemental standards regulations to OGE on or before January 25, 1995. This is the last grace period extension that OGE intends to grant. The agencies subject to this further grandfathering grace period extension, as provided in the notes (which are hereby being further amended) following 5 CFR 2635.403(a) and 2635.803, are enumerated at new appendix B which OGE is adding to part 2635. The agencies are listed in the order of the assignment of their chapter numbers at the end of 5 CFR. Agencies

not listed either have not expressed an interest in issuing supplemental agency ethics regulations, have indicated to OGE that they are no longer interested in a further grace period extension, did not file draft supplemental standards regulations with OGE by January 25, 1995, or have already issued final or interim final supplemental standards.

The Office of Government Ethics notes that it is not by this rulemaking setting a deadline for agencies to submit supplemental ethics regulations. Agencies can, with OGE concurrence and co-signature, issue supplementals at any time. Further, they can, at any time, have new title 5 CFR chapters reserved through OGE and OFR for such purpose if they have not already done so.

Moreover, if an agency's prohibited financial interest (and/or prior approval) restrictions are based on a separate statute, they are not superseded by the 5 CFR part 2635 executive branch-wide standards. If any related regulatory provisions were located in its old agency standards of conduct, the agency concerned could, after consultation with OGE, retain them in their existing place in the agency's own CFR title and chapter or move the provisions to another appropriate part of its regulations. See 5 CFR 2635.105(c)(3). Only prior standards of conduct provisions that are purely regulatory in nature are subject to supersession from the executive branch-wide regulation at 5 CFR part 2635, with entitlement to the successive grace periods for the two enumerated types of provisions as provided in the further amended notes at §§ 2635.403(a) and 2635.803 as well as appendixes A and B.

#### Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b) and (d), as Director of the Office of Government Ethics, I find good cause exists for waiving the general notice of proposed rulemaking and 30-day delay in effectiveness as to this grace period extension. The notice and delayed effective date are being waived because this rulemaking concerns a matter of agency organization, practice and procedure. Furthermore, it is in the public interest that those agencies concerned have adequate time to promulgate successor provisions to their existing standards of conduct regulations in these two areas without a lapse in necessary regulatory restrictions.

#### Executive Order 12866

In promulgating this grace period extension technical amendment, the Office of Government Ethics has adhered to the regulatory philosophy

and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This amendment has not been reviewed by the Office of Management and Budget under that Executive order, as it is not deemed "significant" thereunder.

#### Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rulemaking will not have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this rulemaking does not contain information collection requirements that require the approval of the Office of Management and Budget.

#### List of Subjects in 5 CFR Part 2635

Conflict of interests, Government employees.

Approved: January 27, 1995.

**Stephen D. Potts,**

*Director, Office of Government Ethics.*

Accordingly, pursuant to its authority under title IV of the Ethics in Government Act and Executive Orders 12674 and 12731, the Office of Government Ethics is amending 5 CFR part 2635 as follows:

#### PART 2635—[AMENDED]

1. The authority citation for part 2635 continues to read as follows:

**Authority:** 5 U.S.C. 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. The notes following both §§ 2635.403(a) and 2635.803 are amended by adding a new sentence at the end of each to read as follows:

**Note:** \* \* \* Provided further, that for those agencies listed in appendix B to this part, the grace period for any such existing provisions shall be further extended for an additional eleven months until January 3, 1996 (for a total of two years and eleven months after the effective date of this part) or until issuance by each individual agency concerned of a supplemental regulation, whichever occurs first.

3. A new appendix B is added at the end of part 2635 to read as follows:

#### Appendix B to Part 2635—Agencies Entitled to a Further (Second) Grace Period Extension Pursuant to Notes Following §§ 2635.403(a) and 2635.803

1. Department of the Treasury
2. Federal Deposit Insurance Corporation
3. Department of Energy
4. Federal Energy Regulatory Commission
5. Department of the Interior
6. Department of Commerce
7. Department of Justice
8. Federal Communications Commission
9. Farm Credit Administration
10. Securities and Exchange Commission
11. Office of Personnel Management
12. Thrift Depositor Protection Oversight Board
13. United States Information Agency
14. Occupational Safety and Health Review Commission
15. Department of State
16. Department of Labor
17. National Science Foundation
18. Small Business Administration
19. Department of Health and Human Services
20. Federal Labor Relations Authority
21. Department of Transportation
22. Pension Benefit Guaranty Corporation
23. Export-Import Bank of the United States
24. Department of Education
25. Environmental Protection Agency
26. National Transportation Safety Board
27. General Services Administration
28. Board of Governors of the Federal Reserve System
29. United States Postal Service
30. National Labor Relations Board
31. Equal Employment Opportunity Commission
32. Resolution Trust Corporation
33. Department of Housing and Urban Development
34. National Archives and Records Administration
35. Peace Corps
36. Tennessee Valley Authority
37. Consumer Product Safety Commission
38. Executive Office of the President
39. Department of Agriculture
40. Federal Mine Safety and Health Review Commission
41. Office of Management and Budget
42. Agency for International Development

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