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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 1001 and 4501

RIN 3206-AG87, 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the Office of Personnel Management

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management, with the concurrence of the Office of Government Ethics (OGE), is adopting as final an interim rule published July 16, 1996, issuing a final rule which supplements, for OPM employees, the executive branch-wide Standards of Ethical Conduct (Standards) issued by OGE.

EFFECTIVE DATE: August 11, 1997.

FOR FURTHER INFORMATION CONTACT: Wade Plunkett, Principal Deputy Ethics Official, U.S. Office of Personnel Management, Office of the General Counsel, 1900 E. Street, N.W., Washington, D.C. 20415-0001, Telephone: (202) 606-1700, FAX: (202) 606-2609.

SUPPLEMENTARY INFORMATION:

I. Background

On July 16, 1996, OPM published with OGE concurrence and co-signature, Supplemental Standards of Ethical Conduct for Employees of OPM as an interim rule with request for comments (61 FR 36993-36997). The interim rule was intended to supplement the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) published by OGE on August 7, 1992, and effective February 3, 1993 (57 FR 35006-35067), as corrected at 57 FR 48557, 57 FR 52583, and 60 FR 51667, and amended at 61 FR 42965-42970 (as corrected at 61 FR

48733 and 61 FR 50689-50691) (interim rule revisions adopted as final at 62 FR 12531), with additional grace period extensions for certain existing agency standards of conduct, including requirements for prior approval of outside activities, at 59 FR 4779-4780, 60 FR 6390-6391, and 60 FR 66857-66858. The executive branch-wide Standards, codified at 5 CFR part 2635, establish uniform standards of ethical conduct for executive branch employees. The interim rule was issued pursuant to 5 CFR 2635.105, which authorizes executive branch agencies to publish agency-specific supplemental regulations necessary to implement their respective ethics programs. The interim rule, in new 5 CFR part 4501, contained a notice requirement designed to ensure that OPM employees do not use their official positions or nonpublic information to obtain an advantage for themselves or for certain other persons on competitive and other examinations relating to Federal service; a requirement, revised from prior 5 CFR 1001.735-203, for OPM employees to obtain prior approval before engaging in certain types of outside activities; and a cross-reference to other ethics and conduct-related statutes and regulations. With regard to 5 CFR part 1001, OPM's internal standards of conduct regulations, the interim rule also repealed that portion which had been retained on an interim basis pending issuance of OPM's supplemental standards of ethical conduct regulations and those portions which had been superseded by the new Standards or by the executive branch financial disclosure regulations issued by OGE; retained a separate Privacy Act conduct code; and added to 5 CFR part 1001 a cross-reference to ethics and other conduct-related statutes and regulations.

The interim rule requested comments and prescribed a 30-day comment period. OPM received two comments on the interim rule, one from an OPM employee and another from the President of the International Personnel Management Association. Both comments were timely. OPM has carefully considered the points made in the comments, reviewed other Federal agency rules, considered changes in Federal law since publication of the interim rule, and reexamined OPM's previous requirement for prior approval of outside employment and activity.

OPM has decided to make a minor modification to the rule. With that modification, OPM, with OGE's concurrence, is now adopting as final the interim rule Supplemental Standards of Ethical Conduct for Employees of the U.S. Office of Personnel Management for codification in chapter XXXV of 5 CFR, consisting of part 4501.

II. Summary of the Comments

The employee who commented on the interim regulations asserted that OPM should have allowed more time for comment. Both commenters objected to the requirement for obtaining prior approval before engaging in certain outside activities. The employee also asserted that the regulatory definitions are confusing. The personnel management association official suggested that the prior approval requirements raise the question of whether approval of an outside activity would constitute "sanction" of the activity by OPM. Finally, the personnel management association official suggested that the requirement for prior approval runs counter to the spirit of an amendment to 18 U.S.C. 205.

III. Analysis of the Comments

Comment Period

The employee commenter asserted that OPM should have allowed more time for comment, stating that the changes are not "minor" and that it was unnecessary for the regulations to go into effect immediately. OPM was not required to publish its supplemental standards as a proposed rule or an interim rule with request for comment, but could have published the new supplemental standards as a final rule pursuant to authority at 5 U.S.C. 1103(b)(1) and 1105. OPM believes it took reasonable and appropriate steps to notify employees of the publication of the interim rule, and that an extension of the comment period is not warranted. OPM received no additional comments since August 15, 1996.

Section 4501.103 Prior Approval for Certain Outside Activities

Both commenters objected to the requirement for obtaining prior approval before engaging in certain outside activities, contained in 5 CFR 4501.103(a). The commenters perceived the requirement for prior approval of the

employee's participation, for or without compensation, in the types of outside activities set forth at 5 CFR 4501.103(a) as being unnecessary and an infringement upon the employee's freedom of speech. They assert that this is especially true with regard to the provision of professional services involving the application of the same specialized skills or the same educational background as performance of the employee's official duties (§ 4501.103(a)(1)) and teaching, speaking, and writing that relates to the employee's official duties (§ 4501.103(a)(2)), but which are conducted without compensation to the employee. The employee commenting asserted that the requirement covers activities that "never before have been considered to be problems" and seems designed primarily "to ensure that the employee repeatedly affirms that he or she knows what the rules are." Both commenters were concerned also that the prior approval requirement involves burdensome "red tape" to obtain approval, would prevent the employee from speaking openly and informally in professional meetings—according to the employee, "in some cases educating audiences about technical issues, and in others clarifying OPM policies"—and the employee thought that the requirement would effectively prohibit the professional employee from "doing all the normal things that a professional does to maintain the role of professional." In OPM's view, however, prior approval for certain activities serves many legitimate functions, not the least of which is an opportunity to counsel in order to ensure that the agency and the employee are aware of potential violations of ethics laws or regulations and take appropriate steps to avoid their violation. Violations of ethics laws or regulations may occur even where the activity is performed without monetary compensation to the employee. Prior approval also provides a means of protection for the employee against subsequent adverse action by ensuring that the employee is aware of the specific applicability of ethics statutes and regulations to the proposed activity.

It would be incorrect to conclude, because the previous OPM requirement for prior approval which was in effect prior to the issuance of the OGE Standards did not expressly mention other types of activities, that other activities could not present violations of ethics laws or regulations which would require resolution.

In drafting § 4501.103(a), OPM took care to clarify the previously existing requirement in prior 5 CFR 1001.735–

203 and to narrow its scope, consistent with the Standards. OPM's former regulations also prohibited "[o]utside employment activity which is in violation of a statute, Executive Order, or regulation, including applicable State and local statutes and ordinances." 5 CFR 1001.735–203(a)(4).

Although an activity might be lawful, there could be parameters to an activity, such as restrictions upon the employee's representational activities, imposed by ethics laws and regulations, some of which have criminal sanctions. The requirement that an employee obtain prior approval was designed to ensure that the employee was aware of any such limitations.

Prior written approval from the employee's regional or staff office head was required before the employee could serve as a member of a committee or board which planned or rendered advice on training courses or programs offered by non-Government organizations, or could engage in after-hours teaching as a faculty member; receipt of compensation was not a prerequisite. See prior 5 CFR 1001.735–203 (c) and (d). Previously, prior written approval was also required before an employee "engage[d] in any kind of outside paid employment on a substantially regular basis," 5 CFR 1001.735–203(f). As noted, OPM determined in its new supplemental standards to focus more narrowly the prior approval requirement. See 5 CFR 4501.103 (a)(1)–(a)(4).

Nonetheless, the former, as well as the current, provisions on outside employment and activity expressly did not preclude an employee from participating in the affairs of a "charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civil organization." See prior 5 CFR 1001.735–203(g)(3). The prior approval process does not seek to prevent the free exercise of an employee's rights to outside employment or speech as is evident by new 5 CFR 4501.103(c) which provides that:

Approval shall be granted only upon a determination by the agency designee, in consultation with an agency ethics official when such consultation is deemed necessary by the agency designee, that the outside activity is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

This section was included to show that the presumption is that an activity will be approved unless there is some ethical violation which must be addressed. We emphasize, further, that OPM's new rules contained in 5 CFR part 4501 are supplemental to, and

intended to be read in conjunction with, the OGE Standards contained at 5 CFR part 2635. Currently, the OGE Standards at 5 CFR part 2635, subpart H, provide for some restrictions on outside activities and additionally allow for prior approval to ensure that no other existing statutes or regulations will be violated.

Insofar as comments on the interim rule have asserted that the prior approval requirement itself somehow violates employees' rights under the First Amendment of the Constitution, we point out that the requirement does not prohibit any form of expression or association. In the case of *Williams v. Internal Revenue Service*, 919 F.2d 745 (D.C. Cir. 1990), it was held that an agency regulation that required employees to obtain permission from the agency before engaging in outside employment and that was tailored to the Government's interest in efficiency and avoiding the appearance of impropriety, did not violate employees' First Amendment rights.

Knowledge of these Standards is the personal responsibility of every OPM employee. OPM has established an ethics point of contact in every OPM service or staff office at the central office and agency ethics officials in the Office of the General Counsel to facilitate access to ethics laws and regulations for OPM employees. However, due to the frequent complexity of ethics laws and regulations, understanding of the rules may require consultation with an agency ethics official. For this reason, OPM has endeavored to isolate and require prior approval of those types of outside activities where an ethics statute or regulation may limit the employee's activities to ensure that both the interests of the Government and the employee are protected.

The personnel management association official suggests that the prior approval requirement runs counter to a recent amendment to 18 U.S.C. 205. OPM disagrees. The Federal Employee Representation Improvement Act of 1996; Pub. L. 104–177, 110 Stat. 1563, August 6, 1996, modified 18 U.S.C. 205 to permit employee representation of employee organizations under certain circumstances. OPM published proposed regulations reflecting this amendment's impact on its 5 CFR part 251 executive branch-wide regulations on agency relationships with organizations representing Federal employees and other organizations that are not labor organizations. See 62 FR 19525 (April 22, 1997). That proposed revision to the part 251 agency relationships regulations would continue the express provision that

agency officials and employees are advised to consult with their designated agency ethics officials for guidance regarding any conflicts of interests that may arise under 18 U.S.C. 205. Moreover, the modification to section 205 permitting Federal employees to represent certain nonprofit organizations before the Government in certain circumstances is different in focus, from the separate, and consistent requirement in these supplemental standards regulations that OPM employees obtain prior approval before engaging in certain outside activities. OPM feels both regulations are consistent with current Government-wide policy and each other, and it should not revise the scope of the approval for teaching, speaking and writing which relates to official duties in this part 4501 regulation applicable to OPM employees. This authority will be exercised consistent with the provisions of 18 U.S.C. 205, as amended, and other applicable conflicts laws and regulations.

Definitions

The employee asserts that the regulations are confusing in that they refer to definitions contained elsewhere in the Code of Federal Regulations, such as definitions of "official duties", "outside activity", "profession", "prohibited source", and "compensation", to which, he contends, most OPM readers do not have access. The prior approval requirement regarding teaching, speaking, and writing, contained at 5 CFR 4501.103(a)(2), supplements the Office of Government Ethics Standards contained at 5 CFR 2635.801 and 2635.807. The definition of "compensation" is contained at 5 CFR 2635.807(a)(2)(iii). Section 4501.103(d) defines the terms "active participant," "nonpublic information," "professional services," "prohibited source," and "relates to the employee's official duties." It is OPM's view that the terms necessary for employees to understand the regulation are adequately provided and cross-references are clearly stated. However, should access to the regulations pose a problem or should any other confusion exist, agency ethics officials are available to answer specific questions regarding any ethics provision's applicability to OPM employees.

Appearance of OPM Sanctioning an Outside Activity

The personnel management association official commented that the prior approval requirement raises the question of whether "approval" of an

outside activity would constitute "sanction" of the activity by OPM. The agency has a legitimate interest in the teaching, making of a speech or other presentation by an agency employee on a matter that relates to the employee's official duties and which, by the manner of its presentation, could create the appearance of being the official position of OPM. However, the prior approval requirement, as previously discussed, is meant to provide an opportunity to counsel in order to ensure that the agency and employee are aware of any violation of ethics laws or regulations. It should not in any way indicate that OPM is sanctioning the activity.

In summary, OPM has determined not to modify any of the substantive provisions in adopting the interim supplemental OPM standards at 5 CFR part 4501 as final. A typographical error will be corrected as noted below.

IV. Correction of Typographical Error

OPM is correcting in this final rule a typographical error that appeared in the authority citation for part 4501 which incorrectly cites 5 CFR 2635.802 as "2635.-802".

Regulatory Flexibility Act

As Director of OPM, I certify that this regulation will not have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Paperwork Reduction Act

As Director of OPM, I have determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 5 CFR Parts 1001 and 4501

Conflict of interests, Government employees.

Dated: July 16, 1997.

James B. King,

Director, U.S. Office of Personnel Management.

Approved: July 29, 1997.

Stephen D. Potts,

Director, Office of Government Ethics.

Accordingly, OPM is adopting the interim rule, adding 5 CFR part 4501 and amending 5 CFR part 1001, which was published at 61 FR 36993 on July 16, 1996, as a final rule with the following change.

Chapter XXXV Office of Personnel Management

PART 4501—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE OFFICE OF PERSONNEL MANAGEMENT

1. The authority citation for part 4501 is corrected to read as follows:

Authority: 5 U.S.C. 7301; 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; 5 CFR 2635.105, 2635.702, 2635.703, 2635.802, 2635.803, 2635.805.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. 94-106-7]

RIN 0579-AA71

Importation of Beef From Argentina; Technical Amendment

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; technical amendment.

SUMMARY: In a final rule published in the **Federal Register** on June 26, 1997, that will be effective August 25, 1997, we amended the regulations governing the importation of meat and meat products by allowing, under certain conditions, the importation of fresh, chilled or frozen, beef from Argentina. It was our intent that the amended regulations also allow the importation of cured or cooked beef that would otherwise not be allowed importation, provided it meets the same requirements as for fresh, chilled or frozen, beef. In this amendment, we are clarifying that intent. We are also correcting the Supplementary Information of the final rule to include the date of publication and **Federal Register** citation of a document we referred to.

DATES: This amendment is effective August 25, 1997.

FOR FURTHER INFORMATION CONTACT: Dr. Gary Colgrove, Chief Staff Veterinarian, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737-1231, (301) 734-8590.