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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2634

RIN 3209-AA00

#### Amendment to Clarify Regulatory Intent on Finality of Review for Complaints Regarding Designation of Positions for Employee Confidential Financial Disclosure Reporting

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

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

**SUMMARY:** The Office of Government Ethics is amending the executive branchwide financial disclosure regulation to clarify its original intent that the review provided for therein by an agency head (or his designee) is final for all purposes regarding employee complaints about designation of positions for confidential financial disclosure reporting, and that it constitutes the sole and exclusive means of such review.

**EFFECTIVE DATE:** March 31, 1998.

**ADDRESSES:** Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attn.: Mr. G. Sid Smith.

**FOR FURTHER INFORMATION CONTACT:** G. Sid Smith, Senior Associate General Counsel, Office of Government Ethics, telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

**SUPPLEMENTARY INFORMATION:** Six years ago, the Office of Government Ethics issued a regulation at subpart I of 5 CFR part 2634 (under its authority at 5 U.S.C. appendix, section 107(a) and section 201(d) of Executive Order 12674) to govern the confidential financial disclosure reporting system for executive branch employees, effective October 5, 1992. Pursuant to the provisions therein at §§ 2634.904 and 2634.905, each executive branch

department and agency designates which positions will require employees to file confidential disclosure reports (primarily OGE Form 450), based on criteria in the regulation. Section 2634.906 established the executive branch procedures for handling employees' complaints about an agency's designation of their positions, whereby review and decision of the agency head or his designee shall be final.

The purpose of this finality, without additional appeals or complaints, is to avoid protracted review of filer designations, which could seriously undermine the effectiveness and orderly administration of the executive branch confidential financial disclosure system. While an agency's decision to require confidential reports by employees in designated positions affects the privacy of employees, there are sufficient safeguards built into the system to adequately minimize privacy intrusions, such that the need for nonpublic financial disclosure clearly outweighs privacy concerns. Therefore, prompt and final decisions about who must file these reports are necessary and appropriate.

The bases for the confidential financial disclosure system and the safeguards that have been built in are described at 5 CFR 2634.901. Specifically, the confidential disclosure system serves the necessary purposes of assisting in the prevention of employee conflicts of interest and maintaining ethical integrity in agency programmatic functions. These reports are strictly confidential, not available to the public under the Freedom of Information Act (5 U.S.C. 552, exemptions (b)(3), (b)(4) and (b)(6)) or otherwise, and protected under the Privacy Act (5 U.S.C. 552a), section 107(a) of the Ethics in Government Act (5 U.S.C. appendix, § 107(a)), and section 201(d) of Executive Order 12674. Additionally, only certain types of positions may be designated, applying the criteria provided, and employees may seek review by the agency head (or designee) of an agency decision to designate their positions for filing, in accordance with the procedure prescribed in § 2634.906.

Given the importance of the confidential reporting system and these built-in protections for employees, OGE determined that it was necessary and appropriate to reach finality as promptly

as possible when handling filer designation complaints. That was and continues to be the basis for the statement in the regulatory text at 5 CFR 2634.906 that the decision of the agency head or his designee is final. Because OGE considered the finality language of the regulation to be clear and unambiguous, its meaning was not discussed in the preamble to that regulatory promulgation at 57 **Federal Register** 11800-11830 (April 7, 1992).

It has become apparent, however, that some may be interpreting this finality as limited to the agency's internal decisional mechanism for review, leaving open the possibility of negotiated grievance and arbitration procedures, or other remedies within or outside the agency. See, for example, the Federal Labor Relations Authority's decision in *American Federation of Government Employees, Local 3258 (Union) and U.S. Department of Housing and Urban Development, Boston, Massachusetts (Agency)*, 0-AR-2734 (FLRA, Feb. 19, 1998).

In order to clarify the original intent of the regulation in that regard, OGE is issuing this minor clarifying regulatory amendment, which will state more emphatically that the agency head's (or his designee's) decision upon review of complaints regarding the designation of an employee's position for filing confidential financial disclosure reports is final and conclusive for all purposes, notwithstanding any other provision of law or regulation. Specifically, the amendment to the regulation re-emphasizes, by expressly stating, that this procedure is the sole and exclusive means of seeking such review, and that the final decision by the agency head or designee is intended to preclude administrative or negotiated grievances, arbitration procedures, and any other review or appeal, either within or outside the agency.

#### 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, public comment procedures and 30-day delay in effectiveness as to this revision. The notice, comment and delayed effective date are being waived because this minor amendment to OGE financial disclosure regulations concerns a matter of agency

organization, practice and procedure. Furthermore, it is in the public interest that this amendment become effective immediately, in order to preserve the orderly administration of the confidential financial disclosure system. The amendment's sole purpose is to clarify the original intent of the financial disclosure regulation on a discrete matter which has been the subject of recent question.

#### Executive Order 12866

In promulgating this minor amendment to its regulation, OGE 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 because it primarily affects Federal executive branch agencies and their employees.

#### Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply, because this rulemaking does not create any additional information collection requirements, but simply clarifies the finality of a procedure for determining which positions require employees to file confidential financial disclosure reports (OGE Form 450), involving an information collection procedure previously approved in February 1996 by the Office of Management and Budget (OMB Control No. 3209-0006).

#### List of Subjects in 5 CFR Part 2634

Administrative practice and procedure, Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

Approved: March 17, 1998.

**Stephen D. Potts,**

*Director, Office of Government Ethics.*

For the reasons set forth in the preamble, the Office of Government Ethics is amending part 2634 of chapter XVI of 5 CFR as follows:

#### PART 2634—[AMENDED]

1. The authority citation for part 2634 continues to read as follows:

**Authority:** 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; 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. Section 2634.906 is amended by revising the second sentence and adding a new final sentence and a note at the end to read as follows:

#### § 2634.906 Review of confidential filer status.

\* \* \* A decision by the agency head or designee regarding the complaint shall be final and conclusive for all purposes, notwithstanding any other provision of law or regulation. This procedure is the sole and exclusive means of seeking review of an agency's decision to designate positions and the employees therein for filing confidential financial disclosure reports.

**Note:** The provision in this section for a final decision by the agency head or designee is intended to preclude administrative or negotiated grievances, arbitration procedures, and any other review or appeal, either within or outside the agency. This finality of the agency head's (or designee's) decision is necessary in order to maintain the prompt and orderly administration of the executive branch confidential financial disclosure system.

[FR Doc. 98-8312 Filed 3-30-98; 8:45 am]

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#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 51

[Docket Number FV-97-302]

RIN 0581-AB51

#### Fees for Destination Market Inspections of Fresh Fruits, Vegetables and Other Products

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the regulations governing the inspection and certification for fresh fruits, vegetables and other products by increasing by approximately 10 percent the fees charged for the inspection of these products at destination markets. These revisions are necessary in order to recover, as nearly as practicable, the costs of performing inspection services at destination markets under the Agricultural Marketing Act of 1946. The

fees charged to persons required to have inspections on imported commodities in accordance with the Agricultural Marketing Agreement Act of 1937 and for imported peanuts under the Agricultural Act of 1949 are also affected. This rule also revises the regulations with regard to the disposition of inspection certificates to require that one copy of the certificate be delivered or mailed to the shipper of the inspected product.

**EFFECTIVE DATE:** April 6, 1998.

**FOR FURTHER INFORMATION CONTACT:** Rob Huttenlocker, Fresh Products Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, PO Box 96456, Room 2049 South Building, Washington, DC 20090-6456, (202) 720-0297.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed by the Office of Management and Budget (OMB) and has been determined not significant for purposes of Executive Order 12866.

Also, pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

AMS regularly reviews its user-fee financed programs to determine if the fees are adequate. The Fresh Products Branch (FPB) of the Fruit and Vegetable Programs, AMS, has and will continue to seek out cost saving opportunities and implement appropriate changes to reduce its costs. Such actions can provide alternatives to fee increases. However, even with these efforts, the existing fee schedule will not generate sufficient revenues to cover program costs while maintaining an adequate reserve balance (four months of costs) as called for by Agency policy (AMS Directive 408.1). Current revenue projections for destination market inspection work during FY 97 are \$12.0 million with costs projected at \$11.9 million and an end-of-year reserve of \$3.0 million. However, FPB's trust fund balance for this program will be approximately \$1.0 million under the four-month level of approximately \$4.0 million. Further, FPB's costs of operating the destination market program are expected to increase to approximately \$12.9 million during FY 98 and to approximately \$13.2 million in FY 99. These cost increases will result from both inflationary increases with regard to current FPB operations