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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Parts 2634 and 2636

RINs 3209-AA00 and 3209-AA13

#### Removal of Obsolete Regulations Concerning the Inoperative Statutory Honorarium Bar, Revisions to Related Supplemental Reporting Requirements, and Conforming Technical Amendments

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

**ACTION:** Final rule; technical amendments and removals.

**SUMMARY:** The Office of Government Ethics is removing obsolete executive branch regulatory provisions implementing the statutory honorarium bar, which is no longer legally operative. In addition, OGE is removing related executive branch regulatory provisions concerning a dormant special reporting requirement for payments to charitable organizations in lieu of honoraria. That reporting requirement is being subsumed (for those few to whom it may apply) as part of the overall executive branch financial disclosure regulation, but will remain inactive for now, pending further examination. For conformity with these changes, OGE is also making minor technical amendments to regulatory provisions covering the overall executive branch financial disclosure system and the statutory restrictions for certain employees on outside earned income, employment and affiliations.

**DATES:** These technical amendments and removals are effective August 12, 1998, except that § 2634.302(a)(2) is stayed indefinitely until OGE makes a final determination about its status. Once that determination is made, OGE will publish an appropriate document in the **Federal Register**, and will also notify executive branch departments and agencies by memorandum.

**ADDRESSES:** Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attn.: Mr. G. Sid Smith. A copy of the OGE Memorandum noted in the "Supplementary Information" section below may be obtained from OGE's Web site on the Internet at <http://www.usoge.gov>, or by contacting Mr. 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:** In *National Treasury Employees Union v. United States*, 513 U.S. 454 (1995), the U.S. Supreme Court overturned, as to most executive branch employees, the honorarium bar at 5 U.S.C. app., section 501(b) which had been enacted as part of the Ethics Reform Act of 1989. Subsequently, the Department of Justice determined that because of the scope of the Supreme Court decision, the statutory ban on receipt of honoraria was inoperative as to all Government employees. See OGE Memorandum to Designated Agency Ethics Officials, General Counsels and Inspectors General of February 28, 1996 (# DO-96-012). On that basis, this rulemaking removes the provisions in OGE's executive branchwide regulations at subpart B of 5 CFR part 2636 that previously implemented the honorarium bar, which is now legally inoperative. By final rule at 62 FR 48746-48748 (September 17, 1997), OGE has already removed cross-references to the honorarium bar that were contained in the executive branch regulations on financial disclosure and standards of ethical conduct at 5 CFR parts 2634 and 2635.

By this current rulemaking, OGE is also removing from 5 CFR part 2636 the provisions in § 2636.205 on special confidential reporting of information about payments to charitable organizations in lieu of honoraria, as a supplement to employee financial disclosure reports. That requirement was specified in the financial disclosure portion of the Ethics Reform Act of 1989 (5 U.S.C. app., section 102(a)(1)(A)), but has never been activated for the executive branch. The effective date of the provisions in 5 CFR part 2636 to implement this special reporting requirement was deferred several times

by OGE, most recently indefinitely at 57 FR 5369 (February 14, 1992), pending development of a reporting form. Subsequently, because of legal uncertainties about the related portion of the Ethics Reform Act of 1989 which had banned receipt of honoraria, as well as overall policy issues about how to implement the reporting requirement itself, this special reporting requirement remained inactive. With the determination by the Department of Justice that the statutory bar on receipt of honoraria is legally inoperative, as discussed above, the implementing provisions of 5 CFR part 2636 on supplemental disclosure are no longer necessary. That results because, by removing a major incentive for payments to charitable organizations in lieu of honoraria (which had been permissible notwithstanding the honorarium bar), the determination that the honorarium bar is no longer operative will virtually eliminate the need for employees to make these supplemental reports, in OGE's opinion. While the statutory requirement for supplemental reporting of information about charitable payments in lieu of honoraria remains, it no longer justifies a separate regulatory structure and form, and the attendant continuing need for distinct Paperwork Reduction Act clearance.

In place thereof, this special supplemental reporting requirement will be preserved in a dormant status, by subsuming its basic outline into the overall executive branch financial disclosure system at 5 CFR part 2634. Minor changes to that part are being made by this current rulemaking to conform with the law by limiting the potential scope of this special reporting requirement to public financial disclosure filers, to eliminate reference to a supplemental report form, and to preserve the supplemental reporting requirement as dormant (not currently effective) for the executive branch, pending further determination of its viability. Its viability remains somewhat of an open question, in light of the inoperability of the related honorarium bar, since these provisions were enacted together as part of the Ethics Reform Act of 1989. If this supplemental reporting requirement is subsequently activated, OGE will notify affected executive branch departments and agencies, and

provide them with appropriate guidance.

Finally, in order to conform with the removals and changes discussed above, OGE is making minor technical amendments to the regulatory provisions in 5 CFR part 2636 concerning restrictions under 5 U.S.C. app., section 501(a) and section 502 on outside earned income, employment and affiliations which apply to certain noncareer employees. Those technical amendments remove references that become obsolete, in light of the changes discussed above.

**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 these revisions. The notice and delayed effective date are being waived because these technical amendments to certain OGE regulations concern matters of agency organization, practice and procedure. Furthermore, it is in the public interest that the obsolete provisions be removed as soon as possible.

**Executive Order 12866**

In promulgating these technical amendments to its regulations, 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. These amendments have also been reviewed by the Office of Management and Budget under that Executive order.

**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, involving technical amendments and removals, eliminates the detailed separate regulatory structure (old OMB paperwork control #3209-0004, now expired), which had been developed but never made effective in the executive branch, for supplemental reporting of payments in lieu of honoraria to charitable organizations. Executive branch employees filing public financial

disclosure reports (SF 278s, OMB control #3209-0001) will be advised of this supplemental confidential reporting requirement by separate OGE guidance and by their agencies, if it is subsequently activated. For now, it will be subsumed by the financial disclosure regulation at 5 CFR part 2634, which will preserve the basic outline of this supplemental requirement. Further, if it is activated, OGE expects a very low volume of these supplemental reports, amounting to less than 50 per year for the entire executive branch, with fewer than 10 private citizen filers per year. These paperwork determinations have been approved by the Office of Management and Budget.

**List of Subjects**

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.

5 CFR Part 2636

Administrative practice and procedure, Conflict of interests, Government employees, Penalties.

Approved: December 12, 1997.

**Stephen D. Potts,**

*Director, Office of Government Ethics.*

For the reasons set forth in the preamble, the Office of Government Ethics is amending parts 2634 and 2636 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. In § 2634.302, paragraph (a)(2) is revised to read as follows and is immediately stayed indefinitely:

**§ 2634.302 Income.**

(a) \* \* \*

(2) In the case of payments to charitable organizations in lieu of honoraria, public filers shall also file a separate confidential listing of recipients, along with dates and amounts of payments, to the extent known. (See 5 U.S.C. app. 102(a)(1)(A) and app. 501(c).)

\* \* \* \* \*

**§ 2634.601 [Amended]**

3. Section 2634.601 is amended by removing paragraph (c) and redesignating paragraph (d) as new paragraph (c).

**PART 2636—[AMENDED]**

4. The authority citation for part 2636 continues to read as follows:

**Authority:** 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. The heading of part 2636 is revised to read as follows:

**PART 2636—LIMITATIONS ON OUTSIDE EARNED INCOME, EMPLOYMENT AND AFFILIATIONS FOR CERTAIN NONCAREER EMPLOYEES**

6. Section 2636.101 is revised to read as follows:

**§ 2636.101 Purpose.**

This part is issued under authority of title VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended), to implement the 15 percent outside earned income limitation at 5 U.S.C. app. 501(a) and the limitations at 5 U.S.C. app. 502 on outside employment and affiliations, which are applicable to certain noncareer employees.

**§ 2636.102 [Amended]**

7. Section 2636.102 is amended by removing from paragraph (a) the words and terms “or to receive and review reports of honoraria recipients under § 2636.204 of this part”.

8. Section 2636.103 is amended by revising paragraph (a)(2)(i) to read as follows:

**§ 2636.103 Advisory opinions.**

(a) \* \* \*  
(2) \* \* \*

(i) Whether a particular entity qualifies as a charitable organization to which a payment in lieu of honoraria may be excluded from the definition of outside earned income and compensation under § 2636.303(b)(7) of this part; or

\* \* \* \* \*

**§ 2636.104 [Amended]**

9. Section 2636.104 is amended by removing from the first sentence of paragraph (a) the words “who accepts an honorarium or engages in any other conduct” and adding in their place the words “who engages in any conduct”, by removing the last sentence of paragraph (a), and by removing paragraphs (c) and (d).

**Subpart B—[Removed and Reserved]**

10. Subpart B of part 2636 is removed and reserved.

11. Section 2636.302 is amended by removing the sentence fragment at the end of the undesignated introductory text, by removing paragraphs (a) and (b), and by adding a new sentence at the end of that section to read as follows:

**§ 2636.302 Relationship to other laws and regulations.**

\* \* \* 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.

12. Section 2636.303 is amended by removing from the penultimate sentence in the undesignated text at the end of paragraph (c) the words and terms "under § 2636.204 of this part" and adding in their place the words and terms "under 5 U.S.C. app. 501(c)", and by revising paragraph (b)(7) to read as follows:

**§ 2636.303 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(7) Payments to charitable organizations in lieu of honoraria, as described in 5 U.S.C. app. 501(c) and app. 505; or

\* \* \* \* \*

[FR Doc. 98-20829 Filed 8-11-98; 8:45 am]

BILLING CODE 6345-01-P

**FEDERAL TRADE COMMISSION****5 CFR Part 5701**

RIN 3209-AA15

**Supplemental Standards of Ethical Conduct for Employees of the Federal Trade Commission**

**AGENCY:** Federal Trade Commission (FTC).

**ACTION:** Final rule.

**SUMMARY:** The Federal Trade Commission, with the concurrence of the Office of Government Ethics (OGE), is issuing a final rule amendment for employees of the FTC that supplements 5 CFR part 2635, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), issued by

OGE. This supplemental regulation provision narrows for FTC employees restrictions contained in the Standards on employees' personal fundraising activities. The final rule is effective upon issuance.

**EFFECTIVE DATE:** August 12, 1998.

**ADDRESSES:** Send comments to Ira S. Kaye, Federal Trade Commission, Room 594, 6th and Pennsylvania Ave., NW, Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Ira S. Kaye, (202) 326-2426, Federal Trade Commission, Office of the General Counsel.

**SUPPLEMENTARY INFORMATION:****I. Background**

On August 7, 1992, the Office of Governmental Ethics (OGE) published a final rule entitled "Standards of Ethical Conduct for Employees of the Executive Branch" (Standards). See 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), 61 FR 50689-50691 (interim rule revisions adopted as final at 62 FR 12531), and 62 FR 48746-48748, with additional grace period extensions at 59 FR 4779-4780, 60 FR 6390-6391, 60 FR 66857-66858, and 61 FR 40950-40952. The Standards, codified at 5 CFR part 2653 and effective February 3, 1993, establish uniform standards of ethical conduct applicable to all executive branch personnel.

The Standards, at 5 CFR 2635.105, authorize executive branch agencies, with OGE's concurrence, to publish agency-specific supplemental regulations necessary to implement their respective ethics programs. On May 27, 1993, the FTC published, with OGE's concurrence, an interim rule establishing a supplemental standard of conduct, 5 CFR 5701.101, requiring that all FTC employees receive prior approval before engaging in outside employment (58 FR 30695-30696). The interim rule prescribed a 45-day comment period and invited comments from all interested parties. This interim rule is not being finalized at this time.

The FTC is now issuing a second supplemental regulation because it has determined that a new provision concerning fundraising activities, to be codified in a new § 5701.102 of 5 CFR, is currently necessary to the successful implementation of the Commission's ethics program.

**II. Analysis of the Amendment**

New Section 5701.102 of the final rule supplements the executive branch-wide Standards at 5 CFR 2635.808(c)

regarding fundraising in a personal capacity. That standard bars employees from personally soliciting funds from those persons known by the employee to be "prohibited sources" as defined in 5 CFR 2635.203(d), including, pursuant to 2635.203(d)(3), any person who "conducts activities regulated by the employee's agency." ("prohibited source" is also defined in subparagraphs (d)(1), (d)(2), (d)(4) and (d)(5) of § 2635.203 to include "any person who: (1) Is seeking official action by the employee's agency; (2) Does business or seeks to do business with the employee's agency; . . . (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.")

Because the FTC has enforcement authority over unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, virtually all businesses are "prohibited sources" for FTC employees. The Commission has determined that given the breadth of this enforcement authority, the fundraising provision is unnecessarily restrictive for FTC employees. Accordingly, § 5701.102 provides that it shall be permissible for FTC employees to solicit funds or other support from a person who is a prohibited source only by virtue of the definition in 5 CFR 2635.203(d)(3), because the person is regulated by the FTC (provided that the other provision of 5 CFR 2635.808(c) continue to apply).

Employees of the FTC, however, will not be allowed to solicit contributions from a person known to be a "prohibited source" for the other defined reasons listed in 2635.203(d). Thus, an FTC employee may not engage in charitable fundraising from any person (including an organization a majority of whose members are such persons) seeking official action by the FTC, doing business with the FTC or having interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

**III. Matters of Regulatory Procedure***Administrative Procedure Act*

This rule amendment relates solely to agency management and personnel, and, thus, is not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(a)(2).