

# Rules and Regulations

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## DEPARTMENT OF ENERGY

### 5 CFR Part 3301

### 10 CFR Part 1010

RINs 1990-AA19 and 3209-AA15

### Supplemental Standards of Ethical Conduct for Employees of the Department of Energy and Residual Department Standards Regulation

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (Department or DOE), with the concurrence of the Office of Government Ethics (OGE), published an interim final rule on July 5, 1996, to establish standards of ethical conduct, applicable to employees of the Department, that supplement the Standards of Ethical Conduct for Employees of the Executive Branch issued by the Office of Government Ethics, and to revise the Department's residual standards regulation. The rule requires Department employees to document notices of disqualification and withdrawals of such notices in writing. It also requires that Department employees obtain the written approval of their immediate supervisor and the Department's designated agency ethics official or such official's designee prior to engaging in certain outside employment. The Department now discusses comments received in response to the interim final rule, and adopts that rule as final with certain changes to the Department's residual standards previously issued.

**DATES:** This final rule is effective September 20, 2006.

**FOR FURTHER INFORMATION CONTACT:** Sue E. Wadel, Deputy Assistant General Counsel for Standards of Conduct, Office of the Assistant General Counsel for General Law, GC-77, U.S. Department of Energy, 1000

Independence Avenue, SW., Washington, DC 20585, telephone 202-586-1522.

#### SUPPLEMENTARY INFORMATION:

##### I. Rulemaking History

On August 7, 1992, the Office of Government Ethics published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) (57 FR 35006). The Standards, codified at 5 CFR Part 2635 and effective February 3, 1993, establish uniform standards of ethical conduct applicable to all executive branch personnel.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive agencies to publish agency-specific supplemental regulations that the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of the Standards.

The interim final rule published for comment on July 5, 1996 (61 FR 35085) by the Department, with OGE concurrence, established supplemental DOE regulations under 5 CFR 2635.105, and the Department, in the same rulemaking document, revised its residual standards regulation at 10 CFR part 1010. The Department determined that the supplemental rule was a necessary supplement to the Standards because it addressed ethical issues unique to the Department, and was therefore necessary and appropriate to fulfill the purposes of the Standards. The rule, codified in new chapter XXIII of 5 CFR, consisting of part 3301, provided a 60-day comment period and invited comments by agencies and the public. Comments were received from two (2) sources. In a separate rulemaking action, on June 3, 1998 (63 FR 30109), the Department published a final rule that revised the part 1010 authority citation, amended § 1010.102, and deleted old § 1010.105. The final rulemaking today makes no further changes to the current regulations at 10 CFR part 1010 and 5 CFR part 3301.

On March 1, 2000, the National Nuclear Security Administration (NNSA) was established as a separately organized entity within the Department of Energy. This rule applies to all Department employees, including those of NNSA.

##### II. Summary of Comments

Both sets of comments concerned 5 CFR 3301.103, which requires that

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Department employees obtain the written approval of their immediate supervisor and the Department's designated agency ethics official or that official's designee (ethics counselor) prior to engaging in certain outside employment. The comments addressed the prior approval requirement (§ 3301.103(a)) and the definition of "employment" (§ 3301.103(c)). No comments were received on § 3301.102 requiring Department employees to document notices of disqualification and withdrawals of such notices in writing. Additionally, no comments were received on the revisions to the Department's residual part 1010 standards regulation in its own CFR title and the addition of cross-references to the new provisions.

#### *Section 3301.103(a) Prior Approval Requirement*

The comments suggested the rule is overly broad and unenforceable. It was specifically stated that: (a) The rule should cover only those employees in "sensitive" positions because they are the only employees whom the rule affects, thus preventing an otherwise unwarranted invasion of privacy; (b) the rule should not apply to unpaid employment because unpaid employment would not "prejudice" an employee; (c) the rule, interpreted broadly, would encompass many types of employment that are not the type the rule seeks to prohibit; and (d) the rule is unenforceable because there would be no way of ensuring compliance with the rule.

The Department has determined that it would not be prudent to narrow the scope of the rule and that, in light of the purpose of the rule, the fear it would be unenforceable is not valid. The rule is designed to help ensure that Department employees do not inadvertently violate the criminal statutes and Federal regulations governing outside activities of Federal employees. Determining whether certain outside employment is prohibited is very fact-specific, and does not depend upon an employee's position or on whether outside employment is unpaid. The Department does not believe it is possible to craft a straightforward regulation that would plainly address, in advance, the myriad of situations which could be considered to be employment and to identify which of those situations would be prohibited.

or in conflict with the Standards. It is the Department's view that whatever burden the prior approval requirement may impose upon some employees, it is more than compensated for by the prevention of violations of the applicable statutes and Federal regulations. It should be noted that the prior approval requirement is not designed to arbitrarily deny Department employees permission to engage in outside employment. In fact, the regulation makes clear that a request for approval will be granted unless it is determined that the outside employment involves conduct prohibited by statute or regulation. See 5 CFR 3301.103(b). In practice, since the interim final regulation has been promulgated, the vast majority of requests for approval to engage in outside employment have been routinely granted.

The comments also maintained that the approval process contained in the rule, requiring approval to be in writing and obtained from an employee's immediate supervisor and ethics counselor, is unduly burdensome. It was specifically recommended that an employee's immediate supervisor be authorized to provide the necessary approval, and that verbal approval be allowed.

The Department has not adopted these recommendations. DOE's ethics counselors are uniquely qualified to analyze, interpret, and apply the relevant statutes and regulations. Supervisors generally will not be able to make determinations regarding whether a specific fact situation may violate a statute or regulation. Further, the involvement of Department ethics counselors helps to ensure consistency in the interpretation and application of those statutes and Federal regulations. Written approval is the most effective way of documenting the approval process and it protects both the Department and the employee. Written approval can, as a practical matter, be more effectively relied upon by the Department in the event an employee seeks clarification about advice provided to him or her regarding outside employment, and by the employee in the event there is a dispute concerning the legality of an employee's outside employment activities.

Disciplinary action for violating the Standards or these supplemental regulations will not be taken against an employee who has in good faith relied upon the advice of an ethics counselor, provided the employee, in seeking such advice, has made full disclosure of all relevant facts and circumstances. Where the employee's conduct violates a

criminal statute, reliance on the advice of an ethics counselor cannot ensure that the employee will not be prosecuted under that statute; however, good faith reliance on the advice of an ethics counselor is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. See 5 CFR 2635.107(b).

Finally, one of the comments noted professional employees are governed by professional ethics rules and, therefore, the imposition of additional limitations is unnecessary and likely to result in conflicting ethical regulations. All employees of the executive branch, whether or not professional, must comply with the Standards and any other applicable statutes and regulations. Professional ethical obligations an employee may be subject to may be considered by the employee in addition to the applicable statutes and regulations, but shall not, under any circumstances, relieve an employee of his or her obligations under applicable statutes and regulations.

#### *Section 3301.103(c) Definition of Employment*

The regulation defines "employment" to exclude "participating in the activities of a nonprofit, charitable, religious, public service or civic organization, unless such activities involve the provision of professional services or are for compensation." One set of comments objected to the exclusion of "professional services" from this exception to the definition of "employment" for the following reasons: (a) It would "automatically eliminate all of our professional workers from all public service work," creating a socially undesirable outcome; (b) it "constitutes an unfair labor practice, for, without any negotiation, it bars the union from using its professional members for standard collective bargaining activities;" and (c) it is "unnecessary" because "professional service provided by DOE professionals to public organizations is not related at all to their positions as government employees."

Comments (a) and (b) exhibit a clear misunderstanding of the language of the rule. The definition of employment does not prohibit professionals from engaging in public service work or bar the union from using its professional members for standard collective bargaining activities; rather, it simply states that if an employee's involvement in public service work includes the provision of professional services, or is for compensation, then the employee may not rely on the exception and must, as is required for any other type of outside

employment, receive prior written approval. Further, determining whether certain outside employment is prohibited is very fact-specific and does not necessarily depend upon the relationship between an employee's position and an employee's outside activity.

### **III. Matters of Regulatory Procedure**

#### *Review Under Executive Order 12866*

Today's regulatory action has been determined not to be a significant regulatory action under Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), as amended by Executive Order 13258, Amending Executive Order 12866 on Regulatory Planning and Review (67 FR 9385, February 28, 2002). Accordingly, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs, Office of Management and Budget.

#### *Review Under Executive Order 12988*

Section 3 of Executive Order 12988, Civil Justice Reform, (61 FR 4729, February 7, 1996) instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in section 3(a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that regulations describe any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. The Department has determined that today's regulatory action meets the requirements of section 3(a) and (b) of Executive Order 12988.

#### *Review Under Executive Order 13132*

Executive Order on Federalism 13132 (64 FR 43255, August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or

on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

*Review Under Executive Order 13084*

Under Executive Order 13084 on Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19, 1998), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This rule would not have such effects. Accordingly, Executive Order 13084 does not apply to this rulemaking.

*Review Under the Administrative Procedure Act and the Regulatory Flexibility Act*

The authorizing legislation for this rulemaking does not require notice and comment rulemaking. Moreover, this final rule relates solely to internal agency organization, management, or personnel, and as such, is not subject to the requirement for a general notice of proposed rulemaking under the Administrative Procedure Act (5 U.S.C. 553). Consequently, this rulemaking is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 603).

*Review Under the National Environmental Policy Act*

This final rule adopts as final the Department's interim regulations on standards of conduct. It will not change the environmental effects of the regulations being amended. The Department has therefore determined that the rule is covered under the Categorical Exclusion found at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings interpreting or amending an existing rule that do not change the environmental effect thereof. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

*Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for executive agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by the Office of Management and Budget (OMB). OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has

reviewed today's final rule under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

*Review Under the Paperwork Reduction Act*

This final rule does not impose a "collection of information" requirement, as defined in 44 U.S.C. 3502(3).

*Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 requires each Agency to assess the effects of Federal regulatory action on State, local, and tribal governments and the private sector. The Department has determined that today's regulatory action does not impose a Federal mandate on State, local, or tribal governments or on the private sector.

*Congressional Notification*

The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to report to Congress on the promulgation of certain final rules prior to their effective dates. 5 U.S.C. 801. That reporting requirement does not apply to this final rule because it falls within a statutory exception for rules relating to agency management or personnel. 5 U.S.C. 804(3)(B).

*List of Subjects*

*5 CFR Part 3301*

Conduct standards, Conflicts of interests, Ethical conduct, Government employees.

*10 CFR Part 1010*

Conduct standards, Conflicts of interests, Ethical conduct, Government employees.

Issued in Washington, DC, on August 2, 2006.

**David R. Hill,**

*General Counsel, Department of Energy.*

Approved: August 10, 2006.

**Robert I. Cusick,**

*Director, Office of Government Ethics.*

■ Accordingly, the interim final rule adding 5 CFR part 3301 and revising 10 CFR part 1010, that was published at 61 FR 35085 on July 5, 1996, is adopted as a final rule with the changes published at 63 FR 30109 on June 3, 1998.

[FR Doc. E6-13736 Filed 8-18-06; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 25**

**[Docket No. NM343; Special Conditions No. 25-322-SC]**

**Special Conditions: Airbus Model A380-800 Airplane, Airplane Jacking Loads**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions.

**SUMMARY:** These special conditions are issued for the Airbus A380-800 airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. Many of these novel or unusual design features are associated with the complex systems and the configuration of the airplane, including its full-length double deck. For these design features, the applicable airworthiness regulations do not contain adequate or appropriate safety standards regarding airplane jacking loads. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards. Additional special conditions will be issued for other novel or unusual design features of the Airbus Model A380-800 airplane.

**DATES:** *Effective Date:* The effective date of these special conditions is July 20, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Holly Thorson, FAA, International Branch, ANM-116, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-1357; facsimile (425) 227-1149.

**SUPPLEMENTARY INFORMATION:**

**Background**

Airbus applied for FAA certification/validation of the provisionally-designated Model A3XX-100 in its letter AI/L 810.0223/98, dated August 12, 1998, to the FAA. Application for certification by the Joint Aviation Authorities (JAA) of Europe had been made on January 16, 1998, reference AI/L 810.0019/98. In its letter to the FAA, Airbus requested an extension to the 5-year period for type certification in accordance with 14 CFR 21.17(c).

The request was for an extension to a 7-year period, using the date of the