

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2640

RIN 3209-AA09

Government Employees Serving in Official Capacity in Nonprofit Organizations; Sector Unit Investment Trusts

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule.

SUMMARY: The Office of Government Ethics is issuing a proposed rule amendment that would permit Government employees to participate in particular matters affecting the financial interests of nonprofit organizations in which they serve in an official capacity, notwithstanding the employees' imputed financial interest. This document also proposes an amendment that would clarify that the existing exemptions for interests in the holdings of sector mutual funds also apply to interests in the holdings of sector unit investment trusts.

DATES: Comments are invited and must be received on or before July 5, 2011.

ADDRESSES: You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA09, by any of the following methods:

E-Mail: usoge@oge.gov. Include the reference "Proposed Rule Exemption and Amendment Under 18 U.S.C. 208(b)(2)" in the subject line of the message.

Fax: 202-482-9237.

Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Richard M. Thomas, Associate General Counsel.

Instructions: All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209-AA09, for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Richard M. Thomas, Associate General Counsel, Office of Government Ethics;

telephone: 202-482-9300; *TTY:* 800-877-8339; *Fax:* 202-482-9237.

SUPPLEMENTARY INFORMATION:

I. Background

Section 208(a) of title 18 of the United States Code prohibits Government employees from participating in an official capacity in particular Government matters in which, to their knowledge, they or certain other persons specified in the statute have a financial interest, if the particular matter would have a direct and predictable effect on that interest. Section 208(b)(2) of title 18 permits the Office of Government Ethics to promulgate regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a).

On August 28, 1995, the Office of Government Ethics published its first interim rule, with request for comments, promulgating certain miscellaneous exemptions under 18 U.S.C. 208(b)(2). 60 FR 44705 (August 28, 1995). On December 18, 1996, the Office of Government Ethics published a comprehensive final rule, "Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest)," codified at 5 CFR part 2640, which promulgated several additional exemptions and also adopted as final, with some modifications, the exemptions promulgated in the earlier interim rule. 61 FR 66829 (December 18, 1996) (final rule); 60 FR 47207 (September 11, 1995) (proposed rule). OGE subsequently has added and amended exemptions by interim rule, with request for comment, 65 FR 16511 (March 29, 2000) (adopted as final, 65 FR 47830 (August 4, 2000)), by final rule (after a proposed rule, 65 FR 53942 (September 6, 2000)), 67 FR 12443 (March 19, 2002), and by interim rule, with request for comment, 70 FR 69041 (November 14, 2005).

The Office of Government Ethics is proposing to amend part 2640 by adding a new regulatory exemption and clarifying the scope of an existing exemption, as explained below. This proposed rule is being published after obtaining the concurrence of the Department of Justice pursuant to section 201(c) of Executive Order 12674. Also, as provided in section 402 of the

Ethics in Government Act of 1978, as amended, 5 U.S.C. appendix, section 402, OGE has consulted with both the Department of Justice (as additionally required under 18 U.S.C. 208(d)(2)) and the Office of Personnel Management on this rule.

II. Analysis of the Proposed Changes

The proposed rule would add a new regulatory exemption, section 2640.203(m), which would permit employees to participate in particular matters affecting the financial interests of nonprofit organizations in which they participate, in their official Government capacity, as officers, directors or trustees. The proposed rule also would clarify that the existing regulatory exception for certain interests in sector mutual funds, at section 2640.201(b), also covers interests in sector unit investment trusts.

A. Proposed Section 2640.203(m)—Official Participation in Nonprofit Organizations

Proposed section 2640.203(m) addresses a situation that was not generally thought to be covered by 18 U.S.C. 208 until the mid-1990s. Until that time, a number of agencies had a practice of assigning employees to participate on the boards of directors of certain outside nonprofit organizations, where such service was deemed to further the statutory mission and/or personnel development interests of the agency. The nonprofit organizations included such entities as professional associations, scientific societies, and health information promotion organizations. At the time, neither the agencies involved nor the Office of Government Ethics viewed such official participation in nonprofit organizations as being prohibited by 18 U.S.C. 208.

However, in 1996, the Office of Legal Counsel (OLC) at the Department of Justice issued an opinion concluding that section 208 generally prohibits an employee from serving, in an official capacity, as an officer, director or trustee of a private nonprofit organization. Memorandum of Deputy Assistant Attorney General, OLC, for General Counsel, Federal Bureau of Investigation, November 19, 1996, <http://www.justice.gov/olc/fbimem.2.htm>. This conclusion was premised in large part on the fact that officers, directors and trustees of an outside organization owe certain

fiduciary duties to the organization under state law, which may conflict with the primary duty of loyalty that all Federal employees owe to the United States. As a consequence of this interpretation, employees are no longer permitted to serve in their official capacity as officer, director or trustee of an outside nonprofit organization, absent an individual waiver under 18 U.S.C. 208(b) or some specific statutory authority permitting such service.¹

Since the 1996 OLC opinion, some agencies have continued to assign employees to serve on such outside boards by granting the employees individual waivers under 18 U.S.C. 208(b)(1). Other agencies have declined to issue individual waivers (or have done so rarely), often because of discomfort about waiving the application of a criminal statute. OGE has fielded numerous inquiries and has held many meetings with agencies and nonprofit organizations, mostly professional and scientific societies, concerning the application of section 208 to prevent official participation on outside boards. Several of the agencies and nonprofit organizations have argued that the application of section 208 has created unfortunate barriers to professional development and meaningful exchange between Federal and non-Federal experts in certain professions and areas of expertise. Moreover, some of the organizations have pointed out that there is a lack of uniformity within the Executive Branch, owing to the willingness of some agencies to grant waivers and the unwillingness of other agencies to do so, often with respect to participation in the same organization.

Additionally, the Office of Government Ethics has noted the potential for confusion in some instances when employees are permitted to serve only in a private, rather than official, capacity. Especially where the agency has policy interests that overlap with those of the nonprofit organization, it can be very difficult for the employee to avoid the mistaken impression that he or she is acting in an official capacity when participating in the organization. Employees may be uncertain about the extent to which they are permitted to make reference to their official position or to use official time or agency resources. See 5 CFR 2635.702(b); 2635.704; 2635.705. Such

¹ In rare instances, an employee also may be able to serve pursuant to a waiver of fiduciary duties by the organization, if such a waiver is permitted by state law. See Memorandum of Deputy Assistant Attorney General, OLC, to General Counsel, General Services Administration, August 7, 1998, <http://www.justice.gov/olc/gsa208fn.htm>.

confusion no doubt could be reduced by clearer agency instructions concerning such matters as excused absence and limited use of agency resources in support of outside professional and other organizations. See 5 CFR 251.202. Nevertheless, the fact remains that sometimes there is considerable continuity in subject matter between an employee's official duties and the employee's activities in an outside nonprofit organization, and some agencies believe it would be clearer to permit the latter to occur while the employee is on official duty, without the impediment of section 208.²

For all of the above reasons, the Office of Government Ethics in 2006 recommended to the President and Congress that section 208 be amended "to specify that the financial interests of an organization are not imputed to an employee who serves as an officer or director of such organization in his or her official capacity." OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* 33 (2006) (2006 Report), http://www.usoge.gov/ethics_docs/publications/reports_plans.aspx.³ In the 2006 Report, OGE recognized that it had "regulatory authority to exempt financial interests arising from official service on boards of directors," but OGE opted at that time to place the issue before Congress first. No legislative changes to section 208 were enacted in response to the report, however, and OGE has continued to receive expressions of concern about this matter, both from agencies and from nonprofit organizations.

Then, on March 9, 2009 President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on the topic of scientific integrity. 74 FR 10671, 3 CFR, 2009 Comp., p. 354. In this memorandum, he specifically requested that the Office of Science and Technology Policy (OSTP) provide recommendations to address, among other things, the retention of staff in scientific and technical positions within the Executive branch. In

² Nothing in the proposed rule limits the ability of an employee to serve as officer, director or trustee of a nonprofit organization as a personal outside activity, where the agency has not assigned the employee to serve in an official capacity. Moreover, nothing in the proposed rule is intended to affect the current ability of agencies to assign employees to serve as official liaisons or to serve in similar nonfiduciary positions that do not implicate 18 U.S.C. 208. See OGE Informal Advisory Letter 95 x 8.

³ OGE was required to issue this report, in consultation with the Department of Justice, by section 8403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458 (December 17, 2004).

response, the Director of OSTP issued a memorandum urging all agencies to establish policies that promote and facilitate the professional development of Government scientists and engineers. John P. Holdren, Director, OSTP, "Scientific Integrity," Memorandum for the Heads of Executive Departments and Agencies, at 3, December 17, 2010. The OSTP memorandum specifically calls for policies to "[a]llow full participation in professional or scholarly societies, committees, task forces and other specialized bodies of professional societies, including removing barriers for serving as officers or on governing boards of such societies." *Id.* at 4 (emphasis added).

In response to parallel initiatives, in August of 2010, the Director of the Office of Personnel Management (OPM) wrote to OGE to express several concerns about the application of section 208 to employees serving in their official capacity as officers and directors of scientific and professional organizations. Letter of John Berry, Director, OPM, to Robert I. Cusick, Director, Office of Government Ethics, August 16, 2010 (OPM Letter). Among other things, the Director of OPM wrote:

Policies restricting Federal scientists' and professionals' involvement in professional organizations negatively impact the agencies employing such individuals. Restrictions act as a barrier to employees achieving professional stature in their respective fields, which may discourage scientists and professionals from considering Federal employment. Restrictions also serve to isolate scientists and professionals from the full exchange of knowledge and ideas necessary to stay current and participate fully as members of the greater scientific community. As a result, Federal scientists and professionals are hampered in their ability to provide the best possible advice and service to their respective agencies. These restrictions are particularly burdensome for the "research-grade" scientists whose retention and promotion evaluations depend in part on the recognition of stature by one's scientific peers. U. S. Office of Personnel Management's *Research Grade Evaluation Guide*, Factor 4; Contributions, Impact, and Stature, September, 2006; <http://www.opm.gov/Fedclass/gresch.pdf>.

OPM Letter at 2. The Director of OPM asked OGE to consider exercising its authority under 18 U.S.C. 208(b)(2) to exempt the financial interests of organizations in which employees serve in their official capacity, on the ground that such interests are "too remote and inconsequential to warrant disqualification pursuant to section 208." *Id.* at 3. In response, the Director of OGE wrote that OGE takes "very seriously" OPM's "concerns about the impact that the current bar has on the

professional development of employees.” Letter of Robert I. Cusick, Director, OGE, to John Berry, Director, OPM, September 23, 2010.

To address OPM’s concerns, as well as the concerns raised by other agencies and outside organizations since 1996, and consistent with Administration efforts designed to ensure scientific integrity, OGE has concluded that it is now appropriate to exercise its authority under 18 U.S.C. 208(b)(2) to exempt the imputed financial interests of nonprofit organizations in which employees serve as officers, directors or trustees in their official capacity. OGE has determined that such financial interests are too remote or inconsequential to affect the integrity of employees’ services, for several reasons. As explained in OGE’s 2006 Report, which was issued after consultation with the Department of Justice:

OGE believes that the conflict identified by OLC [between the employee’s duty of loyalty to the Government and the employee’s fiduciary duties to the outside organization] may be more theoretical than real, particularly because employees assigned to serve on outside boards remain subject to important Federal controls, such as the authority to review and approve (or deny) the official activity in the first place, and the authority to order the individual to limit the activity, or even resign the position, in the event of a true conflict with Federal interests. In addition, an agency generally approves such activities only where the organization’s interests are in consonance with the agency’s own interests. In an era when ‘public/private partnerships’ are promoted as a positive way for Government to achieve its objectives more efficiently, ethics officials find it difficult to explain and justify to agency employees why a waiver is required for official board services that have been determined by the agency to be proper. 2006 Report at 33.

In short, the potential for a real conflict of interest is too remote or inconsequential to affect the integrity of an employee’s services under these circumstances.

That is not to say, however, that agencies would be precluded from imposing meaningful controls and limits on employees serving in nonprofit organizations. As made clear in the Note following proposed section 2640.203(m), agencies must satisfy themselves that they have authority to assign employees to serve in such organizations in the first place; the proposed exemption does not itself constitute such authority, but simply removes the bar of the conflict of interest law. Moreover, agency decisions to permit (or not permit) official participation in any particular outside organization will be informed by numerous legal, policy, and managerial

considerations, such as: the degree to which the activity will further the agency’s statutory mission; the availability of agency funds and other resources to support such activities; the degree to which the agency is able and willing to assign employees to serve in other, similar organizations without appearing to single out one organization unreasonably; and the demands of the agency’s workload and the particular employee’s other assignments.⁴ Even where an agency does permit an employee to serve as officer, director or trustee of a nonprofit organization, the agency has discretion to limit or condition the official duty activity in a manner consistent with the needs and interests of the agency. This may include limits on participation in lobbying, fundraising, regulatory, investigational, or representational activities, as determined by the agency. For example, where agencies have granted individual waivers in the past, under section 208(b)(1), some agencies have required employees to refrain from participating in the fundraising activities of the outside organization or from participating in agency decisions to award grants or contracts to the organization; agencies will remain free to impose similar limits as they deem appropriate in the future.⁵ See OGE Memorandum DO–07–006, http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2007/do07006.html In other words, nothing in the proposed regulatory exemption is intended to interfere with the discretion of agencies to assign duties and describe the limits of official assignments, including assignments that involve outside nonprofit organizations.

Finally, OGE notes that the proposed rule refers generally to “nonprofit” organizations. See, e.g. “Black’s Law Dictionary” 1080 (1999) (“group organized for a purpose other than to generate income or profit”). The exemption thus is not limited to scientific organizations, but rather is intended to provide agencies with discretion to determine which nonprofit entities would further agency interests and would be appropriate for employee

⁴ Even prior to the 1996 OLC opinion, some agencies rarely if ever permitted employees to serve as officers, directors or trustees of outside organizations in an official capacity, because of fiscal, policy or managerial concerns. Notwithstanding the proposed regulatory exemption, some agencies may continue to decline to assign employees to serve in an official capacity for similar reasons.

⁵ In any event, agency decisions to permit an employee to engage in official fundraising for a nonprofit organization must take into account the requirements of 5 CFR 2635.808(b) and 5 CFR part 950.

participation, including professional and other nonprofit groups focused on issues pertaining to legal practice, law enforcement, various social sciences, and other disciplines and public policy areas.

B. Proposed Clarifying Amendment to Section 2640.201(b)—Sector Unit Investment Trusts

Among the regulatory exemptions currently found in subpart B of part 2640 are several that exempt certain financial interests in mutual funds and unit investment trusts. The Office of Government Ethics has promulgated exemptions for interests in the holdings of diversified mutual funds and diversified unit investment trusts (5 CFR 2640.201(a)), in the non-sector holdings of sector mutual funds (5 CFR 2640.201(b)(1)), and in the sector holdings of sector mutual funds when the aggregate market value of the employee’s interest in the sector fund or funds does not exceed \$50,000 (5 CFR 2640.201(b)(2)). Most recently, the Office of Government Ethics has promulgated one for interests in mutual funds and unit investment trusts other than interests arising from the holdings of such vehicles (5 CFR 2640.201(d)). This exemption is limited to particular matters of general applicability, as defined in 5 CFR 2640.102(m).

In promulgating these exemptions, the Office of Government Ethics recognized that pooled investment vehicles such as mutual funds and unit investment trusts generally pose fewer concerns that the financial interests will affect the integrity of the services of Government employees. The Office of Government Ethics has noted that usually “only a limited portion of the fund’s assets [are] placed in the securities of any single issuer” and that “an employee’s interest in any one fund is only a small portion of the fund’s total assets.” 60 FR 47211 (September 11, 1995) (preamble to proposed rule).

The Office of Government Ethics is proposing to amend the language of the exemptions for the interests in sector mutual funds to include explicitly the interests of sector unit investment trusts. The current regulation, 5 CFR 2640.201(b), does not include the language “sector unit investment trusts.” At the time that the sector fund exemptions were promulgated, the Office of Government Ethics contemplated that the exemptions would also extend to those investment vehicles organized as sector unit investment trusts. In practice, the Office of Government Ethics has permitted executive branch employees to apply the exemptions for interests in sector

mutual funds to interests in sector unit investment trusts.

Therefore, OGE is proposing to add specific references to sector unit investment trusts to 5 CFR 2640.201(b) in order to clarify that the exemptions for interests in the holdings of sector mutual funds also apply to the interests in the holdings of sector unit investment trusts. OGE also is proposing conforming amendments to the definition in § 2640.102(q), which would define both sector mutual fund and sector unit investment trust.

III. Matters of Regulatory Procedure

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 proposed rule would not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

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

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this proposed involves rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that.

Executive Order 12866

In proposing this rule 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 proposed rule has also been reviewed by the Office of Management and Budget under that Executive order. Moreover, in

accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to this proposed amendment notes the legal basis and benefits of, as well as the need for, the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering this proposed regulation, since it only adds to OGE's financial interests regulation a new regulatory exemption and a clarification of an existing exemption. Finally, this rulemaking is not economically significant under the Executive order and would not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2640

Conflict of interests, Government employees.

Approved: April 21, 2011.

Robert I. Cusick,
Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend 5 CFR part 2640 as follows:

PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

1. The authority citation for part 2640 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; 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.

Subpart A—General Provisions

2. In § 2640.102, paragraph (q) is revised to read as follows:

§ 2640.102 Definitions.

* * * * *

(q) *Sector mutual fund or sector unit investment trust* means a mutual fund or unit investment trust that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

* * * * *

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

3. In § 2640.201, paragraphs (b)(1) and (2) are revised to read as follows:

§ 2640.201 Exemptions for interests in mutual funds, unit investments trusts, and employee benefit plans.

* * * * *

(b) *Sector mutual funds and sector unit investment trusts.* (1) An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund or a sector unit investment trust where the affected holding is not invested in the sector in which the fund or trust concentrates, and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or unit investment trust.

(2)(i) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund or a sector unit investment trust where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or the unit investment trust and the aggregate market value of interests in any sector fund or funds and any sector unit investment trust or trusts does not exceed \$50,000.

(ii) For purposes of calculating the \$50,000 de minimis amount in paragraph (b)(2)(i) of this section, an employee must aggregate the market value of all sector mutual funds and sector unit investment trusts in which he has a disqualifying financial interest and that concentrate in the same sector and have one or more holdings that may be affected by the particular matter.

* * * * *

4. Section 2640.203 is amended by adding paragraph (m) to read as follows:

§ 2640.203 Miscellaneous exemptions.

* * * * *

(m) *Official participation in nonprofit organizations.* An employee may participate in any particular matter where the disqualifying financial interest is that of a nonprofit organization in which the employee serves, solely in an official capacity, as an officer, director or trustee.

Note to paragraph (m): Nothing in this paragraph shall be deemed independent authority for an agency to assign an employee to serve in an official capacity with a particular nonprofit organization. Agencies will make such determinations based on an evaluation of their own statutory authorities and missions. Individual agency decisions to permit (or not permit) an employee to serve in an official capacity necessarily involve a range of legal, policy, and managerial considerations, and nothing in this paragraph

is intended to interfere with an agency's discretion to assign official duties and limit such assignments as the agency deems appropriate.

[FR Doc. 2011-10629 Filed 5-2-11; 8:45 am]

BILLING CODE 6345-03-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, and 275

RIN 0584-AD86

Supplemental Nutrition Assistance Program: Review of Major Changes in Program Design and Management Evaluation Systems

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes to amend the Supplemental Nutrition Assistance Program (SNAP) (formerly the Food Stamp Program) regulations to implement Section 4116 of the Food, Conservation, and Energy Act of 2008 (the Farm Bill). Section 4116 of the Farm Bill, *Review of Major Changes in Program Design*, requires the United States Department of Agriculture (the Department) to identify standards for major changes in operations of State agencies' administration of SNAP. The provision also requires State agencies to notify the Department if they implement a major change in operations and to collect data that can be used to identify and correct problems relating to integrity and access, particularly by certain vulnerable households.

This NPRM proposes criteria for changes that would be considered "major changes" in program operations and identifies the types of data State agencies must collect in order to identify problems relating to integrity and access. It also proposes when and how State agencies must report on implementation of a major change.

This NPRM proposes to amend the Management Evaluation (ME) Review regulations by modifying the requirements for Federal and State reviews of State agency operations. It also proposes to revise the definitions of large, medium and small project areas. Finally, it proposes to remove sections of the regulations pertaining to coupons and coupon storage since they are obsolete.

DATES: Comments must be received on or before July 5, 2011.

ADDRESSES: The Food and Nutrition Service (FNS) invites interested persons to submit comments on this proposed rule. Comments may be submitted by any of the following methods:

Federal eRulemaking Portal: Preferred method. Go to <http://www.regulations.gov>; follow the online instructions for submitting comments on Docket FNS-2011-0035.

Fax: Submit comments by facsimile transmission to (703) 305-2486, attention: Moira Johnston.

Mail: Send comments to Moira Johnston, Branch Chief, Program Design Branch, Program Development Division, Supplemental Nutrition Assistance Program, Food and Nutrition Service, 3101 Park Center Drive, Room 810, Alexandria, Virginia 22302, (703) 305-2501.

Hand Delivery or Courier: Deliver comments to Ms. Johnston at the above address. All comments on this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via <http://www.regulations.gov>.

All submissions will be available for public inspection at the office of FNS during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Room 810, Alexandria, Virginia 22302-1594.

FOR FURTHER INFORMATION CONTACT: For further information concerning this NPRM you may contact Moira Johnston, Branch Chief, Program Development Division, Supplemental Nutrition Assistance Program, 3101 Park Center Drive, Room 800, Alexandria, Virginia 22302, (703) 305-2501, or by e-mail at Moira.Johnston@fns.usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been designated a "significant regulatory

action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Impact Analysis Summary

Need for Action

This action is needed to implement section 4116 of the Farm Bill (Pub. L. 110-234). Section 4116, *Review of Major Changes in Program Design*, amends Section 11 of the Food and Nutrition Act of 2008 (the Act) (7 U.S.C. 2020). It requires the Department to develop standards for identifying major changes in the operations of State agencies that administer SNAP; State agencies to notify the Department upon implementing a major change in operations; and State agencies to collect any information required by the Department to identify and correct any adverse effects on program integrity or access, including access by vulnerable households. The provision identifies four major changes in operations: (1) Large or substantially-increased numbers of low-income households that do not live in reasonable proximity to a SNAP office; (2) substantial increases in reliance on automated systems for the performance of responsibilities previously performed by merit pay personnel; (3) changes that potentially increase the households' difficulty in reporting information to the State; and (4) changes that may disproportionately increase the burdens on specific vulnerable households. In addition, the provision gives the Department the discretion to identify other major changes that a State agency would be required to report as well as to identify the types of data the State agencies would have to collect to identify and correct adverse effects on integrity and access.

In addition, the Department proposes to modify the requirements for Federal and State reviews of State agency operations, which will result in the more efficient use of staff and resources. This rule proposes several changes to the ME review regulations: (1) Remove the requirements that FNS conduct an annual review of a State agency's operation of SNAP and a biennial review of a State agency's ME system; (2) modify the regulations to reflect the elimination of the use of paper coupons and the nationwide implementation of the Electronic Benefit Transfer System (EBT); (3) redefine the terms, large project area, medium project area, and small project area.