

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas

■ 2. Appendix C to subpart B is amended as follows:

■ a. By removing, under the State of Colorado, “Southwestern Colorado” and adding in its place “Southern Colorado.”

■ b. By revising the wage area listings for the Northern Mississippi and Memphis, TN, wage areas to read as follows:

* * * * *

MISSISSIPPI

* * * * *

Northern Mississippi
Survey Area

Mississippi:
Clay
Grenada
Lee
Leflore
Lowndes
Monroe
Oktibbeha

Area of Application. Survey area plus:

Mississippi:
Alcorn
Bolivar
Calhoun
Carroll
Chickasaw
Choctaw
Coahoma
Itawamba
Lafayette (Does not include the Holly Springs National Forest portion)
Montgomery
Noxubee
Pontotoc (Does not include the Holly Springs National Forest portion)
Prentiss
Quitman
Sunflower
Tallahatchie
Tishomingo
Union (Does not include the Holly Springs National Forest portion)
Washington
Webster
Winston
Yalobusha

* * * * *

TENNESSEE

* * * * *

Memphis
Survey Area

Arkansas:
Crittenden
Mississippi

Mississippi:
De Soto
Tennessee:
Shelby
Tipton

Area of Application. Survey area plus:

Arkansas:
Craighead
Cross
Lee
Poinsett
St. Francis
Mississippi:
Benton
Lafayette (Holly Springs National Forest portion only)
Marshall
Panola
Pontotoc (Holly Springs National Forest portion only)
Tate
Tippah
Tunica
Union (Holly Springs National Forest portion only)

Missouri:

Dunklin
Pemiscot

Tennessee:

Carroll
Chester
Crockett
Dyer
Fayette
Gibson
Hardeman
Hardin
Haywood
Lake
Lauderdale
Madison
McNairy
Obion

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FEDERAL ELECTION COMMISSION

5 CFR Chapter XXXVII

11 CFR Parts 7 and 201

[Notice 2011–16]

RIN 3209–AA15

Standards of Conduct

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission (“Commission” or “FEC”), with the concurrence of the Office of Government Ethics (“OGE”), is revising the Commission’s “Standards of Conduct,” which are the FEC rules that govern the conduct of Commissioners and Commission employees. The new rules update the Commission’s regulations to reflect statutory changes

enacted after the Standards of Conduct were originally promulgated in 1986, and to conform them to regulations issued by OGE and the Office of Personnel Management (“OPM”). In addition to the revisions to the FEC’s Standards of Conduct, the Commission, with OGE’s concurrence, is issuing regulations that supplement the Standards of Ethical Conduct for Employees of the Executive Branch issued by OGE. These supplemental regulations address outside employment of Commissioners and Commission employees. The new rules are unchanged from the rules presented in the Notice of Proposed Rulemaking.

DATES: *Effective Date:* December 14, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Background

The Ethics Reform Act of 1989¹ includes restrictions on gifts, travel, outside activities, and outside employment. See Public Law No. 101–194, tit. III and VI, 103 Stat. 1716 (1989). It authorizes the Office of Government Ethics (“OGE”) to implement regulations concerning the conduct of executive branch employees. See 5 U.S.C. 7351(c). OGE issued a final rule setting forth uniform standards of ethical conduct and an interim final rule on financial disclosure in 1992, followed by a final rule on financial interests in 1996. These rules apply to all executive branch departments and agencies of the Federal Government and their employees. These three executive branch-wide regulations, as corrected and amended, are codified at 5 CFR parts 2634, 2635, and 2640.² The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (“the Act”), in part, restricts the activities of members of the Federal Election Commission and the Commission’s

¹ Public Law 101–194, 103 Stat. 1716 (1989).

² Shortly before Congress passed the Ethics Reform Act of 1989, the President issued Executive Order 12674, which sets forth basic principles of ethical conduct for Federal employees and requires OGE to promulgate “regulations that establish a single, comprehensive, and clear set of executive-branch standards of conduct.” E.O. 12674, 54 FR 15159, 15160 (Apr. 12, 1989). This Executive Order was later modified. E.O. 12731, 55 FR 42547 (Oct. 17, 1990). OGE’s regulations also implement Executive Order 12674, as modified by Executive Order 12731.

employees. See 2 U.S.C. 437c(a)(3) and 437g(a)(12)(A).

The OGE Standards of Ethical Conduct regulations supersede any standards of conduct regulations previously issued by Federal agencies and therefore supersede, with some exceptions, the Commission's former regulations in 11 CFR part 7. Although agencies may still issue regulations to supplement OGE's Standards of Ethical Conduct in order to accommodate specific agency needs, any such regulations must be issued in accordance with OGE's rules, and must be submitted to OGE for prior approval. See 5 CFR 2635.105(a) and (b). Agencies may, however, retain any regulations based on their own separate statutory authority or that address different, non-ethics matters.

OGE's Standards of Ethical Conduct regulations address gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, pursuit of other employment, misuse of position, and outside employment and activities. See 5 CFR part 2635.

In addition to OGE's Standards of Ethical Conduct regulations, Commission employees are subject to certain rules issued by the Office of Personnel Management ("OPM") concerning employee responsibilities and conduct. See 5 CFR part 735. These rules address restrictions on certain gambling activities, conduct prejudicial to the government, and unauthorized examination training for individuals preparing to take civil and Foreign Service examinations. See 5 CFR part 735.

The Commission and OGE have determined that the following supplemental regulations are necessary and appropriate in view of the FEC's programs and operations and to fulfill the purposes of the OGE standards. These supplemental regulations are being issued in new chapter XXXVII of title 5 of the Code of Federal Regulations. In addition, the FEC is revising its regulations at 11 CFR part 7 to conform to the OGE and OPM regulations, without compromising the Commission's independence in its core mission of administering Federal campaign finance laws.

On May 17, 2010, the Commission and OGE jointly published a Notice of Proposed Rulemaking in the **Federal Register**. See Notice of Proposed Rulemaking on Standards of Conduct, 75 FR 27456 (May 17, 2010) ("NPRM"). The comment period closed on June 16, 2010. Two comments were received in

response to the proposed rules.³ The Internal Revenue Service submitted a comment stating that it did not find any conflict between the Internal Revenue Code or Treasury Regulations and the proposed rules. One other commenter submitted comments addressing certain aspects of the proposed regulations. These comments are addressed in the discussion below.

Transmittal of Final Rules to Congress

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least thirty calendar days before they take effect. The final rules that follow were transmitted to Congress on November 4, 2011.

II. Statement of Basis and Purpose

The Commission, with the concurrence of OGE, is amending the rules that govern the conduct of members of the Commission ("Commissioners") and Commission employees by adding supplemental regulations in a new chapter XXXVII of 5 CFR, consisting of part 4701, and by revising the Commission's Standards of Conduct in 11 CFR part 7.

FEC Supplemental Regulations in 5 CFR Part 4701

5 CFR 4701.101—Scope

New section 4701.101 sets forth the authority for the supplemental regulations, which includes 2 U.S.C. 437c(a)(3), 5 U.S.C. 7301, and 5 U.S.C. App. (Ethics in Government Act of 1978). Section 4701.101(a) indicates that the regulations in 5 CFR part 4701 apply to both Commissioners and employees of the Commission. The rules at 5 CFR 4701.101(b) list some of the other regulations in title 5 and 11 CFR part 7 that govern the ethical conduct of Commissioners and employees. No public comments were received on this section.

5 CFR 4701.102—Prior approval for certain outside employment and activities

OGE's Standards of Ethical Conduct regulations supersede the Commission's former regulation at 11 CFR 7.9(f) concerning prior approval for outside employment and activities. OGE's

regulations prohibit an employee from engaging in outside employment or any other outside activity that conflicts with their official duties. 5 CFR 2635.802. A Federal agency shall, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment, if that agency determines that a prior approval requirement is necessary or desirable for the purpose of administering the agency's ethics program. 5 CFR 2635.803.

The Commission has determined that an approval requirement for outside employment or activities is necessary, desirable and appropriate to the administration of its ethics program because the approval requirement has been effective in ensuring that the outside employment and activities of its employees conform to all applicable laws and regulations. Therefore, the Commission, with the concurrence of OGE, is renewing its requirement for prior approval of certain outside employment and activities by issuing this supplemental regulation at 5 CFR 4701.102 in accordance with 5 CFR 2635.803.

Section 4701.102 differs significantly from former 11 CFR 7.9(f). The major difference is in the far narrower scope of the outside employment and activities covered by the new regulation. Former 11 CFR 7.9(f) required Commission employees to obtain prior approval for *all* outside employment and activities. The term "outside employment or other outside activity" was defined broadly at former 11 CFR 7.2(h) to include "any work, service or other activity performed by an employee." In contrast, 5 CFR 4701.102 requires prior approval from the Designated Agency Ethics Official ("DAEO") only for outside activities that are related to the employee's official duties or that involve the application of the same specialized skills or the same educational background as used in the performance of the employee's official duties. This new rule, which draws on portions of prior approval regulations adopted by several other Federal agencies with OGE concurrence, is narrowly tailored to address agency concerns, while reducing the administrative burdens placed on employees. See, e.g., 5 CFR 3801.106 (Department of Justice), 5 CFR 4501.103 (OPM), 5 CFR 6301.102 (Department of Education), and 5 CFR 8601.102 (Federal Retirement Thrift Investment Board).

New 5 CFR 4701.102(a) sets out the definitions of the terms used in 5 CFR

³ Copies of submitted comments are available on the Commission's Web site. Go to <http://sers.nictusa.com/fosers/> and search for REG number 2003-01.

4701.102(b). The definitions of “active participant,” “employee,” and “related to the employee’s official duties” refer back to the definitions of these terms used in the general standards of conduct regulations issued by OGE.

Section 4701.102(a)(2) follows the definition of “employee” in OGE’s regulation at 5 CFR 2635.102(h), which includes “any officer or employee of an agency.” This definition includes Commissioners. However, section 4701.102(b) excludes Commissioners from its procedures. Section 437c(a)(3) of the Act itself restricts outside activities of Commissioners. *See* 2 U.S.C. 437c(a)(3).⁴ As discussed below, regulations implementing Section 437c(a)(3) were located in former 11 CFR 7.9, and are being moved to 11 CFR 7.6 as part of this rulemaking.

Section 4701.102(a)(3) defines “outside employment” to mean any form of non-Federal employment, business relationship or activity involving the provision of personal services, with or without compensation. The definition provides a non-exhaustive list of services such as serving as a lawyer, officer, director, trustee, agent, consultant, contractor, general partner, teacher, speaker, writer, or any other services provided by an individual. This definition of “outside employment” is similar to those adopted by other Federal agencies and covers a broad range of outside employment and activities in which a Commission employee may seek to engage. *See, e.g.*, 5 CFR 3801.106 (Department of Justice) and 5 CFR 5701.101 (Federal Trade Commission). Notably, this definition of “outside employment” includes unpaid activity which may not conform to the usual understanding of “employment.”

Section 4701.102(b) states that a Commission employee other than a special Government employee⁵ must obtain prior, written approval from the DAEO before engaging in outside employment or activities where the services provided are related to the employee’s official duties or involve the application of the same specialized skills or the same educational background as used in the performance of the employee’s official duties. Accordingly, Commission employees

are required to obtain prior, written approval only when they seek to engage in outside employment or activities that are related, in one of those respects, to their official duties. For example, a Commission attorney wishing to engage in weekend employment as a salesperson for a retail organization need not seek prior approval because such employment would not be related to his or her official duties or involve the application of the same specialized skills or educational background as used in his or her position at the Commission. In contrast, a Commission attorney wishing to represent a relative in a lawsuit filed against a private party in State court *would* need to seek prior approval because such representation would involve the application of the same specialized skill or same educational background as used in his or her position with the Commission.

One comment argued that the prior approval requirement would be overbroad in that approval would be required for many activities that obviously do not conflict with Federal employment or law. Consequently, according to the comment, the requirement may deter employees from participating in community activities or cause a greater administrative burden in having to process so many requests. This comment also faulted the rule for not specifying how the employer will determine if an outside activity involves the same specialized skills or educational background. The comment suggested that the requirement should be eliminated.

The Commission disagrees with the comment because the scope of activities in the revised rules for which prior approval is required is considerably narrower than the scope of activities in the former regulations, which required prior approval for *any* potential outside employment. Thus, there will likely be fewer requests for the DAEO to handle. Further, the requirement to seek prior approval is not intended to prevent Commission employees from engaging in outside activities; rather, it is merely intended to help employees avoid potential conflicts with their jobs at the Commission.⁶

⁶ To this end, for example, the Commission’s Office of the General Counsel has developed a Policy on Pro Bono Legal Activities. This Policy states, in part, that “it is the policy of the Office of General Counsel to encourage and support efforts by its employees to provide pro bono legal services within their communities that are consistent with applicable federal statutes and regulations governing conflicts of interest and outside activities.” The Policy also provides for pre-approval of certain non-representational pro bono services, such as providing advice at walk-in legal clinics or assisting individuals with filling out

Finally, the Commission has determined that the “same specialized skills and educational background” standard is well suited for reviewing outside activities. The previous standard, in which all outside activities were reviewed, was overly broad and unduly burdensome. On the other hand, although the regulation also requires employees to seek approval for outside activities that “relate to their official duties,” limiting the preapproval requirement to those activities would be too narrow. Such a limitation would exclude from the review and prior approval process activities that have little or nothing to do with an employee’s work, but may nevertheless result in criminal or administrative violations due to the employee’s employment status. For instance, attorney employees may not represent persons before Federal courts or other Federal agencies. *See* 18 U.S.C. 203 and 205 (prohibiting representation by Federal employees in matters involving the United States or District of Columbia). Similarly, Audit staff may not communicate with the Internal Revenue Service on behalf of persons being audited. *See* 18 U.S.C. 203. The Commission has determined that requiring prior approval for those activities that use the same specialized skills or educational background is the least burdensome standard for employees and the Commission that still ensures that employees receive the guidance they need to avoid potential conflicts with their jobs at the Commission.

Section 4701.102(c) establishes the procedure for the submission of approval requests to the DAEO. It requires that the request be submitted through all of the employee’s supervisors. For purposes of this section, the Staff Director, the General Counsel, the Inspector General, the Chief Financial Officer, a Commissioner, or the Commission, respectively, are considered the final level of supervision for their subordinates. A request needs to provide certain information, including the identity of the person, group, or organization for which the employee intends to provide services.

One comment expressed concern that the new regulations would require employees to obtain the approval of all supervisors before commencing outside employment. However, section 4701.102(c) requires only that employees *submit* their requests

governmental forms, which employees may engage in without prior approval (after notifying the Commission’s ethics officer and their supervisor).

⁴ Section 437c(a)(3) states that Commissioners “shall not engage in any other business, vocation, or employment.”

⁵ “Special Government employee” is defined at 5 CFR 2635.102(l). Special Government employees are temporary or part-time employees hired to provide expertise about the industry in which they work. Such special Government employees are expected to have outside employment, and it is unnecessary to require them to seek prior approval for such outside employment.

through all of their supervisors. The only person with the authority to approve or disapprove the request is the DAEO. See 5 CFR 4701.102(b). The purpose of having the employee submit the request through his or her supervisory chain is to alert these supervisors to the request so that they can provide the DAEO with relevant information, where necessary, about the employee's present job duties and likely future assignments. Such additional information is sometimes necessary for the DAEO to make an accurate determination about the request pursuant to section 4701.102(d), and to provide appropriate guidance to the employee for the purpose of avoiding potential conflicts with his or her job duties at the Commission.

Section 4701.102(d) sets forth the standard for the DAEO's approval of an employee's request regarding outside employment or activity, which was not in former 11 CFR 7.9(f). Approval will be granted only upon a determination that the outside employment or activity is not expected to involve conduct prohibited by statute or Federal regulations. In making this determination, the regulations to be considered include those at 5 CFR part 2635. Therefore, the approval will depend on whether the outside employment or activity: (1) Would create conflicting financial interests, (2) would result in a lack of impartiality in performing official duties or the misuse of Government position, and (3) would otherwise comply with 5 CFR part 2635. The Commission also intends to develop appropriate internal procedural guidelines, consistent with the regulations adopted here, to address the processing of requests for prior approval of outside employment or activities by agency employees.

The comment also objected to the use of the phrase "expected to," arguing that it is too broad and subjective, failing to specify an exact standard. The comment further proposed the standard that

"approval shall be granted only upon a determination that the outside employment does not involve conduct prohibited by statute or Federal regulation including 5 CFR part 2635" as an alternative.

The language the Commission is adopting is an appropriate standard, having been adopted by numerous other Federal departments and agencies. See, e.g., 5 CFR 3801.106(b)(3) (Department of Justice), 5 CFR 4501.103(c) (OPM), and 5 CFR 8601.102(b) (Federal Thrift Retirement Investment Board). Moreover, the phrase "expected to" is not intended to introduce any element of subjectivity or uncertainty. It merely recognizes that the activity for which approval is sought has yet to take place, and that a determination by the DAEO will be made based on the information as provided by the employee, not on information that is not provided, or on subsequent changes to the scope of an activity that occur after the employee enters into it. Cf. 5 CFR 2635.107(b) (employee must make full disclosure of all relevant circumstances in order to invoke protection from disciplinary action based on good faith reliance on advice of agency ethics official). Indeed, 5 CFR part 2635, in part, employs the "expected to" standard. See 5 CFR 2635.802(b), Example 2.⁷

FEC Standards of Conduct in 11 CFR Part 7

The Act authorizes the Commission to promulgate regulations addressing certain conduct of its members and its employees. Pursuant to this authority, the Commission is promulgating the following rules in 11 CFR part 7: (1) 11 CFR 7.1 (purpose and applicability), (2) 7.2 (definitions), (3) 7.3 (interpretation and advisory service), (4) 7.4 (reporting suspected violations), (5) 7.5 (corrective actions), (6) 7.6 (outside employment and activities of Commissioners), (7) 7.7 (prohibition against making complaints and investigations public), and (8) 7.8 (ex parte communications in

enforcement actions). Details of these provisions are discussed below.

Many of the Commission's former regulations in 11 CFR part 7 have been supplanted by OGE's regulations. These regulations include: (1) Portions of former 11 CFR 7.1 (purpose and applicability), former 11 CFR 7.3 (notification to employees and special Commission employees), former 11 CFR 7.7 (prohibited conduct—general), former 11 CFR 7.8 (gifts, entertainment, and favors), portions of former 11 CFR 7.9 (outside employment or activities), former 11 CFR 7.10 (financial interests), former 11 CFR 7.12 (membership in associations), former 11 CFR 7.13 (use of Government property), former 11 CFR 7.16 (miscellaneous statutory provisions), and former 11 CFR 7.17–7.21 (comprising Subpart C, which addressed special Commission employees). Accordingly, the Commission is removing the supplanted regulations from the Commission's Standards of Conduct in 11 CFR part 7.

The Commission's regulation at former 11 CFR 7.11 concerning political activity by Commissioners and Commission employees was supplanted by the Hatch Act Reform Amendments of 1993. See Public Law 103–94, 107 Stat. 1001 (1993). Therefore, the Commission is removing former section 7.11. See discussion below.

The Commission's regulations at former 11 CFR part 7, subpart D (composed of sections 7.22–7.33), addressed post-employment conflicts of interest and procedures for administrative enforcement proceedings. The statutory authorization for these regulations has been removed. See 18 U.S.C. 216(j). Therefore, the Commission is removing 11 CFR part 7, subpart D. See discussion below.

The regulations that the Commission is retaining and revising are redesignated. The following chart lists the removals, revisions, and redesignations for 11 CFR part 7.

| Former 11 CFR section | Action | Redesignated 11 CFR section | Supplanted by 5 CFR section |
|---------------------------------|--------------------------------|-----------------------------|----------------------------------|
| 7.1(a) | Removed as supplanted | | 2635.101. |
| 7.1(b) ⁸ & (c) | Removed as supplanted | | 2635.102(h). |
| 7.1(b) ⁹ | Revised | 7.1(a) and (b) | |
| 7.2 | Revised | 7.2 | |
| 7.3 | Removed as supplanted | | 2638.701–2638.706. |
| 7.4 | Revised and redesignated | 7.3 | |
| 7.5 | Revised and redesignated | 7.4 | |
| 7.6 | Revised and redesignated | 7.5 | |
| 7.7 | Removed as supplanted | | 2635.101. |
| 7.8 | Removed as supplanted | | 2635.201–2635.205. ¹⁰ |
| 7.9(a) | Revised and redesignated | 7.6 | |

⁷ The Commission also notes that it received a request from the union that represents some agency

employees seeking to bargain over certain aspects of the prior approval regulation at 5 CFR 4701.102.

| Former 11 CFR section | Action | Redesignated 11 CFR section | Supplanted by 5 CFR section |
|-----------------------|--------------------------|-----------------------------|----------------------------------|
| 7.9(b)–(f) | Removed as supplanted | | 2635.801–2635.809 ¹¹ |
| 7.10 | Removed as supplanted | | 2635.401–2635.403. ¹² |
| 7.11 | Removed as supplanted | | Hatch Act Amendments. |
| 7.12 | Removed as supplanted | | 2635.402. ¹³ |
| 7.13 | Removed as supplanted | | 2635.704. |
| 7.14 | Revised and redesignated | 7.7 | |
| 7.15 | Revised and redesignated | 7.8 | |
| 7.16 | Removed as supplanted | | 2635.901–2635.902. |
| 7.17–7.21 | Removed as supplanted | | 2635.102(h). ¹⁴ |
| 7.22–7.33 | Removed as supplanted | | 18 U.S.C. 207. |

A. 11 CFR 7.1—Scope

Section 7.1(a) states that the regulations in 11 CFR part 7 apply to all members and employees of the Commission. Section 7.1(b) lists the other regulations in title 5 of the Code of Federal Regulations, including new 5 CFR part 4701, that now govern the ethical conduct of Commissioners and employees. Former 11 CFR 7.1(b), which stated that the regulations in 11 CFR part 7 apply to all employees and “special Commission employees,” is being removed. As explained below, 11 CFR 7.2(d) includes “special Government employees” in the definition of “employee.” Although the Commission’s former regulations used the term “special Commission employee,” the revised regulation uses the term “special Government employee” as defined at 5 CFR 2635.102(l) in order to better conform to OGE terminology. Because revised 11 CFR 7.1(a) states that the regulations in 11 CFR part 7 apply to all Commission employees, which includes special Government employees, former paragraph (b) is no longer necessary and is being removed. Former 11 CFR 7.1(c), which stated that the regulations in 11 CFR part 7 must be construed in accordance with any applicable laws, regulations, and the Commission’s Labor-Management Agreement is being removed because it is unnecessary. No public comments were received on this section.

⁸ Part of former 11 CFR 7.1(b) included special Government employees. See also 11 CFR 7.2(d).

⁹ Part of former 11 CFR 7.1(b) explained that 11 CFR part 7 applies to Commission members and employees.

¹⁰ See also 5 CFR 2635.301–2635.304.

¹¹ See also 5 CFR part 4701.

¹² See also 5 CFR 2635.501–2635.503 and 2635.703.

¹³ See also 5 CFR 2635.502, 2635.704–2635.705, and discussion below.

¹⁴ See also 11 CFR 7.2(d) (including special Government employees).

B. 11 CFR 7.2—Definitions

Section 7.2 continues to set forth the definitions used in 11 CFR part 7. The definition of “Commission” in 11 CFR 7.2(a) remains unchanged. The definition of “Commissioner” in 11 CFR 7.2(b) is being revised slightly. Whereas former paragraph (b) of 11 CFR 7.2 defined “Commissioner,” in part, as “a voting member of the Federal Election Commission,” revised 11 CFR 7.2(b) deletes the word “voting” from the definition. The word “voting” is not necessary because the Commission no longer includes non-voting members.¹⁵ This definition includes a Commissioner who holds his or her position by virtue of a recess appointment.

The definition of “conflict of interest” in former section 7.2(c) is being removed. Instead, the Commission relies on OGE regulations and regulatory definitions regarding conflicts of interest, except for the provisions in 11 CFR 7.6 governing outside employment and activities of Commissioners. See, e.g., 5 CFR 2635.801–2635.809. Because section 7.6 does not use the term “conflict of interest,” a definition of that phrase specific to 11 CFR part 7 is no longer needed.

The terms “Designated Agency Ethics Officer” and “Ethics Officer” in former 11 CFR 7.2(d) are being replaced with the term “Designated Agency Ethics Official” in section 7.2(c) and throughout part 7. See 11 CFR 7.3, 7.4, and 7.5. These changes make the Commission’s regulations consistent with OGE’s regulations at 5 CFR 2638.104. Section 7.2(c) also includes a provision from former 11 CFR 7.4 stating that the Commission’s General Counsel serves as the Designated Agency Ethics Official.

¹⁵ Prior to 1993, the Secretary of the Senate and the Clerk of the House of Representatives served as non-voting “ex-officio” members of the Commission. These positions were, however, found to be in violation of the Constitution’s separation of powers doctrine in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (DC Cir. 1993), cert. dismissed for want of jurisdiction, 513 U.S. 88 (Dec. 6, 1994).

In revised 11 CFR 7.2(d), the definition of “employee” is being moved from former 11 CFR 7.2(e) and is being amended to include a “special Government employee as defined in 18 U.S.C. 202(a).” OGE regulations at 5 CFR 2635.102(h) include “special Government employee” within the general definition of “employee,” thus subjecting special Government employees to the same Standards of Conduct as other employees, with certain limitations. Revised section 7.2(d) operates similarly.

Section 7.2(e) defines “*ex parte* communication” for the purposes of 11 CFR part 7. This definition is based on the definition of “*ex parte* communication” at 11 CFR 201.2(a) applicable to non-enforcement situations.¹⁶ Like that definition, section 7.2(e) defines “*ex parte* communication” as any written or oral communication by any person outside the agency to any Commissioner or any member of any Commissioner’s staff, but not to any other Commission employee, that imparts information or argument regarding prospective Commission enforcement action or potential action concerning any pending enforcement matter. Like Commission regulations at 11 CFR 111.22 and part 201, the definition in section 7.2(e) is limited to Commissioners and their staff members because the Commissioners are empowered to make decisions on enforcement matters, and their staff members are their confidential assistants on these matters. The Commission notes that “matter” as used in the revised rule includes enforcement Matters Under Review, Administrative Fines, and Alternative Dispute Resolution cases (“ADR”). See also discussion of 11 CFR 7.8 below.

Section 7.2(f) defines the term “Inspector General.” The definitions of

¹⁶ The treatment of *ex parte* communications in enforcement matters is addressed in 11 CFR 111.22. The treatment of *ex parte* communications in audits, rulemakings, advisory opinions, public funding cases, and litigation matters is covered by 11 CFR part 201.

“former employee,” “official responsibility,” “person,” and “special Commission employee” at former 11 CFR 7.2(f), (g), (i), and (j), respectively, are being removed from section 7.2 as these definitions are no longer necessary. In addition, paragraph (h) of former 11 CFR 7.2 defining “outside employment or other outside activity” is being removed. Because the Commission is replacing much of former 11 CFR 7.9 (outside employment or activities by Commission employees) with a supplemental regulation at 5 CFR 4701.102, paragraph (h) of former 11 CFR 7.2 defining “outside employment or other outside activity” is now superfluous.

No public comments were received on this section.

C. 11 CFR 7.3—Interpretation and Guidance

Section 11 CFR 7.3 is a revised version of former 11 CFR 7.4, which addressed the provision of interpretation and guidance to Commissioners and employees. Specifically, under section 7.3(a), Commissioners and employees may seek interpretation and guidance related to 5 CFR parts 735, 2634, 2635, 2640, and 4701 from the DAEO. Paragraph (b) clarifies that the DAEO, a Commissioner, or an employee may request an opinion from the Director of OGE concerning interpretations of 5 CFR parts 2634, 2635, or 2640. No public comments were received on this section.

D. 11 CFR 7.4—Reporting Suspected violations

Section 7.4, which is a revised version of former 11 CFR 7.5, addresses the reporting of suspected violations of the FEC’s Standards of Conduct and OGE’s Standards of Ethical Conduct. Section 7.4 requires the reporting of suspected violations of 5 CFR parts 735, 2634, 2635, 2640, and 4701, and 11 CFR part 7 to the DAEO, the Inspector General, or other appropriate law enforcement authorities. No public comments were received on this section.

E. 11 CFR 7.5—Corrective Action

Section 7.5 informs employees that a violation of the FEC’s Standards of Conduct or OGE’s Standards of Ethical Conduct may be cause for appropriate corrective action, disciplinary action, or adverse action, in addition to any penalty prescribed by law, including criminal penalties. This section is based on former section 7.6(a). Procedures for taking corrective, disciplinary, and adverse actions are set forth in other authority. Accordingly, the procedures

in former section 7.6(b) and (c) are no longer necessary and are being deleted. No public comments were received on this section.

F. 11 CFR 7.6—Outside Employment and Activities by Commissioners

Section 7.6 addresses outside employment and activities of Commissioners.¹⁷ FECA provides authority for additional restrictions on Commissioners’ outside employment and activities. See 2 U.S.C. 437c(a)(3).

Section 7.6, which retains the approach of the former rule at 11 CFR 7.9(a), states that no Commissioner may devote a substantial portion of his or her time to any other business, vocation, or employment. This regulation retains the former rule’s allowance of a ninety-day period for a Commissioner, following the start of Commission service, to limit such activity.

As noted in the 1986 Explanation and Justification for the prior rule on Commissioners’ outside activities, the use of the words “substantial portion” of a Commissioner’s time to trigger the regulation’s prohibitions is based on the legislative history of 2 U.S.C. 437c(a)(3). See Explanation and Justification for Final Rules on Standards of Conduct for Agency Employees, 51 FR 34440, 34442 (Sept. 29, 1986). The Conference Report that accompanied the 1976 amendments to FECA discusses 2 U.S.C. 437c(a)(3): “[T]he conferees agree that the requirement is intended to apply to members who devote a substantial portion of their time to such business, vocation, or employment activities.” H.R. Rep. No. 94–1057, at 34 (1976) (Conf. Rep.), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976, at 1028 (1977). This rule continues this interpretation. No public comments were received on this section.

G. 11 CFR 7.7—Prohibition Against Making Complaints and Investigations Public

Pursuant to section 111.21 of the Commission’s rules, which implements section 437g(a)(12)(A) of the Act, and with the exception of Commission actions described in section 111.20, “no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any

findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.” 11 CFR 111.21(a); 2 U.S.C. 437g(a)(12)(A). Section 7.7 derives its authority from 2 U.S.C. 437g(a)(12)(A). This rule follows former 11 CFR 7.14. The Commission is making one non-substantive change by removing the phrase “are warned that they” from paragraph 7.7(a). The language is unnecessary because the text of the paragraph itself serves as a warning.

No public comments were received on this section.

H. 11 CFR 7.8—Ex Parte Communications in Enforcement Actions

Section 7.8, which is a revised version of former 11 CFR 7.15, addresses *ex parte* communications made in the context of enforcement actions. In particular, section 7.8 prohibits the making or consideration of *ex parte* communications by Commissioners and any member of a Commissioner’s staff, except as otherwise required by law.¹⁸ Former 11 CFR 7.15 applied to Commissioners and “employees involved in the decisional process.” The revisions to this section were made to conform 11 CFR 7.8 to the *ex parte* rules in 11 CFR 111.22 and part 201. See also discussion of 11 CFR 7.2(e), above. Section 7.8 also contains nonsubstantive revisions from paragraphs (a), (c), and (d) of former section 7.15. For clarity, the Commission has added new paragraph (e) of section 7.8, which references the provisions of 11 CFR 111.22 governing *ex parte* communications made in connection with Commission enforcement actions, and 11 CFR part 201, governing *ex parte* communications made in connection with public funding, audits, litigation, rulemakings, and advisory opinions. Paragraph 7.8(e) is intended to assist the reader in locating additional rules regarding *ex parte* communications in enforcement actions, audits, litigation, rulemakings, and advisory opinions.

No public comments were received on this section.

¹⁷ Outside activities of all FEC employees are addressed in OGE’s Standards of Ethical Conduct at 5 CFR 2635.801–2635.809, which, when the standards became effective in February 1993, superseded the Commission’s former regulations at 11 CFR 7.9(b)–(f). Commissioners are subject to additional limitations on outside activities as described in 11 CFR 7.6 and 2 U.S.C. 437c(a)(3).

¹⁸ Please note that this includes shared staff as described in Commission Directive 64. Directive 64 can be found here: http://www.fec.gov/directives/directive_64.pdf.

I. Removal of 11 CFR 7.11—Political and Organization Activity

The Hatch Act Reform Amendments of 1993¹⁹ lifted many of the restrictions imposed by the original Hatch Act on most Federal employees with regard to participation in political campaigns. However, Congress specifically addressed the FEC in the Hatch Act Amendments and left all of the original Hatch Act's restrictions in place for employees of the Commission, other than Commissioners. See 5 U.S.C. 7323(b)(1) and (2). In contrast to the Commissioners, Commission employees may not give a political contribution to a Member of Congress, an employee of the Executive Branch (other than the President or Vice President), or an officer of a uniformed service. 5 U.S.C. 7323(b)(1). Additionally, Commission employees may not "take an active part in political management or political campaigns." 5 U.S.C. 7323(b)(2)(A).

The Hatch Act, as amended, prohibits certain political activities by Commissioners such as (1) Using official authority or influence to interfere with an election, (2) knowingly soliciting or discouraging political activity by anyone subject to a Commission audit or investigation, (3) soliciting or receiving political contributions (except in certain, narrowly limited circumstances), or (4) being a candidate for public office in a partisan election. 5 U.S.C. 7323(a).

OPM has authority to issue regulations regarding the Hatch Act Amendments, and the Office of Special Counsel ("OSC") interprets and enforces those regulations. See 5 U.S.C. 1103(a)(5), 1212, 1216(a)(1) and 7325. No provision in the Hatch Act Amendments empowers any agency other than OPM to issue regulations pursuant to the Hatch Act Amendments, and no provision in FECA directly refers to the Hatch Act Amendments or previous Hatch Act restrictions. OPM has issued a regulation expressly prescribing the extent to which the political activities of employees may be limited beyond the restrictions in the Hatch Act Amendments. See 5 CFR 734.104. This OPM regulation states: "No further proscriptions or restrictions may be imposed upon employees covered under this regulation except: (a) Employees who are appointed by the President by and with the advice and consent of the Senate; (b) Employees who are appointed by the President; (c) Non-career senior executive service members; (d) Schedule C employees, 5 CFR 213.3301, 213.3302; and (e) Any

other employees who serve at the pleasure of the President." 5 CFR 734.104.

The Commission requested and received an advisory opinion from the OSC as to the scope of the Commission's authority to interpret the Hatch Act Amendments regarding Commissioners and Commission employees.²⁰ The specific question asked was whether the Commission may adopt a regulation that would forbid a Commissioner or a Commission employee from publicly supporting, working for, or contributing to a candidate, political party, or political committee subject to the jurisdiction of the FEC, even if, in the case of public support, the activity is not done in concert with the candidate, political party, or political committee. In its opinion, the OSC noted the OPM regulations cited above and stated with respect to employees that "the FEC cannot further restrict the political activity of its regular employees by forbidding them from publicly supporting or contributing to a candidate, political party, or political committee subject to the jurisdiction of the Commission." U.S. Office of Special Counsel Advisory Opinion, OSC File No. AD-03-0095, at 2 (Aug. 29, 2003). The OSC opinion also noted with respect to Commissioners that "the FEC has no authority to adopt regulations that would forbid a Commissioner from publicly supporting, working for, or contributing to a candidate, political party, or political committee subject to the jurisdiction of the FEC." *Id.* at 2-3. Thus, the OSC concluded that "the FEC may not adopt regulations that would limit the political activity of FEC employees or Commissioners beyond the restrictions set forth in the Hatch Act." *Id.* at 3.

Accordingly, former section 7.11 is being removed because it is inconsistent with the Hatch Act Amendments.

J. Removal of 11 CFR 7.12—Membership in Associations

The Commission is removing former 11 CFR 7.12, which addressed employee and Commissioner membership in associations. In 1991, OGE issued a Notice of Proposed Rulemaking that included proposed regulations concerning participation in professional associations. See Notice of Proposed

Rulemaking on Standards of Ethical Conduct for Employees of the Executive Branch, 56 FR 33778 (July 23, 1991). OGE decided, however, to reserve action in its final rule on this topic as a result of the overwhelming response to its request for comments. See Explanation and Justification for Final Rule on Standards of Ethical Conduct for Employees of the Executive Branch, 57 FR 35006 (Aug. 7, 1992). Consistent with the OGE decision to reserve action on membership in associations in its final rule, the Commission concludes that ethical concerns regarding membership in nongovernmental associations or organizations are properly addressed under the more general standards in 5 CFR part 2635. See 57 FR at 35035. Among those general provisions that are applicable are 5 CFR 2635.402 (concerning disqualifying financial interests), 5 CFR 2635.502 (concerning personal and business relationships), and 5 CFR 2635.704 and 2635.705 (concerning use of government property and official time).

K. Removal of 11 CFR Part 7, Subpart D (Post Employment Conflict of Interest: Procedure for Administrative Enforcement Proceedings)

Former 11 CFR part 7, subpart D, concerned administrative procedures to be followed for investigations of post-employment conflict-of-interest violations by individuals who have left Commission employment. Subpart D was based on a prior version of 18 U.S.C. 207 and 5 CFR parts 2637 and 2641. At the time that subpart D was adopted, 18 U.S.C. 207(j) authorized agency proceedings against individuals who violated that section and required that "departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection."

Subsequently, however, 18 U.S.C. 207(j) was amended and the language authorizing administrative procedures and providing the authority to promulgate regulations establishing procedures was removed and replaced with language providing exceptions to the restrictions on post-employment conflicts of interest.²² The Commission has no pending post-employment situations concerning employees who left service before the repeal of former 18 U.S.C. 207(j). Accordingly, the Commission is removing former 11 CFR part 7, subpart D in its entirety. Please

²⁰ A copy of the Office of Special Counsel's opinion is available on the Commission's Web site. Go to <http://sers.nictusa.com/josers/> and search for REG number 2003-01.

²¹ Under 5 U.S.C. 1212, the advisory opinion authority of the OSC is limited to matters related to the Hatch Act. Therefore, the conclusions of the opinion are also limited to interpretations of the Hatch Act and OPM regulations. They do not apply to any separate statutory authority under FECA.

²² See Pub. L. No. 101-189, Div. A, Title VIII, Part B, sec. 814(d)(2), 103 Stat. 1352, 1499 (1989) (National Defense Authorization Act for Fiscal Years 1990 and 1991).

¹⁹ Public Law 103-94, 107 Stat. 1001 (1993) ("Hatch Act Amendments").

note that former employees remain subject to Department of Justice criminal prosecution under 18 U.S.C. 207 for post-employment conflict of interest violations. See 18 U.S.C. 216.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that this rulemaking affects only the appointed members of the Federal Election Commission and its employees. The members of the Commission and its employees are individuals, and are not small entities under 5 U.S.C. 601.

List of Subjects

5 CFR Part 4701

Conflict of interests, Government employees, Outside activities.

11 CFR Part 7

Administrative practice and procedure, Conflict of interests, Government employees, Political activities (government employees).

11 CFR Part 201

Ex parte communications.

For the reasons set out in the preamble, title 5 of the Code of Federal Regulations is amended as follows, and chapter I of title 11 of the Code of Federal Regulations is further amended as follows:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

■ 1. Chapter XXXVII, consisting of part 4701, is added to title 5 of the Code of Federal Regulations to read as follows:

CHAPTER XXXVII—FEDERAL ELECTION COMMISSION

PART 4701—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE FEDERAL ELECTION COMMISSION

Sec.

4701.101 Scope.

4701.102 Prior approval for certain outside employment.

Authority: 2 U.S.C. 437c(a)(3); 5 U.S.C. 7301; 5 U.S.C. app. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR p. 215 (1989 Comp.), as modified by E.O. 12731, 55 FR 42547, 3 CFR p. 306 (1990 Comp.); 5 CFR 2635.105 and 2635.803.

§ 4701.101 Scope.

(a) In accordance with 5 CFR 2635.105, the regulations in this part set forth standards of conduct that apply to

members and other employees of the Federal Election Commission (“Commission”).

(b) In addition, members and other employees of the Commission are subject to the following regulations:

(1) 5 CFR part 735 (Employee Responsibilities and Conduct);

(2) 5 CFR part 2634 (Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture);

(3) 5 CFR part 2635 (Standards of Ethical Conduct for Employees of the Executive Branch); and

(4) 11 CFR part 7 (Standards of Conduct for Members and Employees of the Federal Election Commission).

§ 4701.102 Prior approval for certain outside employment.

(a) *Definitions.* For purposes of this section:

(1) *Active participant* has the meaning set forth in 5 CFR 2635.502(b)(1)(v).

(2) *Employee* has the meaning set forth in 5 CFR 2635.102(h).

(3) *Definition of outside employment.*

For purposes of this section, *outside employment* means any form of non-Federal employment, business relationship or activity involving the provision of personal services, whether or not for compensation. It includes, but is not limited to, services as an officer, director, agent, advisor, attorney, consultant, contractor, general partner, trustee, teacher, speaker, writer, or any other services provided by an individual. It includes writing when done under an arrangement with another person for production or publication of the written product. The definition does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization, unless:

(i) The activity provides compensation other than reimbursement of expenses;

(ii) The activities of the non-Federal organization are devoted substantially to matters relating to the employee’s official duties as defined in 5 CFR 2635.807(a)(2)(i)(B) through (E) and the employee will serve as officer or director of the non-Federal organization; or

(iii) The activities will involve the provision of consultative or professional services. Consultative services means the provision of personal services, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher

education, hospital, or similar facility. Professional services means the provision of personal services, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR 2636.305(b)(1) or involves a fiduciary relationship as defined in 5 CFR 2636.305(b)(2).

(4) *Related to the employee’s official duties* means that the outside employment meets one or more of the tests described in 5 CFR 2635.807(a)(2)(i)(B) through (E). Outside employment related to the employee’s official duties includes:

(i) Outside employment that an employee has been invited to participate in because of his or her official position rather than his or her expertise in the subject matter;

(ii) Outside employment in which an employee has been asked to participate by a person that has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties;

(iii) Outside employment that conveys information derived from nonpublic information gained during the course of government employment; and

(iv) Outside employment that deals in significant part with any matter to which the employee is or has been officially assigned in the last year, or any ongoing or announced Commission policy, program, or operation.

(b) *Prior approval requirement.* An employee of the Commission, including a member of a Commissioner’s staff, but not a member of the Commission or a special Government employee, shall obtain written approval from the Designated Agency Ethics Official before engaging in outside employment where the services provided:

(1) Are related to the employee’s official duties; or

(2) Involve the application of the same specialized skills or the same educational background as used in the performance of the employee’s official duties.

(c) *Submission of requests for approval.* (1) The request for approval shall be sent through all of the employee’s supervisors and shall state the name of the person, group, or organization for whom the outside employment is to be performed; the type of outside employment to be performed; and the proposed hours of, and approximate dates of, the outside employment.

(2) Upon a significant change in the nature or scope of the outside employment or in the employee’s official position, the employee shall submit a revised request for approval.

(d) *Standard for approval.* Approval shall be granted only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

TITLE 11—FEDERAL ELECTIONS

CHAPTER I—FEDERAL ELECTION COMMISSION

■ 2. Part 7 is revised to read as follows:

PART 7—STANDARDS OF CONDUCT

Sec.

- 7.1 Scope.
- 7.2 Definitions.
- 7.3 Interpretation and guidance.
- 7.4 Reporting suspected violations.
- 7.5 Corrective action.
- 7.6 Outside employment and activities by Commissioners.
- 7.7 Prohibition against making complaints and investigations public.
- 7.8 *Ex parte* communications in enforcement actions.

Authority: 2 U.S.C. 437c, 437d, and 438; 5 U.S.C. 7321 *et seq.* and app. 3.

§ 7.1 Scope.

(a) The regulations in this part apply to members and employees of the Federal Election Commission (“Commission”).

(b) In addition, members and employees of the Commission are subject to the following regulations:

- (1) 5 CFR part 735 (Employee Responsibilities and Conduct);
- (2) 5 CFR part 2634 (Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture);
- (3) 5 CFR part 2635 (Standards of Ethical Conduct for Employees of the Executive Branch); and
- (4) 5 CFR part 4701 (Supplemental Standards of Ethical Conduct for Employees of the Federal Election Commission).

§ 7.2 Definitions.

As used in this part:

(a) *Commission* means the Federal Election Commission, 999 E Street NW., Washington, DC 20463.

(b) *Commissioner* means a member of the Federal Election Commission, in accordance with 2 U.S.C. 437c.

(c) *Designated Agency Ethics Official* means the employee designated by the Commission to administer the provisions of the Ethics in Government Act of 1978 (5 U.S.C. appendix), as amended, and includes a designee of the Designated Agency Ethics Official. The General Counsel serves as the Commission’s Designated Agency Ethics Official.

(d) *Employee* means an employee of the Federal Election Commission and

includes a special Government employee as defined in 18 U.S.C. 202(a).

(e) *Ex parte communication* means any written or oral communication by any person outside the agency to any Commissioner or any member of any Commissioner’s staff, but not to any other Commission employee, that imparts information or argument regarding prospective Commission action or potential action concerning any pending enforcement matter.

(f) *Inspector General* means the individual appointed by the Commission to administer the provisions of the Inspector General Act of 1978, as amended (5 U.S.C. appendix), and includes any designee of the Inspector General.

§ 7.3 Interpretation and guidance.

(a) A Commissioner or employee seeking advice and guidance on matters covered by this part or 5 CFR parts 735, 2634, 2635, 2640, or 4701 may consult with the Designated Agency Ethics Official. The Designated Agency Ethics Official should be consulted before undertaking any action that might violate this part or 5 CFR parts 735, 2634, 2635, 2640, or 4701 governing the conduct of Commissioners or employees.

(b) The Designated Agency Ethics Official, a Commissioner, or an employee may request an opinion from the Director of the Office of Government Ethics regarding an interpretation of 5 CFR parts 2634, 2635, or 2640.

§ 7.4 Reporting suspected violations.

Commissioners and employees shall disclose immediately any suspected violation of a statute or of a rule set forth in this part or of a rule set forth in 5 CFR parts 735, 2634, 2635, 2640, or 4701 to the Designated Agency Ethics Official, the Office of Inspector General, or other appropriate law enforcement authorities.

§ 7.5 Corrective action.

A violation of this part or 5 CFR parts 735, 2634, 2635, 2640, or 4701 by an employee may be cause for appropriate corrective, disciplinary, or adverse action in addition to any penalty prescribed by law.

§ 7.6 Outside employment and activities by Commissioners.

No member of the Commission may devote a substantial portion of his or her time to any other business, vocation, or employment. Any individual who is engaging substantially in any other business, vocation, or employment at the time such individual begins to serve as a member of the Commission will appropriately limit such activity no later

than 90 days after beginning to serve as such a member.

§ 7.7 Prohibition against making complaints and investigations public.

(a) Commission employees are subject to criminal penalties if they discuss or otherwise make public any matters pertaining to a complaint or investigation under 2 U.S.C. 437g, without the written permission of the person complained against or being investigated. Such communications are prohibited by 2 U.S.C. 437g(a)(12)(A).

(b) Section 437g(a)(12)(B) of title 2 of the United States Code provides as follows: “Any member or employee of the Commission, or any other person, who violates the provisions of [2 U.S.C. 437g(a)(12)(A)] shall be fined not more than \$2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of [2 U.S.C. 437g(a)(12)(A)] shall be fined not more than \$5,000.”

§ 7.8 Ex parte communications in enforcement actions.

In order to avoid the possibility of prejudice, real or apparent, to the public interest in enforcement actions pending before the Commission pursuant to 2 U.S.C. 437g:

(a) Except to the extent required for the disposition of enforcement matters as required by law (as, for example, during the normal course of an investigation or a conciliation effort), no Commissioner or member of any Commissioner’s staff shall make or entertain any *ex parte* communications.

(b) The prohibition of this section shall apply from the time a complaint is filed with the Commission pursuant to 2 U.S.C. 437g(a)(1) or from the time that the Commission determines on the basis of information ascertained in the normal course of its supervisory responsibilities that it has reason to believe that a violation has occurred or may occur pursuant to 2 U.S.C. 437g(a)(2), and such prohibition shall remain in force until the Commission has concluded all action with respect to the enforcement matter in question.

(c) Any written communication prohibited by paragraph (a) of this section shall be delivered to the General Counsel, who shall place the communication in the case file.

(d) A Commissioner or member of any Commissioner’s staff involved in handling enforcement actions who receives an offer to make an oral communication or any communication concerning any enforcement action pending before the Commission as described in paragraph (a) of this section, shall decline to listen to such

communication. If unsuccessful in preventing the communication, the Commissioner or employee shall advise the person making the communication that he or she will not consider the communication and shall prepare a statement setting forth the substance and circumstances of the communication. Within 48 hours of receipt of the communication, the Commissioner or any member of any Commissioner's staff shall prepare a statement setting forth the substance and circumstances of the communication and shall deliver the statement to the General Counsel for placing in the file in the manner set forth in paragraph (c) of this section.

(e) Additional rules governing *ex parte* communications made in connection with Commission enforcement actions are found at 11 CFR 111.22. Rules governing *ex parte* communications made in connection with public funding, Commission audits, litigation, rulemakings, and advisory opinions are found at 11 CFR part 201.

PART 201—EX PARTE COMMUNICATIONS

■ 3. The authority citation for Part 201 continues to read as follows:

Authority: 2 U.S.C. 437d(a)(8), 2 U.S.C. 438(a)(8), 5 U.S.C. 553(e).

■ 4. Section 201.1 is amended by removing the citation "7.15" and adding in its place the citation "7.8."

On behalf of the Commission.
Dated: October 21, 2011.

Cynthia L. Bauerly,
Chair, Federal Election Commission.
Dated: October 31, 2011.

Don W. Fox,
Acting Director, Office of Government Ethics.
[FR Doc. 2011-29090 Filed 11-10-11; 8:45 am]

BILLING CODE 6715-01-P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC-2011-0008]

RIN 3150-AI91

List of Approved Spent Fuel Storage Casks: MAGNASTOR® System, Revision 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission)

is amending its spent fuel storage regulations by revising the NAC International, Inc. (NAC) MAGNASTOR® System listing within the "List of Approved Spent Fuel Storage Casks" to include Amendment No. 2 to Certificate of Compliance (CoC) Number 1031. Amendment No. 2 will revise: Technical Specification (TS) 3.3.2 to reduce the transportable storage canister removable surface contamination limits; TS 4.1.1 to add various boron-10 areal densities for use with Pressurized Water Reactor and Boiling Water Reactor baskets and to replace the fuel tube orthogonal pitch with the minimum fuel tube outer diagonal dimension; Table 2.1-2, "ASME Code Alternatives for MAGNASTOR® components," of the Final Safety Analysis Report to correct the code reference; and Appendices A and B of the TSs to make editorial corrections.

DATES: The final rule is effective January 30, 2012, unless significant adverse comments are received by December 14, 2011. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

- **Federal Rulemaking Web site:** Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2011-0008. Address questions about NRC dockets to Carol Gallagher, telephone: (301) 492-3668; email: Carol.Gallagher@nrc.gov.

- **NRC's Public Document Room (PDR):** The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Copies may also be obtained from the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available electronically in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents

located in ADAMS, contact the NRC's PDR Reference staff at 1-(800) 397-4209, (301) 415-4737, or by email to pdr.resource@nrc.gov. An electronic copy of the proposed CoC, TSs, and preliminary safety evaluation report (SER) can be found under ADAMS Package Accession Number ML103300181. The ADAMS Accession Number for the NAC application, dated March 22, 2010, is ML112630346.

FOR FURTHER INFORMATION CONTACT: Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone: (301) 415-6445, email: Gregory.Trussell@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 218(a) of the Nuclear Waste Policy Act (NWPA) of 1982, as amended, requires that "the Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." Section 133 of the NWPA states, in part, that "[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic:218(a)] for use at the site of any civilian nuclear power reactor."

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in Title 10 of the Code of Federal Regulations (10 CFR) part 72, which added a new Subpart K within 10 CFR part 72, entitled "General License for Storage of Spent Fuel at Power Reactor Sites" (55 FR 29181; July 18, 1990). This rule also established a new Subpart L within 10 CFR Part 72, entitled "Approval of Spent Fuel Storage Casks," which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on November 21, 2008 (73 FR 70587), that approved the MAGNASTOR® cask design and added it to the list of NRC-approved cask designs in 10 CFR 72.214 as Certificate of Compliance (CoC) No. 1031.