

# Proposed Rules

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.

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 5 CFR Part 7501

[Docket No. FR-5542-P-01]

RIN 2501-AD55

### Supplemental Standards of Ethical Conduct for Employees of the Department of Housing and Urban Development

**AGENCY:** Office of the Secretary, Department of Housing and Urban Development.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Housing and Urban Development (HUD), with the concurrence of the Office of Government Ethics (OGE), seeks comments on the proposed amendments to HUD's Supplemental Standards of Ethical Conduct, which are regulations for HUD officers and employees that supplement the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) issued by OGE. To ensure a comprehensive and effective ethics program at HUD, and to address ethical issues unique to HUD, the proposed rule reflects statutory changes that were enacted subsequent to the promulgation of HUD's Supplemental Standards of Conduct regulation in 1996; significantly, the transfer of general regulatory authority over the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation from HUD to the Federal Housing Finance Agency (FHFA). In addition, the proposed rule revises definitions used in HUD's Supplemental Standards of Conduct to reflect updated titles and positions and clarifies existing prohibitions on certain financial interests and outside employment to better guide employee conduct, while upholding the integrity of HUD in the administration of its programs.

**DATES:** *Comment Due Date:* May 14, 2012.

**ADDRESSES:** Interested persons are invited to submit comments regarding

this proposed rule. All comments must be in writing and be addressed to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th St. SW., Room 10276, Washington, DC 20410-0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

*1. Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500.

*2. Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll-free, at 800-877-8339. Copies of all comments submitted are

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available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

### FOR FURTHER INFORMATION CONTACT:

Robert H. Golden, Assistant General Counsel, Ethics Law Division, telephone number 202-402-6334, or Peter J. Constantine, Associate General Counsel for Ethics and Personnel Law, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone number 202-402-2377. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. Background

Executive Order 12674, as amended by Executive Order 12731, authorized OGE to establish a single, comprehensive, and clear set of executive-branch standards of conduct. On August 7, 1992, OGE published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), as codified at 5 CFR part 2635. (See 57 FR 35006, as corrected at 57 FR 48557 and 57 FR 52583.) The Standards, effective February 3, 1993, set uniform ethical conduct standards applicable to all executive branch personnel.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch agencies to publish agency-specific supplemental regulations necessary to implement their respective ethics programs. Pursuant to this authority, HUD, with OGE's concurrence, published on July 9, 1996, a final rule to establish its supplementary standards of ethical conduct for HUD employees (61 FR 36246). HUD, with OGE's concurrence, now proposes to amend its supplemental standards in order to successfully implement HUD's ethics program in light of recent statutory changes to HUD's programs and operations. One of the most significant statutory changes to HUD programs and operations was made by the Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110-289, approved July 30, 2008). HERA transfers regulatory authority over the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively referred to as the Government Sponsored Enterprises, or GSEs) from

HUD to the Federal Housing Finance Agency (FHFA). Based on this transfer of regulatory authority, HUD has decided to remove provisions of its Supplemental Standards of Conduct that prohibit all HUD employees from owning certain financial interests issued by the GSEs. In addition, HUD has decided to remove § 7501.106 of its Supplemental Standards of Conduct that apply to employees whose duties involve the regulation or oversight of the GSEs. Section 7501.106 prohibits covered employees from, among other things, owning financial interests in certain mortgage institutions and from performing any work, either compensated or uncompensated, for or on behalf of a mortgage institution. The removal of § 7501.106 is based on HUD's determination that this section is no longer necessary to ensuring the impartiality and integrity in the administration of HUD's programs.

In addition, this proposed rule revises definitions used in HUD's Supplemental Standards of Conduct to reflect updated titles and positions and clarifies existing prohibitions on certain financial interests and outside employment to better guide employee conduct, while upholding the integrity of HUD in the administration of its programs. This rule also proposes to add a new § 7501.106 that clarifies the authority of the HUD OIG in the agency's ethics program and establishes it as a separate component as provided by 5 CFR 2635.203(a).

## II. Amendments Proposed by This Rule

The following is a section-by-section overview of the amendments proposed by this rule.

### Section 7501.101 Purpose

This section remains unchanged.

### Section 7501.102 Definitions

Proposed § 7501.102 updates and clarifies key terms already in the current regulation. In addition, it adds new terms to reflect current HUD policy and removes terms that are no longer used in the regulation. Specifically, the proposed definitions of "Agency designee" and "Designated Agency Ethics Official (DAEO)" are revised to reflect updated office names and titles within the current HUD organization. Definitions of "Bureau," "Bureau Ethics Counselor," and "Deputy Bureau Ethics Counselor," are proposed to clarify the Office of Inspector General's responsibilities in HUD's ethics program. Additionally, the reference to the Inspector General (IG) is removed from the definition of "agency designee" in favor of adding definitions for "Bureau," "Bureau Ethics

Counselor," and "Deputy Bureau Ethics Counselor." "Bureau" would be defined to mean the Office of the Inspector General (OIG). "Bureau Ethics Counselor" and "Deputy Bureau Ethics Counselor" would be defined to mean, respectively, the General Counsel for OIG and the OIG employees to whom the OIG General Counsel delegates responsibility to make determinations, issue explanatory guidance, or establish procedures necessary to implement this part, subpart I of 5 CFR part 2634, and 5 CFR part 2635 for Bureau employees. HUD is proposing these amendments to make the structure of its ethics program more consistent with the structure used by other federal agencies and to more clearly describe the role and responsibilities of the IG in HUD's ethics program.

The proposed definition of "employment" is also clarified to provide that employment includes uncompensated activity, such as volunteer work for others while off-duty.

The terms "assistance" and "security" are proposed to be removed from § 7501.102, because these terms are no longer used in HUD's supplemental regulations.

### Section 7501.103 Waivers

Proposed § 7501.103 clarifies the procedure for requesting a waiver, and makes other minor changes to make the section clearer. Proposed § 7501.103 adds the requirement that a waiver request be submitted in writing to an agency designee and should include the employee's office and division; a description of the employee's official duties; the nature and extent of the waiver; a detailed statement of facts to support the request; and the basis for the request, such as hardship. This amendment codifies HUD practice that a waiver request must be in writing, and provides direction to employees on what should be included in a waiver request for a thorough analysis to be conducted. The amendment further confirms HUD practice that hardship and other exigent circumstances are legitimate reasons for a waiver request, and such a request will be considered in light of HUD's need to ensure public confidence in the impartiality and objectivity with which HUD programs are administered. This section also proposes to delegate authority to the Bureau Ethics Counselor to waive provisions of this part.

The proposed section also makes minor textual changes in order to make the regulation easier to understand. These textual changes are not intended to change the meaning of the section.

### Section 7501.104 Prohibited Financial Interests

Proposed § 7501.104 is amended to remove the reference to covered employees under § 7501.106(b)(1). This change reflects the proposed removal of § 7501.106 as discussed in more detail below in this preamble. The proposed regulation continues to apply to all HUD employees, except special government employees, and to the employee's spouse and minor children, because HUD has determined that ownership of the financial interests listed in this section by these individuals constitutes a significant risk of an apparent conflict of interest. Additionally, this section is revised to reflect the changes to HUD regulatory authority as the result of HERA, which transferred all general regulatory authority over Fannie Mae and Freddie Mac from HUD to the FHFA.

Existing § 7501.104(a)(1) is proposed to be removed. The prohibition in this section was promulgated in 1968 after Congress provided HUD with general regulatory authority over Fannie Mae through the Federal National Mortgage Association Charter Act (12 U.S.C. 1716 *et seq.*). Under this 1968 statute, HUD was directed to establish housing goals for Fannie Mae, specifically a goal for low- and moderate-income housing and a goal for housing located in central cities. Beginning in 1968, HUD's Standards of Conduct prohibited employees from owning securities issued by Fannie Mae or securities collateralized by Fannie Mae securities. (See 24 CFR 0.735.205(a)(3) (1968).) Section 7501.104(a)(1) is no longer necessary since HERA transferred the general regulatory functions over Fannie Mae to FHFA.

Existing § 7501.104(a)(2) is also proposed to be removed. In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) and granted HUD essentially the same authority over Freddie Mac as it had over Fannie Mae. In response to this additional authority, HUD's standards of conduct were updated to include a prohibition against owning securities issued by Freddie Mac or securities collateralized by Freddie Mac securities. HUD has determined that the prohibition is no longer necessary because of HERA.

The remaining provisions are redesignated accordingly.

Proposed § 7501.104(a)(1) adopts language from the current § 7501.104(a)(3).

Proposed § 7501.104(a)(2) is based on current § 7501.104(a)(4), but is revised to add clarity. Specifically, the revised

section replaces the phrase “in a multifamily project or single family dwelling, cooperative unit, or condominium unit” with the term “project” in order to cover all HUD subsidized or insured projects that exist or may come to exist in the future. Employee ownership of homes with mortgages insured under programs of the Federal Housing Administration (FHA) and the purchase by employees of HUD-owned homes, which was an exception within the prohibition of § 7501.104(a)(4), is now addressed in exceptions under proposed § 7501.104(b). All remaining HUD projects, including multifamily projects, assisted living facilities, nursing homes, and hospitals, are now included in the revised prohibition in § 7501.104(a)(2). Finally, proposed § 7501.104(a)(2) now uses the term “financial interest” to replace “stock or other financial interest” and references OGE regulations at 5 CFR 2635.403(c) for a complete definition of the term “financial interest,” including examples.

Proposed § 7501.104(a)(3) revises the language in current § 7501.104(a)(5). A new exception is proposed that allows all new HUD employees who already have a tenant receiving Section 8 subsidies to retain that tenant until the tenant terminates his or her lease. Proposed § 7501.104(a)(3)(i)(E) adds a new exception permitting HUD employees to receive a Section 8 subsidy for the rental of properties located in areas of Presidential declared emergency or natural disaster with prior written approval from an agency designee. HUD’s experience demonstrates that in rare instances (e.g., Hurricane Katrina in 2005 or the 2008 flooding in Cedar Rapids, Iowa), there may be an extreme shortage of affordable housing in an area due to a natural disaster or other emergency. This exception would permit HUD employees with rentable properties in these areas to accept new tenants receiving Section 8 subsidies. These supplemental ethics regulations are intended to uphold the integrity of HUD’s administration of the Section 8 program and are not intended to further restrict the availability of Section 8 housing, especially in times of acute housing shortages.

The exceptions provided by proposed § 7501.104(a)(3) continue as long as the tenant continues to reside in the property and as long as the rent charged the tenant is not increased above the annual rate adjustments permitted by the Section 8 program. This first condition codifies HUD’s intent not to require an employee to terminate the

rental arrangement early or require a Section 8 tenant to move based solely on these regulations. The second condition preserves the current language of the exceptions.

Current § 7501.104(a)(6) is proposed to be removed. The current prohibition against “direct creditor interests” is undefined and unclear.

Proposed § 7501.104(b), which provides exceptions to this section on prohibited financial interests, is revised to add the phrase “directly or indirectly receiving, acquiring or owning” to ensure consistency with § 7501.104(a). Additionally, this section proposes to expand the exceptions by eliminating from current § 7501.104(b)(1) the prohibition on owning investment funds that concentrate in residential mortgages or mortgage-backed securities. This prohibition is no longer needed to maintain the integrity of HUD in light of the fact that HUD no longer has regulatory authority over Fannie Mae and Freddie Mac.

Proposed § 7501.104(b)(1) also provides an exception to the interests prohibited under proposed § 7501.104(a)(2). Section 7501.104(b)(1) allows the employee, or the employee’s spouse or minor child, to have a financial interest in a publicly available or publicly traded investment fund that may include interests that are prohibited under § 7501.104(a)(2), as long as the employee, or the employee’s spouse or minor child, neither exercises control nor has the ability to exercise control over the fund or the financial interests held in the fund. This exception allows the employee, or the employee’s spouse or minor child, to have an interest in an investment fund that may hold interests in HUD subsidized projects. HUD’s experience has been that it is extremely difficult to determine which investment funds have interests in HUD-subsidized projects, since that information is not readily available. Therefore, HUD has decided that this type of interest does not present an appearance problem and is therefore permissible.

Current § 7501.104(b)(2) is proposed to be removed. Read literally, this exception had no possible application to a limited partnership holding. Also, limited partnerships create no less of an appearance issue than other legal entities that could be used as an investment vehicle and do not warrant the specific exception.

Proposed § 7501.104(b)(2) provides that a HUD employee may obtain mortgage insurance provided by FHA under section 203 of the National Housing Act (12 U.S.C. 1709) to assist in his or her purchase of a single-family

home that serves as the employee’s principal residence and of one other single-family residence. Proposed § 7501.104(b)(2) provides notice to HUD employees that they must adhere to the procedures established by the Assistant Secretary for Housing—FHA Commissioner in order to obtain FHA insurance. This exception was previously found in § 7501.104(b)(3).

Proposed § 7501.104(b)(3) covers HUD employees’ purchases of HUD-owned homes. This provision is currently an exception within the prohibition of § 7501.104(a)(4); however, since the provision is permissive, HUD has moved the exception to proposed § 7501.104(b), where the other exceptions to the prohibitions to § 7501.104(a) are located. Current § 7501.104(a)(4) notifies employees that the purchase of HUD-held properties must be consistent with an Office of Housing handbook that is now outdated. To avoid the codification of references to HUD handbooks that may become obsolete, and thus create a discrepancy with the supplemental standards, proposed § 7501.104(b)(3) does not reference a specific Office of Housing handbook, but simply provides notice to HUD employees that they must adhere to the procedures established by the Assistant Secretary for Housing—FHA Commissioner in order to purchase a HUD-held property.

Proposed § 7501.104(b)(4) has been added to ensure that the employment compensation and benefits package for an employee’s spouse is not covered as a prohibited financial interest if the employee’s spouse is employed by an entity that may have interests in HUD projects that are prohibited under proposed § 7501.104(a)(2). For example, an employee’s spouse is not restricted from earning a salary and other benefits as compensation for employment with a real estate development company that does multifamily business with HUD.

Proposed § 7501.104(b)(5) contains a revised provision that permits employees, or their spouses or minor children, to hold Government National Mortgage Association (GNMA) securities. The ownership of GNMA securities is currently addressed in § 7501.104(b)(1). Under this provision, an employee or the spouse or minor child of an employee may not own an interest in an investment fund that has an objective or practice of investing in residential mortgages or securities backed by residential mortgages except those of GNMA. Since HUD is proposing to revise § 7501.104(b)(1), the provision addressing ownership of GNMA securities is established as a separate exception.

**Section 7501.105 Outside Activities**

Proposed § 7501.105 governs the outside activities of HUD employees. This proposed section has been revised to account for changes in HUD's regulatory authority and to provide clarity on restricted real estate activities. The proposed rule is designed to balance several important ethical principles against an employee's right to engage in outside activities.

HUD has determined that maintaining the policy against employment in businesses related to real estate or manufactured housing is necessary to protect against questions regarding the impartiality and objectivity of employees in the administration of HUD programs. Allowing such activity would hinder HUD in meeting its missions if members of the public question whether HUD employees are using their public positions or HUD connections to advance their outside real estate-related employment. While HUD has determined that this concern remains valid, HUD has also concluded that implementing this rule in its current form has led to inconsistent application and confusion. Therefore, HUD is proposing a number of amendments to clarify the intent of the prohibition.

Proposed § 7501.105(a)(1) is amended by removing the phrase "involving active participation" with a real estate-related business. By removing this term, HUD does not intend to change the application of the prohibition contained in § 7501.105(a)(1) of the current rule; rather, HUD intends to make the prohibition less confusing and more transparent. The term "involving active participation" with a real estate-related business encompasses two prohibitions. First, it prohibits employment with a real estate-related business and, second, it prohibits ownership of a real estate-related business. The term led to some confusion in the application of these prohibitions by conflating the concepts of employment in a business related to real estate and the ownership activities of operating or managing investment properties. To rectify any confusion, HUD has separated the prohibition against the ownership activities of operating and managing a real estate-related business involving investment properties from the employment prohibition, by adding § 7501.105(a)(2), which prohibits the operation or management of investment properties to the extent that doing so rises to the level of a real estate business. To make the prohibition more transparent, HUD has decided to codify longstanding policy by listing several factors that it uses to consider whether the employee's

actions of operating or managing investment properties rises to the level of a real estate business and falls within the prohibition. HUD first announced these factors in the 1995 preamble to the proposed version of the current rule. By listing these factors in the rule, HUD has not changed the scope of the current prohibition; rather, it has made the prohibition more transparent by including in the rule the factors that are used to determine a violation of the prohibition. Therefore, HUD employees may continue to own or manage investment properties, so long as that ownership or management does not rise to the level of operation or management of a real estate-related business. In a further effort to make the rule more transparent, HUD has decided to codify existing policy by stating in § 7501.105(a)(2) that HUD will consider these situations on an individual basis.

Proposed § 7501.105(a)(3) is amended to prohibit outside employment with a registered lobbying organization that is registered to lobby HUD. The current regulation cites a repealed statute. The proposed change would incorporate the definition of a lobbyist under the Lobbying Disclosure Act (2 U.S.C. 1601, *et seq.*), although applying only to entities that lobby HUD. This change will allow easier compliance by employees and review by ethics staff because of the ease of checking the lobbying database of the U.S. House of Representatives and the U.S. Senate to determine if a potential employer is prohibited.

Proposed § 7501.105(a)(4) is amended to remove the specific restriction on employees having outside positions with Fannie Mae and Freddie Mac. As previously discussed, HUD no longer has general regulatory authority over Fannie Mae and Freddie Mac. Further, under proposed § 7501.105(a)(1), employees would be prohibited from employment with a business related to real estate. This prohibition would cover employment with Fannie Mae and Freddie Mac. Therefore, a specific prohibition is not necessary.

Proposed § 7501.105(b)(1)(ii) is amended to clarify that the outside employment prohibitions do not prohibit employees from serving as a member of an employee's homeowners' association. HUD previously permitted serving on the board of a cooperative and condominium association, and HUD has determined that serving on the board of a homeowners' association does not create additional ethics concerns.

HUD has added § 7501.105(b)(2), which codifies HUD's longstanding policy that employees with a real estate

agent's license may continue to hold such license. An employee may only use his or her license in relation to purchasing or selling a single-family property for use as the employee's primary residence, or for the primary residence of an immediate family of the employee. Employees seeking to use their real estate license for this purpose, however, must obtain the prior written approval of an agency ethics official. HUD has revised § 7501.105(c) to add the requirement for prior written approval from an agency ethics official for employees seeking to use their real estate license for this purpose.

Proposed § 7501.105(c)(1) would require an employee to receive written approval prior to accepting a position of authority with a prohibited source. This section had previously extended only to organizations that directly or indirectly received HUD assistance. This section has been expanded to include all prohibited sources, because HUD has determined that taking a position of authority with any prohibited source, not just those which receive HUD funding, could create the appearance of a conflict of interest and should therefore be examined by an agency ethics official. Further, the section will now be easier for employees to understand, because prohibited source is a term with which they are familiar. As discussed, HUD proposes to add the requirement at § 7501.105(c)(1)(iv) for prior written approval from an agency ethics official for employees seeking to use their real estate license in relation to purchasing or selling a single-family property for use as the employee's primary residence or as the primary residence of an immediate family member of the employee.

Proposed § 7501.105 would eliminate the reference to voluntary services. That section cited only other regulations, and HUD has determined that it is no longer needed to ensure public confidence in the impartiality and objectivity with which HUD programs are administered.

Proposed § 7501.105(d) incorporates HUD's policy regarding liaison representatives, which was previously provided as a Note. This change will avoid any confusion over the concept and its authority.

**Section 7501.106 Bureau Instructions and Designation of Separate Agency Components**

HUD proposes to remove this section as currently codified. As previously discussed in this preamble, HUD no longer has general regulatory authority over Fannie Mae and Freddie Mac. In its place, HUD is proposing to add a new § 7501.106 that clarifies the authority of

the Office of the Inspector General in the agency's ethics program and establishes it as a separate component as provided for by 5 CFR 2635.203(a).

In 1992, Congress enacted the Federal Housing Enterprise Financial Safety and Soundness Act (FHEFSSA) (12 U.S.C. 4501 *et seq.*), which revamped the statutory requirements and regulatory structure of the GSEs by separating the GSEs' financial regulation from its mission regulation. FHEFSSA also established the Office of Federal Housing Enterprise Oversight as an independent regulatory office within HUD to ensure the GSEs' financial safety and soundness, while the Secretary of HUD retained responsibility for the mission regulation and all other general regulatory powers. FHEFSSA also required HUD to prohibit the GSEs from discriminating in their mortgage purchases. The fair housing authority was twofold: first, to take remedial action against lenders found to have engaged in discriminatory lending practices and second, to periodically review and comment on the GSEs' underwriting and appraisal guidelines to ensure consistency with the Fair Housing Act (42 U.S.C. 3601 *et seq.*). In 2008, HERA transferred all regulatory oversight of the GSEs from HUD to FHFA, except for this fair housing component.

HUD's only remaining direct regulation of the GSEs is the periodic review of their underwriting and appraisal guidelines by the Office of Systemic Investigation of HUD's Office of Fair Housing and Equal Opportunity and by the Fair Housing Enforcement Division of HUD's Office of General Counsel. For employees involved in these compliance reviews, 18 U.S.C. 208, which prohibits employees from participating in matters that may affect their financial interests, would prohibit them from participating in official matters such as these reviews if the employee also owns a financial interest that could be affected by the review. Therefore, these employees would be required to recuse themselves from the official matter or divest their financial interest without the need for an additional HUD-specific regulation. The criminal statute is sufficient to insure against conflicts in those HUD employees when the periodic review is underway.

HUD has determined that the prohibitions in the current § 7501.106 are unnecessary given HUD's very limited role regarding the GSEs. The current § 7501.106 prohibits certain employees that were involved with GSEs from owning securities in certain mortgage institutions that originate,

insure, or service mortgages owned or guaranteed by the GSEs. However, HUD employees no longer regulate the GSEs in a way that could affect the stock value of these mortgage institutions.

Additionally, there are other regulations that cover an appearance issue that might arise for those employees working on fair housing compliance review of the GSEs. Specifically, OGE regulations at 5 CFR 2635.502 would apply and would limit the activity that employees who are involved in the periodic review of the GSEs can engage in with respect to a financial interest in a mortgage institution that currently originates, insures, or services mortgages owned or guaranteed by the GSEs.

Accordingly removing these prohibitions would not compromise the integrity of HUD's functions.

The new proposed § 7501.106(a) delegates to the Bureau Ethics Counselor the authority to designate Deputy Bureau Ethics Counselors to make determinations, issue explanatory guidance, and establish procedures necessary to implement this part, subpart I of 5 CFR 2634, and 5 CFR part 2635 for his or her bureau. The proposed rule also includes the concurrence of the Designated Agency Ethics Official on the delegation. This designation is consistent with 5 CFR 2635.105(c), more clearly describes the role and responsibility of the OIG in the agency's ethics program, and maintains the independence of the IG as provided for by the Inspector General Act, as amended.

Additionally, consistent with 5 CFR 2635.203(a), new proposed § 7501.106(b) designates the OIG as a separate agency component. HUD is designating the OIG as a separate agency component to make the structure of its ethics program more consistent with the structure used by other federal agencies. HUD's changes are intended to more clearly describe the role and responsibility of the OIG in the agency's ethics program, and maintain the independence and authority of the IG. The designation as a separate agency component authorizes Bureau Ethics Counselors within the OIG to render legal ethics advice regarding the regulations contained in subpart B of 5 CFR part 2635, governing gifts from outside sources; and 5 CFR 2635.807, governing teaching, speaking, or writing.

### III. Matters of Regulatory Procedure

#### Administrative Procedure Act

Interested persons are invited to submit written comments on this

proposed amendatory rulemaking, to be received by **DATES** section of this proposed rule. The comments will be carefully considered and appropriate changes will be made before a final rule is adopted and published in the **Federal Register**.

#### 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 the regulation is necessary, to select the regulatory approach that maximizes net benefits. Because this rule relates solely to the internal operations of HUD, this rule was determined to be not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and therefore was not reviewed by the Office of Management and Budget (OMB).

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule would not have a significant economic impact on a substantial number of small entities because this rule pertains only to HUD employees.

#### Information Collection Requirements

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) does not apply to this regulation because it does not contain information collection requirements subject to the approval of OMB.

#### Environmental Impact

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(k) of the HUD regulations, the policies and procedures contained in this rule relate only to internal administrative procedures whose content does not constitute a development decision nor affect the physical condition of project areas or building sites, and therefore, are categorically excluded from the requirements of the National Environmental Policy Act.

#### Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation

that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. Since it is only directed toward HUD employees, this rule would not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

#### **List of Subjects in 5 CFR Part 7501**

Conflicts of interests.

Accordingly, for the reasons described in the preamble, HUD, with the concurrence of OGE, proposes to amend 5 CFR part 7501, as follows:

### **PART 7501—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

Sec.

- 7501.101 Purpose.
- 7501.102 Definitions.
- 7501.103 Waivers.
- 7501.104 Prohibited financial interests.
- 7501.105 Outside activities.
- 7501.106 Bureau instructions and designation of separate agency component.

**Authority:** 5 U.S.C. 301, 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.203(a), 2635.403(a), 2635.803, 2635.807.

#### **§ 7501.101 Purpose.**

In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Housing and Urban Development (HUD or Department) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. Employees are required to comply with 5 CFR part 2635, this part, and any additional rules of conduct that the Department is authorized to issue.

#### **§ 7501.102 Definitions.**

For purposes of this part, and otherwise as indicated, the following definitions shall apply:

*Agency designee*, as used also in 5 CFR part 2635, means the Associate General Counsel for Ethics and Personnel Law, the Assistant General Counsel for the Ethics Law Division, and the HUD Regional Counsels.

*Agency ethics official*, as used also in 5 CFR part 2635, means the agency designees as specified above.

*Affiliate* means any entity that controls, is controlled by, or is under common control with another entity.

*Bureau* means the Office of the Inspector General.

*Bureau Ethics Counselor* means the General Counsel for the Bureau.

*Deputy Bureau Ethics Counselor* means the Bureau employee or employees who the Bureau Ethics Counselor has delegated responsibility to act under § 7501.106 for the Bureau.

*Designated Agency Ethics Official* (DAEO) means the General Counsel of HUD or the Deputy General Counsel for Operations in the absence of the General Counsel.

*Employment* means any compensated or uncompensated (including volunteer work for others while off-duty) form of non-Federal activity or business relationship, including self-employment, that involves the provision of personal services by the employee. It includes, but is not limited to, personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher, or speaker. It includes writing when done under an arrangement with another person for production or publication of the written product.

#### **§ 7501.103 Waivers.**

The Designated Agency Ethics Official, or the Bureau Ethics Counselor for a Bureau employee may waive any provision of this part upon finding that the waiver will not result in conduct inconsistent with 5 CFR part 2635 and is not otherwise prohibited by law and that application of the provision is not necessary to ensure public confidence in the Department's impartial and objective administration of its programs. Each waiver shall be in writing and supported by a statement of the facts and findings upon which it is based and may impose appropriate conditions, such as requiring the employee's execution of a written disqualification statement. A waiver will be considered only in response to a written waiver request submitted to an agency ethics

official. The waiver request should include:

(1) The requesting employee's Branch, Unit, and a detailed description of his or her official duties;

(2) The nature and extent of the proposed waiver;

(3) A detailed statement of the facts supporting the request; and

(4) The basis for the request, such as undue hardship or other exigent circumstances.

#### **§ 7501.104 Prohibited financial interests.**

(a) *General requirement.* This section applies to all HUD employees except special Government employees. Except as provided in paragraph (b) of this section, the employee, or the employee's spouse or minor child, shall not directly or indirectly receive, acquire, or own:

(1) Federal Housing Administration (FHA) debentures or certificates of claim.

(2) A financial interest in a project, including any single family dwelling or unit, which is subsidized by the Department, or which is subject to a note or mortgage or other security interest insured by the Department. The definition of "financial interest" is found at 5 CFR 2635.403(c).

(3)(i) Any Department subsidy provided pursuant to Section 8 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437f), to or on behalf of a tenant of property owned by the employee or the employee's spouse or minor child. However, such subsidy is permitted when:

(A) The employee, or the employee's spouse or minor child acquires, without specific intent as through inheritance, a property in which a tenant receiving such a subsidy already resides;

(B) The tenant receiving such a subsidy lived in the rental property before the employee worked for the Department;

(C) The tenant receiving such a subsidy is a parent, child, grandchild, or sibling of the employee;

(D) The employee's, or the employee's spouse or minor child's, rental property has an incumbent tenant who has not previously received such a subsidy and becomes the beneficiary thereof; or

(E) The location of the rental property is in a Presidentially declared emergency or natural disaster area and the employee receives prior written approval from an agency designee.

(ii) The exception provided by paragraph (a)(3)(i) of this section continues only as long as:

(A) The tenant continues to reside in the property; and

(B) There is no increase in that tenant's rent upon the commencement

of subsidy payments other than normal annual adjustments under the Section 8 program.

(b) *Exception to prohibition for certain interests.* Nothing in this section prohibits the employee, or the employee's spouse or minor child from directly or indirectly receiving, acquiring, or owning:

(1) A financial interest in a publicly available or publicly traded investment fund that includes financial interests prohibited by paragraph (a)(2) of this section, so long as the employee neither exercises control nor has the ability to exercise control over the fund or the financial interests held in the fund;

(2) Mortgage insurance provided pursuant to section 203 of the National Housing Act (12 U.S.C. 1709) on the employee's principal residence and any one other single family residence.

Employees must adhere to the procedures established by the Assistant Secretary for Housing—FHA Commissioner in order to obtain FHA insurance;

(3) Department-owned single family property. Employees must adhere to the procedures established by the Assistant Secretary for Housing—FHA Commissioner in order to purchase a HUD-held property;

(4) Employment compensation and benefit packages provided by the employer of an employee's spouse that include financial interests prohibited by paragraph (a)(2) of this section; or

(5) Government National Mortgage Association (GNMA) securities.

(c) *Reporting and divestiture.* An employee must report, in writing, to the appropriate agency ethics official, any interest prohibited under paragraph (a) of this section acquired prior to the commencement of employment with the Department or without specific intent, as through gift, inheritance, or marriage, within 30 days from the date of the start of employment or acquisition of such interest. Such interest must be divested within 90 days from the date reported unless waived by the Designated Agency Ethics Official in accordance with § 7501.103.

#### **§ 7501.105 Outside activities.**

(a) *Prohibited outside activities.* Subject to the exceptions set forth in paragraph (b) of this section, HUD employees, except special Government employees, shall not engage in:

(1) Employment with a business related to real estate or manufactured housing including, but not limited to, real estate brokerage, management and sales, architecture, engineering, mortgage lending, property insurance, appraisal services, title search services,

construction, construction financing, land planning, or real estate development;

(2) The operation or management of investment properties to the extent that it rises to the level of a real estate-related business. HUD will determine whether an employee is operating or managing investment properties to an extent that it rises to the level of a real estate business based on the totality of the circumstances, and will consider whether the employee maintains an office; advertises or otherwise solicits clients or business; hires staff or employees; uses business stationary or other similar materials; files the business as a corporation, limited liability company, partnership, or other type of business association with a state government; establishes a formal or informal association with an existing business; hires a management company; and the nature and number of its investment properties;

(3) Employment with a person or entity who registered as a lobbyist or lobbyist organization pursuant to 2 U.S.C. 1603(a) and engages in lobbying activity concerning the Department;

(4) Employment as an officer or director with a Department-approved mortgagee, a lending institution, or an organization that services securities for the Department; or

(5) Employment with the Federal Home Loan Bank System or any affiliate thereof.

(b) *Exceptions to employment prohibitions.* The prohibitions set forth in paragraph (a) of this section do not apply to:

(1) Serving as an officer or a member of the Board of Directors of:

(i) A Federal Credit Union;

(ii) A cooperative, condominium association, or homeowners association for a housing project that is not subject to regulation by the Department or, if so regulated, in which the employee personally resides; or

(iii) An entity designated in writing by the Designated Agency Ethics Official.

(2) Holding a real estate agent's license; however, use of the license is limited as provided by paragraph (c) of this section.

(c) *Prior approval requirement.* (1) Employees, except special Government employees, shall obtain the prior written approval of an Agency Ethics Official before accepting compensated or uncompensated employment:

(i) As an officer, director, trustee, or general partner of, or in any other position of authority with a prohibited source, as defined at 5 CFR 2635.203(d);

(ii) With a state or local government;

(iii) In the same professional field as that of the employee's official position; or

(iv) As a real estate agent in relation to purchasing or selling a single family property for use as the employee's primary residence, or the primary residence of the employee's immediate family member.

(2) Approval shall be granted unless the conduct is inconsistent with 5 CFR part 2635 or this part.

(d) *Liaison representative.* An employee designated to serve in an official capacity as the Department's liaison representative to an outside organization is not engaged in an outside activity to which this section applies. Notwithstanding, an employee may be designated to serve as the Department's liaison representative only as authorized by law, and as approved by the Department under applicable procedures.

#### **§ 7501.106 Bureau instructions and designation of separate agency component.**

(a) *Bureau instructions.* With the concurrence of the Designated Agency Ethics Official, the Bureau Ethics Counselor is authorized, consistent with 5 CFR 2635.105(c), to designate Deputy Bureau Ethics Counselors, to make a determination, issue explanatory guidance, and establish procedures necessary to implement this part, subpart I of 5 CFR part 2634, and 5 CFR part 2635 for the Bureau.

(b) *Designation of separate agency component.* Pursuant to 5 CFR 2635.203(a), the Office of the Inspector General is designated as a separate agency for purposes of the regulations contained in subpart B of 5 CFR part 2635, governing gifts from outside sources; and 5 CFR 2635.807, governing teaching, speaking, or writing.

Dated: February 15, 2012.

**Don W. Fox,**

*Principal Deputy Director, Office of Government Ethics.*

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## **DEPARTMENT OF THE TREASURY**

### **Internal Revenue Service**

#### **26 CFR Part 1**

**[REG-109369-10]**

**RIN 1545-BJ33**

#### **Passive Activity Losses and Credits Limited; Hearing**

**AGENCY:** Internal Revenue Service (IRS), Treasury.