

# Proposed Rules

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

## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2635

RIN 3209-AA04

#### Standards of Ethical Conduct for Employees of the Executive Branch; Amendments to the Seeking Other Employment Rules

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

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Government Ethics is amending the Standards of Ethical Conduct for Employees of the Executive Branch regarding seeking other employment, to conform with interpretive advice, update examples, improve clarity, and make technical corrections. In addition, the proposed amendments implement the statutory notification requirements that apply to individuals required to file public financial disclosure reports under section 101 of the Ethics in Government Act of 1978 when they negotiate for or have an agreement of future employment or compensation.

**DATES:** Written comments are invited and, in order to ensure consideration, must be received on or before April 18, 2016.

**ADDRESSES:** You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA04, by any of the following methods:

*Email:* [usoge@oge.gov](mailto:usoge@oge.gov). Include the reference "Proposed Amendments to Subpart F" in the subject line of the message.

*Fax:* (202) 482-9237.

*Mail/Hand Delivery/Courier:* Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917, Attention: "Proposed Amendments to Subpart F."

*Instructions:* All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209-AA04, for this proposed rulemaking. All comments, including attachments and other supporting

materials, will become part of the public record and subject to public disclosure. Comments may be posted on OGE's Web site, [www.oge.gov](http://www.oge.gov). Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:**

Elaine Newton, Associate Counsel, or Rachel Dowell, Assistant Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917; Telephone: (202) 482-9300; TTY: (800) 877-8339; FAX: (202) 482-9237.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Executive Order 12674, which was issued on April 12, 1989, and later modified by Executive Order 12731 (Executive Order), sets forth basic obligations of public service and enumerates 14 principles of ethical conduct for Government officers and employees. The Executive Order also authorizes the Office of Government Ethics (OGE), in consultation with the Department of Justice (DOJ) and the Office of Personnel Management (OPM), to issue "regulations that 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, codified at 5 CFR part 2635. *See* 57 FR 35005-35067, August 7, 1992, as amended.

These uniform standards include a recusal requirement in subpart F that applies to employees seeking employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially. Subpart F combines the standards imposed by criminal statute with the standards imposed by the Executive order. In part, subpart F implements 18 U.S.C. 208(a), which requires an employee's recusal from participation in any particular matter that, to the employee's knowledge, will have a direct and predictable effect on the financial interests of a person with whom the employee is negotiating or has any arrangement concerning prospective employment. Beyond this

statutory requirement, subpart F addresses issues of lack of impartiality that require recusal from any particular matter that affects the financial interests of a prospective employer, even where the employee's actions in seeking employment may fall short of negotiating for employment.

Pursuant to section 402 of the Ethics in Government Act of 1978, the Director of OGE is responsible for periodically reviewing and updating the regulations as needed. Accordingly, OGE is proposing to amend subpart F by reorganizing and expounding upon certain existing subpart F provisions, as well as by adding certain new provisions and examples. In addition, the proposed amendments would implement new notification requirements under section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. 112-105, 126 Stat. 303, 5 U.S.C. app. 101 note, which apply to employees who file public financial disclosure reports. In formulating this proposed rule, OGE has consulted with DOJ and OPM pursuant to section 201(a) of Executive Order 12674, as modified by Executive Order 12731, and the authorities contained in titles I and IV of the Ethics in Government Act of 1978. OGE has also solicited and considered the views of executive branch agency ethics officials.

#### II. Analysis of Proposed Amendments

In addition to the specific changes discussed below, OGE is proposing a number of non-substantive changes. OGE proposes to renumber and reorganize the examples to follow the sequence of the regulations; revise examples for clarity; update legal citations; include references to section 17 of the STOCK Act and new § 2635.607, where applicable; reword language paraphrasing 18 U.S.C. 208(a) to align the regulatory language with the statute; and modernize language by replacing the words "he," "shall," and "disqualification."

##### A. Section 2635.602—Applicability and Related Considerations

OGE proposes to restructure the introductory paragraph for clarity. New subsection (a)(2) clarifies that, with the passage of the STOCK Act, a public filer who negotiates for or has an agreement of future employment or compensation must comply with the requirements in

new § 2635.607. The proposed regulation also emphasizes that employees are strongly encouraged to consult with their ethics officials when they have questions about how subpart F may apply to them. OGE is proposing two new examples to illustrate these concepts.

#### B. Section 2635.603—Definitions

##### 1. Definition of “Employment”

OGE proposes to add a new example to § 2635.603(a) to clarify that certain volunteer activities are not considered “employment” under this subpart. In the preamble to the final rule, 57 FR 35006, Aug. 7, 1992, OGE discussed the types of volunteer services, such as washing dishes one night a week at a soup kitchen, that do not involve an employment or other specified relationship. Consistent with that discussion, a new example illustrates the types of informal, uncompensated, and non-fiduciary volunteer services that are not considered “employment” under this subpart.

##### 2. Definition of “Seeking Employment”

OGE is amending the definition of “seeking employment” in several ways to provide additional clarity. To begin, OGE proposes to delete the exclusion at § 2635.603(b)(1)(ii)(B) and incorporate this provision as a limitation to the recusal obligation in § 2635.604. This makes no substantive change to the regulation. The only effect of the exclusion at § 2635.603(b)(1)(ii)(B) was to limit an employee’s recusal obligations. Accordingly, OGE believes that this provision is more appropriately included as a limitation to the recusal obligation in § 2635.604. OGE also proposes to revise and move the two corresponding examples from § 2635.603(b), Examples 4 and 5, to § 2635.604(a) as Examples 3 and 4, to clarify the limitation to the recusal obligation under § 2635.604.

OGE is also adding new and revised examples to address informational discussions; highlight the distinction between seeking employment within the meaning of § 2635.603(b)(1)(ii) or (iii) and negotiating for employment within the meaning of § 2635.603(b)(1)(i); address whether an employee is “seeking employment” when the employee uses a social networking or resume-posting site; and provide practical guidance on rejecting employment inquiries from prospective employers.

In regard to social media, which has not been explicitly addressed in subpart F, three new examples clarify that the rules in this subpart apply regardless of

the method the employee uses when seeking employment. Specifically, these examples illustrate that the posting of a profile, resume, or other employment information that is not targeted to a specific person is not considered an unsolicited communication with an entity regarding possible employment. Rather, such a posting would be akin to posting a resume on a bulletin board. Likewise, the employee would not be seeking employment with a person if the employee received a notification or email from a person until the employee makes a response other than a rejection.

##### 3. Definition of “Prospective Employer”

A new example in the proposed regulation illustrates that online resume distribution services are treated like employment search firms for purposes of determining when an employee has begun seeking employment.

##### 4. Definition of “Public Filer”

Section 17 of the STOCK Act establishes new notification requirements for an individual required to file a financial disclosure report under section 101 of the Ethics in Government Act of 1978 (5 U.S.C. app. 101). OGE proposes to include a definition of “public filer” describing the individuals who must submit such notification statements.

#### C. Section 2635.604—Recusal While Seeking Employment

OGE proposes to revise § 2635.604 for clarity and reorganize § 2635.604(a) into two subsections. As discussed above, the proposed language includes a new § 2635.604(a)(2) to replace an exclusion to the definition of “seeking employment” in § 2635.603(b)(1)(ii)(B). This is not a new exception; rather, it merely moves the exclusion found at § 2635.603(b)(1)(ii)(B) to a more logical location in the subpart.

OGE has added a new example to emphasize that the recusal obligation in § 2635.604(a) is not limited to particular matters involving specific parties but is also applicable to particular matters of general applicability. In addition, OGE proposes to revise § 2635.604(b) to emphasize that employees are obligated to take whatever steps are necessary to ensure that they do not participate in particular matters from which they are recused. The proposed revision emphasizes that these steps can include written recusals, which employees may file with ethics officials.

#### D. Section 2635.605—Waiver or Authorization Permitting Participation While Seeking Employment

OGE proposes to add a new requirement that any authorizations under § 2635.605(b) must be in writing.

#### E. Proposed § 2635.607—Notification Requirements for Public Financial Disclosure Filers Regarding Negotiations or Agreement of Future Employment or Compensation

OGE proposes to add a new § 2635.607 to implement section 17 of the STOCK Act. Section 17 of the STOCK Act requires a public filer who is negotiating for or has an agreement of future employment or compensation to file a statement notifying the agency ethics official of such negotiation or agreement within three business days after commencement of the negotiation or agreement. A public filer who files a notification statement regarding the negotiation or agreement also must file a notification regarding recusal whenever there is a conflict of interest or appearance of a conflict of interest with respect to the entity identified in the notification. In addition, this section affirms the recusal obligations addressed in the Standards of Ethical Conduct and, where applicable, 18 U.S.C. 208.

OGE issued interpretive guidance for implementing section 17 of the STOCK Act on April 6, 2012, and April 25, 2013. See OGE, LA 12–01, available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/LA-12-01—Post-Employment-Negotiation-and-Recusal-Requirements-under-the-STOCK-Act/>, and OGE, LA 13–06, available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/LA-13-06—Notification-of-Negotiations-for-Post-Government-Compensation-under-Section-17-of-the-STOCK-Act/>. New § 2635.607 is consistent with this guidance.

Pursuant to OGE’s authority under the Ethics in Government Act and Executive Order 12731, and consistent with OGE’s interpretive guidance, OGE proposes to extend the notification requirement to negotiations for or agreements of future employment or compensation with all non-federal entities. The notification requirements under section 17 of the STOCK Act apply only to “private” entities. Because the potential for conflicts of interest is not limited to private entities, the proposed regulations cover all prospective non-federal employers. In addition, OGE proposes to include a provision allowing public filers to elect to file the notification statement, recusal statement, or both before negotiations

have commenced and before an agreement of future employment or compensation is reached. Public filers who elect to file the notification statement, recusal statement, or both prior to the commencement of negotiations or an agreement are deemed to have met the statutory requirements because the statements will continue to be in a "filed" status after the commencement of the negotiations. The statements must name the private entity or entities involved in the negotiations and an estimated date of the commencement of the negotiations or agreement. While not required, the option to file in advance enhances the access of public filers to advice from ethics officials.

### III. Matters of Regulatory Procedure

#### *Regulatory Flexibility Act*

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule would not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

#### *Paperwork Reduction Act*

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

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 5, subchapter II), this proposed rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

#### *Executive Order 13563 and Executive Order 12866*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking has been designated as a "significant regulatory action" although not economically

significant, under section 3(f) of Executive Order 12866. Accordingly this proposed rule has been reviewed by the Office of Management and Budget.

#### *Executive Order 12988*

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

#### List of Subjects in 5 CFR Part 2635

Conflict of interests, Executive Branch standards of ethical conduct, Government employees.

Approved: February 11, 2016.

**Walter M. Shaub, Jr.,**

*Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend 5 CFR part 2635, as set forth below:

#### **PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH**

■ 1. The authority citation for part 2635 continues to read as follows:

**Authority:** 5 U.S.C. 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.

■ 2. Subpart F of part 2635 is revised to read as follows:

#### **Subpart F—Seeking Other Employment**

Sec.

2635.601 Overview.

2635.602 Applicability and related considerations.

2635.603 Definitions.

2635.604 Recusal while seeking employment.

2635.605 Waiver or authorization permitting participation while seeking employment.

2635.606 Recusal based on an arrangement concerning prospective employment or otherwise after negotiations.

2635.607 Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation.

#### **Subpart F—Seeking Other Employment**

##### **§ 2635.601 Overview.**

This subpart contains a recusal requirement that applies to employees when seeking non-Federal employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially. Specifically, it

addresses the requirement of 18 U.S.C. 208(a) that an employee not participate in any particular matter that, to the employee's knowledge, will have a direct and predictable effect on the financial interests of a person "with whom the employee is negotiating or has any arrangement concerning prospective employment." See § 2635.402 and § 2640.103 of this chapter. Beyond this statutory requirement, this subpart also addresses issues of lack of impartiality that require recusal from particular matters affecting the financial interests of a prospective employer when an employee's actions in seeking employment fall short of actual employment negotiations. In addition, this subpart contains the statutory notification requirements that apply to public filers when they negotiate for or have agreements of future employment or compensation. Specifically, it addresses the requirements of section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Public Law 112-105, 126 Stat. 303, 5 U.S.C. app. 101 note, that a public filer must submit a written statement identifying the entity involved in the negotiations or agreement within three business days after commencement of such negotiations or agreement and must submit a notification of recusal whenever there is a conflict of interest or an appearance of a conflict of interest.

##### **§ 2635.602 Applicability and related considerations.**

(a) *Applicability.* (1) To ensure that an employee does not violate 18 U.S.C. 208(a), section 17 of the STOCK Act, or the principles of ethical conduct contained in § 2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment must comply with the applicable recusal requirements of §§ 2635.604 and 2635.606 if particular matters in which the employee will be participating personally and substantially would, to the employee's knowledge, directly and predictably affect the financial interests of a prospective employer or of a person with whom the employee has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part. In addition, a public filer who negotiates for or has an agreement of future employment or compensation must comply with the requirements of § 2635.607.

(2) An employee who is seeking employment with a person whose

financial interests are not, to the employee's knowledge, affected directly and predictably by particular matters in which the employee participates personally and substantially has no obligation to recuse under this subpart. In addition, nothing in this subpart requires an employee, other than a public filer, to notify anyone that the employee is seeking employment unless a notification is necessary to implement a recusal pursuant to § 2635.604(b). A public filer who negotiates for or has an agreement of future employment or compensation must comply with the notification requirements in § 2635.607. An employee may, however, be subject to other statutes that impose requirements on employment contacts or discussions, such as 41 U.S.C. 2103, which is applicable to agency officials involved in certain procurement matters. Employees are encouraged to consult with their ethics officials if they have any questions about how this subpart may apply to them. Ethics officials are not obligated by this subpart to inform supervisors that employees are seeking employment.

*Example 1 to paragraph (a):* Recently, an employee of the Department of Education who is not a public filer submitted her resume to the University of Delaware for a job opening that she heard about through a friend. The employee has begun seeking employment. However, because she is not participating in any particular matters affecting the University of Delaware, she is not required to notify anyone that she has begun seeking employment.

*Example 2 to paragraph (a):* The employee in the preceding example has been approached about an employment opportunity at the University of Maryland. Because the University of Maryland has applied for grants on which she has been assigned to work in the past, she wants to make certain that she does not violate the ethics rules. The employee contacts her ethics official to discuss the matter. The employee informs the ethics official that she is not participating in any particular matters affecting the University of Maryland. As a result, the ethics official advises the employee that she will have no notification obligations under this subpart. However, the ethics official cautions the employee that, if the employee is assigned to participate in a particular matter affecting the University of Maryland while she is seeking employment with the university, she would normally need to notify her supervisor in order to avoid working on the grant.

(b) *Related restrictions.*—(1) *Outside employment while a Federal employee.* An employee who is contemplating outside employment to be undertaken concurrently with the employee's Federal employment must abide by any limitations applicable to the employee's outside activities under subparts G and

H of this part, including any requirements under supplemental agency regulations to obtain prior approval before engaging in outside employment or activities and any prohibitions under supplemental agency regulations related to outside employment or activities. The employee must also comply with any applicable recusal requirement of this subpart, as well as any applicable recusal requirements under subpart D or E of this part as a result of the employee's outside employment activities.

(2) *Post-employment restrictions.* An employee who is contemplating employment to be undertaken following the termination of the employee's Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. The regulation implementing the Governmentwide post-employment statute, 18 U.S.C. 207, is contained in part 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory prohibitions on post-employment acceptance of compensation from contractors, such as 41 U.S.C. 2104.

(3) *Interview trips and entertainment.* Where a prospective employer who is a prohibited source as defined in § 2635.203(d) offers to reimburse an employee's travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with § 2635.204(e)(3). Where a prospective employer is a foreign government or international organization, the employee must also ensure that he or she is in compliance with the Foreign Gifts and Decorations Act.

#### **§ 2635.603 Definitions.**

For purposes of this subpart:

(a) *Employment* means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, or trustee.

*Example 1 to paragraph (a):* An employee of the Bureau of Indian Affairs who has announced her intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The contractual relationship the tribe wishes to negotiate is employment for purposes of this subpart.

*Example 2 to paragraph (a):* An employee of the Department of Health and Human

Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

*Example 3 to paragraph (a):* An employee at the Department of Energy volunteers without compensation to serve dinners at a homeless shelter each month. The employee's uncompensated volunteer services in this case are not considered an employment or business relationship for purposes of this subpart.

(b) An employee is *seeking employment* once the employee has begun seeking employment within the meaning of paragraph (b)(1) of this section and until the employee is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if the employee has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a) and section 17 of the STOCK Act, the term *negotiations* means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was for the sole purpose of requesting a job application; or

(iii) Made a response, other than rejection, to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not

constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

*Example 1 to paragraph (b):* A paralegal at the Department of the Army is in his third year of law school. During a discussion with his neighbor, who is a partner in a large law firm in the community, the neighbor invited him to visit her law firm. The paralegal took her up on the offer and met with an associate at the firm. The associate shared with the paralegal her experiences looking for a legal position, discussed what she does in her position at the law firm, and explained why she chose her current law firm. There was no discussion of possible employment with the firm. The Army paralegal is not seeking employment at this time. The purpose of the visit was informational only.

*Example 2 to paragraph (b):* An employee of the Defense Contract Audit Agency (DCAA) is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee asks what kind of work would be involved. The DCAA employee has begun seeking employment because he made a response other than a rejection to the communication regarding possible employment with the Army contractor, although he has not yet begun negotiating for employment.

*Example 3 to paragraph (b):* The DCAA employee and the head of the contractor's accounting division in the previous example have a meeting to discuss the duties of the position that the accounting division would like to fill and the DCAA employee's qualifications for the position. They also discuss ways the DCAA employee could remedy one of the missing qualifications, and the employee indicates a willingness to obtain the proper qualifications. They do not discuss salary. The employee has engaged in negotiations regarding possible employment with the contractor.

*Example 4 to paragraph (b):* An employee at the Department of Energy (DOE) lists his job duties and employment experience in a profile on an online, business-oriented social networking service. The employee's profile is not targeted at a specific person. The employee has not begun seeking employment because the posting of a profile or resume is not an unsolicited communication with any potential employer.

*Example 5 to paragraph (b):* The DOE employee in the previous example was recently notified that a representative of a university has viewed his profile. The employee still has not begun seeking employment with the university. Subsequently, a representative of the university contacts the employee through the online forum to inquire whether the employee would be interested in working for the university, to which he makes a response other than rejection. At this point, the employee has begun seeking employment with the university until he rejects the

possibility of employment and all discussions of possible employment have terminated.

*Example 6 to paragraph (b):* The DOE employee in the previous two examples receives emails from various companies in response to his online profile. He does not respond. The employee has not begun seeking employment with the companies because he has not made a response.

*Example 7 to paragraph (b):* An employee of the Centers for Medicare & Medicaid Services (CMS) is complimented on her work by an official of a State Health Department who asks her to call if she is ever interested in leaving Federal service. The employee explains to the State official that she is very happy with her job at CMS and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

*Example 8 to paragraph (b):* The employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment with the State Health Department.

*Example 9 to paragraph (b):* Three months prior to the end of the current administration, a political appointee at a large department receives a telephone call from the managing partner of an international law firm. The managing partner asks if the official would be interested in joining the law firm. The official says, "I am not talking to anyone about employment until I leave the Government." The official has rejected the unsolicited employment overture and has not begun seeking employment.

*Example 10 to paragraph (b):* A geologist employed by the U.S. Geological Survey sends her resume to an oil company. The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed. However, if she withdraws her application or is notified within the two-month period that her resume has been rejected, she will no longer be seeking employment with the oil company as of the date she makes such withdrawal or receives such notification.

(c) *Prospective employer* means any person with whom the employee is seeking employment. Where contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer means:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

*Example 1 to paragraph (c):* An employee of the Federal Aviation Administration (FAA) has retained an employment search firm to help her find another job. The search firm has just reported to the FAA employee that it has given her resume to and had promising discussions with two airport authorities, which the search firm identifies to the employee. Even though the employee has not personally had employment discussions with either airport authority, each airport authority is her prospective employer. She began seeking employment with each airport authority upon learning its identity and that it has been given her resume.

*Example 2 to paragraph (c):* An employee pays for an online resume distribution service, which sends her resume to recruiters that specialize in her field. The online service has just notified her that they sent her resume to Software Company A and Software Company B. Even though the employee has not personally had employment discussions with either company, each software company is her prospective employer. She began seeking employment with each company upon learning from the online service that Software Company A and Software Company B had been given her resume by the intermediary.

(d) *Direct and predictable effect, particular matter, and personal and substantial* have the respective meanings set forth in § 2635.402(b)(1), (3), and (4).

(e) *Public filer* means a person required to file a public financial disclosure report as set forth in § 2634.202 of this chapter.

#### **§ 2635.604 Recusal while seeking employment.**

(a) *Obligation to recuse.* (1) Except as provided in paragraph (a)(2) or where the employee's participation has been authorized in accordance with § 2635.605, the employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is seeking employment within the meaning of § 2635.603(b). Recusal is accomplished by not participating in the particular matter.

(2) The employee may participate in a particular matter under paragraph (a)(1) of this section when:

(i) The employee's only communication with the prospective employer in connection with the search for employment is the submission of an

unsolicited resume or other employment proposal;

(ii) The prospective employer has not responded to the employee's unsolicited communication; and

(iii) The matter is not a particular matter involving specific parties.

*Example 1 to paragraph (a):* A scientist is employed by the National Science Foundation (NSF) as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment with a university that received an NSF grant several years ago to study the effect of fluorocarbons but has no current grant applications pending before NSF. The employee is seeking employment, but she does not need to recuse because there is no particular matter that would have a direct and predictable effect on the financial interests of the prospective employer. Recusal would be required if the university submits a new application for the panel's review.

*Example 2 to paragraph (a):* An employee of the Food and Drug Administration is developing a regulation on research criteria for approving prescription drugs. She begins discussing possible employment with a pharmaceutical company. The employee may not participate personally and substantially in the development of the regulation because she has begun employment discussions with the pharmaceutical company and the regulation is a particular matter of general applicability which would have a direct and predictable effect on the financial interests of the pharmaceutical company.

*Example 3 to paragraph (a):* A special Government employee of the Federal Deposit Insurance Corporation (FDIC) is assigned to advise the FDIC on rules applicable to all member banks. She mails an unsolicited letter to a member bank offering her services as a contract consultant. Although the employee is seeking employment, the employee may participate in this particular matter of general applicability until she receives some response indicating an interest in discussing her employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

*Example 4 to paragraph (a):* An employee of the Occupational Safety and Health Administration is conducting an inspection of one of several textile companies to which he sent an unsolicited resume. The employee may not participate personally and substantially in the inspection because he is seeking employment and the inspection is a particular matter involving specific parties that will affect the textile company.

(b) *Notification.* An employee who becomes aware of the need to recuse from participation in a particular matter to which the employee has been assigned must take whatever steps are necessary to ensure that the employee does not participate in the matter. Appropriate oral or written notification of the employee's recusal may be made to an agency ethics official, coworkers,

or a supervisor to document and help effectuate the employee's recusal. Public filers must comply with additional notification requirements set forth in § 2635.607.

*Example 1 to paragraph (b):* An employee of the Department of Veterans Affairs (VA) is participating in the audit of a contract for laboratory support services. Before sending his resume to a lab which is a subcontractor under the VA contract, the employee should recuse from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he should notify his supervisor of his need to recuse for ethics reasons so that appropriate adjustments in his work assignments can be made.

*Example 2 to paragraph (b):* An employee of the Food and Drug Administration (FDA) is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is reviewing an application from a pharmaceutical company that is seeking FDA approval. Once the employee makes a response that is not a rejection to the company's communication concerning possible employment, the employee should recuse from further participation in the review of the application. Where he has authority to ask his colleague to assume his reviewing responsibilities, he may accomplish his recusal by transferring the work to the employee designated to cover for him. However, to ensure that his colleague and others with whom he had been working on the review do not seek his advice regarding the review of the application or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his recusal.

(c) *Documentation.* An employee, other than a public filer, need not file a written recusal statement unless the employee is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or a designated agency ethics official, or is specifically directed by an agency ethics official or the person responsible for the employee's assignment to file a written recusal statement. However, it is often prudent for an employee to create a record of his or her actions by providing written notice to an agency ethics official, a supervisor, or other appropriate official. Public filers must comply with the documentation requirements set forth in § 2635.607.

*Example 1 to paragraph (c):* The General Counsel of a regulatory agency will be engaging in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant

General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, he can, in fact, accomplish his recusal by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be assumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, he would benefit from filing a written recusal statement with an agency ethics official or the Commissioners of the regulatory agency and providing his subordinates with written notification of his recusal. He may also be specifically directed by an agency ethics official or the Commissioners to file a written recusal statement. If the General Counsel is a public filer, he must comply with the documentation requirements set forth in § 2635.607.

(d) *Agency determination of substantial conflict.* Where the agency determines that the employee's action in seeking employment with a particular person will require the employee's recusal from matters so central or critical to the performance of the employee's official duties that the employee's ability to perform the duties of the employee's position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate action.

**§ 2635.605 Waiver or authorization permitting participation while seeking employment.**

(a) *Waiver.* Where, as defined in § 2635.603(b)(1)(i), an employee is engaged in employment negotiations for purposes of 18 U.S.C. 208(a), the employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer. The employee may participate in such matters only where the employee has received a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (3). These waivers are described in § 2635.402(d) and part 2640, subpart C of this chapter. For certain employees, a regulatory exemption under the authority of 18 U.S.C. 208(b)(2) may also apply (see part 2640, subpart B of this chapter), including § 2640.203(g) and (i).

*Example 1 to paragraph (a):* An employee of the Department of Agriculture is negotiating for employment within the meaning of 18 U.S.C. 208(a) and § 2635.603(b)(1)(i) with an orange grower. In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), she may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) *Authorization by agency designee.* Where an employee is seeking employment within the meaning of § 2635.603(b)(1)(ii) or (iii) and is not negotiating for employment, a reasonable person would be likely to question the employee's impartiality if the employee were to participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized in writing the employee's participation in accordance with the standards set forth in § 2635.502(d).

*Example 1 to paragraph (b):* Within the past month, an employee of the Department of Education mailed her resume to a university. She is thus seeking employment with the university within the meaning of § 2635.603(b)(1)(ii). In the absence of specific authorization by the agency designee in accordance with § 2635.502(d), she may not participate in an assignment to review a grant application submitted by the university.

**§ 2635.606 Recusal based on an arrangement concerning prospective employment or otherwise after negotiations.**

(a) *Employment or arrangement concerning employment.* An employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of the person by whom he or she is employed or with whom he or she has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (3), or by a regulatory exemption under the authority of 18 U.S.C. 208(b)(2). These waivers and exemptions are described in § 2635.402(d) and part 2640, subparts B and C of this chapter.

*Example 1 to paragraph (a):* A military officer has accepted a job with a defense contractor that will begin six months after his retirement from military service. During the period that he remains with the Government, the officer may not participate in the administration of a contract with that particular defense contractor unless he has received a written waiver under the authority of 18 U.S.C. 208(b)(1).

*Example 2 to paragraph (a):* An accountant has just been offered a job with the Office of the Comptroller of the Currency (OCC) which involves a two-year limited appointment. Her private employer, a large corporation, believes the job will enhance her skills and has agreed to give her a two-year unpaid leave of absence at the end of which she has agreed to return to work for the corporation.

During the two-year period that she is to be an OCC employee, the accountant will have an arrangement concerning future employment with the corporation that will require her recusal from participation in any particular matter that, to her knowledge, will have a direct and predictable effect on the corporation's financial interests.

(b) *Offer rejected or not made.* The agency designee for the purpose of § 2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless will be subject to a period of recusal upon the conclusion of employment negotiations. Any such determination will be based on a consideration of all the relevant factors, including those listed in § 2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decision-making process outweighs the Government's interest in the employee's participation in the particular matter.

*Example 1 to paragraph (b):* An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer her the partnership position she sought. Even though she is no longer seeking employment with the firm, she may continue to be recused from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, she could act impartially in the matter outweighs the Government's interest in her participation.

**§ 2635.607 Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation.**

(a) *Notification regarding negotiations for or agreement of future employment or compensation.* A public filer who is negotiating for or has an agreement of future employment or compensation with a non-Federal entity must file a statement notifying an agency ethics official of such negotiation or agreement within three business days after commencement of the negotiation or agreement. This notification statement must be in writing, must be signed by the public filer, and must include the name of the non-Federal entity involved in such negotiation or agreement and the date on which the negotiation or agreement commenced. When a public filer has previously complied with the notification requirement in this section regarding the commencement of negotiations, the filer need not file a separate notification statement when an

agreement of future employment or compensation is reached with the previously identified non-Federal entity. There is also no requirement to file another notification when negotiations have been unsuccessful. However, employees may want to do so to facilitate the resumption of their duties.

*Example 1 to paragraph (a):* An employee of the Merit Systems Protection Board who is a public filer was in private practice prior to his Government service. He receives a telephone call from a partner in a law firm who inquires as to whether he would be interested in returning to private practice. During this initial telephone call with the law firm partner, the employee indicates that he is interested in resuming private practice. They discuss generally the types of issues that would need to be agreed upon if the employee were to consider a possible offer to serve as "of counsel" with the firm, such as salary, benefits, and type of work the employee would perform. The employee has begun negotiating for future employment with the law firm. Within three business days after this initial telephone call, he must file written notification of the negotiations with his agency ethics official.

*Example 2 to paragraph (a):* The employee in the previous example also negotiates a possible contract with a publisher to begin writing a textbook after he leaves Government service. Within three business days after commencing negotiations, the employee must file written notification with his agency ethics official documenting that he is engaged in negotiations for future compensation with the book publisher.

(b) *Notification of recusal.* A public filer who files a notification statement pursuant to paragraph (a) of this section must file with an agency ethics official a notification of recusal whenever there is a conflict of interest or appearance of a conflict of interest with the non-Federal entity identified in the notification statement. The notification statement and the recusal statement may be contained in a single document or in separate documents.

(c) *Advance filing of notification and recusal statements.* When a public filer is seeking employment within the meaning of § 2635.603(b)(1)(ii) or (iii) or is considering seeking employment, the public filer may elect to file the notification statement pursuant to paragraph (a) of this section before negotiations have commenced and before an agreement of future employment or compensation is reached. A public filer may also elect to file the recusal statement pursuant to paragraph (b) of this section before the public filer has a conflict of interest or appearance of a conflict of interest with the non-Federal entity identified in the notification statement. The public filer need not file the document again upon

commencing negotiations or reaching an agreement of future employment or compensation. The advance filing of any such document is not construed as a statement that negotiations have or have not commenced or that a conflict of interest does or does not exist. Although the Office of Government Ethics encourages advance filing when a public filer anticipates a realistic possibility of negotiations or an agreement, the failure to make an advance filing does not violate this subpart or the principles of ethical conduct contained in § 2635.101(b).

*Example 1 to paragraph (c):* An employee of the Federal Labor Relations Authority who is a public filer began negotiating for future employment with a law firm. At the time he began negotiating for future employment with the law firm, he was not participating personally and substantially in a particular matter that, to his knowledge, had a direct and predictable effect on the financial interest of the law firm. Although the employee was not required to file a recusal statement because he did not have a conflict of interest or appearance of a conflict of interest with the law firm identified in the notification statement, the Office of Government Ethics encourages the employee to submit a notification of recusal at the same time that he files the notification statement regarding the negotiations for future employment in order to ensure that the requirement of paragraph (b) of this section is satisfied if a conflict of interest or an appearance of a conflict of interest later arises. The agency ethics official should counsel the employee on applicable requirements but is under no obligation to notify the employee's supervisor that the employee is negotiating for employment.

*Example 2 to paragraph (c):* An employee of the General Services Administration is contacted by a prospective employer regarding scheduling an interview for the following week to begin discussing the possibility of future employment. The employee discusses the matter with the ethics official and chooses to file a notification and recusal statement prior to the interview. The notification and recusal statement contain the identity of the prospective employer and an estimated date of when the interview will occur. The employee has complied with the notification requirement of section 17 of the STOCK Act.

(d) *Agreement of future employment or compensation* for the purposes of § 2635.607 means any arrangement concerning employment that will commence after the termination of Government service. The term also means any arrangement to compensate in exchange for services that will commence after the termination of Government service. The term includes, among other things, an arrangement to compensate for teaching, speaking, or

writing that will commence after the termination of Government service.

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 271 and 278

RIN 0584-AE27

#### Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Nutrition Service (FNS) proposes to make changes to the Supplemental Nutrition Assistance Program (SNAP) regulations pertaining to the eligibility of SNAP retail food stores. The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act) to increase the requirement that certain SNAP authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties. The 2014 Farm Bill also amended the Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three. This proposed rule would codify these mandatory requirements.

Further, using existing authority in the Act and feedback from a Request for Information that included five listening sessions in urban and rural locations across the nation and generated 233 public comments, FNS is proposing several additional changes. Among other items, these proposed changes address depth of stock, amend the definition of staple foods, and amend the definition of "retail food store" to clarify when a retailer is a restaurant rather than a retail food store. The rulemaking also proposes that FNS begin disclosing to the public specific information about retailers who have violated SNAP rules.

**DATES:** To be assured of consideration, comments on this proposed rule must be received by the Food and Nutrition Service on or before April 18, 2016.

**ADDRESSES:** The Food and Nutrition Service (FNS), USDA, invites interested persons to submit comments on this proposed rule. Comments may be

submitted by one of the following methods:

- *Federal e-Rulemaking Portal:* Go to <http://www.regulations.gov>. Preferred method; follow the online instructions for submitting comments on docket [insert docket number].

- *Mail:* Comments should be addressed to Vicky Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division, Room 418, 3101 Park Center Drive, Alexandria, Virginia 22302.

All comments submitted in response to this rulemaking will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the internet via: <http://www.regulations.gov>.

All submissions will be available for public inspection at the address above during regular business hours (8:30 a.m. to 5:30 p.m.), Monday through Friday.

#### FOR FURTHER INFORMATION CONTACT:

Address any questions regarding this rulemaking to Vicky Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division at the Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302. Ms. Robinson can also be reached by telephone at 703-305-2476 or by email at [Vicky.Robinson@fns.usda.gov](mailto:Vicky.Robinson@fns.usda.gov) during regular business hours (8:30 a.m. to 5:30 p.m.) Monday through Friday.

#### SUPPLEMENTARY INFORMATION:

##### Background

This proposed rulemaking is the result of two separate developments. First are statutory changes included in the 2014 Farm Bill. The second is the effort initiated by FNS in 2013 to look at enhancing the eligibility standards for SNAP retailers to better enforce the intent of the Act to permit low-income individuals to purchase more nutritious foods for home preparation and consumption.

The 2014 Farm Bill increases the requirement that certain SNAP authorized retail food stores have available on a continuous basis at least three varieties of items in each of four staple food categories to a mandatory statutory minimum of seven varieties. Further, the 2014 Farm Bill increases the minimum number of categories in which perishable foods are required from two to three. This proposed rule