

which it was created, whichever is later.

(c) *Excess funds.* Within 90 calendar days of termination of the legal expense fund, the trustee must distribute any excess funds to an organization or organizations described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code. Funds from the legal expense fund may not be donated to an organization that was established by the trustee or the employee beneficiary, an organization in which the trustee or the employee beneficiary, their spouse, or their child is an officer, director, or employee, or an organization with which the employee has a covered relationship within the meaning of § 2635.502(b)(1). The trustee has sole discretion to select the 501(c)(3) organization. If practicable, the trustee may return the excess funds to the donors on a pro-rata basis rather than donating the funds to a 501(c)(3) organization.

(d) *Trust termination report.* After the trust is terminated, the employee beneficiary must file a trust termination report that contains the information required by § 2635.1007(d)(1) for the period of the last quarter report through the trust termination date. The report also must indicate the organization to which the excess funds were donated or if the excess funds were returned to donors. The report is due 30 calendar days following the termination date of the trust. Trust termination reports should be filed in accordance with the procedures outlined in § 2635.1007(b).

(e) *Exception for anonymous whistleblowers.* An employee beneficiary who is an anonymous whistleblower may choose to file the trust termination report anonymously through the employee beneficiary's trustee or representative with the Office of Government Ethics.

**§ 2635.1009 Pro bono legal services.**

(a) *Acceptance of permissible pro bono legal services.* An employee may solicit or accept the provision of *pro bono* legal services for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice

President, or the employee's prior position on a Presidential Transition Team from:

(1) Any individual who:

(i) Is not an agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);

(ii) Is not a foreign national;

(iii) Is not a lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a); and

(iv) Does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and

(2) An organization or entity that does not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties.

NOTE 1 TO PARAGRAPH (A): Pursuant to § 2634.907(g) of this chapter, an employee who is a public or confidential filer under part 2634 of this chapter must report gifts of *pro bono* legal services on the employee's financial disclosure report, subject to applicable thresholds and exclusions.

(b) *Provision of outside legal services.* An employee may solicit or accept payment for legal services for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team from an organization, established for more than two years, that is described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code. The organization, the legal services provider that the organization pays for legal services, and the individual attorney providing legal services must meet the requirements described in paragraph (a) of this section. The term "*pro bono services*" includes the provision of outside legal services as described in this section.

(c) *Role of designated agency ethics official.* The designated agency ethics official must determine whether the organization, the legal services provider that the organization pays for legal services, and the individual attorney

providing legal services meet the requirements described in paragraph (a) of this section.

*Example 1 to paragraph (c):* A Department of Justice employee is an eyewitness in an Inspector General investigation and is called to testify before Congress. A local law firm offers to represent the employee at no cost. The employee consults with an agency ethics official, who determines that the attorney who would represent the employee is neither an agent of a foreign government nor a lobbyist. However, the law firm is representing a party in a case to which the employee is assigned. The ethics official determines that the law firm is a person who has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Accordingly, the employee may not accept the offer of *pro bono* legal services from the law firm.

*Example 2 to paragraph (c):* A Securities and Exchange Commission employee is harassed by a supervisor and files a complaint. A nonprofit legal aid organization focusing on harassment cases offers *pro bono* legal services to the employee at no cost. The employee consults with an agency ethics official, who determines that the attorney who would represent the employee is neither an agent of a foreign government nor a lobbyist, and neither the attorney nor the nonprofit legal aid organization has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may accept the offer of *pro bono* legal services from the nonprofit legal aid organization.

*Example 3 to paragraph (c):* A registered 501(c)(3) organization whose mission focuses on assisting those experiencing workplace harassment offers to pay for legal services for the Securities and Exchange Commission employee from the preceding example. The legal services themselves are performed by attorneys outside the organization. The employee confers with an agency ethics official who determines that the 501(c)(3) organization has been in operation for more than two years, neither the organization nor the attor-

neys performing legal services have interests that may be substantially affected by the performance or non-performance of the employee's official duties, and the attorneys performing the legal services are neither agents of foreign governments nor lobbyists. Accordingly, the employee may accept the legal services even though they are provided by attorneys outside of the 501(c)(3) organization.

*Example 4 to paragraph (c):* A Department of State employee is asked to testify in a legal proceeding relating to a prior position at the Department of Justice. An attorney at a large national law firm offers *pro bono* services to the employee. The employee confers with an agency ethics official who determines that although the attorney offering representation is neither an agent of a foreign government nor a lobbyist, the law firm is currently registered pursuant to 2 U.S.C. 1603(a), some members of the firm are registered lobbyists, and the firm has business before other parts of the Department of State. However, neither the attorney nor the law firm has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Accordingly, the employee may accept the offer of *pro bono* legal services.

(d) *Appeal process.* An employee may appeal to the Office of Government Ethics in matters when the agency is the party opponent in the legal action. An employee may appeal the designated agency ethics official's determination that the *pro bono* legal services are prohibited; or a failure by the designated agency ethics official to provide a determination regarding whether the *pro bono* legal services are prohibited within 30 days. Appeals should be submitted within 60 days of denial by the designated agency ethics official, or within 90 days of submission to the designated agency ethics official, in the case of a request that has not been acted upon.

**PART 2636—LIMITATIONS ON OUTSIDE EARNED INCOME, EMPLOYMENT AND AFFILIATIONS FOR CERTAIN NONCAREER EMPLOYEES**

**Subpart A—General Provisions**

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**Subpart B [Reserved]**

**Subpart C—Outside Earned Income Limitation and Employment and Affiliation Restrictions Applicable to Certain Non-career Employees**

2636.301	General standards.
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2636.303	Definitions.
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2636.305	Compensation and other restrictions relating to professions involving a fiduciary relationship.
2636.306	Compensation restriction applicable to service as an officer or member of a board.
2636.307	Requirement for advance authorization to engage in teaching for compensation.

AUTHORITY: 5 U.S.C. ch. 131; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended by sec. 31001, Pub. L. 104-134, 110 Stat. 1321 and sec. 701, Pub. L. 114-74; 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.

SOURCE: 56 FR 1723, Jan. 17, 1991, unless otherwise noted.

**Subpart A—General Provisions**

**§ 2636.101 Purpose.**

This part is issued under authority of title VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended), to implement the 15 percent outside earned income limitation at 5 U.S.C. app. 501(a) and the limitations at 5 U.S.C. app. 502 on outside employment and affiliations, which are applicable to certain noncareer employees.

[63 FR 43068, Aug. 12, 1998]

**§ 2636.102 Definitions.**

The definitions listed below are of general applicability to this part. Additional definitions of narrower applicability appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency ethics official* refers to the designated agency ethics official and to any deputy ethics official described in § 2638.204 of this subchapter to whom authority to issue advisory opinions under § 2636.103 of this part has been delegated by the designated agency ethics official.

(b) *Designated agency ethics official* refers to the official described in § 2638.201 of this subchapter.

(c) *Employee* means any officer or employee of the executive branch, other than a special Government employee as defined in 18 U.S.C. 202. It includes officers but not enlisted members of the uniformed services as defined in 5 U.S.C. 2101(3). It does not include the President or Vice President.

(d) *Executive branch* includes each executive agency as defined in 5 U.S.C. 105 and any other entity or administrative unit in the executive branch. However, it does not include any agency that is defined by 5 U.S.C. app. 109(11) as within the legislative branch.

(e) The terms *he*, *his*, and *him* include “she,” “hers” and “her.”

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998]

**§ 2636.103 Advisory opinions.**

(a) *Request for an advisory opinion.* (1) An employee may request an advisory opinion from an agency ethics official as to whether specific conduct which has not yet occurred would violate any provision contained in this part.

(2) An advisory opinion may not be obtained for the purpose of establishing whether a noncareer employee who is subject to the restrictions in subpart C of this part may receive compensation for teaching. An advisory opinion issued under this section may not be substituted for the advance written approval required by § 2636.307 of this part.

(3) The employee’s request for an advisory opinion shall be submitted in writing, shall be dated and signed, and

**§ 2636.104**

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shall include all information reasonably available to the employee that is relevant to the inquiry. Where, in the opinion of the agency ethics official, complete information has not been provided, that official may request the employee to furnish additional information necessary to issue an opinion.

(b) *Issuance of advisory opinion.* As soon as practicable after receipt of all necessary information, the agency ethics official shall issue a written opinion as to whether the conduct in issue would violate any provision contained in this part. Where conduct which would not violate this part would violate another statute relating to conflicts of interest or applicable standards of conduct, the advisory opinion shall so state and shall caution the employee against engaging in the conduct.

(1) For the purpose of issuing an advisory opinion, the agency ethics official may request additional information from agency sources, including the requesting employee's supervisor, and may rely upon the accuracy of information furnished by the requester or any agency source unless he has reason to believe that the information is fraudulent, misleading or otherwise incorrect.

(2) A copy of the request and advisory opinion shall be retained for a period of 6 years.

(c) *Good faith reliance on an advisory opinion.* An employee who engages in conduct in good faith reliance upon an advisory opinion issued to him under this section shall not be subject to civil or disciplinary action for having violated this part. Where an employee engages in conduct in good faith reliance upon an advisory opinion issued by an ethics official of his agency to another, neither the Office of Government Ethics nor the employing agency shall initiate civil or disciplinary action under this part for conduct that is indistinguishable in all material aspects from the conduct described in the advisory opinion. However, an advisory opinion issued under this section shall not insulate the employee from other civil or disciplinary action if his conduct violates any other laws, rule, regulation or lawful management policy or directive. Where an employee has actual

knowledge or reason to believe that the opinion is based on fraudulent, misleading, or otherwise incorrect information, the employee's reliance on the opinion will not be deemed to be in good faith.

(d) *Revision of an ethics opinion.* Nothing in this section prohibits an agency ethics official from revising an ethics opinion on a prospective basis where he determines that the ethics opinion previously issued is incorrect, either as a matter of law or because it is based on erroneous information.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998; 72 FR 16987, Apr. 6, 2007]

**§ 2636.104 Civil, disciplinary, and other action.**

(a) *Civil action.* Except when the employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103, an employee who engages in any conduct in violation of the prohibitions, limitations, and restrictions contained in this part may be subject to civil action under 5 U.S.C. 13145(a), and a civil monetary penalty of not more than the amounts set in Table 1 to this this paragraph (a), as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, or the amount of the compensation the individual received for the prohibited conduct, whichever is greater.

TABLE 1 TO § 2636.104(a)

Date of violation	Penalty
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015 .....	\$11,000
Violation occurring after Nov. 2, 2015 .....	24,496

(b) *Disciplinary and corrective action.* An agency may initiate disciplinary or corrective action against an employee who violates any provision of this part, which may be in addition to any civil penalty prescribed by law. When an employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an agency may not initiate disciplinary or corrective action for violation

of this part. Disciplinary action includes reprimand, suspension, demotion and removal. Corrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution or termination of an activity. It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, the Director of the Office of Government Ethics may order corrective action or recommend disciplinary action under the procedures at part 2638 of this subchapter. The imposition of disciplinary action is at the discretion of the employing agency.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43068, Aug. 12, 1998; 64 FR 47097, Aug. 30, 1999; 81 FR 41790, June 28, 2016; 82 FR 8133, Jan. 24, 2017; 83 FR 2331, Jan. 17, 2018; 84 FR 6055, Feb. 26, 2019; 85 FR 2281, Jan. 15, 2020; 86 FR 7637, Feb. 1, 2021; 87 FR 2525, Jan. 18, 2022; 88 FR 1141, Jan. 9, 2023; 89 FR 1441, Jan. 10, 2024]

### Subpart B [Reserved]

### Subpart C—Outside Earned Income Limitation and Employment and Affiliation Restrictions Applicable to Certain Noncareer Employees

#### § 2636.301 General standards.

A covered noncareer employee shall not:

- (a) Receive outside earned income in excess of the 15 percent limitation described in § 2636.304 of this subpart;
- (b) Receive compensation or allow the use of his name in violation of the restrictions relating to professions involving a fiduciary relationship described in § 2636.305 of this subpart;
- (c) Receive compensation for serving as an officer or board member in violation of the restriction described in § 2636.306 of this subpart; or
- (d) Receive compensation for teaching without having first obtained advance authorization as required by § 2636.307 of this subpart.

#### § 2636.302 Relationship to other laws and regulations.

The limitations and restrictions contained in this section are in addition to

any limitations and restrictions imposed upon an employee by applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interest. Even though conduct or the receipt of compensation is not prohibited by this subpart, an employee should accept compensation or engage in the activity for which compensation is offered only after determining that it is otherwise permissible. In particular, a covered noncareer employee should accept compensation only after determining that its receipt does not violate section 102 of Executive Order 12674, as amended, which prohibits a covered noncareer employee who is also a Presidential appointee to a full-time noncareer position from receiving *any* outside earned income for outside employment or for any other activity performed during that Presidential appointment.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43069, Aug. 12, 1998]

#### § 2636.303 Definitions.

For purposes of this section:

(a) *Covered noncareer employee* means an employee, other than a Special Government employee as defined in 18 U.S.C. 202, who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule, and who is:

(1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position within the uniformed services; or

(ii) A position within the foreign service below the level of Assistant Secretary or Chief of Mission;

(2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;

(3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the

same as those set forth in §213.3301 of this title for Schedule C positions; or

(4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for non-career executive assignment positions. For purposes of applying this definition to an individual who holds a General Schedule or other position that provides several rates of pay or steps per grade, his rate of basic pay shall be the rate of pay for the lowest step of the grade at which he is employed.

*Example 1.* A Schedule C appointee to a position with the United States Information Agency who holds a GS-15 position and who is compensated at the rate for GS-15, Step 9 is not a covered noncareer employee even though the pay he receives in a calendar year exceeds the annual pay for a position above GS-15. Notwithstanding that he is compensated at Step 9, the basic rate of pay for the GS-15 position he holds is the rate in effect for GS-15, Step 1 of the General Schedule, which is lower than the rate for a position above GS-15.

*Example 2.* An employee of the Environmental Protection Agency who has been a career GS-15 employee for 10 years and who is offered a non-career SES position with the Federal Aviation Administration will, if he accepts the offer, become a covered non-career employee by reason of that appointment, regardless of his former status.

*Example 3.* A Department of Justice employee who holds a Schedule A appointment is not a covered noncareer employee even though he does not have competitive status within the meaning of §212.301 of this title.

(b) *Outside earned income and compensation* both mean wages, salaries, honoraria, commissions, professional fees and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government. Neither term includes:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Income attributable to service with the military reserves or national guard;

(3) Income from pensions and other continuing benefits attributable to previous employment or services;

(4) Income from investment activities where the individual's services are

not a material factor in the production of income;

(5) Copyright royalties, fees, and their functional equivalent, from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights;

(6) Actual and necessary expenses incurred by the employee in connection with an outside activity. Where such expenses are paid or reimbursed by another person, the amount of any such payment shall not be counted as compensation or outside earned income. Where such expenses are not paid or reimbursed, the amount of compensation or earned income shall be determined by subtracting the actual and necessary expenses incurred by the employee from any payment received for the activity; or

(7) Compensation for:

(i) Services rendered prior to January 1, 1991, or prior to becoming a covered noncareer employee;

(ii) Services rendered in satisfaction of a covered noncareer employee's obligation under a contract entered into prior to January 1, 1991; or

(iii) Services which the covered non-career employee first undertook to provide prior to January 1, 1991, where the standards of the applicable profession require the employee to complete the case or other undertaking.

*Example 1.* A covered noncareer employee is a limited partner in a partnership that invests in commercial real estate. Because he does not take an active role in the management of the partnership, his share of the partnership income is neither "outside earned income" nor "compensation."

*Example 2.* A covered noncareer employee of the Civil Rights Commission serves without compensation as a member of the Board of Visitors for a university. The roundtrip airfare and hotel expenses paid by the university to permit him to attend quarterly meetings of the Board are neither "outside earned income" or "compensation."

*Example 3.* Where a covered noncareer employee pays for transcripts of a hearing in which he is providing pro bono legal representation, reimbursements for those expenses by a legal aid organization are neither "outside earned income" nor "compensation."

*Example 4.* During the term of his appointment, a Deputy Assistant Secretary of Labor

enters into a contract to write a book of fictional short stories. Royalties based on actual sales of the book after publication are investment income attributable to the property interest he retains in the book and, as such, are neither "outside earned income" nor "compensation."

(c) *Receive* means that the employee has the right to exercise dominion and control over the compensation or outside earned income and direct its subsequent use. Compensation or outside earned income is received by an employee if it is for his conduct and:

(1) If it is paid to any other person on the basis of designation, recommendation or other specification by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Compensation that is prohibited by § 2636.305 through § 2636.307 of this subpart is received while an individual is an employee if it is for conduct by him that occurs while an employee, even though actual payment may be deferred until after Federal employment has terminated. Also, compensation or outside earned income donated to a charitable organization is received by the employee.

[56 FR 1723, Jan. 17, 1991, as amended at 63 FR 43069, Aug. 12, 1998; 64 FR 2422, Jan. 14, 1999; 72 FR 16987, Apr. 6, 2007]

**§ 2636.304 The 15 percent limitation on outside earned income.**

(a) *Limitation applicable to individuals who are covered noncareer employees on January 1 of any calendar year.* A covered noncareer employee may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. The effective date of a change in the rate for level II of the Executive Schedule shall be the date on which a new rate of basic pay for level II first becomes applicable to any level II position.

NOTE: Notwithstanding the 15 percent limitation described in this section, a covered noncareer employee who is a Presidential appointee to a full-time noncareer position is

prohibited by section 102 of Executive Order 12674, as amended, from receiving *any* outside earned income for outside employment or any other activity performed during that Presidential appointment.

*Example 1.* Notwithstanding that the compensation he will receive would not exceed 15 percent of the rate for level II of the Executive Schedule, a covered noncareer employee of the Department of Energy may not receive any compensation for teaching a university course unless he first receives the authorization required by § 2636.307 of this subpart.

(b) *Limitation applicable to individuals who become covered noncareer employees after January 1 of any calendar year.* The outside earned income limitation that applies to an individual who becomes a covered noncareer employee during a calendar year shall be determined on a pro rata basis. His outside earned income while so employed in that calendar year shall not exceed 15 percent of the annual rate of basic pay for level II of the Executive Schedule in effect on January 1 of the calendar year divided by 365 and multiplied by the number of days during that calendar year that he holds the covered noncareer position.

*Example 1.* A former college professor received an appointment to a noncareer Senior Executive Service position on November 1, 1991. The rate of basic pay in effect for Executive Level II on January 1, 1991 was \$125,100. For the 61 day period from November 1, 1991 through December 31, 1991, the amount of outside income he may earn is limited to \$3,129. That amount is determined as follows:

Step 1. The rate of basic pay for Executive Level II as in effect on January 1 of that year (\$125,100) is divided by 365. That quotient is \$342;

Step 2. The dollar amount determined by Step 1 (\$342) is then multiplied by the 61 days the employee held the covered noncareer position. That product is \$20,862;

Step 3. The dollar amount determined by Step 2 (\$20,862) is multiplied by .15 or 15 percent. The product (\$3,129) is the maximum outside earned income the employee may have in the particular year attributable to the period of his service in a covered noncareer position.

(c) *Computation principle.* For purposes of any computation required by this section, any amount of \$.50 or more shall be rounded up to the next full dollar and any amount less than \$.50 shall be rounded down to the next full dollar.