

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.

FEDERAL ELECTION COMMISSION

5 CFR Chapter XXXVII

11 CFR Part 7

[NOTICE 2010–05]

RIN 3209–AA15

Standards of Conduct

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission (“Commission” or “FEC”), with the concurrence of the office of Government Ethics (“OGE”), seeks comments on proposed revisions to the “Standards of Conduct,” which are the FEC rules that govern the conduct of Commissioners and Commission employees. The proposed rules would update the Commission’s current regulations to reflect statutory changes enacted after the Standards of Conduct were originally promulgated in 1986, and to conform to regulations issued by OGE and the Office of Personnel Management (“OPM”). OGE’s regulations establish a government-wide standard of ethical conduct for the Executive Branch and independent agencies, and are known as OGE’s Standards of Ethical Conduct. In addition to the proposed revisions to the FEC’s Standards of Conduct, the Commission, with OGE’s concurrence, is also proposing new rules that would supplement, for Commissioners and employees of the FEC, the OGE Standards of Ethical Conduct for Employees of the Executive Branch. The proposed rules that follow do not represent a final decision by the Commission or OGE on the issues presented by this rulemaking. The supplementary information that follows provides further information.

DATES: Comments must be received on or before June 16, 2010.

ADDRESSES: All comments must be in writing, must be addressed to Robert M. Knop, Assistant General Counsel, and must be submitted in e-mail, facsimile,

or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to ensure timely receipt and consideration. E-mail comments must be sent to ethicsrules@fec.gov. If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219–3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends.

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

SUPPLEMENTARY INFORMATION:

I. Overview of OGE Rules Implementing the Ethics Reform Act and Proposed FEC Supplemental Rules

A. Legal Authority

The Ethics Reform Act of 1989¹ includes restrictions on gifts, travel, outside activities, and outside employment. *See* Public Law 101–194, tit. III and VI, 103 Stat. 1716 (1989). It authorizes the Office of Government Ethics (“OGE”) to implement regulations concerning the conduct of executive branch employees. *See* 5 U.S.C. 7351(c). In 1992, OGE issued a final rule setting forth uniform standards of ethical conduct and an interim final rule on financial disclosure, and in 1996 issued a final rule on financial interests, all for executive branch departments and agencies of the Federal Government and their employees. These three executive branch-wide regulations, as corrected and amended, are codified at 5 CFR parts 2634, 2635, and 2640.²

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

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

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

B. Topics Addressed in OGE and OPM Regulations

OGE regulations address gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, pursuit of other employment, misuse of position, and outside employment and activities. *See* 5 CFR part 2635.³

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

FEC and OGE have determined that the following proposed supplemental regulations are necessary and appropriate in view of FEC’s programs and operations and to fulfill the purposes of the OGE standards. The supplemental regulations proposed will be issued in new chapter XXXVII of title 5 of the CFR. In addition, the FEC is revising its current regulations at 11 CFR part 7 to conform to the OGE and OPM regulations, without compromising the Commission’s essential independence in its core

later modified. E.O. 12731, 55 FR 42547 (Oct. 17, 1990). OGE’s regulations also implement Executive Order 12674, as modified by Executive Order 12731.

³ The remainder of this section is only a brief summary. Important additional restrictions and exceptions may apply. Readers should consult the cited regulations for further information.

mission of administering Federal campaign finance laws.

II. Analysis of the Proposed Regulations

The following discussion explains the Commission's proposal to amend the rules that govern the conduct of Commissioners and Commission employees by adding supplemental regulations in a new chapter XXXVII of 5 CFR, consisting of part 4701, and by revising the Commission's Standards of Conduct in 11 CFR part 7. The Commission seeks comment on the proposed rules.

A. Proposed Supplemental Regulations in 5 CFR part 4701

1. Proposed 5 CFR 4701.101—Scope

Proposed 5 CFR 4701.101 states the authority for the supplemental regulations, which includes 2 U.S.C. 437c(a)(3), 5 U.S.C. 7301, and 5 U.S.C. App. (Ethics in Government Act of 1978). Proposed 5 CFR 4701.101(a) indicates that the regulations of 5 CFR part 4701 apply to both members of the Commission ("Commissioners") and employees of the Commission. Proposed 5 CFR 4701.101(b) lists some of the other regulations in title 5 and 11 CFR part 7 that would govern the ethical conduct of Commissioners and employees.

2. Proposed 5 CFR 4701.102—Prior Approval for Certain Outside Employment and Activities

The OGE Standards of Ethical Conduct supersede the Commission's current regulation at 11 CFR 7.9(f) concerning prior approval for outside employment and activities. However, an agency may issue supplemental regulations with OGE's concurrence that require the agency's employees to obtain approval before engaging in outside employment or activities. *See* 5 CFR 2635.105 and 2635.803.

The Commission has found the current approval requirement for outside employment or activities useful in ensuring that the outside employment and activities of its employees conform to all applicable laws and regulations. Because that requirement is deemed necessary to the administration of its ethics program, the Commission, with the concurrence of OGE, proposes to renew its requirement for prior approval of certain outside employment and activities, and to issue a supplemental regulation in accordance with 5 CFR 2635.803 at proposed 5 CFR 4701.102.

Proposed section 4701.102 would differ significantly from current 11 CFR 7.9(f). The major difference is in the

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

Proposed 5 CFR 4701.102(a) would set out the definitions of the terms used in proposed 5 CFR 4701.102(b). The definitions for "active participant," "employee," and "related to the employee's official duties" refer back to the definitions of these terms used in the general standards of conduct regulations issued by OGE.

Proposed 5 CFR 4701.102(a)(2) would define "employee" as defined in OGE's regulation at 5 CFR 2635.102(h), which includes "any officer or employee of an agency." This definition includes Commissioners. However, proposed section 4701.102(b) would exclude Commissioners from its procedures.⁴ Instead, proposed 11 CFR 7.6, discussed below, would address outside employment and activities by Commissioners.

Proposed 5 CFR 4701.102(a)(3) would define "outside employment" to mean any form of non-Federal employment, business relationship or activity involving the provision of personal services, with or without compensation, other than in the discharge of official duties. The proposed definition provides a non-exhaustive list of services such as serving as a lawyer, officer, director, trustee, agent,

consultant, contractor, general partner, active participant, teacher, speaker, writer, or any other services provided by an individual. This proposed definition of "outside employment" is similar to those adopted by other Federal agencies and is designed to cover a broad range of outside employment and activities in which a Commission employee may seek to engage. *See, e.g.,* 5 CFR 3801.106 (Department of Justice) and 5 CFR 5701.101 (Federal Trade Commission). Notably, this definition of "outside employment" includes unpaid activity which may not conform to the usual understanding of "employment."

Proposed 5 CFR 4701.102(b) states that a Commission employee other than a special Government employee⁵ must obtain prior, written approval from the DAEO before engaging in outside employment or activities where the services provided are related to the employee's official duties or involve the application of the same specialized skills or the same educational background as used in the performance of the employee's official duties. Accordingly, Commission employees would be required to obtain prior, written approval only when they sought to engage in outside employment or activities that are related, in one of those respects, to their official duties. For example, a Commission attorney wishing to engage in weekend employment as a salesperson for a retail organization would not need to seek prior approval because such employment would not be related to his or her official duties or involve the application of the same specialized skills or educational background as used in his or her position at the Commission. On the other hand, a Commission attorney wishing to represent a relative in a lawsuit filed against a private party in State court *would* be required to seek prior approval because such representation would involve the application of the same specialized skill or same educational background as used in his or her position with the Commission.

Proposed section 5 CFR 4701.102(c) would establish the procedure for the submission of approval requests to the DAEO. It would require that the request be submitted through all of the employee's supervisors. For purposes of this section, the Staff Director, the

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

⁴ The Act already restricts outside activities of Commissioners. *See* 2 U.S.C. 437c(a)(3). Regulations implementing this provision are already in place, *see* 11 CFR 7.9, and are being reassigned in this rulemaking. *See* below.

General Counsel, the Inspector General, the Chief Financial Officer, a Commissioner, or the Commission would be considered the final level of supervision for their respective subordinates. A request would need to provide certain information, including the identity of the person, group, or organization for which the employee intends to provide services. Deadlines for a supervisor to respond to a request of a bargaining unit employee, and for a bargaining unit employee to submit a grievance in the event a request is denied, are contained in the Commission's Labor-Management Agreement. *See* Article 31, Labor-Management Agreement between the Federal Election Commission and Chapter 204 of the National Treasury Employees Union, dated May 2, 2007.

Proposed 5 CFR 4701.102(d) would set forth the standard for approval of an employee's request regarding outside employment or activity, which is not in current 11 CFR 7.9(f). Approval would be granted only upon a determination that the outside employment or activity would not involve conduct prohibited by statute or Federal regulations. In making this determination, the regulations to be considered would

include those at 5 CFR part 2635. Therefore, the approval would depend on (1) whether the outside employment or activity would create conflicting financial interests, or (2) a lack of impartiality in performing official duties, or (3) misuse of Government position, and (4) whether the employment or activity otherwise complies with 5 CFR part 2635.

The Commission invites comments on this proposal and on whether an alternative system of seeking prior approval is preferable to that proposed and, if so, how an alternative system should be structured.

B. Proposed Revisions to the Commission's Standards of Conduct in 11 CFR Part 7

The FECA provides authority for some of the Commission's regulations in 11 CFR part 7, including current 11 CFR 7.14 and 7.15, which concern confidentiality of enforcement matters and are based on 2 U.S.C. 437g(a)(12). The Commission proposes to retain these rules. The Commission also proposes to retain provisions that are informational or procedural in nature, such as current 11 CFR 7.1 (purpose and applicability), 7.2 (definitions), 7.4

(interpretation and advisory service), 7.5 (reporting suspected violations), and 7.6 (disciplinary and corrective actions). The revisions and clarifications proposed for these provisions are discussed below.

As explained above in *Overview of OGE Rules Implementing the Ethics Reform Act*, many of the Commission's regulations in current 11 CFR part 7 have been supplanted by OGE's regulations. Accordingly, the Commission proposes to remove the supplanted regulations from the Commission's Standards of Conduct in current 11 CFR part 7.

The Commission's current regulation concerning political activity by Commissioners and Commission employees has been supplanted by the Hatch Act Reform Amendments of 1993. *See* Public Law 103-94, 107 Stat. 1001 (1993); current 11 CFR 7.11. Therefore, the Commission proposes to remove that regulation. *See* discussion below.

The regulations that the Commission proposes to retain and revise would also be redesignated. The following chart lists the removals, revisions, and redesignations proposed for current 11 CFR part 7.

Current 11 CFR Section	Proposal	Redesignated 11 CFR section	Supplanted by 5 CFR section
7.1(a)	Remove as supplanted .....	.....	2635.101.
7.1(b) ⁶ & (c)	Remove as supplanted .....	.....	2635.102(h).
7.1(b) ⁷	Revise.		
7.2	Revise.		
7.3	Remove as supplanted .....	.....	2638.701–2638.706.
7.4	Revise and redesignate	7.3	
7.5	Revise and redesignate	7.4	
7.6	Revise and redesignate	7.5	
7.7	Remove as supplanted .....	.....	2635.101.
7.8	Remove as supplanted .....	.....	2635.201–2635.205. ⁸
7.9(a)	Revise and redesignate	7.6	
7.9(b)–(f)	Remove as supplanted .....	.....	2635.801–2635.809. ⁹
7.10	Remove as supplanted .....	.....	2635.401–2635.403. ¹⁰
7.11	Remove as supplanted .....	.....	Hatch Act Amendments. ¹¹
7.12	Remove as supplanted .....	.....	2635.402. ¹²
7.13	Remove as supplanted .....	.....	2635.704.
7.14	Revise and redesignate	7.7	
7.15	Revise and redesignate	¹³ 7.8	
7.16	Remove as supplanted .....	.....	2635.901–2635.902.
7.17–7.21	Remove as supplanted .....	.....	2635.102(h). ¹⁴
7.22–7.33	Remove as supplanted .....	.....	18 U.S.C. 207. ¹⁵

⁶ This entry refers to the portion of current 11 CFR 7.1(b) that separately includes special Government employees. *See also* proposed 11 CFR 7.2(d).

⁷ This entry refers to the portion of current 11 CFR 7.1(b) that explains that current 11 CFR part 7 applies to Commission members and employees.

⁸ *See also* 5 CFR 2635.301–2635.304.

⁹ *See also* proposed 5 CFR part 4701.

¹⁰ *See also* 5 CFR 2635.501–2635.503 and 2635.703.

¹¹ *See also* discussion below.

¹² *See also* 5 CFR 2635.502, 2635.704–2635.705, and discussion below.

¹³ The citation to current 11 CFR 7.15 in 11 CFR 201.1 would be revised to cite proposed 11 CFR 7.8.

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

¹⁵ *See also* discussion below.

1. Proposed 11 CFR 7.1—Scope

Proposed 11 CFR 7.1(a) would state that the regulations in revised 11 CFR part 7 apply to all members and employees of the Commission. Proposed 11 CFR 7.1(b) would list the other regulations in title 5 of the CFR and proposed 5 CFR part 4701 that would govern the ethical conduct of Commissioners and employees. Current 11 CFR 7.1(b), which states that the regulations in current 11 CFR part 7 apply to all employees and “special Commission employees,” would be removed. As explained below, proposed 11 CFR 7.2(d) would include “special Government employees” in the definition of “employee.” Although the Commission’s current regulations use the term “special Commission employee,” the proposed regulation uses the term “special Government employee” as defined at 5 CFR 2635.102(l) in order to better conform to OGE terminology. Because proposed 11 CFR 7.1(a) states that the regulations in revised 11 CFR part 7 apply to all Commission employees, which includes special Government employees, current paragraph (b) is no longer necessary. Current 11 CFR 7.1(c), which states that the regulations in current 11 CFR part 7 must be construed in accordance with any applicable laws, regulations, and the Commission’s Labor-Management Agreement also would be removed because it is unnecessary to state that other laws, regulations, and agreements apply.

2. Proposed 11 CFR 7.2—Definitions

Proposed 11 CFR 7.2 would continue to set forth the definitions used in 11 CFR part 7. The definition of “Commission” in current 11 CFR 7.2(a) would remain unchanged. The definition of “Commissioner” in current 11 CFR 7.2(b) would be revised slightly. Whereas current paragraph (b) of 11 CFR 7.2 defines “Commissioner,” in part, as “a voting member of the Federal Election Commission,” proposed 11 CFR 7.2(b) would delete the word “voting” from the definition. The word “voting” is no longer necessary because all members of the Commission are currently voting members. This definition includes a Commissioner who holds his or her position by virtue of a recess appointment.

The definition of “conflict of interest” in current section 7.2(c) would be removed. Instead, the Commission would rely on OGE regulations and regulatory definitions regarding conflicts of interest, except for the provisions in proposed 11 CFR 7.6 governing outside employment and

activities of Commissioners. *See, e.g.*, 5 CFR 2635.801–2635.809. Because proposed section 7.6 would not use the phrase “conflict of interest,” a definition of that phrase specific to 11 CFR part 7 would no longer be needed.

The terms “Designated Agency Ethics Officer” and “Ethics Officer” in current 11 CFR 7.2(d) would be replaced with the term “Designated Agency Ethics Official” in proposed section 7.2(c) and throughout the proposed regulations. *See* proposed 11 CFR 7.3, 7.4, and 7.5. These changes would make the Commission’s regulations consistent with OGE’s regulations at 5 CFR 2638.104. Proposed 11 CFR 7.2(c) would also include a provision from current 11 CFR 7.4 stating that the Commission’s General Counsel serves as the Designated Agency Ethics Official.

In proposed 11 CFR 7.2(d), the definition of “employee” from current 11 CFR 7.2(e) would be amended to include a “special Government employee as defined in 18 U.S.C. 202(a).” OGE regulations at 5 CFR 2635.102(h) include “special Government employee” within the general definition of “employee,” thus subjecting special Government employees to the same Standards of Conduct as other employees, with certain limitations. Proposed section 7.2(d) would operate similarly.

Proposed section 7.2(e) defines “*ex parte* communication” for the purposes of 11 CFR part 7. This definition is based on the definition of “*ex parte* communication” at 11 CFR 201.2(a) applicable to non-enforcement situations.¹⁶ Similar to that definition, proposed section 7.9(e) defines “*ex parte* communication” as any written or oral communication by any person outside the agency to any Commissioner or any member of any Commissioner’s staff, but not to any other Commission employee, that imparts information or argument regarding prospective Commission enforcement action or potential action concerning any pending enforcement matter. Similar to current Commission regulations at 11 CFR 111.22 and part 201, the proposed definition is limited to Commissioners and their staff members because the Commissioners are empowered to make decisions on enforcement matters, and their staff members are their confidential assistants on these matters. The Commission notes that “matter” as used in the proposed rule includes

enforcement Matters Under Review, Administrative Fines, and Alternative Dispute Resolution cases (“ADR”). *See also* discussion of proposed 11 CFR 7.9, below.

Proposed section 7.2(f) defines the term “Inspector General.” The definitions of “former employee,” “official responsibility,” “person,” and “special Commission employee” at current 11 CFR 7.2(f), (g), (i), and (j), respectively, would be removed from proposed section 7.2 as these definitions are no longer necessary. In addition, paragraph (h) of current 11 CFR 7.2 defining “outside employment or other outside activity” would be removed. Because the Commission proposes, with OGE concurrence, to replace much of current 11 CFR 7.9 (outside employment or activities by Commission employees) with a supplemental regulation at 5 CFR 4701.102, paragraph (h) of current 11 CFR 7.2 defining “outside employment or other outside activity” would be superfluous.

3. Proposed 11 CFR 7.3—Interpretation and Advisory Service

Proposed 11 CFR 7.3 is a revised version of current 11 CFR 7.4, which addresses interpretation and advisory service. Proposed 11 CFR 7.3(a) adds references to 5 CFR parts 735, 2634, 2635, 2640, and 4701 as subjects on which a Commissioner or employee may seek interpretation and advice. Also, proposed paragraph (a) identifies the DAEO as the person from whom advice should be sought. Proposed paragraph (b) clarifies that the DAEO, a Commissioner, or an employee may request an opinion from the Director of OGE concerning interpretations of 5 CFR parts 2634, 2635, or 2640.

4. Proposed 11 CFR 7.4—Reporting Suspected Violations

Proposed 11 CFR 7.4 is a revised version of current 11 CFR 7.5 and addresses the reporting of suspected violations of the FEC’s Standards of Conduct and OGE’s Standards of Ethical Conduct. Proposed section 7.4 requires the reporting of suspected violations of 5 CFR parts 735, 2634, 2635, 2640, and 4701 or revised 11 CFR part 7 to the DAEO, the Inspector General, or other appropriate law enforcement authorities.

5. Proposed 11 CFR 7.5—Corrective Action

Proposed 11 CFR 7.5 informs employees that a violation of the FEC’s Standards of Conduct or OGE’s Standards of Ethical Conduct may be cause for appropriate corrective action, disciplinary action, or adverse action, in

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

addition to any penalty prescribed by law, including criminal penalties. Proposed section 7.5 is based on current paragraph 7.6(a). Procedures for taking corrective, disciplinary, and adverse actions are set forth in other authority. Accordingly, the procedures in current paragraphs 7.6(b) and (c) are unnecessary and would be deleted.

6. Proposed 11 CFR 7.6—Outside Employment and Activities by Commissioners

Proposed 11 CFR 7.6 addresses outside employment or activities of Commissioners.¹⁷ FECA provides authority for additional restrictions on Commissioners' outside employment and activities. *See* 2 U.S.C. 437c(a)(3).

Similar to the current rule at 11 CFR 7.9(a), proposed 11 CFR 7.6 states that no Commissioner may devote a substantial portion of his or her time to any other business, vocation, or employment. This regulation would also retain the current rule's allowance of a 90-day period for a Commissioner, following the start of Commission service, to limit such activity.

As noted in the 1986 Explanation and Justification for the current rule on Commissioners' outside activities, the use of the words "substantial portion" of a Commissioner's time to trigger the regulation's prohibitions is based on the legislative history of 2 U.S.C. 437c(a)(3). *See* Explanation and Justification for Final Rules on Standards of Conduct for Agency Employees, 51 FR 34440, 34442 (Sept. 29, 1986). The Conference Report that accompanied the 1976 amendments to FECA discusses 2 U.S.C. 437c(a)(3): "The conferees agree that the requirement is intended to apply to members who devote a substantial portion of their time to such business, vocation, or employment activities." H.R. Rep. No. 94-1057, at 34 (1976) (Conf. Rep.), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976*, at 1028 (1977). The proposed rule continues this interpretation.

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

FECA prohibits any person from making public "any notification or investigation" of a complaint under 2 U.S.C. 437g without the written consent

of the person receiving the notification or with respect to whom the investigation is made. 2 U.S.C. 437g(a)(12)(A); 11 CFR 111.21. Proposed 11 CFR 7.7 derives its authority from that provision of FECA. The proposed rule follows current 11 CFR 7.14.

8. Proposed 11 CFR 7.8—*Ex Parte* Communications in Enforcement Actions

Proposed 11 CFR 7.8 is a revised version of current 11 CFR 7.15 and addresses *ex parte* communications. The title of proposed 11 CFR 7.8 clarifies that the rule applies specifically to *ex parte* communications in enforcement matters. Proposed 11 CFR 7.8(a) and (d) would revise the rule to clarify that the prohibition on *ex parte* communications would apply only to Commissioners and any member of a Commissioner's staff. These proposed changes would conform proposed 11 CFR 7.8 to the current *ex parte* rules in 11 CFR 111.22 and part 201. *See also* discussion of proposed 11 CFR 7.2(e), above. Proposed section 7.8 also contains nonsubstantive revisions from paragraphs (a), (c), and (d) of current section 7.15. Finally, proposed 11 CFR 7.8 would add references to 11 CFR 111.22, governing *ex parte* communications made in connection with Commission enforcement actions, and 11 CFR part 201, governing *ex parte* communications made in connection with public funding, audits, litigation, rulemakings, and advisory opinions. *See* proposed 11 CFR 7.8(e). The Commission seeks comment on these changes to its *ex parte* communication rules.

9. Proposed Removal of Current 11 CFR 7.11—Political and Organization Activity

The Hatch Act Reform Amendments of 1993¹⁸ lifted many of the restrictions imposed by the original Hatch Act on most Federal employees with regard to participation in political campaigns. However, Congress specifically addressed the FEC in the Hatch Act Amendments and left all of the original Hatch Act's restrictions in place for employees of the Commission, other than Commissioners. *See* 5 U.S.C. 7323(b)(1) and (2). In contrast to the Commissioners, Commission employees may not give a political contribution to a Member of Congress, an employee of the Executive Branch (other than the President or Vice President), or an officer of a uniformed service. 5 U.S.C. 7323(b)(1). Additionally, Commission

employees may not "take an active part in political management or political campaigns." 5 U.S.C. 7323(b)(2)(A).

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

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

The Commission has received an advisory opinion from OSC as to the scope of the Commission's authority to interpret the Hatch Act Amendments regarding Commissioners and Commission employees.¹⁹ The specific question asked was whether the Commission may adopt a regulation that would forbid a Commissioner or a Commission employee from publicly supporting, or working for, or contributing to, a candidate, political party, or political committee subject to the jurisdiction of the Commission, even if in the case of public support, the activity is not done in concert with the

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

¹⁸ Public Law 103-94, 107 Stat. 1001 (1993) ("Hatch Act Amendments").

¹⁹ A copy of the Office of Special Counsel's opinion is available on the Commission's Web site at http://www.fec.gov/law/law_rulemakings.shtml under "Standards of Conduct."

candidate, political party, or political committee. In its opinion, the OSC noted the OPM regulations cited above and stated with respect to employees that “the FEC cannot further restrict the political activity of its regular employees by forbidding them from publicly supporting or contributing to a candidate, political party, or political committee subject to the jurisdiction of the Commission.” U.S. Office of Special Counsel Advisory Opinion, OSC File No. AD-03-0095, at 2 (Aug. 29, 2003). The OSC opinion also noted with respect to Commissioners that “the FEC has no authority to adopt regulations that would forbid a Commissioner from publicly supporting, working for, or contributing to a candidate, political party, or political committee subject to the jurisdiction of the FEC.” *Id.* at 2–3. Its final conclusion was that “the FEC may not adopt regulations that would limit the political activity of FEC employees or Commissioners beyond the restrictions set forth in the Hatch Act.”²⁰ *Id.* at 3.

Accordingly, the Commission proposes to delete current section 7.11 because it is inconsistent with the Hatch Act Amendments.

10. Proposed Removal of Current 11 CFR 7.12—Membership in Associations

The Commission proposes to remove current 11 CFR 7.12, which addresses employee and Commissioner membership in associations. In 1991, OGE issued a Notice of Proposed Rulemaking that included proposed regulations concerning participation in professional associations. *See* Notice of Proposed Rulemaking on Standards of Ethical Conduct for Employees of the Executive Branch, 56 FR 33778 (July 23, 1991). OGE decided, however, to reserve action in its final rule on this topic as a result of the overwhelming response to its request for comments. *See* Explanation and Justification for Final Rule on Standards of Ethical Conduct for Employees of the Executive Branch, 57 FR 35006 (Aug. 7, 1992). The Commission agrees with the position taken by OGE in its rulemaking that ethical concerns regarding membership in nongovernmental associations or organizations may be addressed under the more general standards in 5 CFR part 2635. *See* 57 FR at 35035. Among those general provisions that are applicable are 5 CFR 2635.402 (concerning disqualifying financial

interests), 5 CFR 2635.502 (concerning personal and business relationships), and 5 CFR 2635.704 and 2635.705 (concerning use of government property and official time).

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

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

Subsequently, however, 18 U.S.C. 207(j) was amended and the section authorizing administrative procedures and the authority to draft regulations regarding the procedures was removed and replaced.²¹ The Commission has no pending post-employment situations concerning employees who left service prior to the repeal of this provision. Accordingly, the Commission is proposing to remove 11 CFR part 7, subpart D pertaining to proceedings regarding post-employment conflicts of interest in its entirety. Please note that former employees would remain subject to Department of Justice criminal prosecution under 18 U.S.C. 207 for post-employment conflict of interest violations. *See* 18 U.S.C. 216.

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

Regulatory Flexibility Act

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

List of Subjects

5 CFR Part 4701

Conflict of interests, Government employees, Outside activities.

11 CFR Part 7

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

For the reasons set out in the preamble, the Federal Election Commission, with the concurrence of the Office of Government Ethics, proposes to amend title 5 of the Code of Federal Regulations, and the Federal Election Commission further proposes to amend chapter I of title 11 of the Code of Federal Regulations as follows:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

1. Add Chapter XXXVII, consisting of part 4701, to read as follows:

Chapter XXXVII—Federal Election Commission

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

Sec.

4701.101 Scope.

4701.102 Prior approval for certain outside employment.

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

§ 4701.101 Scope.

(a) In accordance with 5 CFR 2635.105, the regulations in this part set forth standards of conduct that apply to members and other employees of the Federal Election Commission (“Commission”).

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

- (1) 5 CFR part 735 (Employee Responsibilities and Conduct);
- (2) 5 CFR part 2634 (Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture);
- (3) 5 CFR part 2635 (Standards of Ethical Conduct for Employees of the Executive Branch); and
- (4) 11 CFR part 7 (Standards of Conduct for Members and Employees of the Federal Election Commission).

§ 4701.102 Prior approval for certain outside employment.

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

²⁰ Under 5 U.S.C. 1212, the advisory opinion authority of the OSC is limited to matters related to the Hatch Act. Therefore, the conclusions of the opinion are also limited to interpretations of the Hatch Act and OPM regulations. They do not apply to any separate statutory authority under FECA.

²¹ *See* Public Law 101–189, Div. A, Title VIII, Part B, sec. 814(d)(2), 103 Stat. 1352, 1499 (1989).

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

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

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

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

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

(iii) The activities will involve the provision of consultative or professional services. Consultative services means the provision of personal services, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, hospital, or similar facility. Professional services means the provision of personal services, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR 2636.305(b)(1) or involves a fiduciary relationship as defined in 5 CFR 2636.305(b)(2).

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

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

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

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

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

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

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

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

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

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

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

TITLE 11—FEDERAL ELECTIONS

Chapter I—Federal Election Commission

2. Revise part 7 to read as follows:

PART 7—STANDARDS OF CONDUCT

Sec.

7.1 Scope.

7.2 Definitions.

7.3 Interpretation and advisory service.

7.4 Reporting suspected violations.

7.5 Corrective action.

7.6 Outside employment and activities by Commissioners.

7.7 Prohibition against making complaints and investigations public.

7.8 Ex parte communications in enforcement actions.

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

§ 7.1 Scope.

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

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

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

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

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

(4) 5 CFR part 4701 (Supplemental Standards of Ethical Conduct for Employees of the Federal Election Commission).

§ 7.2 Definitions.

As used in this part:

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

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

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

(d) *Employee* means an employee of the Federal Election Commission and includes a special Government employee as defined in 18 U.S.C. 202(a).

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

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

§ 7.3 Interpretation and advisory service.

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

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

§ 7.4 Reporting suspected violations.

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

§ 7.5 Corrective action.

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

§ 7.6 Outside employment and activities by Commissioners.

No member of the Commission may devote a substantial portion of his or her time to any other business, vocation, or employment. Any individual who is engaging substantially in any other business, vocation, or employment at the time such individual begins to serve as a member of the Commission will appropriately limit such activity no later than 90 days after beginning to serve as such a member.

§ 7.7 Prohibition against making complaints and investigations public.

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

(b) Section 437g(a)(12)(B) of title 2 of the United States Code provides as follows: "Any member or employee of the Commission, or any other person, who violates the provisions of [2 U.S.C.

437g(a)(12)(A)] shall be fined not more than \$2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of [2 U.S.C. 437g(a)(12)(A)] shall be fined not more than \$5,000."

§ 7.8 Ex parte communications in enforcement actions.

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

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

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

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

(d) A Commissioner or member of any Commissioner's staff involved in handling enforcement actions who receives an offer to make an oral communication or any communication concerning any enforcement action pending before the Commission as described in paragraph (a) of this section, shall decline to listen to such communication. If unsuccessful in preventing the communication, the Commissioner or employee shall advise the person making the communication that he or she will not consider the communication and shall prepare a statement setting forth the substance and circumstances of the communication. Within 48 hours of receipt of the communication, the Commissioner or any member of any Commissioner's staff shall prepare a statement setting forth the substance and circumstances of the communication and shall deliver the statement to the General Counsel for placing in the file in the manner set forth in paragraph (c) of this section.

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

Dated: May 11, 2010.

On behalf of the Commission.

Matthew S. Petersen,
Chairman, Federal Election Commission.

Approved: May 7, 2010.

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

[FR Doc. 2010-11599 Filed 5-14-10; 8:45 am]

BILLING CODE 6715-01-P

NUCLEAR REGULATORY COMMISSION
10 CFR Part 72**RIN 3150-AI75****[NRC-2009-0538]**
List of Approved Spent Fuel Storage Casks: NUHOMS® HD System Revision 1; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** on May 7, 2010 (75 FR 25120), that proposes to amend the regulations that govern storage of spent nuclear fuel. Specifically, this proposed amendment would be to the list of approved spent fuel storage casks to add revision 1 to the NUHOMS HD spent fuel storage cask system. This action is necessary to correctly specify the date by which comments must be received, because the notice of direct final rulemaking (75 FR 24786; May 6, 2010), and the companion notice of proposed rulemaking were published in the **Federal Register** on different dates instead of being published concurrently on the same date, as erroneously stated in the notices.

FOR FURTHER INFORMATION CONTACT: Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6219, e-mail Jayne.McCausland@nrc.gov.

SUPPLEMENTARY INFORMATION: On page 25120, in the third column, the fifth full