



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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March 21, 2007

MEMORANDUM

AGENDA ITEM

For Meeting of: 03-22-07

TO: The Commission

FROM: Thomasenia P. Duncan *TAD*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

J. Duane Pugh Jr. *JDP*
Acting Assistant General Counsel

Robert M. Knop *RMK*
Attorney

Stacey J. Shin *SJS*
Law Clerk

SUBMITTED LATE

SUBJECT: Draft Notice of Proposed Rulemaking for Standards of Conduct

Attached is a draft Notice of Proposed Rulemaking for Standards of Conduct.

The proposed rules would update the Commission's regulations to reflect statutory changes enacted after the Standards of Conduct were originally promulgated and to conform to regulations issued by the Office of Government Ethics ("OGE") and the Office of Personnel Management. In addition, the proposed rules include new rules to supplement the OGE's Standards of Ethical Conduct that would be issued by the Commission with OGE's approval.

We request that this draft be placed on the agenda for March 22, 2007.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **5 CFR Chapter XXXVII**

3 **11 CFR Part 7**

4 **STANDARDS OF CONDUCT**

5 **RIN 3209-AA15**

6 **[NOTICE 2007 -]**

7 **AGENCY:** Federal Election Commission

8 **ACTION:** Notice of Proposed Rulemaking

9 **SUMMARY:** The Federal Election Commission (“Commission” or “FEC”), with
10 the concurrence of the Office of Government Ethics (“OGE”), seeks
11 comments on proposed revisions to the “Standards of Conduct,”
12 which are the FEC rules that govern the conduct of Commissioners
13 and Commission employees. The proposed rules would update the
14 Commission’s current regulations to reflect statutory changes
15 enacted after the Standards of Conduct were originally promulgated
16 in 1986, and to conform to regulations issued by OGE and the Office
17 of Personnel Management (“OPM”). OGE’s regulations establish a
18 government-wide standard of ethical conduct for the Executive
19 Branch and independent agencies, and are known as OGE’s
20 Standards of Ethical Conduct. In addition to the proposed revisions
21 to the FEC’s Standards of Conduct, the Commission, with OGE’s
22 concurrence, is also proposing new rules that would supplement
23 OGE’s Standards of Ethical Conduct. The proposed rules that

1 follow do not represent a final decision by the Commission or OGE
2 on the issues presented by this rulemaking. The supplementary
3 information that follows provides further information.

4 **DATES:** Comments must be received on or before [insert date 30 days after
5 the date of publication in the Federal Register].

6 **ADDRESSES:** All comments must be in writing, must be addressed to Mr. J. Duane
7 Pugh Jr., Acting Assistant General Counsel, and must be submitted
8 in e-mail, facsimile, or paper copy form. Commenters are strongly
9 encouraged to submit comments by e-mail or fax to ensure timely
10 receipt and consideration. E-mail comments must be sent to
11 ethicsrules@fec.gov. If e-mail comments include an attachment, the
12 attachment must be in either Adobe Acrobat (.pdf) or Microsoft
13 Word (.doc) format. Faxed comments must be sent to (202) 219-
14 3923, with paper copy follow-up. Paper comments and paper copy
15 follow-up of faxed comments must be sent to the Federal Election
16 Commission, 999 E Street, NW., Washington, DC 20463. All
17 comments must include the full name and postal service address of
18 the commenter or they will not be considered. The Commission will
19 post comments on its website after the comment period ends.

20 **FOR FURTHER**
21 **INFORMATION**
22 **CONTACT:**

Mr. J. Duane Pugh Jr., Acting Assistant General Counsel, Mr.
23 Robert M. Knop, Attorney, or Ms. Stacey J. Shin, Law Clerk, 999 E

1 Street, NW., Washington D.C. 20463, (202) 694-1650 or (800)
2 424-9530.

3 **SUPPLEMENTARY**
4 **INFORMATION:**

5 **I. OVERVIEW OF OGE RULES IMPLEMENTING THE ETHICS REFORM**
6 **ACT AND PROPOSED FEC SUPPLEMENTAL RULES**

7 A. Legal Authority

8 The Ethics Reform Act of 1989¹ applies to all Federal employees and includes
9 restrictions on gifts, travel, outside activities, and outside employment. See Pub. L.
10 101-194, tit. III, VI, 103 Stat. 1716 (1989). It authorizes OGE to implement regulations
11 concerning the conduct of executive branch employees. See 5 U.S.C. 7351(c). OGE has
12 done so with regulations that establish uniform standards of ethical conduct for executive
13 branch and independent agency employees, including FEC employees. See 5 CFR parts
14 2634, 2635 and 2640.²

15 The OGE regulations implementing the Ethics Reform Act supersede any agency
16 regulations previously issued and therefore supersede, with some exceptions, the
17 Commission's current regulations in 11 CFR part 7.³ Although agencies may still issue

¹ Pub. L. 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 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. See E.O. 12731, 55 FR 42547 (Oct. 17, 1990); E.O. 12674, 54 FR 15159 (Apr. 12, 1989).

³ Prior to the Ethics Reform Act of 1989, the Ethics in Government Act of 1978, Public Law 95-521, required agencies to promulgate regulations implementing that Act and other laws and regulations addressing Federal standards of conduct. See Pub. L. 95-521, 92 Stat. 1824 (1978). Thus, executive branch agencies and independent agencies had their own standards of conduct regulations. The Commission promulgated

1 regulations to supplement OGE's regulations in order to accommodate specific agency
2 needs, such regulations must be issued in accordance with OGE's rules, and must be
3 submitted to OGE for prior approval. See 5 CFR 2635.105(a) and (b). Agencies may,
4 however, retain any regulations based on their own separate statutory authority.

5 B. Topics Addressed in OGE and OPM Regulations

6 OGE regulations address gifts from outside sources, gifts between employees,
7 conflicting financial interests, impartiality in performing official duties, pursuit of other
8 employment, misuse of position, and outside activities. See 5 CFR part 2635. These rules
9 set forth the following basic principles.⁴

10 A Federal employee may not solicit or accept gifts that are offered because of the
11 employee's official position or gifts from any person that: seeks official action by the
12 employee's agency, conducts activities regulated by the employee's agency, does business,
13 or seeks to do business, with the employee's agency. See 5 CFR 2635.101 and 2635.201
14 through 2635.205. An employee may not give or solicit donations for a gift to an official
15 superior or accept a gift from a lower-paid employee, unless the two employees are
16 personal friends who are not in a superior-subordinate relationship. See 5 CFR 2635.301
17 through 2635.304.

18 A Federal employee may not participate in matters likely to affect the employee's
19 financial interest, and Federal employees must take certain steps to avoid an appearance of
20 the loss of impartiality in performing official duties. See 5 CFR 2635.401

such regulations in current 11 CFR part 7. See generally Final Rule on Standards of Conduct for Agency Employees, 51 FR 34440 (Sept. 29, 1986).

⁴ 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.

1 through 2635.403, and 2635.601 through 2635.603. When seeking other employment, a
2 Federal employee may not participate in particular matters that would affect the financial
3 interest of a prospective employer. See 5 CFR 2635.601 through 2635.606. Federal
4 employees may not use their public offices, nonpublic information, Government property,
5 or official time, for private gain, either their own gain or the gain of others. See
6 5 CFR 2635.701 through 2635.705. Lastly, OGE rules address outside employment and
7 outside activities of Federal employees. See 5 CFR 2635.801 through 2635.809.

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

13 The FEC is proposing new rules in 5 CFR part 4701 and revisions to 11 CFR part 7
14 that would conform the Commission's regulations to the OGE and OPM regulations,
15 without compromising the Commission's essential independence in its core mission of
16 administering Federal campaign finance laws.

17 **II. PROPOSED REGULATIONS**

18 The following discussion explains the Commission's proposal to amend the rules
19 that govern the conduct of Commissioners and Commission employees by adding
20 supplemental regulations to 5 CFR part 4701 and by revising the Commission's Standards
21 of Conduct in 11 CFR part 7. The Commission seeks comment on the proposed rules.

1 A. Proposed Supplemental Regulations in 5 CFR Part 4701

2 1. Proposed 5 CFR 4701.101 – Scope

3 Proposed 5 CFR 4701.101 would state the authority for the supplemental
4 regulations, which includes 2 U.S.C. 437c(a)(3), 5 U.S.C. 7301 and 5 U.S.C. App. (Ethics
5 in Government Act of 1978). Proposed 5 CFR 4701.101(a) would indicate that the
6 regulations of 5 CFR part 4701 apply to both members of the Commission
7 (Commissioners) and employees of the Commission. Proposed 5 CFR 4701.101(b) would
8 list some of the other regulations in Title 5 and 11 CFR part 7 that would govern the ethical
9 conduct of Commissioners and employees.

10 2. Proposed 5 CFR 4701.102 – Prior approval for certain outside activities

11 The OGE Standards of Ethical Conduct now supersede the Commission’s current
12 regulation at 11 CFR 7.9(f) concerning prior approval for outside employment. However,
13 agencies may issue regulations jointly with OGE that require the agencies’ employees to
14 obtain approval before engaging in outside employment or activities. See 5 CFR 2635.105
15 and 2635.803.

16 The Commission has found the current approval requirement for outside
17 employment or activities useful in ensuring that the outside employment and activities of
18 its employees conform to all applicable laws and regulations. Because that requirement is
19 necessary to the administration of its ethics program, the Commission, with the
20 concurrence of OGE, proposes to renew its requirement for prior approval of certain
21 outside activities and to issue a supplemental regulation in accordance with
22 5 CFR 2635.803 at proposed 5 CFR 4701.102.

1 Proposed section 4701.102 would differ significantly from current 11 CFR 7.9(f).
2 The major difference is in the scope of the outside activities covered by the proposed
3 regulation. Current 11 CFR 7.9(f) requires Commission employees to obtain prior
4 approval for all outside employment. The term “outside employment or other outside
5 activity” is defined broadly at current 11 CFR 7.2(h) to include “any work, service or other
6 activity performed by an employee.” In contrast, proposed 5 CFR 4701.102 would require
7 prior approval from the Designated Agency Ethics Official (“DAEO”) only for outside
8 activities that are related to the employee’s official duties or involve the application of the
9 same specialized skills or the same educational background as used in the performance of
10 the employee’s official duties. This rule, which draws on portions of prior approval
11 regulations adopted by several other Federal agencies, is narrowly constructed to address
12 agency concerns, while limiting the administrative burdens placed on employees. See, e.g.,
13 5 CFR 3801.106 (Department of Justice); 5 CFR 4501.103 (OPM); and 5 CFR
14 6301.102 (Department of Education); and 5 CFR 8601.102 (Federal Retirement Thrift
15 Investment Board).

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

20 Proposed 5 CFR 4701.102(a)(2) would define “employee” as defined in OGE’s
21 regulation at 5 CFR 2635.102(h), which includes “any officer or employee of an agency.”
22 This definition includes Commissioners. However, proposed section 4701.102(b) would
23 exclude Commissioners and members of their staffs from its procedures. Instead, proposed

1 11 CFR 7.6, discussed below, would address outside employment and activities by
2 Commissioners, and proposed section 4701.102(e) would address outside activities by
3 members of Commissioners' staffs. In addition, proposed section 4701.102(a)(2) would
4 make it clear OGE's definition of "employee," which is limited to government employees,
5 does not apply to use of the term "employee" in the proposed definition of "outside
6 activities." Instead, the "outside activities" definition uses "employee" to include
7 employees of any employer.

8 Proposed 5 CFR 4701.102(a)(3) would define "outside activities" to mean
9 providing any services, with or without compensation, other than in the discharge of
10 official duties. The proposed definition provides a non-exhaustive list of services that
11 constitute outside activities, such as serving as a lawyer, officer, director, trustee,
12 employee, agent, consultant, contractor, general partner, active participant, teacher,
13 speaker, or writer. This proposed definition of "outside activities" is similar to those
14 adopted by other Federal agencies and is designed to cover a broad range of outside
15 activities in which a Commission employee may seek to engage. See, e.g., 5 CFR
16 3801.106 (Department of Justice) and 5 CFR 5701.101 (Federal Trade Commission).

17 Proposed 5 CFR 4701.102(b) would state that a Commission employee must obtain
18 prior, written approval from the DAEO before engaging in outside activities with or
19 without compensation where the services provided are related to the employee's official
20 duties or involve the application of the same specialized skills or the same educational
21 background as used in the performance of the employee's official duties. Accordingly,
22 Commission employees would be required to obtain prior, written approval only when they
23 sought to engage in outside activities that are related, in one of those respects, to their

1 official duties. For example, a Commission attorney wishing to engage in weekend
2 employment as a salesperson for a retail organization would not need to seek prior
3 approval because such employment would not be related to his or her official duties or
4 involve the application of the same specialized skills or educational background as used in
5 his or her position at the Commission. On the other hand, a Commission attorney wishing
6 to represent a relative in a lawsuit filed against a private party in State court would be
7 required to seek prior approval because such representation would involve the application
8 of the same specialized skill or same educational background as used in his or her position
9 with the Commission.

10 Proposed section 5 CFR 4701.102(c) would establish the procedure for the
11 submission of approval requests to the DAEO. It would require that the request be
12 submitted through all of the employee's supervisors. For purposes of this section, the Staff
13 Director, the General Counsel, the Inspector General, or, in appropriate cases, a
14 Commissioner or the Commission would be considered the final level of supervision for all
15 Commission employees. A request would need to provide certain information, including
16 the identity of the person, group, or organizations for which the employee intends to
17 provide services. Additional procedures for seeking and obtaining approval are also set
18 forth in the Commission's Labor – Management Agreement.

19 Proposed 5 CFR 4701.102(d) would set forth the standard for approval of an
20 employee's request regarding outside activities, which is not in current 11 CFR 7.9(f).
21 Approval would be granted upon a determination that the outside activity would not
22 involve conduct prohibited by statute or Federal regulations. In making this determination,
23 the regulations to be considered would include those at 5 CFR part 2635. Therefore, the

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

5 Proposed 5 CFR 4701.102(e) would state that a member of a Commissioner's staff
6 must obtain prior, written approval from his or her supervising Commissioner before
7 engaging in outside activities, with or without compensation, where the services provided
8 are related to the employee's official duties or involve the application of the same
9 specialized skills or the same educational background as used in the performance of the
10 employee's official duties. Under proposed section 4701.102(e), the supervising
11 Commissioner would consult the DAEO in determining whether to approve the request.

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

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

16 FECA provides authority for some of the Commission's Standards of Conduct in
17 current 11 CFR part 7 and, therefore, OGE's regulations do not supplant these regulations.
18 These regulations include current 11 CFR 7.14 and 7.15, which concern confidentiality of
19 enforcement matters and are based on 2 U.S.C. 437g(a)(12). The Commission proposes to
20 retain these rules. The Commission also proposes to retain provisions that are
21 informational or procedural in nature, such as current 11 CFR 7.1 (purpose and
22 applicability), 7.2 (definitions), 7.4 (interpretation and advisory service), 7.5 (reporting

1 suspected violations) and 7.6 (disciplinary and corrective actions). The revisions and
2 clarifications proposed for these provisions are discussed below.

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

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

1 The regulations that the Commission proposes to retain and revise would also be
 2 redesignated. The following chart lists the removals, revisions, and redesignations
 3 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) ⁵ & (c)	Remove as supplanted		2635.102(h)
7.1(b) ⁶	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 ⁷
7.9(a)	Revise and redesignate	7.6	
7.9(b)-(f)	Remove as supplanted		2635.801—2635.809 ⁸
7.10	Remove as supplanted		2635.401—2635.403 ⁹
7.11	Remove as supplanted		Hatch Act Amendments ¹⁰
7.12	Remove as supplanted		2635.402 ¹¹
7.13	Remove as supplanted		2635.704
7.14	Revise and redesignate	7.7	
7.15	Revise and redesignate	7.8 ¹²	
7.16	Remove as supplanted		2635.901—2635.902
7.17 – 7.21	Remove as supplanted		2635.102(h) ¹³
7.22 – 7.33	Remove as supplanted		18 U.S.C. 207 ¹⁴

⁵ 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).

⁶ 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.

⁷ See also 5 CFR 2635.301—2635.304.

⁸ See also proposed 5 CFR part 4701.

⁹ See also 5 CFR 2635.501—2635.503; 2635.703.

¹⁰ See also discussion below.

¹¹ See also 5 CFR 2635.502; 2635.704—2635.705; and discussion below.

¹² The citation to current 11 CFR 7.15 in 11 CFR 201.1 would be revised to cite proposed 11 CFR 7.8.

¹³ See also proposed 11 CFR 7.2(d) (including Special Government employees).

1
2 1. Proposed 11 CFR 7.1 – Scope

3 Proposed 11 CFR 7.1(a) would state that the regulations in revised 11 CFR part 7
4 apply to all members and employees of the Commission. Proposed 11 CFR 7.1(b) would
5 list the other regulations in Title 5 and proposed 5 CFR part 4701 that would govern the
6 ethical conduct of Commissioners and employees. Current 11 CFR 7.1(b), which states
7 that the regulations in current 11 CFR part 7 apply to all employees and special
8 Commission employees, would be removed. As explained below, proposed 11 CFR 7.2(d)
9 would include special Government employees in the definition of “employee.” Because
10 proposed 11 CFR 7.1(a) states that the regulations in revised 11 CFR part 7 apply to all
11 Commission employees, which includes special Commission employees, current
12 paragraph (b) is no longer necessary. Current 11 CFR 7.1(c), which states that the
13 regulations in current 11 CFR part 7 must be construed in accordance with any applicable
14 laws, regulations, and the Commission’s labor – management agreement also would be
15 removed because it is unnecessary to state that other laws, regulations, and agreements
16 apply.

17 2. Proposed 11 CFR 7.2 – Definitions

18 Proposed 11 CFR 7.2 would continue to set forth the definitions used in 11 CFR
19 part 7. The definition of “Commission” in current 11 CFR 7.2(a) would remain
20 unchanged. The definition of “Commissioner” in current 11 CFR 7.2(b) would be revised
21 slightly. Whereas current paragraph (b) of 11 CFR 7.2 defines “Commissioner,” in part, as
22 “a voting member of the Federal Election Commission,” proposed 11 CFR 7.2(b) would

¹⁴ See also discussion below.

1 delete the word “voting” from the definition. The word “voting” is no longer necessary
2 because all members of the Commission are currently voting members.

3 The definition of “conflict of interest” in current section 7.2(c) would be removed.
4 Instead, the Commission would rely on OGE regulations and regulatory definitions
5 regarding conflicts of interest, except for the provisions in proposed 11 CFR 7.6 governing
6 outside employment and activities of Commissioners. See, e.g., 5 CFR 2635.801
7 through 2635.809. Because proposed section 7.6 would not use the phrase “conflict of
8 interest,” a definition of that phrase specific to 11 CFR part 7 would no longer be needed.

9 The terms “Designated Agency Ethics Officer” and “Ethics Officer” in current
10 11 CFR 7.2(d) would be replaced with the term “Designated Agency Ethics Official” in
11 proposed section 7.2(c) and throughout the proposed regulations. See proposed
12 11 CFR 7.3, 7.4, and 7.5. These changes would make the Commission’s regulations
13 consistent with OGE’s regulations at 5 CFR 2638.104. Proposed 11 CFR 7.2(c) would
14 also include a provision from current 11 CFR 7.4 stating that the Commission’s General
15 Counsel serves as the Designated Agency Ethics Official.

16 In proposed 11 CFR 7.2(d), the definition of “employee” from current
17 11 CFR 7.2(e) would be amended to include a “special Government employee as defined in
18 18 U.S.C. 202.” OGE regulations at 5 CFR 2635.102(h) include “special Government
19 employee” within the general definition of “employee,” thus subjecting special
20 Government employees to the same Standards of Conduct as other employees. Proposed
21 section 7.2(d) would operate similarly.

22 Proposed section 7.2(e) would define “ex parte communication” for the purposes of
23 11 CFR part 7. This definition would be based on the definition of “ex parte

1 communication” at 11 CFR 201.2(a) applicable to non-enforcement situations.¹⁵ Like that
2 definition, proposed section 7.9(e) would define “ex parte communication” as any written
3 or oral communication by any person outside the agency to any Commissioner or any
4 member of any Commissioner’s staff, but not to any other Commission employee, that
5 imparts information or argument regarding prospective Commission action or potential
6 action concerning any pending enforcement matter. Like current Commission regulations
7 at 11 CFR 111.22 and part 201, the proposed definition would be limited to
8 Commissioners and their staff members because the Commissioners are empowered to
9 make decisions on enforcement matters, and their staff members are their confidential
10 assistants on these matters. The Commission notes that “matter” as used in the proposed
11 rule would include enforcement Matters Under Review, Administrative Fines, and
12 Alternative Dispute Resolution cases (“ADR”). See also discussion of proposed 11 CFR
13 7.9, below.

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

¹⁵ 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.

1 regulation at 5 CFR 4701.102, paragraph (h) of current section 7.2 defining “outside
2 employment or other outside activity” would be superfluous.

3 3. Proposed 11 CFR 7.3 – Interpretation and advisory service

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

12 4. Proposed 11 CFR 7.4 – Reporting suspected violations

13 Proposed 11 CFR 7.4 would be a revised version of current 11 CFR 7.5 and would
14 address the reporting of suspected violations of the FEC’s Standards of Conduct and
15 OGE’s Standards of Ethical Conduct. Proposed section 7.4 would require the reporting of
16 suspected violations of 5 CFR parts 735, 2634, 2635, 2640 and 4701 or revised 11 CFR
17 part 7 to the DAEO, the Inspector General, or other appropriate law enforcement
18 authorities.

19 5. Proposed 11 CFR 7.5 – Corrective action

20 Proposed 11 CFR 7.5 would inform employees that a violation of the FEC’s
21 Standards of Conduct or OGE’s Standards of Ethical Conduct may be cause for appropriate
22 corrective action, disciplinary action, or adverse action, in addition to any penalty
23 prescribed by law, including criminal penalties. Proposed section 7.5 is based on current

1 section 7.6(a). Procedures for taking corrective, disciplinary, and adverse actions are set
2 forth in other authority. Accordingly, the procedures in current section 7.6(b) and (c) are
3 unnecessary and would be deleted.

4 6. Proposed 11 CFR 7.6 – Outside employment and activities by
5 Commissioners

6 Proposed 11 CFR 7.6 would address outside employment or activities of
7 Commissioners.¹⁶ FECA provides authority for additional restrictions on Commissioners'
8 outside employment and activities. See 2 U.S.C. 437c(a)(3).

9 Like the current rule at 11 CFR 7.9(a), proposed 11 CFR 7.6 would state that a
10 Commissioner shall not devote a substantial portion of his or her time to any other
11 business, vocation, or employment. This regulation would also retain the current rule's
12 allowance of a 90-day period for a Commissioner, following the start of Commission
13 service, to limit such activity.

14 As noted in the 1986 Explanation and Justification for the current rule on
15 Commissioners' outside activities, the use of the words "substantial portion" of a
16 Commissioner's time to trigger the regulation's prohibitions is based on the legislative
17 history of 2 U.S.C. 437c(a)(3). See Final Rules on Standards of Conduct for Agency
18 Employees, 51 FR 34440, 34442 (Sept. 29, 1986). The Conference Report that
19 accompanied the 1976 amendments to FECA discusses 2 U.S.C. 437c(a)(3): "the
20 conferees agree that the requirement is intended to apply to members who devote a
21 substantial portion of their time to such business, vocation, or employment activities."

¹⁶ Outside activities of other FEC employees are addressed in OGE's Standards of Ethical Conduct at 5 CFR 2635.801 through 2635.809, which supplant current 11 CFR 7.9(b) through (f).

1 H.R. Conf. Rep. No. 94-1057; at 34 (1976), reprinted in Legislative History of Federal
2 Election Campaign Act Amendments of 1976, at 1028 (1977). The proposed rule would
3 continue this interpretation.

4 7. Proposed 11 CFR 7.7 – Prohibition against making complaints and
5 investigations public

6 FECA prohibits any person from making public “any notification or investigation”
7 of a complaint under 2 U.S.C. 437g without the written consent of the person receiving the
8 notification or with respect to whom the investigation is made. 2 U.S.C. 437g(a)(12)(A);
9 11 CFR 111.21. Proposed 11 CFR 7.7 would derive its authority from that provision of
10 FECA. The proposed rule follows current 11 CFR 7.14.

11 8. Proposed 11 CFR 7.8 – Ex parte communications in enforcement actions

12 Proposed 11 CFR 7.8 would be a revised version of current 11 CFR 7.15 and
13 would address ex parte communications. The title of proposed 11 CFR 7.8 would be
14 clarified to apply specifically to ex parte communications in enforcement matters.
15 Proposed 11 CFR 7.8(a) and (d) would be revised to clarify that the prohibition on ex parte
16 communications would apply only to Commissioners and any members of a
17 Commissioner’s staff. These proposed changes would conform proposed 11 CFR 7.8 to
18 the current ex parte rules in 11 CFR 111.22 and part 201. See also discussion of proposed
19 11 CFR 7.2(e), above. Proposed section 7.8 would also contain nonsubstantive revisions
20 from paragraphs (a), (c) and (d) of current section 7.15. Finally, proposed 11 CFR 7.8
21 would add references to 11 CFR 111.22, governing ex parte communications made in
22 connection with Commission enforcement actions, and 11 CFR part 201, governing ex
23 parte communications made in connection with public funding, audits, litigation,

1 rulemakings, and advisory opinions. See proposed 11 CFR 7.8(e). The Commission seeks
2 comment on these changes to its *ex parte* rules.

3 9. Proposed Removal of Current 11 CFR 7.11 – Political and organization
4 activity

5 The Hatch Act Reform Amendments of 1993¹⁷ lifted many of the restrictions
6 imposed by the original Hatch Act on most Federal employees with regard to participation
7 in political campaigns. However, Congress specifically addressed the FEC in the Hatch
8 Act Amendments and left all of the original Hatch Act’s restrictions in place for employees
9 of the Commission, other than Commissioners. See 5 U.S.C. 7323(b)(1) and (2). In
10 contrast to the Commissioners, Commission employees may not give a political
11 contribution to a Member of Congress, an employee of the Executive Branch (other than
12 the President or Vice President), or an officer of a uniformed service. 5 U.S.C. 7323(b)(1).
13 Additionally, Commission employees may not “take an active part in political management
14 or political campaigns.” 5 U.S.C. 7323(b)(2)(A).

15 The Hatch Act, as amended, prohibits certain political activities by Commissioners
16 such as (1) using official authority or influence to interfere with an election, (2) knowingly
17 soliciting or discouraging political activity by anyone subject to a Commission audit or
18 investigation, (3) soliciting or receiving political contributions (except in certain, narrowly
19 limited circumstances), or (4) being a candidate for public office in a partisan election.
20 5 U.S.C. 7323(a).

21 OPM has authority to issue regulations regarding the Hatch Act Amendments, and
22 OSC interprets and enforces those regulations. See 5 U.S.C 1103(a)(5) and 5 U.S.C. 7325.

¹⁷ Pub. L. 103-94, 107 Stat. 1001 (1993) (“Hatch Act Amendments”).

1 No provisions in the Hatch Act Amendments empower any agencies other than OPM to
2 issue regulations pursuant to the Hatch Act Amendments, and no provision in FECA
3 directly refers to the Hatch Act Amendments or previous Hatch Act restrictions. OPM has
4 issued a regulation expressly prescribing the extent to which the political activities of
5 employees may be limited beyond the restrictions in the Hatch Act Amendments. This
6 OPM regulation provides that: “No further proscriptions or restrictions may be imposed
7 upon employees covered under this regulation except: (a) Employees who are appointed by
8 the President by and with the advice and consent of the Senate; (b) Employees who are
9 appointed by the President; (c) Non-career senior executive service members; (d) Schedule
10 C employees, 5 CFR 213.3301, 213.3302; and (e) Any other employees who serve at the
11 pleasure of the President.” See 5 CFR 734.104.

12 The Commission has received an advisory opinion from OSC as to the scope of the
13 Commission’s authority to interpret the Hatch Act Amendments regarding Commissioners
14 and Commission employees.¹⁸ The specific question asked was whether the Commission
15 may adopt a regulation that would forbid a Commissioner or a Commission employee from
16 publicly supporting, or working for, or contributing to, a candidate, political party, or
17 political committee subject to the jurisdiction of the Commission, even if in the case of
18 public support, the activity is not done in concert with the candidate, political party, or
19 political committee. In its opinion, the OSC noted the OPM regulations cited above and
20 stated with respect to employees that “the FEC cannot further restrict the political activity
21 of its regular employees by forbidding them from publicly supporting or contributing to a

¹⁸ A copy of the Office of Special Counsel’s opinion is available on the Commission’s website at http://www.fec.gov/law/law_rulemakings.shtml under “Standards of Conduct.”

1 candidate, political party, or political committee subject to the jurisdiction of the
2 Commission.” U.S. Office of Special Counsel Advisory Opinion, OSC File No. AD-03-
3 0095, at 2 (Aug. 29, 2003). The OSC opinion also noted with respect to Commissioners
4 that “the FEC has no authority to adopt regulations that would forbid a Commissioner from
5 publicly supporting, working for, or contributing to a candidate, political party, or political
6 committee subject to the jurisdiction of the FEC.” Id. at 2-3. Its final conclusion was that
7 “the FEC may not adopt regulations that would limit the political activity of FEC
8 employees or Commissioners beyond the restrictions set forth in the Hatch Act.”¹⁹ Id. at 3.

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

11 10. Proposed Removal of Current 11 CFR 7.12 – Membership in associations

12 The Commission proposes to remove current 11 CFR 7.12, which addresses
13 employee and Commissioner membership in associations. In 1991, OGE issued a Notice
14 of Proposed Rulemaking that included proposed regulations concerning participation in
15 professional associations. See Notice of Proposed Rule on Standards of Ethical Conduct
16 for Employees of the Executive Branch, 56 FR 33778 (July 23, 1991). OGE decided,
17 however, to reserve action in its final rule on this topic as a result of the overwhelming
18 response to its request for comments. See Final Rule on Standards of Ethical Conduct for
19 Employees of the Executive Branch, 57 FR 35006 (Aug. 7, 1992). Therefore, no OGE
20 rules supplant current 11 CFR 7.12. The Commission, however, believes that a specific
21 Commission regulation governing membership in associations is not advisable. The

¹⁹ 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.

1 Commission agrees with the position taken by OGE in its rulemaking that ethical concerns
2 regarding membership in nongovernmental associations or organizations may be addressed
3 under the more general standards in 5 CFR part 2635. See 57 FR at 35035. Among those
4 general provisions that are applicable are 5 CFR 2635.402 (concerning disqualifying
5 financial interests), 5 CFR 2635.502 (concerning personal and business relationships) and
6 5 CFR 2635.704 and 2635.705 (concerning use of government property and official time).

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

10 Current 11 CFR part 7, subpart D, concerns administrative procedures to be
11 followed for investigations of post-employment conflict-of-interest violations by
12 individuals who have left Commission employment. Subpart D was based on 18 U.S.C.
13 207 and 5 CFR parts 2637 and 2641. When subpart D was adopted, 18 U.S.C. 207(j)
14 authorized agency proceedings against individuals who violated that section and required
15 that “departments and agencies shall, in consultation with the Director of the Office of
16 Government Ethics, establish procedures to carry out this subsection.”

17 Subsequently, however, 18 U.S.C. 207(j) was amended and the section authorizing
18 administrative procedures and the authority to draft regulations regarding the procedures
19 was removed and replaced.²⁰ The Commission has no pending post-employment situations
20 concerning employees who left service prior to the repeal of this provision. Accordingly,
21 the Commission is proposing to remove entirely 11 CFR part 7, subpart D pertaining to
22 proceedings regarding post-employment conflicts of interest. Please note that former

²⁰ See Pub. L. 101-189, Div. A, Title VIII, Part B, sec. 814(d)(2), 103 Stat. 1352, 1499 (1989).

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

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

4 **[Regulatory Flexibility Act]**

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

10 **List of Subjects**

11 5 CFR Part 4701

12 Conflict of interest, Government employees, outside activities.

13 11 CFR Part 7

14 Administrative practice and procedure, Conflicts of interest, Government
15 employees, Political activities (government employees)

16

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

4 **TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES**

5 1. Chapter XXXVII consisting of part 4701 would be added to title 5 of the Code of
6 Federal Regulations to read as follows:

7 **CHAPTER XXXVII – FEDERAL ELECTION COMMISSION**

8 **PART 4701 – SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR**
9 **EMPLOYEES OF THE FEDERAL ELECTION COMMISSION**

10 Sec.

11 4701.101 Scope.

12 4701.102 Prior approval for certain outside activities.

13 Authority: 2 U.S.C. 437c(a)(3); 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in
14 Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR 1989 Comp., p. 215, as
15 modified by E.O. 12731, 55 FR 42547, 3 CFR 1990 Comp., p. 306; 5 CFR 2635.105,
16 2635.204, and 2635.803.

17 **§ 4701.101 Scope.**

18 (a) The regulations of this part set forth standards of conduct that apply to members
19 and employees of the Federal Election Commission (Commission).

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

- 22 (1) 5 CFR part 735 (Executive Branch Employee Responsibilities and
23 Conduct);

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

7 **§ 4701.102 Prior approval for certain outside activities.**

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

- 9 (1) Active participant has the meaning set forth in 5 CFR 2635.502(b)(1)(v).
- 10 (2) Except as used in paragraph (a)(3) of this section, employee has the
11 meaning set forth in 5 CFR 2635.102(h).
- 12 (3) Outside activities means the provision of any services, with or without
13 compensation, other than in the discharge of official duties. Examples of
14 outside activities include, but are not limited to, serving as a lawyer, officer,
15 director, trustee, employee, agent, consultant, contractor, general partner,
16 active participant, teacher, speaker, or writer.
- 17 (4) Related to the employee's official duties means that the activity meets one
18 or more of the tests described in 5 CFR 2635.807(a)(2)(i)(B) through
19 (a)(2)(i)(E). Activities related to the employee's official duties include:
- 20 (i) Activities an employee has been invited to participate in because of
21 his or her official position rather than his or her expertise in the
22 subject matter;

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

4 (iii) Activities that convey information derived from nonpublic
5 information gained during the course of government employment;
6 and

7 (iv) Activities that deal in significant part with any matter to which the
8 employee is or has been officially assigned in the last year, or any
9 ongoing or announced Commission policy, program, or operation.

10 (b) Prior approval requirement. An employee of the Commission, including a special
11 Government employee, but not a member of the Commission or a Commissioner's staff,
12 shall obtain written approval from the Designated Agency Ethics Official before engaging
13 in outside activities with or without compensation where the services provided:

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

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

18 (c) Submission of requests for approval.

19 (1) The request for approval shall be sent through all of the employee's
20 supervisors and shall state the name of the person, group, or organization for
21 whom the outside activity is to be performed; the type of outside activity to
22 be performed; and the proposed hours of and approximate dates of the
23 outside activity.

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

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

7 (e) Commissioner's staff. Any member of a Commissioner's staff who seeks to engage
8 in outside activities, with or without compensation, shall first obtain written approval from
9 his or her supervising Commissioner, who will consult with the Designated Agency Ethics
10 Official, in determining whether to approve the request, where the services provided:

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

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

1 **TITLE 11 – FEDERAL ELECTIONS**

2 **CHAPTER I – FEDERAL ELECTION COMMISSION**

3 2. Part 7 would be revised to read as follows:

4 **PART 7 – STANDARDS OF CONDUCT**

5 **Subpart A—General Provisions**

6 Sec.

7 7.1 Scope Purpose and applicability.

8 7.2 Definitions.

9 7.3 Interpretation and advisory service. ~~Notification to employees and special-~~
10 ~~Commission employees.~~

11 7.4 Reporting suspected violations. ~~Interpretation and advisory service.~~

12 7.5 Corrective action. ~~Reporting suspected violations.~~

13 7.6 Outside employment and activities by Commissioners. ~~Disciplinary and other-~~
14 ~~remedial action.~~

15 **Subpart B—Conduct and Responsibilities of Employees or Commissioners.**

16 7.7 Prohibition against making complaints and investigations public. ~~Prohibited Conduct-~~
17 ~~—General.~~

18 7.8 Ex parte communications in enforcement actions. ~~Gifts, entertainment, and favors.~~

19 7.9 ~~Outside employment or activities.~~

20 7.10 ~~Financial interests.~~

21 7.11 ~~Political and organization activity.~~

22 7.12 ~~Membership in associations.~~

23 7.13 ~~Use of Government property.~~

- 1 ~~7.14 Prohibition against making complaints and investigations public.~~
- 2 ~~7.15 Ex parte communications.~~
- 3 ~~7.16 Miscellaneous statutory provisions.~~
- 4 **Subpart C—Conduct and Responsibilities of Special Commission Employees**
- 5 ~~7.17 Use of Commission employment.~~
- 6 ~~7.18 Use of inside information.~~
- 7 ~~7.19 Coercion.~~
- 8 ~~7.20 Gifts, entertainment, and favors.~~
- 9 ~~7.21 Miscellaneous statutory provisions.~~
- 10 **Subpart D—Post Employment Conflict of Interest: Procedures for Administrative**
- 11 **Enforcement Proceedings**
- 12 ~~7.22 Scope.~~
- 13 ~~7.23 Initiation of investigation.~~
- 14 ~~7.24 Conduct of preliminary investigation.~~
- 15 ~~7.25 Initiation of administrative disciplinary proceeding.~~
- 16 ~~7.26 Notice to former employee.~~
- 17 ~~7.27 Hearing examiner designation and qualifications.~~
- 18 ~~7.28 Hearing date.~~
- 19 ~~7.29 Hearing rights of former employee.~~
- 20 ~~7.30 Hearing procedures.~~
- 21 ~~7.31 Examiner’s decision.~~
- 22 ~~7.32 Appeal.~~
- 23 ~~7.33 Administrative sanctions.~~

1 Authority: 2 U.S.C. 437c, 437d and 438, 5 U.S.C. 7321 et seq. and App. 3, 18-
2 U.S.C. 207; 5 CFR 2635.

3 **§ 7.1 Scope. Purpose and applicability**

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

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

8 (1) 5 CFR part 735 (Executive Branch Employee Responsibilities and Conduct);

9 (2) 5 CFR part 2634 (Executive Branch Financial Disclosure, Qualified Trusts, and
10 Certificates of Divestiture);

11 (3) 5 CFR part 2635 (Standards of Ethical Conduct for Employees of the Executive
12 Branch); and

13 (4) 5 CFR part 4701 (Supplemental Standards of Ethical Conduct for Members and
14 Employees of the Federal Election Commission).

15 ~~The avoidance of misconduct and conflicts of interest on the part of Commission~~
16 ~~employees through informed judgment is indispensable to the maintenance of these~~
17 ~~prescribed ethical standards. Attainment of these goals necessitates strict and absolute~~
18 ~~fairness and impartiality in the administration of the law.~~

19 ~~(b) This part applies to all persons included within the terms employee and special~~
20 ~~Commission employees of the Commission as defined in 11 CFR 7.2, except to the extent~~
21 ~~otherwise indicated herein, and is consistent with Executive Order 11222 and part 735 of~~
22 ~~title 5, Code of Federal Regulations, relating to employee responsibilities and conduct.~~

1 ~~(c) These Standards of Conduct shall be construed in accordance with any applicable~~
2 ~~laws, regulations and agreements between the Federal Election Commission and a labor~~
3 ~~organization.~~

4 **§ 7.2 Definitions.**

5 As used in this part:

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

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

10 ~~(c) Conflict of interest means a situation in which an employee's private interest is~~
11 ~~inconsistent with the efficient and impartial conduct of his or her official duties and~~
12 ~~responsibilities.~~

13 ~~(d) (c) Designated Agency Ethics Officer or Ethics Officer Official means the employee~~
14 ~~designated by the Commission to administer the provisions of the Ethics in Government~~
15 ~~Act of 1978 (5 U.S.C. Appendix 4), as amended, and includes a designee of the Ethics~~
16 ~~Officer-Designated Agency Ethics Official. The General Counsel serves as the~~
17 ~~Commission's Designated Agency Ethics Official.~~

18 ~~(e)(d) Employee means an employee of the Federal Election Commission, but does not~~
19 ~~include a special Commission employee and includes a special Government employee as~~
20 ~~defined in 18 U.S.C. 202.~~

21 (e) Ex parte communication means any written or oral communication by any person
22 outside the agency to any Commissioner or any member of any Commissioner's staff, but
23 not to any other Commission employee, that imparts information or argument regarding

1 prospective Commission action or potential action concerning any pending enforcement
2 matter.

3 (f) Inspector General means the individual appointed by the Commission to
4 administer the provisions of the Inspector General Act of 1978 (5 U.S.C. Appendix 3), as
5 amended, and includes any designee of the Inspector General.

6 ~~(f) — Former employee means one who was, and is no longer, an employee of the~~
7 ~~Commission.~~

8 ~~(g) — Official responsibility means the direct administrative or operating authority,~~
9 ~~whether intermediate or final, to approve, disapprove, or otherwise direct Commission~~
10 ~~action. Official responsibility may be exercised alone or with others and either personally~~
11 ~~or through subordinates.~~

12 ~~(h) Outside employment or other outside activity means any work, service or other~~
13 ~~activity performed by an employee, but not a Commissioner, other than in the performance~~
14 ~~of the employee's official duties. It includes such activities as writing and editing,~~
15 ~~publishing, teaching, lecturing, consulting, self-employment, and other services or work~~
16 ~~performed, with or without compensation.~~

17 ~~(i) Person means an individual, corporation, company, association, firm, partnership,~~
18 ~~society, joint stock company, political committee, or other group, organization, or~~
19 ~~institution.~~

20 ~~(j) — Special Commission employee means an individual who is retained, designated,~~
21 ~~appointed or employed by the Federal Election Commission to perform, with or without~~
22 ~~compensation, temporary duties either on a full time or intermittent basis, for not to exceed~~
23 ~~130 days during any period of 365 consecutive days, as defined at 18 U.S.C. 202.~~

1 **§ ~~7.3~~ 7.4—Interpretation and advisory service.**

2 (a) A Commissioner or employee seeking advice and guidance on ~~questions of~~
3 ~~conflict of interest and on other~~ matters covered by this part or 5 CFR parts 735, 2634,
4 2635, 2640 or 4701 ~~should~~ may consult with the ~~Commission's General Counsel, who~~
5 ~~serves as Ethics Officer~~ Designated Agency Ethics Official. The ~~Ethics Officer~~ Designated
6 Agency Ethics Official should be consulted before ~~prior to the~~ undertaking of any action
7 ~~which that~~ might violate this part or 5 CFR parts 735, 2634, 2635, 2640 or 4701 governing
8 the conduct of Commissioners or employees.

9 (b) The Designated Agency Ethics Official, a Commissioner, or an employee may
10 request an opinion from the Director of the Office of Government Ethics regarding an
11 interpretation of 5 CFR parts 735, 2634, 2635, 2640 or 4701.

12 **§ ~~7.4~~ 7.5—Reporting suspected violations.**

13 Commissioners and employees shall disclose immediately any suspected violation
14 of a statute or of a rule set forth in this part or of a rule set forth in 5 CFR parts 735, 2634,
15 2635, 2640 or 4701 to the Designated Agency Ethics Official, the Office of Inspector
16 General, or other appropriate law enforcement authorities.

17 ~~(a)~~ ~~Personnel who have information which causes them to believe that there has been~~
18 ~~a violation of a statute or of a policy set forth in this part should promptly report such~~
19 ~~incident to the Ethics Officer. If a report is made orally, the Ethics Officer shall require a~~
20 ~~written report from the complainant before proceeding further.~~

21 ~~(b)~~ ~~When information available to the Commission indicates a conflict between the~~
22 ~~interests of an employee or special Commission employee and the performance of his or~~

1 ~~her Commission duties, the employee or special Commission employee shall be provided~~
2 ~~an opportunity to explain the conflict or appearance of conflict in writing.~~

3 ~~§ 7.5 7.6 Disciplinary and other remedial Corrective action.~~

4 (a) A violation of this part ~~or 5 CFR parts 735, 2634, 2635, 2640 or 4701~~ by an
5 ~~employee or special Commission employee~~ may be cause for appropriate corrective,
6 disciplinary, or adverse disciplinary action which may be in addition to any penalty
7 prescribed by law.

8 (b) ~~When the Ethics Officer determines that an employee may have or appears to have~~
9 ~~a conflict of interest, the Ethics Officer, the employee's supervisor, the employee's division~~
10 ~~head, and the Staff Director or General Counsel may question the employee in the matter~~
11 ~~and gather other information. The Ethics Officer, the employee's supervisor, the~~
12 ~~employee's division head, and the Staff Director or General Counsel shall discuss with the~~
13 ~~employee possible ways of eliminating the conflict or appearance of conflict. If the Ethics~~
14 ~~Officer, after consultation with the employee's supervisor, the employee's division head,~~
15 ~~and the Staff Director or General Counsel, concludes that remedial corrective action should~~
16 ~~be taken, he or she shall refer a statement to the Commission containing his or her~~
17 ~~recommendation for such action. The Commission, after consideration of the employee's~~
18 ~~explanation and the results of any investigation, may direct appropriate remedial action as~~
19 ~~it deems necessary.~~

20 (c) ~~Remedial action pursuant to paragraph (b) of this section may include, but is not~~
21 ~~limited to:~~

22 ~~———— (1) Changes in assigned duties;~~

23 ~~———— (2) Divestment by the employee of his or her conflicting interest;~~

1 ~~————(3) Disqualification for a particular action; or~~

2 ~~————(4) Disciplinary action.~~

3 **§ ~~7.6~~ 7.9 Outside employment ~~and~~ or activities by Commissioners.**

4 ~~(a)~~ A member of the Commission shall not devote a substantial portion of his or her
5 time to any other business, vocation, or employment. Any individual who is engaging
6 substantially in any other business, vocation, or employment at the time such individual
7 begins to serve as a member of the Commission shall appropriately limit such activity no
8 later than 90 days after beginning to serve as such a member.

9 ~~(b) — An employee shall not engage in outside employment that is not compatible with~~
10 ~~the full discharge of his or her Government employment and not in compliance with any~~
11 ~~labor management agreement between the Federal Election Commission and a labor~~
12 ~~organization. Incompatible outside employment or other activities include but are not~~
13 ~~limited to:~~

14 ~~(1) — Outside employment or other activities which would involve the violation~~
15 ~~of a Federal or State statute, local ordinance, Executive Order, or regulation~~
16 ~~to which the employee is subject;~~

17 ~~(2) — Outside employment or other activities which would give rise to a real or~~
18 ~~apparent conflict of interest situation even though no violation of a specific~~
19 ~~statutory provision was involved;~~

20 ~~(3) — Acceptance of a fee, compensation, gift, payment of expense, or any other~~
21 ~~thing of monetary value in circumstances where acceptance may result in, or~~
22 ~~create the appearance of, a conflict of interest;~~

- 1 ~~(4) — Outside employment or other activities that might bring discredit upon the~~
2 ~~Government or Commission;~~
- 3 ~~(5) — Outside employment or other activities that establish relationships or~~
4 ~~property interests that may result in a conflict between the employee's~~
5 ~~private interests and official duties;~~
- 6 ~~(6) — Outside employment or other activities which would involve any contractor~~
7 ~~or subcontractor connected with any work performed for the Commission or~~
8 ~~would involve any person or organization in a position to gain advantage in~~
9 ~~its dealings with the Government through the employee's exercise of his or~~
10 ~~her official duties;~~
- 11 ~~(7) — Outside employment or other activities that may be construed by the public~~
12 ~~to be the official acts of the Federal Election Commission. In any~~
13 ~~permissible outside employment, care shall be taken to ensure that names~~
14 ~~and titles of employees are not used to give the impression that the activity~~
15 ~~is officially endorsed or approved by the Commission or is part of the~~
16 ~~Commission's activities;~~
- 17 ~~(8) — Outside employment or other activities which would involve use by an~~
18 ~~employee of his or her official duty time; use of official facilities, including~~
19 ~~office space, machines, or supplies, at any time; or use of the services of~~
20 ~~other employees during their official duty hours;~~
- 21 ~~(9) — Outside employment or other activities which tend to impair the employee's~~
22 ~~mental or physical capacities to perform Commission duties and~~
23 ~~responsibilities in an acceptable manner; or~~

1 ~~(10) — Use of information obtained as a result of Government employment which~~
2 ~~is not freely available to the general public or would not be made available~~
3 ~~upon request. However, written authorization for the use of any such~~
4 ~~information may be given when the Commission determines that such use~~
5 ~~would be in the public interest.~~

6 ~~(c) — An employee shall not receive any salary or anything of monetary value from a~~
7 ~~private source as compensation for his or her services to the Government in violation of 18~~
8 ~~U.S.C. 209.~~

9 ~~(d) — Employees are encouraged to engage in teaching, lecturing, and writing that is not~~
10 ~~prohibited by law, Executive Order 11222, or this part. However, an employee shall not,~~
11 ~~either for or without compensation, engage in teaching or writing that is dependent on~~
12 ~~information obtained as a result of his or her Commission employment, except when that~~
13 ~~information has been made available to the general public or will be made available on~~
14 ~~request, or when the Commission gives written authorization for the use of nonpublic~~
15 ~~information on the basis that the use is in the public interest.~~

16 ~~(e) — This section does not preclude an individual from participation in the affairs of or~~
17 ~~acceptance of an award for meritorious public contribution or achievement given by a~~
18 ~~charitable, religious, professional, social, fraternal, nonprofit educational, recreational,~~
19 ~~public service or civic organization.~~

20 ~~(f) — An employee of the Office of General Counsel who intends to engage in outside~~
21 ~~employment shall obtain the approval of the General Counsel/Ethics Officer. All other~~
22 ~~employees who intend to engage in outside employment shall obtain the approval of the~~
23 ~~Staff Director prior to review and approval by the Ethics Officer. The request shall include~~

1 the name of the person, group, or organization for whom the work is to be performed, the
2 nature of the services to be rendered, the proposed hours of work, or approximate dates of
3 employment, and the employee's certification as to whether the outside employment
4 (including teaching, writing or lecturing) will depend in any way on information obtained
5 as a result of the employee's official Government position. The employee will receive
6 notice of approval or disapproval of any written request in accordance with any labor
7 management agreement between the Commission and a labor organization. A record of the
8 approval shall be placed in each employee's official personnel folder.

9 **§ ~~7.7~~ 7.14 Prohibition against making complaints and investigations public.**

10 (a) Commission employees are warned that they are subject to criminal penalties if
11 they discuss or otherwise make public any matters pertaining to a complaint or
12 investigation under 2 U.S.C. 437g, without the written permission of the person
13 complained against or being investigated. Such communications are prohibited by
14 2 U.S.C. 437g(a)(12)(A).

15 (b) ~~2 U.S.C. Section 437g(a)(12)(B)~~ of Title 2 of the United States Code provides as
16 follows: "Any member or employee of the Commission, or any other person, who violates
17 the provisions of ~~subparagraph (A)~~ [2 U.S.C. 437g(a)(12)(A)] shall be fined not more than
18 \$2,000. Any such member, employee, or other person who knowingly and willfully
19 violates ~~this subsection~~ the provisions of [2 U.S.C. 437g(a)(12)(A)] shall be fined not more
20 than \$5,000."

1 § ~~7.8~~ **7.15 Ex parte communications in enforcement actions.**

2 In order to avoid the possibility of prejudice, real or apparent, to the public interest
3 in enforcement actions pending before the Commission pursuant to 2 U.S.C. 437g(A)(a)(1)
4 ~~or (2)~~:

5 (a) Except to the extent required for the disposition of ex parte enforcement matters as
6 required by law (as, for example, during the normal course of an investigation or a
7 conciliation effort), no Commissioner, or member of any Commissioner's staff ~~or~~
8 ~~employee involved in the decisional process~~ shall make or entertain any ex parte
9 communications.

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

16 (c) Any written communication prohibited by paragraph (a) of this section shall be
17 delivered to the ~~Ethics Officer of the Commission~~ General Counsel, who shall place the
18 communication in the case file ~~of the case~~.

19 (d) A Commissioner or member of any Commissioner's staff ~~employee, other than the~~
20 ~~employee assigned to the case~~, involved in handling enforcement actions who receives an
21 ~~oral offer~~ offer to make an oral communication or any communication concerning any
22 enforcement action pending before the Commission as described in paragraph (a) of this
23 section, shall decline to listen to such communication. If unsuccessful in preventing the

1 communication, the Commissioner or employee shall advise the person making the
2 communication that he or she will not consider the communication and shall prepare a
3 statement setting forth the substance and circumstances of the communication ~~within~~.
4 Within 48 hours of receipt of the communication and, the Commissioner or any member of
5 any Commissioner's staff shall deliver the prepare a statement setting forth the substance
6 and circumstances of the communication and shall deliver the statement to the Ethics-
7 Officer- General Counsel for placing in the file in the manner set forth in paragraph (c) of
8 this section.

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

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Robert D. Lenhard
Chairman
Federal Election Commission

17 DATED: _____
18 BILLING CODE: 6715-01-U

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Robert I. Cusick
Director, Office of Government Ethics

22 DATED: _____