

**OFFICE OF GOVERNMENT ETHICS**

**AGENCY: Office of Government Ethics**

**5 CFR Part 2636**

**Limitations on Outside Employment and Prohibition  
of Honoraria; Confidential Reporting of Payments  
to Charities in Lieu of Honoraria**

**RIN 3209-AA13**

**56 FR 1721**

**Thursday, January 17, 1991**

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**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Government Ethics is issuing a new part 2636 of title 5 of the Code of Federal Regulations to implement 5 U.S.C. app. 501 through 505, as added by title VI of the Ethics Reform Act of 1989, and the related reporting requirement contained in 5 U.S.C. app. 102(a)(1) (A), as added by title II of the Reform Act. As applied to the executive branch, section 501(b) prohibits the receipt of any honorarium by any officer or employee, other than a special Government employee. Section 501(c) permits certain payments in lieu of honoraria to be made to qualifying charitable organizations.

The officer or employee on whose behalf a payment to a charitable organization is made is required by section 102(a)(1)(A) to file a confidential report identifying the charitable recipients. Section 501(a) and 502 impose a number of additional limitations and restrictions that apply to certain senior-level noncareer officers and employees. These include a per annum limitation on the receipt of outside earned income; compensation and other restrictions

applicable to professions which involve a fiduciary relationship; a restriction on receipt of compensation for serving as an officer or member of the board of any association, corporation or other entity; and a requirement to obtain advance authorization to engage in teaching for compensation. These provisions take effect on January 1, 1991. Sections 501 through 505 cease to be effective if the salary increase provisions of section 703 of the Ethics Reform Act of 1989 are repealed.

**DATES:** Interim regulation effective January 1, 1991, except section 2636.205 which will be effective May 15, 1991, after review and approval by the Office of Management and Budget in accordance with the Paperwork Reduction Act. Comments by agencies and the public are invited and must be received by February 19, 1991.

**ADDRESSES:** Comments on this interim regulation should be sent to the Office of Government Ethics, suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Ms. Wilcox. Any comments on the reporting requirements under 2636.205 should additionally be filed with the Office of Management and Budget (see the "Paperwork Reduction Act" discussion below).

**FOR FURTHER INFORMATION CONTACT:** Leslie Wilcox, Office of Government Ethics, telephone (202/FTS) 523-5757, FAX (202/FTS) 523-6325.

## **SUPPLEMENTARY INFORMATION:**

### **A. Summary of Legal Background**

This interim rule, published by the Office of Government Ethics following consultation with the Attorney General and Office of Personnel Management, implements the provisions of title V of the Ethics in Government Act of 1978, as amended by title VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, 103 Stat. 1716, as amended by Pub. L. 101-280, 104 Stat. 149) and the related reporting requirement added by title II of the Ethics Reform Act of 1989. Title V amends title 5 of the United States Code to include new appendix sections 501 through 505, which impose prohibitions, limitations and restrictions applicable to personnel in all three branches of Government. Title II amends the financial disclosure provisions of the Ethics in Government Act of 1978 to include a new requirement at 5 U.S.C. app. 102(a)(1)(A) to report donations to charitable organizations in lieu of honoraria. None of these sections apply to special Government employees, to enlisted members of the uniformed services or to

individuals whose compensation is disbursed by the Secretary of the Senate. Section 503(2) gives the Office of Government Ethics authority to issue regulations with respect to officers and employees of the executive branch. The provisions of 5 U.S.C. app.102(a)(1)(A) and 501 through 505 become effective January 1, 1991. Under section 603 of the Ethics Reform Act of 1989, section 501 through 505 cease to be effective if the pay increase provisions of section 703 of that Act are subsequently repealed, in which case the laws in effect before such amendments shall be deemed to be reenacted.

Section 501(b) prohibits an individual from receiving any honorarium while that individual is a Member, officer or employee. The term "honorarium" is defined in section 505 to mean "a payment of money or anything of value for an appearance, speech or article" and to exclude certain actual and necessary travel expenses. The interim rule at section 2636.203 further defines the term "honorarium" and includes definitions of the relevant terms "appearance," "speech," and definitions contained in the Federal Elections Commission regulations at 11 CFR 110.12 implementing the honoraria restrictions imposed by 2 U.S.C 4411. As amended by the Ethics Reform Act of 1989, 2 U.S.C. 4411 will not apply on or after January 1, 1991 to individuals who are subject to this interim rule.

Section 501(c) provides that an honorarium that an officer or employee might receive but for the prohibition in section 501(b) may be paid on his or her behalf to a qualifying charitable organization. An honorarium paid to a charitable organization under this authority is deemed not to have been received by the officer or employee. The interim rule at section 2636.204(b) stresses that a payment may be made to a charitable organization in lieu of an honorarium only if the honorarium is one the employee could accept without violating applicable standards of conduct or any other conflict of interest statute. Thus, an employee who gives a speech as part of his official duties may not, in view of the supplementation of salary prohibition at 18 U.S.C. 209, suggest that an honorarium offered for that speech be given instead to a charitable organization. The interim rule at section 2636.205, effective May 15, 1991, also will implement the reporting requirement of 5 U.S.C. app. 102(a)(1)(A) applicable to a current or former employee who is required to file a confidential or public financial disclosure report and on whose behalf a payment in lieu of an honorarium is made to a charitable organization. The reason for the delayed effective date of section 2636.205 of the interim rule is to allow time for Office of Management and Budget (OMB) review and approval under the Paperwork Reduction Act of the reporting requirement thereunder. Further, an implementing standard

form for reporting payments to charitable organizations in lieu of honoraria will be issued and made available through the General Services Administration (GSA) after the Office of Government Ethics obtains GSA standard form review and approval and OMB Paperwork Reduction Act review and approval of the new form. Since the new law requiring reporting of such payments takes effect January 1, 1991, reports filed on the standard form once section 2636.205 becomes effective must cover the period January 1, 1991, to the date of filing.

Section 501(a) imposes a per annum limitation on outside earned income applicable to certain noncareer officers and employees whose rates of basic pay are equal to or greater than the rate of basic pay in effect for grade GS-16 of the General Schedule. As described more fully in the interim rule at section 2636.304, the per annum limitation is a dollar amount equal to 15 percent of the rate of pay for level II of the Executive Schedule in effect on January 1 of the year in question. For purposes of applying the 15 percent limitation and other restrictions applicable to noncareer officers and employees, the terms "outside earned income" and "compensation" are both defined in the interim rule at 263.303(b) using concepts similar in some respects to those that had been used to implement the outside earned income limitation earlier imposed by section 210 of the Ethics in Government Act of 1978. Section 210 will be repealed effective January 1, 1991, under the Ethics Reform Act of 1989.

The class of noncareer employees who are subject to the 15 percent outside earned income limitation is defined in the interim rule at section 2636.303(a) to include those paid at or above the triggering rate, currently that for GS-16, step 1, who are appointed by the President to positions under the Executive Schedule, 5 U.S.C. 5312 through 5317, or to positions that, by statute or as a matter of practice, are filled by Presidential appointment, other than positions in the uniformed services and within the foreign service below the level of Assistant Secretary or Chief of Mission. These provisions also apply to all noncareer members of the Senior Executive Service or of other SES-type systems, as well as to employees serving in Schedule C or noncareer executive assignments positions who are paid at or above the triggering rate. Where the pay criterion is met, the class also includes individuals appointed to positions under agency-specific statutes that establish appointment criteria essentially the same as those for Schedule C or noncareer executive assignment positions. The class of employees subject to this limitation includes certain Presidential appointees to full-time noncareer positions who are prohibited from receiving any outside

earned income by Section 102 of Executive Order 12674, as modified by Executive Order 12731 dated October 17, 1990.

Under the Federal Employees Pay Comparability Act of 1990, Public Law 101-509, General Schedule positions at GS-16, 17 and 18 will be replaced by a new range of rates for positions classified ``above GS-15." The pay for these positions may be no less than 120 percent of the rate for GS-15, step 1. When this provision of the Pay Comparability Act takes effect, this minimum rate for positions classified "above GS-15" will replace GS-16, step 1 as the rate that triggers application of the 15 percent outside earned income limitation. For purposes of determining whether an individual's rate of basic pay equals or exceeds the triggering rate, adjustments, such as those for locality pay authorized by the Comparability Act, will be disregarded.

Under section 502, noncareer officers and employees who are subject to the 15 percent outside earned income limitation are also prohibited from receiving compensation for practicing a profession which involves a fiduciary relationship or affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship. They are also prohibited from allowing their name to be used by any such entity. These restrictions are implemented in the interim rule at section 2636.305. The following excerpt from the report of the Bipartisan Task Force on Ethics that recommended the legislation addresses the meaning of the phrase ``profession involving a fiduciary relationship":

``The task force notes that a `fiduciary' is generally described as one `having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking' (Black's Law Dictionary, 5th Ed. 563). However, the task force intends that the term fiduciary not be applied in a narrow, technical sense and wants to ensure that honoraria not reemerge in various kinds of professional fees from outside interests. The task force intends the consulting and advising, insurance, medicine, architecture, or financial \* \* \* " 135 Cong. Rec. H9257 (daily ed. November 21, 1989).

The interim rule at section 2636.305(b) adopts an interpretation of the phrase "profession involving a fiduciary relationship" that is intended to carry out the legislative intent to give these restrictions a broad rather than narrow application.

Noncareer officers and employees who are subject to the 15 percent

outside earned income limitations are also prohibited by section 502 from receiving compensation for serving as an officer or member of the board of any association, corporation or other entity and from receiving compensation for teaching without the prior notification and approval of the designated agency ethics official. The interim rule at section 2636.306 makes it clear that the former prohibition applies to compensated service with nonprofit as well as for profit entities and, at section 2636.307, sets forth procedures by which covered non-career employees may seek advance authorization to engage in teaching for compensation.

## **B. Matters of Regulatory Procedure**

### **Administrative Procedure Act**

Pursuant to section 553(b) of title 5 of the United States Code, as the Director of the Office of Government Ethics I have found that good cause exists for waiving the general requirements of notice of proposed rulemaking and 30 day delayed effective date (except for interim rule section 2636.205, see below). These requirements are being waived because the provisions of 5 U.S.C. app. 501 through 505 are effective January 1, 1991. Because violation of the prohibitions and limitations imposed by sections 501 and 502 can result in fines of \$10,000 or the amount of compensation received for the prohibited conduct, whichever is greater, there is a need for an interim regulation effective January 1, 1991. However, the reporting provisions of section 2636.205 will not become effective until May 15, 1991, in order to allow time for OMB review and approval of the reporting requirement as well as OMB and GSA review and approval of the future implementing standard report form that will actually collect the specified information. Any comments received in response to this interim rule will be considered in formulating a final rule. Comments are due February 19, 1991.

### **E.O. 12291, Federal Regulation**

As Director of the Office of Government Ethics, I have determined that this is not a major rule as defined under section 1(b) of Executive Order 12291.

### **Regulatory Flexibility Act**

As Director of the Office of Government Ethics, I certify that regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

## **Paperwork Reduction Act**

This OGE interim rule to be codified at 5 CFR 2636.205 contains an information collection requirement subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). The annual public reporting burden for this collection is estimated to be 200 hours, based on an estimated 400 non-Federal employee (terminee) filers per year with an average response time for each report form of one half hour (see also the discussion of the future implementing standard report form below). As required by the Paperwork Reduction Act, the Office of Government Ethics is submitting to the Office of Management and Budget (OMB) a request that it approve this information collection requirement. Agencies, organizations or individuals desiring to submit comments for consideration by OMB on this information collection requirement should address them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Mr. Joseph Lackey.

In addition, the future implementing standard report form referred to in section 2636.205 will actually collect the information from some private citizens (former agency employees who file termination reports after leaving Government service, see estimate above), as well as primarily from current Federal executive branch officials (incumbents and those about to leave Government). Thus, OGE will also submit the proposed standard form (which will be adopted separately from, and subsequently to, this rulemaking) to the Office of Management and Budget for paperwork reduction review and approval. In addition, OGE will submit the form to the General Services Administration for standard form review and approval.

### **List of Subjects in 5 CFR Part 2636**

Conflict of interests, Government employees, Reporting and record keeping requirements.

Approved: January 10, 1991.

**Stephen D. Potts,**  
**Director, Office of Government Ethics.**