

DEPARTMENT OF EDUCATION

5 CFR Chapter LIII

34 CFR Part 73

RIN 1801-AA09, 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the Department of Education

AGENCY: Department of Education.

ACTION: Interim final rule with invitation for comments.

SUMMARY: The Department of Education, with the concurrence of the Office of Government Ethics (OGE), is issuing a regulation for employees of the Department of Education that supplements the Standards of Ethical Conduct for Employees of the Executive Branch issued by OGE. The supplemental rule requires Department of Education employees to obtain written approval prior to engaging in certain outside activities. The Department is also revising its residual standards regulation in its own CFR title and adding a cross-reference to the new provisions.

DATES: These regulations take effect January 30, 1995. Comments on this interim final rule must be received on or before March 16, 1995.

ADDRESSES: All comments concerning these regulations should be addressed to Susan A. Winchell, Office of the General Counsel, U.S. Department of Education, 600 Independence Avenue, SW., Room 5304, Washington, D.C. 20202-2110.

FOR FURTHER INFORMATION CONTACT: Susan A. Winchell, Office of the General Counsel, U.S. Department of Education, 600 Independence Avenue SW., Room 5304, Washington D.C. 20202-2110. Telephone (202) 401-8309. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:**I. Background**

On August 7, 1992, OGE published final regulations entitled "Standards of Ethical Conduct for Employees of the Executive Branch" (Standards) codified at 5 CFR part 2635. (See 57 FR 35006-35067, as corrected at 57 FR 48557 and 52583 with an additional grace period extension at 59 FR 4779-4780.) The Standards took effect February 3, 1993 and established uniform standards of ethical conduct that are applicable to all executive branch personnel.

Under 5 CFR 2635.105 executive branch agencies, with OGE's concurrence, are authorized to publish agency-specific supplemental regulations that are necessary to implement an agency's ethics program. The Department of Education, with OGE's concurrence, has determined that the following supplemental rules, being codified in the new chapter LIII of 5 CFR, consisting of part 6301, are necessary to implement its ethics program. This interim final rule will remain in effect until the Department of Education, with OGE's concurrence, publishes an amendment.

II. Analysis of the Regulations*Section 6301.101 General*

Section 6301.101 explains that the regulations contained in the interim final rule apply to all employees of the Department of Education and are supplemental to the executive branch-wide Standards.

Section 6301.102 Prior Approval for Certain Outside Activities

The Standards, at 5 CFR 2635.803, recognize that individual agencies may find it necessary or desirable to supplement the executive branch-wide regulations with a requirement that their employees obtain approval prior to engaging in outside activities. The Department of Education has long required employees, other than special Government employees, to obtain written permission before engaging in certain outside activities or employment. (See 34 CFR 73.22 (1994 edition).) The Department has found this requirement useful in ensuring that employees' outside activities conform to all applicable laws and regulations and, in accordance with 5 CFR 2635.803, has determined that it is necessary to the administration of its ethics program to continue to require prior approval of those outside activities that pose a potential for employees to engage in conduct that might violate the Standards.

Section 6301.102 requires Department employees to obtain approval in advance of engaging in certain outside activities. As compared to the requirement that had been imposed by 34 CFR 73.22, § 6301.102 has been changed to simplify and clarify the requirement, and to narrow its scope, consistent with the Standards. In order to do this, the new provisions significantly revise the situations in which employees are required to seek prior approval to participate in outside employment and activities. Further, the new provisions spell out specific types

of volunteer activities that are excluded from the prior approval requirement. Several examples are also included to clarify the application of this section.

Because the Standards no longer contain a provision such as that previously applicable under prior 5 CFR 735.203(a)(2) (1993 edition, pt. 735, note), the new provisions delete the previous requirement that employees obtain approval prior to participating in any activity or employment that aggregates more than 10 hours per week. Because 5 CFR 2635.705 satisfactorily addresses the issues relating to misuse of official time, the new provisions also delete the requirement that employees obtain prior approval to participate in activities performed during regular work hours. And, because the standard would be too vague, they also delete the general requirement that employees obtain prior approval to participate in an activity or employment that "reasonably raises questions under the standards [of conduct]."

Section 6301.102 of the interim final rule continues, in modified form, the Department's longstanding requirement that employees obtain approval before participating in outside activities for a prohibited source, as that term is defined in paragraph 6301.102(e)(2) of this section. Further, the new provisions add the requirement that employees obtain approval before providing services, other than clerical services or services as a fact witness, in connection with a particular matter in which the United States is a party or has a direct and substantial interest, or which involves the preparation of materials for submission to, or representation before, a Federal court or agency.

Under 5 CFR 2635.805, employees are required to obtain authorization before acting as expert witnesses, other than on behalf of the United States, in any proceeding before a Federal court or agency in a matter in which the United States is a party or has a direct and substantial interest. Paragraph 6301.102(a)(1) is intended to cover such testimony as an outside activity, thus eliminating the need to create a separate procedure for the required authorization.

There may be circumstances in which an employee is not required to obtain authorization to serve as an expert witness but is nonetheless required to obtain prior approval. For instance, an employee might wish to serve as an expert witness on the braking distances of school buses on behalf of a local school district in a negligence case in State court. The employee will be paid the customary rate for appearing as an expert witness. This employee is not

required to obtain authorization to provide expert testimony because the action is not one in which the United States is a party or has a direct and substantial interest. However, the employee is required to obtain prior approval under paragraph 6301.102(a)(2) because he or she is acting as a consultant for a prohibited source.

The new provisions narrow the general requirement that employees obtain approval before engaging in any public writing or speaking, and adopt criteria consistent with the Standards to define when an employee must obtain advance approval for outside teaching, speaking, or writing. For instance, under the Department's previous regulation, an employee was required to obtain approval before publishing an article, or undertaking public speaking on a subject, such as jazz music or gardening, that was clearly unrelated to his or her duties. The new provisions require employees to obtain approval before they participate in teaching, speaking, or writing only if it "relates to their official duties," as that phrase is defined in subpart H of the Standards at 5 CFR part 2635.

The new provisions exclude from the prior approval requirement a number of uncompensated and volunteer activities that are unlikely to raise issues under the Standards. Specifically, employees are not required to obtain approval prior to engaging in activities such as volunteering for a social, fraternal, civic, or political entity, or any religious entity that is not a prohibited source. Further, employees need not obtain approval prior to participating in the activities of a parent association at their children's school. Employees are also not required to obtain prior approval to volunteer with any entity if they are providing direct instructional, social, or medical services.

Even when prior approval is not required by § 6301.102, the Standards and other ethics laws and regulations continue to apply to outside activities and employment. For instance, even if an employee is not required to obtain approval prior to publishing magazine articles on subjects unrelated to his or her duties, that employee may still be subject to the restriction on outside earned income applicable to certain noncareer employees. (See 5 CFR 2635.804(b) and subpart C of 5 CFR part 2636.) Furthermore, employees are generally prohibited from using Government resources to participate in outside activities and outside employment, regardless of whether they are required to obtain prior approval to participate. See subpart G of 5 CFR part

2635 and 5 CFR 2635.801. Additionally, whether subject to advance approval or not, an outside activity or outside employment may raise conflict of interest or impartiality concerns under subparts D and E of 5 CFR part 2635.

III. Repeal and Revision of Department of Education Standards of Conduct

Because 34 CFR 73.22, the Department's residual standards regulation, is superseded by new chapter LIII of title 5, as added by this rulemaking, the Department of Education is herewith amending that section to repeal the Department's previous requirements for prior approval to participate in outside activities, and to provide cross-references to the executive branch-wide Standards at 5 CFR part 2635, to the Department's new supplemental regulation at 5 CFR part 6301, and to the executive branch financial disclosure regulation at 5 CFR part 2634. A more recent version of the "Code of Ethics for Government Service," as enacted by Congress and signed into law by the President in 1980, is also being adopted in the appendix to amended part 73.

IV. Matters of Regulatory Procedure

Waiver of Proposed Rulemaking

In accordance with section 437 of the General Education Provisions Act (20 U.S.C. 1232) and the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. Since these interim final regulations relate to agency management and personnel, they are exempt from notice and comment required under 5 U.S.C. 553(a). However, the Department will consider public comments made within 45 days after the publication of this interim final rule. Depending on the nature of the comments, the Department may or may not adopt and publish amendments to these regulations based on these comments.

Regulatory Flexibility Act Certification

The Department of Education has determined under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this regulation will not have a significant impact on small business entities because it primarily affects Department employees.

Paperwork Reduction Act

The Department of Education has determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain any information collection requirements that require the

approval of the Office of Management and Budget.

List of Subjects

5 CFR Part 6301

Conflict of interests, Standards of conduct, Education Department, Government employees.

34 CFR Part 73

Conflict of interests, Standards of conduct, Education Department, Government employees.

Dated: January 20, 1995.

Richard W. Riley,

Secretary of Education.

Dated: January 23, 1995.

Stephen D. Potts,

Director, Office of Government Ethics.

(Catalog of Federal Domestic Assistance Number does not apply)

The Secretary of Education, with the concurrence of the Office of Government Ethics, amends title 5 of the Code of Federal Regulations and title 34, part 73, of the Code of Federal Regulations, as follows:

TITLE 5—[AMENDED]

1. A new chapter LIII, consisting of part 6301, is added to title 5 of the Code of Federal Regulations to read as follows:

5 CFR CHAPTER LIII—DEPARTMENT OF EDUCATION

PART 6301—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF EDUCATION

Sec.

6301.101 General.

6301.102 Prior approval for certain outside activities.

Authority: 5 U.S.C. 301, 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.803.

§ 6301.101 General.

In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Education and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635.

§ 6301.102 Prior approval for certain outside activities.

(a) An employee, other than a special Government employee, must obtain written approval prior to engaging—with or without compensation—in the following outside activities:

(1) Except as provided in paragraph (b)(1) of this section, providing services,

other than clerical services or service as a fact witness, on behalf of any other person in connection with a particular matter:

- (i) In which the United States is a party;
- (ii) In which the United States has a direct and substantial interest; or
- (iii) If the provision of services involves the preparation of materials for submission to, or representation before, a Federal court or executive branch agency.

(2) Except as provided in paragraph (b)(2) of this section:

- (i) Serving as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, employee, advisory committee member, or active participant for a prohibited source; or
- (ii) Engaging in teaching, speaking, consulting, or writing that relates to the employee's official duties.

(b) Unless the services are to be provided for compensation, including reimbursement for transportation, lodging and meals:

(1) Prior approval is not required by paragraph (a)(1) of this section to provide services as an agent or attorney for, or otherwise to represent, another Department of Education employee who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings; and

(2) Prior approval is not required by paragraph (a)(2) of this section:

(i) To participate in the activities of a: (A) Social, fraternal, civic, or political entity;

(B) Religious entity that is not a prohibited source; or

(C) Parent-Teacher Association or similar parent organization at the employee's child's school or day care center, other than as a member of a board of directors or other governing body of the school or center, or the educational agency of which it is a part; or

(ii) To provide direct instructional, social, or medical services to students or other individuals.

(c) An employee who is required by paragraph (a) of this section to obtain prior written approval shall submit a written request for approval in accordance with Department procedures.

(d) The cognizant reviewing official shall grant approval unless he or she determines that the outside activity is expected to involve conduct prohibited by statute or Federal regulations, including 5 CFR part 2635.

(e) For the purposes of this section:

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

(2) "Prohibited source" has the meaning set forth in 5 CFR 2635.203(d).

(3) "Relates to the employee's official duties" means that the activity meets one or more of the tests described in 5 CFR 2635.807(a)(2)(i) (B) through (E). It includes, in relevant part:

(i) Activities 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) A situation in which an employee has been asked to participate in an activity by a person or organization that has interests that may be substantially affected by the performance or nonperformance of the employee's official duties;

(iii) Activities that convey information derived from nonpublic information gained during the course of Government employment; and

(iv) Activities that deal in significant part with any matter to which the employee is or has been officially assigned in the last year, any ongoing or announced Department policy, program or operation, or—in the case of certain noncareer employees—any matter that is generally related to education or vocational rehabilitation.

Example 1: A Department employee witnessed an automobile accident involving two privately owned cars on her way to work. Some time later she is served with a subpoena at home to appear in Federal court as a fact witness on behalf of the plaintiff, who was injured in the car accident, in a civil case alleging negligence. The Department employee is not required to obtain prior approval to comply with the subpoena because this civil case is not a matter in which the United States is a party or has a direct and substantial interest.

Example 2: A Department employee would like to prepare Federal tax returns for clients on his own time. He is required to obtain prior approval to participate in this outside activity because it involves the provision of personal services in the preparation of materials for submission to the Internal Revenue Service, an executive branch agency.

Example 3: Arlene, a Department employee, has been asked by a Department colleague to represent him, without compensation, in an equal employment opportunity complaint he filed alleging that his supervisor failed to promote him because he is over 40 years old. Arlene is not required to obtain prior approval under this regulation before providing such representation because it involves services for another Department of Education employee in connection with a personnel administration proceeding. However, under 18 U.S.C. section 205, she may only provide such representation if it is not inconsistent with faithful performance of her duties.

Example 4: A local school board offers a Department employee a paid position as a referee of high school football games. The

employee must seek prior approval to accept this outside employment because the local school board is a prohibited source. If, on the other hand, the employee volunteered to coach soccer, without pay, in a sports program sponsored by the local school board, no prior approval is required because she would be engaging in direct instructional services to students.

Example 5: A Department program specialist in the Office of Elementary and Secondary Education actively pursues an interest in painting. The community art league, where he has taken evening art classes, asks him if he would be interested in teaching an evening course on painting with acrylics. The employee is not required to obtain approval prior to accepting this employment. The community art league is not a prohibited source, and the subject matter of the course is not related to his duties.

Example 6: A Department employee helps organize local tennis tournaments. A national tennis magazine calls and asks her to write a monthly column about recreational tennis in her area. The magazine offers to pay the employee \$500 for each column. The subject matter is not related to her duties, and the employee is not required to seek prior approval to write this column. However, the employee is still subject to all of the Standards of Conduct and other laws that may apply, including the limitation on outside earned income for certain noncareer employees, as well as the prohibition on using Government resources to pursue outside activities and employment.

Example 7: An employee's elderly parent is retired and receiving Social Security benefits. The employee would like to represent his parent in an administrative hearing before the Social Security Administration concerning a dispute over benefits. The employee must obtain prior approval to undertake the activity of representing his parent because he is providing services to his parent in a particular matter in which the United States is a party. Moreover, the services will involve representation before a Federal agency.

TITLE 34—EDUCATION

2. Part 73 of Title 34 is revised to read as follows:

PART 73—STANDARDS OF CONDUCT

Sec.

73.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

73.2 Conflict of interest waiver.

Appendix to Part 73—Code of Ethics for Government Service

Authority: 5 U.S.C. 301, 7301; 18 U.S.C. 208; and E.O. 12674, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 3 CFR, 1990 Comp., p. 306.

§ 73.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Employees of the Department of Education are subject to the executive

branch-wide Standards of Ethical Conduct at 5 CFR part 2635 and to the Department of Education regulation at 5 CFR part 6301 which supplements the executive branch-wide standards with a requirement for employees to obtain prior approval to participate in certain outside activities. In addition, employees are subject to the executive branch-wide financial disclosure regulations at 5 CFR part 2634.

§ 73.2 Conflict of interest waiver.

If a financial interest arises from ownership by an employee—or other person or enterprise referred to in 5 CFR 2635.402(b)(2)—of stock in a widely diversified mutual fund or other regulated investment company that in turn owns stock in another enterprise, that financial interest is exempt from the prohibition in 5 CFR 2635.402(a).

Appendix to Part 73—Code of Ethics for Government Service

Any person in Government service should:

Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.

Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.

Seek to find and employ more efficient and economical ways of getting tasks accomplished.

Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.

Make no private promises of any kind binding upon the duties of office, since a Government employee has no private

word which can be binding on public duty.

Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

Never use any information gained confidentially in the performance of governmental duties as a means of making private profit.

Expose corruption wherever discovered.

Uphold these principles, ever conscious that public office is a public trust.

(This Code of Ethics was unanimously passed by the United States Congress on June 27, 1980, and signed into law as Public Law 96-303 by the President on July 3, 1980.)

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