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OFFICE OF GOVERNMENT ETHICS

5 CFR Parts 2634, 2635, and 2636

RINs 3209-AA00, 3209-AA04 and 3209-AA13

Removal of Obsolete Regulations Concerning the Inoperative Provisions Regarding Charitable Payments In Lieu of Honoraria and Conforming Technical Amendments

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; technical amendments and removals.

SUMMARY: The Office of Government Ethics is removing obsolete regulatory provisions in its executive branch outside earned income restrictions and ethical conduct standards regulations that were designed to implement the statutory provision regarding charitable payments made in lieu of honoraria, which is no longer legally operative. In addition, OGE is removing a related provision in the branchwide financial disclosure regulation regarding supplemental confidential reporting for such payments. Finally, OGE is making a few technical conforming amendments to reflect these changes.

DATES: These technical amendments and removals are effective May 7, 2007.

ADDRESSES: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attn.: Mr. Gressman.

FOR FURTHER INFORMATION CONTACT: William E. Gressman, Senior Associate General Counsel, Office of Government Ethics, telephone: 202-482-9300; TDD: 202-482-9293; Fax: 202-482-9237.

SUPPLEMENTARY INFORMATION: The Ethics Reform Act of 1989 (Pub. L. 101-194) amended the Ethics in Government Act of 1978 (Ethics Act) to bar Government employees from accepting honoraria. See 5 U.S.C. app. 501(b). At the same

time, the 1989 Act also contained an exception to this prohibition which permitted employees to direct payment to charitable organizations in lieu of accepting honoraria. See 5 U.S.C. app. 501(c). However, in *National Treasury Employees Union v. United States*, 513 U.S. 454 (1995) (the *NTEU* case), the U.S. Supreme Court overturned, as to most executive branch employees, the general honorarium prohibition in the Ethics Act, finding it to be unconstitutional. Subsequently, the Department of Justice determined that because of the scope of the Supreme Court decision, the statutory ban on receipt of honoraria was inoperative as to all Government employees. See the OGE Memorandum to Designated Agency Ethics Officials (DAEOs), General Counsels and Inspectors General of February 28, 1996 (# DO-96-012); a copy of that OGE memorandum, along with the memorandum of the Justice Department, is available in the "DAEOgrams" section of the OGE Web site (<http://www.usoge.gov>).

In the late 1990s, OGE removed the executive branch regulatory provisions concerning the overturned honoraria prohibition, along with cross-references thereto in various OGE regulations. See 62 FR 48746-48748 (September 17, 1997), 63 FR 43067-43069 (August 12, 1998), and OGE's Memorandum to DAEOs of August 13, 1998 (# DO-98-023); copies of which are available, respectively, in the Laws & Regulations and DAEOgrams sections of OGE's Web site.

Thereafter, OGE asked the Office of Legal Counsel (OLC) of the Justice Department whether section 501(c) of the Ethics Act remained in effect after the Supreme Court decision. OGE reasoned that because section 501(c) is basically an exception to the honoraria ban, the invalidation of section 501(b) should also nullify section 501(c). In an opinion issued March 1, 2001, OLC concluded that section 501(c) of the Ethics Act is no longer in effect given the *NTEU* case and the close connection between the old honorarium prohibition and the statutory exception for qualifying in lieu of honoraria charitable payments. See OGE's Memorandum to DAEOs (# DO-01-011 of March 15, 2001) announcing, in pertinent part, the OLC opinion and a planned OGE regulatory change as a result; both documents are available, respectively,

in the "Laws & Regulations" and "DAEOgrams" sections of OGE's Web site (<http://www.usoge.gov>).

In this rulemaking, OGE is removing from its executive branch regulations various provisions implementing the now-defunct exception in section 501(c) of the Ethics Act. First, in 5 CFR part 2636, which addresses limitations on outside earned income, employment and affiliations for certain noncareer employees, OGE is removing current paragraph (b)(7) of § 2636.303. OGE is rescinding this paragraph, which cites sections 501(c) and 505 (defining certain terms) of the Ethics Act, because it excludes payments to charitable organizations in lieu of honoraria from the terms "outside earned income" and "compensation" for purposes of part 2636. (OGE is also redesignating current paragraph (b)(8) of § 2636.303 as new paragraph (b)(7).) Likewise, OGE is removing a related sentence in paragraph (c) of § 2636.303 that provides that such payments to charitable organizations are not received in violation of any of the limitations in subpart C of part 2636, since they are not outside earned income or compensation. In light of that change, OGE is making a conforming change to the wording of the following sentence of that paragraph. Moreover, OGE is removing current paragraph (a)(2)(i) of § 2636.103, which provides that part 2636 advisory opinions cannot be obtained regarding whether particular entities are qualified charitable organizations for purposes of the in lieu of honoraria payments regulatory provision that OGE is now removing from current paragraph (b)(7) of § 2636.303.

In addition, OGE is removing from 5 CFR 2635.203(f)(2) of the executive branch standards of ethical conduct, which defines gifts that are solicited or accepted indirectly, an exception for payments to charities in lieu of honoraria (and which contains a citation to a provision previously removed from the part 2636 regulation). OGE is also updating a citation in 5 CFR 2635.804(c)(1) to paragraph (b) of § 2636.303 to reflect the above-noted revisions to that paragraph.

Finally, OGE never activated for the executive branch the related provision of the Ethics Act on supplemental confidential reporting of information about payments to charitable

organizations in lieu of honoraria, 5 U.S.C. app., 102(a)(1)(A). In this rulemaking, OGE is removing the residual inactive confidential reporting provision currently found at paragraph (a)(2) of 5 CFR 2634.302 of its executive branch financial disclosure regulation (and is consequently redesignating the other parts of paragraph (a) of that section), since that regulatory provision is no longer needed in light of these developments.

Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b), as Director of the Office of Government Ethics, I find good cause exists for waiving the general notice of proposed rulemaking and opportunity for public comment as to these final rule revisions. The notice and comment are being waived because these technical amendments and removals of certain provisions in the OGE branchwide regulations being revised concern matters of agency organization, practice and procedure. Furthermore, it is in the public interest that the obsolete provisions be removed at this time.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rulemaking will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch agencies and their employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this rulemaking, involving technical amendments and removals, just eliminates the last regulatory vestiges (still unactivated) of a structure (old OMB paperwork control #3209-0004, now expired) which OGE had developed internally but never made effective in the executive branch, for supplemental confidential reporting of payments in lieu of honoraria to charitable organizations. The old inactive regulatory provisions being removed are no longer needed.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more

(as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this rulemaking is a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will submit a report thereon to the U.S. Senate, House of Representatives and Government Accountability Office in accordance with that law when the rule is transmitted to the Office of the **Federal Register** for publication.

Executive Order 12866

In promulgating these technical amendments to its regulations, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These amendments have also been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to these final rule revisions, which are being codified in revised 5 CFR parts 2634, 2635 and 2636, notes the legal basis and benefits of, as well as the need for, the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering these amended regulations, since the revisions only remove obsolete regulatory provisions concerning a provision of the Ethics Act on in lieu of honoraria payments that is no longer in effect, along with an inactive regulatory provision concerning a related confidential reporting section of the Ethics Act. Finally, this rulemaking is not economically significant under the Executive order and will not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects

5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

5 CFR Part 2635

Conflict of interests, Executive branch standards of ethical conduct, Government employees.

5 CFR Part 2636

Conflict of interests, Government employees, Penalties.

Approved: March 26, 2007.

Robert I. Cusick,

Director, Office of Government Ethics.

■ For the reasons set forth in the preamble, the Office of Government Ethics is amending parts 2634, 2635 and 2636 of chapter XVI of 5 CFR as follows:

TITLE 5—ADMINISTRATIVE PERSONNEL

CHAPTER XVI—OFFICE OF GOVERNMENT ETHICS

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

■ 1. The authority citation for part 2634 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart C—Contents of Reports

§ 2634.302 [Amended]

■ 2. Section 2634.302 is amended by:

- A. Removing paragraph (a)(2);
- B. Redesignating paragraph (a)(1) as paragraph (a); and
- C. In redesignated paragraph (a), further designate paragraphs (i) through (iv) as paragraphs (a)(1) through (a)(4), respectively.

PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

■ 3. The authority citation for part 2635 continues to read as follows:

Authority: 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart B—Gifts From Outside Sources

§ 2635.203 [Amended]

■ 4. Section 2635.203 is amended by removing the phrase “or for payments made to charitable organizations in lieu of honoraria under § 2636.204 of this chapter” before the period at the end of paragraph (f)(2).

Subpart H—Outside Activities**§ 2635.804 [Amended]**

■ 5. Section 2635.804 is amended by removing the citation “§ 2636.303(b)(8)” in paragraph (c)(1) and adding in its place the citation “§ 2636.303(b)(7)”.

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

■ 6. The authority citation for part 2636 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104–134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart A—General Provisions

■ 7. Section 2636.103 is amended by revising paragraph (a)(2) to read as follows:

§ 2636.103 Advisory opinions.

(a) * * *

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

* * * * *

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

■ 8. Section 2636.303 is amended by:

- A. Adding the word “or” following the semicolon at the end of paragraph (b)(6);
- B. Removing paragraph (b)(7);
- C. Redesignating paragraph (b)(8) as new paragraph (b)(7); and
- D. Removing the second sentence of the undesignated text at the end of paragraph (c) and revising the last sentence thereof.

The revision reads as follows:

§ 2636.303 Definitions.

* * * * *

(c) * * *

* * * * *

* * * Also, compensation or outside earned income donated to a charitable

organization is received by the employee.

[FR Doc. E7–6228 Filed 4–5–07; 8:45 am]

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FEDERAL RESERVE SYSTEM**12 CFR Part 204**

[Regulation D; Docket No. R–1262]

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors is revising its 1980 interpretation of Regulation D (Reserve Requirements of Depository Institutions) setting forth criteria for the “bankers’ bank” exemption from reserve requirements. The interpretation sets forth the standards that the Board uses in applying the statutory and regulatory requirements for the bankers’ banks exemption to specific institutions. The revised interpretation specifies that the Board may determine, on a case-by-case basis, whether certain entities not already expressly listed in the interpretation may become customers to a limited extent of bankers’ banks that remain exempt from reserve requirements.

DATES: *Effective Date:* May 7, 2007.

FOR FURTHER INFORMATION CONTACT: Heatherun Allison, Senior Counsel, (202) 452–3565; or Kara Handzlik, Attorney, (202) 452–3852, Legal Division, Board of Governors of the Federal Reserve System, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:**I. Statutory Background**

Section 19(b) of the Federal Reserve Act (Act) imposes reserve requirements on certain deposits and other liabilities of depository institutions for monetary policy purposes. 12 U.S.C. 461(b). The Board’s Regulation D, “Reserve Requirements of Depository Institutions” (12 CFR part 204), implements Section 19(b). Section 19(b)(9) of the Act, commonly referred to as the “bankers’ bank exemption,” exempts from reserve requirements certain institutions that would otherwise be subject to them. Specifically, Section 19(b)(9) provides that reserve requirements “shall not apply with respect to any financial institution which—(A) is organized

solely to do business with other financial institutions; (B) is owned primarily by the financial institutions with which it does business; and (C) does not do business with the general public.” 12 U.S.C. 461(b)(9). “Bankers’ banks” for purposes of Section 19(b)(9) of the Act and Regulation D include bankers’ banks for commercial banks and thrifts chartered under state or federal law authorities as well as corporate credit unions.

II. Issuance of Original Interpretation

In November 1980, the Board issued an interpretation of Regulation D specifying certain standards to be used in determining whether institutions qualify for the bankers’ bank exemption from reserve requirements. 12 CFR 204.121 (Interpretation). Under the Interpretation, an institution may be regarded as “organized solely to do business with other depository institutions even if, as an incidental part to [sic] its activities, it does business to a limited extent with entities other than depository institutions.” *Id.* In addition, a depository institution will be regarded as “being owned primarily by the institutions with which it does business” if “75 per cent or more of its capital is owned by other depository institutions * * * regardless of the type of depository institution.” *Id.*

Finally, the Interpretation states that a depository institution will be regarded as “not [do]ing] business with the general public” if the depository institution has satisfied two requirements. First, the depository institution must limit the range of customers with which it does business to: depository institutions; subsidiaries or organizations owned by depository institutions; directors, officers or employees of the same or other depository institutions; individuals whose accounts are required at the request of the institution’s supervisory authority due to the actual or impending failure of another depository institution; share insurance funds; and depository institution trade associations. Second, the depository institution’s loans to or investment in that range of customers (other than depository institutions) cannot exceed 10 percent of total assets, and the extent to which it receives shares or deposits from or issues other liabilities to those same entities (other than depository institutions) cannot exceed 10 percent of total liabilities or net worth. *Id.*

III. Proposed Revisions

On August 14, 2006, the Board published for comment a proposal to revise the Interpretation to specify that