

Rules and Regulations

Federal Register

Vol. 67, No. 53

Tuesday, March 19, 2002

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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2640

RIN 3209-AA09

Exemption Amendments Under 18 U.S.C. 208(b)(2)

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule amendments.

SUMMARY: The Office of Government Ethics is issuing a final rule to amend the regulation that describes financial interests that are exempt from the prohibition in 18 U.S.C. 208(a). These final rule amendments revise the existing exemption regulation by: creating a new exemption for sector mutual funds; raising the de minimis exemption for matters affecting interests in securities from \$5,000 to \$15,000; and creating an exemption that permits an employee to act in certain particular matters that affect an entity in which the employee owns securities, where the entity is not a party to the matter.

EFFECTIVE DATE: April 18, 2002.

FOR FURTHER INFORMATION CONTACT: Richard Thomas, Associate General Counsel, Office of Government Ethics; Telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

SUPPLEMENTARY INFORMATION:

I. Rulemaking History

Section 208(a) generally prohibits employees of the executive branch from participating in an official capacity in particular matters in which they or certain others specified in the statute have a financial interest. Section 208(b)(2) of title 18 permits OGE to promulgate regulations describing financial interests that are exempted as being too remote or inconsequential to warrant disqualification pursuant to section 208(a). The Office of Government Ethics' executive

branchwide section 208 regulations, including such exemptions, are codified at 5 CFR part 2640.

On September 6, 2000, OGE published a set of proposed amendments to the regulation, proposing to revise some existing exemptions as well as to add some new exemptions. See 65 FR 53942-53946. The proposed rule provided a 90-day comment period. The Office of Government Ethics received 13 comment letters on the proposed rule. After carefully considering all comments and making appropriate modifications, OGE is publishing this final rule after obtaining the concurrence of the Department of Justice pursuant to section 201(c) of Executive Order 12674, as modified by E.O. 12731. Also, as provided in section 402 of the Ethics in Government Act of 1978, as amended, 5 U.S.C. appendix, section 402, OGE has consulted with both the Department of Justice (as additionally required under 18 U.S.C. 208(d)(2)) and the Office of Personnel Management on this final rule.

II. Analysis of Comments and Revisions

Of the thirteen comments submitted, ten were from executive branch Departments or agencies, one was from a professional association, and two were from individuals. Overall, the comments to the proposed rule were positive. Many commenters had specific suggestions pertaining to one or more components of the proposed rule. Two commenters expressed the view that the OGE Form 450 and SF 278 reporting requirements should be revised to no longer require a filer to disclose on his form assets which are exempt under 5 CFR part 2640. These reporting issues are separate and distinct from the issue of whether an exemption is warranted under section 208(b)(2). Although OGE will not address specific reporting issues in this rulemaking, comments relating to financial disclosure requirements have been considered as part of OGE's separate proposed revision of the Ethics in Government Act, as amended.

The analysis below focuses on changes from the proposed amendments, either as recommended by the commenters or which OGE believes are otherwise appropriate. Many of the amendments proposed are being

adopted as final without change in this rulemaking document.

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

Section 2640.201 Exemptions for Interests in Mutual Funds, Unit Investment Trusts, and Employee Benefit Plans

Sector Mutual Funds

Several commenters recommended that OGE revise the proposed exemption for sector mutual funds to provide a total, rather than a \$50,000 de minimis exemption. Two commenters suggested raising the de minimis amount. The Office of Government Ethics believes that the \$50,000 de minimis exemption amount proposed is appropriate and is adopting it as final in § 2640.201(b) as revised. Establishing a total exemption for all employees would be difficult in light of the legal standard that the exempted interest be "remote and inconsequential." The \$50,000 exemption being adopted is reasonably considered remote and inconsequential for all employees and is consistent with the de minimis exemption for particular matters of general applicability in existing paragraph (b) of § 2640.202, which is being redesignated as paragraph (c) thereof (see below).

This final rule contains one technical correction of the wording in the proposed rule. In the proposed rule, OGE inadvertently proposed limiting the existing exemption for sector mutual funds at § 2640.201(b) by restricting the exemption to disqualifying financial interests arising from the ownership by the employee, his spouse or minor children of an interest in the fund. Consistent with the original exemption for sector mutual funds, OGE intended that the new exemption would include interests held by an employee and all the others whose financial interests are imputed to him under 18 U.S.C. 208. This is reflected in the final rule by tracking the reference in the existing paragraph (b) of § 2640.201 prior to this amendment. The wording and structure of the exemption also have been modified somewhat in this final rule to clarify its meaning.

Section 2640.202 Exemptions for Interests in Securities

De Minimis Exemption for Matters Involving Parties

Several commenters were pleased with the proposed increase (now being adopted as final) in the de minimis exemption amount for securities in particular matters involving specific parties from \$5,000 to \$15,000, under § 2640.202(a) as proposed for revision. However, one commenter stated that the increase in the de minimis amount would lead to greater intrusion into the privacy of filers, by reducing the number of reported assets, but probing further into the values of assets not previously required to be reported on the OGE Form 450. As an initial matter, raising the de minimis amount will not affect the OGE Form 450 filer's reporting requirements. In addition, as mentioned earlier, the reporting requirements for both the OGE Form 450 and the SF 278 are separate matters from the focus of this rulemaking, which addresses whether certain financial interests are too remote or inconsequential under section 208(b)(2) to warrant disqualification under 18 U.S.C. 208(a).

De Minimis Exemption for Matters Affecting Nonparties

The Office of Government Ethics received varied comments in response to proposed new § 2640.203(m). Under that section, as proposed, an employee would have been able to participate in certain matters in litigation involving specific parties in which the employee had a disqualifying financial interest of up to \$25,000 in securities issued by a nonparty affected by the litigation. Two commenters were generally satisfied with the proposed rule. Of those who expressed some dissatisfaction with the proposed rule, two recommended broadening the rule to encompass any particular matter affecting nonparties, rather than limiting the rule to matters in litigation. Two commenters recommended including an example or definitions.

The Office of Government Ethics' original proposed part 2640 regulations, published for comment in the **Federal Register** on September 11, 1995, included a proposed exemption for disqualifying interests arising from ownership of securities issued by a nonparty. See 60 FR 27228. In the comments to that proposed rule, some agencies expressed a concern that this specific proposed exemption would be too complex. As a result, OGE decided not to include the exemption in its final version of 5 CFR part 2640. Over the years, however, some agencies have

continued to express a need for such an exemption. The strongest advocate stressed the need for an exemption for matters in litigation affecting nonparties, so OGE included this exemption in the proposed regulation published on September 6, 2000. As noted, two commenters to the proposed amendments supported broadening this exemption, essentially recommending that OGE establish in this final rule the exemption as proposed in September 1995. After additional consideration, OGE has decided to adopt in revised § 2640.202(b) of this final rule a broader exemption than that proposed, so as to include any particular matter involving specific parties, not just matters in litigation. Because of its broadened scope, this new exemption is being moved to the primary section for interests in securities at § 2640.202. The broader rule will be more useful to a greater range of agencies and will simplify the exemption by eliminating the need for determining whether a matter constitutes "litigation."

Moreover, to address the commenters' recommendations and to clarify the rule, OGE is adding an example to the exemption. One commenter requested that OGE define "nonparty" and offer guidance on how to identify nonparties and determine if they are affected by a matter. Because each situation may vary to such a degree that the question is best addressed on a case-by-case basis, OGE will not define "nonparty" in this rulemaking. The Office of Government Ethics believes that the example now provided will promote a clearer understanding of the application of this exemption.

In the proposed rule, OGE proposed to revise Example 2 after § 2640.203(f), relating to interests in mutual insurance companies, to suggest that the proposed § 2640.203(m) for matters in litigation could apply in the situation described in the example. Upon reflection, that suggestion was incorrect because the interests of a policy holder with a mutual insurance company would not fall within the definition of "security" at § 2640.102(r). Accordingly, this final rule does not contain any amendment to that example.

The rule as proposed for particular matters affecting nonparties will be revised as described above and redesignated as new paragraph (b) of § 2640.202. Existing paragraphs (b) through (e) of current § 2640.202 are being redesignated as paragraphs (c) through (f), respectively, of that section.

In addition, several existing examples in part 2640 are being revised (as proposed) to reflect the new de minimis exemption amounts.

III. Matters of Regulatory Procedure

Executive Order 12866

In promulgating this final regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Review and Planning. This regulation has also been reviewed by the Office of Management and Budget under that Executive order.

Executive Order 12988

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

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 proposed amendatory rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this final regulation does not contain information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, 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 proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and has submitted a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

List of Subjects in 5 CFR Part 2640

Conflicts of interests, Government employees.

Approved: November 16, 2001.

Amy L. Comstock,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2640 as follows:

PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

1. The authority citation for part 2640 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; 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

2. Section 2640.102 is amended by revising paragraph (r) to read as follows:

§ 2640.102 Definitions.

* * * * *

* * * * *

(r) *Security* means common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest. The term also includes “mutual fund” for purposes of § 2640.202(e) and (f) and § 2640.203(a).

* * * * *

3. Section 2640.103 is amended by revising Example 1 following paragraph (a)(2) to read as follows:

§ 2640.103 Prohibition.

(a) * * *

(2) * * *

Example 1 to paragraph (a)(2): An agency’s Office of Enforcement is investigating the allegedly fraudulent marketing practices of a major corporation. One of the agency’s personnel specialists is asked to provide information to the Office of Enforcement about the agency’s personnel ceiling so that the Office can determine whether new employees can be hired to work on the investigation. The employee personnel specialist owns \$20,000 worth of stock in the corporation that is the target of the investigation. She does not have a disqualifying financial interest in the matter (the investigation and possible subsequent enforcement proceedings) because her involvement is on a peripheral personnel issue and her participation cannot be considered “substantial” as defined in the statute.

* * * * *

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

4. Section 2640.201 is amended by:

a. Revising the heading of Example 1 and revising Example 2 following paragraph (a);

b. Revising paragraph (b); and

c. Revising the heading of Example 1 and adding new Examples 2 and 3 following new paragraph (b)(2)(ii).

The revisions and additions read as follows:

§ 2640.201 Exemptions for interests in mutual funds, unit investment trusts, and employee benefit plans.

(a) * * *

Example 1 to paragraph (a): * * *

Example 2 to paragraph (a): A

nonsupervisory employee of the Department of Energy owns shares valued at \$75,000 in a mutual fund that expressly concentrates its holdings in the stock of utility companies. The employee may not rely on the exemption in paragraph (a) of this section to act in matters affecting a utility company whose stock is a part of the mutual fund’s portfolio because the fund is not a diversified fund as defined in § 2640.102(a). The employee may, however, seek an individual waiver under 18 U.S.C. 208(b)(1) permitting him to act.

(b) *Sector mutual funds.* (1) An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund where the affected holding is not invested in the sector in which the fund concentrates, and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund.

(2)(i) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any sector fund or funds does not exceed \$50,000.

(ii) For purposes of calculating the \$50,000 de minimis amount in paragraph (b)(2)(i) of this section, an employee must aggregate the market value of all sector mutual funds in which he has a disqualifying financial interest and that concentrate in the same sector and have one or more holdings that may be affected by the particular matter.

Example 1 to paragraph (b): * * *

Example 2 to paragraph (b): A health scientist administrator employed in the Public Health Service at the Department of Health and Human Services is assigned to serve on a Departmentwide task force that will recommend changes in how Medicare reimbursements will be made to health care providers. The employee owns \$35,000 worth of shares in the XYZ Health Sciences Fund, a sector mutual fund invested primarily in health-related companies such as pharmaceuticals, developers of medical instruments and devices, managed care

health organizations, and acute care hospitals. The health scientist administrator may participate in the recommendations.

Example 3 to paragraph (b): The spouse of the employee in the previous Example owns \$40,000 worth of shares in ABC Specialized Portfolios: Healthcare, a sector mutual fund that also concentrates its investments in health-related companies. The two funds focus on the same sector and both contain holdings that may be affected by the particular matter. Because the aggregated value of the two funds exceeds \$50,000, the employee may not rely on the exemption.

* * * * *

5. Section 2640.202 is amended by:

a. Revising paragraph (a)(2);

b. Revising the heading of Example 1 and revising Examples 2 and 3 following paragraph (a)(2);

c. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively;

d. Adding a new paragraph (b);

e. Adding new Example 1 following new paragraph (b)(2); and

f. Revising the heading of Example 1 and removing Example 2 following redesignated paragraph (c)(2).

The revisions and additions read as follows:

§ 2640.202 Exemptions for interests in securities.

(a) * * *

(2) The aggregate market value of the holdings of the employee, his spouse, and his minor children in the securities of all entities does not exceed \$15,000.

Example 1 to paragraph (a): * * *

Example 2 to paragraph (a): In the preceding example, the employee and his spouse each own \$8,000 worth of stock in XYZ Corporation, resulting in ownership of \$16,000 worth of stock by the employee and his spouse. The exemption in paragraph (a) of this section would not permit the employee to participate in the evaluation of bids because the aggregate market value of the holdings of the employee, spouse and minor children in XYZ Corporation exceeds \$15,000. The employee could, however, seek an individual waiver under 18 U.S.C. 208(b)(1) in order to participate in the evaluation of bids.

Example 3 to paragraph (a): An employee is assigned to monitor XYZ Corporation’s performance of a contract to provide computer maintenance services at the employee’s agency. At the time the employee is first assigned these duties, he owns publicly traded stock in XYZ Corporation valued at less than \$15,000. During the time the contract is being performed, however, the value of the employee’s stock increases to \$17,500. When the employee knows that the value of his stock exceeds \$15,000, he must disqualify himself from any further participation in matters affecting XYZ Corporation or seek an individual waiver under 18 U.S.C. 208(b)(1). Alternatively, the employee may divest the portion of his XYZ stock that exceeds \$15,000. This can be

accomplished through a standing order with his broker to sell when the value of the stock exceeds \$15,000.

(b) *De minimis exemption for matters affecting nonparties.* An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee, his spouse, or minor children of securities issued by one or more entities that are not parties to the matter but that are affected by the matter, if:

(1) The securities are publicly traded, or are long-term Federal Government or municipal securities; and

(2) The aggregate market value of the holdings of the employee, his spouse and minor children in the securities of all affected entities (including securities exempted under paragraph (a) of this section) does not exceed \$25,000.

Example 1 to paragraph (b): A Food and Drug Administration advisory committee is asked to review a new drug application from Alpha Drug Co. for a new lung cancer drug. A member of the advisory committee owns \$20,000 worth of stock in Mega Drug Co., which manufactures the only similar lung cancer drug on the market. If approved, the Alpha Drug Co.'s drug would directly compete with the drug sold by the Mega Drug Co., resulting in decreased sales of its lung cancer drug. The committee member may participate in the review of the new drug.

(c) * * *

Example 1 to paragraph (c): * * *

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6. Section 2640.204 is amended by revising Example 1 which follows the section to read as follows:

§ 2640.204 Prohibited financial interests.

* * * * *

Example 1 to § 2640.204: The Office of the Comptroller of the Currency (OCC), in a regulation that supplements part 2635 of this chapter, prohibits certain employees from owning stock in commercial banks. If an OCC employee purchases stock valued at \$2,000 in contravention of the regulation, the exemption at § 2640.202(a) for interests arising from the ownership of no more than \$15,000 worth of publicly traded stock will not apply to the employee's participation in matters affecting the bank.

[FR Doc. 02-6617 Filed 3-18-02; 8:45 am]

BILLING CODE 6345-01-U

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1437

RIN 0560-AG20

Noninsured Crop Disaster Assistance Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Interim rule.

SUMMARY: The Commodity Credit Corporation (CCC) amends the regulations with respect to the Noninsured Crop Disaster Assistance Program (NAP). This interim rule amends the NAP regulations to remove area requirements, announce new requirements regarding the filing of applications, payment of service fees, and reporting of crop acreage, yield, and production. These regulatory amendments are designed to improve the overall operation of the program and to conform the regulations with changes to the program made in recent legislation.

DATES: The rule is effective March 19, 2002. Comments must be received by April 18, 2002, to be assured of consideration.

ADDRESSES: Comments should be addressed to Steve Peterson, Chief, Noninsured Assistance Programs Branch (NAPB); Production, Emergencies, and Compliance Division (PECD); Farm Service Agency (FSA); United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW., Washington, DC 20250-0517; e-mail Steve_Peterson@wdc.fsa.usda.gov.

FOR FURTHER INFORMATION CONTACT: Steve Peterson, Chief, Noninsured Assistance Programs Branch (NAPB); Production, Emergencies, and Compliance Division (PECD); Farm Service Agency (FSA); United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW, Washington, DC 20250-0517; telephone (202) 720-5172; facsimile (202) 690-3646; e-mail StevePeterson@wdc.fsa.usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule is issued in conformance with Executive Order 12866 and has been determined to be economically significant and therefore has been reviewed by the Office of Management and Budget (OMB). A summary of the Cost-Benefit Assessment follows the Background section.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because neither FSA nor the CCC is required by 5 U.S.C. 533 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Evaluation

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is needed.

Executive Order 12988

The rule has been reviewed in accordance with Executive Order 12988. The provisions of this rule preempt State laws to the extent such laws are inconsistent with the provisions of this rule. Before any judicial action may be brought concerning the provisions of this rule, the administrative remedies must be exhausted.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, subpart V, published at 49 FR 29115 (June 24, 1983). Unfunded Mandates Reform Act of 1995 (UMRA)

This rule contains no Federal mandates under the regulatory provisions of Title II of the UMRA for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Paperwork Reduction Act

This rule amends current regulations to reference changes to NAP made by amendments to section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (1996 Act). The Paperwork Reduction Act generally requires a 60-day public comment period and OMB review of the information collections before regulations may be promulgated. However, section 161 of the 1996 Act provided that the Secretary issue regulations without regard to the Paperwork Reduction Act. A separate notice announcing a 60-day comment period will be published and OMB approval sought under the provisions of 44 U.S.C. chapter 35.