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DEPARTMENT OF ENERGY

5 CFR Chapter XXIII

10 CFR Part 1010

RINs 1990-AA04, 3209-AA15

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

AGENCY: Department of Energy (DOE).

ACTION: Interim final rule with invitation for comments.

SUMMARY: The Department of Energy, with the concurrence of the Office of Government Ethics (OGE), is issuing a regulation for employees of DOE that supplements the Standards of Ethical Conduct for Employees of the Executive Branch issued by OGE. This interim rule is a necessary supplement to the Standards because it addresses ethical issues unique to DOE. The supplemental regulation requires DOE employees to seek approval from management prior to engaging in certain outside activities. The supplemental regulation also requires employees to document recusals in writing. DOE 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 July 5, 1996. Comments must be received on or before September 3, 1996.

ADDRESSES: All comments concerning these regulations should be addressed to Susan Beard (Deputy Assistant General Counsel for Standards of Conduct), Office of the Assistant General Counsel for General Law, GC-80, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Susan Beard (Deputy Assistant General Counsel for Standards of Conduct),

Office of the Assistant General Counsel for General Law, GC-80, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, telephone 202-586-1522.

SUPPLEMENTARY INFORMATION:

I. Background

On August 7, 1992, OGE published the Standards of Ethical Conduct for Employees of the Executive Branch. See 57 FR 35006-35067, as corrected at 57 FR 48557, 57 FR 52583, and 60 FR 51667, with additional grace period extensions at 59 FR 4779-4780, 60 FR 6390-6391 and 60 FR 66857-66858. The Standards, codified at 5 CFR part 2635 and effective February 3, 1993, establish uniform standards of ethical conduct applicable to all executive branch personnel.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive agencies to publish agency-specific supplemental regulations that are necessary to implement an agency's ethics program. DOE, with OGE's concurrence, has determined that the following supplemental rules, being codified in new chapter XXIII of 5 CFR, consisting of part 3301, are necessary for successful implementation of DOE's ethics program.

II. Analysis of the Regulations

Section 3301.101 General

Section 3301.101 explains that the regulations contained in the interim rule apply to all employees of the Department of Energy, with the exception of employees of the Federal Energy Regulatory Commission, and are supplemental to the uniform executive branch standards at 5 CFR part 2635. The Federal Energy Regulatory Commission was established as part of DOE by sections 204 and 401 of the Department of Energy Organization Act (Pub. L. 95-91, codified at 42 U.S.C. 7134 & 7171). Section 401(d) of that Act specifies that employees of the Federal Energy Regulatory Commission shall not be subject to supervision or direction of any officer, employee, or agent of any other part of DOE. Accordingly, employees of the Federal Energy Regulatory Commission are not subject to these regulations.

This section also notes that DOE employees are subject to the executive branch financial disclosure regulations

at 5 CFR part 2634, and additional rules of conduct published in 5 CFR part 735 and DOE's Conduct of Employees Regulation at 10 CFR part 1010. In addition, this section contains definitions of the terms used in this part. "Agency designee" is defined as an employee's immediate supervisor. This supplement to the definition of this term at 5 CFR 2635.102(b) is needed so that DOE employees know how to contact their agency designee. This section also defines the term "counselor," a term that has historically been used at DOE, to identify the persons primarily responsible for providing counseling on ethics and standards of conduct matters.

Section 3301.102 Procedure for Accomplishing Disqualification

Section 3301.102 of the interim rule supplements the Standards for disqualification contained in 5 CFR part 2635 by requiring written notice of employee disqualifications under 5 CFR 2635.402(c), 2635.502(e) and 2635.604. In the past, it has been DOE's practice to require a written notice of employee disqualification. DOE has determined that it is necessary to the success of its ethics program to continue its procedures for written notice of employee disqualification. DOE recognizes the problems noted by the Office of Government Ethics in adopting a requirement for written notice of disqualification on an executive branch-wide basis. See 57 FR 35024. It is not DOE's purpose to impose an overly technical requirement that would result in disciplining an employee for failure to provide written notice by some arbitrary deadline. Thus, the notice requirement imposed by this regulation is phrased to give an employee flexibility in determining precisely when the employee will give notice of disqualification from a matter to which the employee has been assigned. Notice is to be given when the employee determines that he or she will not participate in the matter. In no way does the notice requirement affect the employee's obligation not to participate in the matter.

Section 3301.103 Prior Approval for Outside Employment

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. Pursuant to 10 CFR 1010.204, which is being repealed in this rulemaking document, the Department of Energy has long required employees, other than special Government employees, to provide written notification, and in some cases, to obtain written permission before engaging in certain outside activities or employment. 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 require any employee of DOE who wants to engage in outside employment to obtain prior approval of such activity from the employee's supervisor and the counselor.

Accordingly, new § 3301.103(a) imposes a requirement on employees to obtain written approval from their immediate supervisors before engaging in such activities, and describes what must be contained in the approval form. To ensure that this provision is not itself construed as authority to deny permission to engage in any outside activity, § 3301.103(b) specifies that approval will be granted unless the activity is expected to involve conduct prohibited by statute or regulation. Section 3301.103(c) defines outside "employment" to include any non-Federal employment involving the provision of personal services by the employee.

III. Repeal and Revision of Department of Energy Conduct of Employees Regulations

On November 30, 1993, the National Defense Authorization Act for Fiscal Year 1994 was enacted. Pub. L. 103-160, sec. 3161. That statute repealed certain statutory conflict-of-interest provisions applicable to DOE employees. On February 10, 1996, the National Defense Authorization Act for Fiscal Year 1996 was enacted. Public Law 104-106. That statute repealed the remaining statutory conflict-of-interest provisions that were unique to DOE. Accordingly, DOE is repealing the regulatory provisions in 10 CFR part 1010 implementing the repealed statutory provisions. This repeal also

applies to those provisions of part 1010 that were applicable to the Federal Energy Regulatory Commission (FERC). The FERC is an independent regulatory commission within the DOE and, to an extent, is subject to DOE rulemaking authority. 42 U.S.C. §§ 7134, 7171, & 7254. The FERC has agreed to DOE's repeal of this provision, and FERC has indicated its intention to publish its own supplemental regulations pursuant to its own regulatory authority.

Because much of the remainder of 10 CFR part 1010, DOE's Conduct of Employees regulation, is largely superseded by new chapter XXIII of title 5, as added by this rulemaking, and the provisions of 5 CFR part 2635, DOE is herewith amending part 1010 to remove the existing provisions, with the exception of the provisions concerning reporting fraud, waste, abuse, and corruption, cooperation with the Inspector General, and the conflict of interest waiver for widely diversified mutual funds. The latter provision will only remain in effect until the Office of Government Ethics publishes final regulations on 18 U.S.C. 208 (at which time DOE will repeal the residual waiver provision at § 1010.105). A new cross-reference provision is also being added to part 1010 to refer to the executive branch-wide Standards and financial disclosure regulation as well as the new DOE supplemental standards regulation.

Section 1010.101 General

Section 1010.101 explains that these regulations apply to DOE employees, excluding employees of the Federal Energy Regulatory Commission.

Section 1010.102 Cross Reference to Employee Ethical Conduct Standards and Financial Disclosure Regulations

Section 1010.102 provides cross-references to the executive branch-wide Standards at 5 CFR part 2635, to DOE's new supplemental regulation at 5 CFR part 3301, to the executive branch financial disclosure regulation at 5 CFR part 2634, and to the executive branch-wide employee responsibilities and conduct regulation at 5 CFR part 735.

Section 1010.103 Reporting Fraud, Waste, Abuse, and Corruption

Section 1010.103 assists employees in adhering to the general principle of ethical conduct at 5 CFR

2635.101(b)(11), under which an employee shall disclose waste, fraud, abuse, and corruption to appropriate authorities. It identifies the Department's Office of Inspector General as an authority to which it would be appropriate for an employee to disclose waste, fraud, abuse, and corruption. In addition, this section institutes a procedure by which appropriate authorities within the Department who receive such allegations that involve the ethical restrictions cross-referenced in § 1010.102 of this part shall refer those allegations to the designated agency ethics official or his delegatee, or the Inspector General.

Section 1010.104 Cooperation with the Inspector General

This section requires employees to cooperate with official inquiries. Section 2(1) & (2) of the Inspector General Act, 5 U.S.C. app. sec. 2, provides that the Inspector General shall be responsible for conducting investigative activities relating to the promotion of economy and efficiency in the administration of, or the detection and prevention of fraud and abuse in, programs and operations of the Department. This regulation is intended to facilitate such activities and those activities provided for in section 6 of the Inspector General Act, including accessing materials and information with respect to agency programs and operations.

Section 1010.105 Conflict of Interest Waiver

This section grandfathers an existing exemption to the prohibition of 5 CFR 2635.402(a). It exempts ownership of stock in a widely diversified mutual fund or other regulated investment company that in turn owns stock in, or bonds of, another enterprise. This provision will be repealed by DOE when the Office of Government Ethics publishes its final regulation on 18 U.S.C. 208.

IV. Matters of Regulatory Procedure *Review Under Executive Order 12866*

Today's regulatory action has been determined by the Department of Energy not to be a "significant regulatory action" under Executive order 12866,

“Regulatory Planning and Review,” (58 FR 51735, October 4, 1993). Accordingly, today’s action was not subject to review under the Executive order by the Office of Information and Regulatory Affairs.

Review Under the Regulatory Flexibility Act

Pursuant to section 605 of the Regulatory Flexibility Act (Pub. L. 96-354), it is hereby certified that the interim final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act. It is related solely to internal agency organization, management, or personnel.

Review Under the National Environmental Policy Act

This rule revises DOE’s regulations on standards of conduct. It will not change the environmental effects of the regulations being amended. The Department has therefore determined that the rule is covered under the Categorical Exclusion found at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings interpreting or amending an existing rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

Review Under the Paperwork Reduction Act

This interim final rule does not impose a “collection of information” requirement, as defined in 44 U.S.C. 3502(4).

Review Under Executive Order 12988

Section 3 of Executive order 12988 on Civil Justice Reform, 61 FR 4729 (February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in section 3(a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of

administrative remedies. The Department has determined that today’s regulatory action meets the requirements of sections 3(a) and (b) of Executive order 12988.

Administrative Procedure Act

Since these interim final regulations relate to agency management and personnel, they are exempt from notice and comment rulemaking requirements under the Administrative Procedure Act, 5 U.S.C. § 553(a). Accordingly, DOE is neither giving prior notice nor providing for a 30-day hiatus between the date of publication and the date the regulations take effect. However, DOE will consider public comments made within 60 days after the publication of this interim final rule.

Congressional Notification

The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to report to Congress on the promulgation of certain final rules prior to their effective dates. 5 U.S.C. 801. That reporting requirement does not apply to the interim final rule in this notice because it falls within a statutory exception for rules relating to agency management personnel. 5 U.S.C. 804(3)(B).

List of Subjects

5 CFR Part 3301

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

10 CFR Part 1010

Conflicts of interest, Government employees, Energy Department, Standards of conduct.

Issued in Washington, DC, June 28, 1996.
Robert R. Nordhaus,
General Counsel, Department of Energy.

Approved: June 28, 1996.

F. Gary Davis,
Deputy Director, Office of Government Ethics.

For the reasons set forth in the preamble, title 5 and chapter X of title 10 of the Code of Federal Regulations are amended as follows:

TITLE 5—[AMENDED]

1. A new chapter XXIII, consisting of part 3301, is added to title 5 of the Code of Federal Regulations to read as follows:

5 CFR Chapter XXIII—Department of Energy

PART 3301—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF ENERGY

Sec.

3301.101 General.

3301.102 Procedure for accomplishing disqualification.

3301.103 Prior approval for outside employment.

Authority: 5 U.S.C. 301, 7301; 5 U.S.C. App. (Ethics in Government Act); 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; 5 CFR 2635.105, 2635.402(c), 2635.502(e), 2635.604, 2635.802, 2635.803.

§ 3301.101 General.

(a) *Purpose.* The regulations in this part apply to employees of the Department of Energy (DOE), excluding employees of the Federal Energy Regulatory Commission, and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. DOE employees are also subject to the regulations on financial disclosure contained in 5 CFR part 2634, and to additional regulations on responsibilities and conduct at 5 CFR part 735, and DOE specific provisions contained in 10 CFR part 1010.

(b) *Definitions.* Unless a term is otherwise defined in this part, the definitions set forth in 5 CFR part 2635 apply to terms used in this part. In addition, for purposes of this part:

Agency designee, as used also in 5 CFR part 2635, means the employee’s immediate supervisor and, for purposes of the approval required by § 3301.103(a), includes the Counselor.

Counselor means the DOE’s designated agency ethics official or his delegates.

§ 3301.102 Procedure for accomplishing disqualification.

(a) *Disqualifying financial interests.* A DOE employee who is required, in accordance with 5 CFR 2635.402(c), to disqualify himself from participation in a particular matter to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.402(c)(1) and

(2), provide written notice of disqualification to his supervisor and counselor upon determining that he will not participate in the matter.

(b) *Disqualification to ensure impartiality.* A DOE employee who is required, in accordance with 5 CFR 2635.502(e), to disqualify himself from participation in a particular matter involving specific parties to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.502(e)(1) and (2), provide written notice of disqualification to his supervisor and counselor upon determining that he will not participate in the matter.

(c) *Disqualification from matter effecting prospective employers.* A DOE employee who is required, in accordance with 5 CFR 2635.604(a), to disqualify himself from participation in a particular matter to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.604(b) and (c), provide written notice of disqualification to his supervisor and counselor upon determining that he will not participate in the matter.

(d) *Withdrawal of notification.* A DOE employee may withdraw written notice under paragraphs (a), (b), or (c) of this section upon deciding that disqualification from participation in the matter is no longer required. A withdrawal of notification shall be in writing and provided to the employee's supervisor and counselor.

§ 3301.103 Prior approval for outside employment.

(a) *Prior approval requirement.* Before engaging in any outside employment, whether or not for compensation, an employee, other than a special Government employee, must obtain written approval of his immediate supervisor and the Counselor. Requests for approval shall include the name of the person, group or organization for whom the work is to be performed; the type of work to be performed; and the proposed hours of work and approximate dates of employment.

(b) *Standard for approval.* Approval shall be granted unless there is a determination that the outside employment is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

(c) *Definition of employment.* For purposes of this section, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services by the employee. It includes but is not limited to personal services as an officer, director, trustee, general partner, agent, attorney, consultant,

contractor, employee, advisor, or teacher. It does not include participating in the activities of a nonprofit, charitable, religious, public service or civic organization, unless such activities involve the provision of professional services or are for compensation.

TITLE 10—ENERGY

Chapter X—Department of Energy (General Provisions)

2. 10 CFR part 1010 is revised to read as follows:

PART 1010—CONDUCT OF EMPLOYEES

Sec.

1010.101 General.

1010.102 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

1010.103 Reporting wrongdoing.

1010.104 Cooperation with the Inspector General.

1010.105 Conflict of interest waiver.

Authority: 5 U.S.C. 301, 303; 5 U.S.C. App. (Inspector General Act of 1978); 18 U.S.C. 208; and 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.

§ 1010.101 General.

This part applies to employees of the Department of Energy (DOE), excluding employees of the Federal Energy Regulatory Commission.

§ 1010.102 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Employees of DOE are subject to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, the DOE regulation at 5 CFR part 3301 which supplements the executive branch-wide standards, the executive branch-wide financial disclosure regulations at 5 CFR part 2634, and the executive branch-wide employee responsibilities and conduct regulation at 5 CFR part 735.

§ 1010.103 Reporting wrongdoing.

(a) Employees shall, in fulfilling the obligation of 5 CFR 2635.101(b)(11), report fraud, waste, abuse, and corruption in DOE programs, including on the part of DOE employees, contractors, subcontractors, grantees, or other recipients of DOE financial assistance, to the Office of Inspector General or other appropriate Federal authority.

(b) All alleged violations of the ethical restrictions described in section 1010.102 that are reported in accordance with (a) of this section to an appropriate authority within the

Department shall in turn be referred by that authority to the designated agency ethics official or his delegatee, or the Inspector General.

§ 1010.104 Cooperation with the Inspector General.

Employees shall respond to questions truthfully under oath when required, whether orally or in writing, and must provide documents and other materials concerning matters of official interest. An employee is not required to respond to such official inquiries if answers or testimony may subject the employee to criminal prosecution.

§ 1010.105 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, or bonds of, another enterprise, that financial interest is exempt from the prohibition of 5 CFR 2635.402(a).

[FR Doc. 96-17115 Filed 7-3-96; 8:45 am]

BILLING CODE 6450-01-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 734

RIN 3206-AH33

Political Activities of Federal Employees

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations regarding the political activity of Federal employees. These regulations will inform Federal employees of the political activities which are permitted and prohibited under the Hatch Act Reform Amendments of 1993. Covered employees also should refer to OPM's interim regulations as part 733, published in the Federal Register in the February 4, 1994 edition, which specifically address political activities connected with local elections in designated communities.

EFFECTIVE DATE: August 5, 1996.

FOR FURTHER INFORMATION CONTACT: Jo-Ann Chabot at (202) 606-1700.

SUPPLEMENTARY INFORMATION: On October 6, 1993, the President signed the Hatch Act Reform Amendments of 1993. The Reform Amendments became