

ENVIRONMENTAL PROTECTION AGENCY**5 CFR Chapter LIV****40 CFR Part 3**

[FRL-5544-5]

RIN 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the Environmental Protection Agency**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency, with the concurrence of the Office of Government Ethics (OGE), is issuing regulations for the employees of EPA that supplement the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) issued by OGE. This final rule is a necessary supplement to the executive branch-wide Standards because it addresses ethical issues unique to EPA. This rule prohibits certain financial interests, including compensated outside employment with certain persons, and requires prior approval to engage in certain categories of outside employment. The Agency is also revoking superseded portions of its existing standards of conduct regulation, 40 CFR part 3, and, in their stead, inserting cross-references to the executive branch-wide Standards and this supplemental regulation, as well as to executive branch financial disclosure regulations.

EFFECTIVE DATE: These regulations are effective August 2, 1996.

FOR FURTHER INFORMATION CONTACT: Hale W. Hawbecker, Office of General Counsel (2379), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260-4550.

SUPPLEMENTARY INFORMATION:**I. Background**

On August 7, 1992, the Office of Government Ethics published the Standards of Ethical Conduct for Employees of the Executive Branch. See 57 FR 35006-35067, as corrected at 57 FR 48557 and 57 FR 52583 with additional extensions for certain existing provisions at 59 FR 4779-4780 and 60 FR 6390 - 6391. The executive branch-wide Standards are now codified at 5 CFR part 2635. Effective February 3, 1993, they established uniform ethical conduct standards applicable to all executive branch personnel.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch

agencies to publish agency-specific supplemental regulations necessary to implement their respective ethics programs. The Environmental Protection Agency, with OGE's concurrence, has determined that the following supplemental regulations, for codification in new 5 CFR chapter LIV, to consist of part 6401, are necessary to implement EPA's ethics program successfully, in light of EPA's unique programs and operations. The Environmental Protection Agency is also simultaneously revoking the provisions of its existing standards of conduct regulations which have already been superseded or which are superseded upon issuance of this supplemental regulation and replacing them with a new section that provides a cross reference to these supplemental regulations and to 5 CFR parts 2634 and 2635.

II. Analysis of the Regulations*Section 6401.101 General*

Section 6401.101 explains that the regulations apply to all EPA employees and supplement the executive branch-wide Standards. Employees of the Environmental Protection Agency are also subject to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635 and the executive branch financial disclosure regulations at 5 CFR part 2634.

Section 6401.102 Prohibited Financial Interests

5 CFR 2635.403(a) authorizes agencies, by supplemental regulation, to prohibit or restrict the acquisition or holding of financial interests or classes of financial interests by agency employees based on the determination that the acquisition or holding of such interests would cause reasonable persons to question the impartiality and objectivity with which agency programs are administered. As under 5 CFR 2635.802(a), this authority may be used to prohibit compensated outside employment relationships.

In developing its supplemental regulation, EPA has determined that the financial holdings of employees in manufacturers and others impacted directly by the work of three EPA program offices would cause reasonable persons to question the impartiality and objectivity with which those program offices carry out their responsibilities. Thus, EPA restricts certain outside employment and financial interests of employees of the Office of Mobile Sources, the Office of Pesticide Programs, and the Office of Information Resources Management. These

restrictions will help (1) To ensure public confidence in the impartiality and objectivity with which these offices administer their programs; (2) eliminate any reason for affected entities to be concerned that information they provide to the three offices might be used for private gain; and (3) avoid the disqualification of employees from official matters to an extent that might result in the offices' inability to administer their programs.

Section 6401.102(a)(1) prohibits employees in the Office of Mobile Sources from having compensated employment relationships with or holding stocks or other financial interests in automobile manufacturers and manufacturers of mobile source pollution control equipment. Most of those employees participate in matters that directly affect the production and profitability of automobile manufacturers and manufacturers of mobile source pollution control equipment.

Section 6401.102(a)(2) prohibits employees in the Office of Pesticide Programs from having outside employment with or holding stocks or other financial interests in companies that manufacture or provide wholesale distribution of pesticides. This office is primarily involved in the regulation of the pesticide industry. The prohibition is not limited to employment with or other financial interests in a company that itself engages in the manufacturing or wholesale distribution of pesticides, but extends to employment with or financial interests in any parent company of which that manufacturer or distributor is a subsidiary. The regulation specifies, by way of clarification, that the prohibition does not extend to employment with or financial interests in any company or other entity simply because it engages in the retail distribution of pesticides.

Section 6401.102(a)(3) prohibits employees in the Office of Information Resources Management who are involved in contracting for data management or computer-related services from having employment with or holding stocks or other financial interests in data management, computer, or information processing firms.

As reflected in 5 CFR 2635.403, certain prohibitions on outside employment and financial interests are statutory. Section 6401.102(a)(4) reflects the provision of the Surface Mining Control and Reclamation Act (SMCRA) at 15 U.S.C. 2603(e) which prohibits a Federal employee who performs any function or duty under SMCRA from holding any "direct or indirect" interest in underground or surface coal mining.

The Office of Government Ethics has no authority to interpret SMCRA and has concurred in § 6401.102(a)(4) only to the extent of incorporating a reference to and information about SMCRA to provide affected EPA employees notice of the statutory prohibition to which they are subject. The Office of Government Ethics' concurrence in this final rule does not indicate its concurrence or other participation in any language of proposed § 6401.102(a)(4) that may appear to involve interpretation or implementation of SMCRA.

Section 6401.102(a)(5) reflects the statutory prohibition which, under the Toxic Substances Control Act (TSCA) at 15 U.S.C. 2603(e), applies to members of the Interagency Testing Committee. Committee members are prohibited from holding stocks, bonds, or other substantial pecuniary interests in any person, including any corporation, engaged in the manufacture, processing, or distribution in commerce of any substance or mixture subject to any rule or order under the Act. The regulation makes it clear that compensated outside employment of any such person is encompassed by the prohibition on substantial pecuniary interests. For one year after their service on the Committee has ceased, members are subject to an additional statutory prohibition on accepting employment or compensation from any person subject to any requirement of the TSCA. Because these restrictions are imposed by a statute for which OGE has no interpretative or other authority, OGE's concurrence in proposed § 6401.102(a)(5) does not extend to any language which might be viewed as an interpretation of TSCA. It reflects only OGE's concurrence in EPA's determination that these employment and financial interest prohibitions should be reflected in EPA's supplemental regulations to provide notice to affected employees.

Section 6401.102(b) permits the EPA Designated Agency Ethics Official or the employee's Deputy Ethics Official, upon making the appropriate determination, to waive in writing the prohibitions in § 6401.102 (a)(1)–(a)(3) precluding certain outside employment for employees in the Office of Mobile Sources, employees in the Office of Pesticide Programs, and employees in the Office of Information Resources Management.

Section 6401.103 Outside Employment

The requirement for prior written approval is made pursuant to 5 CFR 2635.803 of the Executive Branch-wide Standards. EPA has determined that in order to effectively avoid conflicts

arising from outside employment and activities, employees considering certain types of employment or activities outside of the EPA must obtain written approval before engaging in such employment or activities. Given the breadth of the Agency's responsibilities, requiring prior written approval of certain outside employment and activities provides a necessary control to ensure that employees do not engage in outside employment or activities in violation of applicable laws and regulations.

Section 6401.103(a) listing the types of outside employment for which the written approval of the employee's Deputy Ethics Official is required is similar to those found in existing 40 CFR 3.508 that EPA is hereby revoking. Employment requiring advance approval from the employee's Deputy Ethics Official is listed in § 6401.103(a) and includes (1) consulting services; (2) the practice of a profession as defined in 5 CFR 2636.305(b)(1); (3) holding State or local public office; (4) employment regarding subject matter that deals in significant part with EPA policies, programs, or operations to which the employee is assigned or has been assigned during the previous one-year period; and (5) the provision of services to an EPA contractor, to a holder of an EPA assistant agreement, or to a firm regulated by the EPA office in which the employee serves. Prior approval is required for these activities because, by their nature, such activities tend to raise questions under the Standards of Ethical Conduct. Section 6401.103(b) prescribes the content of the request for approval. Section 6401.103(c) makes clear that section 6401 is not itself authority to deny permission to engage in any outside employment activity; that approval for outside employment will be granted unless the prospective outside employment is likely to involve conduct prohibited by statute or Federal regulations, including 5 CFR part 2635 and this supplemental regulation. To assure the integrity of the approval process, § 6401.103(d) requires that requests for approval be updated if there is a change in the outside duties, or services performed, or the nature of the employee's business. New approval also must be requested when the employee transfers to an organization within the Agency for which a different Deputy Ethics Official has responsibility and unless the employee's Deputy Ethics Official specifies a longer period after five years. Section 6401.103(e) broadly defines "employment" to cover any form of non-Federal employment or

business relationship involving the provision of personal services, whether or not for compensation, including personal services and writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization unless such activities are for compensation other than reimbursement for expenses.

III. Revocation of Superseded Portions of the EPA's Responsibilities and Conduct Regulations

This final rule revokes those portions of EPA's employee responsibility and conduct regulations at 40 CFR 3.100 through 3.605 now superseded. Some of those regulations were superseded when the confidential financial disclosure provisions of the Executive Branch-wide financial disclosure regulations at 5 CFR part 2634 took effect on October 5, 1992 and many others were superseded when the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635 became effective on February 3, 1993. Those regulations at 40 CFR 2.304 and 3.305 which reflect statutory prohibitions on financial interests are also superseded by this supplemental regulation, as is EPA's requirement at 40 CFR 3.508 for prior approval of outside employment which, as extended by 59 FR 4779–4780 and 60 FR 6390–6391, remains in effect until no later than January 3, 1996.

Of its responsibilities and conduct regulations in 40 CFR 3.100–3.508, the rule at new § 3.101 retains only EPA's regulatory conflict of interest waivers at existing 40 CFR 3.301(b), which remain in effect under 5 CFR 2635.402(d)(1) until OGE has issued superseding regulatory waivers under 18 U.S.C. 208(b)(2). In that regard, see OGE's recent issuances at 60 FR 44706–44709 (August 29, 1995) and 60 FR 47208–47233 (September 11, 1995). This EPA residual standards rule also replaces EPA's revoked regulations with a cross-reference at new § 3.100 to 5 CFR parts 2634, 2635, and 6401.

IV. Matters of Regulatory Procedure

Executive Order 12866

In issuing this rule, EPA 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. This regulation has not been reviewed by the Office of Management and

Budget under that Executive Order, as it deals with agency organization, management, and personnel matters and is not, in any event, deemed "significant" thereunder.

Paperwork Reduction Act

EPA has determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because the proposed regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

Administrative Procedure Act

EPA has found that good cause exists under 5 U.S.C. 553(b)(3) (A), (B) and (d)(3) for waiving, as unnecessary and contrary to the public interest, the general notice of proposed rulemaking and the 30-day delay in effectiveness as to these rules and revocations. This rulemaking is related solely to EPA's organization, procedure, and practice. Further, the supplemental regulations are essentially a restatement of rules previously contained in EPA's employee responsibilities and conduct regulations, and EPA believes that it is important to a smooth transition from EPA's regulations to the executive branch standards that these rules become effective immediately.

Regulatory Flexibility Act

EPA hereby certifies that this rule will not have significant economic impact on a substantial number of small entities. This rule affects only Federal employees and their immediate families.

List of Subjects

5 CFR Part 6401

Conflict of interests, Government employees.

40 CFR Part 3

Conflict of interests, Government employees.

Dated: June 13, 1996.

Carol M. Browner,
Administrator, Environmental Protection Agency.

Approved: July 19, 1996.

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

For the reasons set forth in the preamble, the Environmental Protection Agency, with the concurrence of the Office of Government Ethics, amends title 5 of the Code of Federal Regulations and Title 40, chapter I, part 3 of the Code of Federal Regulations as follows:

TITLE 5—[AMENDED]

1. A new chapter LIV, consisting of part 6401, is added to title 5 of the Code

of Federal Regulations to read as follows:

CHAPTER LIV—ENVIRONMENTAL PROTECTION AGENCY

PART 6401—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE ENVIRONMENTAL PROTECTION AGENCY

Sec.

6401.101 General.

6401.102 Prohibited financial interests.

6401.103 Prior approval for outside employment.

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); 42 U.S.C. 203(c)(1); 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, 2635.403(a), 2635.802(a), 2635.803.

§ 6401.101 General.

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

§ 6401.102 Prohibited financial interests.

(a) The following employees are prohibited from holding the types of financial interests described in this section:

(1) Employees in the Office of Mobile Sources are prohibited from having outside employment with or holding stock or any other financial interest in manufacturers of automobiles and mobile source pollution control equipment.

(2) Employees in the Office of Pesticide Programs are prohibited from having outside employment with or holding stock or any other financial interest in companies that manufacture or provide wholesale distribution of pesticide products registered by the EPA. These restrictions apply to companies with subsidiaries in these areas but do not include retail distributors to the general public.

(3) Employees in the Office of Information Resources Management involved with data management contracting or computer contracting are prohibited from having outside employment with or holding stock or any other financial interest in data management, computer, or information processing firms.

(4) Employees who perform functions or duties under the Surface Mining Control and Reclamation Act (such as reviewing Environmental Impact Statements of the Office of Surface

Mining in the Department of Interior) are prohibited by 30 U.S.C. 1211(f) from holding direct or indirect interests in underground or surface coal mining operations.

(i) Implementing regulations of the Office of Surface Mining at 30 CFR 706.3 define the terms "direct financial interest" and "indirect financial interest" as follows:

(A) *Direct financial interest* means ownership or part ownership by an employee of land, stocks, bonds, debentures, warrants, a partnership, shares, or other holding and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

(B) *Indirect financial interest* means the same financial relationships as for direct ownership but where the employee reaps the benefits of such interests, including interests held by the employee's spouse, minor child or other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor child or other resident relative holds a financial interest.

(ii) Violation of the restrictions in this section is punishable by a fine of up to \$2,500 or imprisonment for not more than one year, or both.

(iii) Employees who perform functions or duties under the Surface Mining Control and Reclamation Act are not prohibited thereunder from holding interests in excepted investment funds as defined at 5 CFR 2634.310(c)(2) provided that such funds are widely diversified, that is, hold no more than 5% of the value of their portfolios in the securities of any one issuer (other than the United States Government) and no more than 20% in any particular economic or geographic sector.

(5) Members of the Interagency Testing Committee established under section 4(e) of the Toxic Substances Control Act (15 U.S.C. 2603(e)) are prohibited thereunder from holding any stocks or bonds, or having any substantial pecuniary interest, in any person engaged in the manufacture, processing, or distribution in commerce of any substance or mixture subject to any requirement of the Act or any rule or order issued under the Act and, for a period of twelve months after their committee service has ceased, are prohibited thereunder from accepting

employment or compensation from any person subject to any requirement of the Act or to any rule or order issued under the Act.

(i) The statutory prohibitions in this section are enforceable by an action for a court order to restrain violations.

(ii) Members of the Interagency Testing Committee are not prohibited thereunder from holding interests in excepted investment funds as defined at 5 CFR 2634.310(c)(2) provided that such fund are widely diversified, that is, hold no more than 5% of the value of their portfolios in the securities of any one issuer (other than the United States Government) and no more than 20% in any particular economic sector.

(b) The Designated Agency Ethics Official or the cognizant Deputy Ethics Official may grant a written waiver from the prohibitions in paragraph (a)(1) through (a)(3) of this section based on a determination that the waiver is not inconsistent with part 2635 of this title or otherwise prohibited by law and that, under the particular circumstances, application of the prohibition is not necessary to avoid the appearance of misuse of position or loss of impartiality, or otherwise to ensure confidence in the impartiality and objectivity with which agency programs are administered. A waiver under this paragraph may impose appropriate conditions, such as requiring execution of a written disqualification.

§ 6401.103 Prior approval for outside employment.

(a) *Requirement for approval.* An employee shall obtain approval from his or her Deputy Ethics Official before engaging in outside employment, with or without compensation, that involves:

- (1) Consulting services;
- (2) The practice of a profession as defined in 5 CFR 2636.305(b)(1);
- (3) Holding State or local public office;
- (4) Subject matter that deals in significant part with the policies, programs or operations of EPA or any matter to which the employee presently is assigned or to which the employee has been assigned during the previous one-year period; or
- (5) The provision of services to or for:
 - (i) An EPA contractor or subcontractor;
 - (ii) The holder of an EPA assistance agreement or subagreement; or
 - (iii) A firm regulated by the EPA office or Region in which the employee serves.

(b) *Form and content of request.* The employee's request for approval of outside employment shall be submitted in writing to his or her Deputy Ethics

Official. The request shall be sent through the employee's immediate supervisor (for the supervisor's information) and shall include:

- (1) Employee's name, title and grade;
- (2) Nature of the outside activity, including a full description of the services to be performed and the amount of compensation expected;
- (3) The name and business of the person or organization for which the work will be done (in cases of self-employment, indicate the type of services to be rendered and estimate the number of clients or customers anticipated during the next 6 months);
- (4) The estimated time to be devoted to the activity;
- (5) Whether the service will be performed entirely outside of normal duty hours (if not, estimate the number of hours of absence from work required);
- (6) The employee's statement that no official duty time or Government property, resources, or facilities not available to the general public will be used in connection with the outside employment;
- (7) The basis for compensation (e.g., fee, per diem, per annum, etc.);
- (8) The employee's statement that he or she has read, is familiar with, and will abide by the restrictions described in 5 CFR part 2635 and § 6401.102; and
- (9) An identification of any EPA assistance agreements or contracts held by a person to or for whom services would be provided.

(c) *Standard for approval.* Approval shall be granted only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and § 6401.102. The decision must be in writing.

(d) *Keeping the record up-to-date.* If there is a change in the nature or scope of the duties or services performed or the nature of the employee's business, the employee must submit a revised request for approval. Where an employee transfers to an organization for which a different Deputy Ethics Official has responsibility, the employee must obtain approval from the new Deputy Ethics Official. In addition, each approved request is valid only for five years unless the employee's Deputy Ethics Official specifies a longer time period.

(e) *Definition of employment.* For purposes of this section, "employment" means any form of non-Federal employment, business relationship, or activity involving the provision of personal services by the employee, whether or not for compensation. It includes but is not limited to personal

services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher, or speaker. It includes writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the activities of nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organizations, unless such activities are for compensation other than reimbursement for expenses.

TITLE 40—PROTECTION OF ENVIRONMENT

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

Part 3 of 40 CFR chapter I is revised to read as follows:

PART 3—EMPLOYEE RESPONSIBILITIES AND CONDUCT

Sec.

- 3.100 Cross-reference to employee ethical conduct standards and financial disclosure regulations.
- 3.101 Waiver of certain financial interests.
Authority: 5 U.S.C. 7301 and 18 U.S.C. 208(b)(2).

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

Employees of the Environmental Protection Agency (EPA) should refer to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, the EPA regulations at 5 CFR part 6401 that supplement those standards, and the Executive Branch financial disclosure regulations at 5 CFR part 2634.

§ 3.101 Waiver of certain financial interests.

(a) The prohibition of 18 U.S.C. 208(a) may be waived by general regulation. Financial interests derived from the following have been determined to be too remote or too inconsequential to affect the integrity of employee's services, and employees may participate in matters affecting them:

- (1) Mutual funds (including tax-exempt bond funds), except those which concentrate their investments in particular industries;
- (2) Life insurance, variable annuity, or guaranteed investment contracts issued by insurance companies;
- (3) Deposits in a bank, savings and loan association, credit union, or similar financial institution;
- (4) Real property used solely as the personal residence of an employee;
- (5) Bonds or other securities issued by the U.S. Government or its agencies.

(b) This provision will be superseded when the Office of Government Ethics publishes its Executive Branch-wide exemptions and EPA will publish a document in the Federal Register revoking it at that time.

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