

**AGENDA DOCUMENT NO. 11-62**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

2011 OCT 17 P 3:11

October 17, 2011

**AGENDA ITEM**

**MEMORANDUM**

TO: The Commission

FROM: Anthony Herman  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Robert M. Knop  
Assistant General Counsel

Anthony T. Buckley  
Attorney

SUBJECT: Draft Final Rules and Explanation and Justification for Standards of  
Conduct

The attached document contains draft Final Rules and an Explanation and Justification for Standards of Conduct. We request that this document be placed on the agenda for October 20, 2011.

Attachment

For Meeting of 10-20-11

**SUBMITTED LATE**

1 **FEDERAL ELECTION COMMISSION**

2 **5 CFR Chapter XXXVII**

3 **11 CFR Part 7**

4 **STANDARDS OF CONDUCT**

5 **RIN 3209-AA15**

6 **[NOTICE 2011- ]**

7 **AGENCY:** Federal Election Commission.

8 **ACTION:** Final Rules.

9 **SUMMARY:** The Federal Election Commission (“Commission” or “FEC”), with  
10 the concurrence of the Office of Government Ethics (“OGE”), is  
11 revising the Commission’s “Standards of Conduct,” which are the  
12 FEC rules that govern the conduct of Commissioners and  
13 Commission employees. The new rules update the Commission’s  
14 regulations to reflect statutory changes enacted after the Standards  
15 of Conduct were originally promulgated in 1986, and to conform  
16 them to regulations issued by OGE and the Office of Personnel  
17 Management (“OPM”). In addition to the revisions to the FEC’s  
18 Standards of Conduct, the Commission, with OGE’s concurrence, is  
19 issuing regulations that supplement the Standards of Ethical  
20 Conduct for Employees of the Executive Branch issued by OGE.  
21 These supplemental regulations address outside employment of  
22 Commissioners and Commission employees. The new rules are

1 unchanged from the rules presented in the Notice of Proposed  
2 Rulemaking.

3 **EFFECTIVE**  
4 **DATE:**

[INSERT DATE 30 DAYS AFTER THE DATE OF  
5 PUBLICATION IN THE FEDERAL REGISTER].

6 **FOR FURTHER**  
7 **INFORMATION**

8 **CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, or Mr. Anthony T.  
9 Buckley, Attorney, 999 E Street, NW, Washington D.C. 20463,  
10 (202) 694-1650 or (800) 424-9530.

11 **SUPPLEMENTARY**  
12 **INFORMATION:**

13 **I. Background**

14 The Ethics Reform Act of 1989<sup>1</sup> includes restrictions on gifts, travel, outside  
15 activities, and outside employment. See Pub. L. No. 101-194, tit. III and VI,  
16 103 Stat. 1716 (1989). It authorizes the Office of Government Ethics (“OGE”) to  
17 implement regulations concerning the conduct of executive branch employees.  
18 See 5 U.S.C. 7351(c). OGE issued a final rule setting forth uniform standards of ethical  
19 conduct and an interim final rule on financial disclosure in 1992, followed by a final rule  
20 on financial interests in 1996. These rules apply to all executive branch departments and  
21 agencies of the Federal Government and their employees. These three executive branch-  
22 wide regulations, as corrected and amended, are codified at 5 CFR parts 2634, 2635, and

---

<sup>1</sup> Pub. L. No. 101-194, 103 Stat. 1716 (1989).

1 2640.<sup>2</sup> The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq.  
2 (“the Act”), in part, restricts the activities of members of the Federal Election Commission  
3 and the Commission’s employees. See 2 U.S.C. 437c(a)(3) and 437g(a)(12(A)).

4 The OGE Standards of Ethical Conduct regulations supersede any standards of  
5 conduct regulations previously issued by Federal agencies and therefore supersede, with  
6 some exceptions, the Commission’s former regulations in 11 CFR part 7. Although  
7 agencies may still issue regulations to supplement OGE’s Standards of Ethical Conduct in  
8 order to accommodate specific agency needs, any such regulations must be issued in  
9 accordance with OGE’s rules, and must be submitted to OGE for prior approval.  
10 See 5 CFR 2635.105(a) and (b). Agencies may, however, retain any regulations based on  
11 their own separate statutory authority or that address different, non-ethics matters.

12 OGE’s Standards of Ethical Conduct regulations address gifts from outside sources,  
13 gifts between employees, conflicting financial interests, impartiality in performing official  
14 duties, pursuit of other employment, misuse of position, and outside employment and  
15 activities. See 5 CFR part 2635.

16 In addition to OGE’s Standards of Ethical Conduct regulations, Commission  
17 employees are subject to certain rules issued by the Office of Personnel Management  
18 (“OPM”) concerning employee responsibilities and conduct. See 5 CFR part 735. These  
19 rules address restrictions on certain gambling activities, conduct prejudicial to the  
20 government, and unauthorized examination training for individuals preparing to take civil  
21 and Foreign Service examinations. See 5 CFR part 735.

---

<sup>2</sup> Shortly before Congress passed the Ethics Reform Act of 1989, the President issued Executive Order 12674, which sets forth basic principles of ethical conduct for Federal employees and requires OGE to promulgate “regulations that establish a single, comprehensive, and clear set of executive-branch standards of conduct.” E.O. 12674, 54 FR 15159, 15160 (Apr. 12, 1989). This Executive Order was later modified. E.O. 12731, 55 FR 42547 (Oct. 17, 1990). OGE’s regulations also implement Executive Order 12674, as modified by Executive Order 12731.

1           The Commission and OGE have determined that the following supplemental  
2 regulations are necessary and appropriate in view of the FEC’s programs and operations  
3 and to fulfill the purposes of the OGE standards. These supplemental regulations are being  
4 issued in new chapter XXXVII of title 5 of the Code of Federal Regulations. In addition,  
5 the FEC is revising its regulations at 11 CFR part 7 to conform to the OGE and OPM  
6 regulations, without compromising the Commission’s independence in its core mission of  
7 administering Federal campaign finance laws.

8           On May 17, 2010, the Commission and OGE jointly published a Notice of  
9 Proposed Rulemaking in the Federal Register. See Notice of Proposed Rulemaking on  
10 Standards of Conduct, 75 FR 27456 (May 17, 2010) (“NPRM”). The comment period  
11 closed on June 16, 2010. Two comments were received in response to the proposed rules.<sup>3</sup>  
12 The Internal Revenue Service submitted a comment stating that it did not find any conflict  
13 between the Internal Revenue Code or Treasury Regulations and the proposed rules. One  
14 other commenter submitted comments addressing certain aspects of the proposed  
15 regulations. These comments are addressed in the discussion below.

16 **Transmittal of Final Rules to Congress**

17           Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional  
18 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules  
19 to the Speaker of the House of Representatives and the President of the Senate, and publish  
20 them in the Federal Register at least thirty calendar days before they take effect. The final  
21 rules that follow were transmitted to Congress on [date].

---

<sup>3</sup> Copies of submitted comments are available on the Commission’s website. Go to <http://sers.nictusa.com/fosers/> and search for REG number 2003-01.

1 **II. Statement of Basis and Purpose**

2 The Commission, with the concurrence of OGE, is amending the rules that govern  
3 the conduct of members of the Commission (“Commissioners”) and Commission  
4 employees by adding supplemental regulations in a new chapter XXXVII of 5 CFR,  
5 consisting of part 4701, and by revising the Commission’s Standards of Conduct in  
6 11 CFR part 7.

7 **FEC Supplemental Regulations in 5 CFR Part 4701**

8 5 CFR 4701.101 – Scope

9 New section 4701.101 sets forth the authority for the supplemental regulations,  
10 which includes 2 U.S.C. 437c(a)(3), 5 U.S.C. 7301, and 5 U.S.C. App. (Ethics in  
11 Government Act of 1978). Section 4701.101(a) indicates that the regulations in 5 CFR  
12 part 4701 apply to both Commissioners and employees of the Commission. The rules at  
13 5 CFR 4701.101(b) list some of the other regulations in title 5 and 11 CFR part 7 that  
14 govern the ethical conduct of Commissioners and employees. No public comments were  
15 received on this section.

16 5 CFR 4701.102 – Prior approval for certain outside employment and activities

17 OGE’s Standards of Ethical Conduct regulations supersede the Commission’s  
18 former regulation at 11 CFR 7.9(f) concerning prior approval for outside employment and  
19 activities. OGE’s regulations prohibit an employee from engaging in outside employment  
20 or any other outside activity that conflicts with their official duties. 5 CFR 2635.802. A  
21 Federal agency shall, by supplemental regulation, require employees or any category of  
22 employees to obtain prior approval before engaging in specific types of outside activities,  
23 including outside employment, if that agency determines that a prior approval requirement

1 is necessary or desirable for the purpose of administering the agency’s ethics program.  
2 5 CFR 2635.803.

3 The Commission has determined that an approval requirement for outside  
4 employment or activities is necessary, desirable and appropriate to the administration of its  
5 ethics program because the approval requirement has been effective in ensuring that the  
6 outside employment and activities of its employees conform to all applicable laws and  
7 regulations. Therefore, the Commission, with the concurrence of OGE, is renewing its  
8 requirement for prior approval of certain outside employment and activities by issuing this  
9 supplemental regulation at 5 CFR 4701.102 in accordance with 5 CFR 2635.803.

10 Section 4701.102 differs significantly from former 11 CFR 7.9(f). The major  
11 difference is in the far narrower scope of the outside employment and activities covered by  
12 the new regulation. Former 11 CFR 7.9(f) required Commission employees to obtain prior  
13 approval for all outside employment and activities. The term “outside employment or  
14 other outside activity” was defined broadly at former 11 CFR 7.2(h) to include “any work,  
15 service or other activity performed by an employee.” In contrast, 5 CFR 4701.102 requires  
16 prior approval from the Designated Agency Ethics Official (“DAEO”) only for outside  
17 activities that are related to the employee’s official duties or that involve the application of  
18 the same specialized skills or the same educational background as used in the performance  
19 of the employee’s official duties. This new rule, which draws on portions of prior approval  
20 regulations adopted by several other Federal agencies with OGE concurrence, is narrowly  
21 tailored to address agency concerns, while reducing the administrative burdens placed on  
22 employees. See, e.g., 5 CFR 3801.106 (Department of Justice); 5 CFR 4501.103 (OPM);

1 5 CFR 6301.102 (Department of Education); and 5 CFR 8601.102 (Federal Retirement  
2 Thrift Investment Board).

3 New 5 CFR 4701.102(a) sets out the definitions of the terms used in  
4 5 CFR 4701.102(b). The definitions of “active participant,” “employee,” and “related to  
5 the employee’s official duties” refer back to the definitions of these terms used in the  
6 general standards of conduct regulations issued by OGE.

7 Section 4701.102(a)(2) follows the definition of “employee” in OGE’s regulation at  
8 5 CFR 2635.102(h), which includes “any officer or employee of an agency.” This  
9 definition includes Commissioners. However, section 4701.102(b) excludes  
10 Commissioners from its procedures. Section 437c(a)(3) of the Act itself restricts outside  
11 activities of Commissioners. See 2 U.S.C. 437c(a)(3).<sup>4</sup> As discussed below, regulations  
12 implementing Section 437c(a)(3) were located in former 11 CFR 7.9, and are being moved  
13 to 11 CFR 7.6 as part of this rulemaking.

14 Section 4701.102(a)(3) defines “outside employment” to mean any form of non-  
15 Federal employment, business relationship or activity involving the provision of personal  
16 services, with or without compensation. The definition provides a non-exhaustive list of  
17 services such as serving as a lawyer, officer, director, trustee, agent, consultant, contractor,  
18 general partner, teacher, speaker, writer, or any other services provided by an individual.  
19 This definition of “outside employment” is similar to those adopted by other Federal  
20 agencies and covers a broad range of outside employment and activities in which a  
21 Commission employee may seek to engage. See, e.g., 5 CFR 3801.106 (Department of  
22 Justice) and 5 CFR 5701.101 (Federal Trade Commission). Notably, this definition of

---

<sup>4</sup> Section 437c(a)(3) states that Commissioners “shall not engage in any other business, vocation, or employment.”



1 “outside employment” includes unpaid activity which may not conform to the usual  
2 understanding of “employment.”

3 Section 4701.102(b) states that a Commission employee other than a special  
4 Government employee<sup>5</sup> must obtain prior, written approval from the DAEO before  
5 engaging in outside employment or activities where the services provided are related to the  
6 employee’s official duties or involve the application of the same specialized skills or the  
7 same educational background as used in the performance of the employee’s official duties.  
8 Accordingly, Commission employees are required to obtain prior, written approval only  
9 when they seek to engage in outside employment or activities that are related, in one of  
10 those respects, to their official duties. For example, a Commission attorney wishing to  
11 engage in weekend employment as a salesperson for a retail organization need not seek  
12 prior approval because such employment would not be related to his or her official duties  
13 or involve the application of the same specialized skills or educational background as used  
14 in his or her position at the Commission. In contrast, a Commission attorney wishing to  
15 represent a relative in a lawsuit filed against a private party in State court would need to  
16 seek prior approval because such representation would involve the application of the same  
17 specialized skill or same educational background as used in his or her position with the  
18 Commission.

19 One comment argued that the prior approval requirement would be overbroad in  
20 that approval would be required for many activities that obviously do not conflict with  
21 Federal employment or law. Consequently, according to the comment, the requirement

---

<sup>5</sup> “Special Government employee” is defined at 5 CFR 2635.102(l). Special Government employees are temporary or part-time employees hired to provide expertise about the industry in which they work. Such special Government employees are expected to have outside employment, and it is unnecessary to require them to seek prior approval for such outside employment.

1 may deter employees from participating in community activities or cause a greater  
2 administrative burden in having to process so many requests. This comment also faulted  
3 the rule for not specifying how the employer will determine if an outside activity involves  
4 the same specialized skills or educational background. The comment suggested that the  
5 requirement should be eliminated.

6 The Commission disagrees with the comment because the scope of activities in the  
7 revised rules for which prior approval is required is considerably narrower than the scope  
8 of activities in the former regulations, which required prior approval for any potential  
9 outside employment. Thus, there will likely be fewer requests for the DAEO to handle.  
10 Further, the requirement to seek prior approval is not intended to prevent Commission  
11 employees from engaging in outside activities; rather, it is merely intended to help  
12 employees avoid potential conflicts with their jobs at the Commission.<sup>6</sup>

13 Finally, the Commission has determined that the “same specialized skills and  
14 educational background” standard is well suited for reviewing outside activities. The  
15 previous standard, in which all outside activities were reviewed, was overly broad and  
16 unduly burdensome. On the other hand, although the regulation also requires employees to  
17 seek approval for outside activities that “relate to their official duties,” limiting the  
18 preapproval requirement to those activities would be too narrow. Such a limitation would  
19 exclude from the review and prior approval process activities that have little or nothing to  
20 do with an employee’s work, but may nevertheless result in criminal or administrative

---

<sup>6</sup> To this end, for example, the Commission’s Office of the General Counsel has developed a Policy on Pro Bono Legal Activities. This Policy states, in part, that “it is the policy of the Office of General Counsel to encourage and support efforts by its employees to provide pro bono legal services within their communities that are consistent with applicable federal statutes and regulations governing conflicts of interest and outside activities.” The Policy also provides for pre-approval of certain non-representational pro bono services, such as providing advice at walk-in legal clinics or assisting individuals with filling out governmental forms, which employees may engage in without prior approval (after notifying the Commission’s ethics officer and their supervisor).

1 violations due to the employee's employment status. For instance, attorney employees  
2 may not represent persons before Federal courts or other Federal agencies. See 18 U.S.C.  
3 203 & 205 (prohibiting representation by Federal employees in matters involving the  
4 United States or District of Columbia). Similarly, Audit staff may not communicate with  
5 the Internal Revenue Service on behalf of persons being audited. See 18 U.S.C. 203. The  
6 Commission has determined that requiring prior approval for those activities that use the  
7 same specialized skills or educational background is the least burdensome standard for  
8 employees and the Commission that still ensures that employees receive the guidance they  
9 need to avoid potential conflicts with their jobs at the Commission.

10 Section 4701.102(c) establishes the procedure for the submission of approval  
11 requests to the DAEO. It requires that the request be submitted through all of the  
12 employee's supervisors. For purposes of this section, the Staff Director, the General  
13 Counsel, the Inspector General, the Chief Financial Officer, a Commissioner, or the  
14 Commission, respectively, are considered the final level of supervision for their  
15 subordinates. A request needs to provide certain information, including the identity of the  
16 person, group, or organization for which the employee intends to provide services.

17 One comment expressed concern that the new regulations would require employees  
18 to obtain the approval of all supervisors before commencing outside employment.  
19 However, section 4701.102(c) requires only that employees submit their requests through  
20 all of their supervisors. The only person with the authority to approve or disapprove the  
21 request is the DAEO. See 5 CFR 4701.102(b). The purpose of having the employee  
22 submit the request through his or her supervisory chain is to alert these supervisors to the  
23 request so that they can provide the DAEO with relevant information, where necessary,

1 about the employee’s present job duties and likely future assignments. Such additional  
2 information is sometimes necessary for the DAEO to make an accurate determination  
3 about the request pursuant to section 4701.102(d), and to provide appropriate guidance to  
4 the employee for the purpose of avoiding potential conflicts with his or her job duties at  
5 the Commission.

6 Section 4701.102(d) sets forth the standard for the DAEO’s approval of an  
7 employee’s request regarding outside employment or activity, which was not in former  
8 11 CFR 7.9(f). Approval will be granted only upon a determination that the outside  
9 employment or activity is not expected to involve conduct prohibited by statute or Federal  
10 regulations. In making this determination, the regulations to be considered include those at  
11 5 CFR part 2635. Therefore, the approval will depend on whether the outside employment  
12 or activity: (1) would create conflicting financial interests, (2) would result in a lack of  
13 impartiality in performing official duties or the misuse of Government position, and  
14 (3) would otherwise comply with 5 CFR part 2635. The Commission also intends to  
15 develop appropriate internal procedural guidelines, consistent with the regulations adopted  
16 here, to address the processing of requests for prior approval of outside employment or  
17 activities by agency employees.

18 The comment also objected to the use of the phrase “expected to,” arguing that it is  
19 too broad and subjective, failing to specify an exact standard. The comment further  
20 proposed the standard that “approval shall be granted only upon a determination that the  
21 outside employment does not involve conduct prohibited by statute or Federal regulation  
22 including 5 CFR part 2635” as an alternative.

1           The language the Commission is adopting is an appropriate standard, having been  
2 adopted by numerous other Federal departments and agencies. See, e.g., 5 CFR  
3 3801.106(b)(3) (Department of Justice); 5 CFR 4501.103(c) (OPM); and 5 CFR  
4 8601.102(b) (Federal Thrift Retirement Investment Board). Moreover, the phrase  
5 “expected to” is not intended to introduce any element of subjectivity or uncertainty. It  
6 merely recognizes that the activity for which approval is sought has yet to take place, and  
7 that a determination by the DAEO will be made based on the information as provided by  
8 the employee, not on information that is not provided, or on subsequent changes to the  
9 scope of an activity that occur after the employee enters into it. Cf. 5 CFR 2635.107(b)  
10 (employee must make full disclosure of all relevant circumstances in order to invoke  
11 protection from disciplinary action based on good faith reliance on advice of agency ethics  
12 official). Indeed, 5 CFR part 2635, in part, employs the “expected to” standard. See 5  
13 CFR 2635.802(b), Example 2.<sup>7</sup>

14 **FEC Standards of Conduct in 11 CFR Part 7**

15           The Act authorizes the Commission to promulgate regulations addressing certain  
16 conduct of its members and its employees. Pursuant to this authority, the Commission is  
17 promulgating the following rules in 11 CFR part 7: 1) 11 CFR 7.1 (purpose and  
18 applicability), 2) 7.2 (definitions), 3) 7.3 (interpretation and advisory service), 4) 7.4  
19 (reporting suspected violations), 5) 7.5 (corrective actions), 6) 7.6 (outside employment  
20 and activities of Commissioners), 7) 7.7 (prohibition against making complaints and  
21 investigations public), and 8) 7.8 (ex parte communications in enforcement actions).  
22 Details of these provisions are discussed below.

---

<sup>7</sup> The Commission also notes that it received a request from the union that represents some agency employees seeking to bargain over certain aspects of the prior approval regulation at 5 CFR 4701.102.

1 Many of the Commission's former regulations in 11 CFR part 7 have been  
2 supplanted by OGE's regulations. These regulations include: 1) portions of former  
3 11 CFR 7.1 (purpose and applicability), former 11 CFR 7.3 (notification to employees and  
4 special Commission employees), former 11 CFR 7.7 (prohibited conduct – general),  
5 former 11 CFR 7.8 (gifts, entertainment, and favors), portions of former 11 CFR 7.9  
6 (outside employment or activities), former 11 CFR 7.10 (financial interests), former  
7 11 CFR 7.12 (membership in associations), former 11 CFR 7.13 (use of Government  
8 property), former 11 CFR 7.16 (miscellaneous statutory provisions), and former 11 CFR  
9 7.17-7.21 (comprising Subpart C, which addressed special Commission employees).  
10 Accordingly, the Commission is removing the supplanted regulations from the  
11 Commission's Standards of Conduct in 11 CFR part 7.

12 The Commission's regulation at former 11 CFR 7.11 concerning political activity  
13 by Commissioners and Commission employees was supplanted by the Hatch Act Reform  
14 Amendments of 1993. See Pub. L. No. 103-94, 107 Stat. 1001 (1993). Therefore, the  
15 Commission is removing former section 7.11. See discussion below.

16 The Commission's regulations at former 11 CFR Part 7, Subpart D (composed of  
17 sections 7.22-7.33), addressed post-employment conflicts of interest and procedures for  
18 administrative enforcement proceedings. The statutory authorization for these regulations  
19 has been removed. See 18 U.S.C. 216(j). Therefore, the Commission is removing 11 CFR  
20 Part 7, Subpart D. See discussion below.

- 1 The regulations that the Commission is retaining and revising are redesignated.  
 2 The following chart lists the removals, revisions, and redesignations for 11 CFR part 7.

Former 11 CFR Section	Action	Redesignated 11 CFR Section	Supplanted by 5 CFR Section
7.1(a)	Removed as supplanted		2635.101
7.1(b) <sup>8</sup> & (c)	Removed as supplanted		2635.102(h)
7.1(b) <sup>9</sup>	Revised	7.1(a) and (b)	
7.2	Revised	7.2	
7.3	Removed as supplanted		2638.701-2638.706
7.4	Revised and redesignated	7.3	
7.5	Revised and redesignated	7.4	
7.6	Revised and redesignated	7.5	
7.7	Removed as supplanted		2635.101
7.8	Removed as supplanted		2635.201-2635.205 <sup>10</sup>
7.9(a)	Revised and redesignated	7.6	
7.9(b)-(f)	Removed as supplanted		2635.801-2635.809 <sup>11</sup>
7.10	Removed as supplanted		2635.401-2635.403 <sup>12</sup>
7.11	Removed as supplanted		Hatch Act Amendments
7.12	Removed as supplanted		2635.402 <sup>13</sup>
7.13	Removed as supplanted		2635.704
7.14	Revised and redesignated	7.7	
7.15	Revised and redesignated	7.8	
7.16	Removed as supplanted		2635.901-2635.902
7.17-7.21	Removed as supplanted		2635.102(h) <sup>14</sup>
7.22-7.33	Removed as supplanted		18 U.S.C. 207

3  
 4 A. 11 CFR 7.1 – Scope

5  
 6 Section 7.1(a) states that the regulations in 11 CFR part 7 apply to all members and  
 7 employees of the Commission. Section 7.1(b) lists the other regulations in title 5 of the

<sup>8</sup> Part of former 11 CFR 7.1(b) included special Government employees. See also 11 CFR 7.2(d).

<sup>9</sup> Part of former 11 CFR 7.1(b) explained that 11 CFR part 7 applies to Commission members and employees.

<sup>10</sup> See also 5 CFR 2635.301-2635.304.

<sup>11</sup> See also 5 CFR part 4701.

<sup>12</sup> See also 5 CFR 2635.501-2635.503 and 2635.703.

<sup>13</sup> See also 5 CFR 2635.502, 2635.704-2635.705, and discussion below.

<sup>14</sup> See also 11 CFR 7.2(d) (including special Government employees).

1 Code of Federal Regulations, including new 5 CFR part 4701, that now govern the ethical  
2 conduct of Commissioners and employees. Former 11 CFR 7.1(b), which stated that the  
3 regulations in 11 CFR part 7 apply to all employees and “special Commission employees,”  
4 is being removed. As explained below, 11 CFR 7.2(d) includes “special Government  
5 employees” in the definition of “employee.” Although the Commission’s former  
6 regulations used the term “special Commission employee,” the revised regulation uses the  
7 term “special Government employee” as defined at 5 CFR 2635.102(l) in order to better  
8 conform to OGE terminology. Because revised 11 CFR 7.1(a) states that the regulations in  
9 11 CFR part 7 apply to all Commission employees, which includes special Government  
10 employees, former paragraph (b) is no longer necessary and is being removed. Former  
11 11 CFR 7.1(c), which stated that the regulations in 11 CFR part 7 must be construed in  
12 accordance with any applicable laws, regulations, and the Commission’s  
13 Labor-Management Agreement is being removed because it is unnecessary. No public  
14 comments were received on this section.

15 B. 11 CFR 7.2 – Definitions

16 Section 7.2 continues to set forth the definitions used in 11 CFR part 7. The  
17 definition of “Commission” in 11 CFR 7.2(a) remains unchanged. The definition of  
18 “Commissioner” in 11 CFR 7.2(b) is being revised slightly. Whereas former paragraph (b)  
19 of 11 CFR 7.2 defined “Commissioner,” in part, as “a voting member of the Federal  
20 Election Commission,” revised 11 CFR 7.2(b) deletes the word “voting” from the  
21 definition. The word “voting” is not necessary because the Commission no longer



1 includes non-voting members.<sup>15</sup> This definition includes a Commissioner who holds his or  
2 her position by virtue of a recess appointment.

3 The definition of “conflict of interest” in former section 7.2(c) is being removed.  
4 Instead, the Commission relies on OGE regulations and regulatory definitions regarding  
5 conflicts of interest, except for the provisions in 11 CFR 7.6 governing outside  
6 employment and activities of Commissioners. See, e.g., 5 CFR 2635.801-2635.809.  
7 Because section 7.6 does not use the term “conflict of interest,” a definition of that phrase  
8 specific to 11 CFR part 7 is no longer needed.

9 The terms “Designated Agency Ethics Officer” and “Ethics Officer” in former  
10 11 CFR 7.2(d) are being replaced with the term “Designated Agency Ethics Official” in  
11 section 7.2(c) and throughout part 7. See 11 CFR 7.3, 7.4, and 7.5. These changes make  
12 the Commission’s regulations consistent with OGE’s regulations at 5 CFR 2638.104.  
13 Section 7.2(c) also includes a provision from former 11 CFR 7.4 stating that the  
14 Commission’s General Counsel serves as the Designated Agency Ethics Official.

15 In revised 11 CFR 7.2(d), the definition of “employee” is being moved from former  
16 11 CFR 7.2(e) and is being amended to include a “special Government employee as  
17 defined in 18 U.S.C. 202(a).” OGE regulations at 5 CFR 2635.102(h) include “special  
18 Government employee” within the general definition of “employee,” thus subjecting  
19 special Government employees to the same Standards of Conduct as other employees, with  
20 certain limitations. Revised section 7.2(d) operates similarly.

---

<sup>15</sup> Prior to 1993, the Secretary of the Senate and the Clerk of the House of Representatives served as non-voting “ex-officio” members of the Commission. These positions were, however, found to be in violation of the Constitution’s separation of powers doctrine in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed for want of jurisdiction, 513 U.S. 88 (Dec. 6, 1994).

1 Section 7.2(e) defines “ex parte communication” for the purposes of 11 CFR part 7.  
2 This definition is based on the definition of “ex parte communication” at 11 CFR 201.2(a)  
3 applicable to non-enforcement situations.<sup>16</sup> Like that definition, section 7.2(e) defines “ex  
4 parte communication” as any written or oral communication by any person outside the  
5 agency to any Commissioner or any member of any Commissioner’s staff, but not to any  
6 other Commission employee, that imparts information or argument regarding prospective  
7 Commission enforcement action or potential action concerning any pending enforcement  
8 matter. Like Commission regulations at 11 CFR 111.22 and part 201, the definition in  
9 section 7.2(e) is limited to Commissioners and their staff members because the  
10 Commissioners are empowered to make decisions on enforcement matters, and their staff  
11 members are their confidential assistants on these matters. The Commission notes that  
12 “matter” as used in the revised rule includes enforcement Matters Under Review,  
13 Administrative Fines, and Alternative Dispute Resolution cases (“ADR”). See also  
14 discussion of 11 CFR 7.8 below.

15 Section 7.2(f) defines the term “Inspector General.” The definitions of “former  
16 employee,” “official responsibility,” “person,” and “special Commission employee” at  
17 former 11 CFR 7.2(f), (g), (i), and (j), respectively, are being removed from section 7.2 as  
18 these definitions are no longer necessary. In addition, paragraph (h) of former 11 CFR 7.2  
19 defining “outside employment or other outside activity” is being removed. Because the  
20 Commission is replacing much of former 11 CFR 7.9 (outside employment or activities by  
21 Commission employees) with a supplemental regulation at 5 CFR 4701.102, paragraph (h)

---

<sup>16</sup> The treatment of ex parte communications in enforcement matters is addressed in 11 CFR 111.22. The treatment of ex parte communications in audits, rulemakings, advisory opinions, public funding cases, and litigation matters is covered by 11 CFR part 201.

1 of former 11 CFR 7.2 defining “outside employment or other outside activity” is now  
2 superfluous.

3 No public comments were received on this section.

4 C. 11 CFR 7.3 – Interpretation and guidance

5 Section 11 CFR 7.3 is a revised version of former 11 CFR 7.4, which addressed the  
6 provision of interpretation and guidance to Commissioners and employees. Specifically,  
7 under section 7.3(a), Commissioners and employees may seek interpretation and guidance  
8 related to 5 CFR parts 735, 2634, 2635, 2640, and 4701 from the DAEO. Paragraph (b)  
9 clarifies that the DAEO, a Commissioner, or an employee may request an opinion from the  
10 Director of OGE concerning interpretations of 5 CFR parts 2634, 2635, or 2640. No  
11 public comments were received on this section.

12 D. 11 CFR 7.4 – Reporting suspected violations

13 Section 7.4, which is a revised version of former 11 CFR 7.5, addresses the  
14 reporting of suspected violations of the FEC’s Standards of Conduct and OGE’s Standards  
15 of Ethical Conduct. Section 7.4 requires the reporting of suspected violations of 5 CFR  
16 parts 735, 2634, 2635, 2640, and 4701, and 11 CFR part 7 to the DAEO, the Inspector  
17 General, or other appropriate law enforcement authorities. No public comments were  
18 received on this section.

19 E. 11 CFR 7.5 – Corrective action

20 Section 7.5 informs employees that a violation of the FEC’s Standards of Conduct  
21 or OGE’s Standards of Ethical Conduct may be cause for appropriate corrective action,  
22 disciplinary action, or adverse action, in addition to any penalty prescribed by law,  
23 including criminal penalties. This section is based on former section 7.6(a). Procedures

1 for taking corrective, disciplinary, and adverse actions are set forth in other authority.  
2 Accordingly, the procedures in former section 7.6(b) and (c) are no longer necessary and  
3 are being deleted. No public comments were received on this section.

4 F. 11 CFR 7.6 – Outside employment and activities by Commissioners

5 Section 7.6 addresses outside employment and activities of Commissioners.<sup>17</sup>

6 FECA provides authority for additional restrictions on Commissioners’ outside  
7 employment and activities. See 2 U.S.C. 437c(a)(3).

8 Section 7.6, which retains the approach of the former rule at 11 CFR 7.9(a), states  
9 that no Commissioner may devote a substantial portion of his or her time to any other  
10 business, vocation, or employment. This regulation retains the former rule’s allowance of  
11 a ninety-day period for a Commissioner, following the start of Commission service, to  
12 limit such activity.

13 As noted in the 1986 Explanation and Justification for the prior rule on  
14 Commissioners’ outside activities, the use of the words “substantial portion” of a  
15 Commissioner’s time to trigger the regulation’s prohibitions is based on the legislative  
16 history of 2 U.S.C. 437c(a)(3). See Explanation and Justification for Final Rules on  
17 Standards of Conduct for Agency Employees, 51 FR 34440, 34442 (Sept. 29, 1986). The  
18 Conference Report that accompanied the 1976 amendments to FECA discusses  
19 2 U.S.C. 437c(a)(3): “[T]he conferees agree that the requirement is intended to apply to  
20 members who devote a substantial portion of their time to such business, vocation, or  
21 employment activities.” H.R. Rep. No. 94-1057, at 34 (1976) (Conf. Rep.), reprinted in

---

<sup>17</sup> Outside activities of all FEC employees are addressed in OGE’s Standards of Ethical Conduct at 5 CFR 2635.801-2635.809, which, when the standards became effective in February 1993, superseded the Commission’s former regulations at 11 CFR 7.9(b)-(f). Commissioners are subject to additional limitations on outside activities as described in 11 CFR 7.6 and 2 U.S.C. 437c(a)(3).

1 LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976,  
2 at 1028 (1977). This rule continues this interpretation. No public comments were received  
3 on this section.

4 G. 11 CFR 7.7 – Prohibition against making complaints and investigations  
5 public

6 Pursuant to section 111.21 of the Commission’s rules, which implements section  
7 437g(a)(12)(A) of the Act, and with the exception of Commission actions described in  
8 section 111.20, “no complaint filed with the Commission, nor any notification sent by the  
9 Commission, nor any investigation conducted by the Commission, nor any findings made  
10 by the Commission shall be made public by the Commission or by any person or entity  
11 without the written consent of the respondent with respect to whom the complaint was  
12 filed, the notification sent, the investigation conducted, or the finding made.” 11 CFR  
13 111.21(a); 2 U.S.C. 437g(a)(12)(A). Section 7.7 derives its authority from 2 U.S.C.  
14 437g(a)(12)(A). This rule follows former 11 CFR 7.14. The Commission is making one  
15 non-substantive change by removing the phrase “are warned that they” from paragraph  
16 7.7(a). The language is unnecessary because the text of the paragraph itself serves as a  
17 warning.

18 No public comments were received on this section.

19 H. 11 CFR 7.8 – Ex parte communications in enforcement actions

20 Section 7.8, which is a revised version of former 11 CFR 7.15, addresses ex parte  
21 communications made in the context of enforcement actions. In particular, section 7.8  
22 prohibits the making or consideration of ex parte communications by Commissioners and

1 any member of a Commissioner’s staff, except as otherwise required by law.<sup>18</sup> Former 11  
2 CFR 7.15 applied to Commissioners and “employees involved in the decisional process.”  
3 The revisions to this section were made to conform 11 CFR 7.8 to the ex parte rules in  
4 11 CFR 111.22 and part 201. See also discussion of 11 CFR 7.2(e), above. Section 7.8  
5 also contains nonsubstantive revisions from paragraphs (a), (c), and (d) of former section  
6 7.15. For clarity, the Commission has added new paragraph (e) of section 7.8, which  
7 references the provisions of 11 CFR 111.22 governing ex parte communications made in  
8 connection with Commission enforcement actions, and 11 CFR part 201, governing ex  
9 parte communications made in connection with public funding, audits, litigation,  
10 rulemakings, and advisory opinions. Paragraph 7.8(e) is intended to assist the reader in  
11 locating additional rules regarding ex parte communications in enforcement actions, audits,  
12 litigation, rulemakings, and advisory opinions.

13 No public comments were received on this section.

14 I. Removal of 11 CFR 7.11 – Political and organization activity

15 The Hatch Act Reform Amendments of 1993<sup>19</sup> lifted many of the restrictions  
16 imposed by the original Hatch Act on most Federal employees with regard to participation  
17 in political campaigns. However, Congress specifically addressed the FEC in the Hatch  
18 Act Amendments and left all of the original Hatch Act’s restrictions in place for employees  
19 of the Commission, other than Commissioners. See 5 U.S.C. 7323(b)(1) and (2). In  
20 contrast to the Commissioners, Commission employees may not give a political  
21 contribution to a Member of Congress, an employee of the Executive Branch (other than

---

<sup>18</sup> Please note that this includes shared staff as described in Commission Directive 64. Directive 64 can be found here: [http://www.fec.gov/directives/directive\\_64.pdf](http://www.fec.gov/directives/directive_64.pdf).

<sup>19</sup> Pub. L. No. 103-94, 107 Stat. 1001 (1993) (“Hatch Act Amendments”).

1 the President or Vice President), or an officer of a uniformed service. 5 U.S.C. 7323(b)(1).  
2 Additionally, Commission employees may not “take an active part in political management  
3 or political campaigns.” 5 U.S.C. 7323(b)(2)(A).

4 The Hatch Act, as amended, prohibits certain political activities by Commissioners  
5 such as (1) using official authority or influence to interfere with an election, (2) knowingly  
6 soliciting or discouraging political activity by anyone subject to a Commission audit or  
7 investigation, (3) soliciting or receiving political contributions (except in certain, narrowly  
8 limited circumstances), or (4) being a candidate for public office in a partisan election.  
9 5 U.S.C. 7323(a).

10 OPM has authority to issue regulations regarding the Hatch Act Amendments, and  
11 the Office of Special Counsel (“OSC”) interprets and enforces those regulations.

12 See 5 U.S.C. 1103(a)(5), 1212, 1216(a)(1) and 7325. No provision in the Hatch Act  
13 Amendments empowers any agency other than OPM to issue regulations pursuant to the  
14 Hatch Act Amendments, and no provision in FECA directly refers to the Hatch Act  
15 Amendments or previous Hatch Act restrictions. OPM has issued a regulation expressly  
16 prescribing the extent to which the political activities of employees may be limited beyond  
17 the restrictions in the Hatch Act Amendments. See 5 CFR 734.104. This OPM regulation  
18 states: “No further proscriptions or restrictions may be imposed upon employees covered  
19 under this regulation except: (a) Employees who are appointed by the President by and  
20 with the advice and consent of the Senate; (b) Employees who are appointed by the  
21 President; (c) Non-career senior executive service members; (d) Schedule C employees, 5  
22 CFR 213.3301, 213.3302; and (e) Any other employees who serve at the pleasure of the  
23 President.” 5 CFR 734.104.

1           The Commission requested and received an advisory opinion from the OSC as to  
2 the scope of the Commission’s authority to interpret the Hatch Act Amendments regarding  
3 Commissioners and Commission employees.<sup>20</sup> The specific question asked was whether  
4 the Commission may adopt a regulation that would forbid a Commissioner or a  
5 Commission employee from publicly supporting, working for, or contributing to a  
6 candidate, political party, or political committee subject to the jurisdiction of the FEC,  
7 even if, in the case of public support, the activity is not done in concert with the candidate,  
8 political party, or political committee. In its opinion, the OSC noted the OPM regulations  
9 cited above and stated with respect to employees that “the FEC cannot further restrict the  
10 political activity of its regular employees by forbidding them from publicly supporting or  
11 contributing to a candidate, political party, or political committee subject to the jurisdiction  
12 of the Commission.” U.S. Office of Special Counsel Advisory Opinion, OSC File  
13 No. AD-03-0095, at 2 (Aug. 29, 2003). The OSC opinion also noted with respect to  
14 Commissioners that “the FEC has no authority to adopt regulations that would forbid a  
15 Commissioner from publicly supporting, working for, or contributing to a candidate,  
16 political party, or political committee subject to the jurisdiction of the FEC.” *Id.* at 2-3.  
17 Thus, the OSC concluded that “the FEC may not adopt regulations that would limit the  
18 political activity of FEC employees or Commissioners beyond the restrictions set forth in  
19 the Hatch Act.”<sup>21</sup> *Id.* at 3.

20           Accordingly, former section 7.11 is being removed because it is inconsistent with  
21 the Hatch Act Amendments.

---

<sup>20</sup> A copy of the Office of Special Counsel’s opinion is available on the Commission’s website. Go to <http://sers.nictusa.com/fosers/> and search for REG number 2003-01.

<sup>21</sup> Under 5 U.S.C. 1212, the advisory opinion authority of the OSC is limited to matters related to the Hatch Act. Therefore, the conclusions of the opinion are also limited to interpretations of the Hatch Act and OPM regulations. They do not apply to any separate statutory authority under FECA.



1            J.        Removal of 11 CFR 7.12 – Membership in associations

2            The Commission is removing former 11 CFR 7.12, which addressed employee and  
3 Commissioner membership in associations. In 1991, OGE issued a Notice of Proposed  
4 Rulemaking that included proposed regulations concerning participation in professional  
5 associations. See Notice of Proposed Rulemaking on Standards of Ethical Conduct for  
6 Employees of the Executive Branch, 56 FR 33778 (July 23, 1991). OGE decided,  
7 however, to reserve action in its final rule on this topic as a result of the overwhelming  
8 response to its request for comments. See Explanation and Justification for Final Rule on  
9 Standards of Ethical Conduct for Employees of the Executive Branch, 57 FR 35006  
10 (Aug. 7, 1992). Consistent with the OGE decision to reserve action on membership in  
11 associations in its final rule, the Commission concludes that ethical concerns regarding  
12 membership in nongovernmental associations or organizations are properly addressed  
13 under the more general standards in 5 CFR part 2635. See 57 FR at 35035. Among those  
14 general provisions that are applicable are 5 CFR 2635.402 (concerning disqualifying  
15 financial interests), 5 CFR 2635.502 (concerning personal and business relationships), and  
16 5 CFR 2635.704 and 2635.705 (concerning use of government property and official time).

17            K.        Removal of 11 CFR Part 7, Subpart D (Post Employment Conflict of  
18            Interest: Procedure for Administrative Enforcement Proceedings)

19            Former 11 CFR part 7, subpart D, concerned administrative procedures to be  
20 followed for investigations of post-employment conflict-of-interest violations by  
21 individuals who have left Commission employment. Subpart D was based on a prior  
22 version of 18 U.S.C. 207 and 5 CFR parts 2637 and 2641. At the time that subpart D was  
23 adopted, 18 U.S.C. 207(j) authorized agency proceedings against individuals who violated

1 that section and required that “departments and agencies shall, in consultation with the  
2 Director of the Office of Government Ethics, establish procedures to carry out this  
3 subsection.”

4 Subsequently, however, 18 U.S.C. 207(j) was amended and the language  
5 authorizing administrative procedures and providing the authority to promulgate  
6 regulations establishing procedures was removed and replaced with language providing  
7 exceptions to the restrictions on post-employment conflicts of interest.<sup>22</sup> The Commission  
8 has no pending post-employment situations concerning employees who left service before  
9 the repeal of former 18 U.S.C. 207(j). Accordingly, the Commission is removing former  
10 11 CFR part 7, subpart D in its entirety. Please note that former employees remain subject  
11 to Department of Justice criminal prosecution under 18 U.S.C. 207 for post-employment  
12 conflict of interest violations. See 18 U.S.C. 216.

---

<sup>22</sup> See Pub. L. No. 101-189, Div. A, Title VIII, Part B, sec. 814(d)(2), 103 Stat. 1352, 1499 (1989) (National Defense Authorization Act for Fiscal Years 1990 and 1991).

1 **Certification of No Effect Pursuant to 5 U.S.C. 605(b)**

2 (Regulatory Flexibility Act)

3 The Commission certifies that the attached final rules will not have a significant  
4 economic impact on a substantial number of small entities. The basis of this certification  
5 is that this rulemaking affects only the appointed members of the Federal Election  
6 Commission and its employees. The members of the Commission and its employees are  
7 individuals, and are not small entities under 5 U.S.C. 601.

8 **List of Subjects**

9 5 CFR Part 4701

10 Conflict of interests, Government employees, Outside activities.

11 11 CFR Part 7

12 Administrative practice and procedure, Conflict of interests, Government  
13 employees, Political activities (government employees).

14 11 CFR Part 201

15 Ex parte communications.

16

1 For the reasons set out in the preamble, title 5 of the Code of Federal Regulations  
2 is amended as follows, and chapter I of title 11 of the Code of Federal Regulations is  
3 further amended as follows:

4 **TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES**

5 1. Chapter XXXVII, consisting of part 4701, is added to title 5 of the Code of  
6 Federal Regulations to read as follows:

7 **CHAPTER XXXVII – FEDERAL ELECTION COMMISSION**

8 **PART 4701 – SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR**  
9 **EMPLOYEES OF THE FEDERAL ELECTION COMMISSION**

10 Sec.

11 4701.101 Scope.

12 4701.102 Prior approval for certain outside employment.

13 Authority: 2 U.S.C. 437c(a)(3); 5 U.S.C. 7301; 5 U.S.C. app. (Ethics in  
14 Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR p. 215 (1989 Comp.), as  
15 modified by E.O. 12731, 55 FR 42547, 3 CFR p. 306 (1990 Comp.); 5 CFR 2635.105 and  
16 2635.803.

17 **§ 4701.101 Scope.**

18 (a) In accordance with 5 CFR 2635.105, the regulations in this part set forth standards  
19 of conduct that apply to members and other employees of the Federal Election  
20 Commission (“Commission”).

21 (b) In addition, members and other employees of the Commission are subject to the  
22 following regulations:

23 (1) 5 CFR part 735 (Employee Responsibilities and Conduct);

- 1 (2) 5 CFR part 2634 (Executive Branch Financial Disclosure, Qualified Trusts,  
2 and Certificates of Divestiture);
- 3 (3) 5 CFR part 2635 (Standards of Ethical Conduct for Employees of the  
4 Executive Branch); and
- 5 (4) 11 CFR part 7 (Standards of Conduct for Members and Employees of the  
6 Federal Election Commission).

7 **§ 4701.102 Prior approval for certain outside employment.**

8 (a) Definitions. For purposes of this section:

- 9 (1) Active participant has the meaning set forth in 5 CFR 2635.502(b)(1)(v).
- 10 (2) Employee has the meaning set forth in 5 CFR 2635.102(h).
- 11 (3) Definition of outside employment. For purposes of this section, outside  
12 employment means any form of non-Federal employment, business  
13 relationship or activity involving the provision of personal services, whether  
14 or not for compensation. It includes, but is not limited to, services as an  
15 officer, director, agent, advisor, attorney, consultant, contractor, general  
16 partner, trustee, teacher, speaker, writer, or any other services provided by  
17 an individual. It includes writing when done under an arrangement with  
18 another person for production or publication of the written product. The  
19 definition does not include participation in the activities of a nonprofit  
20 charitable, religious, professional, social, fraternal, educational,  
21 recreational, public service or civic organization, unless:
  - 22 (i) The activity provides compensation other than reimbursement of  
23 expenses;

1 (ii) The activities of the non-Federal organization are devoted  
2 substantially to matters relating to the employee's official duties as  
3 defined in 5 CFR 2635.807(a)(2)(i)(B)-(E) and the employee will  
4 serve as officer or director of the non-Federal organization; or

5 (iii) The activities will involve the provision of consultative or  
6 professional services. Consultative services means the provision of  
7 personal services, including the rendering of advice or consultation,  
8 which requires advanced knowledge in a field of science or learning  
9 customarily acquired by a course of specialized instruction and  
10 study in an institution of higher education, hospital, or similar  
11 facility. Professional services means the provision of personal  
12 services, including the rendering of advice or consultation, which  
13 involves application of the skills of a profession as defined in 5 CFR  
14 2636.305(b)(1) or involves a fiduciary relationship as defined in 5  
15 CFR 2636.305(b)(2).

16 (4) Related to the employee's official duties means that the outside  
17 employment meets one or more of the tests described in 5 CFR  
18 2635.807(a)(2)(i)(B)-(E). Outside employment related to the employee's  
19 official duties includes:

20 (i) Outside employment that an employee has been invited to  
21 participate in because of his or her official position rather than his or  
22 her expertise in the subject matter;

1 (ii) Outside employment in which an employee has been asked to  
2 participate by a person that has interests that may be substantially  
3 affected by the performance or nonperformance of the employee's  
4 official duties;

5 (iii) Outside employment that conveys information derived from  
6 nonpublic information gained during the course of government  
7 employment; and

8 (iv) Outside employment that deals in significant part with any matter to  
9 which the employee is or has been officially assigned in the last  
10 year, or any ongoing or announced Commission policy, program, or  
11 operation.

12 (b) Prior approval requirement. An employee of the Commission, including a member  
13 of a Commissioner's staff, but not a member of the Commission or a special Government  
14 employee, shall obtain written approval from the Designated Agency Ethics Official before  
15 engaging in outside employment where the services provided:

16 (1) Are related to the employee's official duties; or

17 (2) Involve the application of the same specialized skills or the same  
18 educational background as used in the performance of the employee's  
19 official duties.

- 1 (c) Submission of requests for approval.
- 2 (1) The request for approval shall be sent through all of the employee's
- 3 supervisors and shall state the name of the person, group, or organization
- 4 for whom the outside employment is to be performed; the type of outside
- 5 employment to be performed; and the proposed hours of, and approximate
- 6 dates of, the outside employment.
- 7 (2) Upon a significant change in the nature or scope of the outside employment
- 8 or in the employee's official position, the employee shall submit a revised
- 9 request for approval.
- 10 (d) Standard for approval. Approval shall be granted only upon a determination that
- 11 the outside employment is not expected to involve conduct prohibited by statute or Federal
- 12 regulation, including 5 CFR part 2635.

13 **TITLE 11 – FEDERAL ELECTIONS**

14 **CHAPTER I – FEDERAL ELECTION COMMISSION**

15 2. Part 7 is revised to read as follows:

16 **PART 7 – STANDARDS OF CONDUCT**

17 Sec.

18 7.1 Scope.

19 7.2 Definitions.

20 7.3 Interpretation and advisory service.

21 7.4 Reporting suspected violations.

22 7.5 Corrective action.

23 7.6 Outside employment and activities by Commissioners.



1 7.7 Prohibition against making complaints and investigations public.

2 7.8 Ex parte communications in enforcement actions.

3 Authority: 2 U.S.C. 437c, 437d, and 438; 5 U.S.C. 7321 et seq. and app. 3.

4 **§ 7.1 Scope.**

5 (a) The regulations in this part apply to members and employees of the Federal  
6 Election Commission (“Commission”).

7 (b) In addition, members and employees of the Commission are subject to the  
8 following regulations:

9 (1) 5 CFR part 735 (Employee Responsibilities and Conduct);

10 (2) 5 CFR part 2634 (Executive Branch Financial Disclosure, Qualified Trusts,  
11 and Certificates of Divestiture);

12 (3) 5 CFR part 2635 (Standards of Ethical Conduct for Employees of the  
13 Executive Branch); and

14 (4) 5 CFR part 4701 (Supplemental Standards of Ethical Conduct for  
15 Employees of the Federal Election Commission).

16 **§ 7.2 Definitions.**

17 As used in this part:

18 (a) Commission means the Federal Election Commission, 999 E Street, NW.,  
19 Washington, DC 20463.

20 (b) Commissioner means a member of the Federal Election Commission, in accordance  
21 with 2 U.S.C. 437c.

22 (c) Designated Agency Ethics Official means the employee designated by the  
23 Commission to administer the provisions of the Ethics in Government Act of 1978

1 (5 U.S.C. appendix), as amended, and includes a designee of the Designated Agency  
2 Ethics Official. The General Counsel serves as the Commission's Designated Agency  
3 Ethics Official.

4 (d) Employee means an employee of the Federal Election Commission and includes a  
5 special Government employee as defined in 18 U.S.C. 202(a).

6 (e) Ex parte communication means any written or oral communication by any person  
7 outside the agency to any Commissioner or any member of any Commissioner's staff, but  
8 not to any other Commission employee, that imparts information or argument regarding  
9 prospective Commission action or potential action concerning any pending enforcement  
10 matter.

11 (f) Inspector General means the individual appointed by the Commission to administer  
12 the provisions of the Inspector General Act of 1978, as amended (5 U.S.C. appendix), and  
13 includes any designee of the Inspector General.

#### 14 **§ 7.3 Interpretation and guidance.**

15 (a) A Commissioner or employee seeking advice and guidance on matters covered by  
16 this part or 5 CFR parts 735, 2634, 2635, 2640, or 4701 may consult with the Designated  
17 Agency Ethics Official. The Designated Agency Ethics Official should be consulted  
18 before undertaking any action that might violate this part or 5 CFR parts 735, 2634, 2635,  
19 2640, or 4701 governing the conduct of Commissioners or employees.

20 (b) The Designated Agency Ethics Official, a Commissioner, or an employee may  
21 request an opinion from the Director of the Office of Government Ethics regarding an  
22 interpretation of 5 CFR parts 2634, 2635, or 2640.

1 **§ 7.4 Reporting suspected violations.**

2 Commissioners and employees shall disclose immediately any suspected violation  
3 of a statute or of a rule set forth in this part or of a rule set forth in 5 CFR parts 735, 2634,  
4 2635, 2640, or 4701 to the Designated Agency Ethics Official, the Office of Inspector  
5 General, or other appropriate law enforcement authorities.

6 **§ 7.5 Corrective action.**

7 A violation of this part or 5 CFR parts 735, 2634, 2635, 2640, or 4701 by an  
8 employee may be cause for appropriate corrective, disciplinary, or adverse action in  
9 addition to any penalty prescribed by law.

10 **§ 7.6 Outside employment and activities by Commissioners.**

11 No member of the Commission may devote a substantial portion of his or her time  
12 to any other business, vocation, or employment. Any individual who is engaging  
13 substantially in any other business, vocation, or employment at the time such individual  
14 begins to serve as a member of the Commission will appropriately limit such activity no  
15 later than 90 days after beginning to serve as such a member.

16 **§ 7.7 Prohibition against making complaints and investigations public.**

17 (a) Commission employees are subject to criminal penalties if they discuss or  
18 otherwise make public any matters pertaining to a complaint or investigation under 2  
19 U.S.C. 437g, without the written permission of the person complained against or being  
20 investigated. Such communications are prohibited by 2 U.S.C. 437g(a)(12)(A).

21 (b) Section 437g(a)(12)(B) of title 2 of the United States Code provides as follows:

22 “Any member or employee of the Commission, or any other person, who violates the  
23 provisions of [2 U.S.C. 437g(a)(12)(A)] shall be fined not more than \$2,000. Any such

1 member, employee, or other person who knowingly and willfully violates the provisions of  
2 [2 U.S.C. 437g(a)(12)(A)] shall be fined not more than \$5,000.”

3 **§ 7.8 Ex parte communications in enforcement actions.**

4 In order to avoid the possibility of prejudice, real or apparent, to the public interest  
5 in enforcement actions pending before the Commission pursuant to 2 U.S.C. 437g:

6 (a) Except to the extent required for the disposition of enforcement matters as required  
7 by law (as, for example, during the normal course of an investigation or a conciliation  
8 effort), no Commissioner or member of any Commissioner’s staff shall make or entertain  
9 any ex parte communications.

10 (b) The prohibition of this section shall apply from the time a complaint is filed with  
11 the Commission pursuant to 2 U.S.C. 437g(a)(1) or from the time that the Commission  
12 determines on the basis of information ascertained in the normal course of its supervisory  
13 responsibilities that it has reason to believe that a violation has occurred or may occur  
14 pursuant to 2 U.S.C. 437g(a)(2), and such prohibition shall remain in force until the  
15 Commission has concluded all action with respect to the enforcement matter in question.

16 (c) Any written communication prohibited by paragraph (a) of this section shall be  
17 delivered to the General Counsel, who shall place the communication in the case file.

18 (d) A Commissioner or member of any Commissioner’s staff involved in handling  
19 enforcement actions who receives an offer to make an oral communication or any  
20 communication concerning any enforcement action pending before the Commission as  
21 described in paragraph (a) of this section, shall decline to listen to such communication. If  
22 unsuccessful in preventing the communication, the Commissioner or employee shall advise  
23 the person making the communication that he or she will not consider the communication

1 and shall prepare a statement setting forth the substance and circumstances of the  
2 communication. Within 48 hours of receipt of the communication, the Commissioner or  
3 any member of any Commissioner’s staff shall prepare a statement setting forth the  
4 substance and circumstances of the communication and shall deliver the statement to the  
5 General Counsel for placing in the file in the manner set forth in paragraph (c) of this  
6 section.

7 (e) Additional rules governing ex parte communications made in connection with  
8 Commission enforcement actions are found at 11 CFR 111.22. Rules governing ex parte  
9 communications made in connection with public funding, Commission audits, litigation,  
10 rulemakings, and advisory opinions are found at 11 CFR part 201.

11 **PART 201 – EX PARTE COMMUNICATIONS**

12 3. The authority citation for Part 201 would continue to read as follows:

13 **Authority:** 2 U.S.C. 437d(a)(8), 2 U.S.C. 438(a)(8), 5 U.S.C. 553(e).

1 4. Section 201.1 is amended by removing the citation “7.15” and adding in its place  
2 the citation “7.8.”

On behalf of the Commission,

3  
4 DATED: \_\_\_\_\_  
5 BILLING CODE: 6715-01-P  
6

\_\_\_\_\_  
Cynthia L. Bauerly  
Chair  
Federal Election Commission

7  
8  
9  
10 APPROVED: \_\_\_\_\_

\_\_\_\_\_  
Don W. Fox  
Acting Director, Office of Government Ethics