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Part II

Office of Government Ethics

5 CFR Part 2635

Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Rule

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635

RIN 3209-AA04

Standards of Ethical Conduct for Employees of the Executive Branch

AGENCY: Office of Government Ethics.

ACTION: Proposed rule.

SUMMARY: The Office of Government Ethics proposes to issue uniform standards of ethical conduct for officers and employees of the executive branch of the Federal Government (hereinafter, Government) that will supersede most of subparts A, B and C of 5 CFR part 735 and agency regulations issued thereunder, as well as 5 CFR 2635.101 of the Office of Government Ethics regulations. The new standards issued by the Office of Government Ethics will be published at revised 5 CFR part 2635, consistent with the earlier transfer and redesignation of other Office of Government Ethics regulations. See 54 Federal Register 50229–50231 (December 5, 1989).

The proposed rule establishes standards relating to the receipt of gifts, whether from prohibited sources, because of official position, or between employees. It establishes standards for dealing with the employee's own and other financial interests that conflict with the performance of an employee's official duties. These include disqualification requirements that apply when a matter to which the employee is assigned affects a person with whom he is seeking employment. In addition to standards relating to use of official position and time, Government property, and nonpublic information, it establishes specific standards for application to outside activities in which an employee may participate, including fundraising and outside employment.

DATES: Comments by agencies and the public are invited and are due September 20, 1991.

ADDRESSES: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005–3917, Attention Ms. Wilcox.

FOR FURTHER INFORMATION CONTACT: Leslie Wilcox or Julie Loring, Office of Government Ethics, telephone (202/FTS) 523–5757, FAX (202/FTS) 523–6325.

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I. Summary of Legal Background

Since 1965, officers and employees of the executive branch (employees) have been subject to individual agency regulations setting forth standards of conduct. Underlying standards common to all existing executive department and agency regulations are contained in parts I and II of Executive Order 11222 of May 8, 1965, as amended, and are implemented by Office of Personnel Management regulations at 5 CFR part 735, subparts A–C.

Consistent with the decentralized regulatory scheme established by the 1965 Executive order, subpart A of 5 CFR part 735 required each executive agency to issue regulations implementing part 735 and prescribing additional standards of ethical conduct appropriate to its particular functions and activities, including exceptions to the restrictions on solicitation or acceptance of gifts from prohibited sources.

In early 1989, as part of a comprehensive review of the ethics laws applicable to all three branches of Government, the President's Commission on Federal Ethics Law Reform recommended that the standards of conduct be updated and that the Office of Government Ethics (OGE) be given authority to issue uniform regulations applicable to all agencies within the executive branch. Thereafter, on April 12, 1989, President Bush issued Executive Order 12674 revoking the 1965 Executive order. Executive Order 12674 was modified by Executive Order 12731, October 17, 1990. The modified Executive order is hereinafter referred to as Executive Order 12674.

Section 201(a) of the new Executive order authorizes OGE, in consultation with the Attorney General and the Office of Personnel Management, to issue regulations that "establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable." Section 201(c) of the new Executive order further authorizes OGE, with the concurrence of the Attorney General, to issue regulations interpreting 18 U.S.C. 207–209.

Part I of Executive Order 12674 incorporates most of the concepts contained in the 1965 Executive order and imposes additional standards, including a prohibition in Section 102 on receipt of outside earned income by Presidential appointees to full-time noncareer positions. Under the Executive order, special Government employees are subject to the same basic principles of ethical conduct that apply to other executive branch employees.

Section 502(a) of Executive Order 12674 provides that, except insofar as irreconcilable with its provisions, regulations issued under the 1965 Executive order shall remain in effect until properly amended, modified, or revoked. Under this savings provision, individual agency regulations remain in effect until the uniform regulations, which are the subject of this notice, take effect. Because existing standards cannot be reconciled with the prohibition on receipt of outside earned income applicable to Presidential appointees to full-time noncareer positions, that provision became effective on April 12, 1989.

As did its predecessor, Executive Order 12674 prohibits employees from soliciting or accepting gifts from specified categories of persons. Title III of the Ethics Reform Act of 1989 amended title 5 of the U.S. Code to add a new section 7353 which contains virtually identical language restricting the solicitation or acceptance of gifts. In its statutory form, this prohibition applies to personnel in all three branches of Government. It authorizes OGE to issue implementing regulations for the executive branch, including "reasonable exceptions as may be appropriate." Thus, the draft regulations contained in subpart B of the proposed rule implement 5 U.S.C. 7353 as well as Section 101(d) of Executive Order 12674.

Under current part 735 and § 2635.101 of 5 CFR and implementing agency regulations, employees are prohibited from giving gifts to official superiors and from accepting gifts from employees receiving less pay than themselves. This prohibition at 5 CFR 735.202(d) is based on the longstanding statutory prohibition against gifts to superiors at 5 U.S.C. 7351. The Ethics Reform Act of 1989 amended section 7351 to give OGE authority to issue implementing regulations applicable to employees of the executive branch. These are contained in subpart C of the proposed rule.

Title VI of the Ethics Reform Act of 1989 added three other provisions that impact directly upon the outside activities of employees, other than special Government employees. One prohibits receipt of honoraria (payment for an appearance, speech, or article) by any individual while serving as an

officer or employee. Another limits receipt of outside earned income by certain noncareer employees paid at or above the basic rate for a position above GS–15. The third prohibits those same noncareer employees from engaging in certain outside employment activities. These three provisions are implemented by 5 CFR part 2636, which was issued by OGE as an interim rule at 56 FR 1721–1730 (January 7, 1991). Relevant provisions of that interim rule are cross-referenced in the outside activities provisions at subpart H of this proposed rule to ensure the review of relevant regulations by covered noncareer employees and by other employees who wish to receive compensation for an appearance, speech, or article.

This proposed rule is published by the Office of Government Ethics (OGE) in consultation with the Department of Justice and the Office of Personnel Management pursuant to Section 201(a) and (c) of Executive Order 12674 of April 12, 1989, as modified by E.O. 12731 of October 17, 1990, and authorities contained in titles I and IV of the Ethics in Government Act of 1978, Public Law 95–521, October 26, 1978, as amended, 5 U.S.C. appendixes III and IV, and 5 U.S.C. 7351(d)(1) and 7353(b)(1) as added by the Ethics Reform Act of 1989, Public Law 101–194, November 30, 1989, as amended. Formerly a part of the Office of Personnel Management, the Office of Government Ethics became a separate executive branch agency on October 1, 1989 pursuant to Sections 3 and 10 of the 1988 OGE reauthorization legislation, Public Law 100–598. Hence, OGE is issuing this proposed rule as revised part 2635 in OGE's chapter XVI of 5 CFR.

II. General Provisions

Subpart A of the proposed rule includes initial sections setting forth the basic obligation of public service and definitions that apply throughout the subpart.

Section 2635.101 of subpart A, as drafted, restates the principles of ethical conduct set forth at section 101 of Executive Order 12674 and the obligation to adhere to the standards set forth in the proposed rule and supplemental agency regulations. With the exception of paragraphs (b)(4), (b)(6) and (b)(14), the general principles set forth in § 2635.101(b) are restated verbatim from Executive Order 12674. These principles and the conflict of interest statutes contained in Chapter 11 of title 18 of the United States Code are the basis for the more specific standards set forth in subsequent subparts of the proposed rule. The final sentence of § 2635.101(b) would require employees to apply the principles of ethical conduct in determining whether conduct not otherwise addressed in the proposed rule is proper.

The three paragraphs contained in proposed § 2635.101(b) that are not restated verbatim from Executive Order 12674 warrant specific comment. Paragraph (b)(4) is reworded simply to clarify that subpart B contains the applicable exceptions referred to in section 101(d) of Executive Order 12674. The other two paragraphs are reworded to amplify the meaning of the respective principles.

Section 2635.101(b)(6), as proposed, would add a knowledge standard to the principle at section 101(f) of Executive Order 12674 that employees "shall make no unauthorized commitments or promises of any kind purporting to bind the Government." The knowledge requirement is proposed because employees frequently deal with complex laws and regulations and must make decisions that fall within the gray areas of those authorities. An employee who acts in good faith and without knowledge that he or she is exceeding official authority will not be found to have violated the standards of ethical conduct simply because his or her judgment proves faulty.

The first sentence of proposed § 2635.101(b)(14) is a verbatim restatement of the principle at section 101(n) of Executive Order 12674 that employees shall try to avoid any action that creates an appearance that they are violating the law or the standards set forth in the proposed rule. This appearance standard is one of long standing, derived from the 1965 Executive order. An additional sentence has been added to § 2635.101(b)(14) to reflect case law and longstanding practice, both of which temper the appearance standard by reference to the perspective of a reasonable person with knowledge of the relevant facts. This is intended to ensure that the conduct of employees is judged by a standard of reasonableness.

Section 2635.101(c) is proposed to caution employees that there are conflict of interest statutes that must be considered in conjunction with the standards of ethical conduct in determining whether particular conduct is appropriate. Synopses of the basic conflict of interest statutes at chapter 11 of title 18 of the U.S. Code are contained in relevant portions of the proposed rule and references to these and other generally applicable statutes are included in subpart I of the proposed rule.

While the definitions set forth in § 2635.102 of the proposed rule are largely self-explanatory, the term agency designee warrants specific comment. The proposed rule includes provisions that require the agency designee to make certain determinations or authorize certain conduct. Because the proposed rule is intended for broad application throughout the entire executive branch, OGE has not undertaken to identify which employees within the various agencies should be delegated those responsibilities. Their designation is left to the individual agencies. Most agencies will find it advantageous to designate a number of individuals as agency designees and there is nothing in the proposed rule that limits designations to individuals who are agency ethics officials. Many agencies will find it appropriate to designate supervisors as agency designees for determinations and authorizations affecting their subordinates.

Consistent with the definition of the term employee at section 503(b) of Executive Order 12674, proposed § 2635.103 clarifies that the proposed rule would not apply to enlisted members of the uniformed services. It would, however, apply to officers of the uniformed services. For employees detailed within the Federal Government for periods in excess of 30 days, proposed § 2635.104(a) would provide guidance intended to reconcile any differences in the nonstatutory ethical standards that may exist between agencies or between branches of the Government. And proposed § 2635.104(b) would give designated agency ethics officials authority to exempt from the gift standards in proposed subpart B those employees detailed for more than 6 months to international organizations or to State or local governments under statutory authorities, such as 5 U.S.C. 3343 and 3371. This exemption authority would be limited to cases in which the organization or governmental entity to which the employee is detailed has its own written gift standards.

Proposed § 2635.104(c) would eliminate any differences in ethical standards that might result from application of different supplemental agency regulations to employees posted overseas. While posted abroad, most employees of civilian agencies and some uniformed officers are subject to the direction, coordination and supervision of the Chiefs of the United States Mission. With the exception of those detailed to international organizations, all others posted abroad are under the

command of the United States area military commander. The proposed section would subject those so attached to the respective supplemental agency regulations of the Department of State or the Department of Defense. Others while abroad, including most employees in a temporary duty travel status, would remain subject to the supplemental agency regulations of their respective employing agencies. The Office of the Legal Adviser, Department of State, has advised that the proposed section would enable the Department of State to use its own supplemental agency regulation in combination with the Department's gift acceptance statute to ensure consistency in the conduct of Federal personnel attached to the mission.

As proposed, subpart A contains authority for agencies to issue regulations supplementing the proposed rule. Other than as contemplated by proposed §§ 2635.203(a), 2635.403(a) and 2635.803, most agencies should not find it necessary to issue supplemental agency regulations. However, OGE recognizes that some agencies will need to augment the proposed rule with standards tailored to their operations. As proposed, § 2635.105 would provide a means by which the uniform regulations may be supplemented by agency-specific regulations consistent with the purposes and format of the proposed rule.

Pursuant to section 301(a) of Executive Order 12674, supplemental agency regulations become effective only upon concurrence by and joint issuance with OGE and publication at agency expense in title 5 of the Code of Federal Regulations. Under proposed § 2635.105(c) agencies may, without issuing a supplemental regulation, delegate authority to agency designees and establish certain procedures necessary to comply with the uniform regulations. Agencies are also free to issue handbooks or similar aids to explain the standards contained in the proposed rule and to issue regulations under authorities other than the Executive order. In the past, some agency standards of conduct have included regulatory provisions that derive from authorities other than Executive Order 11222, such as regulations implementing the Hatch Act. In anticipation of the issuance of this proposed rule as a final regulation, agencies should consult with OGE concerning their authority to preserve any such regulatory provisions.

Section 2635.106 of the proposed rule gives general guidance on disciplinary and corrective action and incorporates the concept set forth in section 504 of Executive Order 12674 that the standards issued under the Executive order are not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. Thus, as noted regarding complaints of discrimination, nothing in the proposed rule makes OGE or an agency ethics official an alternate forum for adjudicating or deciding matters for which other procedures are established.

Section 2635.107 of the proposed rule explains that employees may obtain guidance from agency ethics officials regarding their particular responsibilities under the standards of ethical conduct. It provides assurance that those who obtain and follow that guidance will not be subject to disciplinary action. Although it cannot provide this degree of assurance when the conduct involved violates a criminal statute, it reflects the longstanding practice of the Department of Justice in selecting cases for prosecution to take into consideration an employee's good faith reliance on the advice of agency ethics officials.

III. Gifts From Outside Sources

Subpart B of the proposed rule implements 5 U.S.C. 7353, as added by the Ethics Reform Act of 1989, and section 101(d) of Executive Order 12674. Both provide that an employee shall not solicit or accept gifts from certain (prohibited) sources unless permitted by a regulatory exception. The Executive order and the statute both augment the list of prohibited sources contained in the 1965 Executive order by adding a fourth category—any person or entity seeking official action from the employee's agency.

Section 2635.202(a) of subpart B, as drafted, would prohibit an employee from soliciting or accepting a gift from a prohibited source or a gift given because of the employee's official position, unless the item is excluded from the definition of a gift or falls within one of the exceptions in proposed § 2635.204. While this may appear to expand the scope of the gift prohibitions presently contained in 5 CFR 735.202(a), it reflects OGE's longstanding interpretation of the current requirement at 5 CFR 735.201(a) that an employee avoid any action which might result in or create the appearance of using public office for private gain. This prohibition continues to apply under section 101(g) of Executive Order 12674, as restated at § 2635.101(b)(7) of the proposed rule. Accepting a gift offered because of one's official position creates an appearance of using public office for private gain.

Section 2635.202(b), as drafted, explains the relationship between the standards set forth in proposed subpart B and 18 U.S.C. 201(c)(1)(B). Frequently referred to as the illegal gratuities statute, section 201(c)(1)(B) makes it a crime for a public official "otherwise than as provided by law for the proper discharge of official duty" to demand, seek, receive, accept or agree to receive or accept anything of value "for or because of any official act performed or to be performed by such official or person." As drafted, the language of § 2635.202(b) reflects congressional intent that the acceptance of a gift in accordance with the exceptions and other standards set forth in subpart B will not subject an employee to prosecution for violation of the illegal gratuities statute. Congressional Record for November 16, 1989, at page H8758. By cross-reference to § 2635.202(c)(1) of the proposed rule, § 2635.202(b) balances that purpose with the statutory proviso at 5 U.S.C. 7353(b)(1)(B) that an employee may not accept a gift, even pursuant to a regulatory exception, in return for being influenced in the performance of any official act. While such a gift, if corruptly sought or accepted, would constitute a bribe prosecutable under 18 U.S.C. 201(b)(2)(A), the language of § 2635.202(b) preserves the possibility of prosecution under the illegal gratuities statute where the element of corruption cannot be established.

Section 2635.202(c), as drafted, sets forth five limitations on the use of the exceptions contained in § 2635.204, other than § 2635.204(h). The first reflects the statutory proviso at 5 U.S.C. 7353(b)(1)(B) that a gift may not be accepted in return for being influenced in the performance of an official act. The second makes it clear that any gift that is coerced is improper notwithstanding that it otherwise would come within one of the proposed exceptions at § 2635.204. And the fifth makes it clear that, except as provided in proposed § 2635.202(b), subpart B does not sanction the solicitation or acceptance of any gift that would violate a statute. For clarification, paragraph (5) of the section includes synopses of 18 U.S.C. 201(b), 18 U.S.C. 209 and 41 U.S.C. 423(b)(2).

The limitations in paragraphs (3) and (4) of § 2635.202(c) are derived from the principles of ethical conduct restated at §§ 2635.101 (b)(7) and (b)(8). The acceptance of gifts on a recurring or frequent basis, whether from the same or different sources, gives rise to an appearance of use of public office for private gain. And there are circumstances under which an employee

should decline even an unsolicited gift that falls within the gift exceptions to avoid an appearance of loss of impartiality. While these proposed limitations may appear to leave employees vulnerable to criticism for accepting gifts that fall within the gift exceptions, OGE believes it is inappropriate to authorize the *de minimis* gift exception discussed below without requiring employees to exercise a degree of judgment in accepting and declining gifts.

Section 2635.203 of the proposed rule contains six definitions applicable to subpart B. One of the more significant is the definition of the term prohibited source at § 2635.203(d). While the first four paragraphs of § 2635.203(d) merely restate language in the statute and Executive Order 12674, the fifth is an application of those definitions to certain organizations whose members are prohibited sources. The extension of the prohibited source definition to include an organization, the majority of whose members are themselves prohibited sources, is consistent with OGE informal advisory opinion 84 × 5 issued May 1, 1984 and amended August 24, 1984, as published in The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics (1979–1988).

As contemplated by Executive Order 12674 and 5 U.S.C. 7353, the proposed definition of the term gift at § 2635.203(b) is expansive. Minor differences between the language of Executive Order 12674 and the statute have been reconciled by adopting the language from the Executive order which limits the definition of a gift to anything of monetary value. The proposed definition includes seven specific exclusions. Some, such as the exclusions for loans from financial institutions, broadly available commercial discounts, and rewards and prizes parallel exceptions currently found in the model regulations at 5 CFR 735.202(b) and in most agency standards of conduct regulations. One effect of treating these as exclusions from the definition of a gift, rather than as exceptions under proposed § 2635.204, is to permit employees to accept these items without regard to the appearance limitations at proposed § 2635.202(c).

Greeting cards, plaques, certificates, trophies, and similar items which have only nominal intrinsic value are excluded from the proposed definition of the term gift to enable employees to accept such items without having to consider whether their market value falls within the *de minimis* exception at § 2635.204(a). Plaques and certificates are frequently presented to an employee in a public forum. Because they are ordinarily engraved, embossed or otherwise adorned with the employee's name, they ordinarily are of value to no one other than the employee and the declination of such items causes needless discomfort to both the employee and the donor. A plaque or trophy which is itself an art object or utilitarian item, such as a clock, or which incorporates materials of significant value would not come within this exclusion.

The exclusions for anything "paid for by the Government or secured by the Government under Government contract" and for items "accepted by the Government under specific statutory authority" are intended simply to clarify that items provided to the employee by the Government are not gifts from outside sources and, thus, are not covered by subpart B.

The proposed definition of the term agency at § 2635.203(a) warrants comment. For use throughout the proposed rule, the term agency is defined at proposed § 2635.102(a) to have the meaning set forth in 5 U.S.C. 105. That definition incorporates the definition at 5 U.S.C. 101 of executive departments. Thus, the agency of an employee of the Department of the Army is the entire Department of Defense and, as to that Army employee, a Navy contractor is a prohibited source. For purposes of subpart B, proposed section 2635.203(a) gives the fourteen departments authority, by supplemental agency regulation, to designate agencies within the department as separate agencies. Thus, for example, the Department of Defense could establish the Army, Navy and Air Force as separate agencies for purposes of subpart B. This designation would not be effective, for example, as to the Secretaries of the three services or to any Department level employee.

Section 2635.204, as proposed, sets forth exceptions to the basic prohibition against solicitation or acceptance of a gift from a prohibited source or given because of official position. Under present 5 CFR 735.202 and 2635.101, as well as agency standards of conduct regulations currently in effect, the gift exceptions are narrowly drawn. For example, they have permitted acceptance of promotional items of nominal value and food and refreshments of nominal value on infrequent occasions in the course of a luncheon or dinner meeting. While the limited nature of these exceptions has ensured that employees do not accept gifts in circumstances that would subject them to criticism, the exceptions have themselves been a source of criticism. Many have complained that the exceptions are so overly technical and difficult to apply to specific situations that they tend to trivialize agency ethics programs.

One of the more significant features of the draft rule is the proposal at § 2635.204(a) to adopt a *de minimis* exception which would allow employees to accept unsolicited gifts having an aggregate market value of $25 or less per occasion. Within any calendar year, an employee could not use this particular exception to accept gifts with an aggregate market value in excess of $100 from any single source. This *de minimis* exception has the virtue of establishing a standard that can be easily understood and applied to any gift situation. While it represents a significant departure from prior gift rules applicable to executive branch employees, OGE believes it is a reasonable and simple standard that reduces the need for employees to become aware of a number of technical exceptions dealing with specific situations.

The underlying statute, 5 U.S.C. 7353, was added by the Ethics Reform Act of 1989 and applies to individuals serving in all three branches of Government. Titles VIII and IX of the Reform Act concurrently amended the rules of the House of Representatives and Senate to create a $75 *de minimis* exception applicable to Members, as well as to employees, of both houses of Congress. The rules of the House of Representatives allow the acceptance of gifts with a fair market value of $75 or less from prohibited sources. The Senate rules allow acceptance of gifts less than $75. While the rules of both houses restrict the aggregate amount Members and employees may accept from any single source, gifts within the *de minimis* amount established for the respective house are disregarded in determining the aggregate value of gifts received from a single source. Unlike the legislative branch rules, § 2635.204(a) of this proposed rule for the executive branch would require the aggregation of every *de minimis* gift, whatever its value, received from a single source for purposes of applying the annual $100 aggregate limitation.

Section 2635.204(b), as proposed, is similar to the exception for gifts from friends and relatives that has long been permitted under most agency standards of conduct regulations currently in effect.

Section 2635.204(c) is a proposed new exception that is necessary to accommodate the expansion of the basic gift prohibitions to cover gifts given because of an employee's official position. Under this section, an employee could accept certain benefits or discounts even though they are available because of his or her status as a Federal employee. Opportunities available to the general public or to all Government employees or all uniformed personnel are excluded from the proposed definition of a gift at § 2635.203(b)(2) of this subpart. The exception at proposed § 2635.204(c) is addressed to discounts and other benefits offered to a more limited class. Where such an offer is extended by someone other than a prohibited source to a class encompassing a smaller group of Federal employees, such as a discount offered to all employees of a particular agency, the offer may be accepted if its availability is not limited in a manner that discriminates on the basis of rank, rate of pay, or type of official responsibility. For example, this exception would not permit the acceptance of a discounted membership rate offered only to employees of an agency who are members of the Senior Executive Service. It would, however, permit a discount offered by someone other than a prohibited source to all employees of an agency or to all employees of an agency in a particular city or county.

Section 2635.204(d)(1), as proposed, would allow employees to accept certain awards for public service or individual achievement. Many such awards are given for accomplishments that relate to an employee's official responsibilities and, thus, in the absence of this exception, would be prohibited by § 2635.202(a)(2), even when bestowed by someone other than a prohibited source. The exception allows an employee to accept such an award, other than cash or an investment interest, having a market value of $200 or less when given by someone other than a person whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. Other awards given by such persons, including any award of cash or any noncash award worth more than $200 may be accepted when approved in writing by an agency ethics official in accordance with the standards specified. Regardless of the value of other gifts given in connection with the award, meals and entertainment for the employee and for members of his or her family at any event at which presentation or recognition takes place may be accepted. Such acceptance is not limited to meals and entertainment extended to members of the employee's immediate family. Acceptance would be appropriate, for example, if there is a family relationship in the nature of that encompassed by the definition of a relative at 5 U.S.C. app. 109(16). When approved in writing by an agency ethics official in accordance with the standards specified in § 2635.204(d)(2), employees also may accept honorary degrees and personal tributes, as well as meals and entertainment for themselves and their families at the event at which the presentation or tribute takes place.

Section 2635.204(e), as proposed, contains three exceptions that relate to the outside business and employment relationships of employees and their spouses. Under Executive Order 12674, special Government employees are subject to the same basic principles of ethical conduct that apply to regular employees. Because special Government employees serve the Government only temporarily, often on an intermittent basis, it is expected that many will have other employment and business relationships. The proposed exception at § 2635.204(e)(2) is intended to ensure that the gift prohibitions do not interfere with proper non-Federal employment and business pursuits of special Government employees. Proposed § 2635.204(e)(1) would create a similar exception for benefits which result from the business or employment relationships of any employee's spouse. Section 2635.204(e)(3), as proposed, covers employees seeking employment with prohibited sources. After the employee has complied with the disqualification requirements of subpart F of the proposed rule, the employee may accept transportation, entertainment or any similar gift customarily provided by the prospective employer in connection with its conduct of employment discussions.

Section 2635.204(f) relating to gifts from political organizations is proposed to ensure that the standards of conduct do not hamper the political activities of the relatively small class of higher-level employees who are exempt from the Hatch Act restrictions. It is limited to items provided by political organizations. While these organizations ordinarily will not be prohibited sources, invitations to speak or attend political fundraising events may be extended to these employees because of the positions they hold with the Federal Government.

Where attendance is determined to be in the interest of the agency, proposed § 2635.204(g) would allow an employee to accept a sponsor's offer of all or part of a gift of free attendance at widely-attended gatherings concerning subjects of mutual interest to a number of parties that the employee attends on his own time and at events at which the employee is a speaker or panel participant. Where the employee's acceptance of free attendance is authorized, proposed § 2635.204(g)(5) would provide limited authority for attendance by an accompanying spouse. The limitation proposed at § 2635.204(g)(4) regarding the source of funds used to finance the employee's attendance is added to ensure that the invitation is from the sponsor of the event and that a nominal sponsor is not used to disguise an invitation from another source.

With an exception for days on which the employee is invited to serve as a speaker or panel participant, proposed § 2635.204(g)(2) would require a written determination by the agency designee that the employee's attendance at the event is in the interest of the Government. If the sponsor has interests that would be substantially affected by performance of the employee's duties, that determination must include an appearance analysis. The fact that an employee is invited to serve as a speaker on one of several days of an event does not necessarily permit the employee's acceptance of waiver of the attendance fee for the entire event. Without a written determination of agency interest, the employee may only accept free attendance at substantive portions of the event that take place on the day he or she speaks. Even though a sponsor offers free attendance at an entire event, speakers and others should only be authorized to accept free attendance at those portions of the event that are in the agency's interest.

The exception for widely-attended gatherings at § 2635.204(g)(1)(ii) is one that has been incorporated into the standards of conduct regulations of many agencies. While these events are often sponsored by associations, the exception is not limited to events for which there is an association or other group sponsor. The exception for speakers and panel participants at § 2635.204(g)(1)(i) merely recognizes what has become customary practice—individuals invited as speakers are frequently invited to participate without charge in portions or all of the events at which they are speaking.

Section 2635.204(h), as proposed, is applicable only to gifts to the President or Vice President and to members of their families. The President and Vice

President are not subject to the Standards of Ethical Conduct for Government Officers and Employees imposed by Executive Order 12674. With the exception of 18 U.S.C. 201, they are not subject to the conflict of interest statutes of Chapter II of title 18 of the United States Code. However, 5 U.S.C. 7353, added by the Ethics Reform Act, adopted a broad definition of the term employee that, for the first time, results in the gift prohibitions being made applicable to individuals holding elected positions in all three branches of Government, including the President and Vice President.

The ceremonial and other public duties of the President and Vice President make it impractical to subject them to standards that require an analysis of every gift offered. They are required to file an SF 278 public financial disclosure statement listing gifts aggregating $100 or more from any one source ($250 or more in the case of gifts or reimbursements of transportation, lodgings, food or entertainment). They need not aggregate gifts of $75 or less. In the case of an elected official of the stature of the President or Vice President whose personal conduct is closely scrutinized by the public and the press, this requirement for public disclosure provides sufficient restraint on their acceptance of gifts. To the extent that it does not permit scrutiny of gifts worth less than the amount that triggers the reporting requirement, it is tantamount to an extension to the President and Vice President of an exception not unlike the $75 *de minimis* exception applicable to Members of Congress. OGE anticipates that, as their predecessors have done in the past, the President and Vice President and their successors will establish their own discretionary standards for acceptance of gifts.

Paragraphs (i) and (j) of § 2635.204, as proposed, are crossreferences. The former refers employees to additional exceptions, if any, contained in applicable agency supplemental regulations. Section 2635.204(j) is a reference to additional authorities under which employees may accept gifts; it is not, itself, authority to accept any gift.

Section 2635.205 of the proposed rule deals with the proper disposition of gifts that cannot be accepted, and makes it clear that an employee has a responsibility to return or pay for such gifts. However, perishable gifts, such as food or flowers, may be given to charity or may be used or consumed when shared with others within the recipient's office.

Upon final adoption of the proposed rule, the temporary OGE and Office of Personnel Management rule at 5 CFR 2635.101 continuing the effectiveness of existing agency gift restrictions and exceptions will be revoked. See 54 FR 53310–53311 (December 28, 1989) and the discussion at part X of this preamble, below.

IV. Gifts Between Employees

Subpart C of the proposed rule is intended to supersede 5 CFR 735.202(d), which implements the statutory prohibitions in 5 U.S.C. 7351, Gifts to Superiors. The amendment to that statute by the Ethics Reform Act of 1989 brings the penalties for improper gifts into line with those for violation of the standards of ethical conduct and gives OGE authority to issue implementing regulations applicable to officers and employees of the executive branch.

Because of the statutory definition of the term employee in 5 U.S.C. 7351, the statute does not apply to officers of the uniformed services. In exercising its general rulemaking authority under Executive Order 12674 and title IV of the Ethics in Government Act, OGE nevertheless has determined that the prohibitions on gifts between employees should be applied to officers of the uniformed services to avoid issues of misuse of public office and lack of impartiality that arise when gifts are accepted by superiors from their subordinates. Thus, as a matter of regulation, subpart C of the proposed rule would extend to officers of the uniformed services the same prohibitions as are contained in 5 U.S.C. 7351.

As drafted, proposed § 2635.302(a)(1) amplifies the statutory prohibitions against giving or soliciting for gifts to superiors by adding the phrase directly or indirectly to ensure that the prohibitions are not circumvented by gifts given by the subordinate's family members or by others at the behest of the subordinate. The term indirectly is defined at proposed § 2635.303(b). Proposed § 2635.302(a)(2) amplifies the statutory prohibition against soliciting contributions for gifts to superiors to make it clear that the prohibition applies regardless of whether the gift is solicited for an individual who is the superior of the employee making the solicitation or of the employee from whom a contribution is sought.

Proposed § 2635.302(b) amplifies the statutory language prohibiting any employee from accepting a gift from an employee receiving less pay by adding the phrase "directly or indirectly" to ensure that the prohibition is not circumvented by gifts to family members or to persons designated by the employee receiving the greater amount of pay. For this purpose, the term indirectly is defined at proposed § 2635.303(b) by cross-reference to the definition of that term in subpart B, Gifts from Outside Sources. The statutory prohibition on acceptance of gifts does not precisely mirror the restrictions on giving gifts to superiors. It is broader in scope, prohibiting gifts from any employee receiving less pay, regardless of whether there is a superior-subordinate relationship between donor and recipient. Proposed § 2635.302(b) addresses the unnecessarily broad reach of this prohibition by permitting gifts based on a personal relationship where there is no superior-subordinate relationship between donor and recipient.

Proposed § 2635.302(c) provides that, notwithstanding any exception at proposed § 2635.304, an official superior shall not coerce the offering of a gift from a subordinate.

The definitions of the terms gift and market value in proposed § 2635.303 (a) and (c) include cross-references to the definitions of those terms in subpart B, Gifts from Outside Sources. The definitions have been amplified, however, to ensure that the statutory prohibitions do not interfere with carpool and other mutual arrangements in which there is a proportionate sharing of the expense or effort between employees. The proposed definition of official superior at § 2635.303(d) is drafted to make clear that an employee may have more than one official superior and that individuals in the supervisory chain who direct or evaluate and, thus, supervise the employee's immediate and other superiors are also official superiors of the employee.

The phrase voluntary contribution is defined at proposed § 2635.303(f) to ensure that no employee is coerced to contribute toward even a modest gift for an official superior. Although employees may be given the opportunity to contribute to gifts for superiors, the amount of any contribution they may wish to make is to be left entirely to their discretion. An employee soliciting contributions may suggest an amount to be contributed or may respond to an employee's inquiry regarding an appropriate amount to be contributed if it is made clear that the employee whose contribution is sought is free to contribute less or nothing at all. The definition accommodates the frequent practice of organized luncheons or receptions to honor employees upon special occasions, such as retirement. It

specifically provides that an employee who freely chooses to pay a proportionate share of the total cost in order to attend such an event will be deemed to have made a voluntary contribution.

The proposed rule would create three categories of exceptions to the prohibitions of § 2635.302 (a) and (b). The first is a set of general exceptions at proposed § 2635.304(a) which can be used on an occasional basis, including any occasion on which gifts are traditionally given or exchanged. The statute contemplates that the implementing regulations include an exception for occasions on which gifts are traditionally given or exchanged. After considering a separate exception based on a *de minimis* amount for occasions such as Christmas and birthdays, OGE concluded that an across-the-board $10 *de minimis* exception to be used occasionally and on occasions marked by the exchange or giving of gifts would cause the least confusion. Proposed § 2635.304(a)(1), thus, includes an exception for items with an aggregate market value of $10 or less per occasion.

The three exceptions at § 2635.304 (a)(2) through (a)(4) are proposed to ensure that the subordinate-superior relationship is a comfortable one that allows for an appropriate degree of social interaction. The exception for food and refreshments shared in the office among several employees is intended to permit all members of an office to participate in the modest social events that are common throughout the Government. The exception for personal hospitality provided at the employee's residence is included to reflect current practice. While the statutory prohibition against gifts to superiors is one of long standing, it ordinarily has not been applied to prohibit a subordinate from occasionally inviting a superior to share in a meal at the subordinate's residence or to require a superior's exclusion from a party given in the subordinate's home. The exception at proposed § 2635.304(a)(4) is intended to cover gifts, sometimes referred to as hostess gifts, given by the recipient of personal hospitality. Under this exception, an employee invited to dinner at the home of his official superior may bring a bottle of wine, even though its market value exceeds $10. The proposed exception at § 2635.304(a)(5) is included to ensure that the limitations on gifts between employees do not interfere with the Government's voluntary leave transfer program.

The second category of exceptions for special, infrequent occasions proposed at § 2635.304(b) is similar to the current exception at 5 CFR 735.202(d) for voluntary gifts of nominal value "made on a special occasion such as marriage, illness, or retirement." Consistent with current practice, proposed § 2635.304(b) allows gifts in recognition of infrequently occurring occasions of personal significance and upon occasions such as retirement, resignation or transfer that terminate the superior-subordinate relationship. Gifts on such occasions are not limited to any particular amount, but must be appropriate to the occasion.

The third set of exceptions at proposed § 2635.304(c) specifies those occasions or items for which voluntary contributions may be solicited or made. They are limited to the special, infrequent occasions described in the preceding paragraph and to contributions for food and refreshments to be shared in the office among several employees. Thus, an employee could not solicit contributions from fellow employees for a birthday present for his or her official superior but could give an individual gift worth $10 or could solicit contributions to buy a cake to be shared within the office in celebration of that occasion.

V. Conflicting Financial Interests

Subpart D of the proposed rule contains two sets of standards addressing the problem of financial interests that, in the absence of some remedial step on the employee's part, would conflict with the duties he or she performs for the Government. The standards at proposed § 2635.402 are based on 18 U.S.C. 208(a); the standards at proposed § 2635.403 are required by the principle of ethical conduct restated at proposed § 2635.101(b)(2) of this part. Pending the issuance of more extensive regulations interpreting 18 U.S.C. 208(a), proposed § 2635.402 is included here as necessary to give meaning and context to proposed § 2635.403 and to the impartiality provisions of subpart E, as well as to the provisions of subparts F and H applicable, respectively, to seeking other employment and outside activities.

Proposed § 2635.402 is a restatement of 18 U.S.C. 208(a), amplified to reflect current interpretation of the law and to set forth guidance on means (disqualification, waiver, and divestiture) for avoiding a violation of the statute. The statute prohibits self-dealing by Federal employees. More specifically, it prohibits an employee from participating personally and substantially in any particular matter which, to the employee's knowledge, will affect the employee's own financial interest or that of:

- The employee's spouse, minor child, or general partner;
- Any person the employee serves as officer, director, trustee, general partner or employee; or
- Any person with whom the employee is negotiating for or has an arrangement concerning prospective employment.

While 18 U.S.C. 208(a) prohibits an employee from participating in a particular matter affecting the financial interests of a person with whom he or she is negotiating for or has an arrangement concerning future employment, that particular application of the statute is addressed in subpart F, Seeking Other Employment. There it is combined with standards that impose a similar disqualification obligation upon employees who have taken action to seek employment that falls short of negotiations.

Interests other than the employee's own that are attributed to him or her under 18 U.S.C. 208(a) are referred to as imputed interests and are defined as such in proposed § 2635.402(b)(2). The statutory prohibition at § 2635.402 has been amplified by the phrase direct and predictable to describe the effect on an employee's own or an imputed interest that will require disqualification or other action to avoid a statutory violation. The definition of the phrase personal and substantial is derived from existing regulations at 5 CFR 2637.201(d) issued under the prior version of the post-employment statute, 18 U.S.C. 207, which still applies to those who left Government before January 1, 1991.

The proposed explanation at § 2635.402(c) of the disqualification obligation imposed by the statute warrants specific comment. For most employees to accomplish disqualification, the section imposes no requirement beyond nonparticipation in the matter which affects his or her own or an imputed financial interest. However, depending upon his or her particular duties, it may be necessary for an employee to notify a supervisor of the interest that creates a conflict in order to avoid assignments that would result in violation of the statute.

Unless the individual employee is specifically asked to file a written statement by an agency ethics official or is required to provide evidence of compliance with a recusal requirement contained in an ethics agreement, no requirement for a written disqualification statement is proposed. The statute does not require any formality beyond nonparticipation. A possible regulatory requirement for

notice and written disqualification statements was rejected as unnecessarily burdensome. Most employees can avoid conflicts by properly arranging their assignments with a supervisor. It is often prudent and never inappropriate for an employee to file a written disqualification statement. The proposed regulation includes language and a related example that should cause an employee to consider whether the particular nature of an assignment or of the interest affected makes it prudent to create a written record of the disqualification and, in any given case, an agency ethics official has authority to request a written disqualification statement. However, a written disqualification statement will not protect an employee from prosecution under 18 U.S.C. 208(a) if, in the absence of a waiver, he or she participates personally and substantially in a particular matter affecting his or her own or an imputed financial interest.

Proposed § 2635.402(d) restates the criteria in 18 U.S.C. 208(b) which must be met before a waiver may be issued permitting an employee to participate in a matter from which he or she is otherwise disqualified. OGE will soon be issuing regulatory waivers permitted by 18 U.S.C. 208(b)(2). Pending issuance of those waivers, regulatory waivers issued by agencies under 18 U.S.C. 208(b)(2) in effect prior to November 30, 1989 (the date of amendment of the statute by the Ethics Reform Act) continue to apply.

Violation of 18 U.S.C. 208(a) can always be avoided by selling or otherwise disposing of the interest that would otherwise be affected by performance of the employee's duties. Thus, proposed § 2635.402(e) provides that an employee may voluntarily divest the conflicting interest or, in accordance with proposed § 2635.403, may be required to sell or otherwise divest a particular interest.

Proposed § 2635.402(f) is simply practical advice that an employee should share with a superior enough information about potential conflicts to avoid assignments from which he or she will be disqualified by 18 U.S.C. 208(a).

Proposed § 2635.403 implements the principle restated at § 2635.101(b)(2) of this part that employees shall not hold financial interests that conflict with the conscientious performance of duty. The proposed implementation is necessarily brief. One goal of Executive Order 12674 is a uniform regulation that can be used by executive branch agencies with little further implementation. The area of financial interests, however, is one in which further implementation by some agencies will be necessary. Whether a financial interest conflicts with performance of a particular employee's duties is a determination that ordinarily must be made on an agency-by-agency or case-by-case basis.

Section 2635.403, as proposed, provides that an employee shall not acquire or hold a financial interest that he or she is prohibited from holding by statute, by agency regulation, or by reason of a determination that the holding of such interest would materially impair the employee's ability to perform the duties of his or her position or adversely affect accomplishment of the agency's mission. The reference to statutory prohibitions serves as a caution to employees that they may be subject to agency-specific statutes that prohibit them from holding specified interests. For example, 42 U.S.C. 7211 prohibits supervisory employees of the Department of Energy from having any pecuniary interest in an energy concern.

Section 2635.403(a) is proposed authority under which agencies may, by supplemental agency regulation, prohibit all agency employees or any category of agency employees from acquiring or holding particular financial interests. An agency regulatory prohibition must be based on a determination that the acquisition or holding of such financial interests could give rise to questions concerning the impartiality and objectivity with which agency programs are administered. Proposed § 2635.403(b) provides authority for agencies to direct an employee to sell or to otherwise divest financial interests that will require disqualification from matters so central or critical to the performance of his or her official duties that the employee's ability to perform the duties of the Government position would be materially impaired. It also provides authority to direct divestiture where the employee's holding of an interest would adversely affect accomplishment of the agency's mission because the employee's services cannot be readily replaced.

For purposes of proposed § 2635.403 (a) and (b), the term financial interest is not limited to interests that would require disqualification under 18 U.S.C. 208(a). For example, it would be appropriate for an agency that regulates banks to prohibit its employees from obtaining loans from regulated banks even though the employee's obligation to repay the loan would not be affected by any agency matter affecting the bank. Except as provided in § 2635.402(c)(2), it is limited, however, to interests owned by the employee or imputed to the employee and over which he or she has control. Since disciplinary action would be unlikely to be successful against an employee whose spouse refused to sell stock that was entirely the spouse's own personal property, interests such as these, over which the employee does not have control, are beyond the reach of proposed § 2635.403 (a) and (b). This is true even though the spouse's continued holding of the stock would, under 18 U.S.C. 208(a), preclude the employee from performing particular duties.

Proposed § 2635.403(c)(2) is intended to address certain interests imputed to the employee over which he or she does not have control, including the financial holdings of a person the employee serves as officer, director, trustee, general partner or employee. It would treat as the employee's own financial interest his or her service with the entity, regardless of whether the employee receives compensation for that service. Unlike the financial holdings of the entity, over which he or she may have little or no control, an employee does have control over whether he or she serves as its officer, director, trustee, general partner or employee. By virtue of this definition, an agency would have authority to direct an employee's resignation from a position as a director of a corporation whose interests conflict with the performance of his or her official duties even though the employee may not have control over the affected corporate interest. It is sufficient that the employee can resign his directorship.

VI. Impartiality in Performing Official Duties

Subpart E implements the ethical principles restated at § 2635.101(b)(8) of this proposed rule that an employee shall act impartially and not give preferential treatment to any private organization or individual. To the extent that an employee's lack of impartiality in the performance of official duties might inure or appear to inure to his or her own benefit or to the benefit of certain other persons, the subpart implements the principles restated at § 2635.101(b)(7) and (b)(14) that an employee shall not use public office for private gain and shall endeavor to avoid even an appearance of violating these ethical principles.

Proposed § 2635.502 is addressed to the troublesome area commonly referred to as appearance problems. Most, though not all, appearance problems arise when, because of some personal or business relationship, an employee can be viewed as failing to act impartially in the performance of his or her official duties. The proposed section would

provide a flexible standard for addressing those assignments that would cause a reasonable person to question an employee's impartiality, either because the matter affects the financial interests of a member of the employee's household or because a person with whom the employee shares a particular personal or business relationship is a party to the matter. Proposed § 2635.502(b)(1) identifies as covered relationships to be taken into consideration for this purpose five categories of personal relationships. Questions of lack of impartiality tend to arise when employees participate in matters that affect the financial interests of those with whom they have relationships that fall within these five categories.

Matters such as general rulemaking and legislation tend to raise fewer concerns about an employee's impartiality than do matters to which there are specific parties and, thus, proposed § 2635.502 uses the concept of particular matters involving specific parties found in the post-employment statute, 18 U.S.C. 207, to pinpoint the most significant appearance problems. Notwithstanding the section's use of this concept and its focus on specified relationships, questions about an employee's impartiality can arise from any number of interests or relationships an employee might have and in connection with his or her participation in matters that do not necessarily involve specific parties. Proposed § 2635.502 therefore provides that an employee should use the process set forth in that section when circumstances other than those specifically described raise questions about his or her impartiality in the performance of official duties.

Under current 5 CFR 735.201a(d), employees have long been obligated to act impartially and to avoid even the appearance of loss of impartiality. However, they have not been provided a specific mechanism to resolve difficult issues of whether, in particular circumstances, a possible appearance of loss of impartiality is so significant that it should disqualify them from participation in particular matters. The proposed rule would provide employees with a means to ensure that their conduct will not be found, as a matter of hindsight, to have been improper. The disqualification procedures are similar to those proposed for dealing with disqualifying financial interests under subpart D.

In those cases that do not involve a financial interest that would be disqualifying as a matter of law under 18 U.S.C. 208(a), proposed § 2536.502(d) would place responsibility for the necessary authorization with the agency designee. As proposed, this section would require the agency designee to determine whether the Government's need for the employee's participation in a particular matter outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. The benefit of this procedure is twofold. Once the threshhold determination has been made by the employee, it allows the agency to determine whether a potential appearance problem is or is not so significant as to be disqualifying in a particular matter, and it relieves the employee of responsibility for the ultimate decision regarding the propriety of his involvement in a matter under circumstances where his judgment is likely to be questioned. It is intended to give the agency broad discretion, including the discretion to direct an employee's participation in a matter from which the employee has disqualified himself or herself on the basis of his or her assessment of the appearance implications. In explaining the relationship between proposed subpart E and proposed subparts D and F, the note following § 2635.501 states that a waiver granted under the authority of 18 U.S.C. 208(b) will always permit the employee's participation in a matter covered by that waiver.

Section 2635.502(b)(1)(i) excludes from consideration under the more flexible standards in 2635.502 an employee's participation in matters affecting the interest of a person with whom he or she is seeking employment. An employee who is seeking employment with a person affected by the performance of his official duties must comply instead with subpart F, Seeking Other Employment.

As proposed, § 2635.503 is a two-year disqualification requirement that applies to an employee who receives an extraordinary severance or other payment in excess of $10,000 from a former employer prior to entering Federal service. It does not apply to any payment, regardless of amount, made pursuant to the former employer's established compensation or benefits plan. For this purpose, the term former employer is broadly defined to include any person the employee served as an officer, director, trustee, partner, agent, attorney, consultant, contractor, or employee.

Prior to the holding of the Supreme Court in *Crandon* v. *U.S.*, 110 S. Ct. 997 (1990), an extraordinary payment of the type described in proposed § 2635.503 was thought to be precluded as an illegal supplementation of salary in violation of 18 U.S.C. 209. The Supreme Court held, however, that such payments received prior to entering on duty do not violate this statute. Nevertheless, an extraordinary payment from a former employer received prior to beginning Federal service raises a legitimate concern, and thus an appearance, that the employee may not act impartially in particular matters to which the former employer is a party or represents a party. The disqualification requirement that would be imposed by § 2635.503 is intended to address those appearance issues.

In the absence of a statutory waiver, an employee who retains a financial interest in a former employer, as through continued participation in its retirement plan, will be required by 18 U.S.C. 208(a) and proposed § 2635.402 of this part to disqualify himself or herself from particular matters affecting the former employer where the particular matters would thereby affect his or her own financial interest. Proposed § 2635.503 would not impact upon that obligation. Rather, it would impose an additional disqualification requirement, triggered by the receipt of an extraordinary payment, that applies regardless of whether the employee severed all financial ties with the former employer upon entering Federal service.

VII. Seeking Other Employment

Subpart F of the proposed rule contains a disqualification requirement applicable when an employee seeks employment with a person whose financial interests otherwise would be affected by performance or nonperformance of the employee's official duties. It implements the principle restated at § 2635.101(b)(10) of this proposed rule that an employee shall not engage in seeking or negotiating for employment that conflicts with his or her official Government duties and responsibilities.

The proposed subpart combines standards imposed by criminal statute with standards imposed by Executive Order 12674. In part, it implements 18 U.S.C. 208(a) which requires an employee's disqualification from participation in any particular matter affecting the financial interests of a person with whom he or she is negotiating or has any arrangement concerning prospective employment. Beyond this statutory requirement, it addresses the issues of lack of impartiality that require disqualification from any particular matter that affects the financial interests of a prospective

employer, even though the employee's actions to seek employment may fall short of actually negotiating for employment. Differences between the statutory and nonstatutory standards account for different waiver and authorization standards applicable depending upon whether the employee has or has not begun negotiating for employment.

The disqualification obligation applicable when seeking employment is set forth in proposed § 2635.604. It includes a requirement to take necessary steps to effect disqualification before beginning to seek employment if an employee wishes to initiate employment contacts with a person whose financial interests he or she knows will otherwise be directly affected by a particular matter to which he or she is assigned. Where the prospective employer initiates the contacts, or where an employee's assignment to a matter affecting the financial interests of a prospective employer occurs after the employee has begun seeking employment, disqualification must be accomplished in time to ensure that the employee does not participate in a matter affecting his or her prospective employer. At proposed § 2635.602, the note makes it clear that the subpart would impose no obligation upon an employee who is seeking employment with a person whose financial interests would not be affected by the performance or nonperformance of his or her official duties. That section also contains cross-references to pertinent regulations dealing with outside employment, post-employment, and interviews.

The proposed definition of the phrase seeking employment at § 2635.603(b) is fundamental to the structure of the subpart. It encompasses both the statutory concept of negotiating for employment and the concept found in the Executive order of conduct, short of negotiating, that constitutes seeking employment. The phrase prospective employer is generally defined at proposed § 2635.603(c) as any person with whom the employee is seeking employment. The proposed definition of employment at § 2635.603(a) makes it clear that the term encompasses contractual and other business relationships if they involve the provision of personal services by the employee. It also serves to exclude from the coverage of subpart F instances in which employment is sought with the Federal Government. Issues of lack of impartiality that may arise when an employee is seeking other Federal employment are to be addressed under subpart E, Impartiality in Performing Official Duties.

The phrase seeking employment is defined in terms of a beginning and ending point. Under the proposed definition at § 2635.603(b)(1), employment contacts initiated by the employee, as through the mailing of a resume, will mark the point at which the employee has begun seeking employment. For an employee, other than a special Government employee, the only exception is for a communication made for the sole purpose of requesting a job application. Where the initial employment contact is made by someone other than the employee, any response by an employee, other than rejection, will mark the point at which the employee has begun seeking employment. Although seeking employment will ordinarily have begun with an initial contact by the employee or the prospective employer, bilateral negotiations concerning prospective employment always constitute seeking employment. Based on case law interpreting 18 U.S.C. 208(a), the term negotiating is defined at proposed § 2635.603(b)(1) as any discussion or communication with another person mutually conducted with a view toward reaching an agreement regarding possible employment with that person. Any communication that might occur after an initial contact that constitutes seeking employment has taken place and before the onset of negotiations also constitutes seeking employment. The proposed definition of the term prospective employer at § 2635.603(c) includes standards intended to preclude an employee or a prospective employer from circumventing the requirements of subpart F by interposing an agent, such as an employment search firm, for the purpose of making employment contacts or conducting employment negotiations.

Under the proposed definition at § 2635.603(b)(2)(i), most employees who have begun seeking employment will no longer be seeking employment when either party rejects the employment possibility and all discussions of possible employment have terminated. Where the only employment contact consists of the employee's unilateral submission of an unsolicited resume or employment proposal, in the absence of a response from the recipient indicating an interest in employment discussions, proposed § 2635.603(b)(2)(ii) would treat the employee as nevertheless seeking employment for a period of 2 months from dispatch of the resume or proposal. Earlier communication of a rejection by the recipient of the resume or proposal would, at that time, terminate seeking employment with that particular prospective employer.

Under proposed § 2635.603(b)(1)(ii)(B), a special Government employee would not be deemed to have begun seeking employment with the recipient of his or her unsolicited resume or other employment proposal if the recipient's financial interests would be affected by the performance of the special Government employee's official duties only as part of an industry or other broadly-defined class. Under this exception, the special Government employee would be deemed to have begun seeking employment upon receipt of any response indicating an interest in discussion of the unsolicited resume or employment proposal and would, at that time, become subject to the disqualification requirement at proposed § 2635.604. This exception for unsolicited resumes and other employment proposals would not extend to unilateral efforts to obtain employment with a person affected uniquely or distinctly by performance of the special Government employee's official duties. The less restrictive standard for special Government employees is proposed in recognition of the fact that they serve the Government only on an intermittent or temporary basis and are expected to maintain other employment and business relationships.

The disqualification requirement imposed by proposed subpart F is not absolute. Where an employee is negotiating concerning prospective employment, proposed § 2635.605(a) provides that the employee's participation in a particular matter affecting the financial interests of his or her prospective employer may be permitted on the basis of a waiver granted under the explicit authority and standards contained in 18 U.S.C. 208(b). Where the employee has not yet begun to negotiate, proposed § 2635.605(b) would provide for use of the authority at § 2635.502(d) to permit participation in a matter from which the employee otherwise would be disqualified. This two-part authority is a necessary consequence of combining disqualification requirements that arise from a statute and from the ethical principles into a single subpart.

As with those disqualifications required by subpart D, Conflicting Financial Interests, and subpart E, Impartiality in Performing Official Duties, proposed § 2635.604 provides that disqualification required when seeking employment is accomplished by nonparticipation in the matter that

affects the prospective employer's financial interests. Under proposed § 2635.604(b), a written disqualification statement is not required unless requested by an agency ethics official or unless the employee is required to provide evidence of compliance with a recusal requirement imposed by an ethics agreement. However, the proposed regulations contain examples illustrating circumstances in which it may be prudent for an employee to reduce the fact of his or her disqualification to written form to create a record that he or she has acted properly. A written disqualification statement will not protect an employee who has in fact participated in a matter from which he or she is disqualified by subpart F.

Proposed § 2635.606(a) reflects the requirement of 18 U.S.C. 208(a) for an employee's disqualification throughout any period that the employee has an arrangement concerning future employment or while he or she is in fact employed. Proposed § 2635.606(b) is intended to give the agency flexibility to require an employee's disqualification from matters affecting a person with whom he or she has sought employment, even after employment negotiations have been terminated unsuccessfully, if there is reason to be concerned that the employee's participation may appear to be less than wholly impartial.

VIII. Misuse of Position

In subpart G, the proposed rule would consolidate four of the principles of ethical conduct that are directed at preventing misuse of public office. The prohibitions against use of public office for private gain, improper use of nonpublic information and misuse of Government property found in the principles of ethical conduct restated at proposed § 2635.101(b)(7), (b)(3) and (b)(9) of this part are similar to the prohibitions currently found respectively in 5 CFR 735.201a(a), 735.205 and 735.206. The fourth, relating to use of official time, implements the principle restated at proposed § 2635.101(b)(5) which requires employees to put forth honest effort in the performance of their duties.

Consistent with past interpretations of the current provision at 5 CFR 735.201a(a), proposed § 2635.702 would make it clear that the prohibition against use of public office for private gain is not limited in its application to cases in which the gain accrues to the employee personally, but extends to those cases in which the gain accrues to someone with whom the employee has a significant relationship. There are numerous situations in which questions of use of public office for private gain can arise. In the past, there has been little regulatory language interpreting this particular standard. Section 2635.702 (a) through (e), as proposed, provides standards that illustrate some of the more common situations in which issues of use of public office for private gain are likely to arise. Proposed § 2635.702(d), which serves primarily as a cross-reference to subpart E, points out that situations involving use of public office for private gain can arise in the performance of an employee's official duties as well as in connection with outside activities. As noted in the introductory language of the section, these standards are not intended to limit application of the broad principle that employees shall not use public office for private gain. In fact, many of the standards applicable to outside activities under subpart H of the proposed rule are derived from the principle that employees shall not use public office for private gain.

Proposed § 2635.703 prohibits the use of nonpublic information to further any private interest, whether the interest is the employee's own or that of another. To ensure that this prohibition does not interfere with the proper performance of an employee's official duties, the section also includes language limiting its application to "knowing" unauthorized disclosures. A disclosure that is inadvertent or made under a mistake as to the applicable law may violate another law governing its disclosure, but would not violate the standards of ethical conduct.

Under proposed § 2635.704, employees have a duty to protect and conserve Government property and may not use Government property or allow its use for other than authorized purposes. Under this section, the term Government property is defined broadly. Beyond the Government's ownership and leasehold interests in real and personal property, it extends to Government records as well as to any right or other intangible interest acquired with Government funds, including the right to direct the services of contractor personnel.

As proposed, § 2635.705 is a logical corollary to the preceding three sections. Consistent with the underlying principle restated at proposed § 2635.101(b)(5) of this part, this section provides that official time, whether the employee's own or that of subordinates, is to be used only in an honest effort to perform official duties. An employee who appropriately devotes his official time to the performance of his official duties does not violate the standards of ethical conduct because that performance is unsatisfactory. There are other remedies for dealing with inadequacies in employee performance. For employees not under a leave system, § 2635.705(a) would impose a duty to expend an honest effort and to devote a reasonable proportion of their time to the performance of their official duties.

IX. Outside Activities

Subpart H of the proposed rule contains standards that implement a number of provisions contained in Executive Order 12674, including the outside earned income prohibition applicable to Presidential appointees to full-time noncareer positions. In addition, it is intended to serve as a guide to ethics-related statutes or standards not contained in part 2635 that should be taken into account by an employee who wishes to engage in outside employment or other outside activities.

Proposed § 2635.801(b) is a listing of the more specific standards set forth in the subpart. Proposed § 2635.801(c) cautions employees that their outside activities also must comply with requirements set forth in other subparts of the proposed rule. For example, even though the obligation is not specifically restated in proposed subpart H, outside employment will require disqualification, under proposed subpart D, from participation in particular matters affecting the financial interests of an employer. And, in accordance with proposed subpart G, an employee may not use his or her official position, nonpublic information, Government property, or official time to perform or further outside activities.

As drafted, § 2635.801(c) also cautions employees that, in connection with their outside activities, they may need to consider statutes that are not implemented in proposed part 2635. The subsection contains brief synopses of the bribery, illegal gratuities, and supplementation of Federal salary statutes, and of the two representation statutes, contained in title 18 of the U.S. Code. Because of the frequency with which issues relating to political activities and employment by foreign governments arise, it also contains specific references to the Hatch Act and to the Emoluments Clause of the Constitution. In addition, it provides cross-references to regulations contained in 5 CFR part 2636 which implement the honorarium prohibition, and the outside employment restrictions applicable to certain noncareer employees. These portions of part 2636 are cross-referenced again in §§ 2635.807 and 2635.804 dealing

respectively with teaching, speaking and writing and with the outside earned income limitations applicable to certain noncareer employees.

Section 2635.802 is drafted specifically to implement the general principle restated at proposed § 2635.101(b)(10) that employees shall not engage in outside employment or activities that conflict with their official Government duties. It provides that an employee shall not engage in outside employment or any other outside activity that is prohibited by statute or by a supplemental agency regulation or that, by reason of the conflicting financial interest standards set forth in proposed subpart D or the impartiality standard in subpart E, would require disqualification from matters so central or critical to performance of the employee's official duties that the outside activity would impair the employee's ability to perform the duties of the position.

The principle underlying proposed § 2635.802 is similar to that now contained in 5 CFR 735.203(a) which includes examples of activities not compatible with the full and proper discharge of an employee's official duties. These include, as illustrations of incompatible activities, the acceptance of any item of monetary value under circumstances that would create an appearance of a conflict of interest and outside employment which tends to impair the employee's mental or physical capacity to perform his or her official duties. As a result of this formulation of the predecessor principle, the concept of incompatible activities has expanded so that any outside activity that involves a violation of any statutory or regulatory provision has come to be referred to as an incompatible activity.

As compared to existing § 735.203(a), the proposed rule narrows the concept of conflicting outside employment and activities. The consequence of this narrowing is not to sanction outside activities that result in or involve a violation of some other law or standard. Rather, the employee will be found to have violated that other law or standard. For example, proposed § 2635.807 contains provisions that prohibit the receipt of compensation for speaking where the invitation to engage in the activity has been extended to the employee because of his or her official position. An outside speaking activity for which an employee receives compensation in violation of this provision is treated, under proposed subpart H, as a violation of § 2635.807 and not as conflicting outside employment under § 2635.802. Similarly, an employee who uses agency photocopy equipment to reproduce a flier to advertise her tax preparation business has violated the provisions of proposed § 2635.704 relating to the use of Government property.

The proposed subpart does not itself prohibit any particular form of outside employment. Under proposed § 2635.403(a), an agency may issue a supplemental agency regulation that prohibits or restricts the acquisition or holding of a financial interest. Under the definition of the term financial interest at § 2635.403(c), an agency has authority to prohibit certain employment and other relationships if it determines that the existence of such relationships on the part of its employees would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. For example, the Internal Revenue Service could, by supplemental agency regulation, prohibit all employees from engaging in tax preparation for compensation. Pending the issuance of any such supplemental agency regulation, the note following proposed § 2635.403(a) would continue for one year any such agency prohibition now in effect.

In drafting the proposed regulations pertaining to outside employment and activities, OGE gave consideration to a requirement that all employees obtain advance approval to engage in outside employment. Although a number of agencies currently have requirements for advance approval, many do not. To ensure that it is not unnecessarily intrusive, any such regulation drafted for application to all executive branch employees would have to include so many exceptions and qualifications that it would be cumbersome to interpret and administer. In most cases, outside employment should be permitted unless, under the standards proposed in § 2635.802, it conflicts with performance of the employee's duties. Where outside employment involves a violation of some other provision of this part or a statute or regulation referenced in this part, that violation should be addressed. OGE determined that the disqualification obligation imposed on employees under proposed subparts D and E, coupled with requirements for financial disclosure, would serve to identify and address those employment relationships that are troublesome when considered in light of the employee's official responsibilities. Therefore, proposed § 2635.803 would permit agencies to impose requirements for prior approval for outside employment or activities by agency supplemental regulation. Pending the issuance of any such supplemental regulation, the note following that section would continue for one year any such agency requirement now in effect.

As drafted, § 2635.804(a) would implement section 102 of Executive Order 12674 which prohibits the receipt of outside earned income by full-time Presidential appointees to noncareer positions. Although more restrictive, this prohibition is similar to the 15 percent limitation on outside earned income applicable to certain noncareer employees under title VI of the Ethics Reform Act, which is implemented by OGE regulations at 5 CFR 2636.301 through 2636.304. For consistency, proposed § 2635.804(c)(1) would adopt the definition of outside earned income used for purposes of the 15 percent limitation under 5 CFR 2636.303(b).

Section 2635.805 is proposed as a logical extension of the statutory prohibitions on certain representational activities at 18 U.S.C. 203 and 205, both of which are referenced in proposed § 2635.801(c). Even when paid for by a party to the proceeding, service as an expert witness might not involve a representational act prohibited by either statute. Although such conduct may fall outside the scope of the criminal statutes, an employee should not place himself or herself in a position of serving as an expert witness, with or without compensation, for a party to a proceeding in which United States is a party or has a direct and substantial interest, unless authorized as in the interest of the Government. This is particularly egregious conduct when the employee's expertise relates to his or her official duties. In qualifying as an expert witness, the employee will be called upon to state his or her qualifications, including the fact of Federal employment. Where the fact of that employment tends to be persuasive, the employee's statement of his or her qualifications is likely to result in use of the employee's public office for the private gain of the party on whose behalf he or she is called to testify. Where compensation is received, that use of his or her public office may also result in the employee's personal gain.

The proposed prohibition at § 2635.805 applies differently to special Government employees in recognition of their particular status and of the fact that they frequently are employed by the Government because they possess a particular expertise. With two exceptions, special Government employees who serve 60 days or less in a period of 365 consecutive days would

be restricted from serving as expert witnesses only in particular matters in which they have participated personally and substantially, either as an employee or as a special Government employee. For those who serve more than 60 days, the restriction would extend also to those proceedings in which their employing agency is a party or has a direct and substantial interest. Regardless of the number of days they serve, certain special Government employees whose Federal positions give them particular stature would be restricted to the same extent as those who serve for more than 60 days. These would include special Government employees who are appointed by the President or who are commissioners on commissions established by statute.

Section 2635.805 is not proposed as a blanket prohibition. It allows for service as an expert witness when that service is in the interest of the Government. And it does not prohibit service as an expert witness when directed as part of the employee's duties under applicable agency housekeeping regulations. Moreover, nothing in the standards of ethical conduct prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

Proposed § 2635.806 is included by way of clarification for the many employees who are members of or serve as officers of professional associations. Where participation in the activities of such associations tends to ehance the skills and abilities they use in the course of Federal employment, there is a perception on the part of some employees that involvement in these activities is part and parcel of their Federal employment. Unless participation is specifically authorized as part of their official duties, it is not. These organizations are entities separate from the Federal Government. Under 18 U.S.C. 208(a) and the proposed standards at § 2635.402 of this part, those who serve as officers of professional and other organizations may not participate in their official governmental capacities in particular matters affecting the financial interests of the organizations. Further, as set forth in proposed subpart G, they may not use their Government positions, official time, nonpublic information, or Government property to fulfill their responsibilities with the private organization. Section 2635.806 would make it clear that such activities are personal, while at the same time reflecting the current practice, endorsed by the Office of Personnel Management for career development, of permitting employees to attend substantive programs or presentations offered by these organizations when their attendance is in the interest of the Government.

Section 2635.807(a) of the proposed rule contains a restriction on receipt of compensation for teaching, speaking, and writing that relates to the employee's official duties. As required by 18 U.S.C. 209, this section, by virtue of the definition in paragraph (a)(1)(i), prohibits receipt of compensation when the activity is performed as part of the employee's official duties. Based on the prohibitions against use of public office for private gain and misuse of nonpublic information, the definition also serves to prohibit receipt of compensation in cases where the invitation to engage in the teaching, speaking, or writing activity is extended because of the employee's official position or by a person whose interests are affected by performance or nonperformance of the employee's official duties, or when the information conveyed through such activity is nonpublic information.

The portion of the definition at proposed § 2635.807(a)(1)(i)(E) is less obvious and warrants additional comment. Under current 5 CFR 735.203(c), certain Presidential appointees have long been prohibited from receiving compensation for any "consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency." Because a standard of this nature is appropriate to ensure that public office is not used by any employee for private gain, proposed § 2635.807 would apply to all employees a similar standard that prohibits the receipt of compensation for teaching, speaking or writing where the subject matter focuses specifically on the employee's official duties or on the responsibilities, programs, or operations of the employee's agency. This is consistent in concept with the standards that have applied to outside speaking and writing under informal advisory opinions 84 x 5, cited above, and 85 x 18 issued October 28, 1985, as published in the Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics (1979–1988).

For noncareer employees within the meaning of 5 CFR 2636.303(a), subject matter falls within the prohibition if it deals in significant part with the general subject matter area, industry, or economic sector affected by agency programs and operations. For special Government employees, there must be a specific relationship to their particular Government duties before the prohibition on receipt of compensation applies. For other employees, this definition contemplates a specific relationship between the subject matter and either their particular duties or the responsibilities, programs or operations of the employing agency. The compensation prohibition applies only where the activity deals in significant part with such matters. Thus, an employee would not be prohibited from receiving compensation for a speech that deals largely with other matters and touches only incidentally on agency responsibilities, programs or operations.

Even though the subject matter of the course focuses on agency responsibilities, programs or operation, and notwithstanding that his or her official position may contribute to the employee's attractiveness as a teacher of the particular course, § 2635.807(a)(2) would permit the receipt of compensation for teaching certain courses when sponsored and funded by a Federal, State or local government, or when offered as part of the regularly established curriculum of an institution of higher education or of an elementary or secondary school. This limited exception for teaching is similar to the exceptions to the honorarium prohibition carved out by the definition of the term honorarium at 5 CFR 2636.203(a) (8) and (9). It recognizes the contribution Federal employees can and should make to education in their fields of expertise under circumstances where there is little possibility that they or those who secure their teaching services will unfairly benefit from their government positions.

For purposes of § 2635.807, the proposed definition of the term "compensation" at paragraph (a)(1)(ii) is broader than either that included in the honorarium regulations at 5 CFR 2636.203(a) or the outside earned income provisions at 5 CFR 2636.303(b). It includes, for example, travel reimbursements that are excluded from the statutory definition of outside earned income contained in proposed § 2635.804. This distinction is intended. For example, when an employee's speech relates to his or her official duties, personal acceptance of transportation and hotel accommodations in connection with the speech is as inappropriate as is acceptance of an honorarium or any other form of compensation. There is specific authority, such as 5 U.S.C. 4111 and 31 U.S.C. 1353, under which an agency may accept or authorize acceptance of travel expenses in connection with activities, such as

speaking, that relate to the employee's official duties.

Consistent with OGE opinions, proposed § 2635.807(b) prohibits an employee who is engaged in outside teaching, speaking or writing in a personal capacity from using his or her official title or position, regardless of whether compensation is to be received for the activity. To the extent that it enhances the employee's opportunities or furthers the interests of the employer, sponsor or publisher, use of the employee's official title or position creates at least an appearance of use of public office for private gain and may inappropriately suggest Federal endorsement or sanction of the activity. The proposed regulation includes exceptions for appropriate reference to an employee's title or position as part of biographical information or, when coupled with an appropriate disclaimer, in connection with scholarly articles published in recognized scientific or professional journals. Proposed § 2635.807(c) requires employees to comply with any requirements for approval of content imposed by their agencies.

Proposed § 2635.808 sets forth standards designed to ensure that employees do not use their official positions to further the fundraising interests of any organization, unless specifically permitted by law or regulation. The fact that an entity is a charitable organization does not warrant a departure from the principle that an employee shall not use his or her public office to further a private interest. This issue is most likely to arise when the employee holds a position of high visibility, such as a cabinet-level office. Officials who hold these positions often receive requests to serve as sponsors for or to host fundraising events for nonprofit organizations. Because they cannot honor every such request, their decisions to host or otherwise participate in particular events are likely to result in the appearance of preferential treatment for those whose invitations they accept. Section 2535.808(c)(2) would prohibit officials who serve in Executive Level I and II positions, and certain White House personnel paid at Executive Level II, from engaging in fundraising activities, even in a personal capacity, unless they engaged in fundraising for the particular entity prior to appointment to a covered Government position or are personally and actively involved in the affairs of the organization. Even when those conditions are met, high-level officials covered by proposed § 2635.808(c)(2) would nevertheless be required to comply with the conditions that would be imposed by proposed § 2635.808(c)(1) upon all employees wishing to engage in fundraising in their personal capacities.

Subject to the special rules imposed on very senior officials, employees would be free, under proposed § 2635.808(c)(1), to engage in fundraising in a personal capacity provided they do not personally solicit funds or other support from subordinates or prohibited sources, use their official title, position or authority in connection with fundraising, or engage in other prohibited conduct, such as use of Government property or time to further the fundraising activity. Fundraising in an official capacity is limited by § 2635.808(b) to activities such as the Combined Federal Campaign that are specifically permitted by statute, executive order or regulation. The proposed definitions at § 2635.808 (a)(2) and (a)(3) would ensure that employees may continue to speak in an official capacity at appropriate events even though a particular event may also serve a fundraising purpose. The content of any such speech must relate to the employee's official duties and the employee may not, in the course of the speech or otherwise at the event, solicit donations or other support for the organization.

Proposed § 2635.809 implements the principle restated at § 2635.101(b)(12) of this proposed rule that employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those imposed by law, such as Federal, State and local taxes. The proposed implementation is similar to the current rule at 5 CFR 735.207.

X. Revocation by OPM of Superseded Portions of 5 CFR Part 735 and by OGE of Current 5 CFR 2635.101

When, following notice and comment, the proposed rule is issued as a final rule and takes effect, § 2635.101 will be superseded by the Office of Government Ethics' new 5 CFR part 2635. At that time, the Office of Personnel Management will simultaneously revoke all but § 735.106 of subparts A through C of current part 735 of 5 CFR and will issue a regulation addressing the prohibitions relating to gambling, betting, and lotteries currently found at 5 CFR 735.208.

XI. Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments to OGE on this proposed regulation, to be received on or before September 20, 1991. The comments will be carefully considered and any appropriate changes will be made to the regulation as proposed before a final rule is adopted and published by OGE in the **Federal Register.**

E.O. 12291, Federal Regulation

As Director of the Office of Government Ethics, I have determined that this is not a major rule as defined under section 1(b) of Executive Order 12291.

Regulatory Flexibility Act

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

Paperwork Reduction Act

As Director of the Office of Government Ethics, I have determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget thereunder.

List of Subjects in 5 CFR Part 2635

Conflict of interests, Executive Branch Standards of Conduct, Government employees.

Approved: July 16, 1991.

Stephen D. Potts,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble and pursuant to its authorities under the Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989, and under Executive Order 12674, as modified by E.O. 12731, the Office of Government Ethics proposes to amend title 5, chapter XVI, subchapter B of the Code of Federal Regulations by revising part 2635 to read as follows:

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

Subpart A—General Provisions

Sec.

2635.101 Basic obligation of public service.
2635.102 Definitions.
2635.103 Applicability to members of the uniformed services.
2635.104 Applicability to employees on detail or serving overseas.
2635.105 Supplemental agency regulations.
2635.106 Disciplinary and corrective action.
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Subpart B—Gifts from Outside Sources

Sec.
2635.201 Overview.
2635.202 General Standards.
2635.203 Definitions.
2635.204 Exceptions.
2635.205 Proper disposition of prohibited gifts.

Subpart C—Gifts between Employees

2635.301 Overview.
2635.302 General standards.
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Subpart D—Conflicting Financial Interests

2635.401 Overview.
2635.402 Disqualifying financial interests.
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Subpart E—Impartiality in Performing Official Duties

2635.501 Overview.
2635.502 Personal and business relationships.
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Subpart F—Seeking Other Employment

2635.601 Overview.
2635.602 Applicability and related considerations.
2635.603 Definitions.
2635.604 Disqualification while seeking employment.
2635.605 Waiver or authorization permitting participation while seeking employment.
2635.606 Disqualification upon conclusion of employment negotiations.

Subpart G—Misuse of Position

2635.701 Overview.
2635.702 Use of public office for private gain.
2635.703 Use of nonpublic information.
2635.704 Use of Government property.
2635.705 Use of official time.

Subpart H—Outside Activities

2635.801 Overview.
2635.802 Conflicting outside employment and activities.
2635.803 Prior approval for outside employment and activities.
2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.
2635.805 Service as an expert witness.
2635.806 Participation in professional associations.
2635.807 Teaching, speaking, and writing.
2635.808 Fundraising activities.
2635.809 Just financial obligations.

Subpart I—Related Statutory Authorities

2635.901 General.
2635.902 Related statutes.

Authority: 5 U.S.C. 7351, 7353; 5 U.S.C. App.; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart A—General Provisions

§ 2635.101 Basic obligation of public service.

(a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) *General principles.* The following general principles form the basis for the standards contained in this part.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

(c) *Related statutes.* In addition to the standards of ethical conduct set forth in this part, there are conflict of interest statutes that prohibit certain conduct. Criminal conflict of interest statutes of general applicability to all employees, 18 U.S.C. 201, 203, 205, 208, and 209, are summarized in the appropriate subparts of this part and must be taken into consideration in determining whether conduct is proper. Citations to other generally applicable statutes relating to employee conduct are set forth in subpart I and employees are further cautioned that there may be additional statutory and regulatory restrictions applicable to them as employees of their specific agencies. Because an employee is considered to be on notice of the requirements of any statute, an employee should not rely upon any description or synopsis of a statutory restriction, but should refer to the statute itself and obtain the advice of an agency ethics official as needed.

§ 2635.102 Definitions.

The definitions listed below are used throughout this part. Additional definitions appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency* means an executive agency as defined in 5 U.S.C. 105 and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office or the Government of the District of Columbia.

(b) *Agency designee* refers to any employee who, by agency regulation, instruction, or other issuance, has been delegated authority to make any determination, give any approval, or take any other action required or permitted with respect to another

employee by this part. An agency may delegate these authorities to any number of agency designees necessary to ensure that determinations are made, approvals are given, and other actions are taken in a timely and responsible manner. Any provision that requires a determination, approval, or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head in consultation with the designated agency ethics official.

(c) *Agency ethics official* refers to the designated agency ethics official or the alternate designated agency ethics official and to any deputy ethics official, described in § 2638.204 of this subchapter, who has been delegated authority to assist in carrying out the responsibilities of the designated agency ethics official.

(d) *Agency programs or operations* refers to any program or function carried out or performed by an agency, whether pursuant to statute, executive order, or regulation.

(e) *Corrective action* includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, recusal, divestiture, termination of an activity, waiver, the creation of a qualified or diversified blind trust, or counseling.

(f) *Designated agency ethics official* refers to the official designated under § 2638.201 of this subchapter.

(g) *Disciplinary action* includes those disciplinary actions provided for by Office of Personnel Management regulations and instructions implementing provisions of title 5 of the United States Code or provided for in comparable provisions applicable to employees not subject to title 5, including but not limited to reprimand, suspension, demotion, and removal.

(h) *Employee* means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.

(i) *Head of an agency* means, in the case of an agency headed by more than one person, the chair or comparable member of such agency.

(j) *He, his,* and *him* include she, hers and her.

(k) *Person* means an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity. For purposes of this part, a corporation will be deemed to control a subsidiary if it owns 25 percent or more of the subsidiary's equity or otherwise controls the management or policies of the subsidiary. The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments, including the Government of the District of Columbia. It does not include any agency or other entity of the Federal Government or any officer or employee thereof when acting in his official capacity on behalf of that agency or entity.

(l) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(m) *Supplemental agency regulation* means a regulation issued pursuant to § 2635.105 of this subpart.

§ 2635.103 Applicability to members of the uniformed services.

The provisions of this part, except this section, are not applicable to enlisted members of the uniformed services. Each agency with jurisdiction over enlisted members of the uniformed services shall issue regulations defining the ethical conduct obligations of enlisted members under its jurisdiction. Those regulations shall be consistent with Executive Order 12674, April 12, 1989, as modified, and may prescribe the full range of statutory and regulatory sanctions, including those available under the Uniform Code of Military Justice, for failure to comply with such regulations.

§ 2635.104 Applicability to employees on detail or serving overseas.

(a) *Details to other Federal entities.* An employee on detail, including a uniformed officer on assignment, from his employing agency to another agency for a period in excess of 30 days shall be subject to any supplemental agency regulation of the agency to which he is detailed rather than to any supplemental agency regulation of his employing agency. An employee detailed to the legislative or judicial branch for a period in excess of 30 days shall be subject to the ethical standards of the branch or entity to which detailed. For the duration of any such detail to the legislative or judicial branch, the employee remains subject to the conflict of interest statutes in title 18 of the United States Code, but shall not be subject to the provisions of this part, except this section, or to any supplemental agency regulation of his employing agency.

(b) *Details to non-Federal entities.* Except to the extent exempted in writing pursuant to this paragraph, an employee detailed to a nonFederal entity remains subject to this part and to any supplemental agency regulation of his employing agency. When an employee is detailed pursuant to statutory authority to an international organization or to a State or local government for a period in excess of six months, the designated agency ethics official may grant a written exemption from subpart B of this part based on his determination that the entity has adopted written ethical standards covering solicitation and acceptance of gifts which will apply to the employee during the detail and which will be appropriate given the purpose of the detail.

(c) *Assignments overseas.* (1) An employee serving overseas who is subject to the direction, coordination and supervision of the chief of mission shall be subject to the supplemental agency regulations of the Department of State rather than to any supplemental agency regulations of his employing agency if it is other than the Department of State.

(2) An employee serving overseas who is subject to the command of the United States area military commander shall be subject to the supplemental agency regulations of the Department of Defense rather than to any supplemental agency regulations of his employing agency if it is other than the Department of Defense.

(3) Any employee, other than an employee described in paragraphs (c) (1) and (2) of this section, who is assigned to perform duty overseas shall remain subject to any supplemental agency regulations of his employing agency.

§ 2635.105 Supplemental agency regulations.

In addition to the regulations set forth in this part, an employee shall comply with any supplemental agency regulations issued by his employing agency under this section.

(a) An agency that wishes to supplement this part shall prepare and submit to the Office of Government Ethics, for its concurrence and joint issuance, any agency regulations that supplement the regulations contained in this part. Supplemental agency regulations which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part shall be:

(1) In the form of an addendum to the regulations in this part; and

(2) In addition to the substantive provisions of this part.

(b) After concurrence by the Office of Government Ethics, the agency shall submit its supplemental agency regulations to the **Federal Register** for publication and codification at the expense of the agency in title 5 of the Code of Federal Regulations. Supplemental agency regulations issued under this section are effective only after concurrence and co-signature by the Office of Government Ethics and publication in the **Federal Register.**

(c) This section applies to any supplemental agency regulations or amendments thereof issued under this part. It does not apply to:

(1) A handbook or other issuance intended merely as an explanation of the standards contained in this part or in supplemental agency regulations;

(2) An instruction or other issuance the purpose of which is to:

(i) Delegate to an agency designee authority to make any determination, give any approval or take any other action required or permitted by this part or by supplemental agency regulations; or

(ii) Establish internal agency procedures for documenting or processing any determination, approval or other action required or permitted by this part or by supplemental agency regulations, or for retaining any such documentation; or

(3) Regulations or instructions that an agency has authority, independent of this part, to issue, such as regulations implementing an agency's gift acceptance statute, protecting categories of nonpublic information or establishing standards for use of Government vehicles. Where the content of any such regulations or instructions was included in the agency's standards of conduct regulations issued pursuant to Executive Order 11222 and the Office of Government Ethics concurs that they need not be issued as part of an agency's supplemental agency regulations, those regulations or instructions may be promulgated separately from the agency's supplemental agency regulations.

§ 2635.106 Disciplinary and corrective action.

(a) Except as provided in § 2635.107, a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action which may be in addition to any penalty prescribed by law. Officers of the uniformed services shall continue to be subject to the Uniform Code of Military Justice for a violation of this part or of supplemental agency regulations.

(b) It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics under the procedures at part 2638 of this subchapter.

(c) A violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person. Thus, for example, an individual who alleges that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex, national origin, age, or handicap is required to follow applicable statutory and regulatory procedures, including those of the Equal Employment Opportunity Commission.

§ 2635.107 Ethics advice.

(a) As required by § 2638.201 of this subchapter, each agency has a designated agency ethics official who, on the agency's behalf, is responsible for coordinating and managing the agency's ethics program. The designated agency ethics official has authority under § 2638.204 of this subchapter to delegate certain responsibilities, including that of providing ethics counseling, to one or more deputy ethics officials.

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in compliance with the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege.

Subpart B—Gifts From Outside Sources

§ 2635.201 Overview.

This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§ 2635.202 General standards.

(a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

(1) From a prohibited source; or

(2) Given because of the employee's official position.

(b) *Relationship to illegal gratuities statute.* Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

(c) *Limitations on use of exceptions.* Notwithstanding any exception provided in this subpart, other than § 2635.204(h), an employee shall not:

(1) Accept a gift in return for being influenced in the performance of an official act;

(2) Coerce the offering of a gift;

(3) Accept a gift from a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the employee's impartiality in the matter affecting that person;

Example 1: An employee of the Department of Housing and Urban Development is an appraiser inspecting a building to determine whether HUD will insure a mortgage loan made by a private lender. She should decline the building owner's offer of a bottle of wine. Even though its market value is less than $25 and, thus, within the exception at § 2635.204(a) of this subpart for gifts of $25 or less, acceptance of the gift offered in conjunction with the inspection would cause a reasonable person to question the

employee's impartiality in carrying out her inspectional duties. On the other hand, the appraiser's acceptance of the customary courtesy of a cup of coffee and a donut would be proper.

(4) Accept gifts from the same or different sources on a basis so frequent as to raise an appearance of use of public office for private gain; or

Example 1: A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent on one occasion offered to meet with a representative during his lunch hour and the representative arrived at the employee's office bringing a pastrami sandwich and a soft drink so that the employee would not miss lunch. At the end of the meeting the representative stated that he would like to set up lunch meetings on a monthly basis for which he would provide the meal. Even though the market value of each of the lunches to be provided would be less than $6 and, thus, well within the exception at § 2635.204(a) of this subpart for gifts of $25 or less, the purchasing agent should decline since his acceptance of these modest gifts on a recurring basis would be so frequent as to raise an appearance that he used his position to subsidize his lunches.

(5) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include:

(i) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes special Government employees as well as all other Government officials.

(ii) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality.

(iii) 41 U.S.C. 423(b)(2), which prohibits a procurement official from seeking, accepting, or agreeing to receive any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of a competing contractor during the conduct of a Federal agency procurement. Implementing regulations, including exceptions to the gift prohibition, are contained in subpart 3.104 of the Federal Acquisition Regulation.

§ 2635.203 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) *Agency* has the meaning set forth in § 2635.102(a) of this part. However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions. No such designation shall be effective as to the head of any such separate agency or as to department-level employees.

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

It does not include:

(1) Loans from banks and other financial institutions on terms generally available to the public;

(2) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(3) Rewards and prizes given to competitors in contests or events, including random drawings, which are unrelated to the employee's official duties and open to the public or to a broadly defined class;

(4) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies which are intended solely for presentation;

(5) Anything which is paid for by the Government or secured by the Government under Government contract;

Note: Some airlines encourage those purchasing tickets to join programs that award free flights and other benefits to frequent fliers. Any such benefit earned on the basis of Government-financed travel belongs to the agency rather than to the employee and may be accepted only insofar as provided under 41 CFR 301–1.6(b).

(6) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to his official duties which takes place away from his duty station. The agency's acceptance must be in accordance with the implementing regulations at 41 CFR part 304–1; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; or

(7) Anything for which market value is paid by the employee.

(c) *Market value* means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.

Example 1: An employee who has been given an acrylic paperweight embedded with the corporate logo of a prohibited source may determine its market value based on her observation that a comparable acrylic paperweight, not embedded with a logo, generally sells for about $20.

Example 2: A prohibited source has offered an employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only $20, the market value of the ticket is its $250 face value.

(d) *Prohibited source* means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

(e) A gift is solicited or accepted because of the employee's official position if it would not have been solicited, offered, or given had the employee not held his position as a Federal employee.

Example 1: Where free season tickets are offered by an opera guild to all members of the Cabinet, the gift is offered because of their official positions.

(f) A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee, or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except as permitted for the disposition of perishable items by § 2635.205(a)(2) of this subpart or for payments made to charitable organizations in lieu of honoraria under § 2636.204 of this subchapter.

Example 1: An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

§ 2635.204 Exceptions.

The prohibitions set forth in § 2635.202(a) of this subpart do not apply to a gift accepted under the circumstances described in paragraphs (a) through (j) of this section.

(a) *Gifts of $25 or less.* An employee may accept unsolicited gifts having an aggregate market value of $25 or less per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed $100 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds $25, the employee may not pay the excess value over $25 in order to accept that portion of the gift or those gifts worth $25. Where the aggregate value of tangible items offered on a single occasion exceeds $25, the employee may decline any distinct and separate item in order to accept those items aggregating $25 or less.

Example 1: An employee of the Securities and Exchange Commission and his spouse have been invited by a representative of a regulated entity to a Broadway play, tickets to which have a face value of $30. The aggregate market value of the gifts offered on this single occasion is $60, $35 more than the $25 amount that may be accepted for a single event or presentation. The employee may not accept the evening of entertainment. He and his spouse may attend the play only if he pays the full $60 value of the two tickets.

Example 2: An employee of the Defense Mapping Agency has been invited by an association of cartographers to speak about his agency's role in the evolution of missile technolgy. At the conclusion of his speech, the association presents the employee a framed map with a market value of $18 and a book about the history of cartography with a market value of $20. The employee may accept the map or the book, but not both, since the aggregate value of these two tangible items exceeds $25.

Example 3: An employee of the Department of the Army is serving as a member of a team evaluating a claim submitted by an Army contractor under its contract to supply 20,000 portable generators. Just as the team is about to make its recommendation regarding the amount for which the Army should settle the claim, the contractor sends the employee a golf shirt worth $25. Although the market value of the shirt does not exceed $25, the employee should not accept the gift because of the limitation in § 2635.202(c)(3) of this subpart. The timing and nature of the gift are such that the employee's acceptance would cause a reasonable person to question the employee's impartiality in carrying out his duties as a member of the claims evaluation team.

Example 4: The Army's plant representative assigned to duty at a facility operated by an Army contractor may accept the contractor's gift of a magazine subscription worth $20.

Example 5: On four occasions during the calendar year, an employee of the Defense Logistics Agency was given gifts worth $10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly $100 limitation on gifts of $25 or less from any one person, the four gifts must be aggregated because a *person* is defined at § 2635.102(k) of this part to mean not only the corporate entity, but its officers and employees as well. However, for purposes of applying the $100 limitation, the employee would not have to include the value of a birthday present received from his cousin, who is employed by the same corporation, since he can accept the birthday present under the exception at § 2635.204(b) of this subpart for gifts based on a personal relationship.

Example 6: Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental Protection Agency has accepted an association's gift of travel expenses and conference fees for an employee of its Office of Radiation Programs to attend an international conference on "The Chernobyl Experience." While at the conference, the employee may accept a gift of $25 or less from the association or from another person attending the conference even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the only authority under which an agency may accept gifts from certain nonFederal sources in connection with its employees' attendance at such functions, a gift of $25 or less accepted under § 2635.204(a) of this subpart is a gift to the employee rather than to his employing agency.

(b) *Gifts based on a personal relationship.* An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

Example 1: An employee of the Federal Deposit Insurance Corporation has been dating a secretary employed by a member bank. For Secretary's Week, the bank has given each secretary 2 tickets to an off-Broadway musical review and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept his girlfriend's invitation to the theater. Even though the tickets were initially purchased by the member bank, they were given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship.

Example 2: Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission to join them in a golf tournament at a private club at the firm's expense. The entry free is $500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

(c) *Discounts and similar benefits.* An employee may accept unsolicited opportunities and benefits, including favorable rates and commercial discounts, offered to a limited class of persons if the offer is extended:

(1) By a person who is not a prohibited source: and

(2) To a class that is not defined in a manner that specifically discriminates among Government employees on the basis of employment rank, rate of pay, or type of official responsibility.

Example 1: An employee of the U.S. Information Agency may accept a discount of $100 on a set of four tires offered by a local merchant to all members of an agency credit union. The merchant is not a prohibited source and the discount is offered because she is a member of the credit union, to which any employee of the agency can belong.

Example 2: An Assistant Secretary may not accept a local country club's offer to all members of Department Secretariats which includes a waiver of its $5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer, extended because of the employee's official position and targeted to a narrow class of Federal employees, discriminates on the basis of rank.

(d) *Awards and honorary degrees.* (1) An employee may accept gifts, other

than cash or an investment interest, with an aggregate market value of $200 or less if such gifts are a bona fide award or incident to a bona fide award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties or by an association or other organization the majority of whose members do not have such interests. Other gifts offered by such persons as awards or incidents of awards that are given for these purposes, including awards of cash or investment interests, may be accepted upon a written determination by an agency ethics official that the award meets the following criteria:

(i) The award is made as part of an established program of recognition under which awards are made on a periodic basis. An established program is one under which awards have been made on a regular basis or which is funded, wholly or in part, to ensure its continuation on a regular basis;

(ii) Individuals other than Federal employees are eligible for the award; and

(iii) Selection of the award recipient is made pursuant to specific written standards.

(2) An employee may accept an honorary degree from an institution of higher education as defined at 20 U.S.C. 1141(a) based on a written determination by an agency ethics official that acceptance will not create an appearance of loss of impartiality or use of public office for private gain.

(3) An employee who may accept an award, honorary degree, or personal tribute pursuant to paragraphs (d) (1) or (2) of this section may also accept meals and entertainment given to him and to members of his family at the event at which the presentation takes place.

Example 1: Based on a determination by an agency ethics official that the prize meets the criteria set forth in § 2635.204(d)(1) of this subpart, an employee of the National Institutes of Health may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

Example 2: Prestigious University wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that her acceptance will not create an appearance of loss of impartiality or use of public office for private gain.

Example 3: A Department of State official selected by a nonprofit organization as recipient of its award for distinguished service in the interest of world peace may, together with his mother, wife, and children, attend the awards ceremony dinner and accept a crystal bowl worth $200 presented during the ceremony.

(e) *Gifts based on outside business or employment relationships.* An employee may accept meals, lodgings, transportation, and other benefits:

(1) Resulting from the business or employment activities of an employee's spouse when it is clear that such benefits have not been offered or enhanced because of the employee's official position;

Example 1: A Department of Agriculture employee whose husband is a computer programmer employed by an Agriculture Department contractor may attend the company's annual retreat for all of its employees and their families held at a resort facility. However, under § 2635.502 of this part, the employee may be disqualified from performing official duties affecting her husband's employer.

Example 2: Where the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency whose wife is a clerical worker at a defense contractor may not attend the contractor's annual retreat in Hawaii for corporate officers and members of the board of directors, even though his wife received a special invitation for herself and her spouse.

(2) Resulting, if he is a special Government employee, from his outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of his official status; or

Example 1: The members of an Army Corps of Engineers environmental advisory committee that meets 6 times per year are special Government employees. A member who has a consulting business may accept an invitation to a $50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the committee.

(3) Customarily provided by a prospective employer in connection with bona fide employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties, acceptance is permitted only if the employee first has complied with the disqualification requirements of subpart F of this part applicable when seeking employment.

Example 1: An employee of the Federal Communications Commission with responsibility for drafting regulations affecting the communications industry wishes to apply for a job opening with a television network. Once she has properly disqualified herself from further work on the regulations as required by subpart F of this part, she may enter into employment discussions with the network and accept the network's offer to pay for her airfare, hotel, and meals in connection with an interview trip.

(f) *Gifts from a political organization.* An employee who is exempt under 5 U.S.C. 7324(d) from the Hatch Act prohibitions against active participation in political management or political campaigns may accept meals, lodgings, transportation and other benefits, including free attendance at events, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employee, such as a security officer, whose official duties require him to accompany an exempt employee to a political event may accept meals, free attendance, and entertainment provided at the event by such a political organization.

Example 1: The Secretary of the Department of Health and Human Services is exempt from the noted Hatch Act restrictions. He may accept an airline ticket and hotel accommodations furnished by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) *Speaking engagements and widely-attended gatherings.* (1) When an employee's participation in all or part of an event is determined to be in the interest of the employing agency because it will further agency programs or operations, an employer may accept an unsolicited gift of free attendance at all or appropriate parts of the event provided by the sponsor of:

(i) An event in which the employee is to participate as a speaker or panel participant; or

(ii) A widely-attended gathering concerning a subject of mutual interest to a number of parties that the employee will attend on his own time. A gathering is widely attended if, for example, it is open to members from throughout a given industry or profession or if those in attendance represent various sectors of the economy.

(2) *Determination of agency interest.* The official assignment of an employee to participate as a speaker or panel member shall constitute the necessary determination that it is in the agency's interest of the employee to participate in any part of the event that takes place on the day he will speak or serve on the panel and that involves the presentation or exchange of information. In all other cases, the determination of agency interest shall be made in writing by the agency designee. If the sponsor is a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties, or an association or organization the majority

of whose members have such interests, the employee's participation may be determined to be in the interest of the agency only where there is a written finding by the agency designee that the agency's interest in the employee's participation in the event outweighs concern that acceptance of the gift of free attendance may or may reasonably appear to improperly influence the employee in the performance of his official duties. Relevant factors that should be considered by the agency designee include the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the sponsor of the event, the significance of the employee's role in any such matter, the purpose of the event, the identity of other expected participants, and the monetary value of the gift of free attendance.

(3) *Free attendance.* For purposes of paragraph (g)(1) of this section, a gift of free attendance may include waiver of all or part of a conference or other fee or the provision of food, refreshments, entertainment, instruction, and materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees.

(4) *Cost provided by sponsor of event.* The cost of the employee's attendance will not be considered to be provided by the sponsor where a person other than the sponsor designates the employee to be invited and bears the cost of the employee's attendance through a contribution or other payment intended to facilitate that employee's attendance. Payment of dues or a similar assessment to a sponsoring association or other organization does not constitute a payment intended to facilitate a particular employee's attendance.

(5) *Accompanying spouse.* When an employee is a speaker or panel participant or when his participation in an event is determined by the agency designee to be in the interest of the agency, the agency designee may authorize attendance by an accompanying spouse at all or part of the event based on a determination that others in attendance at the event will generally be accompanied by spouses.

Example 1: An aerospace industry association that is a prohibited source sponsors a seminar for which it charges a fee of $100. An Air Force contractor pays $500 to the association so that the association can extend free invitations to 5 Air Force officials designated by the contractor. The Air Force officials may not attend. Because the contractor specified the invitees and bears the cost of their attendance, the gift of free attendance is considered to be provided by the company and not the sponsoring association. Had the contractor paid $500 to the association in order that it might invite any 5 Federal employees, an Air Force official to whom the sponsoring association has extended one of the 5 invitations could attend if his participation were determined to be in the interest of the agency.

Example 2: An employee of the Department of the Treasury authorized to participate in a panel discussion of economic issues as part of a 1-day conference may accept the sponsor's waiver of the conference fee. Under the separate authority of § 2635.204(a) of this subpart, he may accept a token of appreciation for his speech having a market value of $25 or less.

Example 3: An employee of the Department of the Interior authorized to speak on the first day of a 4-day conference on endangered species may accept the sponsor's waiver of the conference fee for the first day of the conference. However, he may be authorized to accept the sponsor's waiver of the conference fee for any of the 3 remaining days of the conference, and to use official time to attend, only if his participation in the activities to take place on those days is determined by the agency designee to be in the interest of the agency.

(h) *Gifts to the President or Vice President.* Because of considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on his own behalf or on behalf of any family member, provided that such acceptance does not violate §§ 2635.202(c) (1) or (2) of this subpart, 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(i) *Gifts authorized by supplemental agency regulation.* An employee may accept any gift the acceptance of which is specifically authorized by a supplemental agency regulation.

(j) *Gifts accepted under specific statutory authority.* The prohibitions on acceptance of gifts from outside sources contained in this subpart do not apply to any item, receipt of which is specifically authorized by statute. Gifts which may be received by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111 from an organization with tax-exempt status under 26 U.S.C. 501(c)(3). The employee's acceptance must be approved by the agency in accordance with §§ 410.701 through 410.706 of this title; or

Note: Section 501(c)(3) of title 26 of the United States Code is authority for tax-exempt treatment of a limited class of nonprofit organizations, including those organized and operated for charitable, religious or educational purposes. Many nonprofit organizations are not exempt from taxation under this section.

(2) Gifts from a foreign government or international organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by the agency's regulations implementing that Act.

§ 2635.205 Proper disposition of prohibited gifts.

(a) an employee who has received a gift that cannot be accepted under this subpart shall, unless the gift is accepted by an agency acting under specific statutory authority:

(1) Return any tangible item to the donor or pay the donor its market value. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference to the retail cost of similar items of like quality. See § 2635.203(c) of this subpart.

Example 1: To avoid public embarrassment to the seminar sponsor, an employee of the National Park Service did not decline a barometer worth $200 given at the conclusion of his speech on Federal lands policy. The employee must either return the barometer or promptly reimburse the sponsor $200.

(2) When it is not practical to return a tangible item because it is perishable, the item may, at the discretion of the employee's supervisor or an agency ethics official, be given to an appropriate charity, shared within the recipient's office, or destroyed.

Example 1: With approval by the recipient's supervisor, a floral arrangement sent by a disability claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

(3) For any entertainment, favor, service, benefit or other intangible, reimburse the donor the market value. Subsequent reciprocation by the employee does not constitute reimbursement.

Example 1: A Department of Defense employee wishes to attend a charitable event to which he has been offered a $300 ticket by a prohibited source. Although his attendance is not in the interest of the agency under § 2635.204(g) of this subpart, he may attend if he reimburses the donor the $300 face value of the ticket.

(4) Dispose of gifts from foreign governments or international organizations in accordance with 41

CFR part 101–49, and dispose of materials received in conjunction with official travel in accordance with 41 CFR 101–25.103.

(b) An agency may authorize disposition or return of gifts at Government expense. Employees may use penalty mail to forward reimbursements required or permitted by this section.

(c) An employee who, on his own initiative, promptly complies with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. An employee who promptly consults his agency ethics official to determine whether acceptance of an unsolicited gift is proper and who returns the gift upon the advice of the ethics official will be considered to have complied with the requirements of this section on his own initiative.

Subpart C—Gifts Between Employees

§ 2635.301 Overview.

This subpart contains standards that prohibit an employee from giving, donating to, or soliciting contributions for, a gift to an official superior and from accepting a gift from an employee receiving less pay than himself, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§ 2635.302 General standards.

(a) *Gifts to superiors.* Except as provided in this subpart, an employee may not:

(1) Directly or indirectly, give a gift to or make a donation toward a gift for an official superior; or

(2) Solicit a contribution from another employee for a gift to either his own or the other employee's official superior.

(b) *Gifts from employees receiving less pay.* Except as provided in this subpart, an employee may not, directly or indirectly, accept a gift from an employee receiving less pay than himself unless:

(1) The two employees are not in a subordinate-official superior relationship; and

(2) There is a personal relationship between the two employees that would justify the gift.

(c) *Limitation on use of exceptions.* Notwithstanding any exception provided in this subpart, an official superior shall not coerce the offering of a gift from a subordinate.

§ 2635.303 Definitions.

For purposes of this subpart the following definitions shall apply:

(a) *Gift* has the meaning set forth in § 2635.203(b) of this part. For purposes of that definition an employee will be deemed to have paid market value for any benefit received as a result of his participation in any carpool or other such mutual arrangement involving another employee or other employees if he bears his fair proportion of the expense or effort involved.

(b) *Indirectly,* for purposes of § 2635.302(b) of this subpart, has the meaning set forth in § 2635.203(f) of this part. For purposes of § 2635.302(a) of this subpart, it includes a gift:

(1) Given with the employee's knowledge and acquiescence by his parent, sibling, spouse, child, or dependent relative; or

(2) Given by a person other than the employee under circumstances where the employee has promised or agreed to reimburse that person or to give that person something of value in exchange for giving the gift.

(c) Subject to paragraph (a) of this section, *market value* has the meaning set forth in § 2635.203(c) of this part.

(d) *Official superior* means any other employee, other than the President and the Vice President, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. For purposes of this subpart, an employee is considered to be the subordinate of any of his official superiors.

(e) *Solicit* means to request contributions by personal communication or by general announcement.

(f) *Voluntary contribution* means a contribution given freely, without pressure or coercion. A contribution is not voluntary unless it is made in an amount determined by the contributing employee, except that where an amount for a gift is included in the cost for a luncheon, reception, or similar event, an employee who freely chooses to pay a proportionate share of the total cost in order to attend will be deemed to have made a voluntary contribution. Except in the case of contributions for a luncheon, reception, or similar event, a statement that an employee may choose to contribute less or not at all shall accompany any recommendation of an amount to be contributed for a gift to an official superior.

Example 1: A supervisory employee of the Agency for International Development has just been reassigned from Washington, DC to Kabul, Afghanistan. As a farewell party, 12 of her subordinates have decided to take her out to lunch at the Khyber Repast. It is understood that each will pay for his own meal and that the cost of the supervisor's lunch will be divided equally among the twelve. Even though the amount they will contribute is not determined until the supervisor orders lunch, the contribution made by those who chose to participate in the farewell lunch is voluntary.

§ 2635.304 Exceptions.

The prohibitions set forth in § 2635.302 (a) and (b) of this subpart do not apply to a gift given or accepted under the circumstances described in paragraphs (a) or (b) of this section. A contribution or the solicitation of a contribution that would otherwise violate the prohibitions set forth in § 2635.302 (a) and (b) of this subpart may only be made in accordance with paragraph (c) of this section.

(a) *General exceptions.* On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) Items with an aggregate market value of $10 or less per occasion;

(2) Items such as food and refreshments to be shared in the office among several employees;

(3) Personal hospitality provided at a residence;

(4) Items given in connection with the receipt of personal hospitality if of a type customarily given on such occasions; and

(5) Leave transferred under subpart I of part 630 of this title, unless obtained in violation of § 630.912 of that subpart.

Example 1: Upon returning to work following a vacation at the beach, a claims examiner with the Department of Veterans Affairs may give his supervisor, and his supervisor may accept, a bag of saltwater taffy purchased on the boardwalk for $8.

Example 2: An employee of the Federal Deposit Insurance Corporation whose bank examination responsibilities require frequent travel may not bring her supervisor, and her supervisor may not accept, souvenir coffee mugs from each of the cities she visits in the course of performing her duties, even though each of the mugs costs less than $5. Gifts given on this basis are not occasional.

Example 3: The Secretary of Labor has invited the agency's General Counsel to a dinner party at his home. The General Counsel may bring a bottle of wine to the dinner party and the Secretary may accept this customary hostess gift from his subordinate, even though its cost is in excess of $10.

Example 4: For Christmas, a secretary may give his supervisor, and the supervisor may accept, a poinsettia plant purchased for $10 or less. The secretary may also invite his supervisor to a Christmas party in his home and the supervisor may attend.

(b) *Special, infrequent occasions.* A gift appropriate to the occasion may be

given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child; or

(2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

Example 1: The administrative assistant to the personnel director of the Tennessee Valley Authority may send a $30 floral arrangement to the personnel director who is in the hospital recovering from surgery. The personnel director may accept the gift.

Example 2: A chemist employed by the Food and Drug Administration has been invited to the wedding of the lab director who is his official superior. He may give the lab director and his bride, and they may accept, a place setting in the couple's selected china pattern purchased for $70.

(c) *Voluntary contributions.* An employee may solicit voluntary contributions of nominal amounts from fellow employees for a gift to an official superior and an employee may make a voluntary contribution of a nominal amount to a gift to an official superior:

(1) On a special, infrequent occasion as described in paragraph (b) of this section; or

(2) On an occasional basis, for items such as food and refreshments to be shared in the office among several employees.

An employee may accept such gifts to which a subordinate or other employee receiving less pay than himself has contributed.

Example 1: To mark the occasion of his retirement, members of the immediate staff of the Under Secretary of the Army would like to give him a party and provide him with a gift certificate. They may distribute an announcement of the party and include a nominal amount for a retirement gift in the fee for the party.

Example 2: The General Counsel of the National Endowment for the Arts may not collect contributions for a Christmas gift for the Chairman. Because Christmas occurs annually, it is not an infrequently occurring occasion of personal significance.

Example 3: Subordinates may not take up a collection for a gift to an official superior on the occasion of the superior's swearing in or promotion to a higher grade position within the supervisory chain of that organization. These are not events that mark the termination of the subordinate-official superior relationship, nor are they events of personal significance within the meaning of § 2635.304(b) of this subpart. However, subordinates may take up a collection and employees may contribute $3 each to buy refreshments to be consumed by everyone in the immediate office to mark either such occasion.

Example 4: Subordinates may each contribute a nominal amount to a fund to give a gift to an official superior upon the occasion of that superior's transfer or promotion to a position outside the organization.

Example 5: An Assistant Secretary at the Department of the Interior is getting married. His secretary has decided that a microwave oven would be a nice gift from his staff and has informed each of the Assistant Secretary's subordinates that they should contribute $5 for the gift. Her method of collection is improper. Although she may recommend a $5 contribution, the recommendation must be coupled with a statement that the employee whose contribution is solicited is free to contribute less or nothing at all.

Subpart D—Conflicting Financial Interests

§ 2635.401 Overview.

This subpart contains two provisions relating to financial interests. One is a disqualification requirement and the other is a prohibition on acquiring or continuing to hold specific financial interests. An employee may acquire or hold any financial interest not prohibited by § 2635.403 of this subpart. Notwithstanding that his acquisition or holding of a particular interest is proper, an employee is prohibited in accordance with § 2635.402 of this subpart from participating in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

§ 2635.402 Disqualifying financial interests.

(a) *Statutory prohibition.* An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

Note: Standards applicable when seeking non-Federal employment are contained in subpart F of this part and, if followed, will ensure that an employee does not violate 18 U.S.C. 208(a) or this section when he is negotiating for or has an arrangement concerning future employment. In all other cases where the employee's participation would violate 18 U.S.C. 208(a), an employee shall disqualify himself from participation in the matter in accordance with paragraph (c) of this section or obtain a waiver, as described in paragraph (d) of this section.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Direct and predictable effect.* (i) A particular matter will have a *direct* effect on a financial interest for purposes of this subpart if there is a close causal link between any decision or action to be taken in the matter and any expected effect on the financial interest. An effect may be direct even though it does not occur immediately. A matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.

(ii) A matter will have a *predictable* effect for purposes of this subpart if there is a real, as opposed to a slight or speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known.

Note: If a particular matter involves a specific party or parties, the matter will generally only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party. There may, however, be some situations in which, under the above standards, a particular matter will have a direct and predictable effect on an employee's financial interests in or with a nonparty. For example, if a party is a corporation, a particular matter may also have a direct and predictable effect on an employee's stock in an affiliate, parent, or subsidiary of that party. Similarly, the disposition of a protest against the award of a contract to a particular company may also have a direct and predictable effect on the employee's stock in another company listed as a subcontractor in the proposal of one of the competing offerors.

(2) *Imputed interests.* For purposes of 18 U.S.C. 208(a) and this subpart, the financial interests of the following persons are treated as if they were the employee's own interests:

(i) The employee's spouse;

(ii) The employee's minor child;

(iii) The employee's general partner;

(iv) An organization or entity which the employee serves as officer, director, trustee, general partner or employee; and

(v) A person with whom the employee is negotiating for or has an arrangement concerning prospective employment. (Employees who are seeking other employment should refer to and comply with the standards in subpart F of this part).

(3) *Particular matter.* The term *particular matter* encompasses only

matters that involve deliberation, decision, or action that is focused upon the interests or specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even though it does not involve formal parties and may include governmental action such as legislation or policy making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term *particular matter*, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest.

(4) *Personal and substantial.* To participate *personally* means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate *substantially* means that the employee's involvement is of material significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation, or the rendering of advice in a particular matter.

(c) *Disqualification.* Unless the employee is authorized to participate in the particular matter by virtue of a waiver described in paragraph (d) of this section or because the interest has been divested in accordance with paragraph (e) of this section, the employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or a person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

(1) *Documentation of disqualification.* Disqualification is accomplished by not participating in the particular matter. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is asked by an agency ethics official to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor.

(2) *Notification to coworkers.* An employee who is not authorized to determine or to make his own assignments may, as a practical matter, need to notify his supervisor (or other person responsible for his assignments) of the disqualifying financial interest in order to permit the supervisor to make arrangements to fulfill the agency's responsibility in the matter. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

Example 1: A newly wed Army employee is negotiating an on-going procurement of amphibious landing equipment. He has just learned that his bride is the beneficiary of a family trust that holds 100 shares of stock in one for the offerors. Because this financial interest of his spouse is imputed to him for purposes of 18 U.S.C. 208(a), he cannot continue to participate in the procurement. Because he has already participated in the matter, the employee may wish to file a written disqualification statement with the person who assigned him to the procurement in order to create a written record that he withdrew from participation immediately upon learning of his imputed financial interest in the matter.

Example 2: An Assistant Secretary of the Department of the Interior owns recreational property that borders on land which is being considered for annexation to a national park. Annexation would increase the value of her vacation property and, thus, she is disqualified from participating in any way in the Department's deliberations or decisions regarding the annexation. Because she is responsible for determining which matters she will work on, she may accomplish her disqualification merely by ensuring that she does not participate in the matter. Because of the level of her position, however, the Assistant Secretary may, as a matter of prudence, wish to establish a record that she has acted properly by providing a written disqualification statement to an official superior and by providing written notification of the disqualification to subordinates to ensure that they do not raise or discuss with her any issues related to the annexation.

(d) *Waiver of disqualification.* An employee who would otherwise be disqualified by 18 U.S.C. 208(a) may be permitted to participate in a particular matter where the otherwise disqualifying financial interest is the subject of a regulatory or individual waiver described in this paragraph, or results from certain Indian birthrights as described in 18 U.S.C. 208(b)(4).

(1) *Regulatory waivers.* Under 18 U.S.C. 208(b)(2), regulatory waivers of general applicability may be issued by the Office of Government Ethics based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of the employees to whom the waiver apply. Pending issuance of superseding regulatory waivers under this authority, agency regulatory waivers issued under 18 U.S.C. 208(b)(2) as in effect prior to November 30, 1989, continue to apply.

(2) *Individual waivers.* An individual waiver enabling the employee to participate in a particular matter may be issued under 18 U.S.C. 208(b)(1) if, in advance of the employee's participation:

(i) The employee:

(A) Advises the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated) about the nature and circumstances of the particular matter; and

(B) Makes full disclosure to such official of the nature and extent of the disqualifying financial interest; and

(ii) Such official determines, in writing, that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from each employee.

(3) *Federal advisory committee member waivers.* An individual waiver may be issued under 18 U.S.C. 208(b)(3) to a special Government employee serving on, or under consideration for appointment to, an advisory committee within the meaning of the Federal Advisory Committee Act if the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated):

(i) Reviews the financial disclosure report filed by the special Government employee pursuant to the Ethics in Government Act of 1978; and

(ii) Certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the disqualifying financial interest.

When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in paragraphs (d)(2) or (3) of this section. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, 18 U.S.C. 208(a) and paragraph (c) of this section will no longer prohibit the employee's participation in the matter.

(1) *Voluntary divestiture.* An employee who would otherwise be

disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with § 2635.403(a) of this subpart, or if the agency determines in accordance with § 2635.403(b) of this subpart that a substantial conflict exists between the financial interest and the employee's duties or accomplishments of the agency's mission.

An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this subchapter. An employee who voluntarily divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should, as a matter of prudence, advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

§ 2635.403 Prohibited financial interests.

An employee shall not acquire or hold any financial interest that he is prohibited from acquiring or holding by statute, by agency regulation issued in accordance with paragraph (a) of this section or by reason of an agency determination of substantial conflict under paragraph (b) of this section.

Note: There is no statute of Government-wide applicability prohibiting employees from holding or acquiring any financial interest. Statutory restrictions, if any, are contained in agency statutes.

(a) *Agency regulation prohibiting certain financial interests.* An agency may, by supplemental agency regulation, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.

Note: Any prohibition on acquiring or holding a specific financial interest contained in an agency regulation, instruction or other issuance in effect prior to the effective date of this part shall, for employees of that agency, constitute a prohibited financial interest for purposes of this paragraph for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

(b) *Agency determination of substantial conflict.* An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest or a class of financial interests based upon the agency's determination that the holding of such interest or interests will:

(1) Require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired; or

(2) Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

Example 1: An Air Force employee who owns stock in a major aircraft engine manufacturer is being considered for promotion to a position that involves responsibility for development of a new fighter airplane. Because engineering and other decisions about the Air Force's requirements for the fighter necessarily impact upon the nation's several engine manufacturers, the employee could not, by virtue of 18 U.S.C. 208(a), perform these significant duties of the position while retaining his stock in the company. The agency can require the employee to sell his stock as a condition of being selected for the position.

(c) *Definition of financial interest.* (1) Except as provided in paragraph (c)(2) of this section, the term *financial interest* is limited to financial interests that are owned by the employee or that are both imputed to the employee under § 2635.402(b)(2) of this subpart and controlled by the employee. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. 208(a) and § 2635.402 of this subpart. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.

Example 1: A regulatory agency wishes to issue a supplemental agency regulation to prohibit employees from acquiring stock or bonds in regulated entities. Because an employee will generally not control his spouse's independent investments, the agency may not prohibit the independent acquisition of such stock or bonds by an employee's spouse. However, because a spouse's financial interests are imputed to the employee under 18 U.S.C. 208(a), a spouse's holding of stock in a regulated entity may result in the employee's disqualification from particular duties or other appropriate administrative remedies.

(2) The term *financial interest* includes service, with or without compensation, as an officer, director, trustee, general partner or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under § 2635.402(b)(2)(iii) or (iv) or this subpart.

Example 1: Because the Foundation for Preservation of Wild Horses routinely comments on all rulemaking affecting the use of Federal grasslands, the Bureau of Land Management may require that an employee resign from his uncompensated position as Vice President of the Foundation as a condition of his promotion to a policy-level position with the Bureau.

(d) *Reasonable period to divest or terminate.* Whenever an agency directs divestiture of a financial interest under paragraph (a) or (b) of this section, the employee shall be given a reasonable period of time, considering the nature of his particular duties and the nature and marketability of the interest, within which to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period shall not exceed 90 days from the date divestiture is first directed. However, as long as the employee continues to hold the financial interest, he remains subject to any restrictions imposed by this subpart.

(e) *Eligibility for special tax treatment.* An employee required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this subchapter.

Subpart E—Impartiality in Performing Official Duties

§ 2635.501 Overview.

(a) This subpart contains two provisions intended to ensure that an

employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502 of this subpart, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 of this subpart to determine whether he should or should not participate in a particular matter.

(b) Under § 2635.503 of this subpart, an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.

Note: Questions regarding impartiality necessarily arise when an employee's official duties impact upon the employee's own financial interests or those of certain other persons, such as the employee's spouse or minor child. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter on which, to his knowledge, he, his spouse, general partner or minor child has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The statutory prohibition also extends to an employee's participation in a particular matter in which, to his knowledge, an organization in which the employee is serving as officer, director, trustee, general partner or employee, or with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest. Where the employee's participation in a particular matter would affect any one of these financial interests, the standards set forth in subparts D or F of this part apply and only a statutory waiver, as described respectively in §§ 2635.402(d) and 2635.605(a) of this part, will enable the employee to participate in that matter. The authorization procedures in § 2635.502(d) of this subpart may not be used to authorize an employee's participation in any such matter. The granting of a statutory waiver will be deemed to constitute a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or that a person with whom he has a covered relationship is or represents a party to such matter, and where the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in § 2635.603(c) of this part, with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

Note: An employee who is seeking employment within the meaning of § 2635.603 of this part shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

(2) *Direct and predictable effect* has the meaning set forth in § 2635.402(b)(1) of this part.

(3) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this subchapter.

Example 1: An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2: An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of 5 or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

Example 3: An employee of the Defense Logistics Agency who has responsibilities for testing avionics being produced by an Air Force contractor has just learned that his sister-in-law has accepted employment as an engineer with the contractor's parent corporation. The employee should readily conclude that, under the circumstances, a reasonable person would not be likely to question his impartiality if he were to continue to perform his test and evaluation responsibilities.

Example 4: An engineer has just resigned from her position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration in a position involving procurement responsibilities. Although the employee did not receive an extraordinary payment in connection with her resignation and has severed all financial ties with the firm, under the circumstances she would be correct in concluding that her former service as an officer of the company would be likely to cause a reasonable person to question her

impartiality if she were to participate in the administration of a DOT contract for which the firm is a first-tier subcontractor.

Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

(c) *Determination by agency designee.* Where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee's household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship, the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (e) of this section, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(1) If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

(2) If the agency designee determines that the employee's impartiality is not likely to be questioned, he may advise the employee, including an employee who has reached a contrary conclusion under paragraph (a) of this section, that the employee's participation in the matter would be proper.

(d) *Authorization by agency designee.* Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

(1) The nature of the relationship involved;

(2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;

(3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;

(4) The sensitivity of the matter;

(5) The difficulty of reassigning the matter to another employee; and

(6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Authorization by the agency designee should, at the agency designee's discretion, be documented in writing. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

Example 1: The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected, the partner would receive a substantial increase in salary. The Director must appoint another person to replace the Deputy Director on the selection panel. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See § 2635.402 of this part.

Example 2: A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to pass on a routine filing by the particular brokerage house.

Example 3: An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) *Disqualification.* Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality.

(1) *Documentation of disqualification.* Disqualification is accomplished by not participating in the matter. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor.

(2) *Notification to coworkers.* An employee who is not authorized to determine or to make his own assignments may, as a practical matter, need to notify his supervisor (or other person responsible for his assignments) of the relationship that gives rise to the obligation of disqualification in order to permit the supervisor to make arrangements to fulfill the agency's responsibility in the matter or to give or seek authorization to permit the employee's participation pursuant to paragraph (d) of this section. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee

or a supervisor to ensure that the employee is not involved in a particular matter involving specific parties from which he is disqualified.

(f) *Relevant considerations.* An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

§ 2635.503 Extraordinary payments from former employers.

(a) *Disqualification requirement.* Except as provided in paragraph (c) of this section, an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

Example 1: Following his confirmation hearings and one month before his scheduled swearing in, a nominee to the position of Assistant Secretary of a department received an extraordinary payment from his employer. For one year and 11 months after his swearing in, the Assistant Secretary may not participate in any particular matter to which his former employer is a party.

Example 2: An employee received an extraordinary payment from her former employer, a coal mine operator, prior to entering on duty with the Department of the Interior. She may not participate in a determination regarding her former employer's obligation to reclaim a particular mining site, because her former employer is a party to the matter. However, she may help to draft reclamation legislation affecting all coal mining operations because this legislation does not involve any parties.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Extraordinary payment* means any item, including cash or an investment interest, with a value in excess of $10,000, which is paid:

(i) On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and

(ii) Other than pursuant to the former employer's established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.

Example 1: Upon being nominated for a position as an ambassador, the vice president of a small corporation announced his intention to resign his vice presidency upon confirmation. Upon his resignation, the corporation voted to give him a gratuitous payment of $50,000, in recognition of his service as a corporate officer, in addition to the regular severance payment provided for by the corporate bylaws. The regular severance payment is not an extraordinary payment. The gratuitous payment of $50,000 is an extraordinary payment, since the corporation had not made similar payments to other departing officers.

(2) *Former employer* includes any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.

(c) *Waiver of disqualification.* The disqualification requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party. The waiver shall be in writing and may be given only by the head of the agency or, where the recipient of the payment is the head of the agency, by the President or his designee. Waiver authority may be delegated by agency heads to any person who has been delegated authority to issue individual waivers under 18 U.S.C. 208(b) for the employee who is the recipient of the extraordinary payment.

Subpart F—Seeking Other Employment

§ 2635.601 Overview.

This subpart contains a disqualification requirement that applies to employees when seeking employment with persons who otherwise would be affected by the performance or nonperformance of the employees' official duties. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person "with whom he is negotiating or has any arrangement concerning prospective employment." Beyond this statutory requirement, it also addresses the issues of lack of impartiality that require disqualification from particular matters affecting the financial interests of a prospective employer when an employee's actions in seeking employment fall short of actual employment negotiations.

§ 2635.602 Applicability and related considerations.

To ensure that he does not violate 18 U.S.C. 208(a) or the principles of ethical conduct contained in § 2635.101(b) of this part, an employee who is seeking employment or who has an arrangement concerning prospective employment shall comply with the applicable disqualification requirements of §§ 2635.604 and 2635.606 of this subpart if the employee's official duties would affect the financial interests of a prospective employer or of a person with whom he has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part.

Note: An employee who is seeking employment with a person whose financial interests are not affected by the performance of nonperformance of his official duties has no obligation under this subpart. An employee may, however, be subject to other statutes which impose restrictions on employment contacts or discussions, such as 41 U.S.C. 423(b)(1), applicable to procurement officials, and 10 U.S.C. 2397a, applicable to certain employees of the Department of Defense.

(a) *Related employment restrictions*—(1) *Outside employment while a Federal employee.* An employee who is contemplating outside employment to be undertaken concurrently with his Federal employment must abide by any limitations applicable to his outside activities under subparts G and H of this part. He must also comply with any disqualification requirement that may be applicable under subpart D of this part as a result of his outside employment activities.

(2) *Post-employment restrictions.* An employee who is contemplating employment to be undertaken following the termination of his Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. Regulations implementing the Government-wide post-employment statute, 18 U.S.C. 207, are contained in parts 2637 and 2641 of this subchapter. Employees are cautioned that they may be subject to additional statutory restrictions on their post-employment activities.

(b) *Interview trips and entertainment.* Where a prospective employer who is a prohibited source as defined in § 2635.203(d) of this part offers to reimburse an employee's travel expenses, or provide other reasonable amenities, incident to employment discussions, the employee may accept such amenities only in accordance with the gift standards in subpart B of this part.

§ 2635.603 Definitions.

For purposes of this subpart:

(a) *Employment* means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, consultant, general partner, or trustee.

Example 1: An employee of the Bureau of Indian Affairs who has announced her intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The independent contractual relationship the tribe wishes to negotiate is employment for purposes of this subpart.

Example 2: An employee of the Department of Health and Human Services is invited to a meeting with officials of a corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service as a member of the board of directors constitutes employment for purposes of this subpart.

(b) An employee is *seeking employment* once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if he has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term *negotiations* means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:

(A) For the sole purpose of requesting a job application; or

(B) By a special Government employee for the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The special Government employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

(iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

Example 1: An employee of the Health Care Financing Administration is complimented on her work by an official of a State Health Department who asks her to call if she is ever interested in leaving Federal service. The employee explains to the State official that she is very happy with her job at HCFA and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

Example 2: The employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment with the State Health Department.

Example 3: An employee of the Defense Contract Audit Agency is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee says he is interested in knowing what kind of work would be involved. They discuss the duties of the position the accounting division would like to fill and the DCAA employee's qualifications for the position. They do not discuss salary. The head of the division explains that he has not yet received authorization to fill the particular position and will get back to the employee when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding possible employment. The employee has begun seeking employment with the Army contractor.

Example 4: An employee of the Occupational Safety and Health Administration helping to draft safety standards applicable to the textile industry has mailed his resume to 25 textile manufacturers. He has begun seeking employment with all twenty-five. If he does not receive a response from any of the resume recipients indicating an interest in employment discussions, the employee will be seeking employment with each resume recipient for 2 months from the date the particular resume was dispatched. However, if he withdraws his application from any recipient or if he is notified within the 2-month period that his resume has been rejected by that recipient, he will no longer be seeking employment with that particular person as of the date he makes such withdrawal or receives such notification.

Example 5: A special Government employee of the Federal Deposit Insurance Corporation assisting in drafting rules applicable to all member banks mails an unsolicited letter to a member bank offering her services as a contract consultant. She has not begun seeking employment with the bank until she receives some response indicating an interest in discussing her employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

(c) *Prospective employer* means any person with whom the employee is seeking employment. Where contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer includes:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

Example 1: An employee of the Federal Aviation Administration has overall responsibility for airport safety inspections in a three-state area. She has retained an employment search firm to help her find another job. The search firm has just reported to the FAA employee that it has given her resume to and had promising discussions with two airport authorities within her jurisdiction. Even though the employee has not personally had employment discussions with either, each airport authority is her prospective employer. She began seeking employment with each upon learning its identity and that it has been given her resume.

(d) *Direct and predictable effect* and *particular matter* have the respective meanings set forth in § 2635.402(b) (1) and (3) of this part.

§ 2635.604 Disqualification while seeking employment.

(a) *Obligation to disqualify.* Unless the employee's participation is authorized in accordance with § 2635.605 of this subpart, the employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is negotiating for employment within the meaning of § 2635.603(b) of this subpart. An employee who wishes to initiate employment contacts with a person whose financial interests he knows will be directly affected by a particular matter to which he is assigned shall take steps necessary to effect such disqualification before beginning to seek employment with that person.

(b) *Documentation of disqualification.* Disqualification is accomplished by not participating in the particular matter. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor.

(c) *Notification to coworkers.* An employee who is not authorized to determine or to make his own assignments may, as a practical matter, need to notify his supervisor (or other person responsible for his assignments) of the disqualifying financial interest in order to permit the supervisor to make arrangements to fulfill the agency's responsibility in the matter. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

Example 1: An employee of the Department of Veterans Affairs is participating in the audit of a contract for laboratory support services. Before sending his resume to a lab which is a subcontractor under the VA contract, the employee should disqualify himself from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he will have to disclose his intentions to his supervisor in order to have his work assignment changed.

Example 2: An employee of the Food and Drug Administration is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is actively involved in formulating recommendations to improve particular testing procedures that would directly affect the company. Before making a response that is not a rejection, the employee should disqualify himself from further participation in formulating testing procedures. Where he has authority to ask his colleague to assume his responsibility in the matter, he may accomplish his disqualification by transferring the work to that coworker. However, to ensure that his colleague and others with whom he had been working on the recommendations do not seek his advice regarding testing or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his disqualification.

Example 3: The General Counsel of a regulatory agency wishes to engage in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, he can in fact accomplish his disqualification by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be assumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, he may, as a matter of prudence, wish to file a written disqualification statement with the Commissioners of the regulatory agency and provide his subordinates with written notification of his disqualification, or he may be specifically asked by an agency ethics official to file a written disqualification statement.

Example 4: A scientist is employed by the National Science foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effect of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel's review, the employee would not have to take any action to effect disqualification.

(d) *Agency determination of substantial conflict.* Where the agency determines that the employee's action in seeking employment with a particular person will require his disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired, the agency may allow or direct the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative action.

§ 2635.605 Waiver or authorization permitting participation while seeking employment.

(a) *Waiver.* Where, as defined in § 2635.603(b)(1)(i) of this subpart, an employee is engaged in discussions that constitute employment negotiations for purposes of 18 U.S.C. 208(a), the employee may participate in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3). These waivers are described in § 2635.402(d) of this part.

Example 1: An employee of the Department of Agriculture has had two telephone conversations with an orange grower regarding possible employment. They have discussed the employee's qualifications for a particular position with the grower, but have not yet discussed salary or other specific terms of employment. The employee is negotiating for employment within the meaning of 18 U.S.C. 208(a) and § 2635.603(b)(1)(i) of this subpart. In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), she may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) *Authorization by agency designee.* Where an employee is seeking employment within the meaning of § 2635.603(b)(1) (ii) or (iii) of this subpart, a reasonable person would be likely to question his impartiality if he were to participate in a particular matter that has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized his participation in accordance with the standards set forth in § 2635.502(d) of this part.

Example 1: Within the past month, an employee of the Education Department mailed her resume to a university. She is thus seeking employment with the university within the meaning of § 2635.603(b)(1)(ii) of this subpart even though she has received no reply. In the absence of specific authorization by the agency designee in accordance with § 2635.502(d), she may not participate in an assignment to review a grant application submitted by the university.

§ 2635.606 Disqualification upon conclusion of employment negotiations.

(a) *Offer accepted.* An employee who has sought and accepted employment shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person by

whom he is employed or with whom he has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208 (b)(1) or (b)(3). These waivers are described in § 2635.402(d) of this part.

Example 1: A military officer has accepted a job with a defense contractor to begin in 6 months, after his retirement from military service. During the period that he remains with the Government, the officer may not participate in the administration of a contract with that particular defense contractor unless he has received a written waiver under the authority of 18 U.S.C. 208(b)(1).

(b) *Offer rejected or not made.* The agency designee for the purpose of § 2635.502(c) of this part may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all relevant factors, including those listed in § 2635.502(d) of this part, and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking process outweighs the Government's interest in the employee's participation in the matter.

Example 1: An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer her the partnership position she sought. Even though she is no longer seeking employment with the firm, she may continue to be disqualified from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, she could act impartially if the matter outweighs the Government's interest in her participation.

Subpart G—Misuse of Position

§ 2635.701 Overview.

This subpart contains provisions relating to the proper use of official time and authority, and of information and resources to which an employee has access because of his Federal employment. This subpart sets forth standards relating to:

(a) Use of public office for private gain;

(b) Use of nonpublic information;

(c) Use of Government property; and

(d) Use of official time.

§ 2635.702 Use of public office for private gain.

An employee shall not use his public office for his own private gain or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general principle, but are not intended to be exclusive or to limit the application of this section.

(a) *Inducement or coercion of benefits.* An employee shall not use or permit the use of his Government position or title or any authority with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

Example 1: Offering to pursue a relative's consumer complaint over a household appliance, an employee of the Securities and Exchange Commission called the general counsel of the manufacturer and, in the course of discussing the problem, stated that he worked at the SEC and was responsible for reviewing the company's filings. The employee violated the prohibition against use of public office for private gain by invoking his official authority in an attempt to influence action to benefit his relative.

Example 2: An employee of the Department of Commerce was asked by a friend to determine why his firm's export license had not yet been granted by another office within the Department of Commerce. At a department-level staff meeting, the employee raised as a matter for official inquiry the delay in approval of the particular license and asked that the particular license be expedited. The official used her public office in an attempt to benefit her friend and, in acting as her friend's agent for the purpose of pursuing the export license with the Department of Commerce, also violated 18 U.S.C. 205.

(b) *Appearance of governmental sanction.* Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by § 2635.807(b) of this part. He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

Example 1: An employee of the Department of the Treasury who is asked to provide a letter of recommendation for a former subordinate on his staff may provide the recommendation using official stationery and may sign the letter using his official title. If, however, the request is for the recommendation of a personal friend with whom he has not dealt in the Government, the employee should not use official stationery or sign the letter of recommendation using his official title, unless the recommendation is for Federal employment. In writing the letter of recommendation for his personal friend, it may be appropriate for the employee to refer to his official position in the body of the letter.

(c) *Endorsements.* Except in furtherance of statutory authority to promote products, services or enterprises, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service, or enterprise.

Example 1: A Commissioner of the Consumer Product Safety Commission may not appear in a television commercial in which she endorses an electrical appliance produced by her former employer, stating that it has been found by the CPSC to be safe for residential use.

Example 2: A Foreign Commercial Service officer from the Department of Commerce is asked by a United States telecommunications company to meet with representatives of the Government of Spain, which is in the process of procuring telecommunications services and equipment. The company is bidding against five European companies and the statutory mission of the Department of Commerce includes assisting the export activities of U.S. companies. As part of his official duties, the Foreign Commercial Service officer may meet with Spanish officials and explain the advantages of procuring from the United States company.

Example 3: An employee of the National Aeronautics and Space Administration who works on weekends as an automobile salesman cannot be featured in a television commercial that advertises the opportunity to buy a car from a "real astronaut."

(d) *Performance of official duties affecting a private interest.* To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of

certain persons with whom he has significant relationships shall comply with any applicable requirements of § 2635.502 of this part.

(e) *Use of ranks and terms of address.* Nothing in this section prohibits an employee who is ordinarily addressed using a general term of address, such as "The Honorable", or a rank, such as a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity.

§ 2635.703 Use of nonpublic information.

(a) *Prohibition.* An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice, recommendation, or by knowing unauthorized disclosure.

(b) *Definition of nonpublic information.* For purposes of this section, *nonpublic information* is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute or executive order;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

Example 1: A Navy employee learns in the course of her duties that a small corporation will be awarded a Navy contract for electrical test equipment. She may not take any action to purchase stock in the corporation or its suppliers and she may not advise friends or relatives to do so until after public announcement of the award. Such actions could violate insider trading laws as well as this section.

Example 2: A General Services Administration employee involved in evaluating proposals for a construction contract cannot disclose the terms of a competing proposal to a friend employed by a company bidding on the work. Prior to award of the contract, bid or proposal information is nonpublic information specifically protected by 41 U.S.C. 423.

Example 3: An employee is a member of a source selection team assigned to review the proposals submitted by several companies in response to an Army solicitation for spare parts. As a member of the evaluation team, the employee has access to proprietary information regarding the production methods of Alpha Corporation, one of the competitors. He may not use that information to assist Beta Company in drafting a proposal to compete for a Navy spare parts contract. Parts 3, 14 and 15 of the Federal Acquisition Regulation restrict the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. 1905 and 41 U.S.C. 423.

Example 4: An employee of the Nuclear Regulatory Commission inadvertently includes a document that is exempt from disclosure with a group of documents released in response to a Freedom of Information Act request. Regardless of whether the document is used improperly, the employee's disclosure does not violate this section because it was not a knowing unauthorized disclosure made for the purpose of furthering a private interest.

Example 5: An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter nonpublic information about long-range plans to build a particular dam.

§ 2635.704 Use of Government property.

(a) *Standard.* An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.

(b) *Definitions.* For purposes of this section:

(1) *Government property* includes any form of real or personal property in which the Government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with Government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities, Government records, and Government vehicles.

(2) *Authorized purposes* are only those purposes authorized by law or regulation for the performance of official duty. In the absence of such authority, an employee's use of Government property for any purpose unrelated to the performance of his official duties is improper. However, on his own time, provided such use does not inconvenience the agency, an employee:

(i) May occasionally use microfiche and printed library and general reference materials; and

(ii) May be authorized by his supervisor to use microfiche and printed library and general reference materials and word processing equipment for purposes of professional development where there is a negligible cost to the Government.

Example 1: Under regulations of the General Services Administration at 41 CFR 201-38.007-1, an employee may use the Government telephones to make a brief local call to her daughter's day care center or to make a commercial long distance call charged to her personal calling card.

Example 2: An employee of the Defense Contract Audit Agency is taking a night course on cost accounting as part of a masters degree program. She may be authorized by the supervisor to use the agency's library and her office word processor during nonduty hours to research and write a paper required for the course.

Example 3: An employee of the Commodity Futures Trading Commission whose office computer gives him access to a commercial service providing information for investors may not use that service for personal investment research.

§ 2634.705 Use of Official Time.

(a) *Use of an employee's own time.* An employee shall not use official time other than in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. 6301(2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

(b) *Use of a subordinate's time.* An employee shall not direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties.

Example 1: An employee of the Department of Housing and Urban Development may not ask his secretary to type his personal correspondence during duty hours. Further, directing or coercing a subordinate to perform such activities during nonduty hours constitutes an improper use of public office for private gain in violation of § 2635.702(a) or this subpart. Where the arrangement is entirely voluntary and appropriate compensation is paid, the secretary may type the correspondence at home on her own time.

Subpart H—Outside Activities

§ 2635.801 Overview.

(a) This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) An employee who wishes to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activities;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other noncareer employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on participation in professional organizations;

(6) The limitations on paid and unpaid teaching, speaking, and writing; and

(7) The limitations on fundraising activities.

(c) Outside employment and other outside activities of employees must also comply with applicable requirements set forth in other subparts of this part and with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty.

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act.

(3) 18 U.S.C. 203(a), which prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity of the United States. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction.

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity of the United States, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restrictions.

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability.

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits an employee from accepting any gift, office, title or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any employee from acting as an agent of a foreign principal, including a foreign government, corporation or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 *et seq.*

(7) The Hatch Act, 5 U.S.C. 7321 through 7328, which prohibits most employees from engaging in certain partisan political activities.

(8) The honorarium prohibition, 5 U.S.C. App., which prohibits an employee, other than a special Government employee, from receiving any compensation for an appearance, speech or article. Implementing regulations are contained in §§ 2636.201 through 2636.205 of this subchapter.

(9) The limitations on outside employment, 5 U.S.C. App., which prohibit a covered noncareer employee's receipt of compensation for specified activities and provide that he shall not allow his name to be used by any firm or other entity which provides professional services involving a fiduciary relationship. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this subchapter.

§ 2635.802 Conflicting outside employment and activities.

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties:

(a) If it is prohibited by statute or by an agency supplemental regulation; or

(b) If, under the standards set forth in §§ 2635.402 and 2635.502 of this part, it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

Employees are cautioned that even though an outside activity may not be prohibited under this section, it may nevertheless require the employee to disqualify himself from participation in certain particular matters under either subpart D or subpart E of this part.

Example 1: An employee of the Environmental Protection Agency has just been promoted. His principal duty in his new position is to write regulations relating to the disposal of hazardous waste. The employee may not continue to serve as president of a nonprofit environmental organization that routinely submits comments on such regulations. His service as an officer would require his disqualification from duties critical to the performance of his official duties on a basis so frequent as to materially impair his ability to perform the duties of his position.

§ 2635.803 Prior approval for outside employment and activities.

Where required by agency supplemental regulation, an employee shall obtain prior approval before engaging in outside employment or activities. Where it is desirable for the purpose of administering its ethics program, an agency may, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in any or specific types of outside employment or activities.

Note: Any requirement for prior approval of employment or activities contained in any agency regulation, instruction, or other issuance in effect prior to the effective date of this part shall constitute a requirement for prior approval for purposes of this section for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

§ 2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.

(a) *Presidential appointees to full-time noncareer positions.* A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment. This limitation does not apply to any outside earned income received for outside employment, or for any other outside activity, carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989.

(b) *Covered noncareer employees.* Covered noncareer employees, as defined in § 2636.303(a) of this subchapter, may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive

Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. Employees should consult the regulations implementing this limitation, which are contained in §§ 2636.301 through 2636.304 of this subchapter.

Note: In addition to the 15 percent limitation on outside earned income, covered noncareer employees are prohibited from receiving any compensation for: practicing a profession which involves a fiduciary relationship; affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; serving as an officer or member of the board of any association, corporation or other entity; or teaching without prior approval. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this subchapter.

(c) *Definitions.* For purpose of this section:

(1) *Outside earned income* has the meaning set forth in § 2636.303(b) of this subchapter, except that paragraph (b)(8) of that section shall not apply.

(2) *Presidential appointee to a full-time noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by presidential appointment, other than:

(i) A position filed under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;

(iii) A position within the uniformed services; or

(iv) A position held by a member of the foreign service which does not require advice and consent of the Senate.

Example 1: A career Department of Justice employee who is detailed to a policymaking position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

Example 2: A Department of Energy employee appointed under § 213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a presidential appointee to a full-time noncareer position.

§ 2635.805 Service as an expert witness.

(a) *Restriction.* An employee shall not serve as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section as in the interest of the Government. Except as provided in paragraph (b) of this section, this restriction shall only apply to a special Government employee if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) *Additional restriction applicable in certain special Government employees.* (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section as in the interest of the Government.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

(i) Is appointed by the President;

(ii) Serves on a commission established by statute; or

(iii) has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) *Authorization to serve as an expert witness.* Authorization to serve as an expert witness may be given by the designated agency ethics official of the agency in which the employee serves when, after consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government.

§ 2635.806 Participation in professional associations.

Employees are encouraged to participate in the activities of professional associations and similar entities organized to enhance the skills and abilities of their members. Employees may participate through membership in, and may serve as officers of, such organizations subject to the limitations contained in this part and consistent with paragraphs (a) through (c) of this section. Nothing in this section prohibits an agency from designating an employee to serve in his official capacity as its official liaison to a particular organization in which the agency has a specific interest.

(a) *Participation in substantive programs.* An employee may use official time to attend or otherwise to participate in a substantive program sponsored by a professional association or similar organization when authorized by his supervisor on the basis of a determination that the substantive content of the program relates to the performance of the employee's official duties and that the employee's participation is in the interest of the Government.

(b) *Participation in internal or business affairs.* Unless an employee is specifically authorized by statute, executive order or regulation to serve in an official capacity as an officer of a professional association or similar organization, he may not use official time to administer the internal affairs of any such organization or to carry out its business affairs, or to attend or to participate in meetings or events that primarily serve those purposes. Nothing in this paragraph prohibits an employee from using official time to participate in a substantive program that he is authorized to attend under paragraph (a) of this section if only a small portion of the program is devoted to the internal or business affairs of the organization, or from occasionally using a Government telephone for the conduct of organizational affairs if such use is consistent with the requirements of 41 CFR 201.38.007-1.

(c) *Conflict of interest considerations.* An employee who is not simply a member but who serves, other than in his official capacity, as an officer, director, trustee or employee of a professional association or similar organization is prohibited, in accordance with 18 U.S.C. 208(a) and the standards set forth in subpart D of this part, from participating in his official capacity in any particular matter that has a direct and predictable effect on a financial interest of that organization.

Example 1: An attorney with the Defense Logistics Agency is treasurer of the Federal Bar Association and serves on the association's election committee. She may not use DLA wordprocessing or photocopy equipment nor the Government mails to produce and mail bills for association dues or ballots for the election of officers.

Example 2: An accountant employed by the Defense Contract Audit Agency is a member of the Association of Government Accountants. She has been directed by her supervisor to participate in a panel discussion of cost accounting principles to take place at a seminar sponsored by the association. Because she is authorized to participate in her official capacity, she may participate on official time and use her title in

connection with the panel presentation. In addition, she may use her office word processor to prepare her remarks as a panel member.

Example 3: An attorney employed by the Department of Housing and Urban Development serves as an officer of her local bar association. While she must take annual leave to attend a meeting of the association's officers or to run the internal affairs of the association, she may be authorized to use official time to attend an association meeting on problems of the homeless where her participation is determined to be related to her official duties and in the interest of the Government. To improve her professional skills, she may also be authorized to use official time to attend a seminar on professional conduct sponsored by the association. In the absence of a waiver issued under 18 U.S.C. 208(b), however, she may not direct a subordinate to speak at a seminar sponsored by the association for which an attendance fee is to be charged nor could she sign a training form obligating HUD funds to pay the fee for a subordinate to attend the seminar.

§ 2635.807 Teaching, speaking, and writing.

(a) *Compensation for teaching, speaking or writing.* Except as permitted by paragraph (a)(2) of this section, an employee, including a special Government employee, shall not receive compensation from any source other than the Government for teaching, speaking, or writing that relates to the employee's official duties.

(1) *Definitions.* For purposes of this paragraph:

(i) Teaching, speaking, or writing *relates to the employee's official duties* if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The invitation to engage in the activity was extended to the employee because of his official position;

(C) The invitation to engage in the activity was extended to the employee, directly or indirectly, by a person who has interests that may be substantially affected by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in § 2635.703(b) of this part; or

(E) The subject matter focuses specifically on the employee's official duties or on the responsibilities, programs, or operations of the employee's agency. A subject matter focuses specifically on agency responsibilities, programs, or operations if:

(1) In the case of a noncareer employee as defined in § 2636.303(a) of this subchapter, it deals in significant part with the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency;

(2) In the case of a special Government employee, it deals in significant part with particular matters to which he is or has been assigned as a special Government employee; or

(3) In the case of any other employee, it deals in significant part with particular matters to which he is or has been assigned as an employee of the agency, or with any planned or announced policy of the agency, or with any program or operation of the agency.

Any component of a department designated as a separate agency under § 2635.203(a) of this part shall be considered a separate agency for purposes of this paragraph. No such designation shall be effective as to the head of any such separate agency or as to department-level employees.

Example 1: On his own time, a National Highway Traffic Safety Administration employee prepares a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. He may not receive royalties or any other form of compensation for the guide. The guide focuses specifically on responsibilities and programs of NHTSA.

Example 2: A consultant is employed as a special Government employee by the Department of State for the purpose of providing advice and assistance in multilateral treaty negotiations relating to scientific research on the continent of Antarctica. A speech given by the special Government employee on the subject of scientific advances stemming from research in the Antarctic is not related to his official duties. However, a speech on the status of the treaty negotiations would be related to his official duties. He may receive compensation for the former, but not for the latter. (Note that special Government employees are not subject to the honorarium prohibition on receipt of compensation for speeches, which is implemented in §§ 2636.201 through 2636.205 of this subchapter).

Example 3: A philosophical article on theories of sentencing in felony cases written by a noncareer Senior Executive Service employee of the Department of Justice would be related to his official duties.

(ii) *Compensation* includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's teaching, speaking or writing activities. Unless accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111, or an agency gift acceptance statute, it includes transportation, lodgings and meals, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement after the expense has been incurred. It does not include:

(A) Items offered by any source that could be accepted from a prohibited source under subpart B of this subpart;

(B) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place; or

(C) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking, or writing activity.

(iii) *Receive* means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation, or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative.

(2) *Exception for teaching certain courses.* Notwithstanding that the activity would relate to his official duties under paragraphs (a)(1)(i) (B) or (E) of this section, an employee may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1141(a);

(B) An elementary school as defined at 20 U.S.C. 2891(8); or

(C) A secondary school as defined at 20 U.S.C. 2891(21); or

(ii) A program of education or training sponsored and funded by the Federal government or by a State or local government which is not offered by an entity described in paragraph (a)(2)(i) of this section.

Example 1: An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though one or more of the twenty classes comprising the course deals with cost accounting principles applicable to contracts with the Government. Moreover, his receipt of a salary or other compensation for teaching this course does not violate the honorarium prohibition on receipt of compensation for any speech, which is

implemented in §§ 2636.201 through 2636.205 of this subchapter.

(3) *Relationship to other limitations on receipt of compensation.* The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this subchapter, including:

(i) The honorarium prohibition on receipt of compensation for an appearance, speech, or article, which is implemented in §§ 2636.201 through 2636.205 of this subchapter;

(ii) The requirement contained in § 2636.307 of this subchapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(iii) The prohibitions and limitations in § 2636.804 of this subchapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered noncareer employees.

Example 1: A personnel specialist employed by the Department of Labor has been asked by the publisher of a magazine to write an article on his hobby of collecting arrowheads. Even though the subject matter is unrelated to his official duties, he may not accept the publisher's offer of $200 for the article. Because the compensation offered is for an article, its receipt would violate the honorarium prohibition contained in §§ 2636.201 through 2636.205 of this subchapter.

(b) *Reference to official position.* An employee who is engaged in teaching, speaking, or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking, or writing activity or to promote any book, seminar, course, program, or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking, or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with a scholarly article published in a recognized scientific or professional journal, provided that on the page where his title or position appears, there is a disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) An employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank may use, or permit the use of, that term of address or rank in connection with his teaching, speaking, or writing.

Example 1: A meteorologist employed with the National Oceanic and Atmospheric Administration is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about his education and previous employment in course materials setting forth biographical data of all teachers involved in the graduate program. However, his title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under his name. In contrast, his title may be used in this manner when the meteorologist is authorized by NOAA to speak in his official capacity.

Example 2: A doctor recently employed by the Centers for Disease Control has written a paper based on his earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the first page of the article also contains a disclaimer, concurred in by the Center, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the Centers for Disease Control.

(c) *Approval of content.* An employee shall comply with any requirement for advance agency review, clearance, or approval of the content of any speech, book, article or similar product.

§ 2635.808 Fundraising activities.

An employee may engage in fundraising only in accordance with paragraphs (b) and (c) of this section.

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

(1) *Fundraising* means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) *Participation in the conduct of an event* means active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, his attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech.

Note: This section does not prohibit fundraising for political parties. However, there are statutory restrictions that apply to political fundraising. Employees, other than those exempt under 5 U.S.C. 7324(d), are prohibited by the Hatch Act, 5 U.S.C. 7321 through 7328, from soliciting or collecting contributions or other funds for a partisan political purpose or in connection with a partisan election. In addition, employees are prohibited by 18 U.S.C. 602 from soliciting contributions for any political purpose from other employees.

Example 1: The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost $150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

Example 2: A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy. He could, however, pay an entry fee and play in the golf tournament on the same basis as any other entrant, even though his attendance might add prestige to the event. The former constitutes fundraising; the latter does not.

(3) *Official speech* means a speech given by an employee in his official capacity on a subject matter that relates to his official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the responsibilities, programs, or operations of the employee's agency as described in § 2635.807(a)(1)(i)(E) of this subpart, or on matters of Administration policy on which the employee has been authorized to speak.

Example 1: A nonprofit organization that raises funds for cancer research has organized a seminar and has invited the

Director of the National Cancer Institute to speak on recent findings by the Institute relating to the treatment of lung cancer. Where the Director determines that the seminar provides an appropriate forum for the dissemination of the information to be presented, the giving of that speech in his official capacity does not constitute fundraising, even though a portion of the attendance fee charged for the seminar may be taken as a charitable deduction by an attendee. The Director would be engaged in fundraising, however, if he were to conclude his official speech with a request for contributions to the nonprofit organization.

Example 2. The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a non-profit organization that assists homeless families. She devotes a major portion of her speech to the Administration's Points of Light Program, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because she is authorized to speak on Administration policy, her remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if she were to conclude her official speech with a request for donations to the nonprofit organization.

Example 3: A charitable organization is sponsoring a 2-day tennis tournament at a country club in the Washington, DC area to raise funds for recreational programs for learning disabled children. The organization has invited the Secretary of Education to give a speech on Federally funded special education programs at the awards dinner to be held at the conclusion of the tournament and a determination has been made that the dinner is an appropriate forum for the particular speech. The Secretary may speak at the dinner and, under § 2635.204(g) of this part, he may partake of the meal provided to him at the dinner. However, under subpart B of this part, he may not accept the charitable organization's offer to waive the $1,000 entry fee to allow him to play in the tournament in the absence of a determination of agency interest.

(4) *Personally solicit* means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of § 2635.203(d) of this part. It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

Example 1: An employee of the Department of Energy who signs a letter soliciting funds for a local private school does not "personally solicit" funds when 500 copies of the letter, which makes no mention of his DOE position and title, are mailed to members of the local community, even though some individuals who are employed by Department of Energy contractors may receive the letter.

(b) *Fundraising in an official capacity.* An employee shall not participate in fundraising in his official capacity unless specifically authorized by statute, executive order or regulation. For purposes of this paragraph, an employee participates in fundraising in an official capacity when the fundraising is conducted as part of his official duties or involves the use of his Government title, position, or authority.

Example 1: Because participation in his official capacity is specifically authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

Example 2: During an official visit to a homeless shelter, the Secretary of Health and Human Services praises the volunteers whose efforts keep the shelter open and members of the community who provide funding. She expresses her view that the world would be a better place in which to live if every American volunteered a few hours a week and supported the charities in his local community. Her remarks are reported in the press and, as a result of media recognition, contributions to this and other homeless shelters increase. She has not engaged in "fundraising" within the meaning of this section. General remarks of this nature and in this context do not constitute solicitation of funds for a nonprofit organization.

(c) *Fundraising in a personal capacity.* An employee may engage in fundraising in his personal capacity only in accordance with paragraphs (c)(1) and (2) of this section.

(1) An employee who engages in fundraising in a personal capacity shall not:

(i) Personally solicit funds or other support from a subordinate or from any person:

(A) Known to an employee, other than a special Government employee, to be a prohibited source within the meaning of § 2635.203(d) of this part; or

(B) Known to a special Government employee to be a prohibited source within the meaning of § 2635.203(d)(4) of this part that is a person whose interests may be substantially affected by performance or nonperformance of his official duties.

(ii) Use or permit the use of his official title, position or any authority associated with his public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(iii) Engage in any action that would otherwise violate this part.

Example 1: An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for her son's private school. Such use of the photocopier would violate the standards at § 2635.704 of this part regarding use of Government property.

Example 2: An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as "John Doe, Assistant Attorney General." He also may not sign a letter with just his signature, "John Doe," soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group where the solicitation is not known to him to be targeted at persons who are either prohibited sources or subordinates.

Example 3: A Navy Admiral who is the head of his church's building committee may be introduced to the congregation as "Admiral Davey Jones" when he talks about the need for more building funds. The use of his military rank to identify him is not the improper use of his title or position. The addition of his title, "Judge Advocate General of the Navy," would be improper.

(2) An employee holding a position described in 5 U.S.C. 5312 or 5313 or in 3 U.S.C. 105(a)(2)(A) or 106(a)(1)(A) may not engage in fundraising activities in a personal capacity on behalf of an organization unless:

(i) He is personally and actively involved in the affairs of the organization in a manner that involves the use of his personal time; or

(ii) Prior to his appointment to a covered position, he had engaged in fundraising activities on behalf of the organization.

Example 1: The chairman of the Council of Economic Advisers is an active participant in the local alumni chapter of her alma mater. She serves on a committee that arranges speakers for the monthly alumni chapter meetings and, recently, she has participated in a program to encourage promising high school seniors to apply for college scholarships sponsored by the local chapter. Subject to the conditions in § 2635.808(c)(1) of this subpart, she may serve in her personal capacity as chairperson of a dinner to raise funds for the chapter's scholarship program and she may sign the invitation addressed to all area alumni using her name, but not her official title.

Example 2: Prior to his confirmation, the Secretary of the Interior had authorized a charitable organization that raises funds for leukemia research to list his name as one of the 10 sponsors of a fundraising gala held at

the Kennedy Center. he attended the gala but has not otherwise participated in the affairs of the organization. Although his participation in the affairs of the organization has not been personal and active, he may authorize the charitable organization to list his name as a sponsor of this year's fundraising gala since he had engaged in fundraising for the organization prior to confirmation. He may not permit them to use his official title.

§ 2635.809 Just financial obligations.

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a *just financial obligation* includes any financial obligation acknowledged by the employee or reduced to judgment by a court. *In good faith* means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

Subpart I—Related Statutory Authorities

§ 2635.901 General.

In addition to the standards of ethical conduct set forth in subparts A through H of this part, there are a number of statutes that establish standards to which an employee's conduct must conform. The list set forth in § 2635.902 of this subpart references some of the more significant of those statutes. It is not comprehensive and includes only references to statutes of general applicability. While it includes references to several of the basic conflict of interest statutes whose standards are set forth in more detail throughout this part, it does not include references to statutes of more limited applicability, such as statutes that apply only to officers and employees of the Department of Defense.

§ 2635.902 Related statutes.

(a) The prohibition against solicitation or receipt of bribes (18 U.S.C. 201(b)).

(b) The prohibition against or receipt of illegal gratuities (18 U.S.C. 201(c)).

(c) The prohibition against seeking or receiving compensation for certain representational services before the Government (18 U.S.C. 203).

(d) The prohibition against assisting in the prosecution of claims against the Government or acting as agent or attorney before the Government (18 U.S.C. 205).

(e) The post-employment restrictions applicable to former employees (18 U.S.C. 207, with implementing regulations at parts 2637 and 2641 of this subchapter).

(f) The post-employment restrictions applicable to former procurement officials (41 U.S.C. 423(f)).

(g) The prohibition against participating in matters affecting an employee's own financial interests or the financial interests of other specified persons or organizations (18 U.S.C. 208).

(h) The prohibition on a procurement official's negotiating for employment with competing contractors (41 U.S.C. 423(b)(1)).

(i) The prohibition against receiving salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States (18 U.S.C. 209).

(j) The prohibition against gifts to superiors (5 U.S.C. 7351).

(k) The prohibition against solicitation or receipt of gifts from specified prohibited sources (5 U.S.C. 7353).

(l) The prohibition against solicitation or receipt of gifts from competing contractors (41 U.S.C. 423(b)(2)).

(m) The Code of Ethics for Government Service (Pub. L. 96–303, 94 Stat. 855).

(n) The prohibitions against certain political activities (5 U.S.C. 7321 *et seq.* and 18 U.S.C. 602, 603, 606 and 607).

(o) The prohibitions against disloyalty and striking (5 U.S.C. 7311 and 18 U.S.C. 1918).

(p) The prohibition against employment of a member of a Communist organization (50 U.S.C. 784).

(q) The prohibition against acting as the agent of a foreign principal required to register under the Foreign Agents Registration Act (18 U.S.C. 219).

(r) The prohibition against employment of a person convicted of participating in or promoting a riot or civil disorder (5 U.S.C. 7313).

(s) The prohibition against employment of an individual who habitually uses intoxicating beverages to excess (5 U.S.C. 7352).

(t) The prohibition against misuse of a Government vehicle (31 U.S.C. 1344).

(u) The prohibition against misuse of the franking privilege (18 U.S.C. 1719).

(v) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(w) The prohibition against concealing, mutilating or destroying a public record (18 U.S.C. 2071).

(x) The prohibition against counterfeiting or forging transportation requests (18 U.S.C. 508).

(y) The prohibitions against disclosure of classified information (18 U.S.C. 798 and 50 U.S.C. 783(b)).

(z) The prohibition against disclosure of proprietary information and certain other information of a confidential nature (18 U.S.C. 1905).

(aa) The prohibition against unauthorized disclosure of certain procurement sensitive information, including proprietary or source selection information (41 U.S.C. 423(b)(3) and (d)).

(bb) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(cc) The prohibition against certain personnel practices (5 U.S.C. 2302).

(dd) The prohibition against interference with civil service examinations (18 U.S.C. 1917).

(ee) The prohibition against participation in the appointment or promotion of relatives (5 U.S.C. 3110).

(ff) The prohibition against solicitation or acceptance of anything of value to obtain public office for another (18 U.S.C. 211).

(gg) The prohibition against conspiracy to commit an offense against or to defraud the United States (18 U.S.C. 371).

(hh) The prohibition against embezzlement or conversion of Government money or property (18 U.S.C. 641).

(ii) The prohibition against failing to account for public money (18 U.S.C. 643).

(jj) The prohibition against embezzlement of the money or property of another person that is in the possession of an employee by reason of his employment (18 U.S.C. 654).

[FR Doc. 91–17227 Filed 7–22–91; 8:45 am]

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federal register

Tuesday
July 23, 1991

Part III

Department of Education

Research in Education of Individuals With Disabilities Program; Notice

DEPARTMENT OF EDUCATION

Research in Education of Individuals With Disabilities Program

AGENCY: Department of Education.

ACTION: Notice of final funding priority.

SUMMARY: The Secretary announces a final funding priority for fiscal year 1991 for the Research in Education of Individuals with Disabilities Program. This program is administered by the Office of Special Education Programs. The Secretary announces this priority to ensure effective use of program funds and to direct funds to an area of identified need during fiscal year 1991.

EFFECTIVE DATE: This priority takes effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of this priority, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Linda Glidewell, Division of Innovation and Development, Office of Special Education Programs, Department of Education, 400 Maryland Avenue SW, (Switzer Building, room 3095—M/S 2313-2640), Washington, DC 20202. Telephone: (202) 732-1099. (TDD (202) 732-6153).

SUPPLEMENTARY INFORMATION: The Research in Education of Individuals with Disabilities Program, (20 U.S.C. 1441-1443), provides support for advancing and improving the knowledge base and improving the practice of professionals, parents, and others providing early intervention, special education, and related services, including professionals who work with children and youth with disabilities in regular education environments, to provide those children effective instruction and enable them to learn successfully. This priority provides support for one or more centers designed to organize, synthesize, and disseminate current knowledge relating to children with attention deficit disorder as required by the Education of the Handicapped Act Amendments of 1990. The Conference report accompanying the Department's 1991 appropriations bill expressed the intent that these centers help educators, researchers, and parents to respond to the needs of children with attention deficit disorder (ADD). The intended effect of this priority is to provide access to current research knowledge in two specific areas by providing assistance to organize, synthesize, and disseminate information related to the needs of children with attention deficit disorder (ADD). This priority is part of a response to the 1990 amendments. In addition to this priority, support will also be provided through ongoing contracts to identify promising regular and special education efforts to respond to the educational needs of children with ADD, and to provide a national forum for disseminating this information to professionals and parent organizations.

Because the Department's authority to obligate these funds will expire on September 30, 1991, cooperative agreements will no longer be specified as the type of award.

This priority is in addition to the final priorities previously published in the **Federal Register** on May 7, 1991 for the Research in Education of Individuals with Disabilities Program (56 FR 21226).

Analysis of Comments and Changes

In response to the Secretary's invitation to comment in the Notice of Proposed Funding priorities, published on April 9, 1991 (56 FR 14432), four comments were received. One commenter was strongly supportive of the proposed priority as written. The other three commenters, although generally supportive, raised several concerns. An analysis of the comments on the proposed priorities follows.

Comment: One commenter was concerned that these projects not "reinvent the wheel" given the limited amount of funding available, and the current existence of information on ADD and its relation to public education.

Discussion: The Secretary agrees with the commenter on the existence of a significant body of information. The intent of the centers is to make that information accessible to the public, parents, and teachers involved with children and youth with ADD. These centers are designed to disseminate existing knowledge consistent with the commenters' concern not to "reinvent the wheel."

Changes: None.

Comment: One commenter was concerned that most of the available "research" knowledge of ADD and "researchers" are in psychology and medicine, and not in education in general nor special education in particular. The commenter felt that research has mainly been done from the "perspective of clinical treatments and medical regimes", and not from an educational perspective. The commenter suggested that, in order to reinforce the educational perspective, the priority should use the terms "field educators and educational researchers" instead of "educators and researchers," and that perhaps some of the centers should focus on educational research or that some of the center directors should be educational researchers.

Discussion: The Secretary believes that to limit project staff or personnel according to their disciplinary training or professional affiliation would be overly prescriptive, and not supported by either the statute or the regulations. In addition, the selection criteria that will be used to evaluate applications under this competition provide for the peer reviewers to evaluate the "quality of key personnel" proposed by the project. This selection criterion requires reviewers to consider experience and training in fields related to the objectives of the project, as well as other evidence the applicant provides.

Changes: None.

Comment: One commenter was concerned about the perceived order of activities as outlined by the proposed priority. The commenter felt that educators, researchers, and parents needed to provide input on specific information needs before the identification of critical issues.

Discussion: As written, the priority provides that "Identifying and prioritizing critical issues must be based on those having the greatest promise for assisting educators, researchers, and parents to respond to the *needs* of children with ADD" (emphasis added). The Secretary believes that, as written, the priority provides for "information needs" to drive the identification of critical issues.

Changes: None.

Comment: One commenter suggested that the assessment centers include the integration of newly proposed assessment criteria for the ADD population, and a critical review of the empirical data supporting various assessment instruments. The commenter also stated that there are no pathognomonic or highly specific tests that can be used alone to establish the diagnosis of ADD.

Discussion: The Secretary notes that the intent of the priority is to synthesize current knowledge on assessment which includes classification and criteria techniques and systems, and reliable and valid instrumentation. The psychometric properties of assessment instruments will be addressed in the synthesis.

Changes: None.

Comment: One commenter suggested that, with respect to assessment centers, the outcome of this effort should be to integrate current and future assessment tools into a comprehensive evaluation model that could be used in school settings.

Discussion: The Secretary believes that the priority, as written, provides for capturing the existing knowledge and for the review of current assessment instruments that will assist and provide direction for future improvements.

Changes: None.

Comment: One commenter suggested that the intervention centers emphasize integrating the family, educational, and medical perspectives so that comprehensive multi-modality forms of treatment are considered.

Discussion: The Department, in addition to these centers, is funding separate synthesis activities through a contract that will involve these centers to achieve the integration of family, educational, and medical perspectives.

Changes: None.

Comment: One commenter suggested examining the accuracy of data reported by school nurses and teachers, particularly in regard to medical interventions, and the exploration of academic and nonacademic interventions.

Discussion: The Secretary believes that the priority, as written, provides for the centers to look at the full range of interventions being used to meet the needs of students with ADD.

Changes: None.

Priority: The Secretary establishes the following priority for the Research in Education of Individuals with Disabilities Program, CFDA No. 84.023. In accordance with the Education Department General Administrative Regulations (EDGAR, 34 CFR 75.105(c)(3)), the Secretary gives an absolute preference under this program to applications that respond to the following priority. The Secretary proposes to select for funding only those applications proposing projects that meet this priority.

Priority: Centers for Organizing and Analyzing the Research Knowledge Base for Children With Attention Deficit Disorder (CFDA 84.023)

Issue

Section 641(f)(1) of the Individuals with Disabilities Education Act (IDEA), as retitled and amended by the 1990 amendments to the Education of the Handicapped Act, requires the Secretary to establish one or more centers to organize, synthesize, and disseminate current knowledge relating to children with Attention Deficit Disorder (ADD). This current knowledge must be designed to help educators, researchers, and parents respond to the educational needs of students with ADD.

During the reauthorization process, parents and advocates for children with ADD identified access to the current research knowledge base as one of the problems in meeting the needs of their children in school.

Purpose

The purpose of this priority is to organize, synthesize, and disseminate the current knowledge base related to either: (a) Assessment and identification of, or (b) interventions for, children with ADD. This priority will support up to four awards for up to 18 months. These four centers—two for each topic area—must organize and analyze research findings; design, format, and prepare syntheses; and disseminate information to assist educators, researchers, and parents to respond to the educational needs of these children. These centers shall serve as central focal points for making current knowledge accessible to national professional and parent organizations. This information is expected to increase the awareness of educators, researchers, and parents of the current knowledge related to the assessment and identification of, and interventions for responding to, the educational needs of children with ADD. These centers shall have demonstrated knowledge concerning the disorder; proven effectiveness in performing tasks comparable to the ones specified in this priority; and the ability to conduct projects, communicate with intended consumers of information, and maintain the necessary communication with national, regional, State, and local agencies.

Activities

Each Center shall develop a procedure for, and obtain input from, educators, researchers, and parents for identifying the most critical issues related to either: (a) Assessment and identification, or (b) interventions. These critical issues must provide the focal points for organizing the current research knowledge base and designing syntheses. Identifying and prioritizing critical issues must be based on those having the greatest promise for assisting educators, researchers, and parents to respond to the needs of children with ADD. For purposes of illustration only, critical issues related to assessment and identification might be: Measurement technology for appropriately identifying children with ADD in need of assistance in regular education or in special education; or typologies of educational needs and corresponding estimates of numbers of children with ADD. Similarly, for purposes of illustration, critical issues related to interventions might be: Effective education interventions in regular classrooms for responding to the needs of children with ADD; or the nature of curricula and instructional accommodations, adaptations, and modifications needed to respond to the educational needs of children with ADD.

Designing and formatting syntheses. The critical issues must provide the focus for synthesizing the current research findings. Input must also be obtained from educators, researchers, and parents related to their specific information needs related to each issue. In addition, procedures must be developed and implemented for obtaining feedback from these audiences on the design and format for preparing each of their syntheses. The syntheses must consistently address the characteristics and educational needs of children with ADD relevant to the literature being synthesized.

Organize and analyze current research base. Each center must develop and implement procedures for identifying and obtaining current research findings relevant to each critical issue identified for their topic focus. This information must be organized consistent with the critical issues identified for each topic focus, and need for this information by educators, researchers, and parents. The analyses of this information must address implications for professional personnel practice and preparation, service delivery, and future knowledge development and use agendas for responding to the needs of children with ADD.

National dissemination and exchange forum. Each center must cooperate with the Department in conducting a national forum. The national forum will be held during the 15th month of the award in Washington, DC. Forum participants will include representatives of national organizations representing educators, researchers, parents, and other parties having significant responsibilities and interests in responding to the educational needs of children with ADD. The centers will be responsible for presenting their syntheses and implications. The Forum participants will discuss the centers' syntheses and strength of research support related to implications. The centers shall revise their syntheses taking into account the comments received from forum participants.

Coordination. Each center must coordinate with the other centers funded under this priority, and other projects identified by the Secretary that are engaged in relevant activities for achieving the intent of section 641(f)(1) of the Act. The Department will convene the centers to review their critical issues

prior to the centers conducting their respective syntheses. All projects funded relevant to section 641(f)(1) will be convened at the national forum. Each center must budget for participation in these two activities.

Dissemination activities. Each center shall make its syntheses available to relevant national, professional, and parent organizations. The centers shall develop and implement procedures during these activities to assure that information products are prepared that have the greatest potential for use by these organizations in their existing communication systems and member networks.

Program Authority: 20 U.S.C. 1441–1443.

(Catalog of Federal Domestic Assistance Number 84.023, Research in Education of Individuals with Disabilities Program)

Dated: July 12, 1991.

Lamar Alexander,

Secretary of Education.

[FR Doc. 91–17408 Filed 7–22–91; 8:45 am]

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Tuesday
July 23, 1991

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 31, et al.

Federal Acquisition Regulation (FAR), Contract Air Fares; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31, 51, and 52

[FAR Case 91-36]

Federal Acquisition Regulation; Contract Air Fares

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering an amendment to add subpart 51.3, Contractor Use of Government Discount Air Passenger Transportation Fares, and a new clause at 52.251-XX, Government Discount Air Passenger Transportation Fares. The coverage and clause permit contractor personnel traveling under certain Government contracts to use the same discount air fares available to Federal employees traveling at Government expense. A corresponding change to the cost principle at 31.205-46, Travel costs, limits the contractor's recovery of travel costs to the discount air fare provided for in the new subpart. These changes implement the requirements of section 833 of the Department of Defense Authorization Act for Fiscal Year 1989 (Pub. L. 100-456).

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before September 23, 1991, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., room 4041, Washington, DC 20405.

Please cite FAR Case 91-36 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact Ms. Beverly Fayson, FAR Secretariat, room 4041, GS Building, Washington, DC, 20405 (202) 501-4755. Please cite FAR Case 91-36.

SUPPLEMENTARY INFORMATION:

A. Background

The Department of Defense Authorization Act for Fiscal Year 1989, Public Law 100-456, section 833, Air Travel Expenses of Defense Contractor Personnel, requires the General Services Administration to negotiate agreements with airlines to permit certain contractor personnel traveling solely in the performance of Government contracts to receive the same discount air fares Government employees receive when traveling at Government expense. This statute also requires the issuance of regulatory guidance within 120 days after GSA negotiates the first discount air fares contract for contractor personnel. These changes are proposed in compliance with this statute.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the proposed changes should not have a significant administrative impact on a substantial number of small entities. These rates will be readily available through a standard travel agent network already utilized by small entities. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. However, comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR Case 91-36) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Parts 31, 51, and 52

Government procurement; Contract air fares.

Dated: July 12, 1991.

Albert A. Vicchiolla,

Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 31, 51, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 31, 51, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 31.205-46 is amended by revising paragraph (d) and the first sentence in paragraph (e)(2) to read as follows:

31.205-46 Travel costs.

* * * * *

(d)(1) Air fare costs, charged as a direct cost to a contract, in excess of the discounted fares established for a primary contract air carrier under a General Services Administration (GSA) contract (see 51.3), are not allowable if—

(i) The discounted rate was available to the contractor, and

(ii) Travel could have reasonably been performed under the conditions required by the air carrier to qualify for such rate.

(2) If there is no GSA contract as discussed in paragraph (d)(1) of this subsection, air fare costs in excess of the lowest customary standard, coach, or equivalent air fare offered during normal business hours are unallowable.

(3) The air fares in paragraphs (d)(1) and (d)(2) of this subsection need not be used when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for air fare costs in excess of the standard air fare to be allowable, the applicable condition(s) set forth above must be justified by the contractor. Any travel costs associated with the use of Government discount air fares (e.g., commuting expenses to and from the airport) shall be taken into consideration when determining the applicable air fare under paragraphs (d)(1) and (d)(2) of this subsection.

(e) * * *

(2) The costs of travel by contractor-owned, -leased, or -chartered aircraft are limited to the air fare described in paragraph (d) of this subsection for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount is approved by the contracting officer. * * *

* * * * *

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

3. The table of contents for subpart 51.3, consisting of §§ 51.300 through 51.306, is added to read as follows:

Subpart 51.3—Contractor Use of Government Discount Air Passenger Transportation Fares

Sec.
51.300 Scope of subpart.
51.301 Definitions.
51.302 Policy.
51.303 General.

Sec.
51.304 Contractor use of contract air carriers.
51.305 Procedures.
51.306 Contract clause.

4. Subpart 51.3, consisting of §§ 51.300 through 51.306, is added to read as follows:

Subpart 51.3—Contractor Use of Government Discount Air Passenger Transportation Fares

51.300 Scope of subpart.

This subpart establishes policies and procedures concerning contractor use of Government discount air fares (refer to section 833 of the Department of Defense Authorization Act for Fiscal Year 1989, Pub. L. 100–456).

51.301 Definitions.

Contract air carrier, as used in this subpart, means a commercial air passenger carrier that has a contract with the General Services Administration to provide air passenger services at discount air passenger transportation fares to Government employees and, when agreed to by the carrier, eligible contractors traveling on official Government business.

Eligible contractor, as used in this subpart, means a contractor performing under a Government contract (other than a firm-fixed price contract) requiring air travel by an employee of the contractor, the cost of which will be charged as a direct cost to the contract.

Primary contract air carrier, as used in this subpart, means: (1) The only contract air carrier listed in the Federal Travel Directory that provides service for a specific city-pair, or (2) the contract air carrier offering a fare lower than any other contract air carrier for the same specific city-pair.

51.302 Policy.

It is the policy of the Federal Government to reimburse eligible contractors for air travel in amounts not to exceed the fares available to Federal employees if a contract negotiated between GSA and the air carrier states that the air carrier will allow authorized eligible contractors to utilize the carrier's services at those air fares. Contractors shall be reimbursed for air travel as provided in 31.205–46(d).

51.303 General.

The General Services Administration negotiates contracts with air carriers for transportation of passengers between specific cities. The primary purpose of the contracts is to provide economical air transportation to Federal employees traveling on official Government business.

51.304 Contractor use of contract air carriers.

(a) Certain of the GSA contracts referenced in 51.302 contain terms that permit eligible contractors to purchase contract fares when traveling on official Government business. These contract air carriers are listed in the Federal Travel Directory (FTD), which is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 under Stock Number ISSN 0278–0941.

(b) There is no mandatory requirement for eligible contractors to utilize contract air carriers. Nevertheless, if eligible contractors do not use the contract air carriers, the cost principle in 31.205–46, places limits on the amount of allowable costs for this travel, unless one of the following exceptions applies:

(1) Space or scheduled flights are not available in time to accomplish the purpose of travel, or use of contract service would require the traveler to incur unnecessary overnight lodging costs which would increase the total cost of the trip;

(2) The air carrier flight schedule is inconsistent with explicit company travel policies, where applicable, to schedule travel during normal working hours; or

(3) A non-contract carrier offers a lower fare available to the general public, the use of which will result in a lower total trip cost to the contractor, to include the combined costs of transportation, lodging, meals, and related expenses.

(c) In cities with multiple airports for which contracts have not been awarded on an airport basis, use of a fare in excess of the one offered by the primary contractor must be justified based on one of the exceptions in this section, not on the basis of the convenience of one airport over another to the traveler.

51.305 Procedures.

Some contract air carriers require an agency letter of identification in order for eligible contractors to obtain the reduced air fares. These air carriers are identified in the FTD. The contracting officer shall provide an agency letter of identification, substantially as set forth below, when requested by the contractor. The contracting officer shall complete all information in the letter except that required to be completed by the contractor.

Agency Letter of Identification Required for Eligible Contractor Use of GSA Contract Discount Air Fares

(To be typed on agency official letterhead)

To: GSA Contract Airline

Subject: Official Travel of Government Contractor

The bearer of this letter, identified below, is an employee of (COMPANY NAME), which is under contract to this agency under contract (CONTRACT NUMBER), working directly on the performance of the contract. During the period of the contract (GIVE DATES), the employee will be traveling in performance of the contract. The employee is thereby eligible and authorized to use the GSA contract discount air fares if you have extended such fares to Government contractors in accordance with your city-pairs contract with the General Services Administration. (See contractor authorization below).

_____

_____

_____

(Signature, title and telephone number of the contracting officer)

_____

(Dated signed)

Contractor employee authorized to use GSA contract discount air fares: (To be completed by the contractor)

_____

_____

_____

(Signature, title and telephone number of authorized contractor representative)

_____

(Date signed)

Note: Various discount travel rates are available to eligible Government Contractors only at the option of the vendor under contract and/or agreement with the General Services Administration. The Federal Travel Directory identifies those vendors which have agreed to extend discount contract air fares to Government contractors. Detailed information and procedures should be obtained directly from the Federal contracting agency.

(End of letter)

51.306 Contract clause.

The contracting officer shall insert the clause at 52.251–XX, Government Discount Air Passenger Transportation Fares, in solicitations and contracts when any one of the following situations is contemplated:

(a) A cost-reimbursement contract involving air travel by contractor employees.

(b) A fixed-price contract that provides for cost-reimbursement of air travel by contractor employees.

(c) A fixed-price incentive contract involving reimbursable air travel by contractor employees.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 52.251–XX is added to read as follows:

52.251-XX Government Discount Air Passenger Transportation Fares.

As prescribed in 51.306, insert the following clause:

Government Discount Air Passenger Transportation Fares (Date)

(a) *Definition—Contract air carrier*, as used in this clause, means a commercial air passenger carrier that has a contract with the General Services Administration to provide air passenger services at discount air passenger transportation fares to Government employees and, when agreed to by the carrier, eligible contractors traveling on official Government business.

(b) The Contractor may use the discount air fares to the extent authorized under the GSA contracts as referenced in the Federal Travel Directory (available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, under Stock Number ISSN: 0278–0941). However, if eligible Contractors do not use the contract air carriers, the cost principle in FAR 31.205–46 places a limit on the amount of allowable costs for this travel.

(c) The contract air carrier may require an agency letter of identification in order for Contractors to obtain reduced air fares. The Contractor shall request such agency letter of identification from the Contracting Officer. Duplication of the authorization letter by the Contractor is authorized.

(d) The Contractor shall retain all records of authorized employee travel generated in performance of this contract in accordance with FAR 4.7.

(e) Nothing in this clause shall authorize transportation or services which are not otherwise reimbursable under this contract.

(End of clause)

[FR Doc. 91–17403 Filed 7–22–91; 8:45 am]

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