

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF SPECIAL COUNSEL

### 5 CFR Part 10201

RIN 3209-AA53

#### Supplemental Standards of Ethical Conduct for Employees of the U.S. Office of Special Counsel

**AGENCY:** U.S. Office of Special Counsel (OSC).

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Special Counsel, with the concurrence of the U.S. Office of Government Ethics (OGE), proposes a regulation for OSC employees that supplements the executive branch Standards of Ethical Conduct issued by OGE. The supplemental regulation requires OSC employees to seek prior approval before engaging in outside employment or activity.

**DATES:** Interested parties should submit comments to OSC at one of the addresses shown below on or before August 24, 2020 to be considered in the formulation of a final rule.

**ADDRESSES:** You may submit written comments to OSC on the proposed rule by any of the following methods:

- *Email:* [frliaison@osc.gov](mailto:frliaison@osc.gov). Include the Regulatory Identification Number (RIN) 3209-AA53 in the subject line of the message.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions on the portal for submitting comments.

*Instructions:* All submissions must include the agency's name "OSC" and the RIN 3209-AA53. All comments received may be posted without change to [www.osc.gov](http://www.osc.gov), including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Heidi R. Morrison, Alternate Designated Agency Ethics Official, U.S. Office of Special Counsel, by email at [frliaison@osc.gov](mailto:frliaison@osc.gov) or by telephone at (202) 804-7000.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On August 7, 1992, OGE published the OGE Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards). See 57 FR 35006-35067, as corrected at 57 FR 48557, 57 FR 52483, and 60 FR 51167, with additional grace period extensions for certain existing provisions at 59 FR 4779-4780, 60 FR 6390-6391, and 60 FR 66857-66858. The OGE Standards, codified at 5 CFR part 2635, effective February 3, 1993, established uniform standards of ethical conduct that apply to all executive branch personnel. Section 2635.105 of the OGE Standards authorizes an agency, with the concurrence of OGE, to adopt agency specific supplemental regulations that are necessary to properly implement its ethics program. OSC, with OGE's concurrence, has determined that the following supplemental rule is necessary and appropriate for successful implementation of OSC's ethics program.

## II. Analysis of the Proposed Regulations

### Section 10201.101 General

Section 10201.101 explains that these regulations apply to OSC employees and supplement the OGE Standards.

### Section 10201.102 Prior Approval for Outside Employment or Activity

OSC has determined that it is necessary for the purpose of administering its ethics program to require its employees to obtain approval before engaging in outside employment or activities. The approval requirement will help ensure that potential ethical problems are resolved before employees begin outside employment or activities that could involve a violation of applicable statutes and OGE Standards and to remind OSC attorneys to consult their applicable state bar rules of professional conduct.

Section 10201.102(a) requires an OSC employee to obtain written approval from the Designated Agency Ethics Official (DAEO) or the Alternate Designated Agency Ethics Official (ADAEO) before engaging in any outside employment or activity.

Section 10201.102(b) defines outside "employment" or "activity" for purposes of this regulation to cover any form of non-Federal employment or business relationship involving the provision of services, whether for

compensation or not for compensation. It includes, but is not limited to, serving as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, or teacher. The definition does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization unless such activities involve the provision of professional services or advice, or are for compensation other than reimbursement of expenses. The definition of "employment" and "activity" does not cover outside speaking or writing activities done on either an uncompensated or compensated basis.

A note following paragraph (b) of § 10201.102 highlights that employees who wish to engage in speaking or writing in a personal capacity are subject to a number of Federal ethics laws, and although not required to seek prior approval before engaging in those activities under the proposed rule, are encouraged to seek guidance from an agency ethics official. The note also reminds OSC attorneys that they are responsible for ensuring their outside conduct comports with the rules of professional conduct imposed by their state bar association.

Section 10201.102(c) provides that OSC's DAEO or ADAEO will grant approval when the outside employment or activity is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

Section 10201.102(d) provides that OSC's DAEO or ADAEO may issue instructions governing the submission of requests for approval of outside employment or activity, which may exempt categories of employment or activity from the prior approval requirement of this section based on a determination that employment or activity within those categories would generally be approved and is not likely to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

## III. Matters of Regulatory Procedure

### Administrative Procedure Act (APA)

This action is taken under the Special Counsel's authority at 5 U.S.C. 1212(e) to publish regulations in the **Federal Register**.

*Executive Order 12866 and Executive Order 13771*

This rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget. This rule is not subject to the requirements of Executive Order 13771 because this rule results in no more than de minimis costs.

*Regulatory Flexibility Act (RFA)*

As required by the RFA, OSC certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

*National Environmental Policy Act (NEPA)*

This rule will have no physical impact upon the environment and therefore will not require any further review under the NEPA.

*Congressional Review Act (CRA)*

This rule relates to agency personnel and does not substantially affect the rights or obligations of non-agency parties. Therefore, it does not meet the definition of a “rule” at 5 U.S.C. 804 and is not subject to the procedures of the CRA.

*Paperwork Reduction Act (PRA)*

OSC has determined that the PRA does not apply because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

**List of Subjects in 5 CFR Part 10201**

Conflict of interests, Government employees.

Approved: June 25, 2020.

**Travis G. Millsaps,**

*Deputy Special Counsel for Public Policy, U.S. Office of Special Counsel.*

**Emory Rounds,**

*Director, U.S. Office of Government Ethics.*

■ For the reasons set forth in the preamble, the U.S. Office of Special Counsel, with the concurrence of the U.S. Office of Government Ethics, is proposing to amend title 5 of the Code of Federal Regulations by adding a new chapter CII, consisting of part 10201, to read as follows:

**TITLE 5—ADMINISTRATIVE PERSONNEL****CHAPTER CII—U.S. OFFICE OF SPECIAL COUNSEL****PART 10201—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE U.S. OFFICE OF SPECIAL COUNSEL**

Sec.

10201.101 General.

10201.102 Prior approval for outside employment or activity.

**Authority:** 5 U.S.C. 1212(e); 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); Exec. Order No. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by Exec. Order No. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.803.

**§ 10201.101 General.**

(a) *Purpose.* In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the U.S. Office of Special Counsel (OSC) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635.

(b) *Other regulations, guidance, and procedures.* In addition to the standards in 5 CFR part 2635 and this part, all OSC employees are required to comply with implementing guidance and procedures issued by OSC in accordance with 5 CFR 2635.105(c). OSC employees are also subject to all other government-wide regulations concerning executive branch ethics including without limitation, financial disclosure regulations contained in 5 CFR part 2634, regulations concerning financial interests contained in 5 CFR part 2640, post-employment conflict of interest restrictions contained in 5 CFR part 2641, outside earned income limitations and employment and affiliation restrictions applicable to certain noncareer employees contained in 5 CFR part 2636, and the regulations concerning executive branch employee responsibilities and conduct contained in 5 CFR part 735.

**§ 10201.102 Prior approval for outside employment or activity.**

(a) *General requirement.* Before engaging in any outside employment or activity, whether or not for compensation, an OSC employee must obtain written approval from the Designated Agency Ethics Official (DAEO) or the Alternate Designated Agency Ethics Official (ADAEO), except to the extent that OSC has issued an internal instruction pursuant to paragraph (d) of this section exempting certain employment or activities from this requirement.

**Note 1 to paragraph (a).** 18 U.S.C. 203(d) and 205(e) require special approval for certain representational activities in claims against the Federal Government and other matters affecting the interests of the Government.

(b) *Definition of “outside employment or activity”.* For purposes of this section, “outside employment or activity” means any form of non-Federal employment or business relationship involving the provision of services by the employee, whether for compensation or not for compensation. It includes, but is not limited to, serving as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, or teacher. The definition does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization unless such activities involve the provision of professional services or advice, or are for compensation other than reimbursement of expenses.

**Note 2 to paragraph (b).** Employees who wish to engage in compensated speaking or writing in a personal capacity are subject to, among other things, the provisions of 5 CFR 2635.703 (concerning use of nonpublic information) and 5 CFR 2635.807 (concerning receipt of compensation for teaching, speaking, and writing related to one’s duties), and are encouraged to seek guidance from an agency ethics official before engaging in such activities. Certain covered non-career employees are also subject to further restrictions on receipt of outside compensation pursuant to section 502 of the Ethics in Government Act (5 U.S.C. app.). In addition, OSC attorneys should consult their applicable state bar rules of professional conduct.

(c) *Standard for approval.* Approval shall be granted by the DAEO or ADAEO upon a determination that the outside employment or activity is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

(d) *Implementation guidance.* The DAEO or ADAEO may issue internal instructions governing the submission of requests for approval of outside employment or activity. The instructions may exempt categories of employment or activities from the prior approval requirement of this section based on a determination that those categories generally would be approved and are not likely to involve prohibited conduct or create an appearance of lack of impartiality.

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