

September 7, 2000  
DO-00-031

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: F. Gary Davis  
Acting Director

SUBJECT: Publication of Interim Rule Amending 5 C.F.R. § 2635.807(a), the Prohibition on Employee Receipt of Compensation for Outside Teaching, Speaking, and Writing

The Office of Government Ethics (OGE) has published an interim rule amending 5 C.F.R. § 2635.807(a), the prohibition on employee receipt of compensation for outside teaching, speaking, or writing that relates to official duties. See 65 Fed. Reg. 53650 (September 5, 2000). The amendment responds to the May 30, 1995 en banc decision by the United States Court of Appeals for the District of Columbia Circuit in Sanjour v. Environmental Protection Agency, 56 F.3d 85, as clarified in the April 14, 1998 decision on remand by the United States District Court for the District of Columbia, 7 F. Supp.2d 14.

Under section 2635.807(a), as amended, employees who are *not* "covered noncareer employees" as defined in 5 C.F.R. § 2636.303(a) will be able to accept travel expenses incurred in connection with teaching, speaking, or writing activities that are related to their official duties. "Covered noncareer employees," on the other hand, will remain subject to the travel expenses ban. The amendment, which does not affect forms of compensation other than travel expenses, codifies OGE's previously announced enforcement policy in response to the Sanjour litigation. See DAEOgram 98-034 (Nov. 25, 1998).

The rule was mistakenly published in the "Proposed Rules" section of the Federal Register. It is, however, an interim regulation, effective immediately. The 60-day period for submission of comments will end on November 6, 2000.

Please see the regulation (attached) for additional information.

Attachment

# Proposed Rules

Federal Register

Vol. 65, No. 172

Tuesday, September 5, 2000

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 GOVERNMENT ETHICS

### 5 CFR Part 2635

RIN 3209-AA04

#### Standards of Ethical Conduct for Employees of the Executive Branch; Definition of Compensation for Purposes of Prohibition on Acceptance of Compensation in Connection With Certain Teaching, Speaking and Writing Activities

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Government Ethics is amending the prohibition on employees' receipt of compensation for outside teaching, speaking, and writing, as set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, to permit acceptance of travel expenses by employees other than covered noncareer employees.

**DATES:** This interim rule amendment is effective September 5, 2000. Comments are invited and must be received on or before November 6, 2000.

**ADDRESSES:** Send comments to the Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Kay L. Richman. Comments may also be sent electronically to OGE's Internet E-mail address at [usoge@oge.gov](mailto:usoge@oge.gov). For E-mail messages, the subject line should include the following reference—"Comments on the Interim Rule Standards Amendment to the Compensation Definition for Teaching, Speaking and Writing Activities."

**FOR FURTHER INFORMATION CONTACT:** Kay L. Richman, Associate General Counsel, Office of Government Ethics; telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

This interim rule, which is being published by the Office of Government

Ethics (OGE) after consultation with the Department of Justice and the Office of Personnel Management, amends 5 CFR 2635.807 to conform to the May 30, 1995, decision by the United States Court of Appeals for the District of Columbia Circuit in *Sanjour v.*

*Environmental Protection Agency*, 56 F.3d 85 (*en banc*), as clarified in the April 14, 1998, decision on remand by the United States District Court for the District of Columbia, 7 F. Supp.2d 14 (D.D.C. 1998). *Sanjour*, in which OGE was a co-defendant, involved a First Amendment challenge to the regulatory prohibition in 5 CFR 2635.807(a) on employee acceptance of travel expense reimbursements in connection with unofficial teaching, speaking, and writing that "relates to \* \* \* official duties" under 5 CFR 2635.807(a)(2)(i). The District Court initially rejected the plaintiffs' claims, 786 F. Supp. 1033 (D.D.C. 1992), as did the Court of Appeals on its first hearing of the case, 984 F.2d 434 (D.C. Cir. 1993). On May 30, 1995, however, the Court of Appeals, in a 5-4 *en banc* decision on rehearing, sustained the employees' First Amendment challenge and held invalid "the no-expenses regulations." 56 F.3d 85, 88 (D.C. Cir. 1995). The Court of Appeals *en banc* reasoned that, since a regulation of the General Services Administration (GSA), 41 CFR 304-1.3(a), allows travel reimbursements from non-Government sources in connection with *official* speech, whereas § 2635.807(a) prohibits travel reimbursements in connection with *unofficial* speech, the regulatory scheme posed a risk of censorship and discrimination based on viewpoint. 7 F. Supp.2d at 18 (District Court decision on remand, explaining the Court of Appeals decision); see 56 F.3d at 87, 89, 90, 96-97. At the same time, however, the Appeals Court noted that "the balancing of interests relevant to senior executive officials might 'present [ ] a different constitutional question.'" 56 F.3d at 93. The Court, therefore, explicitly reserved judgment on the constitutionality of the regulations as applied to "senior executive employees." *Id.*

On remand, the District Court entered a final order that enjoined enforcement of the bar on nonofficial travel expenses in 5 CFR 2635.807(a) against "employees below the senior executive service level of employment." As the

District Court explained, the *en banc* Court of Appeals ruling invalidated the ban on travel expenses in connection with *all* types of teaching, speaking, and writing related to duties under § 2635.807(a)(2)(i), not just those related to duties under § 2635.807(a)(2)(i)(E)(2). 7 F. Supp.2d at 17-18. The District Court, however, did not enjoin enforcement of the GSA regulation, which allows travel reimbursements from outside sources in connection with official speech. *Id.* at 18. According to the District Court, "[o]nce the prohibition on travel expense reimbursement for unofficial speech \* \* \* is lifted, then there can be no possible constitutional objection to allowing agencies to accept travel reimbursements from outside sources for official travel." *Id.* at 19.

##### II. The Amendment

As presently codified, 5 CFR 2635.807(a) bars employees from accepting from non-Government sources "compensation" for teaching, speaking, or writing that "relates to \* \* \* official duties." "Compensation" is generally defined as including travel expenses, except when accepted pursuant to certain statutory authorities that relate primarily to official travel activities. 5 CFR 2635.807(a)(2)(iii). In the revised rule, the introductory text of paragraph (a)(2)(iii) and exclusionary paragraphs (A)-(C) thereunder remain unchanged but, in response to *Sanjour*, a new paragraph (a)(2)(iii)(D) excludes from the definition of "compensation" travel expenses incurred in connection with a covered teaching, speaking or writing activity, unless the employee is a covered noncareer employee as defined in 5 CFR 2636.303(a).

This amendment affects only travel expenses. The ban on acceptance of other forms of compensation remains applicable to all employees to the extent the compensation is given for or in connection with teaching, speaking, or writing related to duties.

Under § 2635.807(a) as amended, employees who are *not* "covered noncareer employees" will be able to accept travel expenses incurred in connection with teaching, speaking, or writing activities that are related to duties. "Covered noncareer employees," on the other hand, will remain subject to the travel expenses ban. This approach continues and formalizes the

enforcement advice OGE provided pending amendment of § 2635.807(a). See OGE Memorandum of November 25, 1998, to Designated Agency Ethics Officials (DO-98-034), which is available in the Ethics Resource Library section of the OGE Web site, address: <http://www.usoge.gov>.

As defined in 5 CFR 2636.303(a), as amended at 64 FR 2421-2422 (January 14, 1999), the term "covered noncareer employee" includes certain Presidential appointees, noncareer members of the Senior Executive Service (SES) or other SES-type systems, and Schedule C or comparable appointees, provided such appointees hold positions "above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule." The term excludes special Government employees, Presidential appointees to positions within the uniformed services, and Presidential appointees within the foreign service below the level of Assistant Secretary or Chief of Mission.

Relying on the definition of "covered noncareer employee" as a means of distinguishing those employees to whom the travel expenses ban continues to apply from those employees who are exempt from it makes sense for a variety of reasons. By definition, a covered noncareer employee is a senior employee at or above the Senior Executive Service level of employment. Excluding such employees from the relaxation of the teaching, speaking and writing rule thus comports with the statement by the *en banc* Court of Appeals in *Sanjour* that "the balancing of interests relevant to senior executive officials might 'present[ ] a different constitutional question than the one we decide today'" and the Court's determination, accordingly, to "express no view on whether the challenged regulations may be applied to senior executive employees." 56 F.3d at 93, citing *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). Conversely, exempting employees other than covered noncareer employees from the ban is consistent with the District Court's clarification, in its decision on remand, that the travel expenses ban may not be enforced against "federal employees below the senior executive service level of employment." 7 F. Supp.2d at 17, n.1.

Insofar as the District Court enjoined enforcement of the travel expenses ban only against federal employees below the senior executive service level of employment, 7 F. Supp.2d at 17, n. 1,

OGE, consistent with the court ruling, could have continued the ban against all senior employees, career as well as noncareer. The decision to continue the ban only against senior noncareer employees, by employing the "covered noncareer employee" definition in this way, however, accords with the higher standards to which the Ethics Reform Act, related regulations, and other regulations hold senior officials who are "covered noncareer employees," particularly with regard to their outside activities. See 5 U.S.C. appendix, sections 501(a) and 502; 5 CFR 2635.804 and accompanying note; 5 CFR 2635.807(a)(2)(i)(E)(3) and example 6; 5 CFR 2636.301-2636.307. As a practical matter, moreover, the definition of covered noncareer employee has been in use for some time and is familiar to agency ethics officials.

Under amended § 2635.807, therefore, insofar as employees other than "senior," *i.e.* "covered noncareer," employees are concerned, the burden, for First Amendment purposes, on unofficial speech that relates to duties under 5 CFR 2635.807(a)(2)(i) will no longer be greater than the burden on official speech under 31 U.S.C. 1353 and GSA's implementing regulation.

As revised, § 2635.807(a)(2)(iii) includes four new examples that illustrate how applicability of the compensation prohibition may depend on such circumstances as—whether the payment covers travel expenses incurred in connection with a teaching, speaking, or writing activity, or constitutes a fee or other form of consideration; whether the travel expenses are incurred by a covered noncareer employee or by another employee; whether the payment concerns travel that is unrelated to the covered teaching, speaking, or writing activity and is, in effect, a fee for services; and whether the payment is made in connection with a teaching, speaking, or writing activity that is officially assigned and for which travel expense payments are authorized under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111 or 7342, or an agency gift acceptance statute.

As amended, § 2635.807(a)(2)(iii) also includes a note intended to alert employees that, independent of § 2635.807, other authorities, such as 18 U.S.C. 209, Salary of Government Officials and Employees Payable Only by United States, in some circumstances may limit or entirely preclude an employee's acceptance of travel expenses.

### III. Matters of Regulatory Procedure

#### *Administrative Procedure Act*

Pursuant to 5 U.S.C. 553(b) and (d), as Director of the Office of Government Ethics, I find that good cause exists for waiving the general requirements of notice of proposed rulemaking, opportunity for public comment and 30-day delayed effective date for this interim rule amendment. These requirements are being waived because it is in the public interest that this regulation take effect as soon as possible in order to clarify when Government employees may accept travel expenses in connection with teaching, speaking and writing activities that are related to official duties. Interested persons are invited to submit written comments on this interim rule amendment, to be received by OGE on or before November 6, 2000. Before adopting this amendatory interim rule as a final rule, OGE will consider all comments received.

#### *Executive Order 12866*

In promulgating this interim rule amendment, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Review and Planning. The amendment has also been reviewed by the Office of Management and Budget under that Executive order.

#### *Executive Order 12988*

As Director of the Office of Government Ethics, I have reviewed this interim amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

#### *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 amendatory rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this amendment does not contain information collection requirements that require the approval of the Office of Management and Budget.

**List of Subjects in 5 CFR Part 2635**

Conflict of interests, Executive branch standards of ethical conduct, Government employees.

Approved: July 24, 2000.

**Stephen D. Potts,**

*Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2635 as follows:

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

1. The authority citation for part 2635 continues to read as follows:

**Authority:** 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); 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 H—Outside Activities**

2. Section 2635.807 is amended by:
- Removing the word “or” at the end of paragraph (a)(2)(iii)(B);
  - Removing the period at the end of paragraph (a)(2)(iii)(C) and adding in its place a semicolon followed by the word “or”;
  - Adding a new paragraph (a)(2)(iii)(D); and
  - Adding a Note and four Examples following new paragraph (a)(2)(iii)(D).
- The additions read as follows:

**§ 2635.807 Teaching, speaking and writing.**

- (a) \* \* \*  
(2) \* \* \*  
(iii) \* \* \*

(D) In the case of an employee other than a covered noncareer employee as defined in 5 CFR 2636.303(a), travel expenses, consisting of transportation, lodgings or meals, incurred in connection with the teaching, speaking or writing activity.

**Note to Paragraph (a)(2)(iii):** Independent of § 2635.807(a), other authorities, such as 18 U.S.C. 209, in some circumstances may limit or entirely preclude an employee's acceptance of travel expenses.

**Example 1 to paragraph (a)(2)(iii):** A GS-15 employee of the Forest Service has developed and marketed, in her private capacity, a speed reading technique for which popular demand is growing. She is invited to speak about the technique by a representative of an organization that will be substantially affected by a regulation on land management which the employee is in the process of drafting for the Forest Service. The representative offers to pay the employee a \$200 speaker's fee and to reimburse all her travel expenses. She may accept the travel reimbursements, but not the speaker's fee. The speech is related to her duties under

§ 2635.807(a)(2)(i)(C) and the fee is prohibited compensation for such speech; travel expenses incurred in connection with the speaking engagement, on the other hand, are not prohibited compensation for a career GS-15 employee.

**Example 2 to paragraph (a)(2)(iii):** Solely because of her recent appointment to a Cabinet-level position, a Government official is invited by the Chief Executive Officer of a major international corporation to attend firm meetings to be held in Aspen for the purpose of addressing senior corporate managers on the importance of recreational activities to a balanced lifestyle. The firm offers to reimburse the official's travel expenses. The official may not accept the offer. The speaking activity is related to duties under § 2635.807(a)(2)(i)(B) and, because she is a covered noncareer employee as defined in § 2636.303(a) of this chapter, the travel expenses are prohibited compensation as to her.

**Example 3 to paragraph (a)(2)(iii):** A GS-14 attorney at the Federal Trade Commission (FTC) who played a lead role in a recently concluded merger case is invited to speak about the case, in his private capacity, at a conference in New York. The attorney has no public speaking responsibilities on behalf of the FTC apart from the judicial and administrative proceedings to which he is assigned. The sponsors of the conference offer to reimburse the attorney for expenses incurred in connection with his travel to New York. They also offer him, as compensation for his time and effort, a free trip to San Francisco. The attorney may accept the travel expenses to New York, but not the expenses to San Francisco. The lecture relates to his official duties under paragraphs (a)(2)(i)(E)(1) and (a)(2)(i)(E)(2) of § 2635.807, but because he is not a covered noncareer employee as defined in § 2636.303(a) of this chapter, the expenses associated with his travel to New York are not a prohibited form of compensation as to him. The travel expenses to San Francisco, on the other hand, not incurred in connection with the speaking activity, are a prohibited form of compensation. If the attorney were a covered noncareer employee he would be barred from accepting the travel expenses to New York as well as the travel expenses to San Francisco.

**Example 4 to paragraph (a)(2)(iii):** An advocacy group dedicated to improving treatments for severe pain asks the National Institutes of Health (NIH) to provide a conference speaker who can discuss recent advances in the agency's research on pain. The group also offers to pay the employee's travel expenses to attend the conference. After performing the required conflict of interest analysis, NIH authorizes acceptance of the travel expenses under 31 U.S.C. 1353 and the implementing General Services Administration regulation, 41 CFR part 304-1, and authorizes an employee to undertake the travel. At the conference the advocacy group, as agreed, pays the employee's hotel bill and provides several of his meals. Subsequently the group reimburses the agency for the cost of the employee's airfare and some additional meals. All of the payments by the advocacy group are

permissible. Since the employee is speaking officially and the expense payments are accepted under 31 U.S.C. 1353, they are not prohibited compensation under § 2635.807(a)(2)(iii). The same result would obtain with respect to expense payments made by non-Government sources properly authorized under an agency gift acceptance statute, the Government Employees Training Act, 5 U.S.C. 4111, or the foreign gifts law, 5 U.S.C. 7342.

\* \* \* \* \*

[FR Doc. 00-22612 Filed 9-1-00; 8:45 am]

BILLING CODE 6345-01-P

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 983**

[Docket No. FV96-983-1PR;  
AO F&V-983-1]

**Pistachios Grown in California, Arizona, Nevada, New Mexico, and Utah; Termination of Proceeding on Proposed Marketing Agreement and Order**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Termination of proceeding.

**SUMMARY:** This action terminates the proceeding to establish a marketing agreement and order for pistachios grown in California, Arizona, Nevada, New Mexico, and Utah. At the request of the pistachio industry, the Agricultural Marketing Service held a public hearing in August 1996 to receive evidence on a program proposed by the California Pistachio Commission and the Western Pistachio Association. The program would have authorized quality and container requirements and mandatory inspection. Subsequent to the hearing, the proponent industry groups requested that the proceeding be terminated. Given the lack of support for the proposal currently under consideration, the Department is terminating the proceeding.

**DATES:** The action is terminated as of September 6, 2000.

**FOR FURTHER INFORMATION CONTACT:** Kurt Kimmel, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901, Fax: (559) 487-5906; or Anne Dec, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698.