

COMMODITY FUTURES TRADING COMMISSION (CFTC)

5 CFR Chapter XLI

**Supplemental Standards of Ethical Conduct for Employees of the
Commodity Futures Trading Commission**

RIN 3209-AA04 and 3209-AA15

58 FR 52637

October 12, 1993

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission), with the concurrence of the Office of Government Ethics (OGE), is issuing regulations (supplemental regulations) for members and other employees of the Commission which supplement the Standards of Ethical Conduct for Employees of the Executive Branch issued by OGE, effective February 3, 1993. The regulations are a necessary supplement to the Executive Branch Standards because they address ethical issues unique to the Commission. The supplemental regulations, the substance of which has applied to Commission employees under its conduct standards codified in 17 CFR chapter I, relate to financial interests and transactions and to outside employment and activities.

EFFECTIVE DATE: October 12, 1993.

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SUPPLEMENTARY INFORMATION:

I. Background

On August 7, 1992, the Office of Government Ethics published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). See *57 FR 35006-35067*, as corrected at *57 FR 48557* and *57 FR 52583*. The Standards, codified at 5 CFR part 2635 and effective February 3, 1993, established uniform standards of ethical conduct that apply to all executive branch personnel.

With the concurrence of OGE, *5 CFR 2635.105* authorizes executive branch agencies to publish agency-specific supplemental regulations necessary to implement their respective ethics programs. The Commission, with OGE's concurrence, has determined that the following supplemental regulations, being codified in new chapter XLI of 5 CFR, are necessary to implement the Commission's ethics program successfully, in light of the Commission's unique programs and operations. In a related action, the Commission is today repealing certain portions of its code of conduct which have been superseded by the Standards and is recodifying at 17 CFR part 140 other portions of that code which it has independent authority to adopt.

II. Analysis of the Regulations

Section 5101.101 General

Section 5101.101 explains that the regulations apply to members and other employees of the Commission and supplement the Standards. It also notes that members and other employees are required to comply with 5 CFR part 2635, this part and the existing Commission regulations being recodified in 17 CFR part 140.

Section 5101.102 Prohibited Financial Interests and Transactions

Section 5101.102 incorporates reference to existing Commission regulations recodified in *17 CFR 140.735-2* which implement and interpret the restrictions on certain financial interests and transactions in sections 2(a)(7) and 9(c) and (d) of the Commodity Exchange Act. Because the financial interests restricted by those regulations are prohibited financial interests within the meaning of *5 CFR 2635.403*, the Commission, at the request of OGE, has included a cross-reference to recodified *17 CFR 140.735-2* in § 5101.102 of its supplemental regulations.

Section 5101.103 Outside Employment and Activities

As permitted by *5 CFR 2635.802*, the Commission is issuing § 5101.103(b) as a supplemental regulation. This regulation sets forth prohibitions on non-Governmental employment and outside activities applicable to Commission members and employees. Prohibited activities listed in § 5101.103(b) include the rendering of advice concerning any legal, accounting or economic matter, or any agricultural, mining, foreign currency market or other commodity-related matter, in which the Commission may be significantly interested. Also prohibited are legal representational activities in relation to any matter which relates to any policy, program or operation of the Commission. The Commission has determined that these prohibitions, which have applied to Commission personnel under superseded *17 CFR 140.735-5*, should be continued to help ensure that reasonable persons will not question the impartiality and objectivity with which the Commission's programs are administered. The rule also provides that a special Government employee is not subject to the prohibition against furnishing commodity-related advice unless the employee has participated personally and substantially in the same matter or has served with the Commission 60 days or more during the immediately preceding year. Finally, § 5101.103(b) incorporates by reference the prohibition in section 2(a)(7) of the Commodity Exchange Act on Commission members or employees accepting employment from any person, exchange or clearinghouse subject to regulation by the Commission or participating in operations or transactions subject to regulation by the Commission.

Under 5 *CFR* 2635.803, agencies may, by supplemental regulation, require employees to obtain prior approval before engaging in outside employment or activities. Under superseded 17 *CFR* 140.735-5 the Commission has long required notification by employees who undertake outside employment. Based on its finding that this requirement has helped to ensure that employees' outside activities conform to applicable statutes and regulations, the Commission has determined to continue this requirement in § 5101.103(c) as necessary for the purposes of its ethics program. Section 5101.103(c) also makes clarifying changes to conform the regulation to the Commission's practices administering 17 *CFR* 140.735-5. Before engaging in any outside employment, with or without compensation, § 5101.103(c) requires a Commission employee (other than a special Government employee) to obtain written approval from his or her division or office head and the Executive Director. In addition, an employee must obtain written approval from the Commission to appear in court or on a brief in a representative capacity.

"Employment" is broadly defined at § 5101.103(c)(5) to cover any form of non-Federal employment or business relationship involving the provision of personal services, including writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the activities of nonprofit charitable, religious, professional, social, fraternal and similar organizations, unless such activities involve the provision of professional services or advice or are for compensation other than reimbursement of expenses.

Section 5101.103(c)(3) provides that approval shall be granted only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 *CFR* part 2635 and these supplemental regulations. And, § 5101.103(c)(4) sets forth the requirements for submission and processing of a written request for approval.

III. Matters of Regulatory Procedure

Administrative Procedure Act

The Commission has determined that these rules relate solely to agency organization, procedure, and practice. In addition, the substance of these rules already applies to Commission employees under the Commission's ethics standards contained in 17 *CFR* part 140, subpart C, 17 *CFR* 140.735-1-140.735-16 which, as noted above, is simultaneously being revoked in part and recodified in part by the Commission in a separate rulemaking document. Therefore, the provisions of the Administrative Procedure Act, as codified, 5 *U.S.C.* 553, generally requiring notice of proposed rulemaking and other opportunity for public participation, are not applicable. The Commission further finds that there is good cause to make these rules effective upon publication in the **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), Public Law No. 96-354, 94 Stat. 1164 (1980), 5 *U.S.C.* 601 *et seq.*, requires each Federal agency to consider, in the course of proposing substantive rules, the effect of those rules on small entities. The Commission has determined that the provisions of the RFA do not apply to the promulgation of these supplemental regulations since they relate solely to agency procedure or practice.

Paperwork Reduction Act

The Paperwork Reduction Act of 1989, ("PRA") *44 U.S.C. 3501 et seq.*, imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The Commission has determined that this rulemaking does not impose any information collection requirements as defined by the PRA.

List of Subjects in 5 CFR Part 5101

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

Dated: September 27, 1993.

Jean Webb,

Secretary, Commodity Futures Trading Commission.

Approved: September 28, 1993.

Stephen D. Potts,

Director, Office of Government Ethics.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission, in concurrence with the Office of Government Ethics, is amending title 5 of the Code of Federal Regulations by adding a new chapter XLI, consisting of part 5101, to read as follows:

CHAPTER XLI-COMMODITY FUTURES TRADING COMMISSION

PART 5101-SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE COMMODITY FUTURES TRADING COMMISSION

Sec.

5101.101 General.

5101.102 Prohibited financial interests and transactions.

5101.103 Outside employment and activities.

Authority: *5 U.S.C. 7301, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); 7 U.S.C. 4a(f) and (j); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.403(a), 2635.802(a), 2635.803.*

§ 5101.101 -- General.

In accordance with *5 CFR 2635.105*, the regulations in this part apply to members and other employees of the Commodity Futures Trading Commission and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. Members

and other employees are required to comply with 5 CFR part 2635 and this part. Commission members and other employees are also subject to the Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission at 17 CFR part 140.

§ 5101.102 -- Prohibited financial interests and transactions.

In accordance with 5 *CFR* 2635.403(a), no Commission member or other employee shall engage in business or financial transactions, or hold business or financial interests, prohibited by the Commodity Exchange Act, as set forth in 17 *CFR* 140.735-2.

§ 5101.103 -- Outside employment and activities.

(a) Subject to the restrictions and requirements contained in 5 CFR part 2635 and this part, Commission members and other employees are encouraged to engage in teaching, speaking, and writing activities and, when qualified, to participate without compensation in programs to provide legal assistance and representation to indigents.

(b) *Prohibitions.* A Commission member or other employee shall not engage in non-Federal employment or any other outside activity that:

(1) Involves the rendering of advice concerning any legal, accounting or economic matter, or any agricultural, mining, foreign currency market or other commodity-related matter, in which the Commission may be significantly interested, except that this prohibition shall not apply to a special Government employee unless the special Government employee

(i) Has participated personally and substantially as an employee or special Government employee in the same matter; or

(ii) Has served with the Commission 60 days or more during the immediately preceding period of 365 consecutive days.

(2) Involves an appearance in court or on a brief in a representative capacity in relation to any matter which relates to any policy, program or operation of the Commission; or

(3) Is prohibited by section 2(a)(7) of the Commodity Exchange Act, as incorporated in 17 *CFR* 140.735-2 and 140.735-3. That statute provides that no Commission member or employee shall accept employment or compensation from any person, exchange or clearinghouse subject to regulation by the Commission, or participate, directly or indirectly, in any contract market operations or transactions of a character subject to regulation by the Commission.

(c) *Prior approval for outside employment.* (1) Before engaging in any outside employment, with or without compensation, an employee of the Commission, other than a special Government employee, must obtain written approval from his or her division or office head and the Executive Director, who may seek the concurrence of the General Counsel.

(2) In addition to the approval under paragraph (c)(1) of this section, an employee, including a special Government employee, must obtain written approval from the Commission to appear in court or on a brief in a representative capacity.

(3) Approval shall be granted only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and this part.

(4) The approval required by paragraph (c)(1) or (c)(2) of this section shall be requested in writing in advance of engaging in outside employment. The request shall be submitted to the employee's division or office head, through the employee's immediate supervisor, and shall set forth all pertinent facts regarding the anticipated employment, including the name of the employer, the nature of the work to be performed, its estimated duration and the amount of compensation to be received. If approved by the division or office head, the request shall be forwarded by the division or office head to the Executive Director. In granting or denying approval, the Executive Director may seek the concurrence of the General Counsel. If approved by the Executive Director, a request for permission to appear in court or on a brief in a representational capacity shall be forwarded to the Commission for final decision.

(5) For purposes of this section, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services by the employee. It includes, but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher or speaker. It includes writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the activities of 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.