

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



August 1, 2016
LA-16-06

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Walter M. Shaub, Jr.
Director

SUBJECT: Publication of the Final Rule Revising Subpart F of the Standards of Conduct,
Seeking Other Employment

On July 26, 2016, the U.S. Office of Government Ethics (“OGE”) published a final rule amending the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (“Standards of Conduct”) that govern seeking other employment found at 5 C.F.R. § 2635, Subpart F. *See Standards of Ethical Conduct for Employees of the Executive Branch; Amendments to the Seeking Other Employment Rules*, 81 Fed. Reg. 48,687 (July 26, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-26/pdf/2016-17553.pdf>. Subpart F sets forth a recusal requirement that applies to employees seeking employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially. The final rule is the first major revision to Subpart F since 1993. The amendments implement the statutory notification requirements under section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”), incorporate past interpretive guidance, add and update regulatory examples, improve clarity, update citations, and make technical corrections.

This Legal Advisory highlights two principal changes to Subpart F of the Standards of Conduct made in this rulemaking. For a complete discussion of all of the amendments and OGE’s rationale for the proposed rule, which OGE has now adopted as final, please see *Standards of Ethical Conduct for Employees of the Executive Branch; Amendments to the Seeking Other Employment Rules*, 81 Fed. Reg. 8008 (Feb. 17, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-17/pdf/2016-03214.pdf>. OGE is also providing the attached redlined version of Subpart F, which shows all changes made by the amendments.

Seeking Employment Online and Through Social Media

Previously, employees’ use of social media was not explicitly addressed in Subpart F. In recognition of the increased use of social media and the need to understand how the Standards of Conduct apply to the use of social media, OGE added four new examples to clarify that the rules in this subpart apply in a similar manner to all methods employees use when seeking employment. Specifically, three of these examples apply the definition of “seeking employment”

to an employee's social media activities. The fourth example discusses who is a "prospective employer" when seeking employment online. In these examples, OGE applies to employees' use of social media existing interpretive guidance regarding when an employee has begun seeking employment.

New example 4 to 5 C.F.R. § 2635.603(b) illustrates that an employee is not considered to be seeking employment merely because the employee posted to his or her social media account a profile, resume, or similar summary of professional experience that is not targeted at a specific person. Such a posting is not an unsolicited communication with any prospective employer; rather, it would be akin to posting a resume on a bulletin board.

Likewise, new example 5 to 5 C.F.R. § 2635.603(b) explains that the same employee would not be seeking employment with a person merely because a person has viewed the employee's profile on that social media account. Similarly, new example 6 to 5 C.F.R. § 2635.603(b) explains that the employee would not be considered to be seeking employment with a person merely because that person sent an unsolicited message to the employee after viewing the online profile. However, examples 5 and 6 both explain that an employee who receives an unsolicited message or job offer through email or an online forum is seeking employment with the sender if the employee responds to the message and the employee's response is anything other than a rejection.

The final social media example illustrates the definition of "prospective employer" by providing a modern example of OGE's existing analysis regarding the use of agents or intermediaries while seeking employment. Specifically, new example 2 to 5 C.F.R. § 2635.603(c) explains that online resume distribution services are analogous to traditional employment search firms for purposes of determining who is a prospective employer and when an employee has begun seeking employment. As is the case with traditional employment search firms, a person becomes a prospective employer with whom the employee is seeking employment once the resume distribution service identifies the person to the employee, even though the employee has not personally had employment discussions with the person.

STOCK Act Notification Requirements

OGE has implemented the statutory notification requirements under section 17 of the STOCK Act by adding a new 5 C.F.R. § 2635.607 to Subpart F and incorporating references to the requirements throughout the regulation.¹ Section 17 of the STOCK Act requires a public filer who is negotiating for or has an agreement of future employment or compensation to file a statement notifying the agency ethics official of such negotiation or agreement within three business days after commencement of the negotiation or agreement. Pub. L. No. 112-105, 126 Stat. 303, 5 U.S.C. app. 101 note. A public filer who files a notification statement regarding the negotiation or agreement also must file a notification regarding recusal whenever there is a

¹ Although OGE added references to the STOCK Act notification requirements applicable to public filers throughout revised Subpart F, the examples to sections other than 5 C.F.R. § 2635.607 are not necessarily meant to illustrate the additional notification requirements applicable to public filers. For example, revised 5 C.F.R. § 2635.602(a)(2) references the STOCK Act requirements, but the examples to that section focus more broadly on the general notification and recusal requirements applicable to an employee who is not a public filer.

conflict of interest or appearance of a conflict of interest with respect to the entity identified in the notification statement. *Id.*

OGE previously issued interpretive guidance for implementing section 17 of the STOCK Act on April 6, 2012, and April 25, 2013. *See* OGE Legal Advisories 12-01 (negotiations and agreements of future employment) and 13-06 (negotiations and agreements of future compensation). New 5 C.F.R. § 2635.607 codifies and further develops this guidance.

Specifically, new 5 C.F.R. § 2635.607(c) provides public filers with the option to file notification and recusal statements before negotiations have commenced and before an agreement of future employment or compensation is reached. OGE has long considered such notification a best practice that enhances public filers' access to advice from ethics officials. Public filers who elect to file statements that include all required information² prior to the commencement of negotiations are deemed to have met the statutory requirements. Notification and recusal statements will continue to satisfy the statutory requirements after the commencement of the negotiations or reaching of an agreement of future employment or compensation.

If an employee elects to file a notification or recusal statement in advance, new 5 C.F.R. § 2635.607(c) further clarifies that such filing is not construed as a statement that negotiations have or have not commenced or that a conflict of interest does or does not exist. Although OGE encourages advance filing when a public filer anticipates a realistic possibility of negotiations or an agreement, the absence of an advance filing does not violate Subpart F or the principles of ethical conduct contained in 5 C.F.R. § 2635.101(b).

Agency ethics officials should contact their OGE Desk Officers if they have any questions about the revisions to Subpart F of the Standards of Conduct.

Attachment

² The statements must name the private entity or entities involved in the negotiations or agreement and provide an estimated date of the commencement of the negotiations or agreement. *See* Pub. L. No. 112-105, 126 Stat. 303, 5 U.S.C. app. 101 note.

Subpart F -- Seeking Other Employment

Sec.

- 2635.601 Overview.
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2635.607 Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation.

§ 2635.601 Overview.

This subpart contains a ~~disqualification~~recusal requirement that applies to employees when seeking non-Federal employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee ~~disqualify himself from participation~~not participate personally and substantially in any particular matter that, to the employee's knowledge, will have a direct and predictable effect on the financial interests of a person “with whom ~~he~~the employee is negotiating or has any arrangement concerning prospective employment.” See §_2635.402 and §_2640.103 of this chapter. Beyond this statutory requirement, ~~it~~this subpart also addresses ~~the~~ issues of lack of impartiality that require ~~disqualification~~recusal 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. In addition, this subpart contains the statutory notification requirements that apply to public filers when they negotiate for or have agreements of future employment or compensation. Specifically, it addresses the requirements of section 17 of the

Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Public Law 112-105, 126 Stat. 303, 5 U.S.C. app. 101 note, that a public filer must submit a written statement identifying the entity involved in the negotiations or agreement within three business days after commencement of such negotiations or agreement and must submit a notification of recusal whenever there is a conflict of interest or an appearance of a conflict of interest.

§ 2635.602 Applicability and related considerations.

(a) Applicability. (1) To ensure that ~~he~~an employee does not violate 18 U.S.C. 208(a), section 17 of the STOCK Act, or the principles of ethical conduct contained in § 2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment ~~shall~~must comply with the applicable ~~disqualification~~recusal requirements of §§ 2635.604 and 2635.606 if particular matters in which the employee will be participating personally and substantially would, to the employee's knowledge, directly and predictably affect the financial interests of a prospective employer or of a person with whom ~~he~~the employee 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. In addition, a public filer who negotiates for or has an agreement of future employment or compensation must comply with the requirements of § 2635.607.

NOTE:(2) An employee who is seeking employment with a person whose financial interests are not, to the employee's knowledge, affected directly and predictably by particular matters in which ~~he~~the employee participates personally and substantially has no obligation to recuse under this subpart. In addition, nothing in this subpart requires an employee, other than a public filer, to notify anyone that the employee is seeking employment unless a notification is necessary to

implement a recusal pursuant to § 2635.604(b). A public filer who negotiates for or has an agreement of future employment or compensation must comply with the notification requirements in § 2635.607. An employee may, however, be subject to other statutes ~~which~~that impose requirements on employment contacts or discussions, such as 41 U.S.C. ~~423(e),2103,~~ which is applicable to agency officials involved in certain procurement matters. Employees are encouraged to consult with their ethics officials if they have any questions about how this subpart may apply to them. Ethics officials are not obligated by this subpart to inform supervisors that employees are seeking employment.

Example 1 to paragraph (a): Recently, an employee of the Department of Education submitted her resume to the University of Delaware for a job opening that she heard about through a friend. The employee has begun seeking employment. However, because she is not participating in any particular matters affecting the University of Delaware, she is not required to notify anyone that she has begun seeking employment.

Example 2 to paragraph (a): The employee in the preceding example has been approached about an employment opportunity at the University of Maryland. Because the University of Maryland has applied for grants on which she has been assigned to work in the past, she wants to make certain that she does not violate the ethics rules. The employee contacts her ethics official to discuss the matter. The employee informs the ethics official that she is not currently participating in any particular matters affecting the University of Maryland. As a result, the ethics official advises the employee that she will have no notification obligations under this subpart. However, the ethics official cautions the employee that, if the employee is assigned to participate in a particular matter affecting the University of Maryland while she is seeking employment with the University, she must take whatever steps are necessary to avoid working on the grant, in accordance with § 2635.604.

(b) Related ~~employment~~ restrictions—(1) Outside employment while a Federal employee. An employee who is contemplating outside employment to be undertaken concurrently with ~~his~~the employee's Federal employment must abide by any limitations applicable to ~~his~~the employee's outside activities under subparts G and H of this part. ~~He,~~ including any requirements under supplemental agency regulations to obtain prior approval before engaging in outside employment or activities and any prohibitions under supplemental

agency regulations related to outside employment or activities. The employee must also comply with any disqualificationapplicable recusal requirement ~~that may be of this subpart, as well as any~~ applicable recusal requirements under subpart D or E of this part as a result of ~~his~~the employee's outside employment activities.

(2) Post-employment restrictions. An employee who is contemplating employment to be undertaken following the termination of ~~his~~the employee's Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. ~~Regulations~~The regulation implementing the Governmentwide post-employment statute, 18 U.S.C. 207, ~~are~~is contained in ~~parts 2637 and part~~ 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory prohibitions on post-employment acceptance of compensation from contractors, such as 41 U.S.C. ~~423(d)~~2104.

~~(b3)~~ Interview trips and entertainment. - Where a prospective employer who is a prohibited source as defined in § 2635.203(d) offers to reimburse an employee's travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with § 2635.204(e)(3). Where a prospective employer is a foreign government or international organization, the employee must also ensure that he or she is in compliance with the Foreign Gifts and Decorations Act, 5 U.S.C. 7342.

§ 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, attorney, consultant, contractor, general partner, or trustee.

Example 1 to paragraph (a): 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 to paragraph (a): An employee of the Department of Health and Human Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

Example 3 to paragraph (a): An employee at the Department of Energy volunteers without compensation to serve dinners at a homeless shelter each month. The employee's uncompensated volunteer services in this case are not considered an employment or business relationship for purposes of this subpart.

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

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

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), and section 17 of the STOCK Act, 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 a 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: for the sole purpose of requesting a job application; or

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

~~(B) 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 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 1 to paragraph (b): A paralegal at the Department of the Army is in his third year of law school. During a discussion with his neighbor, who is a partner in a large law firm in the community, the neighbor invited him to visit her law firm. The paralegal took her up on the offer and met with an associate at the firm. The associate shared with the paralegal her experiences looking for a legal position, discussed what she does in her position at the law firm, and explained why she chose her current law firm. There was no discussion of possible employment with the firm. The Army paralegal is not seeking employment at this time. The purpose of the visit was informational only.

Example 32 to paragraph (b): An employee of the Defense Contract Audit Agency (DCAA) 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 ~~askssays he is interested in knowing~~ what kind of work would be involved. The DCAA employee has begun seeking employment because he made a response other than a rejection to the communication regarding possible employment with the Army contractor, although he has not yet begun negotiating for employment.

Example 3 to paragraph (b): The DCAA employee and the head of the contractor's accounting division in the previous example have a meeting to ~~They~~ discuss the duties of the position the accounting division would like to fill and the DCAA employee's qualifications for the position. They also discuss ways the DCAA employee could remedy one of the missing qualifications, and the employee indicates a willingness to obtain the proper qualifications. They do not discuss salary. The employee has engaged in negotiations regarding possible employment with the contractor. ~~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 to paragraph (b): An employee at the Department of Energy (DOE) lists his job duties and employment experience in a profile on an online, business-oriented social networking

service. The employee's profile is not targeted at a specific prospective employer. The employee has not begun seeking employment because the posting of a profile or resume is not an unsolicited communication with any prospective employer.

Example 5 to paragraph (b): The DOE employee in the previous example was recently notified that a representative of a university has viewed his profile. The employee still has not begun seeking employment with the university. Subsequently, a representative of the university contacts the employee through the online forum to inquire whether the employee would be interested in working for the university, to which he makes a response other than rejection. At this point, the employee has begun seeking employment with the university until he rejects the possibility of employment and all discussions of possible employment have terminated.

Example 6 to paragraph (b): The DOE employee in the previous two examples receives emails from various companies in response to his online profile. He does not respond. The employee has not begun seeking employment with the companies because he has not made a response.

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 not begun seeking employment with any of the twenty-five. If he receives a response from one of the resume recipients indicating an interest in employment discussions, the employee will have begun seeking employment with the respondent at that time.

~~Example 5: A special Government employee of the Federal Deposit Insurance Corporation is serving on an advisory committee formed for the purpose of reviewing rules applicable to all member banks. She 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.~~

Example 4:7 to paragraph (b): An employee of the Medicare & Medicaid Services (CMS) 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 HCFACMS 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:Example 8 to paragraph (b): 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 9 to paragraph (b): Three months prior to the end of the current administration, a political appointee at a large department receives a telephone call from the managing partner of an international law firm. The managing partner asks if the official would be interested in joining the law firm. The official says, "I am not talking to anyone about employment until I leave the

Government.” The official has rejected the unsolicited employment overture and has not begun seeking employment.

Example 6: Example 10 to paragraph (b): A geologist employed by the U.S. Geological Survey ~~has been working as a member of a team preparing the Government's case in an action brought by the Government against six oil companies. The geologist~~ sends her resume to an oil company ~~that is a named defendant in the action.~~ The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed, provided she does not receive a response indicating an interest in employment discussions. A letter merely acknowledging receipt of the resume is not an indication of interest in employment discussions. However, if she withdraws her application or is notified within the two-month period that her resume has been rejected, she will no longer be seeking employment with the oil company as of the date she makes such withdrawal or receives such notification.

(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~~ means:

(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: to paragraph (c): An employee of the Federal Aviation Administration ~~has overall responsibility for airport safety inspections in a three-state area. She (FAA)~~ 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, which the search firm identifies to the employee.~~ Even though the employee has not personally had employment discussions with either airport authority, each airport authority is her prospective employer. She began seeking employment with each airport authority upon learning its identity and that it has been given her resume.

Example 2 to paragraph (c): An employee pays for an online resume distribution service, which sends her resume to recruiters that specialize in her field. The online service has just

notified her that it sent her resume to Software Company A and Software Company B. Even though the employee has not personally had employment discussions with either company, each software company is her prospective employer. She began seeking employment with each company upon learning from the online service that Software Company A and Software Company B had been given her resume by the intermediary.

(d) Direct and predictable effect, particular matter, and personal and substantial have the respective meanings set forth in § 2635.402(b)(1), (3), and (4).

(e) Public filer means a person required to file a public financial disclosure report as set forth in § 2634.202 of this chapter.

§ 2635.604 Recusal while seeking employment.

(a) Obligation to ~~disqualify~~. Unless recuse. (1) Except as provided in paragraph (a)(2) or where the employee's participation is has been authorized in accordance with § 2635.605, the employee shall may not participate personally and substantially in a particular matter that, to his the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he the employee is seeking employment within the meaning of § 2635.603(b). Disqualification Recusal is accomplished by not participating in the particular matter.

(2) The employee may participate in a particular matter under paragraph (a)(1) of this section when:

(i) The employee's only communication with the prospective employer in connection with the search for employment is the submission of an unsolicited resume or other employment proposal;

(ii) The prospective employer has not responded to the employee's unsolicited communication with a response indicating an interest in employment discussions; and

(iii) The matter is not a particular matter involving specific parties.

Example 41 to paragraph (a): A scientist is employed by the National Science Foundation (NSF) 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 current grant application pending before NSF. The employee is seeking employment, but she does not need to recuse because there is no particular matter that would have a direct and predictable effect on the financial interests of the prospective employer. Recusal would be required if the university submits a new application for the panel's review. 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.

Example 2 to paragraph (a): An employee of the Food and Drug Administration is developing a regulation on research criteria for approving prescription drugs. She begins discussing possible employment with a pharmaceutical company. The employee may not participate personally and substantially in the development of the regulation because she has begun employment discussions with the pharmaceutical company and the regulation is a particular matter of general applicability which would have a direct and predictable effect on the financial interests of the pharmaceutical company.

Example 53 to paragraph (a): A special Government employee of the Federal Deposit Insurance Corporation (FDIC) is assigned to advise the FDIC on serving on an advisory committee formed for the purpose of reviewing rules applicable to all member banks. She mails an unsolicited letter to a member bank offering her services as a contract consultant. Although the employee is seeking employment, the employee may participate in this particular matter of general applicability. 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.

Example 4 to paragraph (a): An employee of the Occupational Safety and Health Administration is conducting an inspection of one of several textile companies to which he sent an unsolicited resume. The employee may not participate personally and substantially in the inspection because he is seeking employment and the inspection is a particular matter involving specific parties that will affect the textile company.

(b) Notification. An employee who becomes aware of the need to disqualify himself recuse from participation in a particular matter to which he-the employee has been assigned should

~~notify the person responsible for his assignment. An employee who is responsible for his own assignment should must take whatever steps are necessary to ensure that he-the employee does not participate in the matter. Appropriate oral or written notification of the employee's disqualification-recusal may be made to an agency ethics official, coworkers, ~~by the employee~~ or a supervisor to document and help effectuate the employee's recusal~~ensure that the employee is not involved in a matter from which he is disqualified.~~ Public filers must comply with additional notification requirements set forth in § 2635.607~~

Example 1 to paragraph (b): An employee of the Department of Veterans Affairs (VA) 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 recuse from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he should ~~disclose his intentions to~~ notify his supervisor in order of his need to recuse for ethics reasons so that appropriate adjustments in his work assignments can be made.

Example 2 to paragraph (b): An employee of the Food and Drug Administration (FDA) is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is ~~involved in testing a drug for~~ reviewing an application from the same pharmaceutical company, which the company is seeking FDA approval for a new drug product. ~~Once the employee makes. Before making~~ a response that is not a rejection to the company's communication concerning prospective employment, the employee should disqualify himself must recuse from further participation in the ~~testing~~ review of the application. Where he has authority to ask his colleague to assume his ~~testing~~ reviewing responsibilities, he may accomplish his ~~disqualification~~ recusal by transferring the work to ~~that coworker~~ the employee designated to cover for him. However, to ensure that his colleague and others with whom he had been working ~~on the recommendations~~ review do not seek his advice regarding ~~testing~~ the review of the application or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his ~~disqualification~~ recusal.

(c) Documentation. An employee, other than a public filer, need not file a written ~~disqualification-recusal~~ 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 a designated agency ethics official, or is specifically asked by an agency ethics official or the person responsible for ~~his-the employee's~~ assignment to file a written ~~disqualification-recusal~~

statement. However, it is often prudent for an employee ~~may elect~~ to create a record of his or her actions by providing written notice to an agency ethics official, a supervisor, or other appropriate official. Public filers must comply with the documentation requirements set forth in § 2635.607.

~~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 should disclose his intentions to his supervisor in order that appropriate adjustments in his work assignments can be made.~~

~~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 involved in testing a drug for which the company is seeking FDA approval. Before making a response that is not a rejection, the employee should disqualify himself from further participation in the testing. Where he has authority to ask his colleague to assume his testing responsibilities, 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: 1 to paragraph (c): The General Counsel of a regulatory agency ~~wishes to engage~~will be engaging 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~~recusal 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 would ~~be wise to file~~benefit from filing a written ~~disqualification~~recusal statement with an agency ethics official or the Commissioners of the regulatory agency and ~~provide~~providing his subordinates with written notification of his ~~disqualification, or he~~recusal. He may also be specifically ~~asked~~directed by an agency ethics official or the Commissioners to file a written ~~disqualification~~recusal statement. If the General Counsel is a public filer, he must comply with the documentation requirements set forth in § 2635.607.

~~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 the employee's recusal from matters so central or critical to the performance of his the employee's official duties that the employee's ability to perform the duties of his the employee's position would be materially impaired, the agency may allow 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), an employee is engaged in ~~discussions that constitute~~ employment negotiations for purposes of 18 U.S.C. 208(a), the employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer. The employee may participate in such matters only ~~after receiving where~~ the employee has received 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). ~~See also~~ and part 2640, subpart C of ~~part 2640 of~~ this chapter. For certain employees, a regulatory exemption under the authority of 18 U.S.C. 208(b)(2) may also apply (see part 2640, subpart B of ~~part 2640 of~~ this chapter), including § 2640.203(g) and (i).

Example 1: to paragraph (a): 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) ~~with an orange grower.~~ 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) ~~(i) or (iii)~~ and is not negotiating for employment, a reasonable person would be likely to question ~~his~~ the employee's impartiality if ~~he~~ the employee were to participate personally and substantially in a particular matter that, to the employee's knowledge, 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~~ in writing the employee's participation in accordance with the standards set forth in § 2635.502(d).

Example 1: to paragraph (b): Within the past month, an employee of the Education Department of Education mailed her resume to a university. She is thus seeking employment with the university within the meaning of § 2635.603(b)(1) ~~(ii) 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 personally and substantially in an assignment to review a grant application submitted by the university.

§ 2635.606 Recusal based on an arrangement concerning prospective employment or otherwise after negotiations.

(a) Employment or arrangement concerning employment. An employee ~~shall be disqualified from participating~~ may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of the person by whom he or she is employed or with whom he or she 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)~~, or by a regulatory exemption under the

authority of 18 U.S.C. 208-(b)(2). These waivers and exemptions are described in §_2635.402(d)-
~~See also) and part 2640,~~ subparts B and C ~~of part 2640~~ of this chapter.

Example 1: to paragraph (a): A military officer has accepted a job with a defense contractor ~~to that will~~ begin ~~in~~ six months, after his retirement from military service. During the period that he remains with the Government, the officer may not participate personally and substantially 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).

Example 2: to paragraph (a): An accountant has just been offered a job with the Office of the Comptroller of the Currency (OCC) which involves a two-year limited appointment. Her private employer, a large corporation, believes the job will enhance her skills and has agreed to give her a two-year unpaid leave of absence at the end of which she has agreed to return to work for the corporation. During the two-year period that she is to be ~~a COC~~ an OCC employee, the accountant will have an arrangement concerning future employment with the corporation that will require her disqualification/recusal from participation personally and substantially in any particular matter that, to her knowledge, will have a direct and predictable effect on the ~~corporation's~~ corporation's financial interests.

(b) Offer rejected or not made. The agency designee for the purpose of §_2635.502(c) 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/will be subject to a period of disqualification/recusal upon the conclusion of employment negotiations. Any such determination shall/will be based on a consideration of all the relevant factors, including those listed in §_2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking decision-making process outweighs the Government's interest in the employee's participation in the particular matter.

Example 1: to paragraph (b): 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/recused 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 in the matter outweighs the Government's interest in her participation.

§ 2635.607 Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation.

(a) Notification regarding negotiations for or agreement of future employment or compensation. A public filer who is negotiating for or has an agreement of future employment or compensation with a non-Federal entity must file a statement notifying an agency ethics official of such negotiation or agreement within three business days after commencement of the negotiation or agreement. This notification statement must be in writing, must be signed by the public filer, and must include the name of the non-Federal entity involved in such negotiation or agreement and the date on which the negotiation or agreement commenced. When a public filer has previously complied with the notification requirement in this section regarding the commencement of negotiations, the filer need not file a separate notification statement when an agreement of future employment or compensation is reached with the previously identified non-Federal entity. There is also no requirement to file another notification when negotiations have been unsuccessful. However, employees may want to do so to facilitate the resumption of their duties.

Example 1 to paragraph (a): An employee of the Merit Systems Protection Board who is a public filer was in private practice prior to his Government service. He receives a telephone call from a partner in a law firm who inquires as to whether he would be interested in returning to private practice. During this initial telephone call with the law firm partner, the employee indicates that he is interested in resuming private practice. They discuss generally the types of issues that would need to be agreed upon if the employee were to consider a possible offer to serve as “of counsel” with the firm, such as salary, benefits, and type of work the employee would perform. The employee has begun negotiating for future employment with the law firm. Within three business days after this initial telephone call, he must file written notification of the negotiations with his agency ethics official.

Example 2 to paragraph (a): The employee in the previous example also negotiates a possible contract with a publisher to begin writing a textbook after he leaves Government service. Within three business days after commencing negotiations, the employee must file

written notification with his agency ethics official documenting that he is engaged in negotiations for future compensation with the book publisher.

(b) Notification of recusal. A public filer who files a notification statement pursuant to paragraph (a) of this section must file with an agency ethics official a notification of recusal whenever there is a conflict of interest or appearance of a conflict of interest with the non-Federal entity identified in the notification statement. The notification statement and the recusal statement may be contained in a single document or in separate documents.

(c) Advance filing of notification and recusal statements. When a public filer is seeking employment within the meaning of § 2635.603(b)(1)(ii) or (iii) or is considering seeking employment, the public filer may elect to file the notification statement pursuant to paragraph (a) of this section before negotiations have commenced and before an agreement of future employment or compensation is reached. A public filer may also elect to file the recusal statement pursuant to paragraph (b) of this section before the public filer has a conflict of interest or appearance of a conflict of interest with the non-Federal entity identified in the notification statement. The public filer need not file the document again upon commencing negotiations or reaching an agreement of future employment or compensation. The advance filing of any such document is not construed as a statement that negotiations have or have not commenced or that a conflict of interest does or does not exist. Although the Office of Government Ethics encourages advance filing when a public filer anticipates a realistic possibility of negotiations or an agreement, the failure to make an advance filing does not violate this subpart or the principles of ethical conduct contained in § 2635.101(b).

Example 1 to paragraph (c): An employee of the Federal Labor Relations Authority who is a public filer began negotiating for future employment with a law firm. At the time he began negotiating for future employment with the law firm, he was not participating personally and substantially in a particular matter that, to his knowledge, had a direct and predictable effect on

the financial interest of the law firm. Although the employee was not required to file a recusal statement because he did not have a conflict of interest or appearance of a conflict of interest with the law firm identified in the notification statement, the Office of Government Ethics encourages the employee to submit a notification of recusal at the same time that he files the notification statement regarding the negotiations for future employment in order to ensure that the requirement of paragraph (b) of this section is satisfied if a conflict of interest or an appearance of a conflict of interest later arises. The agency ethics official should counsel the employee on applicable requirements but is under no obligation to notify the employee's supervisor that the employee is negotiating for employment.

Example 2 to paragraph (c): An employee of the General Services Administration is contacted by a prospective employer regarding scheduling an interview for the following week to begin discussing the possibility of future employment. The employee discusses the matter with the ethics official and chooses to file a notification and recusal statement prior to the interview. The notification and recusal statement contain the identity of the prospective employer and an estimated date of when the interview will occur. The employee has complied with the notification requirement of section 17 of the STOCK Act.

(d) Agreement of future employment or compensation for the purposes of § 2635.607 means any arrangement concerning employment that will commence after the termination of Government service. The term also means any arrangement to compensate in exchange for services that will commence after the termination of Government service. The term includes, among other things, an arrangement to compensate for teaching, speaking, or writing that will commence after the termination of Government service.