

PART 2636 -- LIMITATIONS ON OUTSIDE EMPLOYMENT AND PROHIBITION OF HONORARIA; CONFIDENTIAL REPORTING OF PAYMENTS TO CHARITIES IN LIEU OF HONORARIA

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Subpart A -- General Provisions

2636.101 Purpose.

This part is issued under authority contained in titles II and VI of the Ethics Reform Act of 1989 (Pub. L. 101 - 194, as amended), amending the Ethics in Government Act of 1978, and contains regulations that implement the following:

- (a) The prohibition at 5 U.S.C. app. 501(b) against receipt of honoraria and the provisions of 5 U.S.C. app. 501(c) whereby payments may be made to charitable organizations in lieu of honoraria;
- (b) The confidential reporting requirement at 5 U.S.C. app. 102(a)(1)(A) applicable to payments made to charitable organizations in lieu of honoraria; and
- (c) The 15 percent outside earned income limitation at 5 U.S.C. app. 501(a) and the limitations at 5 U.S.C. app. 502 on outside employment and affiliation applicable to certain noncareer employees.

2636.102 Definitions.

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

- (a) Agency ethics official refers to the designated agency ethics official and to any deputy ethics official described in 2638.204 of this subchapter to whom authority to issue advisory opinions under 2636.103 of this part or to receive and review reports of honoraria recipients under 2636.204 of this part has been delegated by the designated agency ethics official.
- (b) Designated agency ethics official refers to the official described in 2638.201 of this subchapter.
- (c) Employee means any officer or employee of the executive branch, other than a special Government employee as defined in 18 U.S.C. 202. It includes officers but not enlisted members of the uniformed services as defined in 5 U.S.C. 2101(3). It does not include the President or Vice President.
- (d) Executive branch includes each executive agency as defined in 5 U.S.C. 105 and any other

entity or administrative unit in the executive branch. However, it does not include any agency that is defined by 5 U.S.C. app. 109(11) as within the legislative branch.

(e) The terms he, his, and him include "she," "hers" and "her."
2636.103 Advisory opinions.

(a) Request for an advisory opinion. (1) An employee may request an advisory opinion from an agency ethics official as to whether specific conduct which has not yet occurred would violate any provision contained in this part.

(2) An advisory opinion may not be obtained for the purpose of establishing:

(i) Whether a particular entity qualifies as a charitable organization to which an honorarium may be paid pursuant to 2636.204 of this part; or

(ii) Whether a noncareer employee who is subject to the restrictions in subpart C of this part may receive compensation for teaching. An advisory opinion issued under this section may not be substituted for the advance written approval required by 2636.307 of this part.

(3) The employee's request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the employee that is relevant to the inquiry. Where, in the opinion of the agency ethics official, complete information has not been provided, that official may request the employee to furnish additional information necessary to issue an opinion.

(b) Issuance of advisory opinion. As soon as practicable after receipt of all necessary information, the agency ethics official shall issue a written opinion as to whether the conduct in issue would violate any provision contained in this part. Where conduct which would not violate this part would violate another statute relating to conflicts of interest or applicable standards of conduct, the advisory opinion shall so state and shall caution the employee against engaging in the conduct.

(1) For the purpose of issuing an advisory opinion, the agency ethics official may request additional information from agency sources, including the requesting employee's supervisor, and may rely upon the accuracy of information furnished by the requester or any agency source unless he has reason to believe that the information is fraudulent, misleading or otherwise incorrect.

(2) A copy of the request and advisory opinion shall be retained for a period of 6 years.

(c) Good faith reliance on an advisory opinion. An employee who engages in conduct in good faith reliance upon an advisory opinion issued to him under this section shall not be subject to civil or disciplinary action for having violated this part. Where an employee engages in conduct in good faith reliance upon an advisory opinion issued by an ethics official of his agency to another, neither the Office of Government Ethics nor the employing agency shall initiate civil or disciplinary action under this part for conduct that is indistinguishable in all material aspects from the conduct described in the advisory opinion. However, an advisory opinion issued under

this section shall not insulate the employee from other civil or disciplinary action if his conduct violates any other laws, rule, regulation or lawful management policy or directive. Where an employee has actual knowledge or reason to believe that the opinion is based on fraudulent, misleading, or otherwise incorrect information, the employee's reliance on the opinion will not be deemed to be in good faith.

(d) Revision of an ethics opinion. Nothing in this section prohibits an agency ethics official from revising an ethics opinion on a prospective basis where he determines that the ethics opinion previously issued is incorrect, either as a matter of law or because it is based on erroneous information.

2636.104 Civil, disciplinary and other action.

(a) Civil action. Except when the employee engages in conduct in good faith reliance upon an advisory opinion issued under 2636.103 of this subpart, an employee who accepts an honorarium or engages in any other conduct in violation of the prohibitions, limitations and restrictions contained in this part may be subject to civil action under 5 U.S.C. app. 504(a) and a civil penalty of not more than \$10,000 or the amount of compensation the individual received for the prohibited conduct, whichever is greater. Knowing and willful failure to file the report required by 2636.205 of this part or falsification of information thereon may subject an employee to a civil penalty of not more than \$10,000 under 5 U.S.C. app. 104(a).

(b) Disciplinary and corrective action. An agency may initiate disciplinary or corrective action against an employee who violates any provision of this part, which may be in addition to any civil penalty prescribed by law. When an employee engages in conduct in good faith reliance upon an advisory opinion issued under 2636.103 of this subpart, an agency may not initiate disciplinary or corrective action for violation of this part. Disciplinary action includes reprimand, suspension, demotion and removal. Corrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution or termination of an activity. It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, the Director of the Office of Government Ethics may order corrective action or recommend disciplinary action under the procedures at part 2638 of this subchapter. The imposition of disciplinary action is at the discretion of the employing agency.

(c) Late Filing Fee. An employee may be assessed a late filing fee of \$200 under 5 U.S.C. app. 104(d) for any report of payments to charitable organizations in lieu of honoraria required by 2636.205 of this part that is filed more than 30 days after the date the report is due.

(d) Criminal penalties. An employee who knowingly and willfully falsifies information on a report of payments to charitable organizations in lieu of honoraria required by 2636.205 of this part may be subject to criminal prosecution and sentencing under 18 U.S.C. 1001 and 3571.

Subpart B -- The Honorarium Prohibition; Confidential Reporting of Payments to Charities in Lieu of Honoraria

2636.201 General standard.

An individual may not receive any honorarium while that individual is an employee.

2636.202 Relationship to other laws and regulations.

The honorarium prohibition described in this subpart is in addition to any restriction on appearances, speaking or writing or the receipt of compensation therefor to which an employee is subject under applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interests. Even though compensation for an activity is not prohibited by this subpart, an employee should accept compensation, including travel expenses, or engage in the activity for which compensation is offered, only after determining that it is not prohibited by the following:

(a) An employee is prohibited by criminal statute and by the standards of conduct at part 735 of this title and agency implementing regulations from accepting compensation for an appearance or speech made or an article written in his official capacity or as part of his official duties. Unless specifically authorized by a statute, such as 5 U.S.C. 4111, 5 U.S.C. 7342, or 31 U.S.C. 1353, this prohibition applies to the acceptance of travel expenses paid other than by the United States Government.

(b) An employee is prohibited by the standards of conduct from receiving compensation, including travel expenses, for speaking or writing on subject matter that focuses specifically on his official duties or on the responsibilities, policies and programs of his employing agency.

(c) As described in subpart C of this part, certain noncareer employees are subject to limitations on their receipt of outside earned income and may not engage in compensated teaching activities without advance approval under 2636.307 of that subpart.

2636.203 Definitions.

For purposes of this subpart:

(a) Honorarium means a payment of money or anything of value for an appearance, speech or article. The term does not include:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Meals or other incidents of attendance, such as waiver of attendance fees or course materials furnished as part of the event at which an appearance or speech is made;

(3) Copies of publication containing articles, reprints of articles, tapes of appearances or speeches, and similar items that provide a record of the appearance, speech or article;

(4) Actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing or publication of an article. Such travel expenses, when paid, reimbursed or provided in kind by another, shall not be counted as part of an honorarium. Where such expenses are not paid or reimbursed, the amount of an honorarium shall be determined by subtracting the actual and necessary travel expenses incurred in

connection with the appearance or speech or the writing or publication of the article;

(5) Actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, when paid or reimbursed by another;

(6) Compensation for goods or services other than appearing, speaking or writing, even though making an appearance or speech or writing an article may be an incidental task associated with provision of the goods or services;

(7) Salary, wages and other compensation pursuant to an employer's usual employee compensation plan when paid by the employer for services on a continuing basis that involve appearing, speaking or writing. For these purposes, the term "employment" refers to services rendered in the context of an employer-employee relationship. It does not include any arrangement entered into by the employee or another as an independent contractor or with an agent, speakers bureau or similar entity that facilitates appearances or speaking or writing opportunities;

(8) Compensation for teaching a course involving multiple presentations by the employee offered as part of a program of education or training sponsored and funded by the Federal government or by a state or local government;

(9) Compensation for teaching a course involving multiple presentations by the employee offered as part of the regularly established curriculum of an institution of higher education as defined at 20 U.S.C. 1141(a);

(10) An award for artistic, literary or oratorical achievement made on a competitive basis under established criteria;

(11) Witness fees credited under 5 U.S.C. 5515 against compensation payable by the United States; or

(12) Compensation received for any appearance or speech made or article accepted for publication prior to January 1, 1991, or for any appearance or speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991.

(13) Payment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government.

Example 1. An employee of the Department of Agriculture has entered into a contract to develop a complex software package for a private company. The contract, which is for a single fee for all work to be provided under the contract, requires the employee to provide 2 hours of oral instruction on use of the program. He may accept the entire fee for performance under the contract. No part of the fee is an honorarium since the 2 hours of instruction is only incidental to his development and delivery of the software package. He could not, however, receive a fee specifically for 2 hours of oral instruction on the use of a program he had earlier provided under

a contract that required only his development of a program.

Example 2. A management trainee employed by the Bureau of Indian Affairs is employed two nights a week as a reporter on a local newspaper. He may receive a salary for his continuing employment even though it is in a profession characterized by the writing of articles. He may not, however, accept compensation for newspaper or magazine articles written on a freelance basis or pursuant to a contract to furnish 5 articles over a one year period.

Example 3. An economist employed by the Department of the Treasury has entered into an agreement with a speakers bureau to give 10 unrelated after-dinner speeches to be arranged by the speakers bureau with various organizations over a six-month period. The employee may not receive the contract fee of \$10,000. The 10 speeches do not constitute a series of speeches, but 10 individual speeches.

Example 4. An attorney employed by the Department of the Air Force may not accept compensation for teaching a two-day seminar on Federal procurement law presented by a publishing company under the sponsorship of an accredited law school. He may, however, accept compensation for teaching procurement law as part of the law school's regular curriculum of courses.

Example 5. An air traffic controller employed by the Federal Aviation Administration has entered into a contract with a magazine publisher to write an article on sheep ranching in New Zealand. In addition to a fee of \$500 for the article, the contract provides that the publisher will provide expenses for the employee to travel to New Zealand to conduct research on sheep ranching. The employee may accept the travel expenses, but not the \$500 fee. In lieu of the \$500 fee, he could not accept expenses to travel to and stay for a weekend in Sydney, Australia after the completion of his research.

Example 6. An employee of the National Aeronautics and Space Administration may accept compensation for a series of three articles on white collar crime she has agreed to write for a local newspaper. While she could not accept compensation for just two articles on white collar crime, she could accept a national journalism award for two articles she had written on an uncompensated basis.

Example 7. A physicist employed by the Department of Energy to conduct research on laser technology may not accept a contract fee for a series of three lectures on lasers where one of the lectures is to focus on the research he is conducting for DOE.

(b) Appearance means attendance at a public or private conference, convention, meeting, hearing, event or other gathering and the incidental conversation or remarks made at that time. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display.

Example 1. Because the fee is for an "appearance", an employee of the Securities and Exchange Commission who was responsible for a major securities fraud investigation may not accept a fee for standing in the reception line at the premier of a movie entitled "Junk Bond Scandal."

Example 2. A staff member of the National Security Council does not make an "appearance" by playing the piano and singing at a wedding reception and may accept a fee for his performance.

Example 3. An employee of the Forest Service does not make an "appearance" by modeling in a fashion show and may accept a modeling fee.

(c) Speech means an address, oration, or other form of oral presentation, whether made in person, recorded or broadcast. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of an appearance in paragraph (b) of this section. It does not include the conduct of worship services or religious ceremonies.

Example 1. An attorney employed by the Department of Justice may not receive a \$50 honorarium for her informal talk to a local gardening club on how to design and grow a Victorian rose garden. Her talk, though informal, is a "speech."

Example 2. A nutritionist employed by the National Institutes of Health who is a stand-up comedian by avocation may accept a fee for performing a comedy routine at a dinner theater. His oral remarks do not constitute a speech because they are an incident of his performance using his talent as a comedian. He could not, however, accept compensation for a speech simply because he tells an introductory joke or otherwise amuses his audience.

Example 3. A statistician employed by the Department of Labor who is a lay minister may accept a gratuitous payment of \$50 for performing a funeral service since it involves his conduct of a religious ceremony. However, he may not accept a payment for a talk on theology given to other ministers, for offering a prayer at the opening of a convention or for delivering a sermon during a worship service conducted by another minister. He could accept payment for his own conduct of worship services.

Example 4. A price analyst employed by the Defense Fuel Supply Agency may accept a fee of \$100 for writing a speech to be delivered by another. The term "speech" includes only oral presentations and does not include writing a speech to be delivered by someone other than the employee. Moreover, the text of a speech is not an article.

Example 5. The stage portrayal of Hamlet by an employee of the Department of State does not involve the making of a "speech." He may be paid for his role in the Shakespearean production.

(d) Article means a writing, other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings. The term does not include works of fiction, poetry, lyrics, or script.

Example 1. An employee of the Office of Personnel Management who has reviewed a new book about the New York Yankees may not accept a \$50 honorarium from the publisher of a sports magazine. The book review is an "article."

Example 2. The lyrics and music for a college song written by two Department of the Navy attorneys does not constitute an "article." The attorneys could each accept a gratuitous payment of \$50 if the song were selected by their alma mater for publication in its compendium of college songs.

Example 3. An engineer employed by the National Aeronautics and Space Administration has entered into a contract with an association of electrical component manufacturers to proofread and edit articles submitted by members of the association for publication in its monthly newsletter. The employee may accept the contract fee since the compensation is not for the writing of articles.

Example 4. An accountant employed by the Federal Deposit Insurance Corporation may accept compensation for writing a chapter of a textbook on corporate accounting. A chapter of a book is not an "article."

(e) Receive means that there is actual or constructive receipt of the honorarium by the employee so that the employee has a right to exercise dominion and control over the honorarium and direct its subsequent use. For purposes of this subpart, an honorarium is received while an employee if it is for an appearance or speech made or any article submitted for publication by that individual while he was an employee. Except when it is paid to a charitable organization in accordance with 2636.204 of this subpart, an honorarium is received by an employee:

(1) If it is paid to another person on

the basis of designation, recommendation or other specification by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Example 1. At the suggestion of the Army officer who authored an article selected for publication in a popular magazine, the publisher paid the amount of its usual honorarium to the officer's husband. The officer has "received" an honorarium.

Example 2. An employee of the Department of Housing and Urban Development has been offered a \$500 honorarium for a speech to be given during the week before his scheduled date of retirement from Federal service. Since it is for a speech to be made while he is an employee, he will have "received" the offered honorarium while an employee even though actual payment may not occur until after his retirement.

(f) Charitable organization means an organization which is qualified with respect to deductible charitable contributions under 26 U.S.C. 170(c) because it is organized or operated exclusively for religious, charitable, scientific, literary, educational or another specified purpose. It includes, but is not limited to, an organization exempt from Federal taxation under the authority of 26 U.S.C. 501(c)(3).

(g) Travel expenses means the actual and necessary cost of transportation, lodging and meals incurred while away from the employee's residence or principal place of employment in

connection with an appearance, speech or article. Where the lodgings and meals portion of travel expenses are paid or reimbursed by another in the form of a per diem or subsistence expense allowance, that allowance shall be treated as actual and necessary travel expenses if the allowance is no more than that customarily paid by the payor to its own officers or employees, provided the employee in fact incurs costs for commercial meals and lodgings on each day for which the allowance is received.

[56 FR 1723, Jan. 17, 1991, as amended at 57 FR 602, Jan. 8, 1992]

2636.204 Payment to charitable organizations in lieu of honoraria.

(a) Effect of payment to a charitable organization. An honorarium which, but for this subpart, could be paid to an employee but is paid instead on behalf of the employee to a charitable organization is deemed not to be received by the employee. An employee may suggest that an honorarium that he is prohibited from receiving solely by application of this subpart be paid in his name to a charitable organization. An honorarium received and later donated to a charitable organization by the employee does not qualify as a payment to a charitable organization in lieu of an honorarium made in accordance with this section.

Note: An employee on whose behalf a payment in lieu of an honorarium has been made to a charitable organization may not take a tax deduction on account of the payment under any provision of the Internal Revenue Code or under any tax law of a State or political subdivision thereof.

(b) Nonqualifying payments to charitable organizations. No payment may be made to a charitable organization pursuant to this section:

(1) If the employee would be prohibited from receiving and retaining the honorarium by any conflict of interest statute or regulation or applicable standards of conduct other than this subpart. Honoraria that the employee is prohibited from receiving and retaining would include, for example, any honorarium that is for:

(i) An appearance or speech made or article written by the employee in an official capacity or as part of his official duties; or

(ii) A speech or article, the subject matter of which focuses specifically on agency responsibilities, policies or programs.

(2) In an amount in excess of \$2,000 per appearance, speech, or article; or

(3) If the employee, the employee's parent, sibling, spouse, child, or dependent relative derives any direct financial benefit from the charitable organization that is separate from and beyond any general benefit conferred by the organization's activities.

Example 1. An Assistant U.S. Attorney who has successfully prosecuted an espionage case may not suggest that an honorarium offered for his speech about the prosecution be given to his law school. Because the topic of the speech relates to his official duties, he is prohibited from

accepting any compensation by applicable standards of conduct. He could, however, suggest that an honorarium offered for his speech on training sheepdogs, be paid to his school.

Example 2. A personnel specialist employed by the Department of Labor whose spouse is employed by the Red Cross may not suggest that an honorarium for his speech about his vacation spent bicycling through China be donated in his name to the Red Cross.

Example 3. A claims examiner employed by the Department of Veterans Affairs whose mother suffers from Parkinson's Disease may suggest that an honorarium for her article on historic preservation be donated to a charitable organization that funds research seeking a cure for Parkinson's Disease. She may not suggest, however, that it be donated to a charitable organization that provides her mother with in-home nursing services.

2636.205 Reporting payments to charitable organizations in lieu of honoraria.

(a) Who must file. A current or former employee, other than a new entrant, who is required to file a financial disclosure report, either on a confidential or public basis, shall at the same time file a confidential report of payments to charitable organizations in lieu of honoraria if:

(1) Payments in lieu of honoraria aggregating more than \$200 were made on his behalf by any one source to one or more charitable organizations during the reporting period covered by the financial disclosure statement; or

(2) In the case of an individual filing a termination report, there is an understanding between the reporting individual and any other person that payments in lieu of honoraria will be made on his behalf for an appearance or speech made or article submitted for publication while the individual was a Government employee which, together with any payments in lieu of honoraria made by that source during the reporting period, will aggregate more than \$200.

This reporting requirement is in addition to any other requirement to disclose on a public or confidential financial disclosure report the source, date and amount of an honorarium paid to a charitable organization on the employee's behalf. It does not apply to any payment in lieu of an honorarium made to a charitable organization on behalf of the current or former employee's spouse or dependent child.

(b) Where and when to file. The report required by this section shall be filed with the agency ethics official by the date the current or former employee is required to file a confidential or public financial disclosure report. Any grant of an extension to file a financial disclosure report shall automatically extend the date for filing the report of payments to charitable organizations in lieu of honoraria and the agency ethics official may, for good cause shown by the employee, grant a separate extension of the date for filing the report required by this section. The total of all extensions for filing the report required by this section shall not exceed 90 days.

(c) Reporting period. The report of payments to charitable organizations in lieu of honoraria shall cover the same period that applies to the confidential or public financial disclosure report the individual is required to file. For employees filing annual financial disclosure reports, the reporting period is the preceding calendar year or, if the employee commenced Government

service during that year, the portion of the preceding calendar year beginning with the date the employee entered on duty. For those filing termination reports, the reporting period is the portion of the calendar year in which he terminated Government service up to the date of termination and, if he has not yet filed an annual financial disclosure report covering that period, the preceding calendar year or other period required for the annual report.

(d) What to report. Each report shall be filed on the standard form prescribed by the Office of Government Ethics and made available through the General Services Administration. Each report filed shall include the following information for each payment to a charitable organization in lieu of an honorarium, regardless of amount, made on the employee's behalf by any source from whom such payments made during the reporting period aggregate more than \$200:

(1) The date of the payment (if payment has been made);

(2) The date of the appearance or speech for which the honorarium was paid or, where the honorarium is for an article, the date the article was submitted by the employee for publication;

(3) The name of the person or entity making the payment to the charitable organization;

(4) The name and the tax status of charitable purpose of the recipient;

(5) The subject matter of the speech or article or, where the honorarium is for an appearance, the reason for the appearance; and

(6) The amount of the payment;

An individual filing a termination report who is reporting with respect to payments which have not yet been made should write "Not Applicable" in the space provided for the date of payment and should provide the remainder of the information required on the basis of his best knowledge and belief as to payments which he understands will be made to charitable organizations on his behalf.

(e) Effect of signing the form. By signing the form the employee certifies that the information he has reported is true, complete and correct to the best of his knowledge and that neither he nor his parent, sibling, spouse, child or dependent relative receives from the recipient charitable organization a benefit that is separate and distinct from any general benefit conferred by the organization's activities.

(f) Review of reports. Within 60 days after receipt, the agency ethics official shall review each report of payments to charitable organizations in lieu of honoraria to determine that the reporting requirements of this section have been met and that each payment reported meets the standards at 2636.204 of this subpart.

(1) The agency ethics official need not audit the report to ascertain whether the disclosures are correct; disclosures are to be taken at face value unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report.

(2) If the agency ethics official determines that the report is complete and that each payment is proper, he shall sign and date the report.

(3) If the agency ethics official determines that the form is not complete, he shall request that the employee complete the form by a specific date and annotate each addition or change with the employee's signature and the date the annotation was made. The 60 day period for review shall run from the date the completed form is filed.

(4) If the agency ethics official determines that additional information is needed to determine whether a payment to a charitable organization meets the standards at 2636.204 of this subpart, he shall request that the employee furnish such information by a specific date and shall date and append to the report any information obtained in writing or annotate the report to reflect any information obtained other than in writing and the date it was furnished. The 60 day period for review shall run from the date the additional information is furnished.

(5) If the agency ethics official determines that the employee has failed to file a report or a complete report or has received an honorarium in violation of 2636.201 of this subpart because a reported payment does not meet the standards at 2636.204 of this subpart, he shall give the individual written notice of the deficiency and 10 days in which to submit a written response and, thereafter, shall refer the case for appropriate action as described in 2636.104 of this subpart and annotate the report to reflect that referral.

(g) Filing of reports with the Office of Government Ethics. On August 15 of each year, the designated agency ethics official shall forward to the Office of Government Ethics all reports reviewed within his agency during the preceding one-year period.

(h) Review of reports by the Office of Government Ethics. Within 60 days after receiving the reports forwarded under paragraph (g) of this section, reports of payments to charitable organizations in lieu of honoraria filed by individuals whose public financial disclosure reports are required to be filed with the Director of the Office of Government shall be reviewed and signed by the Director.

(i) Retention of reports. Reports of payments to charitable organizations in lieu of honoraria shall be retained by the Office of Government Ethics for a period of 6 years. Unless needed in an ongoing investigation, the reports shall be destroyed after 6 years.

(j) Confidentiality of reports. Reports of payments to charitable organization in lieu of honoraria filed pursuant to this section are not available to members of the public and are to be treated with the confidentiality afforded confidential financial disclosure reports.

[56 FR 1723, Jan. 17, 1991, as amended at 56 FR 21589, May 10, 1991; 56 FR 51319, Oct. 11, 1991]

Subpart C -- Outside Earned Income Limitation and Employment and Affiliation Restrictions
Applicable to Certain Noncareer Employees

2636.301 General standards.

A covered noncareer employee shall not:

- (a) Receive outside earned income in excess of the 15 percent limitation described in 2636.304 of this subpart;
- (b) Receive compensation or allow the use of his name in violation of the restrictions relating to professions involving a fiduciary relationship described in 2636.305 of this subpart;
- (c) Receive compensation for serving as an officer or board member in violation of the restriction described in 2636.306 of this subpart; or
- (d) Receive compensation for teaching without having first obtained advance authorization as required by 2636.307 of this subpart.

2636.302 Relationship to other laws and regulations.

The limitations and restrictions contained in this section are in addition to any limitations and restrictions imposed upon an employee by applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interest. Even though conduct or the receipt of compensation is not prohibited by this subpart, an employee should accept compensation or engage in the activity for which compensation is offered only after determining that it is otherwise permissible. In particular, a covered noncareer employee should accept compensation only after determining that its receipt does not violate the following prohibitions:

- (a) A covered noncareer employee who is a Presidential appointee to a full-time noncareer position is prohibited by section 102 of Executive Order 12674, as amended, from receiving any outside earned income for outside employment or any other activity performed during that Presidential appointment.
- (b) An individual is prohibited from receiving any honorarium while he is an employee. The honoraria prohibition, described in subpart B of this part, applies to any compensation for an appearance or speech made or article submitted for publication while the individual is an employee.

2636.303 Definitions.

For purposes of this section:

- (a) Covered noncareer employee means an employee, other than a special Government employee as defined in 18 U.S.C. 202, whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for GS - 16, step 1 of the General Schedule under 5 U.S.C. 5332 and who is:
 - (1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position within the uniformed services; or

(ii) A position within the foreign service below the level of Assistant Secretary or Chief of Mission;

(2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;

(3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in 213.3301 of this title for Schedule C positions; or

(4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in 305.601 of this title for noncareer executive assignment positions.

For purposes of applying this definition to an individual who holds a General Schedule or other position that provides several rates of pay or steps per grade, his rate of basic pay shall be the rate of pay for the lowest step of the grade at which he is employed.

Example 1. A Schedule C appointee to a position with the United States Information Agency who holds a GS - 15 position and who is compensated at the rate for GS - 15, Step 9 is not a covered noncareer employee even though the pay he receives in a calendar year exceeds the annual pay for GS

- 16, Step 1. Notwithstanding that he is compensated at Step 9, the basic rate of pay for the GS - 15 position he holds is the rate in effect for GS - 15, Step 1 of the General Schedule, which is lower than the rate for GS - 16, Step 1.

Example 2. An employee of the Environmental Protection Agency who has been a career GS - 15 employee for 10 years and who is offered a non-career SES position with the Federal Aviation Administration will, if he accepts the offer, become a covered noncareer employee by reason of that appointment, regardless of his former status.

Example 3. A Department of Justice employee who holds a Schedule A appointment is not a covered noncareer employee even though he does not have competitive status within the meaning of 212.301 of this title.

(b) Outside earned income and compensation both mean wages, salaries, honoraria, commissions, professional fees and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government. Neither term includes:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Income attributable to service with the military reserves or national guard;

- (3) Income from pensions and other continuing benefits attributable to previous employment or services;
- (4) Income from investment activities where the individual's services are not a material factor in the production of income;
- (5) Copyright royalties, fees, and their functional equivalent, from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights;
- (6) Actual and necessary expenses incurred by the employee in connection with an outside activity. Where such expenses are paid or reimbursed by another person, the amount of any such payment shall not be counted as compensation or outside earned income. Where such expenses are not paid or reimbursed, the amount of compensation or earned income shall be determined by subtracting the actual and necessary expenses incurred by the employee from any payment received for the activity;
- (7) An honorarium paid to a charitable organization pursuant to 2636.204 of this part; or
- (8) Compensation for:
- (i) Services rendered prior to January 1, 1991, or prior to becoming a covered noncareer employee;
 - (ii) Services rendered in satisfaction of a covered noncareer employee's obligation under a contract entered into prior to January 1, 1991; or
 - (iii) Services which the covered noncareer employee first undertook to provide prior to January 1, 1991, where the standards of the applicable profession require the employee to complete the case or other undertaking.

Example 1. A covered noncareer employee is a limited partner in a partnership that invests in commercial real estate. Because he does not take an active role in the management of the partnership, his share of the partnership income is neither "outside earned income" nor "compensation."

Example 2. A covered noncareer employee of the Civil Rights Commission serves without compensation as a member of the Board of Visitors for a university. The roundtrip airfare and hotel expenses paid by the university to permit him to attend quarterly meetings of the Board are neither "outside earned income" or "compensation."

Example 3. Where a covered noncareer employee pays for transcripts of a hearing in which he is providing pro bono legal representation, reimbursements for those expenses by a legal aid organization are neither "outside earned income" nor "compensation."

Example 4. During the term of his appointment, a Deputy Assistant Secretary of Labor enters into a contract to write a book of fictional short stories. Royalties based on actual sales of the book after publication are investment income attributable to the property interest he retains in the

book and, as such, are neither "outside earned income" nor "compensation."

(c) Receive means that the employee has the right to exercise dominion and control over the compensation or outside earned income and direct its subsequent use. Compensation or outside earned income is received by an employee if it is for his conduct and:

(1) If it is paid to any other person on the basis of designation, recommendation or other specification by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Compensation that is prohibited by 2636.305 through 2636.307 of this subpart is received while an individual is an employee if it is for conduct by him that occurs while an employee, even though actual payment may be deferred until after Federal employment has terminated.

Payments made to charitable organizations in lieu of honoraria under 2636.204 of this part are not compensation or outside earned income and thus are not received in violation of any of the limitations contained in this subpart. However, other compensation or outside earned income donated to a charitable organization is received by the employee.

2636.304 The 15 percent limitation on outside earned income.

(a) Limitation applicable to individuals who are covered noncareer employees on January 1 of any calendar year. A covered noncareer employee may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. The effective date of a change in the rate for level II of the Executive Schedule shall be the date on which a new rate of basic pay for level II first becomes applicable to any level II position.

Note: Notwithstanding the 15 percent limitation described in this section, a covered noncareer employee who is a Presidential appointee to a full-time noncareer position is prohibited by section 102 of Executive Order 12674, as amended, from receiving any outside earned income for outside employment or any other activity performed during that Presidential appointment.

Example 1. Notwithstanding that the compensation he will receive would not exceed 15 percent of the rate for level II of the Executive Schedule, a covered noncareer employee of the Department of Energy may not receive any compensation for teaching a university course unless he first receives the authorization required by 2636.307 of this subpart.

(b) Limitation applicable to individuals who become covered noncareer employees after January 1 of any calendar year. The outside earned income limitation that applies to an individual who becomes a covered noncareer employee during a calendar year shall be determined on a pro rata basis. His outside earned income while so employed in that calendar year shall not exceed 15 percent of the annual rate of basic pay for level II of the Executive Schedule in effect on January 1 of the calendar year divided by 365 and multiplied by the number of days during that calendar year that he holds the covered noncareer position.

Example 1. A former college professor received an appointment to a noncareer Senior Executive Service position on November 1, 1991. The rate of basic pay in effect for Executive Level II on January 1, 1991 was \$125,100. For the 61 day period from November 1, 1991 through December 31, 1991, the amount of outside income he may earn is limited to \$3,129. That amount is determined as follows:

Step 1. The rate of basic pay for Executive Level II as in effect on January 1 of that year (\$125,100) is divided by 365. That quotient is \$342;

Step 2. The dollar amount determined by Step 1 (\$342) is then multiplied by the 61 days the employee held the covered noncareer position. That product is \$20,862;

Step 3. The dollar amount determined by Step 2 (\$20,862) is multiplied by .15 or 15 percent. The product (\$3,129) is the maximum outside earned income the employee may have in the particular year attributable to the period of his service in a covered noncareer position.

(c) Computation principle. For purposes of any computation required by this section, any amount of \$.50 or more shall be rounded up to the next full dollar and any amount less than \$.50 shall be rounded down to the next full dollar.

(d) Year to which outside earned income is attributable. Regardless of when it is paid, outside earned income is attributable to the calendar year in which the services for which it is paid were provided.

2636.305 Compensation and other restrictions relating to professions involving a fiduciary relationship.

(a) Applicable restrictions. A covered noncareer employee shall not:

(1) Receive compensation for:

(i) Practicing a profession which involves a fiduciary relationship; or

(ii) Affiliating with or being employed to perform professional duties by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship; or

(2) Permit his name to be used by any firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship.

Example 1. A covered noncareer employee of the White House Office who is an attorney may not receive compensation for drafting a will for her friend. She may, however, participate in her bar association's pro bono program by providing free legal services for the elderly, provided her participation in the program is otherwise proper. For example, 18 U.S.C. 205 would prohibit her from representing her pro bono client in a hearing before the Social Security Administration.

Example 2. An accountant named C.B. Debit who is offered a covered noncareer appointment must terminate his partnership in the accounting firm of Delight, Waterhose and Debit upon appointment. Because his deceased father, J.R. Debit, was the founding partner for whom the firm is named, the name Debit need not be deleted from the firm's name. However, the name C.B. Debit may not appear on the firm's letterhead after the individual enters on duty as a covered noncareer employee.

(b) Definitions. For purposes of this section:

(1) Profession means a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical or scholarly principles underlying such skills and methods. It is characteristic of a profession that those in the profession, through force of organization or concerted opinion, establish and maintain high standards of achievement and conduct, and commit its practitioners to continued study of the field. Consulting and advising with respect to subject matter that is generally regarded as the province of practitioners of a profession shall be considered a profession.

(2) Profession which involves a fiduciary relationship means a profession in which the nature of the services provided causes the recipient of those services to place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge of the practitioner. Such professions are not limited to those whose practitioners are legally defined as fiduciaries and include practitioners in such areas as law, insurance, medicine, architecture, financial services and accounting. A covered noncareer employee who is uncertain whether a particular field of endeavor is a profession which involves a fiduciary relationship may request an advisory opinion under 2636.103.

Example 1. In view of the standards of the profession which require a licensed real estate broker to act in the best interests of his clients, the selling of real estate by a licensed broker involves the practice of a profession involving a fiduciary relationship.

Example 2. A covered noncareer employee may receive the customary fee for serving as the executor of his mother's estate, provided he does not violate the applicable limitation on the amount of outside earned income he may receive. Although the executor of an estate has fiduciary obligations, serving as an executor in these circumstances does not involve the practice of a profession and, therefore, is not prohibited. He could not, however, serve for compensation as attorney for the estate.

2636.306 Compensation restriction applicable to service as an officer or member of a board.

(a) Applicable restriction. A covered noncareer employee shall not receive compensation for serving as an officer or member of the board of any association, corporation or other entity. Nothing in this section prohibits uncompensated service with any entity.

(b) Definition. For purposes of this section, the phrase "association, corporation or other entity" is not limited to for-profit entities, but includes nonprofit entities, such as charitable organizations and professional associations, as well as any unit of state or local government.

Example 1. A covered noncareer employee of the Environmental Protection Agency may not serve with compensation on the board of directors of his sister's closely-held computer software corporation.

Example 2. A covered noncareer employee of the Department of the Navy may serve without compensation as an officer of a charitable organization that operates a hospice.

Example 3. A covered noncareer employee of the Coast Guard appointed to serve as a member of the board of education of the county in which she is a resident may not receive compensation for that service.

2636.307 Requirement for advance authorization to engage in teaching for compensation.

(a) Authorization requirement. A covered noncareer employee may receive compensation for teaching only when specifically authorized in advance by the designated agency ethics official.

(b) Definition. For purposes of this section "teaching" means any activity that involves oral presentation or personal interaction, the primary function of which is to instruct or otherwise impart knowledge or skill. It is not limited to teaching that occurs in a formal setting, such as a classroom, but extends to instruction on an individual basis or in an informal setting.

(c) Request for authorization. An employee may request authorization to engage in compensated teaching activities by forwarding a written request to the designated agency ethics official. The request shall describe the employee's official duties, the subject matter of the teaching activity, the entity sponsoring the course, and the student, class or audience to be taught. In addition, it shall set forth the terms of the compensation arrangement and identify the source of the payment. The request shall be accompanied by any contract or employment agreement and any literature describing, publicizing or otherwise promoting the class, classes or course.

(d) Standard for authorization. Compensated teaching may be approved by the designated agency ethics official only when:

(1) The teaching will not interfere with the performance of the employee's official duties or give rise to an appearance that the teaching opportunity was extended to the employee principally because of his official position;

(2) The employee's receipt of compensation does not violate any of the limitations and prohibitions on honoraria, compensation or outside earned income contained in this part; and

(3) Neither the teaching activity nor the employee's receipt of compensation therefor will violate applicable standards of conduct or any statute or regulation related to conflicts of interests.

(e) Determination and authorization. The determination by the designated agency ethics official to grant or deny authorization to engage in teaching for compensation shall be in writing and shall be final. The authority of the designated agency ethics official to authorize compensated teaching may not be delegated to any person other than the alternate designated agency ethics official described in 2638.202(b).

