

(Billing Code 4410-19-P)

DEPARTMENT OF JUSTICE

5 CFR Part 3801

**Supplemental Standards of Ethical Conduct for Employees of the Department of Justice
(2013R-4F)**

AGENCY: Department of Justice.

ACTION: Final rule; amendments.

SUMMARY: The Department of Justice (DOJ), with the concurrence of the Office of Government Ethics, is amending its Supplemental Standards of Ethical Conduct for Employees of the Department of Justice (Supplemental Standards) to incorporate existing rules for Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) employees that had initially been adopted by the Department of the Treasury (Treasury) when the Bureau of Alcohol, Tobacco, and Firearms was within Treasury. These rules, which have continued to be applicable to ATF employees after the transfer of authorities to DOJ, are being incorporated without substantive change into DOJ's Supplemental Standards. Additionally, this final rule designates ATF as a separate agency for purposes of applying the gifts and the teaching, speaking, and writing provisions of the Standards of Ethical Conduct for Employees of the Executive Branch.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Denise R. Brown, Office of Regulatory Affairs, Bureau of Alcohol, Tobacco, Firearms and Explosives, 99 New York Avenue NE, Washington, DC 20226, (202) 648-7105.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 1992, the Office of Government Ethics (OGE) published the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards). *See* 57 FR 35006–35067, as corrected at 57 FR 48557, 57 FR 52483, and 60 FR 51167, with additional grace period extensions for certain existing provisions at 59 FR 4779–4780, 60 FR 6390–6391, and 60 FR 66857–66858. The OGE Standards, codified at 5 CFR part 2635, effective February 3, 1993, established uniform standards of ethical conduct that apply to all executive branch personnel. Section 2635.105 of the OGE Standards authorizes an agency, with the concurrence of OGE, to adopt agency-specific supplemental regulations that are necessary to properly implement its ethics program. In 1995, the Department of the Treasury (Treasury), with OGE’s concurrence, established the Supplemental Standards of Ethical Conduct for Employees of the Treasury, which included additional rules for Bureau of Alcohol, Tobacco and Firearms employees. *See* 60 FR 22249-22255 (May 5, 1995), as codified at 5 CFR part 3101. In 1997, the Department of Justice (DOJ), with OGE’s concurrence, established the Supplemental Standards of Ethical Conduct for Employees of the Department of Justice (Supplemental Standards). *See* 62 FR 23941-23943 (May 2, 1997), as codified at 5 CFR part 3801.

On November 25, 2002, the President signed into law the Homeland Security Act of 2002, Public Law No. 107–296, 116 Stat. 2135. Title XI, Subtitle B, Section 1111 of the Act which was effective January 24, 2003, transferred the “authorities, functions, personnel, and assets” of the Treasury’s Bureau of Alcohol, Tobacco and Firearms (the Bureau), to DOJ, with the exception of certain enumerated authorities retained by Treasury. Section 1111 of the Act (later transferred in relevant part and codified at 28 U.S.C. 599A) further provided that the

Bureau retains its identity as a distinct entity within DOJ known as the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The authorities retained by Treasury include the administration and enforcement of chapters 51 and 52 of the Internal Revenue Code of 1986, sections 4181 and 4182 of the Internal Revenue Code of 1986, and title 27 of the United States Code. The functions retained by Treasury became the responsibility of a new Alcohol and Tobacco Tax and Trade Bureau (TTB).

As part of the separation, title 27 of the Code of Federal Regulations (CFR) was reorganized into two chapters, chapter I for TTB and chapter II for ATF. Reorganization of Title 27, Code of Federal Regulations, 68 FR 3744 (Jan. 24, 2003). The regulations were divided between the two chapters based upon the respective authorities of Treasury and DOJ.

At that time, DOJ did not amend its Supplemental Standards to incorporate Treasury's existing rules for employees of the Bureau. However, pursuant to section 1111(c)(1) of the Homeland Security Act, and 28 U.S.C. 599A(c)(1), the authorities and functions of the Bureau that the Secretary of the Treasury previously exercised when the Bureau was part of Treasury have been transferred to DOJ. Accordingly, the restrictions of section 3101.105 have continued to be applicable to ATF employees pursuant to this transfer of authorities. However, DOJ has now determined that it is appropriate to incorporate in its Supplemental Standards Treasury's existing regulatory restrictions for ATF employees at 5 CFR 3101.105.

Final Rule

This final rule incorporates the existing provisions of 5 CFR 3101.105 into the Supplemental Standards in a new section 3801.107. This action carries forward the prohibited financial interests rule that had initially been adopted when ATF was part of Treasury, and that has continued to be applicable to ATF employees after the transfer of ATF to DOJ. Now that

ATF is part of DOJ, DOJ has determined that continuing to prohibit ATF employees from having financial interests in the alcohol, tobacco, firearms, or explosives industries is necessary for successful implementation of its ethics program. Prohibiting ATF employees from having financial interests in entities that are regulated or inspected by or closely connected to the work of ATF is important for three reasons: (1) To maintain ATF's appearance of impartiality and objectivity in the execution of its regulatory and law enforcement functions; (2) to eliminate a regulated entity's concern that sensitive information provided to ATF might be misused for private gain; and (3) to avoid the large-scale recusal of employees from official matters resulting in an inability of ATF to fulfill its mission.

Accordingly, the final rule incorporates those applicable ethics standards directly into the DOJ regulations. However, the new language in section 3801.107(b) regarding the granting of regulatory waivers omits reference to a provision of the Internal Revenue Code (26 U.S.C. 7214(b)) that no longer applies to ATF employees and substitutes new clarifying language that gives the agency designee authority to grant a written waiver of the prohibition in paragraph (a) based on a determination that the waiver is not inconsistent with law and the OGE Standards, and otherwise meets the waiver standard previously established in section 3101.105(b).

Additionally, this final rule will designate ATF as a separate agency for purposes of applying the gifts and the teaching, speaking, and writing provisions of the OGE Standards. Pursuant to section 2635.203(a) of the OGE Standards, an executive department, with the concurrence of OGE, may designate any component that exercises distinct and separate functions as a separate agency for the purpose of applying the rules governing the solicitation or acceptance of gifts from prohibited sources or given because of official position. *See* 5 CFR 2635.201–2635.205. Pursuant to section 2635.807(a)(2)(ii) of the OGE Standards, any

component so designated is also considered a separate agency for the purpose of applying the rules governing the receipt of compensation by an employee for teaching, speaking, and writing. DOJ has determined that ATF exercises distinct and separate functions for purposes of applying sections 2635.201–2635.205 and section 2635.807(a)(2)(ii).

Statutory and Executive Order Reviews

Executive Order 12866 and Executive Order 13563

This rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review” section 1(b), Principles of Regulation and in accordance with Executive Order 13563, “Improving Regulations and Regulatory Review,” section 1(b) General Principles of Regulation and section 6 Retrospective Analyses of Existing Rules. This rule is limited to agency organization, management, or personnel matters as described by Executive Order 12866, section 3(d)(3) and, therefore, is not a “regulation” or “rule” as defined by that Executive Order 12866.

This rule will not have an annual effect on the economy of \$100 million or more, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities. Accordingly, this rule is not an “economically significant” rulemaking as defined in Executive Order 12866.

Administrative Procedure Act (APA)

Notice and comment rulemaking is not required for this final rule. Under the APA, “rules of agency organization, procedure or practice,” 5 U.S.C. 553(b)(3)(A), that do not “affect individual rights and obligations,” *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), are exempt from the general notice and comment requirements of section 553. See *JEM Broadcasting Co. v.*

FCC, 22 F.3d 320, 326 (D.C. Cir. 1994) (section 553(b)(3)(A) applies to “agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency”). The revisions to the regulations in 5 CFR part 3801 are purely a matter of agency organization, procedure, and practice that will not affect individual rights and obligations. Furthermore, internal delegations of authority are subject to an exception under the APA for “rules of agency organization, procedure, or practice.”

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities because it pertains to personnel and administrative matters affecting the Department. Further, a Regulatory Flexibility Analysis is not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, Federalism, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 et seq.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a rule for purposes of the reporting requirement of 5 U.S.C. 801.

Paperwork Reduction Act

This proposed rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

Congressional Review Act

The Department of Justice has determined that this action pertains to agency management and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (CRA), (Subtitle E of the Small Business Regulatory Enforcement Fairness Act, (SBREFA)). Therefore,

the reports to Congress and the General Accounting Office specified by section 801 of SBREFA are not required.

Drafting Information

The author of this document is Denise R. Brown, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 5 CFR Part 3801

Conflicts of Interest

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, the Department of Justice, with the concurrence of the Office of Government Ethics, is amending 5 CFR part 3801 as follows:

PART 3801—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF JUSTICE

1. The authority citation for 5 CFR part 3801 is revised to read as follows:

Authority: 5 U.S.C. 301, 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; E.O. 12988, 61 FR 4739; 5 CFR 2635.105, 2635.203(a), 2635.403(a), 2635.701-2635.705, 2635.803, 2635.807(a)(2)(ii); and DOJ Order 1200.1, Chap 11-1.

2. Section 3801.103(a) is amended by adding “Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)” between “Antitrust Division” and “Bureau of Prisons (including Federal Prison Industries, Inc.)” on the list of “Designation of separate Departmental components” within the Department of Justice.

3. Section 3801.107 is added to read as follows:

§ 3801.107 Additional rules for Bureau of Alcohol, Tobacco, Firearms, and Explosives employees.

The following rules apply to the employees of the Bureau of Alcohol, Tobacco, Firearms, and Explosives and are in addition to §§ 3801.101 through 3801.106:

(a) *Prohibited financial interests.* Except as provided in this section, no employee of ATF, or spouse or minor child of an ATF employee, shall have, directly or indirectly, any financial interest, including compensated employment, in the alcohol, tobacco, firearms or explosives industries. The term financial interest is defined in § 2635.403(c) of this title.

(b) *Waiver.* An agency designee, with the advice and legal clearance of the Deputy Designated Agency Ethics Official, may grant a written waiver of the prohibition in paragraph (a) of this section on a determination that the waiver is not inconsistent with part 2635 of this title or otherwise prohibited by law and that, in the mind of a reasonable person with knowledge of the particular circumstances, the financial interest will not create an appearance of misuse of position or loss of impartiality, or call into question the impartiality and objectivity with which ATF's programs are administered. A waiver under this paragraph may require appropriate conditions, such as execution of a written disqualification.

July 23, 2014

Date

Approved:

July 24, 2014

Date



Lee V. Lofthus
Assistant Attorney General for
Administration



Walter M. Shaub, Jr.
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Ethics