## **DEPARTMENT OF EDUCATION**

5 CFR Chapter LIII

34 CFR Part 73

RIN 1801-AA09, 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the Department of Education

**AGENCY:** Department of Education. **ACTION:** Interim final rule with invitation for comments.

**SUMMARY:** The Department of Education, with the concurrence of the Office of Government Ethics (OGE), is issuing a regulation for employees of the Department of Education that supplements the Standards of Ethical Conduct for Employees of the Executive Branch issued by OGE. The supplemental rule requires Department of Education employees to obtain written approval prior to engaging in certain outside activities. The Department is also revising its residual standards regulation in its own CFR title and adding a cross-reference to the new provisions.

**DATES:** These regulations take effect January 30, 1995. Comments on this interim final rule must be received on or before March 16, 1995.

ADDRESSES: All comments concerning these regulations should be addressed to Susan A. Winchell, Office of the General Counsel, U.S. Department of Education, 600 Independence Avenue, SW., Room 5304, Washington, D.C. 20202–2110.

FOR FURTHER INFORMATION CONTACT: Susan A. Winchell, Office of the General Counsel, U.S. Department of Education, 600 Independence Avenue SW., Room 5304, Washington D.C. 20202–2110. Telephone (202) 401–8309. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

## SUPPLEMENTARY INFORMATION:

## I. Background

On August 7, 1992, OGE published final regulations entitled "Standards of Ethical Conduct for Employees of the Executive Branch" (Standards) codified at 5 CFR part 2635. (See 57 FR 35006–35067, as corrected at 57 FR 48557 and 52583 with an additional grace period extension at 59 FR 4779–4780.) The Standards took effect February 3, 1993 and established uniform standards of ethical conduct that are applicable to all executive branch personnel.

Under 5 CFR 2635.105 executive branch agencies, with OGE's concurrence, are authorized to publish agency-specific supplemental regulations that are necessary to implement an agency's ethics program. The Department of Education, with OGE's concurrence, has determined that the following supplemental rules, being codified in the new chapter LIII of 5 CFR, consisting of part 6301, are necessary to implement its ethics program. This interim final rule will remain in effect until the Department of Education, with OGE's concurrence, publishes an amendment.

## II. Analysis of the Regulations

Section 6301.101 General

Section 6301.101 explains that the regulations contained in the interim final rule apply to all employees of the Department of Education and are supplemental to the executive branchwide Standards.

Section 6301.102 Prior Approval for Certain Outside Activities

The Standards, at 5 CFR 2635.803, recognize that individual agencies may find it necessary or desirable to supplement the executive branch-wide regulations with a requirement that their employees obtain approval prior to engaging in outside activities. The Department of Education has long required employees, other than special Government employees, to obtain written permission before engaging in certain outside activities or employment. (See 34 CFR 73.22 (1994 edition).) The Department has found this requirement useful in ensuring that employees' outside activities conform to all applicable laws and regulations and, in accordance with 5 CFR 2635.803, has determined that it is necessary to the administration of its ethics program to continue to require prior approval of those outside activities that pose a potential for employees to engage in conduct that might violate the Standards.

Section 6301.102 requires Department employees to obtain approval in advance of engaging in certain outside activities. As compared to the requirement that had been imposed by 34 CFR 73.22, § 6301.102 has been changed to simplify and clarify the requirement, and to narrow its scope, consistent with the Standards. In order to do this, the new provisions significantly revise the situations in which employees are required to seek prior approval to participate in outside employment and activities. Further, the new provisions spell out specific types

of volunteer activities that are excluded from the prior approval requirement. Several examples are also included to clarify the application of this section.

Because the Standards no longer contain a provision such as that previously applicable under prior 5 CFR 735.203(a)(2)(1993 edition, pt. 735, note), the new provisions delete the previous requirement that employees obtain approval prior to participating in any activity or employment that aggregates more than 10 hours per week. Because 5 CFR 2635.705 satisfactorily addresses the issues relating to misuse of official time, the new provisions also delete the requirement that employees obtain prior approval to participate in activities performed during regular work hours. And, because the standard would be too vague, they also delete the general requirement that employees obtain prior approval to participate in an activity or employment that "reasonably raises questions under the standards [of conduct].

Section 6301.102 of the interim final rule continues, in modified form, the Department's longstanding requirement that employees obtain approval before participating in outside activities for a prohibited source, as that term is defined in paragraph 6301.102(e)(2) of this section. Further, the new provisions add the requirement that employees obtain approval before providing services, other than clerical services or services as a fact witness, in connection with a particular matter in which the United States is a party or has a direct and substantial interest, or which involves the preparation of materials for submission to, or representation before, a Federal court or agency.

Under 5 CFR 2635.805, employees are required to obtain authorization before acting as expert witnesses, other than on behalf of the United States, in any proceeding before a Federal court or agency in a matter in which the United States is a party or has a direct and substantial interest. Paragraph 6301.102(a)(1) is intended to cover such testimony as an outside activity, thus eliminating the need to create a separate procedure for the required authorization.

There may be circumstances in which an employee is not required to obtain authorization to serve as an expert witness but is nonetheless required to obtain prior approval. For instance, an employee might wish to serve as an expert witness on the braking distances of school buses on behalf of a local school district in a negligence case in State court. The employee will be paid the customary rate for appearing as an expert witness. This employee is not