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## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Part 5901

#### Supplemental Standards of Ethical Conduct for Employees of the Federal Labor Relations Authority

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Federal Labor Relations Authority (FLRA), with the concurrence of the Office of Government Ethics (OGE), intends to issue an interim regulation for employees of the FLRA that supplements the executive-branch-wide Standards of Ethical Conduct (Standards) issued by OGE. The supplemental regulation: Establishes procedures for seeking prior approval for outside employment; prohibits certain outside employment; and requires employees who disqualify themselves from participation in particular matters for ethical reasons to notify their supervisors and the Designated Agency Ethics Official (DAEO) of that disqualification.

**DATES:** This interim rule is effective January 19, 2011. Written comments must be received on or before February 18, 2011.

**ADDRESSES:** Mail or deliver comments to the Office of the Solicitor, Federal Labor Relations Authority, 1400 K Street, NW., Room 300, Washington, DC 20424. Comments may also be e-mailed to [solmail@flra.gov](mailto:solmail@flra.gov).

**FOR FURTHER INFORMATION CONTACT:** Rosa M. Koppel, Solicitor, at [rkoppel@flra.gov](mailto:rkoppel@flra.gov), fax: (202) 343-1007.

#### SUPPLEMENTARY INFORMATION:

##### Background

On August 7, 1992, OGE published the Standards of Ethical Conduct for Employees of the Executive Branch

(Standards), which became effective on February 3, 1993. The Standards, as corrected and amended, are codified at 5 CFR part 2635. The Standards set uniform ethical conduct standards applicable to all executive branch personnel.

Section 2635.105 of the Standards authorizes agencies, with the concurrence of OGE, to publish agency-specific supplemental regulations that are necessary to properly implement their respective ethics programs. The FLRA, with OGE's concurrence, has determined that the following interim supplemental rule is necessary for successful implementation of its ethics program.

#### Analysis of the Regulations

##### Section 5901.101 General

Section 5901.101 explains that the regulations in part 5901 apply to employees of the FLRA and supplement the OGE Standards. The section also includes cross-references to other issuances applicable to FLRA employees, including the regulations concerning executive branch financial disclosure, financial interests, and employee responsibilities and conduct, as well as implementing FLRA guidance and procedures issued in accordance with the OGE Standards.

##### Section 5901.102 Prior Approval for Outside Employment

In accordance with 5 CFR 2635.803, the FLRA has determined it is necessary for the purpose of administering its ethics program to require its employees to obtain approval before engaging in permissible outside employment or activities. This approval requirement will help to ensure that potential ethical problems are resolved before employees begin outside employment or activities that could involve a violation of applicable statutes and standards of conduct.

Section 5901.102(a) provides that an FLRA employee, other than a special Government employee (*i.e.*, employees expected to work no more than 130 days in any consecutive 365-day period), must obtain advance written approval from the DAEO or the Alternate DAEO before engaging in any outside employment, except to the extent that the FLRA DAEO or the Alternate DAEO has issued an instruction or manual, pursuant to section 5901.102(e),

exempting an activity or class of activities from this requirement.

Section 5901.102(b) defines outside employment to cover any form of non-Federal employment or business relationship involving the provision of personal services. It includes writing when done under an arrangement with another person or entity for production or publication of the written product. It does not, however, include participation in the activities of nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organizations, unless such activities are for compensation other than reimbursement of expenses, or the organization's activities are devoted substantially to matters relating to the employee's official duties as defined in 5 CFR 2635.807(a)(2)(i)(B) through (E) and the employee will serve as officer or director of the organization, or the activities will involve the provision of consultative or professional services. Consultative services means the provision of personal services by an employee, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, hospital, or similar facility. Professional services means the provision of personal services by an employee, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR 2636.305(b)(1), or involves a fiduciary relationship as defined in 5 CFR 2636.305(b)(2).

Section 5901.102(c) sets out the procedures for requesting prior approval to engage in outside employment initially, or within seven calendar days of a significant change in the nature or scope of the outside employment or the employee's official position within the FLRA. It also sets out the standard to be applied by the DAEO or the Alternate DAEO in acting on requests for prior approval of outside employment as broadly defined by Sec. 5901.102(b). Approval shall be granted only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

Section 5901.102(d) prohibits FLRA employees other than special Government employees from advising or

preparing an individual or group in any matter relating to labor relations, or from engaging in any other outside employment that conflicts with official Government duties or responsibilities.

However, consistent with Federal policy embodied in the exceptions to the representation bans contained in 18 U.S.C. 203 (prohibition of compensation for representational services in a matter in which the United States is involved) and 205 (prohibition of representational services, with or without compensation, in a matter in which the United States is involved), nothing in the section precludes representation or advice that is: (1) Rendered, with or without compensation, and with the prior approval of the official responsible for the employee's appointment, to specified relatives or to an estate for which an employee serves as a fiduciary; or (2) provided, without compensation, to an employee subject to disciplinary, loyalty, or other personnel administration proceedings.

Section 5901.102(e) provides that the FLRA DAEO or the Alternate DAEO may issue instructions or manual issuances governing the submission of requests for approval of outside employment, which may exempt categories of employment from the prior approval requirement of this section based on a determination that employment within those categories would generally be approved and is not likely to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635. The instructions or issuances may include examples of outside employment that are permissible or impermissible consistent with this part and 5 CFR part 2635.

Section 5901.103(a) requires an FLRA employee who disqualifies himself or herself from participation in a particular matter because of a financial interest to provide written notice of disqualification to his or her supervisor and the DAEO notwithstanding the guidance in 5 CFR 2635.402(c)(1) and (2). Under that guidance, disqualification can be accomplished without prior written notice.

Section 5901.103(b) requires an FLRA employee who disqualifies himself or herself from participation in a particular matter to ensure impartiality to provide written notice of disqualification to his or her supervisor and the DAEO notwithstanding the guidance in 5 CFR 2635.502(e)(1) and (2). Under that guidance, disqualification can be accomplished without prior written notice.

Section 5901.103(c) requires an FLRA employee who disqualifies himself or herself from participation in a particular

matter affecting prospective employers to provide written notice of disqualification to his or her supervisor and the DAEO notwithstanding the guidance in 5 CFR 2635.604(b) and (c).

Section 5901.103(d) permits an FLRA employee to withdraw, in writing, notice under paragraphs (a), (b), or (c) of this section upon deciding that disqualification from participation in a particular matter is no longer required.

#### **Administrative Procedure Act**

Pursuant to 5 U.S.C. 553(b), the FLRA finds good cause exists for waiving the general notice of proposed rulemaking and opportunity for public comment as to this proposed rule. Notice and comment before the effective date are being waived because this rule concerns matters of agency organization, practice and procedure. However, written comments, which must be received by February 18, 2011 can be submitted regarding this interim rule; any such comments will be considered before this rule is adopted as final.

#### **Executive Orders 12866 and 12988**

Because this rule relates to FLRA personnel, it is exempt from the provisions of Executive Orders Nos. 12866 and 12988.

#### **Regulatory Flexibility Act Certification**

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this regulation, as amended, will not have a significant economic impact on a substantial number of small entities.

#### **Paperwork Reduction Act of 1995**

The Paperwork Reduction Act, 44 U.S.C. chapter 35, does not apply because this rulemaking does not contain information collection requirements subject to the approval of the Office of Management and Budget.

#### **Congressional Review Act**

The FLRA has determined that this rule is not a rule as defined in 5 U.S.C. 804, and thus, does not require review by Congress.

#### **List of Subjects in 5 CFR Part 5901**

Conflict of interest, Government employees.

■ Accordingly, for the reasons set forth in the preamble, the FLRA, with the concurrence of the OGE, is amending title 5 of the Code of Federal Regulations by adding a new chapter XLIX consisting of part 5901, to read as follows:

## **CHAPTER XLIX—FEDERAL LABOR RELATIONS AUTHORITY**

### **PART 5901—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE FEDERAL LABOR RELATIONS AUTHORITY**

Sec.

5901.101 General.

5901.102 Prior approval for outside employment.

5901.103 Procedure for accomplishing disqualification.

**Authority:** 5 U.S.C. 7105; 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; 5 CFR 2635.105, 2635.803.

#### **§ 5901.101 General.**

(a) Applicability. In accordance with 5 CFR 2635.105, and unless provided elsewhere in this part, these regulations apply to all employees of the Federal Labor Relations Authority (FLRA), including employees of the Federal Service Impasses Panel and the Office of the General Counsel, and supplement the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) contained in 5 CFR part 2635.

(b) Cross-references. In addition to 5 CFR part 2635 and this part, FLRA employees are required to comply with implementing guidance and procedures issued by the FLRA in accordance with 5 CFR 2635.105(c). FLRA employees are also subject to the regulations concerning executive branch financial disclosure contained in 5 CFR part 2634, the regulations concerning executive branch financial interests contained in 5 CFR part 2640, and the regulations concerning executive branch employee responsibilities and conduct contained in 5 CFR part 735.

(c) Agency designees. The Designated Agency Ethics Official (DAEO) and the Alternate Designated Agency Ethics Official (Alternate DAEO) shall serve as the FLRA's designees to make determinations, grant approvals, and take other actions under 5 CFR part 2635 and this part.

#### **§ 5901.102 Prior approval for outside employment.**

(a) General requirement. Any FLRA employee, excluding all special Government employees (*i.e.*, employees expected to work no more than 130 days in any 365-day period), shall obtain prior written approval from the DAEO or the Alternate DAEO before engaging in any outside employment, except to the extent that the DAEO or the Alternate DAEO has issued an instruction or manual pursuant to

paragraph (e) of this section.

Nonetheless, special Government employees remain subject to other statutory and regulatory provisions governing their outside activities, including 18 U.S.C. 203(c) and 205(c), as well as applicable provisions of 5 CFR part 2635.

(b) Definition of "employment." (1) For the purposes of this section, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services by the employee for direct, indirect, or deferred compensation other than reimbursement of actual and necessary expenses. It also includes, irrespective of compensation, the following outside activities:

(i) Providing personal services as a consultant or professional, including service as an expert witness or as an attorney;

(ii) Providing personal services to a for-profit entity as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher, or speaker; and

(iii) Writing when done under an arrangement with another person for production or publication of the written product.

(2) The definition does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization, unless:

(i) The employee will receive compensation other than reimbursement of expenses;

(ii) The organization's activities are devoted substantially to matters relating to the employee's official duties as defined in 5 CFR 2635.807(a)(2)(i)(B) through (E) and the employee will serve as officer or director of the organization; or

(iii) The activities will involve the provision of consultative or professional services. Consultative services means the provision of personal services by an employee, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, hospital, or similar facility. Professional services means the provision of personal services by an employee, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR 2636.305(b)(1) or involves a fiduciary relationship as defined in 5 CFR 2636.305(b)(2).

(c) Procedure for requesting approval.

(1) Requests for approval of outside employment shall be sent to either the DAEO or the Alternate DAEO through the employee's normal supervisory channels and shall include the following information:

(i) The name of the person, group, or organization for which the outside employment is proposed to be performed;

(ii) The nature of the service to be performed and the position's title, if any;

(iii) The proposed hours of work (if regularly scheduled) and the approximate dates of employment;

(iv) The employee's explanation as to whether the proposed outside employment (including teaching, speaking, or writing) will implicate in any way information obtained as a result of the employee's official Federal position; and

(v) The employee's explanation that no Federal property, resources, or facilities not available to the general public will be used in connection with the outside employment.

(2) Upon a significant change in the nature or scope of the outside employment or in the employee's official position within the FLRA, the employee must, within seven calendar days of the change, submit a revised request for approval.

(3) The DAEO or the Alternate DAEO shall grant approval only on a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including part 2635 of this title, or paragraph (d) of this section. The DAEO or the Alternate DAEO will advise the employee, in writing, of the approval or denial of the request for outside employment and will maintain a record of the written request and determination.

(d) Prohibited outside employment.

(1) Employees shall not engage in:

(i) Rendering legal advice regarding, or preparing an individual or group in any matter relating to, labor relations in either the private or public sector, outside the employee's official duties. This prohibition shall not apply to a special Government employee unless he or she:

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

(B) Has served with the FLRA 60 days or more during the immediately preceding period of 365 consecutive days; or

(C) Any other outside employment that conflicts with the employee's

official Government duties or responsibilities.

(2) Exceptions. Nothing in this paragraph (d) prevents an employee from:

(i) Acting, with or without compensation, as an agent or attorney for, or otherwise representing, the employee's parents, spouse, child, or any other person for whom, or for any estate for which, the employee is serving as guardian, executor, administrator, trustee, or other personal fiduciary to the extent permitted by 18 U.S.C. 203(d) and 205(e), or from providing advice or counsel to such persons or estate; or

(ii) Acting, without compensation, as an agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings, to the extent permitted by 18 U.S.C. 205.

(e) DAEO's and Alternate DAEO's responsibilities. The FLRA DAEO or Alternate DAEO may issue instructions or manual issuances governing the submission of requests for approval of outside employment. The instructions or manual issuances may exempt categories of employment from the prior approval requirement of this section based on a determination that employment within those categories of employment would generally be approved and is not likely to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635. The DAEO or Alternate DAEO may include in these instructions or issuances examples of outside employment that are permissible or impermissible consistent with this part and 5 CFR part 2635.

#### **§ 5901.103 Procedure for accomplishing disqualification.**

(a) Disqualifying financial interest. An FLRA employee who is required, in accordance with 5 CFR 2635.402(c), to disqualify himself or herself from participation in a particular matter to which he or she has been assigned shall, notwithstanding the guidance in 5 CFR 2635.402(c)(1) and (2), provide written notice of disqualification to his or her supervisor and the DAEO upon determining that he or she will not participate in the matter.

(b) Disqualification to ensure impartiality. An FLRA employee who is required, in accordance with 5 CFR 2635.502(e), to disqualify himself or herself from participation in a particular matter involving specific parties to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.502(e)(1) and (2), provide written

notice of disqualification to his or her supervisor and the DAEO upon determining that he will not participate in the matter.

(c) Disqualification from matters affecting prospective employers. An FLRA employee who is required, in accordance with 5 CFR 2635.604(a), to disqualify himself or herself from participation in a particular matter to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.604(b) and (c), provide written notice of disqualification to his or her supervisor and the DAEO upon determining that he will not participate in the matter.

(d) Withdrawal of notification. An FLRA employee may withdraw written notice under paragraphs (a), (b), or (c) of this section upon deciding that disqualification from participation in the matter is no longer required. A withdrawal of notification shall be in writing and provided to the employee's supervisor and the DAEO.

Dated: December 10, 2010.

**Carol Waller Pope,**

*Chairman, Federal Labor Relations Authority.*

Approved on this date: December 13, 2010.

**Robert I. Cusick,**

*Director, Office of Government Ethics.*

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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 103, 214, and 274a

[CIS No. 2758-08; DHS Docket No. USCIS-2008-0035]

RIN 1615-AB75

#### E-2 Nonimmigrant Status for Aliens in the Commonwealth of the Northern Mariana Islands With Long-Term Investor Status

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security (DHS) regulations governing E-2 nonimmigrant treaty investors to establish procedures for classifying long-term investors in the Commonwealth of the Northern Mariana Islands (CNMI) as E-2 nonimmigrants. This final rule implements the CNMI nonimmigrant investor visa provisions of the Consolidated Natural Resources Act of 2008 extending the immigration laws of the United States to the CNMI.

**DATES:** This rule is effective January 19, 2011.

**FOR FURTHER INFORMATION CONTACT:** Steven W. Viger, Office of Policy & Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529-2140, telephone (202) 272-1470.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Commonwealth of the Northern Mariana Islands (CNMI) is a U.S. territory located in the western Pacific that has been subject to most U.S. laws for many years. However, the CNMI has administered its own immigration system under the terms of its 1976 covenant with the United States. See A Joint Resolution to Approve the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (the Covenant Act), Public Law 94-241, sec. 1, 90 Stat. 263, 48 U.S.C. 1801 note (1976). On May 8, 2008, President Bush signed into law the Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110-229, 122 Stat. 754 (2008). Title VII of the CNRA extends U.S. immigration laws to the CNMI with transition provisions unique to the CNMI. See 48 U.S.C. 1806; 48 U.S.C.A. 1806 note. The stated purpose of the CNRA is to ensure effective border control procedures, to properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI (phasing-out the CNMI's nonresident contract worker program while minimizing to the greatest extent practicable the potential adverse economic and fiscal effects of that phase-out), to maximize the CNMI's potential for future economic and business growth, and to assure workers are protected from the potential for abuse and exploitation. See sec. 701 of the CNRA, 48 U.S.C.A. 1806 note.

Since 1978, the CNMI has admitted a substantial number of foreign workers from China, the Philippines, and other countries through an immigration system that provides a permit program for foreigners entering the CNMI, such as visitors, investors, and workers. In fact, foreign workers under this system represent a majority of the CNMI labor force. Such workers outnumber U.S. citizens and other local residents in private sector employment in the CNMI. Currently, the CNMI faces serious economic challenges, including the total collapse of the territory's \$1 billion a year garment industry and a substantial

decline in its tourism industry.<sup>1</sup> The result has been a decrease in the CNMI government budget from \$217,964,866 in 2005 to \$132,565,000 in 2011.

Title VII of the CNRA was to become effective approximately one year after the date of enactment, subject to certain transition provisions unique to the CNMI. On March 31, 2009, DHS announced that the Secretary of Homeland Security, in her discretion under the CNRA, had extended the effective date of the transition program from June 1, 2009 (the first day of the first full month commencing one year from the date of enactment of the CNRA) to November 28, 2009. DHS Press Release, "DHS Delays the Transition to Full Application of U.S. Immigration Laws in the Commonwealth of the Northern Mariana Islands" (Mar. 31, 2009), [http://www.dhs.gov/ynews/releases/pr\\_1238533954343.shtm](http://www.dhs.gov/ynews/releases/pr_1238533954343.shtm). The transition period concludes on December 31, 2014. The law also contains several CNMI-specific provisions affecting foreign workers and investors during the transition period. These temporary provisions are intended to provide for an orderly transition from the CNMI permit system to the Immigration and Nationality Act (INA) and to mitigate potential harm to the CNMI economy before these foreign workers and investors are required to obtain U.S. immigrant or nonimmigrant status. See sec. 701 of the CNRA, 48 U.S.C.A. 1806 note; 48 U.S.C. 1806(c), (d).

Among the CNMI-specific provisions applicable during the transition period is a provision authorizing the Secretary of Homeland Security to classify an alien foreign investor in the CNMI as a CNMI-only "E-2" nonimmigrant investor under section 101(a)(15)(E)(ii) of the INA, 8 U.S.C. 1101(a)(15)(E)(ii). 48 U.S.C. 1806(c). This status is provided upon application of the alien, notwithstanding the treaty requirements otherwise applicable. *Id.* Eligible investors are those who:

- Were admitted to the CNMI in long-term investor status under CNMI immigration law before the transition program effective date;
- Have continuously maintained residence in the CNMI under long-term investor status;

<sup>1</sup> GAO, *Commonwealth of the Northern Mariana Islands: Pending Legislation Would Apply U.S. Immigration Law to the CNMI with a Transition Period*, GAO-08-466 (Washington, DC: Mar. 2008); GAO, *U.S. Insular Areas: Economic, Fiscal, and Accountability Challenges*, GAO-07-119 (Washington, DC: Dec. 12, 2006); and GAO, *Commonwealth of the Northern Mariana Islands: Serious Economic, Fiscal, and Accountability Challenges*, GAO-07-746T (Washington, DC: Apr. 19, 2007).