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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2641

RIN 3209-AA14

Post-Employment Conflict of Interest Restrictions; Revision of Departmental Component Designations

AGENCY: Office of Government Ethics.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Government Ethics (OGE) is issuing a proposed rule to revise the component designations of two agencies for purposes of the one-year post-employment conflict of interest restriction for senior employees. Specifically, OGE is proposing to revoke two existing component designations and add five new component designations, based on the recommendations of the agencies concerned.

DATES: Written comments are invited and must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA14, by any of the following methods:

Email: usoge@oge.gov. Include the reference “Proposed Rule Revising Departmental Component Designations” in the subject line of the message.

Fax: (202) 482-9237.

Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW, Washington, DC 20005-3917, Attention: “Proposed Rule Revising Departmental Component Designations.”

Instructions: All submissions must include OGE’s agency name and the Regulation Identifier Number (RIN), 3209-AA14, for this proposed rulemaking. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Comments may be posted on OGE’s website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Kimberly L. Sikora Panza, Associate Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917; Telephone: (202) 482-9300; TTY: (800) 877-8339; FAX: (202) 482-9237.

SUPPLEMENTARY INFORMATION:

I. Substantive Discussion; Revocation and Addition of Departmental Components

The Director of OGE (Director) is authorized by 18 U.S.C. 207(h) to designate distinct and separate departmental or agency components in the executive branch for purposes of 18 U.S.C. 207(c), the one-year post-employment conflict of interest restriction for senior employees. The representational bar of 18 U.S.C. 207(c) usually extends to the whole of any department or agency in which a former senior employee served in any capacity during the year prior to termination from a senior employee position. However, 18 U.S.C. 207(h) provides that whenever the Director determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate component of that department or agency. As a result, a former senior employee who served in a “parent” department or agency is not barred by 18 U.S.C. 207(c) from making communications to or appearances before any employees of any designated component of that parent, but is barred as to employees of that parent or of other components that have not been separately designated. Moreover, a former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated.

Under 18 U.S.C. 207(h)(2), component designations do not apply to persons employed at a rate of pay specified in or fixed according to subchapter II of 5 U.S.C. chapter 53 (the Executive Schedule). Component designations are listed in appendix B to 5 CFR part 2641.

The Director regularly reviews the component designations and determinations and, in consultation with the department or agency concerned, makes such additions and deletions as are necessary. Specifically, the Director “shall, by rule, make or revoke a component designation after considering the recommendation of the designated agency ethics official.” 5 CFR 2641.302(e)(3). Before designating an agency component as distinct and separate for purposes of 18 U.S.C. 207(c), the Director must find that there exists no potential for use of undue influence or unfair advantage based on past Government service, and that the component is an agency or bureau, within a parent agency, that exercises functions which are distinct and separate from the functions of the parent agency and from the functions of other components of that parent. 5 CFR 2641.302(c).

Pursuant to the procedures prescribed in 5 CFR 2641.302(e), two agencies have forwarded written requests to OGE to amend their listings in appendix B. After carefully reviewing the requested changes in light of the criteria in 18 U.S.C. 207(h) as implemented in 5 CFR 2641.302(c), OGE is proposing to grant these requests and amend appendix B as explained below.

The Department of Labor has requested that OGE revoke the designation of the Employment Standards Administration (ESA) in appendix B to part 2641, and in the

place of ESA designate the Office of Federal Contract Compliance Programs (OFCCP), Office of Labor Management Standards (OLMS), Office of Workers' Compensation Programs (OWCP), and the Wage and Hour Division (WHD) as distinct and separate components of the Department of Labor for purposes of 18 U.S.C. 207(c). These four entities were the major program components of ESA until November 8, 2009, when the Secretary of the Department of Labor dissolved ESA into its constituent components. OFCCP, OLMS, OWCP, and WHD are each headed by a director who now reports directly to the Secretary of Labor.

OFCCP enforces, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal Government (Government contractors and subcontractors). Specifically, OFCCP administers and enforces three legal authorities requiring equal employment opportunity: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212. These authorities prohibit Federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, and protected veteran status, and also require Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity in their employment processes.

OLMS administers and enforces most provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The LMRDA is a law that promotes union democracy and financial integrity in private sector labor unions through standards for union officer elections and union trusteeships and safeguards for union assets, and

also promotes labor union and labor-management transparency through certain reporting and disclosure requirements. In addition to the LMRDA, OLMS administers provisions of the Civil Service Reform Act of 1978 and the Foreign Service Act of 1980 relating to standards of conduct for Federal employee organizations, which are comparable to LMRDA requirements. OLMS' role as an independent enforcement agency overseeing unions gives it a unique and critical role within the Department of Labor with a key stakeholder.

OWCP administers four major disability compensation programs that provide wage replacement benefits, medical treatment, vocational rehabilitation, and other benefits to certain workers or their dependents who experience work-related injury or occupational disease. Specifically, the OWCP administers the Energy Employees Occupational Illness Compensation Program, the Federal Employees' Compensation Program, the Longshore and Harbor Workers' Compensation Program, and the Coal Mine Workers' Compensation Program, each of which serve specific employee groups by mitigating the financial burden resulting from workplace injury.

WHD enforces the federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act. WHD also enforces the Migrant and Seasonal Agricultural Worker Protection Act, the Employee Polygraph Protection Act, the Family and Medical Leave Act, the wage garnishment provisions of the Consumer Credit Protection Act, and various employment standards and worker protections provided in several immigration-related statutes. WHD also administers and enforces the prevailing wage requirements of the Davis Bacon Act and the Service

Contract Act, and other statutes applicable to federal contracts for construction and the provision of goods and services.

According to the Department of Labor, the functions of OFCCP, OLMS, OWCP, and WHD are distinct and separate from each other, and also distinct and separate from every other agency within the Department. This distinction was previously recognized when OGE designated the now-abolished parent agency, ESA, as a separate component of the Department of Labor for purposes of 18 U.S.C. 207(c). The action that abolished the ESA left OFCCP, OLMS, OWCP, and WHD in its place. The four departments were each created by distinct authorities that are separate not only from each other but also from the organic statute for the Department of Labor; have been explicitly delegated distinct responsibilities following dissolution of the ESA; exercise distinct and separate functions to implement and enforce distinct and separate statutes; as noted above, are each headed by a political appointee who reports directly to the Secretary of Labor; and are relatively the same size as other components designated by the Department of Labor in appendix B to part 2641. Given the manner in which OFCCP, OLMS, OWCP, and WHD work independently from other component agencies and the general management of the Department of Labor, there exists no potential for the use of undue influence or unfair advantage based on past Government service.

Accordingly, OGE is proposing to grant the request of the Department of Labor and is proposing to amend the agency's listing in appendix B to part 2641 to remove the ESA from the component designation list and to designate OFCCP, OLMS, OWCP, and WHD as new components for purposes of 18 U.S.C. 207(c).

The Department of Transportation has requested that OGE designate the Pipeline and Hazardous Materials Safety Administration (PHMSA) as a distinct and separate component of the Department of Transportation for purposes of 18 U.S.C. 207(c). Created pursuant to the Norman Y. Mineta Research and Special Programs Improvements Act of 2004, PHMSA is responsible for regulating safety in pipeline transportation and hazardous materials transportation, *see* 49 U.S.C. 108, and administers the Natural Gas Pipeline Safety Act of 1968, among other authorities. PHMSA is headed by an Administrator who reports directly to the Secretary of Transportation. The Administrator is statutorily authorized to carry out the duties and powers related to pipeline and hazardous materials transportation and safety, as well as other duties and powers prescribed by the Secretary.

According to the Department of Transportation, PHMSA is responsible for exercising functions that are distinct and separate from the Department of Transportation and from the functions of other Operating Administrations within the agency. PHMSA is the only mode within DOT charged with regulating pipeline safety. It is also the only mode with the primary delegated authority to regulate hazardous material packaging, and is responsible for drafting all hazardous material regulations. In light of the distinct and separate functions of PHMSA, there is no potential for the use of undue influence or unfair advantage based on based on past Government service. PHMSA is comparable in size to several other Department of Transportation divisions that are currently designated as separate components in appendix B to part 2641, and with the designation of PHMSA, each of the Operating Administrations of the Department of Transportation will be designated as separate components for purposes of 18 U.S.C. 207(c).

Accordingly, OGE is proposing to grant the request of the Department of Transportation and amend the listing in appendix B to part 2641 to designate the Pipeline and Hazardous Materials Safety Administration as a new component for purposes of 18 U.S.C. 207(c).

The Department of Transportation also has requested revocation of the designation of the Surface Transportation Board (STB) in appendix B to part 2641. The STB, the successor to the Interstate Commerce Commission, was established in 1996 as an independent entity within the Department of Transportation. On December 28, 2015, the Surface Transportation Board Reauthorization Act of 2015 (Public Law 114-110) established the STB as a wholly-independent federal agency. Because the STB is now an independent agency and is no longer administratively aligned with the Department of Transportation, OGE is proposing to grant the request of the Department of Transportation and amend the listing in appendix B to part 2641 to remove STB from the component designation list.

As indicated in 5 CFR 2641.302(f), a designation “shall be effective on the date the rule creating the designation is published in the FEDERAL REGISTER and shall be effective as to individuals who terminated senior service either before, on or after that date.” Initial designations in appendix B to part 2641 were effective as of January 1, 1991. The effective date of subsequent designations is indicated by means of parenthetical entries in appendix B. The new component designations made in this proposed rule would be effective on the date the final rule is published in the FEDERAL REGISTER.

As also indicated in 5 CFR 2641.302(f), revocation of a component designation is effective 90 days after the publication in the FEDERAL REGISTER of the rule that revokes the designation. Accordingly, the component designation revocations proposed in this rule would take effect 90 days after the publication of the final rule effectuating these proposed changes. Revocations are not effective as to any individual terminating senior service prior to the expiration of the 90-day period.

II. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects only Federal departments and agencies and current and former Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed rule because it does not contain information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal

governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The proposed rule is not a major rule as defined in 5 U.S.C. chapter 8, Congressional Review of Agency Rulemaking.

Executive Orders 12866 and 13563

In promulgating this rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in Executive Orders 12866 and 13563. This proposed rule has not been reviewed by the Office of Management and Budget under Executive Order 12866 because it is not a “significant” regulatory action for the purposes of that order.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2641

Conflict of interests, Government employees.

Approved: October 12, 2016.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend 5 CFR part 2641, as set forth below:

**PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST
RESTRICTIONS**

1. The authority citation for part 2641 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; 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.

2. Amend appendix B to part 2641 as follows:

a. Revise the listings for Parent: Department of Labor and Parent: Department of Transportation.

b. Effective [DATE 90 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], remove the Employment Standards Administration component from the listing for Parent: Department of Labor

c. Effective [DATE 90 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], remove the Surface Transportation Board component from the listing for Parent: Department of Transportation.

The revisions read as follows:

Appendix B to Part 2641 – Agency Components for Purposes of 18 U.S.C. 207(c)

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Parent: Department of Labor

Components:

Bureau of Labor Statistics.

Employee Benefits Security Administration (formerly Pension and Welfare Benefits Administration) (effective May 16, 1997).

Employment and Training Administration.

Employment Standards Administration (expires 90 days after the date of publication of the final rule in the FEDERAL REGISTER).

Mine Safety and Health Administration.

Occupational Safety and Health Administration.

Office of Disability Employment Policy (effective January 30, 2003).

Office of Federal Contract Compliance Programs (effective upon publication of the final rule in the FEDERAL REGISTER).

Office of Labor Management Standards (effective upon publication of the final rule in the FEDERAL REGISTER).

Office of Workers' Compensation Programs (effective upon publication of the final rule in the FEDERAL REGISTER).

Pension Benefit Guaranty Corporation (effective May 25, 2011).

Wage and Hour Division (effective upon publication of the final rule in the FEDERAL REGISTER).

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Parent: Department of Transportation

Components:

Federal Aviation Administration.

Federal Highway Administration.

Federal Motor Carrier Safety Administration (effective January 30, 2003).

Federal Railroad Administration.

Federal Transit Administration.

Maritime Administration.

National Highway Traffic Safety Administration.

Pipeline and Hazardous Materials Safety Administration (effective upon publication
of the final rule in the FEDERAL REGISTER).

Saint Lawrence Seaway Development Corporation.

Surface Transportation Board (effective May 16, 1997; expires 90 days after the date
of publication of the final rule in the FEDERAL REGISTER).

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