

134 FERC ¶ 61,003  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

5 CFR Part 3401

[Docket No. RM11-3-000; Order No. 744]

Supplemental Standards of Ethical Conduct for Employees of the  
Federal Energy Regulatory Commission

(Issued January 4, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (FERC or Commission), with the concurrence of the Office of Government Ethics (OGE), is amending the Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission (FERC Supplemental Standards). The final rule expands existing FERC Supplemental Standards involving prohibited financial interests and clarifies an exception to the general prohibition. The rule codifies existing reporting, divestiture, and disqualification requirements related to prohibited financial interests and clarifies that an employee may be eligible to defer the tax consequences of divestiture under subpart J of 5 CFR Part 2634. The amendments codify the current agency practice regarding disqualification and waivers. *See* 5 CFR 2635.403(a). Additionally, the amendment makes minor revisions to the definitions.

DATES: Effective [insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission      Docket No. RM11-3-000

ORDER NO. 744

FINAL RULE

(Issued January 4, 2011)

**I. Background**

1. The Office of Government Ethics (OGE) has issued rules setting out the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR Part 2635 (Standards). The FERC Supplemental Standards at 5 CFR 3401 were issued to provide an additional degree of assurance that agency decisions are not influenced by non-merit considerations and to protect the integrity of the Commission's programs and processes. These rules were designed to prevent Commission employees from taking actions that violate, or may appear to violate, conflict of interest laws or certain criminal statutes, or may create an appearance of a loss of impartiality.

2. The Commission has reexamined its prohibition on ownership of securities and is making several revisions to the FERC Supplemental Standards pursuant to its rulemaking authority under 5 CFR Part 2635. The Commission has determined, with OGE's concurrence, that certain amendments to its existing regulations are needed.

## **II. Analysis of the Rule Changes**

### ***Section 3401.102 – Prohibited financial interests***

#### ***Section 3401.102(a) – Prohibited financial interests; General prohibition.***

3. The FERC Supplemental Standards generally prohibit employees from acquiring or holding securities of entities regulated by the Commission. 5 CFR 3401.102(a). The Commission has determined that the general prohibition does not cover all entities that may be affected by Commission regulation. The Energy Policy Act of 2005 (EPAc 2005), Pub.L.No. 109-58, 119 Stat. 594 (2005), which amended section 3 of the Natural Gas Act (NGA),<sup>1</sup> gives the Commission exclusive authority to approve an application for siting, construction, expansion, or operation of a liquefied natural gas (LNG) terminal under section 3 of the NGA. EPAc 2005 defines an LNG terminal as including “all natural gas facilities located onshore or in State waters that are used to receive, unload, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or

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<sup>1</sup> 15 U.S.C. 717b.

transported in interstate commerce by waterborne vessel.” 15 U.S.C. 717a(11). The acquisition or ownership of securities in an LNG terminal is not prohibited, however, by existing FERC Supplemental Standards.

4. Also, the Commission’s Supplemental Standards currently prohibit only the acquisition or holding of any securities of “any electric utility engaged in the wholesale sale or transmission of electricity or having obtained an interconnection or wheeling order under Part II of the Federal Power Act.” However, the Supplemental Standards do not expressly apply to ownership of securities of a “transmitting utility,” an entity redefined in EPCRA to mean “an entity (including an entity described in section 201 (f)) that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale.” 16 U.S.C. 796(23).

5. The Commission recognizes that the existing general prohibition is not broad enough to expressly give the Commission the flexibility to prohibit the acquisition or holding of securities in all FERC regulated entities. To close the gap and to protect the integrity of the Commission’s programs and processes, the Commission amends the general prohibition by prohibiting an employee, and the spouse or minor children of an employee, from owning securities of a “transmitting utility” and a liquefied natural gas terminal as defined by section 3 of the Natural Gas Act.

6. The amendment also provides flexibility to the Designated Agency Ethics Official (DAEO) to amend the list of entities whose securities an employee, or

spouse or minor child of an employee, may not acquire or hold due to changes in legislation or regulation. The regulation codifies the Office of General Counsel's practice of maintaining a prohibited securities list that bars Commission employees from acquiring or holding securities of a company found on the list.

***Section 3401.102(b) – Prohibited financial interests; Prohibited securities list.***

7. The Final Rule codifies current practice that a prohibited securities list shall be maintained by the Office of General Counsel's General and Administrative Law section, updated annually or on a more frequent basis, and published and distributed on the Commission's intranet website. The regulation also gives the DAEO discretion to determine whether the securities of an entity otherwise prohibited by paragraph (a) may be omitted from the prohibited securities list because the entity does not present concerns of impartiality and further allows the DAEO to determine whether the securities of an entity not included in paragraph (a) should, nevertheless, be deemed prohibited because the acquisition or holding of securities of such a particular entity presents concerns of impartiality. The discretion is appropriate because the types of entities currently prohibited may change over time due to corporate restructuring, mergers, legislation and regulation.

***Section 3401.102(c) – Prohibited financial interests; Exception.***

8. The amendment clarifies the Commission's longstanding exception to the general prohibition of paragraph 3401.102(a) for interests in mutual funds that do not have a stated objective of concentrating their investments in prohibited

securities. The exception was previously included in the definition of the term “securities,” but caused confusion. The rule continues to prohibit holdings in a mutual fund if the stated objective is to concentrate the fund’s investments in securities prohibited by paragraph 3401.102(a).

***Section 3401.102(d) – Prohibited financial interests; Reporting and divestiture.***

9. The amendment codifies the current reporting and disqualification requirements for interests in prohibited securities.

10. Paragraph 3401.102(d)(1), *Reporting of prohibited securities*, requires written notification to the DAEO of any interest prohibited under paragraph 3401.102(a). A new employee must report a prohibited financial interest within 30 days of the commencement of employment. If a prohibited security is acquired without specific intent after employment begins, such as through gift, inheritance, or marriage, the acquisition must be reported within 30 days of the acquisition of such interest.

11. Paragraph 3401.102(d)(2), *Divestiture of prohibited securities*, requires that, except in the case where a waiver has been granted pursuant to paragraph 3401.102(e), prohibited financial interests must be divested within 90 days from the date divestiture is directed by the DAEO. This provision is consistent with 5 CFR 2635.403(d).

12. Paragraph 3401.102(d)(3), *Disqualification pending divestiture*, codifies the current agency practice of requiring that an employee disqualify himself or herself pending the divestiture discussed above from participating in particular

matters which, as a result of continued ownership of prohibited securities, would affect the financial interests of the employee, or those of the spouse or minor child of the employee. The amendment continues to allow waiver from the disqualification rule where 5 CFR 2635.402(d) (pertaining to waiver of or exemptions from disqualification under 18 U.S.C. 208) applies.

13. Finally, paragraph 3401.102(d)(4), *Special tax treatment of gain on divested securities*, clarifies that an employee may be eligible to defer paying capital gains tax on investments sold to comply with the conflict of interest requirements under 26 U.S.C. 1043 and Subpart J of 5 CFR Part 2634.

***Section 3401.102(e) – Prohibited financial interests; Waiver.***

14. The waiver section is substantially the same as the existing waiver provision. The rule adds a minor revision by explicitly requiring that waivers granted by the DAEO be in writing. The writing requirement is consistent with 5 CFR 2635.402(d)(2)(ii).

***Section 3401.102(f) – Prohibited financial interests; Definitions.***

15. The term *securities* is revised to eliminate the portion of the definition related to mutual funds.

**III. Regulatory Findings**

**A. Administrative Procedure Act**

16. Pursuant to 5 U.S.C. 553(a)(2), notice of proposed rulemaking, opportunity for public comment, and a 30-day delayed effective date are not applicable to this final rule because this rule is limited to agency organization, management, or

personnel matters and is exempt from the provisions of Executive Order Nos. 12866 and 12988.

**B. Regulatory Flexibility Act Analysis**

17. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply.

**C. Paperwork Reduction Act**

18. 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.

**Effective Date**

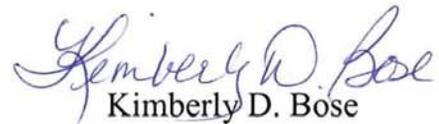
19. This regulation includes rules relating to agency management or personnel; it also includes rules of agency organization, procedure or practice that do not substantially affect the rights or obligations of nonagency parties. As such, pursuant to 5 U.S.C. 804, this regulation is effective [date of publication in the **FEDERAL REGISTER**].

**List of Subjects in 5 C.F.R. Part 3401**

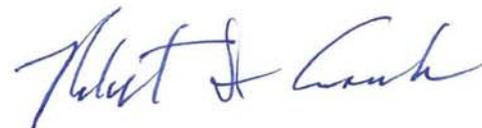
Conflicts of interest, Government employees.

By the Commission.

Submitted: 10/18/10

  
Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission

Approved: 10/21/10

  
Robert I. Cusick  
Director, Office of Government Ethics

For the reasons set forth in the preamble, the Commission, with the concurrence of OGE, amends Part 3401 of Title 5, Code of Federal Regulations, as follows:

**PART 3401 – SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT  
FOR EMPLOYEES OF THE FEDERAL ENERGY REGULATORY  
COMMISSION**

1. The authority citation for part 3401 continues to read as follows:

**Authority:** 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); 42 U.S.C. 7171, 7172; 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, 2635.402(c), 2635.403, 2635.502(e), 2635.604, 2635.803.

2. Section 3401.102 is revised to read as follows:

**§ 3401.102 Prohibited financial interests.**

(a) *General prohibition.* No employee, and no spouse or minor child of an employee, shall acquire or hold any securities issued by an entity on the prohibited securities list described in paragraph (b). The list shall include, but not be limited to the following:

- (1) Natural gas companies;
- (2) Interstate oil pipelines;
- (3) Hydroelectric licensees or exemptees;
- (4) Public utilities;
- (5) Transmitting utilities or electric utilities engaged in the wholesale sale

or transmission of electricity or having obtained an interconnection or wheeling order under part II of the Federal Power Act;

(6) Liquefied natural gas terminals as defined by section 3 of the Natural Gas Act; or

(7) Parent companies of an entity identified in paragraphs (a)(1) through (a)(6) of this section.

(b) *Prohibited securities list.* A prohibited securities list shall be maintained, published, and distributed by the Office of the General Counsel's General and Administrative Law section, updated annually or on a more frequent basis to include entities that meet the criteria in paragraph (a) or are otherwise subject to the Commission's jurisdiction and to remove entities that do not raise impartiality concerns after considering the above criteria.

(c) *Exception.* Nothing in this section prohibits an employee, or the spouse or minor child of an employee, from acquiring or holding an interest in a publicly traded or publicly available mutual fund or other collective investment fund, or in a widely held pension or mutual fund, provided: (1) that the employee neither exercises control nor has the ability to exercise control over the financial interests held in the fund; or (2) that the fund's prospectus or practice does not indicate the stated objective of concentrating its investments in entities identified in paragraphs (a)(1) through (a)(7) of this section.

(d) *Reporting and divestiture.* (1) *Reporting of prohibited securities.* An employee must promptly report in writing to the DAEO any acquired interest

prohibited under paragraphs (a) and (b) of this section. New employees must report in writing to the DAEO prohibited financial interests within 30 days of commencement of employment. Prohibited financial interests acquired after employment commences and without specific intent, such as through gift, inheritance, or marriage, must be reported in writing to the DAEO within 30 days of acquisition of such interest.

(2) *Divestiture of prohibited securities.* A prohibited financial interest must be divested within 90 days from the date divestiture is ordered by the DAEO unless the employee obtains a written waiver from the DAEO in accordance with this section.

(3) *Disqualification pending divestiture.* Pending divestiture of prohibited securities, an employee must disqualify himself or herself, in accordance with 5 CFR 2635.402 and 3401.103, from participating in particular matters which, as a result of continued ownership of prohibited securities, could affect the financial interests of the employee or those of the spouse or minor child of the employee. Disqualification is not required where a waiver described in section 2635.402(d) applies.

(4) *Tax treatment of gain on divested securities.* Where divestiture is required by this section, the employee or the spouse or minor child of an employee may be eligible to defer the tax consequences of divestiture by obtaining a Certificate of Divestiture from the Director of the Office of Government Ethics before selling the securities in accordance with subpart J of 5 CFR Part 2634.

(e) *Waiver.* The DAEO may grant a written waiver from this section based on a determination that the waiver is not inconsistent with 5 CFR Part 2635 of this title or otherwise prohibited by law and that, under the particular circumstances, application of the prohibition is not necessary to avoid the appearance of an employee's misuse of position or loss of impartiality, or to otherwise ensure confidence in the impartiality and objectivity with which the Commission's programs are administered, or in the case of a special Government employee, divestiture would result in substantial financial hardship. A waiver under this paragraph must be in writing and may impose appropriate conditions, such as requiring execution of a written disqualification.

(f) *Definitions.* For the purposes of this section:

(1) The term *securities* includes an interest in debt or equity instruments. The term includes, without limitation, secured and unsecured bonds, debentures, notes, securitized assets, and commercial paper, as well as all types of preferred and common stock. The term encompasses both current and contingent ownership interests, including any beneficial or legal interest derived from a trust. It extends to any right to acquire or dispose of any long or short position in such securities and includes, without limitation, interests convertible into such securities, as well as options, rights, warrants, puts, calls, and straddles with respect thereto.

(2) The term *parent* means a company that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of an entity identified in paragraphs (a)(1) through (a)(6) of this section.