

Proposed Rules

Federal Register

Vol. 82, No. 6

Tuesday, January 10, 2017

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

BUREAU OF CONSUMER FINANCIAL PROTECTION

5 CFR Part 9401

[Docket No. CFPB–2016–0050]

RIN 3209–AA15

Supplemental Standards of Ethical Conduct for Employees of the Bureau of Consumer Financial Protection

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (CFPB or Bureau), with the concurrence of the Office of Government Ethics (OGE), is issuing this notice of proposed rulemaking for employees of the Bureau. This proposal would amend the existing Supplemental Standards of Ethical Conduct for Employees of the Bureau of Consumer Financial Protection (CFPB Ethics Regulations) involving: Outside employment for covered employees; Bureau employees' ownership or control of certain securities; restrictions on seeking, obtaining, or renegotiating credit or indebtedness; and disqualification requirements based on existing credit or indebtedness. Additionally, the proposed regulation would clarify and make minor revisions to certain definitions.

DATES: Comments are invited and must be received on or before February 9, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2016–0050 or Regulatory Information Number (RIN) number 3209–AA15, by any of the following methods:

- *Electronic:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* FederalRegisterComments@cfpb.gov. Include Docket No. CFPB–2016–0050 or RIN number 3209–AA15 in the subject line of the message.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Consumer

Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

- *Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1275 First Street NE., Washington, DC 20002.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. In addition, comments will be available for public inspection and copying at 1275 First Street NE., Washington, DC 20002, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Amber Vail, Senior Ethics Counsel, at (202) 435–7305 or Amy Mertz Brown, Alternate Designated Agency Ethics Official, at (202) 435–7256 at the Legal Division, Consumer Financial Protection Bureau.

SUPPLEMENTARY INFORMATION:

I. Background

Section 2635.105 of the OGE Standards of Ethical Conduct for Executive Branch Employees (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. On April 27, 2012, the Bureau, with OGE's concurrence, published in the *Federal Register* an interim final rule to establish the CFPB Ethics Regulations (77 FR 25019, April 27, 2012), effective June 27, 2012. The Bureau received one comment on the interim final rule, which did not prompt a change, and the interim final rule went into effect as

proposed. The Bureau, with OGE's concurrence, now proposes to amend the CFPB Ethics Regulations.

II. Description of Proposed Amended Sections of the CFPB Ethics Regulations

Proposed Amended § 9401.102—Definitions

Section 9401.102 defines terms and phrases used throughout the CFPB Ethics Regulations. The Bureau proposes to amend the definitions section to add and revise certain useful definitions and delete others.

The proposed regulation replaces the phrase “debt and equity interest” with the term “security” throughout the CFPB Ethics Regulations. The Bureau has found that the term “debt interest” has caused confusion among some employees. This revision would help distinguish between those instances when an individual owns or controls a debt ownership interest in an entity (e.g., owns a corporate bond) from those in which an individual is indebted to an entity (e.g., has a loan or existing credit). The term “security” would have the same definition as the phrase “debt and equity interest” in the current regulations.

The proposed regulation amends the term “employee” to exclude special Government employees (SGEs). During CFPB's initial stand-up period, the Bureau appointed several CFPB executives, subject matter experts, and other Bureau officials with significant policy-making authority to short-term SGE positions. At that time, the Bureau determined it was essential that the CFPB Ethics Regulations apply to these employees to assure the public that the Bureau created and administered the Bureau's programs in an impartial and objective manner. It is no longer the practice for the Bureau to fill such positions with SGEs, and the Bureau currently does not have any employees designated as SGEs. As a result, the Bureau has determined this provision is no longer needed. Therefore, the proposed regulation excludes SGEs from the definition of “employee.” This treatment of SGEs is consistent with the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation, both of which exclude SGEs from the definition of “employee” in their supplemental standards of ethical conduct. The proposed regulation would not relax or

otherwise affect how the criminal conflict of interest statutes and OGE Standards apply to SGEs. The Bureau will continue to provide ethics guidance and assistance to SGEs on compliance with the conflict of interest statutes and OGE Standards. In addition, the Bureau's Office of Human Capital will continue to identify and designate individuals as SGEs at the time the individual is appointed or retained, and will continue to maintain an internal tracking system of individuals who are designated as SGEs.

The proposed regulation also adds the phrase "practice of law" to the definitions section. The Bureau has received multiple inquiries from employees as to whether a proposed outside activity would fall within the prohibition in § 9401.105. To ensure consistency and for the ease of administration, the phrase "practice of law" would have the same meaning as in Rule 49 of the Rules of the District of Columbia Court of Appeals as of November 2016. The Bureau opted to borrow the definition utilized by the District of Columbia Court of Appeals because the majority of attorneys employed by the Bureau have a duty station located in the District of Columbia.

The proposed regulation also amends the term "spouse" by removing the reference to "legally" in the phrase "legally separated." The current definition explains that for purposes of the CFPB Ethics Regulations, an individual is not considered to be an employee's spouse if: (1) The employee and the employee's spouse are legally separated; (2) the employee and the employee's spouse live apart; (3) there is an intention to end the marriage or separate permanently; and (4) the employee has no control over the legally separated spouse's debt or equity interests. On several occasions the Bureau encountered confusion as to what constituted a "legal separation" because this is a standard defined by State law and varies depending on the State in which an employee resides. The proposed revision to the definition of "spouse" eliminates the reference to "legally" in the phrase "legally separated." This proposed amendment is consistent with how OGE determines whether an employee is required to report information concerning a spouse from whom the employee is separated for purposes of the financial disclosure reporting requirements at 5 CFR 2634.309(c)(2). OGE does not require a reporting individual to report any information about a spouse from whom the reporting individual is "permanently separated." OGE only

requires the employee to be "permanently separated" from the employee's spouse and does not require the two individuals to be "legally separated."

The proposed regulation also adds the phrase "vested legal or beneficial interest" to the definitions section to clarify several provisions. This new definition is meant to help interpret the proposed amendments in §§ 9401.106, 9401.108, and 9401.109, where the Bureau proposes to narrow the disqualification and reporting requirements with respect to trusts in which the employee or the employee's spouse or minor child has a vested legal or beneficial interest. A vested legal or beneficial interest in a trust means that the individual has a present legal right to its property or income, even though the right to possession or enjoyment may be postponed to some unknown time in the future. In defining this phrase, the Bureau relied upon 5 CFR 2634.310, where OGE explains what constitutes a vested beneficial interest in the principal or income of an estate or trust.

The Bureau is republishing all the definitions in this section, including those not proposed for revision, for ease of reference.

*Proposed Amended § 9401.104—
Additional Rules Concerning Outside
Employment for Covered Employees*

The proposed amendments to § 9401.104 are designed to balance several important ethical principles against an employee's right to engage in outside activities. Proposed § 9401.104 would retain the existing prohibition that precludes a covered employee from engaging in compensated outside employment for any entity supervised by the Bureau or for any officer, director, or employee of such entity. The proposed rule adds a new prohibition on covered employees using a professional license related to real estate, mortgage brokerage, property appraisals, or property insurance for compensation. The proposed amendment would permit covered employees to retain these professional licenses but would prohibit them from engaging in outside compensated employment as real estate agents, mortgage brokers, property appraisers, real property insurance agents, or in other similar positions.

The Bureau has determined this new prohibition is necessary to ensure that a reasonable person would not question the impartiality and objectivity with which covered employees perform their official Bureau duties in connection with financial institutions that are

involved in real estate-related transactions. Continuing to allow covered employees to use these licenses for compensation would hinder CFPB in fulfilling its mission if members of the public question whether these employees are using their public office or Bureau connections for private gain by advancing their outside real estate-related business activities.

The proposed rule authorizes the Designated Agency Ethics Official (DAEO), in consultation with senior management in the Division in which the employee works, to grant a limited waiver to this prohibition based on a written determination that a specific transaction requiring the use of the license would not create an appearance of loss of impartiality or use of public office for private gain.

The proposed regulation expands the term "covered employee" to include all employees who work in a Bureau office where employees participate in the examination, investigation, or supervision of entities offering or providing a consumer financial product or service. For example, all employees in the Division of Supervision, Enforcement, and Fair Lending (SEFL) would be "covered employees" under the proposed rule, whereas only certain SEFL positions are covered under the current definition.

*Proposed Amended § 9401.106—
Prohibited Financial Interests*

This proposed rule would amend 5 CFR 9401.106, which provides in paragraph (a), with certain exceptions set forth in paragraph (b), that no CFPB employee, or an employee's spouse or minor child, may own or control a security in an entity supervised by the Bureau. The proposed amendment of this section would clarify the scope of the prohibited financial interests by more clearly defining the types of financial interests covered by this prohibition and the exceptions to the general rule. The intent of the proposed amendment is to make this section easier for employees to understand and follow.

The prohibited financial interests are defined in paragraph (a). The proposed regulation would not change the scope of financial interests that currently are prohibited under this section. The purpose of the proposed amendment is to more clearly define prohibited financial interests by dividing the prohibited holdings into two categories. The first would refer to a security in, or bonds issued by, an entity supervised by the Bureau. The second would refer to securities in a collective investment fund, such as a mutual fund, if the fund

has a stated policy of concentrating its investments in the financial services or banking industry. The Bureau always has interpreted the current rule to prohibit employees, as well as their spouses and minor children, from owning or controlling these collective investment funds (*i.e.*, sector mutual funds), and is proposing to amend the rule to make this prohibition more explicit.

The exceptions to the general prohibition are listed in paragraph (b). The purpose of the exceptions is to ease the restrictions on the financial interests of employees and their spouses and minor children by permitting interests of a character unlikely to raise questions regarding the objective and impartial performance of employees' official duties or the possible misuse of their positions. In promulgating the exemptions to the financial conflict of interest statute in 5 CFR part 2640, subpart B, OGE determined that certain financial interests are unlikely to affect an employee's official actions. The Bureau proposes to revise the exceptions in paragraph (b) to more closely conform to certain exemptions to the financial conflict of interest statute (18 U.S.C. 208) promulgated by OGE. The Bureau determined that these newly proposed exceptions will make it easier for Bureau employees to understand and comply with the CFPB Ethics Regulations, as well as the financial conflict of interest statutes.

In paragraph (b)(1), the Bureau proposes to change the name of the first exception to "collective investment funds" to conform with the language of that exception but no substantive change is intended. Proposed paragraph (b)(2) replaces the current description for the widely held, diversified pension plan exception with new language that the Bureau intends to have the same meaning as OGE's regulatory exemption found at 5 CFR 2640.201(c)(iii) for diversified employee benefit plans. Proposed paragraph (b)(4) adds an exception for an interest held within a State pension plan. This exception would have the same meaning as OGE's exemption in 5 CFR 2640.201(c)(ii) for State government pension plans.

In new paragraph (c), the proposed regulation would provide specific time frames for employees to notify the DAEO and divest a prohibited financial interest after: (1) An individual commences employment with the Bureau; (2) the Bureau adds a new financial institution to the list of entities supervised by the Bureau (*i.e.*, the prohibited holdings list); or (3) an employee or an employee's spouse or minor child acquires a prohibited

interest without specific intent, such as via inheritance. The proposed amendment would provide a uniform 30-day period for notifying the DAEO, and consistent with 5 CFR 2635.403(d), a uniform 90-day period for divestiture in each instance.

Proposed paragraph (d) requires employees to immediately disqualify themselves if they or their spouses or minor children own or control a security prohibited by paragraph (a). Proposed paragraphs (d)(1) and (d)(2) explain the different disqualification standards for securities prohibited under proposed paragraphs (a)(1) and (a)(2), respectively. Proposed paragraph (d)(1) describes the disqualification requirements that apply when an employee or an employee's spouse or minor child owns or controls a security in an entity supervised by the Bureau. Whereas, proposed paragraph (d)(2) describes the more extensive disqualification requirements that apply when an employee or an employee's spouse or minor child owns or controls a security in a collective investment fund that has a stated policy of concentrating its investments in the financial services or banking industry.

Proposed paragraph (e)(4) provides an additional factor for the DAEO to consider when an employee requests a waiver from the general prohibition in paragraph (a). It is expected that the DAEO will grant a waiver of the prohibitions in § 9401.106 only in limited circumstances based on a case-by-case analysis, and only when the granting of the waiver would not unduly undermine the public's confidence in the impartiality and objectivity with which: (1) The employee performs his or her official duties; and (2) the Division in which the employee works executes its functions. Towards this end, proposed paragraph (e)(4) specifically includes public confidence and the appearance of impartiality as a factor for the DAEO to consider in granting a waiver.

The CFPB Ethics Regulations currently require an employee to notify the DAEO in writing if a trust in which the employee or the employee's spouse or minor child has a legal or beneficial interest contains a security that the employee would be prohibited from owning or controlling under paragraph (a). The Bureau proposes to amend paragraph (f)(3) to clarify that the employee's reporting requirement only applies to trusts in which the employee or the employee's spouse or minor child has a vested legal or beneficial interest. The Bureau has determined that the reporting requirement in this section should apply only to those financial

interests in which an employee or an employee's spouse or minor child has a present legal right to the property or income in the trust. As noted previously, the proposed rule would add a definition of "vested legal or beneficial interest" in § 9401.102.

The Bureau has determined, under its authority in section 2635.403(a) of the OGE Standards, that these proposed regulations are needed so that a reasonable person will not question the impartiality and objectivity with which the Bureau administers its agency programs.

*Proposed Amended § 9401.107—
Prohibition on Acceptance of Credit or
Indebtedness on Preferential Terms
From an Entity Supervised by the
Bureau*

The proposed rule would amend § 9401.107, which provides that employees may accept credit, become indebted, or enter into other financial relationships with entities supervised by the Bureau, only if the credit, indebtedness or other financial service is offered on terms and conditions no more favorable than those offered to the general public. The proposed amendment is not intended to change the scope of this prohibition. The proposed rule is meant to clarify that the standard for entering into financial relationships with entities supervised by the Bureau as articulated in this section is the same standard that is referenced in §§ 9401.108(b) and (e) and 9401.109(b). The proposed rule also states that an employee or the employee's spouse or minor child may not accept credit from, become indebted to, or enter into a financial relationship with an entity supervised by the Bureau, if the credit, indebtedness, or financial relationship is otherwise prohibited by the Federal conflict of interest statutes, the OGE Standards, or the CFPB Ethics Regulations. This proposed language is intended to remind employees there are other government ethics rules that may affect their ability to secure credit or indebtedness or to enter into financial relationships.

*Proposed Amended § 9401.108—
Restrictions on Seeking, Obtaining, or
Renegotiating Credit From an Entity
That Is or Represents a Party to a Matter
to Which an Employee Is Assigned or
May Be Assigned*

The proposed revision to 5 CFR 9401.108 would retain the existing general prohibitions on seeking, obtaining, or renegotiating credit or indebtedness, the disqualification provisions, and the exemptions from the disqualification requirements. The

Bureau proposes to restructure this section to clarify the prohibitions and to incorporate new exemptions.

Under the proposed new paragraph (b), an employee or the employee's spouse or minor child would be permitted to seek, obtain, or renegotiate credit or indebtedness secured by a principal residence subject to five conditions. First, the credit or indebtedness must be secured by residential real property that is or will be the principal residence of the employee or the employee's spouse or minor child. Second, a minimum of three months must have elapsed since the employee stopped participating in each particular matter involving specific parties in which the entity from which the credit or indebtedness will be sought, obtained, or renegotiated was or represented a party to the matter. Third, the employee would be disqualified from participating in any particular matter involving specific parties in which the lender or creditor is or represents a party while the employee or the employee's spouse or minor child is actively seeking, obtaining, or renegotiating the loan or credit. Fourth, the party seeking, obtaining, or renegotiating the credit or indebtedness would have to satisfy all financial requirements that apply to applicants for the same type of credit or indebtedness for a residential real property. Fifth, the credit or indebtedness would have to be obtained on terms and conditions no more favorable than those offered to the general public.

The Bureau determined that a different standard for a residential home loan or credit on the principal residence is necessary because the Bureau's general prohibition in paragraph (a) against seeking, obtaining, or renegotiating credit or indebtedness has been a significant burden on certain employees. The current prohibition substantially reduces the number of lending options available to employees when they attempt to secure funding for a principal residence and prevents them from full access to the competitive consumer financial marketplace. The five conditions upon which seeking, obtaining, or renegotiating a residential home loan or credit are contingent reduce the possibility that: (1) The employee is using the employee's public office for private gain; (2) a reasonable person would question the impartiality and objectivity with which the Bureau administers its programs; and (3) the borrower has obtained the loan or credit on more favorable terms due to the employee's work on a Bureau matter involving that lender.

The Bureau notes that other financial regulatory agencies, including the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, have similar exemptions for a home loan for an employee's principal residence. Additionally, this proposed amendment is consistent with the intent of the Preserving Independence of Financial Institution Examinations Act of 2003 (PIFIEA), which amended sections 212 and 213 of title 18 of the United States Code. These sections generally impose criminal penalties on national examiners borrowing from banks they examine. The PIFIEA modified those rules by decriminalizing extensions of credit to examiners for principal residential home loans from institutions that they examine or have authority to examine, if these loans are made on the same terms and conditions as are available to other borrowers. In amending sections 212 and 213, Congress explained that several factors supported the blanket residential loan exception, but most importantly, consolidation within the banking industry made it increasingly difficult for examiners to obtain nationally available mortgage loans and for the banking agencies to assign examiners work. Although Bureau employees are not subject to sections 212 and 213, the rationale for allowing Bureau employees, as well as their spouses and minor children, the ability to secure a residential home loan for their principal residence is the same.

For the same reasons as stated in § 9401.106, amended § 9401.108(d)(4) would limit the trust disqualification requirement to only those trusts in which the employee or the employee's spouse, domestic partner, or dependent child has a vested legal or beneficial interest.

The exemptions to the general prohibition are listed in new paragraph (e). The proposed rule would modify the two existing exemptions by deleting the limitation related to insured depository institutions or credit unions. As a result, all consumer credit or charge cards regardless of the issuer, and all checking or similar accounts regardless of where held, would fall within an exemption.

The proposed rule also would add a new exemption involving certain utility services. Under the current regulation, an employee and the employee's spouse and minor child are prohibited from seeking, obtaining, or renegotiating credit or indebtedness with any entity that is or was a party to a particular matter involving specific parties in which the employee: (1) Is currently participating; (2) is aware of the matter and believes it is likely the employee

will participate; or (3) participated within the last two years. For purposes of this prohibition, the term "credit" includes "the right granted by a person to a consumer to purchase property or services and defer payment of such." A number of courts have determined that this definition of "credit" includes when a consumer receives gas, electricity, water, and cellular telephone services and receives periodic bills for the services used.¹ When the Bureau originally promulgated the CFPB Ethics Regulations, it was not anticipated that the prohibition in this section would limit Bureau employees' ability to have these basic utility services and still be able to work on Bureau matters.

Under proposed paragraph (e)(3), the Bureau would exempt certain types of basic utility services used by consumers from the prohibition in paragraph (a) and the disqualification requirement in paragraph (d). Specifically, the proposed rule would add an exemption for the provision of telephone, cable, gas, electricity, water, or other similar utility services provided on credit. The Bureau has determined that there is no need to limit an employee's ability to work on matters while holding these forms of credit because they tend to involve fairly standardized agreements and low credit amounts. The Bureau also has concluded that permitting employees to have adequate access to sources of credit involving these types of utility services to meet their personal needs outweighs the incremental benefit that may be gained by covering these forms of credit.

*Proposed Amended § 9401.109—
Disqualification of Employees From
Particular Matters Involving Existing
Creditors*

In addition, the proposed rule would amend 5 CFR 9401.109, which generally provides that an employee is disqualified from participating in a particular matter involving specific parties if the employee is aware that the employee, the employee's spouse, domestic partner, or dependent child, or a specified third party has credit with or is indebted to an entity that is or represents a party to the matter. The Bureau proposes to narrow the disqualification requirement regarding trusts and to incorporate new exemptions.

For the same reasons as stated in §§ 9401.106 and 9401.108, amended § 9401.109(a)(5) would impose a

¹ See, e.g., *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008); *Mays v. Buckeye Rural Elec. Coop.*, 277 F.3d 873, 879 (6th Cir. 2002); *Williams v. AT&T Wireless Servs., Inc.*, 5 F. Supp. 2d 1142, 1145 (W.D. Wash. 1998).

disqualification requirement regarding a trust only if the employee or the employee's spouse, domestic partner, or dependent child has a vested legal or beneficial interest in the trust.

The existing regulation in paragraph (b) exempts five forms of credit and indebtedness from the general disqualification requirement as long as the person with the credit or indebtedness is not in an adversarial position with the entity that extended the credit or to which the indebtedness is owed, and the credit or indebtedness was offered on terms and conditions no more favorable than those offered to the general public. The current exemptions include: (1) Revolving consumer credit or charge cards issued by insured depository institutions or insured credit unions; (2) overdraft protection on checking accounts and similar accounts at insured depository institutions or insured credit unions; (3) educational loans; (4) loans on residential homes; and (5) amortizing indebtedness on consumer goods (e.g., automobile loans). The proposed rule would modify the first two existing exemptions by deleting the limitation related to insured depository institutions or insured credit unions. As a result, all consumer credit or charge cards regardless of the issuer, and all checking or similar accounts regardless of where held, would fall within an exemption.

The proposed amendment also would add two new exemptions. The proposed amendment at paragraph (b)(4) would create an exemption for automobile leases for primarily personal (consumer) use vehicles. The Bureau has determined that there is no need to limit an employee's ability to work on matters while holding this form of credit because automobile leases tend to involve fairly standardized agreements and automobile leases are similar in nature to automobile loans, which are already exempted. For the same reasons as stated for § 9401.108, amended § 9401.109 also would create a new exemption for the provision of telephone, cable, gas, electricity, water, or other similar utility services on credit.

Proposed Amended § 9401.111—Restrictions on Participating in Matters Involving Covered Entities

The proposed rule would amend § 9401.111 by reorganizing this section and expanding the definition of "covered entity." Proposed paragraph (b)(1) would expand the definition to include any person for whom the employee is serving or seeking to serve, or has served within the last year, as an officer, director, trustee, general partner,

agent, attorney, consultant, contractor, or employee. This proposal builds on OGE's impartiality rule at 5 CFR 2635.502(b)(iv), and is based on the Bureau's presumption that a reasonable person likely would question an employee's impartiality when the employee is participating in a particular matter involving specific parties in which a covered entity is a party or represents a party. Disqualification of the employee eliminates the potential for an appearance of preferential treatment in those instances where the employee's connection to a covered entity would likely raise questions regarding the appropriateness of actions taken by the employee or the Bureau.

The current definition of "covered entity" includes, among others, a person for whom the employee is aware that the employee's parent, child, or sibling is serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. Employees have questioned whether this restriction extends to stepfamily members and half siblings. The proposed regulation in paragraph (b)(2) extends the restriction to stepfathers, stepmothers, stepsons, stepdaughters, stepbrothers, stepsisters, half-brothers, and half-sisters. The Bureau has determined that this proposed regulation is needed so that a reasonable person will not question the impartiality and objectivity with which the Bureau administers its agency programs.

III. Matters of Regulatory Procedure

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (the RFA), requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations, unless the head of the agency certifies that the rules will not have a significant economic impact on a substantial number of small entities. The Director of the Bureau so certifies. The rule does not impose any obligations or standards of conduct for purposes of analysis under the RFA, and it therefore does not give rise to a regulatory compliance burden for small entities.

Paperwork Reduction Act

The Bureau has determined that this proposed rule does not impose any new recordkeeping, reporting, or disclosure requirements on members of the public that would be collections of information

requiring approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 5 CFR Part 9401

Conflict of interests, Government employees.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau, in concurrence with OGE, proposes to amend part 9401 of title 5 of the Code of Federal Regulations to read as follows:

PART 9401—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION

■ 1. The authority citation for part 9401 is revised to read as follows:

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159 (April 12, 1989); 3 CFR, 1898 Comp., p.215, as modified by E.O. 12731, 55 FR 42547 (October 17, 1990); 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.403, 2635.502 and 2635.803.

■ 2. Section 9401.102 is revised to read as follows:

§ 9401.102 Definitions.

For purposes of this part:

CFPB Ethics Regulations means the supplemental ethics standards set forth in this part.

Control means the possession, direct or indirect, of the power or authority to manage, direct, or oversee.

Credit has the meaning set forth in 12 U.S.C. 5481(7) and as further defined in regulations promulgated by the Bureau to implement that statute. A person may have credit without any outstanding balance owed.

Dependent child has the meaning set forth in 5 CFR 2634.105(d). It includes an employee's son, daughter, stepson, or stepdaughter if:

(1) Unmarried, under the age of 21, and living in the employee's household; or

(2) Claimed as a "dependent" on the employee's income tax return.

Designated Agency Ethics Official (DAEO) means the official within the Bureau that the Director has appointed to coordinate and manage the ethics program at the Bureau, under 5 CFR 2638.202(b). For purposes of this part, the term "DAEO" also includes the Alternate DAEO appointed under 5 CFR 2638.202(b), and a designee of the DAEO or Alternate DAEO unless a particular provision says an authority is reserved to the DAEO.

Director means the Director of the Bureau.

Domestic partner means a person with whom a Bureau employee:

(1) Has a close and committed personal relationship and both parties are at least 18 years of age, are each other's sole domestic partner and intend to remain in the relationship indefinitely, and neither is married to, in a civil union with, or partnered with any other spouse or domestic partner;

(2) Is not related by blood in a manner that would bar marriage under the laws of the jurisdiction in which the employee resides;

(3) Is in a financially interdependent relationship in which both agree to be responsible for each other's common welfare and share in financial obligations; and

(4) Has shared for at least six months the same regular and permanent residence in a committed relationship and both parties intend to do so indefinitely, or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle.

Employee means an employee of the Bureau, other than a special Government employee.

Entity supervised by the Bureau means a person that is subject to the Bureau's supervision authority pursuant to 12 U.S.C. 5514(a)(1) or 5515(a) and in regulations promulgated thereunder, as identified on a list to be maintained by the Bureau.

Indebted or indebtedness means a legal obligation under which an individual or borrower received money or assets on credit, and currently owes payment.

Indebted to an entity means an obligation to make payments to an entity as a result of an indebtedness, whether originally made with that entity or with another entity. This includes without limitation, a servicer on a mortgage to whom payments are made.

OGE Standards mean the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635.

Participate means personal and substantial participation and has the meaning set forth in 5 CFR 2635.402(b)(4). An employee participates when, for example, he or she makes a decision, gives approval or disapproval, renders advice, provides a recommendation, conducts an investigation or examination, or takes an official action in a particular matter, and such involvement is of significance to the matter. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

Particular matter has the meaning set forth in 5 CFR 2635.402(b)(3). The term includes a matter that involves deliberation, decision, or action and is focused upon the interests of specific persons or a discrete and identifiable class of persons. It may include governmental action such as legislation, regulations, or policy-making that is narrowly focused on the interest of a discrete and identifiable class of persons.

Particular matter involving specific parties has the meaning set forth in 5 CFR 2641.201(h). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties. The term includes without limitation, a contract, audit, enforcement action, examination, investigation, litigation proceeding, or request for a ruling.

Person has the same meaning set forth in 5 CFR 2635.102(k). It includes without limitation, an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution.

Practice of law means the provision of legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(1) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments, or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;

(2) Preparing or expressing legal opinions;

(3) Appearing or acting as an attorney in any tribunal;

(4) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency, or other tribunal;

(5) Providing advice or counsel as to how any of the activities described in subparagraphs (1) through (4) might be done, or whether they were done, in accordance with applicable law; or

(6) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (1) through (5) above.

Security means an interest in debt or equity instruments. The term includes without limitation, secured and unsecured bonds, debentures, notes, securitized assets, commercial papers, and preferred and common stock. The term encompasses both current and contingent ownership interests; a beneficial or legal interest derived from a trust; a right to acquire or dispose of any long or short position in debt or equity interests; interests convertible into debt or equity interests; and options, rights, warrants, puts, calls, straddles, derivatives, and other similar interests. It does not include deposits; credit union shares; a future interest created by someone other than the employee or the employee's spouse or dependent child; or a right as a beneficiary of an estate that has not been settled.

Special Government employee has the meaning set forth in 5 CFR 2635.102(l).

Spouse means an employee's husband or wife by lawful marriage, but does not include an employee's spouse if:

(1) The employee and the employee's spouse are separated;

(2) The employee and the employee's spouse live apart;

(3) There is an intention to end the marriage or separate permanently; and

(4) The employee has no control over the separated spouse's securities.

Vested legal or beneficial interest means a present right or title to property, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future. This includes a future interest when one has a right, defeasible or indefeasible, to immediate possession or enjoyment of the property, upon the ceasing of another's interest.

■ 3. Section 9401.104 is revised to read as follows:

§ 9401.104 Additional rules concerning outside employment for covered employees.

(a) *Prohibited outside employment with an entity supervised by the Bureau.* A covered employee shall not engage in compensated outside employment for an entity supervised by the Bureau or for an officer, director, or employee of such entity. For purposes of this section, "employment" has the same meaning as set forth in § 9401.103(b) of this part.

(b) *Use of professional licenses related to real estate.* A covered employee who holds a license related to real estate, mortgage brokerage, property appraisals, or real property insurance is prohibited from using such license for the production of income. The DAEO, in consultation with senior management in

the Division in which the employee works, may grant a limited waiver to this prohibition based on a written finding that the specific transaction which requires use of the license will not create an appearance of loss of impartiality or use of public office for private gain.

(c) *Definition of covered employee.* For purposes of this section, “covered employee” means:

(1) An employee in the Division of Supervision, Enforcement, and Fair Lending;

(2) An employee serving in an attorney position;

(3) An employee in the Office of Research, serving as a section chief at Bureau pay band 71 or above or as a senior economist in the Compliance Analytics and Policy Section;

(4) An employee serving in the Office of Consumer Response in an investigations position;

(5) An employee required to file a Public Financial Disclosure Report (OGE Form 278e) under 5 CFR part 2634; or

(6) Any other Bureau employee specified in a Bureau order or directive whose duties and responsibilities, as determined by the DAEO, require application of the prohibition on outside employment contained in this section to ensure public confidence that the Bureau’s programs are conducted impartially and objectively.

■ 4. Section 9401.105 is amended by revising paragraphs (a) introductory text, (a)(1), (b)(1), and (b)(2) to read as follows:

§ 9401.105 Additional rules concerning outside employment for Bureau attorneys.

(a) *Prohibited outside practice of law.* In addition to the prior approval requirements under § 9401.103 and the outside employment restrictions under § 9401.104 of this part, an employee serving in an attorney position shall not engage in the practice of law outside the employee’s official Bureau duties that might require the attorney to:

(1) Take a position that is or appears to be in conflict with the interests of the Bureau; or

* * * * *

(b) * * *

(1) In those matters in which the attorney has participated personally and substantially as a Government employee; or

(2) In those matters which are the subject of the attorney’s official responsibility.

■ 5. Section 9401.106 is revised to read as follows:

§ 9401.106 Prohibited financial interests.

(a) *Prohibited interests.* Except as permitted by this section, an employee or an employee’s spouse or minor child shall not own or control a security in:

(1) An entity supervised by the Bureau; or

(2) A collective investment fund that has a stated policy of concentrating its investments in the financial services or banking industry. A collective investment fund includes, without limitation, mutual funds, unit investment trusts (UITs), exchange traded funds (ETFs), real estate investment trusts (REITs), and limited partnerships.

(b) *Exceptions.* Interests prohibited in paragraph (a) of this section do not include the ownership or control of a security in:

(1) *Collective investment funds.* A publicly traded or publicly available collective investment fund if:

(i) The fund does not have a stated policy of concentrating its investments in the financial services or banking industry; and

(ii) Neither the employee nor the employee’s spouse or minor child exercises or has the ability to exercise control over or selection of the financial interests held by the fund.

(2) *Diversified employee benefit plans.* A pension or other retirement fund, trust, or plan established or maintained by an employer or an employee organization, or both, to provide its participants with medical, disability, death, unemployment, or vacation benefits, training programs, day care centers, scholarship funds, prepaid legal services, deferred income, or retirement income (employee plan), provided:

(i) The employee plan does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States;

(ii) The investments of the employee plan are administered by an independent trustee;

(iii) The employee plan’s trustee has a written policy of varying the plan investments;

(iv) Neither the employee nor the employee’s spouse or minor child participates in the selection of the employee plan’s investments or designates specific plan investments (except for directing that contributions be divided among several different categories of investments, such as stocks, bonds, or mutual funds, which are available to plan participants); and

(v) The employee plan is not a profit-sharing or stock bonus plan.

(3) *Federal retirement and thrift savings plans.* Funds administered by the Thrift Plan for Employees of the Federal Reserve System, the Retirement Plan for Employees of the Federal Reserve System, the Thrift Savings Plan, or a Federal government agency.

(4) *State pension plans.* A pension plan established or maintained by a State government or any political subdivision of a State government for its employees.

(c) *Reporting and divestiture of prohibited interests—*(1) *New employees.* Within 30 calendar days from the start of employment with the Bureau, an employee must notify the DAEO in writing of a financial interest prohibited under paragraph (a) of this section that the employee or the employee’s spouse or minor child acquired prior to the start of the employee’s employment with the Bureau. The employee or the employee’s spouse or minor child shall divest prohibited securities within 90 days after the start of the employee’s employment at the Bureau.

(2) *Newly prohibited interest.* Within 30 days after the Bureau updates and internally publishes a new list of entities supervised by the Bureau, an employee who owns or controls, or whose spouse or minor child owns or controls, a security in an entity newly added to that list must notify the DAEO in writing. The employee or the employee’s spouse or minor child shall divest prohibited securities within 90 days after internal publication of the new list.

(3) *Interests acquired without specific intent.* If an employee or an employee’s spouse or minor child acquires a financial interest prohibited under paragraph (a) of this section as a result of marriage, inheritance, or otherwise without specific intent to acquire, the employee must notify the DAEO in writing within 30 days of the acquisition. The employee or the employee’s spouse or minor child shall divest prohibited securities within 90 days of the acquisition.

(d) *Disqualification and divestiture—*(1) *Securities in entities supervised by the Bureau.* If an employee or an employee’s spouse or minor child owns or controls a security in an entity that is prohibited under paragraph (a)(1) of this section, the employee shall immediately disqualify himself or herself from participating in all particular matters affecting that entity, unless and until the security is divested or the employee is granted a waiver pursuant to paragraph (e) of this section and the waiver includes an

authorization allowing the employee to participate in such matters.

(2) *Securities in collective investment funds.* If an employee or an employee's spouse or minor child owns or controls a security in a collective investment fund that is prohibited under paragraph (a)(2) of this section, the employee shall immediately disqualify himself or herself from participating in all particular matters affecting one or more holdings of the collective investment fund if the affected holding is invested in the financial services or banking industry, unless and until the collective investment fund is divested or the employee is granted a waiver pursuant to paragraph (e) of this section and the waiver includes an authorization allowing the employee to participate in such matters.

(e) *Waivers.* Upon request by the employee, the DAEO in the DAEO's sole discretion has the authority to grant an individual waiver under this paragraph. The DAEO's authority to grant an individual waiver under this paragraph may not be delegated to any person except the Alternate DAEO. The DAEO, in consultation with senior management in the Division in which the employee works, may issue a written waiver permitting the employee or the employee's spouse or minor child to own or control a particular security that otherwise would be prohibited by this section, after considering all relevant factors. Relevant factors include, without limitation, whether:

(1) Mitigating circumstances exist due to the way the employee or the employee's spouse or minor child acquired ownership or control of the security. Mitigating circumstances may include without limitation:

(i) The employee or the employee's spouse or minor child acquired the security through inheritance, merger, acquisition, or other change in corporate structure, or otherwise without specific intent on the part of the employee or the employee's spouse or minor child; or

(ii) The employee's spouse received the security as part of a compensation package in connection with employment or prior to marriage to the employee;

(2) The employee makes a prompt and complete written disclosure of the security to the DAEO;

(3) The disqualification of the employee from participating in particular matters pursuant to paragraph (d) of this section, as specified in the written waiver, would not unduly interfere with the full performance of the employee's duties; and

(4) The granting of the waiver would not unduly undermine the public's

confidence in the impartiality and objectivity with which:

(i) The employee performs the employee's official Bureau duties; and

(ii) The Division in which the employee works executes its programs and functions.

(f) *Covered third party entities.*

Immediately after becoming aware that a covered third party entity owns or controls a security that an employee would be prohibited from owning or controlling under paragraph (a) of this section, the employee shall report the interest in writing to the DAEO. The DAEO may require the employee to terminate the relationship with the covered third party entity, disqualify himself or herself from certain particular matters, or take other action as necessary to avoid a statutory violation, a violation of the OGE Standards, or the CFPB Ethics Regulations, including an appearance of misuse of position or loss of impartiality. For purposes of this paragraph, "covered third party entity" includes:

(1) A partnership in which the employee or the employee's spouse or minor child is a general partner;

(2) A partnership or closely held corporation in which the employee or the employee's spouse or minor child individually or jointly holds more than a 10 percent equity interest;

(3) A trust in which the employee or the employee's spouse or minor child has a vested legal or beneficial interest;

(4) An investment club or similar informal investment arrangement between the employee or the employee's spouse or minor child, and others;

(5) A qualified profit sharing, retirement, or similar plan in which the employee or the employee's spouse or minor child has an interest; or

(6) An entity in which the employee or the employee's spouse or minor child individually or jointly holds more than a 25 percent equity interest.

■ 6. Section 9401.107 and the section heading are revised to read as follows:

§ 9401.107 Prohibition on acceptance of credit or indebtedness on preferential terms from an entity supervised by the Bureau.

An employee or the employee's spouse or minor child may not accept credit from, become indebted to, or enter into a financial relationship with an entity supervised by the Bureau, unless the credit, indebtedness, or other financial relationship:

(1) Is offered on terms and conditions no more favorable than those offered to the general public; and

(2) Is not otherwise prohibited by law or inconsistent with the OGE Standards or the CFPB Ethics Regulations.

■ 7. Section 9401.108 is revised to read as follows:

§ 9401.108 Restrictions on seeking, obtaining, or renegotiating credit from an entity that is or represents a party to a matter to which an employee is assigned or may be assigned.

(a) *General rules regarding seeking, obtaining, or renegotiating credit or indebtedness—(1) Prohibition.* While an employee is assigned to participate in a particular matter involving specific parties, the employee or the employee's spouse or minor child shall not seek, obtain, or renegotiate credit or indebtedness with an entity that is a party or represents a party to the matter. This prohibition also applies to a particular matter involving specific parties pending at the Bureau in which the employee is not currently participating but of which the employee is aware and believes it is likely that the employee will participate.

(2) *Cooling off period.* The prohibition in paragraph (a)(1) of this section continues for two years after the employee's participation in the particular matter has ended.

(b) *Rules regarding credit or indebtedness secured by principal residence.* Notwithstanding paragraph (a) of this section, an employee or an employee's spouse or minor child may seek, obtain, or renegotiate credit or indebtedness secured by residential real property with an entity, subject to the following conditions:

(1) The residential real property is or will be the principal residence of the employee or the employee's spouse or minor child;

(2) A minimum of three months have passed since the end of the employee's participation in each particular matter involving specific parties in which that entity was a party or represented a party;

(3) The employee is disqualified from participating in particular matters involving specific parties in which that entity is a party or represents a party while the employee or the employee's spouse or minor child is seeking, obtaining, or renegotiating the credit or indebtedness;

(4) The employee or the employee's spouse or minor child seeking, obtaining, or negotiating the credit or indebtedness must satisfy all financial requirements generally applicable to all applicants for the same type of credit or indebtedness for residential real property; and

(5) The credit or indebtedness is obtained on terms and conditions no more favorable than those offered to the general public.

(c) *Specific rules for employee's spouse and minor child.* The prohibitions in paragraphs (a) and (b) of this section do not apply when the employee's spouse or minor child is seeking, obtaining, or renegotiating credit or indebtedness and:

(1) The credit or indebtedness is supported only by the income or independent means of the spouse or minor child;

(2) The credit or indebtedness is obtained on terms and conditions no more favorable than those offered to the general public; and

(3) The employee does not participate in the negotiating for the credit or indebtedness or serve as co-maker, endorser or guarantor of the credit or indebtedness.

(d) *Disqualification requirement for credit sought by person related to an employee.* An employee shall disqualify himself or herself from participating in a particular matter involving specific parties as soon as the employee learns that any of the following persons are seeking, obtaining, or renegotiating credit or indebtedness with an entity that is or represents a party to the matter:

(1) The employee's spouse, domestic partner, or dependent child;

(2) A partnership in which the employee or the employee's spouse, domestic partner, or dependent child is a general partner;

(3) A partnership or closely held corporation in which the employee or the employee's spouse, domestic partner, or dependent child individually or jointly owns or controls more than a 10 percent equity interest;

(4) A trust in which the employee or the employee's spouse, domestic partner, or dependent child has a vested legal or beneficial interest;

(5) An investment club or similar informal investment arrangement between the employee or the employee's spouse, domestic partner, or dependent child, and others;

(6) A qualified profit sharing, retirement, or similar plan in which the employee or the employee's spouse, domestic partner, or dependent child has an interest; or

(7) An entity in which the employee or the employee's spouse, domestic partner, or dependent child individually or jointly holds more than a 25 percent equity interest.

(e) *Exemptions.* The following forms of credit are exempted from the prohibitions in paragraphs (a) and (b) of this section and the disqualification requirement in paragraph (d) of this section, provided the credit is offered on

terms and conditions no more favorable than those offered to the general public:

(1) Revolving consumer credit or charge cards;

(2) Overdraft protection on checking accounts and similar accounts; and

(3) The provision of telephone, cable, gas, electricity, water, or other similar utility services provided on credit (*i.e.*, the service is provided before payment is due such that consumers incur debt as they use the service and receive periodic bills for the services used).

(f) *Waivers.* The DAEO, after consultation with senior management in the Division in which the employee works, may grant a written waiver from the prohibition in paragraphs (a) or (b) of this section or the disqualification requirement in paragraph (d) of this section, based on a determination that participation in matters otherwise prohibited by this section would not be prohibited by law (18 U.S.C. 208) or create an appearance of loss of impartiality or use of public office for private gain, and would not otherwise be inconsistent with the OGE Standards or the CFPB Ethics Regulations.

■ 8. Section 9401.109 is amended by:

■ a. Revising the section heading;

■ b. Revising paragraphs (a)(5) and (b)(1) through (5); and

■ c. Adding paragraphs (b)(6) and (7).

The revisions and additions read as follows:

§ 9401.109 Disqualification of employees from particular matters involving existing creditors.

(a) * * *

(5) A trust in which the employee or the employee's spouse, domestic partner, or dependent child has a vested legal or beneficial interest;

* * * * *

(b) * * *

(1) Revolving consumer credit or charge cards;

(2) Overdraft protection on checking accounts and similar accounts;

(3) Amortizing indebtedness on consumer goods (*e.g.*, automobiles);

(4) Automobile leases for primarily personal (consumer) use vehicles;

(5) The provision of telephone, cable, gas, electricity, water, or other similar utility services provided on credit (*i.e.*, the service is provided before payment is due such that consumers incur debt as they use the service and receive periodic bills for the services used);

(6) Educational loans (*e.g.*, student loans; loans taken out by a parent or guardian to pay for a child's education costs); and

(7) Loans on residential homes (*e.g.*, home mortgages; home equity lines of credit).

* * * * *

■ 9. Section 9401.110 is revised to read as follows:

§ 9401.110 Prohibited recommendations.

An employee shall not make recommendations or suggestions, directly or indirectly, concerning the acquisition or sale or other divestiture of a security in an entity supervised by the Bureau, or an entity that is or represents a party to a particular matter involving specific parties to which the employee is assigned.

■ 10. Section 9401.111 is revised to read as follows:

§ 9401.111 Restriction on participating in matters involving covered entities.

(a) *Disqualification required.* Absent an authorization pursuant to paragraph (c) of this section, an employee shall not participate in a particular matter involving specific parties if a covered entity is or represents a party to the matter.

(b) *“Covered entity” defined.* For purposes of this section, a “covered entity” includes:

(1) Any person for whom the employee is serving or seeking to serve, or has served with the last year, as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; or

(2) Any person for whom the employee is aware the employee's spouse, domestic partner, fiancé, child, parent, sibling, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or member of the employee's household is serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.

(c) *Waivers.* The DAEO may authorize the employee to participate in a matter that would require disqualification under paragraph (a) of this section, using the authorization process set forth in 5 CFR 2635.502(d) of the OGE Standards. The DAEO will consult with senior management in the Division in which the employee works before issuing such an authorization.

Dated: December 15, 2016.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

[FR Doc. 2016–31596 Filed 1–9–17; 8:45 am]

BILLING CODE 4810-AM-P