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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2640

RIN 3209–AA09

Government Employees Serving in Official Capacity in Nonprofit Organizations; Sector Unit Investment Trusts

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule.

SUMMARY: The Office of Government Ethics is issuing this final rule to amend the regulation that describes financial interests that are exempt from the prohibition in 18 U.S.C. 208(a). These final rule amendments would revise the existing regulatory exemptions by: Creating a new exemption that permits Government employees to participate in particular matters affecting the financial interests of nonprofit organizations in which they serve in an official capacity as officer, director or trustee, notwithstanding the employees' imputed financial interest under 18 U.S.C. 208(a); and revising the existing exemption for interests in the holdings of sector mutual funds to clarify that it applies to interests in the holdings of sector unit investment trusts.

DATES: *Effective Date:* April 5, 2013.

FOR FURTHER INFORMATION CONTACT: Christopher J. Swartz, Assistant Counsel, Office of Government Ethics; telephone: 202–482–9300; TTY: 800–877–8339; FAX: 202–482–9237.

SUPPLEMENTARY INFORMATION:

I. Rulemaking History

Section 208(a) of title 18 of the United States Code prohibits Government employees from participating in an official capacity in particular Government matters in which, to their knowledge, they or certain other persons specified in the statute have a financial interest, if the particular matter would have a direct and predictable effect on that interest. Section 208(b)(2) of title 18 permits the Office of Government Ethics (OGE) to promulgate regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a). OGE's regulations exempting various financial interests are codified at 5 CFR part 2640, subpart B.

On May 3, 2011, OGE published a set of proposed amendments to these regulations, proposing to add one new exemption and to revise an existing exemption. *See* 76 FR 24816–24820. Specifically, OGE proposed to add a new exemption, 5 CFR 2640.203(m), that would exempt the imputed financial interests of nonprofit organizations in which employees serve as officers, directors or trustees in their official capacity. OGE concluded that such financial interests are too remote or inconsequential to affect the integrity of employees' services, as explained more fully below. OGE also proposed a revision to the existing exemption, at 5 CFR 2640.201(b), that would clarify that the exemption for the holdings of a sector mutual fund was intended to apply to the holdings of a sector unit investment trust. The proposed rule provided a 60-day comment period.

The Office of Government Ethics received 64 written comments on the proposed rule. The majority of comments, 42, were submitted by nonprofit associations (including one comment that represented 32 different organizations and another comment that represented seven organizations). OGE also received comments from 16 individuals, including current and former Federal employees and other private citizens. Three executive agencies submitted comments, as did one Federal employees' union. All 64 comments addressed the proposed new exemption for official duty participation in nonprofit organizations, but only one comment, from an executive agency, addressed the proposed amendment pertaining to sector unit investment trusts.

II. Analysis of Rule Amendments, Comments and Revisions

A. Sector Unit Investment Trusts

1. Background

Among the regulatory exemptions currently found in subpart B of part 2640 are several that exempt certain financial interests in mutual funds and unit investment trusts. The Office of Government Ethics has promulgated exemptions for interests in the holdings of diversified mutual funds and diversified unit investment trusts (5 CFR 2640.201(a)), in the non-sector holdings of sector mutual funds (5 CFR 2640.201(b)(1)), and in the sector holdings of sector mutual funds when the aggregate market value of the employee's interest in the sector fund or funds does not exceed $50,000 (5 CFR 2640.201(b)(2)). Most recently, the Office of Government Ethics has promulgated one for interests in mutual funds and unit investment trusts other than interests arising from the holdings of such vehicles (5 CFR 2640.201(d)). This exemption is limited to particular matters of general applicability, as defined in 5 CFR 2640.102(m).

In promulgating these exemptions, the Office of Government Ethics recognized that pooled investment vehicles such as mutual funds and unit investment trusts generally pose fewer concerns that the financial interests will affect the integrity of the services of Government employees. The Office of Government Ethics has noted that usually ''only a limited portion of the fund's assets [are] placed in the securities of any single issuer'' and that ''an employee's interest in any one fund is only a small portion of the fund's total assets.'' 60 FR 47211 (September 11, 1995) (preamble to proposed rule).

This final rule will amend the language of the exemptions for the interests in sector mutual funds to explicitly include the interests of sector unit investment trusts. Previously the regulation, 5 CFR 2640.201(b), did not include the language ''sector unit investment trusts.'' At the time that the sector fund exemptions were promulgated, the Office of Government Ethics contemplated that the exemptions would also extend to those investment vehicles organized as sector unit investment trusts. Thus, in practice, the Office of Government Ethics has permitted executive branch

employees to apply the exemptions for interests in sector mutual funds to interests in sector unit investment trusts.

The Office of Government Ethics therefore proposed to specifically add a reference to ''sector unit investment trusts'' to 5 CFR 2640.201(b) in order to clarify that the exemptions for interests in the holdings of sector mutual funds also apply to the interests in the holdings of sector unit investment trusts. 76 FR 24818–24819. OGE also made a conforming amendment to the definition in § 2640.102(q), which defines both sector mutual fund and sector unit investment trust.

2. Comments and Revisions

The Office of Government Ethics received only one comment on the proposed revision to 5 CFR 2640.201(b). This comment, from an executive agency, simply noted that the proposed revision would be a useful update to the exemption. Therefore, for the reasons explained above, OGE is adopting as final the language of the proposed revision of § 2640.201(b) and the conforming revision of § 2640.102(q).

B. Official Participation in Nonprofit Organizations

1. Background

The new exemption at 5 CFR 2640.203(m) addresses a situation that was not generally thought to be covered by 18 U.S.C. 208 until the mid-1990s. Because it is in the best interests of the Government, a number of agencies have had a longstanding practice of assigning employees to participate on the boards of directors of certain outside nonprofit organizations, when such service is deemed to further the statutory mission and/or personnel development interests of the agency. These nonprofit organizations included such entities as professional associations, scientific societies, and health information promotion organizations. Until 1996, neither the agencies involved nor the Office of Government Ethics viewed such official participation in nonprofit organizations as being prohibited by 18 U.S.C. 208.

However, in 1996, the Office of Legal Counsel (OLC) at the Department of Justice issued an opinion concluding that section 208 generally prohibits an employee from serving, in an official capacity, as an officer, director or trustee of a private nonprofit organization. Memorandum of Deputy Assistant Attorney General, OLC, for General Counsel, Federal Bureau of Investigation, November 19, 1996, *http://www.justice.gov/olc/fbimem.2.htm.* This conclusion was premised in large part on the fact that officers, directors and trustees of an outside organization owe certain fiduciary duties to the organization under state law, which may conflict with the primary duty of loyalty that all Federal employees owe to the United States. As a consequence of this interpretation, employees were no longer permitted to serve in their official capacity as officer, director or trustee of an outside nonprofit organization, absent an individual waiver under 18 U.S.C. 208(b) or specific statutory authority permitting such service.[1]

Following the 1996 OLC opinion, agencies have continued to assign employees to serve on such outside boards by granting the employees individual waivers under 18 U.S.C. 208(b)(1). Other agencies declined to issue individual waivers (or did so rarely), often because of discomfort about waiving the application of a criminal statute. OGE fielded numerous inquiries and held many meetings with agencies and nonprofit organizations, mostly professional and scientific societies, concerning the application of section 208 to prevent official participation on outside boards. Many of the agencies and nonprofit organizations have argued that the application of section 208 created unfortunate barriers to professional development and meaningful exchange between Federal and non-Federal experts in certain professions and areas of expertise. Moreover, some of the organizations pointed out that there was a lack of uniformity within the executive branch, owing to the willingness of some agencies to grant waivers and the unwillingness of other agencies to do so, often with respect to participation in the same organization.

Additionally, the Office of Government Ethics recognized the potential for confusion in some instances when employees were permitted to serve only in a private, rather than official, capacity. For example, when an agency has policy interests that overlap with those of the nonprofit organization, it can be very difficult for the employee to avoid the mistaken impression that he or she is acting in an official capacity when participating in the organization. Further, OGE was concerned that employees in some cases were uncertain about the extent to which they were permitted to make reference to their official position or to use official time or agency resources. *See* 5 CFR 2635.702(b); 2635.704; 2635.705. While OGE recognized that such confusion no doubt could be reduced by clearer agency instructions concerning such matters as excused absence and limited use of agency resources in support of outside professional and other organizations, the fact remained that sometimes considerable continuity in subject matter between an employee's official duties and the employee's activities in an outside nonprofit organization remained, and some agencies believed it would be clearer to permit the latter to occur while the employee was on official duty, without the impediment of section 208.[2]

For all of the above reasons, the Office of Government Ethics in 2006 recommended to the President and Congress that section 208 be amended ''to specify that the financial interests of an organization are not imputed to an employee who serves as an officer or director of such organization in his or her official capacity.'' OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 33 (2006) (2006 Report), http://www.usoge.gov/ethics_docs/publications/reports_plans.aspx.*[3] In the 2006 Report, OGE recognized that it had ''regulatory authority to exempt financial interests arising from official service on boards of directors,'' but OGE opted at that time to place the issue before Congress first. No legislative changes to section 208 were enacted in response to the report, however, and OGE continued to receive expressions of concern about this matter, both from agencies and from nonprofit organizations.

Then, on March 9, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on the topic of scientific integrity. 74 FR 10671, 3 CFR, 2009 Comp., p. 354. In this memorandum, the

[1] In rare instances, an employee also may be able to serve pursuant to a waiver of fiduciary duties by the organization, if such a waiver is permitted by state law. *See* Memorandum of Deputy Assistant Attorney General, OLC, to General Counsel, General Services Administration, August 7, 1998, *http://www.justice.gov/olc/gsa208fn.htm.*

[2] As noted in the preamble to the proposed rule, nothing in the exemption limits the ability of an employee to serve as officer, director or trustee of a nonprofit organization as a personal outside activity, when the agency has not assigned the employee to serve in an official capacity. *See* 76 FR 24817, Note 2. Moreover, nothing in the exemption is intended to affect the current ability of agencies to assign employees to serve as official liaisons or to serve in similar nonfiduciary positions that do not implicate 18 U.S.C. 208. *See* OGE Informal Advisory Letter 95 x 8.

[3] OGE was required to issue this report, in consultation with the Department of Justice, by section 8403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458 (December 17, 2004).

President specifically requested that the Office of Science and Technology Policy (OSTP) provide recommendations to address, among other things, the retention of staff in scientific and technical positions within the executive branch. In response, the Director of OSTP issued a memorandum urging all agencies to establish policies that promote and facilitate the professional development of Government scientists and engineers. John P. Holdren, Director, OSTP, ''Scientific Integrity,'' Memorandum for the Heads of Executive Departments and Agencies, at 3, December 17, 2010. The OSTP memorandum specifically called for policies to ''[a]llow full participation in professional or scholarly societies, committees, task forces and other specialized bodies of professional societies, *including removing barriers for serving as officers or on governing boards of such societies.*'' *Id.* at 4 (emphasis added).

In response to parallel initiatives, in August of 2010, the Director of the Office of Personnel Management (OPM) wrote to OGE to express several concerns about the application of section 208 to employees serving in their official capacity as officers and directors of scientific and professional organizations. Letter of John Berry, Director, OPM, to Robert I. Cusick, Director, Office of Government Ethics, August 16, 2010 (OPM Letter). Among other things, the Director of OPM wrote:

> Policies restricting Federal scientists' and professionals' involvement in professional organizations negatively impact the agencies employing such individuals. Restrictions act as a barrier to employees achieving professional stature in their respective fields, which may discourage scientists and professionals from considering Federal employment. Restrictions also serve to isolate scientists and professionals from the full exchange of knowledge and ideas necessary to stay current and participate fully as members of the greater scientific community. As a result, Federal scientists and professionals are hampered in their ability to provide the best possible advice and service to their respective agencies. These restrictions are particularly burdensome for the ''research-grade'' scientists whose retention and promotion evaluations depend in part on the recognition of stature by one's scientific peers. U.S. Office of Personnel Management's Research Grade Evaluation Guide, Factor 4; Contributions, Impact, and Stature, September, 2006; *http://www.opm.gov/Fedclass/gsresch.pdf.*

OPM Letter at 2. The Director of OPM asked OGE to consider exercising its authority under 18 U.S.C. 208(b)(2) to exempt the financial interests of organizations in which employees serve in their official capacity, on the ground that such interests are ''too remote and inconsequential to warrant disqualification pursuant to section 208.'' Id. at 3.

To address OPM's concerns, as well as the concerns raised by other agencies and outside organizations since 1996, and consistent with Administration efforts designed to ensure scientific integrity, OGE determined that it was appropriate to exercise its authority under 18 U.S.C. 208(b)(2) to exempt the imputed financial interests of nonprofit organizations in which employees serve as officers, directors or trustees in their official capacity. Pursuant to the statute, OGE found that such financial interests are too remote or inconsequential to affect the integrity of employees' services, for several reasons. As explained in OGE's 2006 Report, which was issued after consultation with the Department of Justice: ''OGE believes that the conflict identified by OLC [between the employee's duty of loyalty to the Government and the employee's fiduciary duties to the outside organization] may be more theoretical than real, particularly because employees assigned to serve on outside boards remain subject to important Federal controls, such as the authority to review and approve (or deny) the official activity in the first place, and the authority to order the individual to limit the activity, or even resign the position, in the event of a true conflict with Federal interests. In addition, an agency generally approves such activities only where the organization's interests are in consonance with the agency's own interests. In an era when 'public/private partnerships' are promoted as a positive way for Government to achieve its objectives more efficiently, ethics officials find it difficult to explain and justify to agency employees why a waiver is required for official board services that have been determined by the agency to be proper.'' 2006 Report at 33. In short, the potential for a real conflict of interest is too remote or inconsequential to affect the integrity of an employee's services under these circumstances. For the above noted reasons, OGE published a proposed rule on May 3, 2011, creating an exemption for the imputed financial interests of nonprofit organizations in which employees serve as officers, directors or trustees in their official capacity from the prohibition of 18 U.S.C. 208(a).

As we noted in the preamble to the proposed rule, agencies will continue to retain discretion to impose meaningful controls and limits on employees serving in nonprofit organizations. 76 FR 24818. The Note following section 2640.203(m) clarifies that agencies must satisfy themselves that they have authority to assign employees to serve in such organizations in the first place; the exemption does not itself constitute such authority, but simply removes the bar of the conflict of interest law. Moreover, agency decisions to permit (or not permit) official participation in any particular outside organization will be informed by numerous legal, policy, and managerial considerations, such as: The degree to which the activity will further the agency's statutory mission; the availability of agency funds and other resources to support such activities; the degree to which the agency is able and willing to assign employees to serve in other, similar organizations without appearing to single out one organization unreasonably; and the demands of the agency's workload and the particular employee's other assignments.[4] Even when an agency does permit an employee to serve as officer, director or trustee of a nonprofit organization, the agency has discretion to limit or condition the official duty activity in a manner consistent with the needs and interests of the agency. This may include limits on participation in lobbying, fundraising, regulatory, investigational, or representational activities, as determined by the agency. For example, where agencies have granted individual waivers in the past, under section 208(b)(1), some agencies have required employees to refrain from participating in the fundraising activities of the outside organization or from participating in agency decisions to award grants or contracts to the organization; agencies will remain free to impose similar limits as they deem appropriate in the future.[5] *See* OGE Memorandum DO–07–006, *http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2007/do07006.html.* In other words, nothing in the regulatory exemption is intended to interfere with the discretion of agencies to assign duties and describe the limits of official assignments, including assignments that involve outside nonprofit organizations.

[4] Even prior to the 1996 OLC opinion, some agencies rarely if ever permitted employees to serve as officers, directors or trustees of outside organizations in an official capacity, because of fiscal, policy or managerial concerns. Notwithstanding the regulatory exemption, agencies may continue to decline to assign employees to serve in an official capacity for similar reasons.

[5] In any event, agency decisions to permit an employee to engage in official fundraising for a nonprofit organization must take into account the requirements of 5 CFR 2635.808(b) and 5 CFR part 950.

2. Comments and Revisions

The overwhelming majority of comments were strongly supportive of the proposed new exemption, 5 CFR 2640.203(m), which would exempt the imputed financial interests of nonprofit organizations in which an employee serves, solely in an official Government capacity, as officer, director or trustee. Most of these comments agreed with OGE's conclusion that the exemption would remove an unnecessary barrier to professional development for Government employees and the achievement of other agency missions and goals. Several of the comments recited instances in which the current application of 18 U.S.C. 208 had led employees to resign from positions or decline service, as well as instances in which there was confusion among agency employees and officials of nonprofit organizations about what activities were permitted by different agencies, which had differing policies and practices with regard to the issuance of individual waivers under 18 U.S.C. 208(b)(1). Some commenters also expressed the view that increased participation in scientific and professional organizations would enhance the quality and integrity of government policymaking: As one environmental advocacy organization put it, such participation ''will, in our view, actually further the quality of information used in official decision-making and enhance the transparency of that decision-making'' while also tending to deter ''political manipulation'' of scientific policies.

A small number of comments did raise certain concerns about the proposed exemption. One individual stated flatly that ''no Federal employee should serve on any non-profit board,'' because, among other things, she believed that nonprofit organizations are not accountable to the public, their operations are not transparent, and they benefit from unwarranted advantages under the tax laws. This view, however, contradicts decades of executive branch policy and is inconsistent with the spirit of the President's 2009 memorandum and with Director Barry's policy objectives as stated in his letter of August 16, 2012. Further, the Office of Government Ethics notes that the criminal conflict of interest law and the regulations promulgated thereunder provide an appropriate mechanism for addressing general concerns about the role of executive branch personnel serving at nonprofit organizations in the United States.

Another individual similarly expressed ''grave misgivings'' about the involvement of Federal employees in nonprofit organizations, in part because some nonprofit organizations provide products and services, and the participation of Federal employees may be taken as an endorsement that creates an unfair competitive advantage over for-profit businesses that offer the same products and services. This commenter recommended that any exemption should be conditioned on the Government publishing a list of approved nonprofit professional organizations, which would constitute the only permissible opportunities for official service. OGE does not agree that the mere participation of a Federal employee on the board of a nonprofit organization necessarily constitutes a general endorsement of that organization's products and services, but in any event, as noted above, OGE believes that the proposed regulatory exemption appropriately recognizes the discretion of agencies to use their sound judgment to determine which nonprofit organizations provide acceptable opportunities for professional development and the achievement of other agency objectives. Moreover, given the large number and wide range of nonprofit organizations, as well as the significant variations among agency missions, OGE does not believe it is either feasible or desirable to prescribe a single list of approved organizations for the entire Government.

One of these individuals, as well as another individual commenter, raised concerns about the possibility that Federal employees serving in nonprofit organizations could become involved in inappropriate fundraising activities. As noted above, however, any fundraising by agency employees in their official capacity is already subject to important limits. Furthermore, the textual Note following § 2640.203(m) makes clear that agencies retain the discretion to limit assignments involving nonprofit organizations, and the preamble to the proposed rule explains that such limits may include instructions not to engage in fundraising activities. Such limitations on fundraising are already common in individual waivers that agencies have issued under 18 U.S.C. 208(b)(1), and OGE anticipates that many agencies will continue to apply similar limits when assigning employees to participate in nonprofit organizations in the future.

One organization generally supported the proposed exemption, but recommended that the rule be revised to require that agencies post information on their Web sites concerning each employee serving in an official capacity on the board of a nonprofit organization, including the employee's role on the board, the term of service and a description of the nonprofit organization. The commenter believed that such transparency was necessary because some nonprofit organizations may be ''dominated by corporate members'' or may receive ''donations by special interests with specific policy goals,'' and the participation of Federal employees in those organizations might lead to those employees being inappropriately influenced with respect to agency policies. In OGE's view, even though an agency may choose to post information about official participation as a good practice, this would not be an appropriate condition for a regulatory exemption issued under 18 U.S.C. 208(b)(2). Regulatory exemptions are intended to be self-executing, and employees should be able to rely on the exemptions without individual agency action as a condition, including disclosure of information; indeed, this is one of the key distinctions between an individual waiver under 18 U.S.C. 208(b)(1) and a regulatory exemption under section 208(b)(2). *Compare* 18 U.S.C. 208(b)(1) (employee must disclose financial interest and receive individual determination), with 18 U.S.C. 208(b)(2) (regulation applies to all employees or entire class of employees).

A Federal employee labor union commented that it ''strongly supports the adoption'' of the proposed recommendation, but expressed ''some concern with the degree of discretion left to agencies to decide whether to permit employee participation in their official capacity.'' In particular, the union stated that employees have ''a First Amendment right to speak on matters of public concern and the government's interest in censoring the content of that speech, by declining to permit employee participation, would have to outweigh employees' strong interest in speech on such matters to the nonprofit professional associations.'' The union therefore suggested that OGE revise the proposed rule to specify that ''permission to participate is not to be denied for improper reasons.'' OGE has not adopted this suggested revision. OGE's role is not to determine agency management practices concerning the assignment of work, beyond the determination of whether an assignment is consistent with the conflict of interest laws and regulations. Moreover, as stated above, nothing in the rule limits the ability of an employee to serve as an officer, director or trustee of a nonprofit organization as a personal outside activity, when the agency has not

assigned the employee to serve in an official capacity.

One agency recommended that OGE add the parenthetical phrase ''(or equivalent position)'' following the terms ''officer, director or trustee'' in § 2640.203(m). The agency pointed out that some nonprofit organizations do not actually use the terms ''officer,'' ''director,'' or ''trustee'' to describe the organizational leadership but rather use other terms, such as ''council member.'' OGE has not adopted the recommendation of the commenter, because the exemption needs to reflect the terms of the statute itself, which specifies officer, director and trustee. OGE certainly is aware that some nonprofit organizations do not use the actual terms of section 208(a) in the titles of their officials, but this has never been the end of the inquiry into whether section 208 applies. In such cases, ethics officials must determine whether the position has the same legal responsibilities and characteristics as the positions described in 18 U.S.C. 208(a). In some cases, the position does not correspond to an officer, director or trustee position because the position is solely advisory or honorary or otherwise does not carry the powers and fiduciary duties associated with officers, directors and trustees; in other cases, the position in question truly does entail the powers and duties of an officer, director or trustee within the meaning of the law. Agency ethics officials will need to engage in the same inquiry with respect to the coverage of the regulatory exemption, although of course no exemption would be needed if the agency determines that the employee does not hold any section 208 position in the first place. In OGE's experience, such questions typically can be resolved by consulting with counsel for the nonprofit organization and/or by examining the organization's governing documents.

Other comments supported the proposed new exemption but requested that OGE provide guidance on a variety of subjects, including agency implementation of official assignments with outside organizations, as well as the application of conflict of interest requirements to employees serving in their personal, rather than official, capacity. While this final rule is not the place for such detailed guidance, OGE certainly will be available to agency ethics officials for assistance with the application of this and all other ethics rules and conflict of interest laws. As the Note following § 2640.203(m) emphasizes, however, agency decisions to permit official participation in any particular outside organization will be informed by numerous legal, policy, and managerial considerations, and many of those considerations fall outside of OGE's area of expertise.

Therefore, for the reasons explained above, the Office of Government Ethics is adopting the new regulatory exemption at 5 CFR 2640.203(m). OGE is, however, making one revision to the language of the proposed rule: OGE is clarifying that the exemption applies not just to current positions but also to prospective positions as officer, director or trustee. OGE anticipates that some employees may have duties that could affect an organization in which they plan to serve in an official capacity in the future or that some employees might even occupy one position in the present (e.g., vice president) but have an arrangement to serve in another position in the organization in the future (e.g., president). In order to make clear that the exemption covers prospective service, the final rule will read ''nonprofit organization in which the employee serves (or is seeking or has an arrangement to serve) * * *'' Other than this revision, the final rule adopts the language of the proposed rule.

III. 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 final rule would not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require 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 final 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 Office of Government Ethics has determined that this rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

Executive Order 12866

In promulgating this rule amendment, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This rule has also been reviewed by the Office of Management and Budget under that Executive order. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering this regulation, since it only adds to OGE's financial interests regulation a new regulatory exemption and a clarification of an existing exemption. Finally, this rulemaking is not economically significant under the Executive order and would not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final amendatory regulation 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 2640

Conflict of interests, Government employees.

Approved: February 28, 2013.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2640 as follows:

PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

■ 1. The authority citation for part 2640 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; 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.

Subpart A—General Provisions

■ 2. In § 2640.102, paragraph (q) is revised to read as follows:

§ 2640.102 Definitions.

* * * * *

(q) *Sector mutual fund or sector unit investment trust* means a mutual fund or

unit investment trust that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

* * * * *

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

■ 3. In § 2640.201, paragraphs (b)(1) and (2) are revised to read as follows:

§ 2640.201 Exemptions for interests in mutual funds, unit investments trusts, and employee benefit plans.

* * * * *

(b) *Sector mutual funds and sector unit investment trusts.* (1) An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund or a sector unit investment trust where the affected holding is not invested in the sector in which the fund or trust concentrates, and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or unit investment trust.

(2)(i) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund or a sector unit investment trust where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or the unit investment trust and the aggregate market value of interests in any sector fund or funds and any sector unit investment trust or trusts does not exceed $50,000.

(ii) For purposes of calculating the $50,000 de minimis amount in paragraph (b)(2)(i) of this section, an employee must aggregate the market value of all sector mutual funds and sector unit investment trusts in which he has a disqualifying financial interest and that concentrate in the same sector and have one or more holdings that may be affected by the particular matter.

* * * * *

■ 4. Section 2640.203 is amended by adding paragraph (m) to read as follows:

§ 2640.203 Miscellaneous exemptions.

(m) *Official participation in nonprofit organizations.* An employee may participate in any particular matter where the disqualifying financial interest is that of a nonprofit organization in which the employee serves (or is seeking or has an arrangement to serve), solely in an official capacity, as an officer, director or trustee.

Note to paragraph (m): Nothing in this paragraph shall be deemed independent authority for an agency to assign an employee to serve in an official capacity with a particular nonprofit organization. Agencies will make such determinations based on an evaluation of their own statutory authorities and missions. Individual agency decisions to permit (or not permit) an employee to serve in an official capacity necessarily involve a range of legal, policy, and managerial considerations, and nothing in this paragraph is intended to interfere with an agency's discretion to assign official duties and limit such assignments as the agency deems appropriate.

[FR Doc. 2013–05243 Filed 3–5–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1037; Directorate Identifier 2011–NE–30–AD; Amendment 39–17373; AD 2013–05–01]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all Turbomeca S.A. Makila 1A2 turboshaft engines. That AD currently requires replacement of certain serial number (S/N) N2 sensor harnesses. This AD requires replacement of the same S/N harnesses, and requires replacement of additional S/N N2 sensor harnesses. This AD was prompted by corrosion detected in affected N2 sensor harnesses. We are issuing this AD to prevent inadvertent activation of the 65% N1 back up mode, resulting in N2 speed fluctuation, significant power loss, and emergency landing of the helicopter.

DATES: This AD is effective March 21, 2013.

We must receive any comments on this AD by April 22, 2013.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal: Go* to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Turbomeca, 40220 Tarnos, France, phone: +33 (0)5 59 74 40 00; telex: 570 042; fax: +33 (0)5 59 74 45 15; Web site: *http://www.turbomeca-support.com*. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Rose Len, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *rose.len@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

On November 9, 2011, we issued AD 2011–24–08, Amendment 39–16872 (76 FR 72091, November 22, 2011), for all Turbomeca S.A. Makila 1A2 turboshaft engines with certain part number (P/N) N2 sensor harnesses installed. That AD requires replacement of certain S/Ns of the affected N2 sensor harnesses, on the two engines of the helicopter. That AD resulted from mandatory continuing airworthiness information issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. We issued that AD to prevent inadvertent activation of the 65% N1 backup control mode, as a result of defective N2 sensor harness crimps, which could result in engine power loss and emergency landing of the helicopter.

Actions Since AD Was Issued

Since we issued AD 2011–24–08 (76 FR 72091, November 22, 2011), Turbomeca S.A. has determined through investigation that additional S/Ns of the N2 sensor harness, P/N 0 301 52 001 0, are affected and require replacement.