

## EPA ETHICS ADVISORY 94-15

SUBJECT: EPA Order 1000.28 - Ethics

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General Law Branch  
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TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to transmit EPA Order 1000.28 of June 7, 1994, "Ethics," which assigns responsibility for decisions and determinations regarding the EPA ethics program among the Designated Agency Ethics Official (DAEO), the Alternate Agency Ethics Official (AAEO), the Deputy Ethics Officials (DEOs), and the Director of the Executive Resources and Special Programs Division of the Office of Human Resources and Organizational Services. This Ethics Advisory focuses on the responsibilities of the DEOs and discusses factors to be taken into account in carrying out these responsibilities.

The "Standards of Ethical Conduct for Employees of the Executive Branch" at 5 C.F.R. Part 2635 provide for a number of determinations by "agency designees" regarding employees' requests. **DEOs are responsible for making most of these determinations.** DEOs are also responsible for carrying out the confidential financial disclosure program for their organizations under 5 C.F.R. Part 2638<sup>1</sup> and for ensuring that employees in their organizations who file confidential or public financial

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<sup>1</sup> See EPA Ethics Advisories 92-18 (December 7, 1992), 93-03 (April 29, 1993), 94-07 (February 3, 1994), 94-09 (March 4, 1994), 94-12 (May 13, 1994) together with materials distributed at the "Train the Trainers and Reviewers" conferences in October of 1992 and 1993.

disclosure reports receive annual ethics training under 5 C.F.R. Part 2634.<sup>2</sup>

### **Who are the DEOs?**

Paragraph 6 of EPA Order 1000.28 designates the following employees as DEOs for their organizations:

Assistant Administrators  
 Inspector General  
 Associate Administrators  
 Office Directors reporting to Assistant Administrators  
 Heads of staff offices reporting directly to the Administrator  
 Laboratory Directors reporting to headquarters  
 Regional Counsels  
 Regional Administrators

The DAEO may appoint additional DEOs.<sup>3</sup> Confirmed Presidential appointees, Associate Administrators, and Regional Administrators may delegate all of their DEO functions to their Deputies. Other DEOs may not delegate their functions except for determinations under paragraphs 6.d.(5), 6.d.(7), 6.d.(8), and 6.d.(14). However, all DEOs may designate staff employees to assist them in carrying out their duties. Such designations should be in writing with a copy sent to the DAEO.

DEOs who are Assistant Administrators (or Deputy Assistant Administrators) carry out DEO functions for their immediate offices and for the DEOs who report to them, and Office Directors carry out DEO functions for any DEOs who may report to them. The DAEO performs the DEO functions regarding requests by Assistant Administrators, Associate Administrators, Regional Administrators, and Regional Counsels. Employees who are "acting" for DEOs assume DEO functions while they are serving in an "acting" capacity.

### **What are the Responsibilities and Authorities of DEOs?**

EPA Order 1000.28 delegates the following responsibilities and authorities to DEOs:

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<sup>2</sup> **See** EPA Ethics Advisories 90-10 (October 23, 1990), 93-03 (April 29, 1993), 94-07 (February 3, 1994), 94-09 (March 4, 1994), and 94-12 (May 13, 1994).

<sup>3</sup> **See** EPA Ethics Advisories 84-7 (April 6, 1994) and 92-9 (March 16, 1992).

1. Providing oral and written advice on ethics questions for employees in their organizations (5 C.F.R. §2638.204).

DEOs are authorized to provide oral and written advice to employees in their organizations regarding **all** government ethics questions. Employees may rely on such advice for purposes of 5 C.F.R. §2635.107, **Ethics advice**, which provides that

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.

Paragraph 3 of EPA Order 1000.28 encourages Ethics Officials to provide advice **in writing**, especially where there are factual issues to be resolved. Copies of all written advice must be provided to the DAEO. It is also advisable for DEOs to keep "desk notes" of ethics advice, which can be referred to if a question arises later.<sup>4</sup>

2. Approving acceptance of external awards, or gifts incident to bona fide, non-monetary awards worth more than \$200 (5 C.F.R. §2635.204(d)(1)).

DEOs make determinations regarding acceptance of awards and honorary degrees under the exception at 5 C.F.R. §2635.204(d)(1) to the general prohibition against accepting gifts from "a prohibited source" or gifts which are given "because of an employee's official position." **See** 5 C.F.R.

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<sup>4</sup> It is a good idea to use a computer for such "desk notes" so that information can be retrieved easily.

§2635.202(a). Before an employee may accept an award or honorary degree under 5 C.F.R. §2635.204(d)(1), the DEO must determine **in writing** that

the award is made as part of an established program of recognition:

(i) Under which awards have been made on a regular basis or which is funded, wholly or in part, to ensure its continuation on a regular basis; and

(ii) Under which selection of award recipients is made pursuant to written standards.

3. Approving acceptance of honorary degrees from institutions of higher education (5 C.F.R. §2635.204(d)(2)).

Before an employee may accept an honorary degree from an institution of higher education, the DEO must make "a written determination \* \* \* that the timing of the award or the degree would not cause a reasonable person to question the employee's impartiality in a matter affecting the institution."

4. Directing employees to file written disqualification statements pursuant to 5 C.F.R. §2635.402(c)(1).

An employee who is barred by 18 U.S.C. §208(a) from participation in a "particular matter" which affects the employee's own financial interest or a financial interest imputed to the employee (**see** 5 C.F.R. §2635.402(b)(2)) is ordinarily not required to take any action other than to refrain from the prohibited activity. However, in appropriate cases the employee's DEO may require the employee to issue a "recusal statement" to document his or her disqualification. A "recusal statement" is appropriate where EPA personnel other than the employee's immediate supervisor are likely to refer "particular matters" to the employee's attention. Such "recusal statements" should be addressed to employees' supervisors and to everyone who reports directly to the employee. A recusal statement should briefly describe the scope of the recusal and indicate who will be dealing with matters from which the employee is recused.

5. Disposing of a perishable gift item by transferring it to charity, sharing it in the office, or destroying it (5 C.F.R. §2635.205(a)(2)).

The cited provision states:

When it is not practical to return a tangible item because it is perishable, the item may, at the discretion of the employee's supervisor or an agency

ethics official, be given to an appropriate charity, shared within the recipient's office, or destroyed.

Example 1: With approval by the recipient's supervisor, a floral arrangement sent by a disability

claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

DEOs may redelegate this function to lower-level supervisors.

6. In consultation with the DAEO or Alternate Agency Ethics Official (AAEO), directing an employee to divest disqualifying financial interests (5 C.F.R. §2635.402(e)(2)).

In appropriate cases, DEOs may direct employees in their organizations to dispose of financial interests which disqualify them from participation in matters which are critical to their job duties or which another employee cannot be readily assigned to perform. Employees may also be directed to divest financial interests which employees in the organization are prohibited from holding under EPA supplemental regulations. The cited provision states:

**Directed divestiture.** An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with §2635.403(a), or if the agency determines in accordance with §2635.403(b) that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

Under 5 C.F.R. §2635.403(b) a "substantial conflict" exists if

the holding of such interest or interests will:

(1) Require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired; or

(2) Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

Example 1: An Air Force employee who owns stock in a major aircraft engine manufacturer is being considered for promotion to a position that involves responsibility for development of a new fighter airplane. If the agency determined that engineering and other decisions about the Air Force's requirements for the fighter would directly and predictably affect his financial interests, the employee could not, by virtue of 18 U.S.C. 208(a), perform these significant duties of the position while retaining his stock in the company. The agency can require the employee to sell his stock as a condition of being selected for the position rather than allowing him to disqualify himself in particular matters.

7. Making determinations of agency interest for an employee to accept a sponsor's gift of free attendance at a "widely-attended gathering" (5 C.F.R. §2635.204(g)(2), (3), (4), and (5)).

If an employee is assigned to participate as a speaker or panel participant, or otherwise to present information on behalf of EPA at a conference or other "widely-attended" event, the employee is in a duty status and needs no further approval to accept free attendance (including food, refreshments, entertainment, instruction, and training materials--**see** 5 C.F.R. §2635.204(g)(4)). **See also** EPA Ethics Advisory 94-11 (March 25, 1994) regarding attendance at press dinners.<sup>5</sup>

If the employee is merely attending the "widely-attended" event, and is not participating as described above, the DEO's determination is required before the employee can accept "free attendance."<sup>6</sup> Where the employee's attendance "is in the interest of the agency because it will further agency programs or operations," and the sponsor is not a "prohibited source" as described below, such approval is generally appropriate. However, where the sponsor

is a person who has interests that may be substantially affected by the performance or nonperformance of an employee's official duties or an association or organization the majority of whose members have such interests, the employee's participation may be determined to be in the interest of the agency only

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<sup>5</sup> If the event occurs outside the local commuting area, advance approval from the DAEO (or the DAEO's designee) to accept official travel expenses may be required. **See** EPA Ethics Advisory 92-26 (December 24, 1992).

<sup>6</sup> **See** 5 C.F.R. §2635.204(g)(4) for definition.

where there is a **written** finding by the agency designee that the agency's interest in the employee's participation in the event outweighs concern that acceptance of the gift of free attendance may or may appear to improperly influence the employee in the performance of his official duties. Relevant factors that should be considered by the agency designee include the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the sponsor of the event, the significance of the employee's role in any such matter, the purpose of the event, the identity of other expected participants and the monetary value of the gift of free attendance.

(ii) A blanket determination of agency interest may be issued to cover all or any category of invitees other than those as to whom a finding is required by paragraph (g) (3) (i) of this section. Where a finding under paragraph (g) (3) (i) of this section is required, a written determination of agency interest, including the necessary finding, may be issued to cover two or more employees whose duties similarly affect the interests of the sponsor or its members.

[5 C.F.R. §2635.204(g) (3), **emphasis added**]

DEOs may redelegate this function to lower-level supervisors.

8. Approving attendance of an accompanying spouse at a widely-attended gathering (5 C.F.R. §2635.204(g) (6)).

DEOs may authorize an employee to accept a sponsor's invitation to an accompanying spouse to participate in all or a portion of a "widely-attended gathering" where an employee is permitted to accept free attendance. Such authorization is appropriate only where "others in attendance will generally be accompanied by spouses."

\_\_\_\_ DEOs may redelegate this function to lower-level supervisors.

9. Making determinations regarding impartiality under 5 C.F.R. Part 2635, Subpart E.

\_\_\_\_ Under 5 C.F.R. §2635.502(a), an employee is barred from participating in a "particular matter involving a specific parties" which is likely to have a "direct and predictable effect" on the financial interest of a member of the employee's household, or where the employee knows that a person with whom he

or she has a "covered relationship"<sup>7</sup> is or represents a party to such a matter **and** where a "reasonable person with knowledge of the relevant facts" would question the employee's impartiality."

An employee may resolve any concern about "impartiality" by asking for a determination by the DEO. If the DEO determines that "a reasonable person with knowledge of the relevant facts" would not question the employee's impartiality (**see** 5 C.F.R. §2635.502(c)), the employee may participate despite any personal concern about impartiality. The regulation provides the following examples of appropriate determinations:

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<sup>7</sup> Under 5 C.F.R. §2635.502(b)(1), an employee has a "covered relationship" with the following persons or entities:

(i) A person, other than a prospective employer described in Sec. 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction; \* \* \*

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

Example 1: An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2: An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

[5 C.F.R. §2635.502(b) (3)]

If the DEO determines that a "reasonable person with knowledge of the relevant facts" **would** question the employee's impartiality, the DEO may nonetheless authorize the employee's participation by determining that (1) the employee's participation would not violate 18 U.S.C. §208(a)<sup>8</sup> and that (2) "in light of all relevant circumstances, \* \* \* the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." In making this determination, the DEO should consider the following:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would

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<sup>8</sup> This is the criminal provision that bars employees from participation in "particular matters" which affect their own financial interests or the financial interests of their spouses; minor children; general partners; organizations or entities in which they are serving as officers, directors, general partners, trustees, or employees; or persons with whom employees are negotiating or have arrangements regarding prospective employment. **See** 5 C.F.R. Parts 2635, Subpart D.

have upon the financial interests of the person involved in the relationship;

(3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;

(4) The sensitivity of the matter;

(5) The difficulty of reassigning the matter to another employee; and

(6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

[5 C.F.R. §2635.502(d)(1) - (d)(6)]

The regulation provides the following examples of appropriate determinations under 5 C.F.R. §2635.502(d):

Example 1: The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected, the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See Sec. 2635.402.

Example 2: A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government

for the employee to pass on a routine filing by the particular brokerage house.

Example 3: An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

An employee who is concerned that a situation other than a "specific party" matter involving a member of the employee's household or a person or entity with which the employee has a "covered relationship" would cause "a reasonable person with knowledge of the relevant facts" to question his or her impartiality is encouraged to seek a determination by the DEO.<sup>9</sup> DEOs may also make determinations under Subpart E on their own initiative or at the request of employees' supervisors or others who are responsible for employees' assignments.<sup>10</sup> **See** 5 C.F.R. §§2635.502(a)(2) and 2635.502(c). It is important to note that

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<sup>9</sup> Although "specific party" matters are more likely than rulemaking or policy matters to raise impartiality concerns, the regulation suggests that other situations might also create problems. For instance, 5 C.F.R. §2635.802(b), Example 1, states that an EPA employee who is an officer in an environmental advocacy organization should not participate in developing regulations where the organization is likely to provide comments and that the employee should resign from the position in the outside organization if participation in the rulemaking process is an essential part of the employee's duties.

<sup>10</sup> A stock holding which would not give rise to a statutory prohibition under 18 U.S.C. §208(a) and Subpart D should not be regarded as an "appearance" problem under Subpart E. This is because, in the absence of a waiver under 18 U.S.C. §208(b)(1) or (b)(3) or an applicable exemption under 18 U.S.C. §208(b)(2), the statutory prohibition itself is extremely broad and is intended to encompass any concern about "appearances." The prohibition applies to any "particular matter," including a rulemaking or policy matter, as well as a "specific party" matter, which has a "direct and predictable" effect on the financial interest, no matter how small the effect may be.

[a]n employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.  
[5 C.F.R. §2635.502(f)]

Authorizations under 5 C.F.R. §2635.502(d) **must** be documented in writing if the employee so requests. Even where an employee does not request documentation, it is advisable for DEOs to create a written record of determinations and authorizations under 5 C.F.R. §2635.502(c) and (d). Otherwise, it might be impossible to establish what information was provided by the employee and the considerations on which the determination or authorization was based if the decision is called into question at a later date. **See** 5 C.F.R. §2635.107, **Ethics advice.**

10. Authorizing participation in a matter affecting financial interests of a prospective employer where the employee is "seeking employment" but is not "negotiating" for employment (5 C.F.R. §2635.605(b)).

DEOs may determine under 5 C.F.R. §2635.605(b) that the Agency's interest in an employee's participation in a "particular matter" which "directly and predictably"<sup>11</sup> affects a person or organization with which the employee is "seeking employment" outweighs concern about the employee's impartiality. Such determinations permit an employee to participate in such a "particular matter" even though a "reasonable person with knowledge of the relevant facts" would be likely to question the employee's impartiality.

Determinations under 5 C.F.R. §2635.605(b) are particularly sensitive because: (1) it is difficult to ascertain when communications regarding future employment become "negotiations" which invoke the statutory restriction, and (2) such situations **always** raise reasonable concerns about an employee's impartiality. **See** 5 C.F.R. §2635.605(b). As a general rule, such determinations should not authorize participation in a "particular matter" which specifically involves a prospective future employer unless an employee's communications regarding future employment have consisted only of widespread distribution of a **curriculum vitae**. It is essential that employees understand that any further communications may constitute "negotiations" and invoke the criminal provision at 18 U.S.C. §208(a). **A DEO cannot authorize an employee's participation where the employee is**

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<sup>11</sup> **See** 5 C.F.R. §2635.402(b)(3) and 5 C.F.R. §2635.603(b) for definitions.

actually "negotiating" for employment; such determinations are reserved for the DAEO under paragraph 4. b. (8) of EPA Order 1000.28.<sup>12</sup>

11. Determining whether an employee should be subject to a period of disqualification where the employee has sought, but is no longer seeking, employment (5 C.F.R. §2635.606(b)).

In appropriate cases, DEOs may determine that an employee who has been negotiating for future employment, but is no longer doing so, must continue to refrain from participation in "particular matters" which "directly and predictably" affect the financial interests of the former prospective employer. The cited provision states:

**Offer rejected or not made.** The agency designee for the purpose of §2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all the relevant factors, including those listed in Sec. 2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking process outweighs the Government's interest in the employee's participation in the particular matter.

Example 1: An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer her the partnership position she sought. Even though she is no longer seeking employment with the firm, she may continue to be disqualified from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, she could act impartially in

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<sup>12</sup> We are not aware of any instance where a waiver under 18 U.S.C. §208(b)(1) has been granted to permit an employee to participate in a "particular matter" having a "direct and predictable effect" on the financial interests of a person or organization with which the employee was "negotiating" for employment.

the matter outweighs the Government's interest in her participation.

It is important to note that the fact that a prospective employer did **not** extend an offer may be just as important a consideration in deciding whether a "reasonable person" would question the employee's impartiality and whether the "Government's interest in the employee's participation" outweighs such concern. Employees may be biased **against** former prospective employers as well as biased **in their favor**.

12. Managing the collection and review of Confidential Financial Disclosure Reports (SF 450s) and ensuring that any necessary remedial action is taken (see 5 C.F.R. §§2634.602, 2634.604, 2634.605, and 2634, Subpart I; EPA Ethics Advisory 92-21 (December 21, 1992), and EPA Ethics Advisory 94-3 (April 20, 1993).

13. Providing written decisions regarding certain outside employment requests (Supplemental Ethics Regulations to be published at 5 C.F.R. Part 6401.)

EPA regulations at 40 C.F.R. §3.508 have long required EPA employees to obtain advance approval from their DEOs for certain types of outside employment. Office of Government Ethics regulations at 5 C.F.R. §2635.803 authorize agencies to continue to require such approval in supplemental agency regulations. EPA's supplemental regulations to be published at 5 C.F.R. Part 6401 will continue the requirement for advance approval for certain types of outside employment. Until supplemental regulations are effective, the requirement at 40 C.F.R. §3.508 continues to apply.

DEOs' decisions regarding requests for approval of outside employment are governed by 5 C.F.R. Part 2635, Subpart H, **Outside Activities**. Outside employment may not be approved unless it would be consistent with the considerations discussed in Subpart H, and outside employment may not be disapproved unless it would be inconsistent with the considerations discussed in Subpart H.

14. Maintaining a current file of EPA Ethics Advisories that is available to employees.

DEOs are expected to maintain copies of EPA Ethics Advisories for the use of employees in their organizations. It is also advisable to distribute copies of certain Ethics Advisories throughout a DEO's organization. For example, EPA Ethics Advisory 92-26 (December 24, 1992), "Revised Rule on Acceptance of Travel Expenses," provides useful information about accepting official travel expenses from outside sources that all

employees who travel on official business (and their administrative assistants) will find useful.

DEOs may redelegate this function to other employees in their organizations.

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This Office is available to assist you in answering any questions from employees in your organizations and in making any determinations under EPA Order 1000.28. Please call me, or call Don Nantkes or Hale Hawbecker, at (202) 260-4550 for assistance.

Attachment

cc: Office of Government Ethics

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