

Dated: January 19, 1996.
Philip Lader,
Administrator.
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13 CFR Part 105

Standards of Conduct and Other Employee Responsibilities

AGENCY: Small Business Administration.
ACTION: Final rule.

SUMMARY: The Small Business Administration (SBA) amends its regulations governing employee standards of conduct. This amendment repeals provisions that are superseded by the Office of Government Ethics (OGE) Uniform Standards of Conduct for Employees of the Executive Branch (5 CFR Part 2635); amends one provision by adding the Associate General Counsel for General Law as an Assistant Standards of Conduct Counselor; and renumbers the remaining provisions with several minor technical amendments.

EFFECTIVE DATE: This rule is effective February 26, 1996.

FOR FURTHER INFORMATION CONTACT: Robinson S. Nunn, Chief Counsel for Ethics, Office of the General Counsel, U.S. Small Business Administration, 409 Third Street SW., Washington, D.C. 20416, (202) 205-6867, or Martin D. Teckler, Deputy General Counsel (202) 205-6642.

SUPPLEMENTARY INFORMATION: The Small Business Administration repeals numerous provisions of its existing standards of conduct regulations at 13 CFR Part 105 as either superseded by the Office of Government Ethics' (OGE) Uniform Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635), eliminated by other regulatory authority, or determined to be inappropriate for continued inclusion in this part. SBA repeals the following sections of 13 CFR Part 105: 105.101 through 105.301; 105.401; 105.402; 105.405; 105.406 through 105.408; 105.501 through 105.505; 105.506 except paragraph (g)(1); 105.507 through 105.515; 105.518 through 105.521 and 105.901. The remaining provisions of 13 CFR Part 105 are renumbered and renamed "Standards of Conduct and Employee Restrictions and Responsibilities."

In place of SBA's former standards at 13 CFR Part 105, SBA issues a residual cross reference provision at new 13 CFR section 105.101 to refer to the uniform Standards of Conduct and financial disclosure regulations for Executive

Branch employees and SBA's Supplemental Standards of Conduct regulation. Additionally, SBA reissues, in the new 13 CFR Part 105, several provisions regarding other employee responsibilities.

Proposed changes to Part 105 were published in the Federal Register on November 27, 1995 (60 FR 58260). The public was invited to comment during a thirty day comment period. SBA received seven comments (all of which concerned post-employment restrictions) during that time period. SBA discusses the comments and SBA's response here.

Section 105.201, "Definitions": This section provides definitions unique to SBA which are applicable throughout Part 105. The definition of "SBA Assistance" (§ 105.201(e)) was proposed to be amended to include all participating lenders, including banks, as recipients of SBA Assistance. This proposal generated several comments, which noted that SBA employees with specialized knowledge losing jobs due to downsizing would now be precluded from employment with participating lenders, and that such employment is often the only means available to such employees to maintain a customary standard of living and make use of education and skills. SBA employees commented that the SBA would be unable to attract private sector employees to the SBA if they believe that they will be unmarketable when they leave the government. In addition, participants in SBA's financial programs commented that the interpretation would deny them a qualified universe of potential employees to the detriment of the delivery of SBA's programs.

As a result of these comments, and those relative to the other sections contained in the proposal (discussed below), SBA has determined that revision of the definition will be deferred. This final rule therefore merely restates the existing definition of SBA Assistance, and does not adopt the proposed change, pending further review.

SBA also received three comments concerning Section 105.202, "Employment of Former Employee by Person Previously the Recipient of SBA Assistance". This section, the first of two sections providing restrictions relating to former SBA employees, was not changed by the proposed rule, although the preamble to this section did not make that fact completely clear. All of the comments were directed at the effect on § 105.202 of the addition of participating lenders as recipients of SBA Assistance to the definition section of section 105.201(e).

All three commenters were concerned that agency employees losing their employment as a result of an involuntary separation or those otherwise seeking post-SBA employment would be unfairly denied employment best suited for their specialized knowledge and education and would be unable to maintain their lifestyles and support their families by virtue of section 105.202. One of the commenters also argued that 105.202 should not apply to Certified Development Companies (CDC's), because they are not business enterprises receiving loans from the agency and should therefore be exempt from this rule.

As set forth above, the proposed rule made no change to section 105.202 which is based upon section 13 of the Small Business Act. To the extent all of these comments were directed at the addition of participating lenders to the § 105.201 definition of SBA Assistance, that issue is addressed by the withdrawal of the proposal.

The same issue arises in connection with section 105.203 "SBA Assistance to Person Employing Former SBA Employee." This section is based on the same provision of the Small Business Act as section 105.202. It prohibits SBA from providing assistance to any Person who has as an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor, or debtor, any individual who, within one year prior to the request for such assistance, was an SBA employee, without the prior approval of the SBA Standards of Conduct Counselor.

Additionally, this section sets forth the criteria to be used in reviewing such applications for SBA Assistance.

SBA received one comment on this section to the effect that this provision unfairly penalizes a business which hires a qualified former SBA employee.

As discussed above, to the extent that the impact of this section was proposed to be altered by adding Participating lenders as recipients of Assistance, the provision is unaffected by this rule. However, it is SBA's intent to revisit both sections 105.202 and 105.203 at a later point keeping in mind the comments received in this rulemaking.

SBA received no other comments on this rule. For a detailed description of the other changes made to this rule, please refer to SBA's proposed rules, published at 60 FR 58260 (November 27, 1995).

Compliance With Executive Orders 12612, 12778 and 12866; the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.; and the Paperwork Reduction Act, 44 U.S.C. ch. 35

SBA certifies that this rule will not be considered a significant rule within the meaning of Executive Order 12866 and does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq.

For purposes of Executive Order 12612, SBA certifies that this rule does not have federalism implications. For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of that Order.

For purposes of the Paperwork Reduction Act, SBA certifies that this rule, if promulgated in final, will impose no new reporting or recordkeeping requirements.

List of Subjects in 13 CFR Part 105

Conflict of interests.

For the reasons set forth above, part 105 of title 13, Code of Federal Regulations, is revised to read as follows:

PART 105—STANDARDS OF CONDUCT AND EMPLOYEE RESTRICTIONS AND RESPONSIBILITIES

Standards of Conduct

Sec.

105.101 Cross reference to employee ethical conduct standards and financial disclosure regulations.

Restrictions and Responsibilities Related to SBA Employees and Former Employees

105.201 Definitions.

105.202 Employment of former employee by person previously the recipient of SBA Assistance.

105.203 SBA Assistance to person employing former SBA employee.

105.204 Assistance to SBA employees or members of their household.

105.205 Duty to report irregularities.

105.206 Applicable rules and directions.

105.207 Politically motivated activities with respect to the Minority Small Business Program.

105.208 Penalties.

Restrictions on SBA Assistance to Other Individuals

105.301 Assistance to officers or employees of other Government organizations.

105.302 Assistance to employees or members of quasi-Government organizations.

Administrative Provisions

105.401 Standards of Conduct Committee.

105.402 Standards of Conduct Counselors.

105.403 Designated Agency Ethics Officials.

Authority: 5 U.S.C. 7301; 15 U.S.C. 634, 637(a)(18) and (a)(19), 642, and 645(a).

Standards of Conduct

§ 105.101 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

In addition to this Part, Small Business Administration (SBA) employees should refer to the Uniform Standards of Ethical Conduct for Executive Branch employees at 5 CFR Part 2635, the SBA Supplemental Standards of Ethical Conduct at 5 CFR Chapter XLIV, and the Uniform Financial Disclosure regulation for Executive Branch employees at 5 CFR Part 2634.

Restrictions and Responsibilities Related to SBA Employees and Former Employees

§ 105.201 Definitions.

(a) *Employee* means an officer or employee of the SBA regardless of grade, status or place of employment, including employees on leave with pay or on leave without pay other than those on extended military leave. Unless stated otherwise, Employee shall include those within the category of Special Government Employee.

(b) *Special Government Employee* means an officer or employee of SBA, who is retained, appointed or employed to perform temporary duties on a full-time or intermittent basis, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days.

(c) *Person* means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(d) *Household member* means spouse and minor children of an employee, all blood relations of the employee and any spouse who resides in the same place of abode with the employee.

(e) *SBA Assistance* means financial, contractual, grant, managerial or other aid, including size determinations, section 8(a) participation, licensing, certification, and other eligibility determinations made by SBA. The term also includes an express decision to compromise or defer possible litigation or other adverse action.

§ 105.202 Employment of former employee by person previously the recipient of SBA Assistance.

(a) No former employee, who occupied a position involving discretion over, or who exercised discretion with respect to, the granting or

administration of SBA Assistance may occupy a position as employee, partner, agent, attorney or other representative of a concern which has received this SBA Assistance for a period of two years following the date of granting or administering such SBA Assistance if—

(1) The date of granting or administering such SBA Assistance was within the period of the employee's term of employment; or

(2) The date of granting or administering such SBA Assistance was within one year following the termination of such employment.

(b) Failure of a recipient of SBA Assistance to comply with these provisions may result, in the discretion of SBA, in the requirement for immediate repayment of SBA financial Assistance, the immediate termination of other SBA Assistance involved or other appropriate action.

§ 105.203 SBA Assistance to person employing former SBA employee.

(a) SBA will not provide SBA Assistance to any person who has, as an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor or debtor, any individual who, within one year prior to the request for such SBA Assistance was an SBA employee, without the prior approval of the SBA Standards of Conduct Counselor. The Standards of Conduct Counselor will refer matters of a controversial nature to the Standards of Conduct Committee for final decision; otherwise, his or her decision is final.

(b) In reviewing requests for approval, the Standards of Conduct Counselor will consider:

(1) The relationship of the former employee with the applicant concern;

(2) The nature of the SBA Assistance requested;

(3) The position held by the former employee with SBA and its relationship to the SBA Assistance requested; and

(4) Whether an apparent conflict of interest might exist if the SBA Assistance were granted.

§ 105.204 Assistance to SBA employees or members of their household.

Without the prior written approval of the Standards of Conduct Committee, no SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, shall be furnished to a person when the sole proprietor, partner, officer, director or significant stockholder of the person is an SBA employee or a household member.

§ 105.205 Duty to report irregularities.

Every employee shall immediately report to the SBA Inspector General any

acts of malfeasance or misfeasance or other irregularities, either actual or suspected, arising in connection with the performance by SBA of any of its official functions.

§ 105.206 Applicable rules and directions.

Every employee shall follow all agency rules, regulations, operating procedures, instructions and other proper directions in the performance of his official functions.

§ 105.207 Politically motivated activities with respect to the Minority Small Business Program.

(a) Any employee who has authority to take, direct others to take, recommend, or approve any action with respect to any program or activity conducted pursuant to section 8(a) or section 7(j) of the Small Business Act, shall not, with respect to any such action, exercise or threaten to exercise such authority on the basis of the political activity or affiliation of any party. Employees shall expeditiously report to the SBA Inspector General any such action for which such employee's participation has been solicited or directed.

(b) Any employee who willfully and knowingly violates this section shall be subject to disciplinary action, which may consist of separation from service, reduction in grade, suspension, or reprimand.

(c) This section shall not apply to any action taken as a penalty or other enforcement of a violation of any law, rule, or regulation prohibiting or restricting political activity.

(d) The prohibitions in and remedial measures provided for under this section with regard to such prohibitions, shall be in addition to, and not in lieu of, any other prohibitions, measures or liabilities that may arise under any other provision of law.

§ 105.208 Penalties.

Any employee guilty of violating any of the provisions in this Part may be disciplined, including removal or suspension from SBA employment.

Restrictions on SBA Assistance to Other Individuals

§ 105.301 Assistance to officers or employees of other Government organizations.

(a) SBA must receive a written statement of no objection by the pertinent Department or military service before it gives any SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person when its sole proprietor, partner, officer,

director or stockholder with a 10 percent or more interest, or a household member, is an employee of another Government Department or Agency having a grade of at least GS-13 or its equivalent.

(b) The Standards of Conduct Committee must approve an SBA contract with an entity if a sole proprietor, general partner, officer, director, or stockholder with a 10 or more percent interest (or a household member of such individuals) is an employee of a Government Department or Agency. See also 48 CFR part 35, subpart 3.6.

(c) The Standards of Conduct Committee must approve SBA Assistance, other than disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person if its sole proprietor, general partner, officer, director or stockholder with a 10 percent or more interest (or a household member of such individual) is a member of Congress or an appointed official or employee of the legislative or judicial branch of the Government.

§ 105.302 Assistance to employees or members of quasi-Government organizations.

(a) The Standards of Conduct Committee must approve SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person if its sole proprietor, general partner, officer, director or stockholder with a 10 percent or more interest (or a household member) is a member or employee of a Small Business Advisory Council or is a SCORE volunteer.

(b) In reviewing requests for approval, factors the Standards of Conduct Committee may consider include whether the granting of the SBA Assistance might result in or create the appearance of giving preferential treatment, the loss of complete independence or impartiality, or adversely affect the confidence of the public in the integrity of the Government.

Administrative Provisions

§ 105.401 Standards of Conduct Committee.

(a) The Standards of Conduct Committee will:

(1) Advise and give direction to SBA management officials concerning the administration of this Part and any other rules, regulations or directives dealing with conflicts of interest and ethical standards of SBA employees; and

(2) Make decisions on specific requests when its approval is required.

(b) The Standards of Conduct Committee will consist of:

(1) The General Counsel or, in his or her absence, the Deputy General Counsel or, in his or her absence, the Acting General Counsel who shall act as Chairman of the Committee;

(2) The Associate Deputy Administrator for Management and Administration, or in his or her absence, the Assistant Administrator for Administration; and

(3) The Director of Human Resources, or in his or her absence, the Deputy Director of Human Resources.

§ 105.402 Standards of Conduct Counselors.

(a) The SBA Standards of Conduct Counselor is the Deputy General Counsel. The Associate General Counsel for General Law (AGC) is an Assistant Standards of Conduct Counselor, and other Assistants may be designated by the Standards of Conduct Counselor.

(b) The Standards of Conduct Counselors and Assistants:

(1) Provide general advice, assistance and guidance to employees concerning this Part and the regulations referred to in § 105.101;

(2) Monitor the Standards of Conduct Program within their assigned areas and provide required reports thereon;

(3) Review Confidential Financial Disclosure Reports as required under 5 CFR part 2634, subpart I, and provide an annual report on compliance with filing requirements to the SBA Standards of Conduct Counselor as of February 1 of each year; and

(4) Provide Outside Employment decisions pursuant to 5 CFR 5401.104.

(c) Each employee will be periodically informed of the name, address and telephone number of the Assistant Standards of Conduct Counselor to contact for advice and assistance.

(d) Employee requests for advice or rulings should be directed to the appropriate Standards of Conduct Counselor for appropriate action.

§ 105.403 Designated Agency Ethics Officials.

(a) The Designated Agency Ethics Official, pursuant to the Ethics in Government Act of 1978 (5 U.S.C. App.), is the Deputy General Counsel. He or she may, in turn, appoint one or more Alternate Designated Agency Ethics Officials. The Alternates will assist the Designated Agency Ethics Official and act for him or her whenever absent.

(b) The Designated Agency Ethics Official and Alternates administer the program for Financial Disclosure Statements under 5 CFR 2634.201,

receive and evaluate these statements, and provide advice and counsel regarding matters relating to the Ethics in Government Act of 1978 and its implementing regulations. The duties and responsibilities of the Designated Agency Ethics Official and Alternates are set forth in more detail in 5 CFR 2638.203, which is promulgated and amended by the Office of Government Ethics.

Dated: January 19, 1996.

Philip Lader,

Administrator.

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13 CFR Part 114

Policies of General Application

AGENCY: Small Business Administration.
ACTION: Final rule.

SUMMARY: In response to President Clinton's regulatory review directive, the Small Business Administration has completed a page-by-page and line-by-line review of its regulations. As a result, SBA is clarifying and streamlining its regulations, revising or eliminating any duplicative, outdated, inconsistent or confusing provisions. This final rule reorganizes the entire Part 114 covering administrative claims under the Federal Tort Claims Act to make it clearer and easier to use. It also amends the Part to streamline the review and adjustment of claims and provide for the use of nonbinding alternative dispute resolution in appropriate cases.

EFFECTIVE DATE: This rule is effective February 26, 1996.

FOR FURTHER INFORMATION CONTACT: Jeff Lane, Office of General Counsel, at (202) 205-6879.

SUPPLEMENTARY INFORMATION: Part 114 of chapter I, 13 CFR contains policies governing the presentment, review and handling of administrative claims brought against the Federal Government for money damages for injuries or death arising from the negligent or wrongful act or omission of any employee of the Small Business Administration. The rule reorganizes the entire Part 114 to make it clearer and easier to use and amends it to create a more efficient administrative process. It eliminates from the process the various boards of survey that now investigate and review claims, and gives District Counsel authority to review and deny claims of \$5,000 or less and use nonbinding alternative dispute resolution in appropriate cases. (Boards of Survey

would retain all other existing responsibilities.)

The proposed rule was published on November 3, 1995, at 60 FR 55808. The SBA received four comments on the proposed rule during the thirty-day comment period. Two comments questioned generally the need for revisions in the existing rule. As indicated, SBA has revised and reorganized the rule to streamline its operation and make it more understandable to employees and others who may be affected by it. One of those two comments supported the proposal to eliminate the boards of survey from the review process, but stated that employees should not enjoy the benefits of the attorney-client privilege. With regard to this latter point, this final rule makes no substantive change in the longstanding SBA policy applying the attorney-client privilege in cases where Government legal representation is authorized for employees. Finally, two commenters suggested changes in section 114.105 that are adopted in the final rule. Section 114.105(b) now makes clear that any alternative dispute resolution mechanisms must be nonbinding, and § 114.105(c) is clarified to state that District Counsel have authority to deny claims under \$5,000, but may only recommend their approval. In addition to this clarification in proposed section 114.105(c) in response to comments, SBA includes in the final rule an administrative change: the recommendation for approval will be made by District Counsel to the General Counsel or designee, not to the Senior Area Counsel.

Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this rule involves internal administrative procedures and is not a significant rule within the meaning of Executive Order 12866 and will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. It is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule contains no new reporting or recordkeeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of that Order.

List of Subjects in 13 CFR Part 114

Claims.

Accordingly, pursuant to the authority set forth in sections 5(b)(1) and (b)(6) of the Small Business Act, 15 U.S.C. 634(b)(1) and (b)(6), 28 U.S.C. 2672, and 28 CFR 14.11 (31 FR 16616), SBA revises part 114 of Title 13, Code of Federal Regulations (CFR), to read as follows:

PART 114—ADMINISTRATIVE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT AND REPRESENTATION AND INDEMNIFICATION OF SBA EMPLOYEES

Subpart A—Administrative Tort Claims

Sec.

- 114.100 Definitions.
- 114.101 What do these regulations cover?
- 114.102 When and where do I present a claim?
- 114.103 Who may file a claim?
- 114.104 What evidence and information may SBA require relating to my claim?
- 114.105 Who investigates and considers my claim?
- 114.106 What if my claim exceeds \$5,000?
- 114.107 What if my claim exceeds \$25,000 or has other special features?
- 114.108 What if my claim is approved?
- 114.109 What if my claim is denied?

Subpart B—Representation and Indemnification of SBA Employees

- 114.110 What is SBA's policy with respect to indemnifying and providing legal representation to SBA employees?
- 114.111 Does the attorney-client privilege apply when SBA employees are represented by the Government?

Authority: 15 U.S.C. 634 (b)(1), (b)(6); 28 U.S.C. 2672; 28 CFR 14.11.

Subpart A—Administrative Tort Claims

§ 114.100 Definitions.

As used throughout this Part 114, *date of accrual* means the date you know or reasonably should have known of your injury. The date of accrual will depend on the facts of each case. *Site* means the geographic location where the incident giving rise to your claim occurred.

§ 114.101 What do these regulations cover?

This part applies only to monetary claims you assert under the Federal Tort Claims Act, 28 U.S.C. 2671 et seq., for