SUBMITTED COMMITTEE REPORTS

As a general policy, the Federal Energy Bar Association does not take positions in published Committee Reports on substantive issues that are the subject of pending litigation.

REPORT OF THE COMMITTEE ON ETHICS*

Bar members should be aware of two recent ethics developments that are relevant to lawyers who work in the executive branch and lawyers who work in the private sector. First, the Federal Energy Regulatory Commission ("FERC" or "the Commission") issued Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission on August 16, 1996. Second, the American Law Institute ("ALI"), which has been drafting the Restatement of the Law Governing Lawyers (Third) for the past ten years, has taken significant steps toward the completion of a final document.

I. SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE FEDERAL ENERGY REGULATORY COMMISSION (ISSUED AUGUST 16, 1996)

On August 16, 1996, the Commission issued Standards of Ethical Conduct for its employees that supplement the general Standards of Ethical Conduct for Employees of the Executive Branch ("Executive Branch Standards").[1] The Executive Branch Standards, which became effective on February 3, 1993, and are codified at 5 C.F.R. part 2635, broadly address conflict of interest and ethical conduct issues. They superseded most agency-specific standards, but authorized agencies to publish supplemental regulations that are necessary to implement their respective ethics programs. Because the FERC is an independent regulatory body within the Department of Energy ("DOE"), it has issued its own supplemental regulations, which are distinct from the supplemental ethics regulations published by the DOE on July 5, 1996.[2] The DOE supplemental regulations are not applicable to Commission employees.

FERC's Supplemental Standards apply to all Commission employees, including members of the Commission, and are in addition to the Executive Branch Standards. FERC's Supplemental Standards specifically note that employees are required to comply with the Executive Branch Standards, as well as the executive branch financial disclosure regulations at 5 C.F.R. part 2634, the executive branch employee responsibilities and conduct regulation at 5 C.F.R. part 735, and the Commission's Standards of Conduct at 18 C.F.R. part 3c.[3] The new standards address three principal areas: (1) prohibited financial interests; (2) procedures for accomplishing disqualifi-

* The Committee gratefully acknowledges the assistance of Jacqueline Gerson Cooper, Esq. of Sidley & Austin in the preparation of this report.

1. *See* Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission, 61 Fed. Reg. 43,411 (1996) (to be codified at 5 C.F.R. Ch. XXIV and 18 C.F.R. pt. 3).

2. *See* Supplemental Standards of Ethical Conduct for Employees of the Department of Energy, 61 Fed. Reg. 35,085 (1996) (to be codified at 5 C.F.R. Ch XXIII and 10 C.F.R. pt. 1010).

3. 61 Fed. Reg. 43,411, at 43,412.

cation from matters before the Commission; and (3) procedures for obtaining prior approval for outside employment.[4]

A. Prohibited Financial Interests

The Commission has long prohibited employees, their spouses, and minor children from owning the securities of entities directly or indirectly subject to the jurisdiction of the Commission (18 C.F.R. part 3c). It has now adopted a supplemental regulation that prohibits holdings in any debt or equity instrument of entities that are substantially affected by Commission regulation. These entities include natural gas companies, interstate oil pipelines, hydroelectric licensees or exemptees, public utilities, electric utilities engaged in the wholesale sale or transmission of electricity, and the parent companies of any of the foregoing entities.[5]

This prohibition is designed to preserve public confidence in the impartiality of agency personnel. It also helps accomplish the Commission's mission by avoiding widespread disqualification of employees. The Commission deemed it necessary to extend the securities restriction to the spouses and minor children of agency personnel in order to give regulated entities and others affected by agency decisions an additional measure of assurance that Commission personnel are not influenced by considerations of personal gain.[6]

The regulation directs the agency ethics officer to compile annually a Prohibited Securities List ("PSL") cataloguing securities that employees may not own.[7] The PSL is merely intended to serve as a reference source, however, and is not conclusive as to whether a security is a prohibited holding. Employees also may request a waiver of the securities restriction to prevent hardship in individual cases, which the agency ethics officer may grant upon a determination that application of the restriction is not necessary to avoid the appearance of misuse of position or loss of impartiality.[8] The agency officer may impose appropriate conditions on the waiver, such as requiring the employee to disqualify himself from particular matters.[9]

B. Procedures For Accomplishing Disqualification From Matters Before The Commission

FERC's Supplemental Standards require that when an employee determines that he or she must be disqualified from a particular matter before the Commission, either "because of a conflicting financial interest, a question of the employee's impartiality, or because the employee is seeking employment with a person who could be affected by the performance of the employee's duties, written notification of the recusal must be provided

4. 61 Fed. Reg. 43,411, at 43,413.
5. 61 Fed. Reg. 43,411, at 43,412.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

to a supervisor and the [FERC's] ethics officer."[10] Under the Executive Branch Standards, written notification is not required. The written notice requirement is not applicable to members of the Commission, who have no supervisors, and who indicate recusal from public matters on the public record.

The Commission determined that a written record of recusals is necessary to protect both disqualified employees and the agency. A written recusal statement avoids possible questions about the scope and terms of the recusal. The notice requirement solely is a procedural rule that does not establish any independent standards concerning when recusal is appropriate. Accordingly, it does not affect employees' obligation to seek recusal in appropriate cases. The notice requirement also does not establish any deadline for when notice must be given. It merely provides that the employee should provide notice "when he becomes aware of the need to disqualify himself,"[11] which is intended to give the employee flexibility in determining when it is appropriate to give notice.[12] An employee may withdraw a notice of recusal by providing written notice that disqualification is no longer required.[13]

C. Procedures For Obtaining Prior Approval For Outside Employment

Prior to implementation of the Executive Branch Standards, FERC required employees to obtain written approval before engaging in outside employment concurrent with Commission employment. The Commission determined that a general requirement of prior approval for all outside employment is not necessary, but decided to re-institute a narrower version of the advance notice requirement that requires employees to obtain prior written approval from the agency ethics officer before accepting outside employment with a "prohibited source" as that term is defined by 5 C.F.R. § 2635.203(d).[14] "Prohibited sources" include entities regulated by the Commission, parties to Commission proceedings, and contractors doing business or seeking to do business with the Commission. "Employment" is broadly defined to cover any form of compensated non-Federal employment or business relationship or activity involving the provision of personal service by the employee, including personal service as an officer, director, employee, agent, attorney, consultant, contractor, general partner, or trustee.

The prior approval requirement applies only to outside employment concurrent with Commission employment. It does not apply to employ-

10. 61 Fed. Reg. 43,411, at 43,412.

11. *Id.*

12. *Id.*

13. *Id.*

14. 5 C.F.R. § 2635.203(d) (1997) defines a prohibited source as "any person who: (1) Is seeking official action by the employee's agency; (2) Does business or seeks to do business with the employee's agency; (3) Conducts activities regulated by the employee's agency; (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) Is in an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section."

ment that will begin after an employee terminates Federal service. Standards governing post-employment conflicts of interest are contained in different regulations, 18 U.S.C. § 207 and 5 C.F.R. part 2641. The prior approval requirement also does not apply to employment negotiations, which are governed by standards contained in 18 U.S.C. § 208(a) and subpart F of 5 C.F.R. part 2635. The prior approval requirement is not intended to discourage outside employment. Accordingly, the regulation provides that approval shall be granted unless a determination is made that the outside employment is expected to involve conduct prohibited by federal statutes or regulations.

D. Other Provisions

The new regulation also includes a section on "nonpublic information," which provides that "[t]he nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission." The provision states that the Secretary of the Commission has exclusive authority to release information concerning public proceedings. In addition, the provision prohibits Commission employees from divulging information that comes to their knowledge through audits of the books and accounts of regulated entities.

Finally, the new regulation identifies the DOE Office of Inspector General as the authority to which employees should report in fulfilling their existing duty to disclose waste, fraud, abuse, and corruption. The provision also requires employees to cooperate with official inquiries by the Inspector General.

II. RESTATEMENT OF THE LAW GOVERNING LAWYERS

For about the last ten years, the ALI, a Philadelphia-based organization of lawyers, judges, and law professors, has been drafting a Restatement (Third) of the Law Governing Lawyers ("the Restatement"). The Restatement aims to "restate" or summarize black letter principles applicable in legal malpractice and disqualification proceedings. It draws largely on the ABA Model Rules of Professional Conduct (promulgated in 1983), the ABA Model Code of Professional Responsibility (promulgated in 1970), various state rules and codes, and case law.

The Restatement has been through numerous drafts. In May 1996, the ALI approved a proposed final draft of several chapters of the Restatement. Revisions are ongoing and some chapters are still under development. It is expected that formal adoption and publication may occur in 1997 or 1998.

The Restatement is likely to be influential with courts and other tribunals. Indeed, although no chapter of the Restatement is yet final, numerous state and federal courts already have cited sections of proposed drafts in resolving issues arising out of the practice of law.[15] In general, ALI's

15. *See generally* David C. Little, *Potential Impact of the Restatement (Third) of the Law Governing Lawyers*, COLO. LAW, Sept. 1996, at 83, 83-84.

Restatements on other topics have been influential and widely cited, sometimes contributing to the development of the law by giving first expression to concepts or principles that were later widely adopted.

Although a detailed analysis of the lengthy Restatement drafts is beyond the scope of this Report, several positions taken in the Restatement are of particular interest. First, while the ABA Model Code and Model Rules are intended to govern lawyer disciplinary proceedings and expressly state that they are *not* designed to be a basis for civil liability,[16] section 74 of the proposed Restatement permits the consideration of applicable disciplinary rules by the trier of fact in a civil case. While section 74 states that violation of a disciplinary rule does not give rise to a cause of action for malpractice, it also provides that proof of violation of a disciplinary rule "may be considered by a trier of fact as an aid in understanding and applying" the applicable standard of care.[17] The Restatement expressly contemplates that "[t]he court may instruct the jury as to the content and construction of [a disciplinary] statute or rule and its bearing on the issue of care."[18] This arguably is a departure from the spirit, if not the express intent, of the Model Rules, the Model Code, and most state disciplinary codes, which do not appear to contemplate such a prominent role for disciplinary rules in malpractice trials.

Section 170 of the proposed Restatement expands the scope of current prohibitions on frivolous advocacy, addressed in Federal Rule of Civil Procedure 11 ("Rule 11") and parallel state rules.[19] While Rule 11 is applicable to written pleadings and briefs signed by attorneys, section 170 appears to prohibit frivolous advocacy in nearly every aspect of the litigation process. It expressly prohibits a lawyer from "mak[ing] a frivolous discovery request or fail[ing] to make a reasonably diligent effort to comply with a proper discovery request of another party,"[20] which is a significant extension of the Rule 11 framework. Section 170 also generally prohibits a lawyer from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis for doing so that is not frivolous."[21] This broad prohibition against the taking of frivolous positions in any aspect of litigation proceedings may significantly affect litigation practice, in the same way that Rule 11 has affected pleading practice.

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16. MODEL RULES OF PROFESSIONAL CONDUCT, preamble at 8 (amended 1993).

17. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74(2)(c) (Tentative Draft No. 8, 1997) [hereinafter RESTATEMENT].

18. *Id.* §74, cmt. f.

19. *Id.* § 170; Section 170 appears to apply to administrative proceedings as well as judicial proceedings. The introductory note to the Chapter that includes section 170 (which is entitled "Representing Clients in Litigation") states that the Chapter "addresses situations in which the lawyer is 'representing a client in a matter before a tribunal.' A tribunal includes a court, administrative hearing board, or similar formal body hearing a contested matter under rules of procedure and evidence."

20. *Id.* § 170(3).

21. *Id.* § 170(1)(a).

Finally, section 73 of the proposed Restatement identifies circumstances in which a lawyer's duty of care, for malpractice purposes, extends to non-clients. While comment "a" to the section states that lawyers owe a duty of care to non-clients only in "limited circumstances," the section is broadly written and may pave the way for expanded liability to non-clients.[22] For example, section 73(2) states that the lawyer owes a duty of care to a non-client when the lawyer or the lawyer's client (with the lawyer's acquiescence) invites the non-client to rely on the lawyer's opinion.[23] In addition, section 73(3) provides that a lawyer owes a duty of care to a non-client where "the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client" and such a duty would not impair the lawyer's performance of obligations to the client.[24] Finally, section 73(4) defines circumstances in which a lawyer owes a duty to a non-client beneficiary when there are questions about a fiduciary's performance.[25] All of these sections may become the subject of litigation and judicial interpretation.

22. RESTATEMENT, *supra* note 17, § 73(1)(a).
23. RESTATEMENT, *supra* note 17, § 73(2).
24. RESTATEMENT, *supra* note 17, § 73(3).
25. RESTATEMENT, *supra* note 17, § 73(4).