

§ 2637.216

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§ 2637.216 “Senior Employee” designations.

NOTE: Part 2637 provides guidance concerning the prior version of 18 U.S.C. 207 (1988) as it continues to apply to individuals who terminated Government service (or a “Senior” Government position) before January 1, 1991. However, since no former “Senior Employee” who terminated service before that date could any longer be subject to either the two-year restriction of section 207(b)(ii) or the one-year restriction of section 207(c) of 18 U.S.C. as they existed prior to their amendment by the Ethics Reform Act of 1989, the listing of “Senior Employee” positions that previously appeared in § 2637.216 has been deleted.

[57 FR 62468, Dec. 31, 1992]

PART 2638—OFFICE OF GOVERNMENT ETHICS AND EXECUTIVE AGENCY ETHICS PROGRAM RESPONSIBILITIES

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

SOURCE: 46 FR 2583, Jan. 9, 1981, unless otherwise noted. Redesignated at 54 FR 50231, Dec. 5, 1989.

Subpart A—General Provisions

§ 2638.101 Authority and purpose.

(a) *Authority.* The regulations of this part are issued pursuant to the authority of titles II and IV of the Ethics in Government Act of 1978 (Pub. L. 95–521, as amended) (“the Act”).

(b) *Purpose.* These regulations supplement and implement titles II, IV and V of the Act, set forth more specifically certain procedures provided in those titles, and furnish examples, where appropriate.

§ 2638.102 General policies.

(a) The Office of Government Ethics (“the Office”) provides overall direction and leadership concerning executive branch policies related to preventing conflicts of interest. The head of each agency has primary responsibility for the administration of the “ethics in government” program within his or her agency. The Office carries out its leadership role by:

- (1) Providing information on and promoting ethical standards in executive agencies;
- (2) Consulting with agencies regarding their agency ethics programs and assisting them in interpreting ethics rules and regulations;
- (3) Developing rules and regulations pertaining to conflicts of interests and standards of conduct;
- (4) Monitoring compliance with the public and confidential financial disclosure requirements;
- (5) Establishing a formal advisory opinion service; and
- (6) Evaluating the effectiveness of programs designed to prevent conflicts of interests.

§ 2638.103 Agency regulations.

Each agency may, subject to the prior approval of the Office of Government Ethics, issue regulations not inconsistent with this part.

§ 2638.104 Definitions.

For the purposes of this part:

Act means the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended).

Agency means any executive department, military department, Government corporation, independent establishment or agency, including the United States Postal Service and Postal Rate Commission.

Designated agency ethics official means an officer or employee who is designated by the head of the agency to coordinate and manage the agency’s ethics program in accordance with the provisions of § 2638.203 of this part.

Director means the Director of the Office of Government Ethics.

Executive branch includes each executive department, military department, Government corporation, independent establishment, and any other entity or administrative unit in the executive

branch unless such agency, entity or unit is specifically included in the coverage of title I (relating to the legislative branch) or title III (relating to the judicial branch) of the Act.

Person includes an individual, partnership, corporation, association, government agency, or public or private organization.

Subpart B—Designated Agency Ethics Official**§ 2638.201 In general.**

Each agency shall have a designated agency ethics official who is the officer or employee designated by the head of the agency to administer the provisions of title II of the Act within that agency, to coordinate and manage the agency’s ethics program and to provide liaison to the Office of Government Ethics with regard to all aspects of such ethics program. The agency’s ethics program shall be designed to implement titles II, IV and V of the Act and regulations promulgated thereunder, Executive Order 11222 (relating to standards of conduct for officers and employees within the executive branch) and regulations promulgated thereunder, and other statutes and regulations applicable to agency ethics matters.

§ 2638.202 Responsibilities of agency head.

(a) *In general.* The head of each agency is responsible for and shall exercise personal leadership in establishing, maintaining, and carrying out the agency’s ethics program. He or she shall make available to the ethics program sufficient resources (including investigative, audit, legal, and administrative staff as necessary) to enable the agency to administer its program in a positive and effective manner.

(b) *Selection of a designated agency ethics official.* The head of each agency shall appoint an individual to serve as the designated agency ethics official and an individual to serve in an acting capacity in the absence of the primary designated agency ethics official (alternate agency ethics official). In selecting these two individuals the head of

an agency should ensure that the experience of such appointees in administrative, legal, managerial, or analytical work demonstrates the ability to—

(1) Review the financial disclosure reports submitted by officers or employees within the agency, assessing the application of conflict of interest laws and regulations to the information reported and counseling those officers or employees with regard to resolving actual or potential conflicts of interests, or appearances thereof;

(2) Review the financial disclosure reports submitted by Presidential appointees for confirmation purposes and counsel those appointees with regard to resolving potential conflicts of interest, or appearances thereof, before the confirmation hearing;

(3) Counsel agency personnel concerning ethics standards and programs;

(4) Counsel departing and former agency officials on post-employment conflict of interest standards;

(5) Assist managers and supervisors in understanding and implementing agency ethics programs;

(6) Administer a system for periodic evaluation of the ethics program; and

(7) Select deputy ethics officials if necessary and manage the ethics program through them.

(c) *Designation.* The head of each agency shall formally delegate functional authority to coordinate and manage the ethics program as set forth in § 2638.203 to the designated and alternate agency ethics officials. Within 30 days of any such delegation of authority the head of the agency shall submit to the Office of Government Ethics a formal written designation. The designation shall include:

(1) The names of the individuals so designated;

(2) The title of the position held by each designee; and

(3) A copy of the delegation of authority.

§ 2638.203 Duties of the designated agency ethics official.

(a) *In general.* The designated agency ethics official shall coordinate and manage the agency's ethics program. The program consists generally of:

(1) Liaison with the Office of Government Ethics;

(2) Review of financial disclosure reports;

(3) Initiation and maintenance of ethics education and training programs; and

(4) Monitoring administrative actions and sanctions.

(b) *Program elements.* In carrying out this program on behalf of the head of the agency, the designated agency ethics official shall ensure that:

(1) Close liaison with the Office of Government Ethics concerning the agency's ethics program is developed and maintained;

(2) An effective system and procedure for the collection, filing, review, and, when applicable, public inspection of the financial disclosure reports as required by title II of the Act, Executive Order 11222, and other applicable statutes and regulations is developed and properly administered;

(3) The financial disclosure reports of Presidential nominees to agency positions submitted prior to Senate confirmation hearings pursuant to § 2634.605(c) of part 2634 are certified personally by him or herself or alternate designated agency ethics official in his or her absence;

(4) All financial disclosure reports submitted by employees and filed in bureaus and regional offices, as well as those submitted and filed at the agency's headquarters, are properly maintained and effectively and consistently reviewed for conformance with all applicable laws and statutes;

(5) A list of those circumstances or situations which have resulted or may result in noncompliance with ethics laws and regulations is developed, maintained and published within the agency as required by § 206(b)(7) of the Act and made available for public inspection;

(6) An education program for agency employees concerning all ethics and standards of conduct matters is developed and conducted in accordance with subpart G, Executive Agency Ethics Training Programs, of this part.

(7) A counseling program for agency employees concerning all ethics and standards of conduct matters including post employment matters, is developed and conducted;

(8) Records are kept, when appropriate, on advice rendered;

(9) Prompt and effective action including administrative action is undertaken to remedy:

(i) Violations or potential violations, or appearances thereof, of the agency's standards of conduct including post employment regulations;

(ii) The failure to file a financial disclosure report or portions thereof;

(iii) Potential or actual conflicts of interests, or appearances thereof, which were disclosed on a financial disclosure report; and

(iv) Potential or actual violations of other laws governing the conduct or financial holdings of officers or employees of that agency, and

that a follow-up is made to ensure that actions ordered, including divestiture and disqualification, have been taken;

(10) The agency's standards of conduct regulations, financial disclosure systems, and post-employment enforcement systems are evaluated periodically to determine their adequacy and effectiveness in relation to current agency responsibilities;

(11) Information developed by internal audit and review staff, the Office of the Inspector General, if any, or other audit groups is reviewed to determine whether such information discloses a need for revising agency standards of conduct or for taking prompt corrective action to remedy actual or potential conflict of interest situations;

(12) The services of the agency's Office of the Inspector General, if any, are utilized when appropriate, including the referral of matters to and acceptance of matters from that Office;

(13) A list of those persons to whom delegations of authority are made pursuant to § 2638.204(a) is maintained and made available to the Office of Government Ethics, upon request; and

(14) Information required by the Act or requested by the Office of Government Ethics in the performance of its responsibilities is provided in a complete and timely manner.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 58 FR 69176, Dec. 30, 1993; 59 FR 12148, Mar. 16, 1994]

§ 2638.204 Deputy ethics official.

(a) *Functions.* A designated agency ethics official may, if necessary, delegate to one or more deputy ethics officials any of the duties referred to in § 2638.203, except for those functions set forth in § 2634.605(c)(2) of part 2634 and referred to in § 2638.203(b)(3) (certification of nominee statements). A deputy ethics official shall work under the supervision of the designated agency ethics official in carrying out such delegated functions.

(b) *Dual status.* A deputy ethics official may also be designated pursuant to § 2638.202 to serve as the alternate agency ethics official. During the absence of the designated agency ethics official a deputy ethics official who has also been designated as the alternate ethics official shall perform the functions set forth in § 2634.605(c)(2) of part 2634 and referred to in § 2638.203(b)(3).

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 58 FR 69176, Dec. 30, 1993]

Subpart C—Formal Advisory Opinion Service

§ 2638.301 In general.

(a) The Director of the Office of Government Ethics has the authority and responsibility to render formal advisory opinions pursuant to Section 402(b)(8) of the Act. This service is available to any person who has a question about a matter over which the Office of Government Ethics has jurisdiction. Formal advisory opinions will be issued when a two-pronged test is met. First, the person making the request must meet the requirements of § 2638.302 and, second, the subject matter of the request must meet the criteria set forth in § 2638.303.

(b) Normally, formal advisory opinions will not be issued to individuals who wish to obtain general advice concerning their own specific present or proposed activities or financial transactions. Such questions should be directed to the designated ethics official of the agency in which the individual will serve, serves or served. If a designated agency ethics official receives a request which he or she believes should be answered by the Office of

Government Ethics, a referral procedure is available.

(c) The Office of Government Ethics will provide interested parties, to the extent practicable, with an opportunity to comment on any question which will be the subject of a formal advisory opinion issued by the Office. These opinions will be published in a form which will not identify specific individuals unless necessary to the understanding of the opinion. Copies will be sent to the designated ethics officials of each agency and be available at the Office of Government Ethics in that same form.

§ 2638.302 Who may request a formal advisory opinion.

Any person (as defined in § 2638.104) may request an opinion with respect to a situation in which that person is directly involved. A designated agency ethics official, representative, or attorney may request an opinion on behalf of the person. Notwithstanding this direct involvement requirement, a designated agency ethics official may always request an opinion concerning a situation about which he or she has knowledge.

§ 2638.303 Subject matter of formal advisory opinions.

Formal advisory opinions will be rendered on matters of general applicability or on important matters of first impression concerning the application of the Act, Executive Order 11222 and regulations promulgated pursuant to such Act and Executive Order, and the laws embodied in 18 U.S.C. 202–209. The Director will respond to those requests which in his or her discretion fall within this category taking into consideration:

- (a) The unique nature of the question and its precedential value,
- (b) The potential number of officers or employees throughout the Government affected by the question,
- (c) The frequency with which the question arises, and
- (d) The likelihood or presence of inconsistent interpretations on the same question by different agencies.

Except in unusual circumstances, opinions will not be rendered with respect to hypothetical situations posed in re-

quests. Opinions may be rendered, however, on proposed activities or transactions.

§ 2638.304 Form of requests for formal advisory opinions.

(a) A request for a formal advisory opinion should be directed to the Director of the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005–3917.

(b)(1) A request should be in writing and signed by the individual making the request or by a representative of that person. A request shall state all material facts necessary for the Director to render a complete and correct opinion.

(2) In addition, it should also include the following information:

- (i) the name, mailing address, and daytime telephone contact of the individual making the request, and
- (ii) a copy of the position, description of the position involved, if available.

(c) If the request is submitted by a representative, he or she must show his or her representative status, list a mailing address and daytime telephone contact.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

§ 2638.305 Acceptance of requests for formal advisory opinions.

(a) Subject to the provisions of paragraph (d) of this section, the Director shall review each request for a formal advisory opinion and take one of the following actions:

- (1) If the Director determines that the person making the request meets the requirements of § 2638.302 and that the subject matter of the request qualifies under the criteria established in § 2638.303, he or she shall assign an identifying number to the request and notify the person that a formal advisory opinion will be rendered; or
- (2) If the Director determines that the person making the request is not a person who is eligible to receive a formal advisory opinion as provided in § 2638.302, or that the subject of the request is not a matter upon which the Office issues formal advisory opinions as outlined by § 2638.303, he or she shall

so notify the person making the request.

When a formal advisory opinion will not be rendered, the Office of Government Ethics may provide other informational assistance to the person as appropriate. (See also § 2638.312.)

(b) If at any time after receipt of a request for a formal advisory opinion, the Director believes that additional relevant information is needed, he or she may seek such information directly from the person requesting the opinion or from other sources which may include the agency involved.

(c) The person requesting the opinion may furnish the Office of Government Ethics with legal memoranda or other material relevant to the opinion requested.

(d)(1) In the case of a request which involves an actual or apparent violation of any conflict of interest law embodied in 18 U.S.C. 202-209, the Director shall consult with the Criminal Division of the Department of Justice.

(2) If after such consultation the Criminal Division determines that a criminal investigation will be undertaken, the Director shall take no further action with regard to that request pending a determination by the Criminal Division not to prosecute.

(3) Upon receipt of a determination by the Criminal Division not to prosecute, the Director shall then follow the procedures for all other requests for formal advisory opinions set forth in this part.

§ 2638.306 Notice of requests.

The Director shall provide notice to interested parties identified in a request which will be the subject of a formal advisory opinion that such an opinion will be rendered. Generally, the designated agency ethics official of the agency involved shall be notified of the request.

§ 2638.307 Written comment on requests.

(a) To the extent practicable, the Director shall provide interested parties with an opportunity to submit written comment on a request for a formal advisory opinion. A time by which the comment should be received to be con-

sidered will be indicated with the notice that the request has been made.

(b) Additional time in which to comment may be granted upon written request to or at the discretion of the Director. Such requests and all written comments shall be sent to the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

§ 2638.308 Issuance.

(a) A formal advisory opinion,

(1) Which involves the application of any conflict of interest law embodied in 18 U.S.C. 202-209 to a transaction or activity which does not raise a question of an actual or apparent violation of this law but which raises an important matter of first impression, or

(2) Which is issued following the procedure set forth in § 2638.305(d),

requires consultation by the Office of Government Ethics with the Office of Legal Counsel of the Department of Justice before it is issued.

(b) An advisory opinion shall be considered issued when it is dated, numbered, and signed by the Director. Unless released by the person who made the request, the opinion will not become publicly available until information which identifies individuals involved and which is unnecessary to the complete understanding of the opinion has been deleted from the opinion and this version of the opinion is placed in a public reading file at the Office of Government Ethics. (See § 2638.310)

§ 2638.309 Reliance on formal advisory opinions.

(a) Any formal advisory opinion referred to in § 2638.308(a) or any provisions or finding of a formal advisory opinion involving the application of the Act, Executive Order 11222 and the regulations promulgated pursuant to the Act or Executive Order, may be relied upon by:

(1) Any person directly involved in the specific transaction or activity with respect to which such advisory opinion has been rendered, and

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(2) Any person directly involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion was rendered.

(b) Any person who relies upon any provision or finding of any formal advisory opinion in accordance with paragraph (a) of this section and who acts in good faith in accordance with the provisions and findings of such opinion, shall not, as a result of such act, be subject to prosecution under 18 U.S.C. 202–209 or, in the case where the opinion is exculpatory, be subject to any administrative adverse action or civil action based upon legal authority cited in that opinion.

§ 2638.310 Public availability and publication of formal advisory opinions.

(a) The Director shall make sufficient deletions in any formal advisory opinion so that unless necessary to the complete understanding of the opinion, the identity of any person involved is not disclosed. No deletion shall in any way affect the substance of the opinion.

(b) A copy of this version of the opinion shall then be made available for public inspection within 10 working days after the issuance of the opinion at the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005–3917.

(c) The Director shall thereafter publish this version of the opinion.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

§ 2638.311 Copies of published formal advisory opinions.

Each designated agency ethics official shall receive a copy of each published opinion. Copies will also be available to the public from the Office of Government Ethics upon request at no more than cost.

§ 2638.312 Referral of requests.

(a) If a designated agency ethics official receives a request for advice from a person and determines that the request may come within the criteria set forth in § 2638.303, he or she shall con-

tact the Office of Government Ethics concerning the request before referring the request to the Office. If after such consultation the Office of Government Ethics determines that the request should be the subject of a formal advisory opinion, the designated agency ethics official shall notify the person making the request of that determination and request the person's permission to refer the request to the Office of Government Ethics.

(b) If the Director receives a request for an opinion which does not fulfill the criteria set forth in § 2638.303, he or she may:

(1) Furnish informational assistance to the person as provided in § 2638.305(a), or

(2) Refer the request to the appropriate designated agency ethics official.

(c) In all instances covered by paragraphs (a) and (b) of this section, a referral will not be made in the case of questions regarding possible future employment plans of an individual making the request unless he or she is first notified and gives his or her consent or the request itself indicates that such a referral may be made.

§ 2638.313 Agency opinions.

If the designated agency ethics official issues a written opinion concerning the application of 18 U.S.C. 202–209, he or she shall transmit a copy of that opinion to the Office of Government Ethics.

Subpart D—Correction of Executive Branch Agency Ethics Programs

SOURCE: 55 FR 1666, Jan. 18, 1990, unless otherwise noted.

§ 2638.401 In general.

The Director of the Office of Government Ethics has authority under subsections 402(b)(9) and 402(f)(1) of the Ethics in Government Act to order action to correct deficiencies in agency ethics programs. These procedures are intended to be used to correct deficiencies in agency ethics programs

that are not being addressed adequately by the agency. They are not intended to be used to deal with cases involving individual employees or former employees. See subpart E of this part. For purposes of this section, an agency ethics program shall include those matters that are the responsibility of agency heads and designated agency ethics officials under subpart B of this part and shall include the requirements under part 2634 of this chapter and part 735 of this title to establish public and nonpublic financial disclosure systems. In implementing these procedures, the Director may use any authority contained in the Ethics Act.

§ 2638.402 Corrective orders.

(a) *Notice.* Where the Director has information indicating that an agency ethics program is not in full compliance with the requirements set forth in applicable statutes or regulations, the Director may issue a Notice of Deficiency to the designated agency ethics official and request an agency report under paragraph (b) of this section.

(b) *Agency report.* Within such time as may be set forth in the Notice of Deficiency, the designated agency ethics official shall provide a written report to the Director that shall include relevant information about the agency's ethics program. The ethics official's report may include:

- (1) Information establishing that there is no deficiency;
- (2) An explanation of how any deficiency is being corrected; or
- (3) A plan for correcting any deficiency within a reasonable period of time.

(c) *Director's determination.* The Director will make a determination based on the agency report.

(1) If the Director determines that there is no deficiency, the designated agency ethics official will be so notified.

(2) If the Director determines that appropriate steps are being taken or that the agency has presented an adequate plan for correcting the deficiency, the Director will so notify the designated agency ethics official and, in consultation with the designated agency ethics official, establish requirements for status reports, if nec-

essary, and for notification when the deficiency has been corrected.

(3) If the Director determines that a deficiency is not being corrected, the Director will issue an Order under paragraph (d) of this section.

(d) *Orders.* An order issued by the Director will be addressed to the head of the agency with a copy to the designated agency ethics official and shall specify:

- (1) The deficiency in the agency ethics program that requires correction;
- (2) The basis upon which the Director has determined that a deficiency exists;
- (3) The corrective action required to remedy the deficiency; and
- (4) Any reporting requirements necessary to establish that corrective action has been accomplished.

§ 2638.403 Agency compliance.

Within such time as may be set forth in the order, the agency head shall file a report with the Director detailing the corrective action taken. If corrective action cannot be accomplished within that time, the agency head shall submit a plan of corrective action for approval by the Director providing for appropriate status reports and notification of compliance. In either case, if the agency report or plan is deemed satisfactory, the Director will so inform the agency head. If the agency report or plan is insufficient, but only in minor respects, the Director may inform the agency head of the adjustments needed to bring the report or plan into compliance and a timeframe therefor; otherwise, the procedures under § 2638.404 of this subpart will be invoked.

§ 2638.404 Report of noncompliance.

If the agency fails to comply with an order issued under § 2638.402(d), the Director shall:

(a) Notify the head of the agency of intent to furnish a report of noncompliance to the President and the Congress;

(b) Provide the agency 14 calendar days within which to furnish written comments for submission with the report of noncompliance; and

(c) Report the agency's noncompliance to the President and to the Congress.

Subpart E—Corrective and Remedial Action in Cases Involving Individual Executive Agency Employees

SOURCE: 55 FR 1667, Jan. 18, 1990, unless otherwise noted.

§ 2638.501 In general.

(a) *Authority.* The Director of the Office of Government Ethics has authority under subsections 402(b)(9) and 402(f)(2) of the Act to order corrective and remedial action with respect to individual employees to bring about compliance with applicable ethics provisions. Nothing in this subpart relieves an agency of its primary responsibility to ensure compliance.

(b) *Definitions.* For the purpose of this subpart:

(1) *Ethics provision* includes any rule, regulation or executive order relating to conflicts of interest or standards of conduct in the executive branch. The term excludes any statute that is contained in title 18 of the United States Code or which imposes a criminal penalty as well as any statute made applicable to a specific agency that mandates or proscribes conduct not otherwise the subject of Governmentwide standards. It excludes any matter covered by sections 101 (k) and (m) of Executive Order 12674 that are within the cognizance of agency Inspectors General, the Office of Special Counsel or the Equal Employment Opportunity Commission.

(2) *Employee* means any officer or employee, including a special Government employee, covered by any of the provisions contained in part 735 of this title.

(3) *Head of an agency*, in the case of an agency that is headed by a board, committee or other group of individuals, refers to the employee's appointing authority.

(4) *Corrective action* means any action necessary to remedy a violation of an ethics provision including, but not limited to, recusal, divestiture, termination of an activity, restitution, or

the creation of a qualified blind or diversified trust.

(5) *Disciplinary action* includes the full range of disciplinary actions provided for by Office of Personnel Management regulations and instructions implementing authorities contained in title 5 of the United States Code or provided for in comparable authorities applicable to employees not subject to title 5.

(6) The terms *he*, *his* and *him* include "she," "hers" and "her."

(c) *Violations of criminal statutes.* Nothing contained in this part gives the Director or any agency official authority to make a finding that any criminal statute relating to conflicts of interest is being or has been violated. If facts elicited under these procedures indicate that a criminal violation of any such provision is occurring or has occurred, the suspected violation will be referred for possible prosecution in accordance with 28 U.S.C. 535 and the reporting requirements set forth in §2638.603 of this chapter shall apply. Subsequent to referral, proceedings under this subpart may be initiated or continued at the discretion of the Director, after consultation with the appropriate investigatory or prosecutorial authorities.

(d) *National security.* Proceedings under this subpart shall be conducted in accordance with applicable national security requirements.

[55 FR 1667, Jan. 18, 1990; as amended at 55 FR 21846, May 30, 1990]

§ 2638.502 Recommendations and advice.

The Director may make recommendations and provide advice to agencies, designated agency ethics officials and employees for the purpose of ensuring an employee's compliance with applicable ethics provisions. This authority may be used where there is doubt or a dispute regarding the applicability of an ethics provision or where the Director has information indicating that an ethics provision is being improperly interpreted. Recommendations may be made or advice provided on the Director's own initiative or at the Director's discretion in response to

a written or oral request. As determined by the Director, the recommendation may be made or the advice given either orally or in writing. In addition, the Director shall afford an employee the opportunity for personal consultation, if practicable, regarding action required to be taken by the employee to achieve compliance with applicable ethics provisions.

§ 2638.503 Agency investigations.

(a) *Recommendation of investigation.* If the Director has reason to believe that an employee is violating or has violated any ethics provision, the Director may recommend to the head of the agency that the agency conduct such investigation as is necessary to determine whether, in fact, a violation is occurring or has occurred and, where warranted, take appropriate disciplinary or corrective action. If the matter already has been investigated or if the facts are fully known to the agency and, in the opinion of the agency head, require no further investigation, the head of the agency shall notify the Director of that determination and shall promptly file the agency report required by paragraph (c) of this section.

(1) If the employee involved is the head of an agency, the recommendation shall be made to the President and the procedures set forth in this section shall serve as guidance only.

(2) Where there is reason to believe that an employee has given preferential treatment or failed to act impartially, this authority will not be used to initiate an investigation in the nature of a review or audit of the agency program in which the employee participated.

(b) *Initiation of investigation.* The head of the agency shall notify the Director when the agency has initiated an investigation. Where it is anticipated that the investigation will not be completed within 60 calendar days, the head of the agency will notify the Director of that fact and provide an explanation reasonably justifying additional time.

(c) *Agency report.* The head of the agency shall file a report with the Director detailing findings of fact and disciplinary and/or corrective actions taken, if any.

(d) *Director's determination.* The Director will make a determination based on the agency investigation and report.

(1) If the Director determines that the agency has conducted an adequate investigation and has taken appropriate corrective and/or disciplinary action, the Director shall notify the agency that the matter is closed.

(2) If the Director determines that the agency has conducted an adequate investigation and has recommended appropriate corrective and/or disciplinary action, the Director shall notify the agency that the matter will be closed upon notification that such action has been taken.

(3) If the Director determines that the agency has not conducted an adequate investigation, the Director may recommend that the agency undertake further investigative effort.

(4) If the Director determines that the agency has improperly interpreted an ethics provision or improperly applied an ethics provision to the facts of the case, the Director may, in accordance with § 2638.502, provide advice and recommendations necessary to ensure compliance.

(5) If the Director determines that the agency has taken or recommended inappropriate corrective or disciplinary action, the Director may notify the head of the agency of intent to institute proceedings under § 2638.504 or § 2638.505.

(e) *Notice of noncompliance.* If the Director determines that the head of an agency has failed to conduct an adequate investigation within a reasonable period of time, the Director shall notify the President of that determination. A Notice of Noncompliance will not be based upon a determination that the agency has improperly interpreted or applied an ethics provision or that the agency has taken or recommended inappropriate corrective or disciplinary action.

§ 2638.504 Director's finding.

(a) *In general.* If the Director has reason to believe that an employee is violating or has violated an ethics provision, the Director may initiate proceedings under this section for the purpose of making a finding as to whether there is or has been such a violation. In

the context of such proceedings, the Office of Government Ethics has the burden of proof to establish that the employee is violating or has violated an ethics provision. The procedures contained in this section do not apply to findings or orders for action made to obtain compliance with the financial disclosure requirements in title II of the Ethics Act. For those findings and orders, the procedures contained in section 206 of the Act shall apply.

(b) *Investigation.* The Director may initiate such investigation as is necessary to determine whether proceedings under this section are warranted. Ordinarily, a determination to proceed will be based upon an agency report of investigation filed under § 2638.503(c) and a determination by the Director under § 2638.503(d)(5) that the agency has taken or recommended inappropriate corrective or disciplinary action.

(c) *Notice.* The employee shall be served personally or by United States mail with written notice of commencement of proceedings under this section. A copy of the notice shall be provided to the head of the agency and to the designated agency ethics official. The notice shall be signed by the Director and shall include the following:

- (1) A brief statement setting forth the basis for a possible ethics violation;
- (2) A copy of this section; and
- (3) The date by which the employee's comments must be submitted.

(d) *Employee comments.* The respondent employee has the right to comment on the alleged violation of an ethics provision by submission of evidence or arguments. As determined by the Director, the submission may be made orally or in writing. In the absence of an extension granted by the Director for good cause shown, comments shall be submitted within the time set forth in the notice.

(e) *Finding.* The Director will make a written finding as to whether a violation of any ethics provision has occurred or is occurring. The finding will include a statement of the facts upon which the finding is based and a reference to the specific ethics provision in issue. A copy of the finding will be provided to the respondent employee, the head of the agency and the designated agency ethics official.

§ 2638.505 Director's decision and order.

(a) *In general.* Where the Director has reason to believe that an employee is violating an ethics provision, the Director may, subject to the procedures set forth in this section, issue an order that the employee take specific corrective action to remedy the violation. Ordinarily, a determination to proceed under this paragraph (a) will be based on the Director's finding under § 2638.504(e) that an ethics violation has occurred or is occurring and reason to believe that the violation is continuing. The procedures contained in this section do not apply to findings or orders for action made to obtain compliance with the financial disclosure requirements in title II of the Ethics Act. For those findings and orders, the procedures contained in section 206 of the Act shall apply.

(b) *Notice.* The employee will be served, personally or by United States mail, with notice of proceedings to determine whether a violation of an ethics provision is occurring and whether corrective action is necessary to end the violation. A copy of the notice shall be provided to the head of the employee's agency and the designated agency ethics official thereof. The notice shall specify the employee's right to present evidence or arguments either in writing or, at the employee's written request, at a hearing conducted on the record. The notice shall be signed by the Director and shall include:

- (1) A brief statement setting forth the basis for a possible ethics violation;
- (2) Where applicable, a copy of the Director's finding under § 2638.504(e);
- (3) A statement of the authority under which proceedings are to be conducted, together with a copy of this section; and
- (4) The date by which the employee must, by written notification to the Director, elect to present evidence and arguments either at a hearing or in writing.

(c) *Separation of functions.* Once the Director has issued a notice of proceedings and if the respondent employee has elected to have a hearing conducted on the record, the General Counsel of the Office of Government

Ethics shall designate attorneys of the Office of Government Ethics to participate on behalf of the Office in the proceedings, including the investigation and presentation of the evidence at the hearing. During this time period, the General Counsel of the Office of Government Ethics shall serve as Advisor to the Director and will not supervise Office of Government Ethics attorneys who are charged with the investigation and presentation of the evidence in the pending matter. A Deputy General Counsel shall supervise the Office attorneys responsible for the investigation and presentation of the evidence during this time period. No officer, employee, or agent engaged in the performance of investigative or advocacy functions for the Office of Government Ethics shall, in that or a factually related case, participate or advise in the decision, recommended decision or Office review except as witness or counsel in the proceedings. The Deputy General Counsel may request the views or report of the designated agency ethics official of the employee's agency when necessary to develop the record.

(d) *Written submissions.* Where the respondent employee elects to submit evidence and arguments in writing, he will be given a period of 30 calendar days from the date of the notice within which to make a submission.

(e) *Hearings.* If the respondent employee demands a hearing conducted on the record, he will be given written notice of the time and place of the hearing. The hearing will be convened within a reasonable period of time and will be conducted on the record. An administrative law judge who has been appointed under 5 U.S.C. 3105 shall act as the presiding official at the hearing. Hearings will be as informal as may be reasonably appropriate under all the circumstances. Evidence and testimony, although not ordinarily admissible under rules of evidence, may be received subject to the discretion of the administrative law judge. Immaterial, irrelevant or unduly repetitious evidence may be excluded. The parties may stipulate as to any facts or testimony. The testimony of witnesses shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge shall make such

rulings with respect to the conduct of the hearings as circumstances may require to ensure the orderly and expeditious presentation of evidence in a manner fair to the parties and consistent with these regulations and requirements of due process of law. The following procedures will apply to the hearing:

(1) *Conference.* The respondent employee or the designated attorney for the Office of Government Ethics may request, and the administrative law judge, on his own initiative or in response to a request, may set a prehearing conference for such purposes as the administrative law judge deems necessary.

(2) *Public hearings.* Hearings shall generally be open to the public. However, the administrative law judge may order a hearing or any part thereof closed, on his own initiative or upon motion of a party or other affected person, where to do so would be in the best interests of national security, the respondent employee, a witness, the public or other affected persons. Unless specifically excluded by the administrative law judge, the designated agency ethics official of the employee's agency shall be permitted to attend a closed hearing. Any order closing the hearing or any part thereof shall set forth the reasons for the administrative law judge's decision. Any objections thereto shall be made a part of the record. If a party or affected person's request to close the hearing or any part thereof is denied by the administrative law judge, that request shall be immediately appealable to the Director and the hearing shall be held in abeyance pending resolution of the appeal. The notice of appeal shall be filed in writing, not to exceed 10 pages exclusive of attachments, with the Director within 3 working days of the administrative law judge's denial of the request. The Director shall provide an opportunity for an oral hearing on the appeal conducted on the record and shall decide the appeal within 3 working days following receipt of the notice of appeal.

(3) *Continuances and delays.* The authority to adjourn the hearing shall rest with the administrative law judge.

Continuances will be allowed only for the most compelling reasons.

(4) *Hearing record.* Testimony and arguments shall be recorded verbatim and preserved for a reasonable period of time. When requested, transcripts of the testimony and arguments and copies of all documentary exhibits will be made available to the respondent employee upon the payment of the reasonable costs thereof.

(5) *Representation.* A party is entitled to appear in person or by or with counsel.

(6) *Witnesses.* The administrative law judge does not have the authority to subpoena witnesses. However, the respondent employee and the Office of Government Ethics may call witnesses whose testimony is relevant and necessary to the proceedings. Witnesses who are to testify or to produce documents in their official capacities will be assigned to do so by their agencies pursuant to 5 U.S.C. 6322 and will be paid travel expenses under 5 U.S.C. 5702. Witnesses who are not Federal employees may be issued invitational travel orders under 5 U.S.C. 5703 based on a determination by the administrative law judge that their testimony is essential to the proceedings.

(7) *Proof.* The Office of Government Ethics has the burden of proof to establish that the respondent employee is committing a violation of an ethics provision and that corrective action is necessary to end the violation.

(8) *Evidence.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination. The respondent employee and the designated attorney for the Office of Government Ethics may offer evidence, arguments, testimony of witnesses, affidavits or sworn statements.

(f) *Recommended decision.* At the conclusion of the hearing, the administrative law judge may request that the parties submit proposed findings and conclusions within a reasonable period of time. After receipt of the proposed findings and conclusions, if any, the administrative law judge shall certify the entire record to the Director for decision. When so certifying the record, the administrative law judge shall make a recommended decision that in-

cludes his written findings of fact and conclusions of law with respect to material issues.

(g) *Decision and order.* The Director's decision shall include written findings and conclusions with respect to all material issues and shall be supported by substantial evidence of record. The order shall state the corrective action, if any, to be taken by the respondent employee in order to remedy a violation of an ethics provision and shall establish a reasonable period of time within which the respondent employee must commence and complete the corrective action. A copy of the decision and order shall be furnished to the respondent employee and to the head of the agency and the designated agency ethics official, or where the respondent employee is the head of an agency, to the President.

(1) Preliminary to issuing a decision and order, the Director may request that comments on the recommended decision be provided by the designated agency ethics official of the employee's agency.

(2) Where the respondent employee has elected to have a hearing conducted on the record, the Director shall issue a decision and order as soon as practicable following receipt of the certified record and the administrative law judge's recommended decision.

(3) Where the respondent employee has elected to make a written submission under paragraph (d) of this section or has chosen to make no submission and has not requested a hearing, the Director will issue a decision and order as soon as practicable following receipt of all materials of record.

(4) In addition to the decision and order and any finding issued under §2638.504(e), the record will include, where applicable, all written submission under §2638.504(d) and §2638.505(d), a record of the hearing, all documentary evidence introduced at the hearing, any proposed findings and conclusions submitted by the parties and the administrative law judge's recommended decision.

(h) *Compliance with the order.* The respondent employee shall comply with the Director's order by commencing and completing the corrective action within the time specified in the order

and by furnishing the Director with satisfactory evidence of compliance.

(i) *Notice of noncompliance.* Where the respondent employee fails to comply with the Director's order within the time specified in the order, the Director will provide the head of the respondent employee's agency with written notice of the respondent employee's failure to comply. Where the respondent employee is the head of the agency, the Director shall submit such notification to the President.

[55 FR 1667, Jan. 18, 1990, as amended at 55 FR 21846, May 30, 1990]

§2638.506 Director's recommendation.

(a) Where the Director has made a finding under §2638.504(e) or has issued a decision and order under §2638.505(g) that an ethics provision is being or has been violated, the Director may recommend to the head of the respondent employee's agency that appropriate disciplinary action be taken. If the respondent employee is the head of an agency, the Director shall make any such recommendation to the President and the procedures contained in this section will serve as guidance only.

(b) *Agency response.* Within the time specified by the Director in his recommendation, the head of the agency shall notify the Director in writing of the action taken. If the action cannot be accomplished within the time specified, the head of the agency shall notify the Director in writing of the time needed for the action to be taken, and, thereafter, will provide appropriate notice of the disciplinary action taken.

(c) *Notice of noncompliance.* If the Director determines that the head of an agency has not taken appropriate disciplinary action within a reasonable period of time after the Director has recommended such action, the Director may notify the President of that determination in writing.

**Subpart F—Executive Branch
Agency Reports**

SOURCE: 55 FR 1670, Jan. 18, 1990, unless otherwise noted.

§2638.601 In general.

Agencies are required by section 402(b)(10) of the Act to file such reports as the Director of the Office of Government Ethics deems necessary. Section 402(e) contains specific requirements for annual reports and for reporting cases referred for possible prosecution under 28 U.S.C. 535. Reporting requirements imposed under this subpart are in addition to any requirements for reports or opinions contained in part 735 of this title, parts 2633 through 2637 of this chapter, or otherwise under this chapter, and in other subparts of this part.

§2638.602 Annual agency reports.

(a) On or before February 1 of each year, each agency shall file with the Office of Government Ethics a report containing information about the agency's ethics program. Detailed reporting requirements will be specified in instructions to be issued by the Director in advance of the first day of the period to be covered by the annual report. Annual agency reports will cover the prior calendar year and, as a minimum, will include the following:

(1) The name, position, title and duties of each official who performs any or all of the duties of the designated agency ethics official or alternate;

(2) Statistics regarding public and nonpublic (confidential) financial disclosure report filings;

(3) A description and evaluation of the agency's program of ethics education, training and counseling, including the number of training courses given, the subject matters covered, training materials distributed and counseling services offered.

(b) Failure to timely file the report required by paragraph (a) of this section may be cause to invoke the procedures at subpart D of this part for correction of agency programs.

§2638.603 Reports of referral for possible prosecution.

(a) *In general.* Section 535 of title 28 of the United States Code imposes upon every agency a duty to report to the Attorney General any information, allegations or complaints relating to violations of title 18 of the United States Code involving Government officers

and employees, including possible violations of 18 U.S.C. 207 by former officers and employees. Guidelines issued by the Attorney General require reporting of such allegations or complaints to the local office of the appropriate investigative agency, the United States Attorney for the district in which the violation occurred or is occurring and the appropriate division of the Department of Justice.

(b) *Report of referral.* When any matter involving an alleged violation of Federal conflict of interest law is referred pursuant to 28 U.S.C. 535, the agency shall concurrently notify the Director of the Office of Government Ethics of the referral and provide a copy of the referral document, unless such notification or disclosure would otherwise be prohibited by law.

(c) *Disposition reports.* (1) Where there has been notice that the matter reported under paragraph (b) of this section will not be prosecuted, the agency shall promptly notify the Director of that fact, the date of the decision and any disciplinary or corrective action initiated, taken or to be taken by the agency.

(2) When the agency is notified or learns from the Department of Justice that an indictment has been handed up and signed or an information has been filed, the agency shall promptly report that fact to the Director. Thereafter, the agency shall promptly notify the Director of the final disposition of the prosecution and of any disciplinary or corrective action initiated, taken or to be taken by the agency.

(3) When disciplinary or corrective action is initiated or is to be taken, the agency will notify the Director of the final disposition of the matter.

[55 FR 1670, Jan. 18, 1990, as amended at 55 FR 21847, May 30, 1990]

Subpart G—Executive Agency Ethics Training Programs

SOURCE: 57 FR 11890, Apr. 7, 1992, unless otherwise noted.

§ 2638.701 Executive agency ethics training programs; generally.

Each executive branch agency shall maintain a program of ethics training

designed to ensure that all of its employees are aware of: the Federal conflict of interest statutes, located at chapter 11 of title 18 of the United States Code; the Principles of Ethical Conduct, found in part I of Executive Order 12674, as modified; the Standards of Ethical Conduct for Employees of the Executive Branch, codified at 5 CFR part 2635, and any agency supplemental regulation thereto; and how to contact agency ethics officials when the employee needs advice concerning ethics issues. As a minimum, each agency program shall consist of the initial ethics orientation required by § 2638.703 of this subpart and the annual ethics briefing required by § 2638.704 of this subpart. For purposes of this subpart, the term “employee” shall include special Government employees (as defined in 18 U.S.C. 202(a)) and officers of the uniformed services.

[62 FR 11312, Mar. 12, 1997]

§ 2638.702 Responsibilities of the designated agency ethics official; review by the Office of Government Ethics.

It shall be the responsibility of the designated agency ethics official of each executive agency or his or her designee to make any written determinations provided for in this subpart and to:

(a) Direct the agency ethics training program to ensure that it meets the requirements of E.O. 12674 (as modified by E.O. 12731) and of this subpart and that the course content is legally correct;

(b) Ensure the availability of qualified individuals to meet the annual ethics briefing requirements of § 2638.704 of this subpart. For the purposes of this subpart, the following shall be considered qualified individuals:

(1) The designated agency ethics official described in § 2638.201;

(2) The alternate agency ethics official described in § 2638.202(b);

(3) A deputy ethics official described in § 2638.204;

(4) Any employee of the Office of Government Ethics whose services are made available by the Office of Government Ethics; and

(5) An individual determined by the designated agency ethics official or his or her designee to possess sufficient familiarity with the conflict of interest statutes and standards of ethical conduct regulations applicable to agency employees to respond to routine questions raised during briefing; and

(c) Develop each year a written plan for annual ethics training to be conducted by the agency. The written plan for annual ethics training shall be completed by the beginning of the calendar year covered by the plan. In developing their written plans for annual ethics training, agencies shall coordinate with OGE where necessary. The plan shall contain a brief narrative description of the agency's annual ethics training, and shall also include:

(1) An estimate of the total number of agency employees who will be provided annual ethics briefings, including:

(i) An estimate of the number of public filers described in §2638.704(b)(3) of this subpart who must be provided annual ethics briefings, including:

(A) An estimate of the number of public filers to whom annual ethics briefings will be presented verbally with a qualified individual present in accordance with §2638.704(d)(2)(ii) of this subpart;

(B) An estimate of the number of public filers to whom annual ethics briefings will be presented under the exception provided at 2638.704(d)(2)(iii)(A) of this subpart; and

(C) An estimate of the number of special Government employees who are public filers to whom the annual ethics briefing will be presented in accordance with the exception provided at 2638.704(d)(2)(iii)(B) of this subpart; and

(ii) An estimate of the number of covered employees other than public filers described in §2638.704(b)(3) of this subpart who must be provided annual ethics briefings, including:

(A) An estimate of the number of covered employees who will receive a verbal annual ethics briefing in accordance with 2638.704(d)(3)(ii) of this subpart;

(B) An estimate of the number of covered employees who will receive a written ethics briefing in accordance with 2638.704(d)(3)(i) of this subpart;

(C) An estimate of the number of covered employees who will receive a written ethics briefing in accordance with the exception provided at §2638.704(d)(3)(iii)(A) of this subpart;

(D) An estimate of the number of special Government employees and the number of officers in the uniformed services who will receive a written ethics briefing in accordance with the exceptions provided at §2638.704(d)(3)(iii)(B) and (d)(3)(iii)(C) of this subpart; and

(E) An estimate of the number of covered employees who will receive a written ethics briefing in accordance with the exception provided at §2638.704(d)(3)(iii)(D) of this subpart; and

(2) Any other information that the designated agency ethics official believes will facilitate OGE's review of the agency's ethics training program.

[57 FR 11890, Apr. 7, 1992, as amended at 59 FR 12148, Mar. 16, 1994; 62 FR 11312, Mar. 12, 1997]

§2638.703 Initial agency ethics orientation.

(a) Each new agency employee who enters on duty shall, within 90 days of the date of his or her entrance on duty, be given:

(1) Except as provided in paragraph (b) of this section, a copy of part 2635 of this chapter, Standards of Ethical Conduct for Employees of the Executive Branch, and any supplemental regulation of the concerned agency;

(2) The names, titles, office addresses, and telephone numbers of the Designated Agency Ethics Official and other agency ethics officials available to answer questions regarding the employee's ethical responsibilities; and

(3) A minimum of one hour of official duty time for the purpose of permitting the employee to review the written materials furnished pursuant to this section. If the agency provides verbal ethics training during official duty time, including a verbal ethics briefing provided in accordance with §2638.704(d) of this subpart, or a nominee or other new entrant receives verbal ethics training provided by the Office of Government Ethics or the White House Office, the period of official duty time set aside

for individual review may be reduced by the time spent in such training.

(b) An agency may meet the requirement of paragraph (a)(1) of this section by:

(1) Furnishing each employee a copy of the Standards of Ethical Conduct for Employees of the Executive Branch at part 2635 of this chapter, and any supplemental regulation of the concerned agency, for the purposes of review only, provided that copies of the complete text of part 2635 and any supplemental regulation of the concerned agency are retained and readily accessible in the employee's immediate office for use by several employees; or

(2) Providing each employee with materials that summarize part I of Executive Order 12674, as modified by Executive Order 12731, 3 CFR, 1990 Comp., p. 306, the Standards of Ethical Conduct for Employees of the Executive Branch at part 2635 of this chapter, and any supplemental regulation of the concerned agency. To ensure that all employees have access to all of the information contained in these documents, an agency using this alternative must ensure that copies of the complete text of part 2635 and the agency's supplemental regulation thereto (if any) are retained and readily accessible in the employees' immediate office area.

[59 FR 12148, Mar. 16, 1994, as amended at 62 FR 11313, Mar. 12, 1997]

§ 2638.704 Annual ethics briefings.

(a) *Annual ethics briefings.* Executive branch agencies must provide each employee identified in paragraph (b) of this section with an ethics briefing every calendar year. This briefing must meet the content requirements contained in paragraph (c) of this section and the presentation requirements contained in paragraph (d) of this section.

(b) *Employees covered.* Executive branch agency employees to whom this section applies include all of the following:

- (1) Employees appointed by the President;
- (2) Employees employed within the Executive Office of the President;
- (3) Employees required to file public financial disclosure reports under part 2634 of this chapter;

(4) Employees required to file confidential (nonpublic) financial disclosure reports under subpart I of part 2634 of this chapter or any supplemental regulation or addendum of the concerned agency (agency employees who are excluded from the confidential financial disclosure requirements through the use of an alternative procedure approved by the Office of Government Ethics pursuant to § 2634.905(c) of this chapter must also receive annual ethics briefings from their agency pursuant to this paragraph);

(5) Contracting officers within the meaning of 41 U.S.C. 423(f)(5); and

(6) Other agency employees designated by the head of the agency or his or her designee based on a determination that such briefings are desirable in view of their particular official duties.

(c) *Content.* Agencies are encouraged to vary the emphasis and content of annual agency ethics briefings from year to year as necessary within the context of their ethics programs. The emphasis and content are generally a matter of each agency's sole discretion. However, each briefing must include, as a minimum:

(1) A reminder of the employees' responsibilities under part I of Executive Order 12674, as modified, the Standards of Ethical Conduct for Employees of the Executive Branch, part 2635 of this chapter, and any supplemental regulation thereto by the concerned agency;

(2) A reminder of the employees' responsibilities under the conflict of interest statutes contained in 18 U.S.C. chapter 11; and

(3) The names, titles, office addresses, and telephone numbers of the designated agency ethics official and other agency ethics officials available to answer questions regarding the employees' ethical responsibilities.

(d) *Presentation.* The annual ethics briefing shall be presented in accordance with the following requirements:

(1) A qualified individual, as defined in § 2638.702(b) of this subpart, shall:

- (i) Present the briefing, if the briefing is presented in person;

(ii) Prepare the recorded materials or presentation, if the briefing is presented by telecommunications, computer-based methods or recorded means; or

(iii) Prepare the written ethics briefing, if the annual ethics briefing requirement is satisfied through the use of a written ethics briefing in accordance with paragraphs (d)(2)(iii)(A)(2), (d)(2)(iii)(B), (d)(3)(i) or (d)(3)(iii) of this section.

(2) *Annual briefings for filers of public financial disclosure reports.* (i) The annual ethics briefings for covered employees described at paragraph (b)(3) of this section shall be verbal, either in person or by telecommunications, computer-based methods or recorded means. Employees must be provided a minimum of one hour of official duty time for this briefing.

(ii) A qualified individual, as defined in §2638.702(b) of this subpart, shall be present during and immediately following the presentation. The qualified individual need not be physically present at the training site to meet this requirement. To meet the “presence” requirement, the covered employees receiving the briefing must have direct and immediate access to the qualified individual.

Example 1 to paragraph (d)(2)(ii): An agency provides annual ethics briefings for public filers in a regional office by establishing a video conference link between a qualified individual in the headquarters office and the regional office. Because the link provides for direct and immediate communication between the qualified individual and the employees receiving the briefing, this arrangement meets the presence requirement even though the qualified individual is not physically located in the room where the briefing is received.

Example 2 to paragraph (d)(2)(ii): The agency described in the preceding example provides a briefing through a videotaped briefing instead of through a video conference link. The employees viewing the videotape are provided with a telephone at the training site and the telephone number of a qualified individual who is standing by during and immediately following the training to answer any questions. The

briefing fulfills the physical presence requirement because the employees receiving the briefing have direct and immediate access to a qualified individual.

Example 3 to paragraph (d)(2)(ii): The physical presence requirement would not be met if the facts of Example 2 were varied so that the employees receiving the briefing did not have immediate access to the qualified individual, either because there was no phone provided at the training site or because the qualified individual was not standing by to respond to any questions raised. Merely providing the phone number of the qualified individual, without providing access to that individual who is standing by to answer questions raised during the briefing, does not provide the employees receiving the training with the direct and immediate access to the qualified individual necessary to satisfy the presence requirement.

(iii) *Exceptions.* An agency may provide the annual ethics briefing for employees described in paragraph (b)(3) of this section by means other than as specified in paragraphs (d)(2)(i) and (d)(2)(ii) of this section only under the following circumstances:

(A) Where the Designated Agency Ethics Official, or his or her designee, has made a written determination that circumstances make it impractical to provide the annual verbal ethics briefing with a qualified individual present, to a particular employee or group of employees in accordance with paragraphs (d)(2)(i) and (d)(2)(ii) of this section. In such cases, the annual ethics briefing may be provided without the presence of a qualified individual, provided that a minimum of one hour of official duty time is set aside for employees to attend the presentation or review the written materials, either by:

(1) Telecommunications, computer-based methods or recorded means; or

(2) Written means.

Example 1 to paragraph (d)(2)(iii)(A): The State Department has one public filer (the Ambassador) in the American Embassy in Ulan Bator, Mongolia. Because of the difference in time zones and the uncertainty of an ambassador’s schedule, the designated agency ethics

official for the State Department is justified in making a written determination that circumstances make it impractical to provide the annual ethics training as a verbal briefing, either with or without the presence of a qualified individual. The required annual ethics briefing can therefore be provided by written means in accordance with § 2638.704(d)(2)(iii)(A)(2). Note that an initial ethics orientation provided in the same calendar year in accordance with § 2638.703 of this subpart will meet this annual written ethics briefing requirement, provided the materials meet the content requirements stated at paragraph (c) of this section.

(B) In the case of special Government employees who are covered employees under paragraph (b)(3) of this section, an agency may (without the presence of a qualified individual) provide the annual ethics briefing by written or other means at the agency's discretion, provided that a minimum of one hour of official duty time is set aside for employees to attend the presentation or review the written materials.

(3) *Annual ethics briefings for all other covered employees.* (i) An agency may satisfy the annual ethics briefing requirement for covered employees other than those described at paragraph (b)(3) of this section for up to two out of every three calendar years through the distribution of a written ethics briefing to those employees. In such case, while not required to provide a minimum of one hour of official duty time, an agency must provide employees receiving their annual ethics briefings under this paragraph with sufficient official duty time to review the written materials provided. Note that an initial ethics orientation provided in the same calendar year in accordance with § 2638.703 of this subpart will meet this annual ethics briefing requirement (as well as that of § 2638.704(d)(3)(iii) of this section), provided the materials meet the content requirements stated at paragraph (c) of this section.

(ii) Except as permitted under paragraph (d)(3)(iii) of this section, the ethics briefing for covered employees other than those described at paragraph (b)(3) of this section shall be presented verbally at least once every

three years, either in person or by telecommunications, computer-based methods or recorded means. Employees must be provided a minimum of one hour of official duty time for this verbal briefing. Unlike the annual ethics briefing described at paragraph (d)(2) of this section, for covered employees described at paragraph (b)(3) of this section, a qualified individual need not be present during and immediately following the verbal presentation provided under this paragraph.

(iii) *Exceptions.* An agency can provide covered employees receiving their annual ethics briefings under this paragraph (d)(3) with written briefings only, in accordance with paragraph (d)(3)(i) of this section, every year without the verbal ethics briefing as described at paragraph (d)(3)(ii) of this section at least once in any three calendar year period, under the following circumstances:

(A) Where the Designated Agency Ethics Official, or his or her designee, has made a written determination that circumstances make it impractical to provide an ethics briefing verbally once every three calendar years to a particular employee or group of employees in accordance with paragraph (d)(3)(ii) of this section;

(B) In the case of special Government employees who are expected to work fewer than 60 days in a calendar year;

(C) In the case of officers in the uniformed services who serve on active duty for 30 or fewer consecutive days; or

(D) Where a particular employee or group of employees are covered employees solely because of agency discretionary designation pursuant to paragraph (b)(6) of this section.

[57 FR 11890, Apr. 1992, as amended at 59 FR 12149, Mar. 16, 1994; 62 FR 11313, Mar. 12, 1997]

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

Subpart A—General Provisions

Sec.

2640.101 Purpose.

2640.102 Definitions.