

OFFICE OF GOVERNMENT ETHICS

AGENCY: Office of Government Ethics

5 CFR Part 2638

**Corrective Action and Reporting Requirements
Relating to Executive Agency Ethics Programs:
Implementation of the Office of Government Ethics
Reauthorization Act of 1988**

RIN 3209-AA02

55 FR 21845

Wednesday, May 30, 1990

ACTION: Final rule.

SUMMARY: The Office of Government Ethics is issuing final rules to establish procedures: (1) To correct deficiencies in executive branch agency ethics programs; (2) to bring individual agency employees into compliance with rules, regulations and executive orders relating to standards of conduct and conflicts of interest; and (3) to specify requirements for executive agency reports.

EFFECTIVE DATE: May 30, 1990.

FOR FURTHER INFORMATION CONTACT: Leslie L. Wilcox, Office of Government Ethics, telephone (202/FTS) 523-5757, FAX (202/FTS) 523-6325.

SUPPLEMENTARY INFORMATION:

A. Review of Comment Letters and Rule Changes Adopted

The Office of Government Ethics published interim regulations on January 18, 1990 at 55 Federal Register 1665 establishing procedures to correct deficiencies in executive branch agency ethics programs, to bring individual executive agency employees into compliance with ethics standards and to specify requirements for executive agency reports and assistance. The interim rules document provided that interested persons could file comments through March 19, 1990. We received comments from 5 agencies.

The Office of Government Ethics (OGE) has adopted changes that accommodate national security concerns and clarify executive agencies' role in hearings and their responsibility for notifying OGE of conflict cases referred for possible prosecution. These changes address the substance of the concerns expressed by four of the five agencies that furnished comments (the other comment was not adopted, see below).

Three agencies noted that new @ 2638.603(b) of 5 CFR would appear to require reporting by agencies to OGE of any case referred for possible prosecution, whereas Section 402(e) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. IV, only requires notification of cases involving alleged violations of Federal conflict of interest laws. Sections 2638.603(b) and 2638.603(c)(1) of 5 CFR are accordingly revised to make clear that the notification requirement applies only to alleged violations of Federal conflict of interest laws referred for prosecution pursuant to 28 U.S.C. 535. One agency noted that conflict of interest cases may be referred for possible prosecution under authorities other than 28 U.S.C. 535 and another noted that the Department of Justice has systems in place that may provide information about case referrals. OGE recognizes that there are other referral authorities and other sources of information about conflict of interest cases referred for possible prosecution. Section 2638.603 is intended to implement the statutory requirement under the Ethics Act that agencies, unless otherwise prohibited by law, report to OGE any conflict of interest case referred for possible prosecution under 28 U.S.C. 535. It does not foreclose the collection of other information or the use of other sources of information about conflict of interest cases.

Two agencies expressed concern with the absence of regulatory

language in the interim rules that would accommodate any national security concerns that might arise in connection with proceedings involving individual employees conducted under subpart E. They suggested that language be inserted at several points to ensure that personnel involved in investigations and hearings, including administrative law judges, have proper security clearances and that classified information is not improperly disclosed. In lieu of the several changes recommended by these agencies, a new @ 2638.501(d) of 5 CFR is added to provide that proceedings under subpart E shall be conducted in accordance with national security requirements. Furthermore, @ 2638.505(e)(2) is revised to provide that hearings, which are generally to be open to the public, may be closed, inter alia, in the interest of national security.

Two agencies felt that the regulations did not clearly define the agency's role in proceedings conducted under subpart E. One suggested a provision for agency participation in proceedings involving its own employees in order to protect agency interests and information. The other suggested changes that would make the agency concerned virtually a third party to hearings conducted under @ 2638.505. That agency suggested for example, that the designated agency ethics official be served with copies of all submissions as well as a copy of the administrative law judge's recommended decision and be provided an opportunity to comment thereon.

The procedures contained in subpart E will generally ensure that the views of the agency of the individual employee involved are taken into account in any proceeding conducted under that subpart. The Office of Government Ethics does not agree that the designated agency ethics official should have an active role in such proceedings; this is simply not contemplated in the Ethics Act statutory scheme. However, to clarify and enhance the agency's role in hearings involving its own employees, we have amended @@ 2638.505(c) and 2638.505(g) of 5 CFR, respectively, to ensure that the views of the designated agency ethics official concerned may be obtained when necessary to develop the record and to provide that the Director may request comments by the designated agency ethics official on the recommended decision of the administrative law judge. To ensure that the employee's agency is apprised of proceedings under @ 2638.505, we have adopted the recommendation to amend @ 2638.505(b) to provide that a copy of the notice of proceedings shall be provided to the head of the agency and the designated agency ethics official. We have also adopted the recommendation that specific provision be made for attendance by

the designated agency ethics official at hearings closed to the public. Accordingly, @ 2638.505(e)(2) is amended to permit attendance by the designated agency ethics official of the employee's agency at closed hearings unless specifically excluded by the administrative law judge.

The Office of Government Ethics rejected the recommendation by the fifth commenting agency that the regulations be amended to provide that an agency attorney who has furnished ethics advice to an employee who is the subject of a proceeding under subpart E may not be required to provide information with respect of that advice without the consent of the employee. This recommendation sought recognition of the existence of a privilege similar to the attorney-client privilege as between agency attorneys or ethics officials and individual employees. In providing advice relating to standards of conduct and conflicts of interest, agency attorneys and ethics officials act on behalf of their Government agency and not in an attorney-client or similar relationship to the employees they advise.

Finally, OGE has additionally decided to clarify that these corrective action and agency report regulations apply to executive branch agencies and their employees, and not to the other two branches of the Government, by amending the titles of subparts D, E and F of 5 CFR part 2638 to include reference to the executive branch (the amended subpart D title also makes it clear that ethics programs are the subject of its provisions).

B. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553 (b) and (d), the Director of the Office of Government Ethics finds good cause exists for waiving the general notice of proposed rulemaking and 30-day delay in effectiveness as to these revisions. The notice is being waived because these regulations concern matters of agency organization, practice and procedure and because the Office of Government Ethics Reauthorization Act of 1988 has been in effect since November 1988, and it is essential to the workings of executive branch agency ethics programs that these revisions to the implementing regulations go into effect as soon as possible. Further, these revisions in large measure reflect the comments received on the interim rules published at 55 Federal Register 1665 (Jan. 18,

1990).

Executive Order 12291

The Office of Government Ethics has determined that this is not a major rule as defined under section 1(b) of Executive Order 12291, Federal Regulation.

Regulatory Flexibility Act

I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal executive branch agencies and employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because these regulations do not contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 5 CFR Part 2638

Administrative practice and procedure, Conflict of interests, Government employees, Reporting and recordkeeping requirements.

Approved: May 8, 1990.

Donald E. Campbell,
Acting Director, Office of Government Ethics.

Accordingly, the Office of Government Ethics pursuant to its authority under title IV of the Ethics in Government Act is adopting the interim rules amending 5 CFR part 2638 published at 55 FR 1665 (January 18, 1990) as final rules with the following changes:

PART 2638 -- OFFICE OF GOVERNMENT ETHICS AND EXECUTIVE AGENCY

ETHICS PROGRAM RESPONSIBILITIES

1. The authority citation for part 2638 is revised to read as follows:

Authority: 5 U.S.C. appendixes III, IV.

2. The title of subpart D of part 2638 is revised to read as follows:

Subpart D -- Correction of Executive Branch Agency Ethics Programs

3. The title of subpart E of part 2638 is revised to read as follows:

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

4. The title of subpart F of part 2638 is revised to read as follows:

Subpart F -- Executive Branch Agency Reports

5. Section 2638.501 is amended by adding a new paragraph (d) at the end to read as follows:

@ 2638.501 In general.

* * * * *

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

6. Section 2638.505 is amended by revising the introductory text of paragraph (b), by adding a new sentence to the end of paragraph (c), by removing the first two sentences of and adding three new sentences in place thereof to paragraph (e)(2), and by redesignating paragraphs (g)(1), (g)(2), and (g)(3) as paragraphs (g)(2), (g)(3) and (g)(4) and adding a new paragraph (g)(1) to read as follows:

@ 2638.505 Director's decision and order. * * * * *

(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:

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(c) * * * 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.

* * * * *

(e) * * *

(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. * * *

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(g) * * *

(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.

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7. Section 2638.603 is amended by revising paragraphs (b) and (c)(1) to read as follows:

@ 2638.603 Reports of referral for possible prosecution.

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(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.