

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Walter M. Shaub, Jr.
Director

SUBJECT: Technical Modification of 5 C.F.R. part 2640

The U.S. Office of Government Ethics (OGE) is issuing an interim final rule in order to make a technical modification to its regulations at 5 C.F.R. part 2640, in order to ensure their continued applicability to all individuals subject to requirements of 18 U.S.C. § 208.

Specifically, OGE is issuing an interim final rule making a technical modification to the definition of “employee” in its regulations at 5 C.F.R. part 2640, which implement section 208. OGE originally promulgated 5 C.F.R. part 2640 to cover all employees who were subject to section 208. OGE established this uniform coverage by defining “employee” to mean “an officer or employee of the executive branch of the United States, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia,” including “a special Government employee as defined in 18 U.S.C. 202.” 5 C.F.R. § 2640.102(b). The language of this definition in 5 C.F.R. part 2640 carefully covered all individuals then subject to the statute, including certain individuals who were not executive branch employees. The applicability of 5 C.F.R. part 2640 was, thus, coextensive with the applicability of section 208.

Recently, however, a cross-reference in the organic statute of a newly created board has expanded the coverage of the requirements of section 208 to include the board’s members and staff, who would not otherwise be subject to section 208. Pub. L. No. 114-187, § 109(a) (2016). In order to ensure the continued applicability of 5 C.F.R. part 2640 to all individuals subject to section 208, this interim regulation adds the phrase “..., or any other individual subject to requirements of 18 U.S.C. 208” at the end of the first sentence of the definition of “employee.” This technical amendment will guard against uncertainty as to the applicability of 5 C.F.R. part 2640 to the members and staff of this board, as well as to others who may in the future become subject to section 208.

As a result of this technical modification, 5 C.F.R. § 2640.102(b) will now read, as follows:

§ 2640.102 – Definitions.

(b) *Employee* means an officer or employee of the executive branch of the United States, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, an officer or employee of the District of Columbia, or any other individual subject to requirements of 18 U.S.C. 208. The term also includes a special Government employee as defined in 18 U.S.C. 202.

This modified language will be effective immediately. Because this minor amendment is strictly technical in nature, providing notice and comment and delaying the effective date are unnecessary. Moreover, in clarifying the meaning of “employee,” this rule is an interpretative rule and thus exempt from notice and comment and a delay in effective date pursuant to 5 U.S.C. 553(b) and 553(d)(2), respectively. Finally, this rule recognizes exemptions, which exempts the rule from the 30-day delayed effective date pursuant to 5 U.S.C. 553(d)(1). Nonetheless, the interim final rule provides a 60-day comment period for agencies and the public. OGE will review any comments received during the comment period and consider any modifications to this rule that appear warranted.

The interim final rule has been sent to the Office of the Federal Register for publication and will appear in the Federal Register.