

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

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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 2634.604(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, including post employment matters, is developed and conducted in cooperation with the education program of the Office of Government Ethics;

(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.

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 2634.604(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 2634.604(c)(2) of part 2634 and referred to in 2638.203(b)(3).

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 requests. 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 considered 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

(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 contact 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 necessary, 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.