

OFFICE OF GOVERNMENT ETHICS

AGENCY: Office of Government Ethics (OGE)

5 CFR Part 2638

Executive Agency Ethics Training Programs

RIN 3209-AA07

59 FR 12145

Wednesday, March 16, 1994

ACTION: Interim rule amendments with request for comments.

SUMMARY: This interim rule amends the OGE executive branch-wide regulation on "Executive Agency Ethics Training Programs." In response to agency concerns, the interim regulation grants executive branch agencies greater flexibility in administering their ethics training programs, enabling them to more efficiently use available resources to provide their employees with effective ethics training. Under the interim regulation, executive agencies will be able to provide their employees with summaries of the branch-wide regulations governing employee conduct in place of the actual text of those provisions as part of the employees' initial ethics orientation. Agencies are also able to make use of communications and electronic technologies in providing annual ethics training to covered employees. Written materials may be used to meet the annual training requirement for certain categories of employees; the requirement that employees in these categories receive a minimum of one hour of official duty time for annual ethics training is removed. The interim regulation clarifies that employees who fulfill the confidential financial disclosure

requirements through an alternate procedure or an OGE-approved substitute affirmative disclosure system are required to receive annual ethics training. Minor changes have also been made to delete out-of-date language associated with the initiation of the training requirements in calendar years 1992 and 1993 and to add an appropriate cross-reference to the detailed training provisions.

DATES: Interim regulation amendments effective January 1, 1994. Comments by agencies and the public are invited and are due on or before May 16, 1994.

ADDRESSES: Comments should be sent to the Office of Government Ethics, suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917, Attention: John C. Condray.

FOR FURTHER INFORMATION CONTACT: John C. Condray, Office of the General Counsel and Legal Policy, Office of Government Ethics, telephone: 202-523-5757; FAX: 202-523-6325.

SUPPLEMENTARY INFORMATION:

A. Synopsis of Changes

In accordance with section 301 of Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731 of October 17, 1990) (hereinafter Executive Order 12674), and consistent with its authority under the Ethics in Government Act (as amended), the Office of Government Ethics published subpart G of 5 CFR part 2638 as a final rule on April 7, 1992 at 57 FR 11886-11891, as corrected at 57 FR 15219 (April 29, 1992). On December 10, 1992, OGE published as a final rule certain amendments to the training regulation not directly related to this proposed amendment (see 57 FR 58399-58400, as corrected at 57 FR 61612 (December 28, 1992)). Based on concerns that agencies expressed to OGE, this interim rule further amends subpart G to provide agencies with greater flexibility in providing ethics training to their employees. The substantive amendments made by this interim regulation concern two sections of subpart G, Sec. Sec. 2638.703 and 2638.704. The amendments to Sec. 2638.703 revise the format of the requirement that agencies provide all of their employees with an initial ethics orientation. The amendments to Sec. 2638.704 revise the format of the annual ethics training that agencies must provide to certain covered employees. These amendments are described in greater detail below. Section 2638.702(a) has been amended to correspond to the amendments made to Sec. 2638.704. Minor changes have also been

made throughout subpart G to delete language associated with the initiation of the training requirements in calendar years 1992 and 1993.

Section 2638.703 Initial Agency Ethics Orientation

The key change for the initial ethics orientation requirement is found at interim 5 CFR 2638.703(b)(2). This provision permits agencies to substitute a summary of part I of Executive Order 12674 and the Standards of Ethical Conduct in the place of the actual text of the Standards. This was done in response to agency concerns that their employees may not be able to adequately assimilate the information contained in the actual text of the Standards and part I of Executive Order 12674 in the amount of time set aside for the initial agency ethics orientation, a minimum of one hour of official duty time. In the original training regulation as published in April 1992, OGE required the full text of these materials to be distributed to employees receiving the initial ethics orientation. This was based upon section 301(b) of Executive Order 12674, which requires that agencies ensure review by all employees of the Executive order and any regulations promulgated thereunder. The principle of that section is to ensure that employees understand the ethical expectations and responsibilities that they are required to meet. After careful consideration, OGE has determined that this requirement is more effectively met by allowing agencies the freedom to develop a summary that conveys the substance of the Executive order and the Standards of Ethical Conduct in a form that their employees will be better able to assimilate. Of course, executive branch employees remain subject to the requirements of part 2635. To make certain that employees have access to all of the information contained in part I of Executive Order 12674 and part 2635, Sec. 2638.703(b)(2) requires agencies using summary materials in lieu of part 2635 for an employees' initial ethics orientation to ensure that copies of the complete text of part 2635 are retained and readily accessible in the employee's immediate office area.

For those agencies that do decide to continue to provide the full text of the Standards for review instead of summary materials, Sec. 2638.703(a) has been amended to delete the requirement that agencies also provide their employees with a copy of part I of Executive Order 12674 as part of the initial agency ethics orientation. The revised Sec. 2638.703(a) only requires agencies to provide a copy of the Standards of Ethical Conduct for Employees of the Executive Branch, together with the names, titles, office addresses and telephone numbers of ethics officials available to

answer employee questions (this is also required in the case of provision of summary materials). The Office of Government Ethics has deleted the requirement that agencies provide their employees with a copy of part I of Executive Order 12674 because the requirement was redundant. The Standards, which were published in the Federal Register four months after subpart G was originally published, restate the 14 principles of ethical conduct contained in part I of Executive Order 12674 virtually verbatim. 5 CFR 2635.101(b). Agencies should note that OGE has retained part I of Executive Order 12674 as one of the subjects that must be included in any summary provided to agency employees in accordance with new Sec. 2638.703(b)(2). This was done to ensure that the 14 principles, which are fundamental to employee conduct, are included in any summary used thereunder.

Section 2638.704 Annual Agency Ethics Training

Annual Training for Alternate Confidential Filers

The interim regulation clarifies that employees exempted from confidential financial disclosure reporting pursuant to OGE-approved alternative procedures in accordance with 5 CFR 2634.905(c) must also receive annual ethics training from their agencies pursuant to Sec. 2638.704(b)(4). That section requires agencies to provide annual ethics training to all employees required to file confidential (nonpublic) financial disclosure reports under subpart I of 5 CFR part 2634 as well as any supplemental regulation or addendum thereto of the concerned agency. This is based in turn upon section 301(c) of Executive Order 12674, which explicitly includes confidential filers among those categories of employees for whom agencies must provide annual ethics briefings. Under another OGE executive branch regulation, Sec. 2634.905(c) of this chapter, an individual employee or class of employees (including special Government employees) who are otherwise subject to the confidential reporting requirements of 5 CFR part 2634 may be excluded from all or a portion of the confidential reporting requirements if they are subject to an agency alternative procedure approved by OGE under Sec. 2634.905(c). The Office of Government Ethics believes that agencies should still provide annual ethics training to such employees in accordance with Sec. 2638.704. Because of concern over the potential for a conflict of interest in their official positions, these employees are still obligated by their agency to fulfill an alternate procedure for the prevention of any conflicts. They are therefore the type of employees meant to be covered by the annual training requirement contained in section 301(c) of Executive

Order 12674 and this regulation. Based upon these considerations, OGE is therefore amending Sec. 2638.704(b)(4) to explicitly include such employees among those who must receive annual ethics training from their agency. The amendment to that section also changes the "and" to an "or" in the main clause referring to confidential filing under agency supplemental regulations as well as 5 CFR part 2634 itself to clarify that any employees subject to confidential reporting pursuant to OGE-approved agency substitute affirmative disclosure systems are to be included in annual training.

Course Content

Another change made by the interim regulation concerns the course content requirements for annual agency ethics training, contained in the training regulation at Sec. 2638.704(c). Some agencies had read the former course content requirements as requiring all executive branch agencies to provide repetitive training year after year on the same material. As OGE indicated in the preamble to the training regulation when it was published in April of 1992, this view is based on a misunderstanding of the nature of the requirement. Section 2638.704(c) as now amended retains language from its predecessor that states " * * * the emphasis and course content of annual agency ethics training courses may change from year to year * * * ." The former section then went on to state the minimum requirements, that of a review of employee's responsibilities under part I of Executive Order 12674, as modified, and the Standards of Ethical Conduct (and any agency supplemental regulation) as well as a review of employees' responsibility under the conflict of interest statutes contained in 18 U.S.C. chapter 11. The preamble to the April 1992 final rule stated that, after the first session of annual training, this requirement could be met with a brief overview of the basic principles. Such an overview, given to employees who are familiar with their responsibilities under the statutes and the regulations, need serve only as a reminder of the basic principles, and could be accomplished in a very short period of time. The content of the rest of the training is entirely at agency discretion.

The structure of the annual ethics training is intended to allow agencies to vary their approach from year to year to keep the program interesting and also to best meet the needs of their employees. The Office of Government Ethics encourages innovation by agencies in providing training to their employees. Some agencies have been very active in following up on the flexibility provided to them for annual training. The Department of Justice, for example,

is developing an interactive ethics computer game for use in its training. Several agencies, such as the Department of Defense and the U.S. Forest Service, are developing videotapes to supplement the OGE ethics training videotapes or to target the information provided to their employees. The Office of Government Ethics has consistently maintained that the minimum course content requirement contained in the regulation is intended to be a starting point from which agencies design and conduct their training, not a rigid requirement. However, because of continued confusion regarding the nature of this requirement, the interim regulation amends the language contained in Sec. 2638.704(c) to state that a "reminder" of employees' responsibilities under the conflicts' statutes and the regulations will suffice to meet this requirement.

Presence of a Qualified Individual

The interim rule amendment deletes the general requirement, formerly contained in Sec. 2638.704(d)(1), that annual training be presented with a qualified individual physically present during and immediately following the presentation. While the former Sec. 2638.704(d)(1) used the term "available," both the text of the regulation and the preamble at the time of publication made it clear that OGE expected the qualified individual to be present at the training. 57 FR 11886, 11889 (April 7, 1992). The reason for this requirement, as explained in the preamble to the final rule, was to provide the best means for addressing employee questions and concerns raised by the training. Some agencies, particularly those whose duty sites are widely scattered, have voiced concern over their ability to meet this requirement. The former training regulation provided an exception, at Sec. 2638.704(d)(2)(i), that allowed agencies to train covered employees without a qualified individual present under limited circumstances. This exception, however, was narrow in scope. Other limited exceptions were made for training provided to special Government employees and reserve officers.

Agency concern with this requirement, spurred on by legitimate concerns over the best use of limited agency resources, has caused OGE to move away from a strict presence requirement for the annual ethics training over the past year, so long as the employee retains some form of access to a qualified individual during and immediately following the training. During the course of reviewing agency written plans for annual ethics training, OGE has approved certain agency procedures that, while they did not provide for actual physical presence of the qualified individual, did meet the goal of

giving employees immediate and easy access to the qualified individual. For example, OGE approved an agency's training plan that called for the use of a video conferencing arrangement where the qualified individual could respond to employee questions directly as part of the training even though the qualified individual was not going to be physically present where the training was to be given. In another OGE-approved arrangement, an agency plan called for training to be provided through a satellite video broadcast, with a qualified individual on standby at the time of the training to answer questions over the telephone. These plans were approved because of the evolution of OGE's opinion on the desirability of a strict interpretation of the training regulation as it existed. The Office of Government Ethics has come to conclude that, while in-person training is often the most effective means of providing training, providing the "best" means of training may not be a realistic standard for all agencies in these times of fiscal restraints. The question therefore becomes one of setting a standard that agencies are able to meet while simultaneously meeting the goals of the ethics training program.

This interim regulation meets this standard by deleting the general requirement that a qualified individual be physically present during and following annual ethics training. The interim regulation retains the requirement that the annual training generally be provided verbally, which now can be done either in person or by recorded means. Written materials, standing alone, generally will not meet this requirement. This is necessary to comply with section 301(c) of Executive Order 12674, as modified by Executive Order 12731, which requires agencies to provide covered employees with an annual ethics "briefing." The interim regulation thus permits and encourages agencies to take advantage of technology in meeting this requirement. This could include, but is not limited to, use of video conferencing, telephone conferencing, audio or video cassettes, or computer-based training. Agencies will be required to have "qualified individuals," as defined in subpart G, develop any materials or lessons used in the training. Agencies will also be required to remind employees receiving annual ethics training of the names and phone numbers of ethics officials at their agency. This will provide employees with a point of contact should they need to seek clarification of issues raised in the course of the training or in their day-to-day work. Thus the interim regulation provides a standard that both encourages agencies to be creative in the means that they choose to provide the required training and is a realistic means of providing covered employees with the information that they need concerning the ethics and

conflict of interest rules that govern their conduct.

The interim regulation retains the exception, at Sec. 2638.704(d)(2)(i), permitting agencies to provide annual ethics training to a particular employee or group of employees by means of written materials when the Designated Agency Ethics Official, or his or her designee, makes a written determination that circumstances make it impractical to provide training to the employee or group of employees in accordance with Sec. 2638.704(d)(1). This section has been slightly reworded to reflect the changes made to Sec. 2638.704(d)(1). Because Sec. 2638.704(d)(1) now permits agencies to provide annual ethics training without the presence of a qualified individual, language referring to such training has been deleted from Sec. 2638.704(d)(2)(i). Like its predecessor, this exception is limited. Mere inconvenience to the agency, standing alone, will not justify a written determination under this section. As a practical matter, OGE does not expect this exception to be widely used because of the many options now available to agencies in providing annual ethics training to their employees. Section 2638.702(a)(ii), which requires agencies to include the number of employees to be trained under this exception in the agencies' written plan for annual ethics training, has also been reworded somewhat to reflect the changes made in Sec. 2638.704(d)(2)(i).

The interim regulation also preserves the two exceptions, at 5 CFR 2638.704(d)(2)(ii) and 2638.704(d)(2)(iii), permitting agencies to use written materials in providing annual ethics training to special Government employees and to officers in the uniformed services who serve on active duty for 30 or fewer consecutive days. As with Sec. 2638.704(d)(2)(i), discussed above, these sections have been slightly rewritten to reflect the changes made in Sec. 2638.704(d)(1). Corresponding changes have been made to Sec. 2638.704(a)(3)(iii), which requires agencies to include an estimate of the number of employees to be provided annual ethics training in accordance with these exceptions with their written plan for annual ethics training.

The interim regulation also expressly states two limited exceptions to the requirement that agencies provide covered employees with a minimum of one hour of official duty time for annual ethics training. These exceptions, found at Sec. Sec. 2638.704(d)(2)(ii) and 2638.704(d)(2)(iii), waive the official duty hour requirement only for training provided to covered employees who are either: Special Government employees who are expected to work fewer than 60 days in a calendar year; or officers in the uniformed

services who serve on active duty for 30 or fewer consecutive days. Thus, agencies may send a written summary of the ethics restrictions applicable to a special Government employee who will serve for a limited time on an advisory committee prior to the employee's actual dates of service. This avoids a rigid requirement that agencies provide training for a predefined period of time. This should enable agencies to communicate the ethics restrictions applicable to these employees while giving agencies flexibility in how they apply the limited number of hours that these employees actually serve.

The interim regulation also deletes obsolete language throughout the training regulation. This language generally pertained to the start-up phase of the requirements imposed by subpart G, and is no longer necessary. For example, the language at former Sec. 2638.702(a)(3) stating that the first agency written plans for annual ethics training were due by August 1992, has been deleted. Finally, OGE is adding a cross-reference to the detailed subpart G ethics training requirements in Sec. 2638.203(b)(6). Section 2638.203(b) lists the duties of the Designated Agency Ethics Officials; the responsibility to ensure that their agency has an education program for agency employees on ethics and standards of conduct matters has always been listed at Sec. 2638.203(b)(6). The interim regulation rewords the language of this subsection to explicitly state that the education program for agency employees must be developed and conducted in accordance with subpart G of 5 CFR part 2638.

B. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to section 553 (b) and (d) of title 5 of the United States Code, I find good cause for waiving the general notice of proposed rulemaking and 30-day delay in effectiveness. Because the changes made by this interim regulation will enable agencies to more efficiently use their resources to provide required Government ethics orientation and training to their employees, it is essential to the administration of the executive branch ethics program that the changes made by this interim regulation become effective as soon as possible. Making the rule retroactive to January 1, 1994, enables agencies to complete all required ethics training for calendar year 1994 under one set of procedures. For these reasons, the notice and delay in effectiveness are being waived as impracticable, unnecessary, and contrary to the public interest. However, this is an interim rule with provision for a 60-day comment

period. The Office of Government Ethics will review any comments received during the comment period, and consider any modifications to this rule which appear warranted.

Executive Order 12866

In promulgating this interim rule amending the executive branch-wide Government ethics training regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These interim rule amendments have not been reviewed by the Office of Management and Budget under that Executive order, as they are not deemed "significant" thereunder.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this interim rule will not have a significant economic impact on a substantial number of small businesses because it affects only Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this interim rule because it does 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: March 9, 1994.

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