



DEPARTMENT OF THE ARMY
UNITED STATES ARMY AUDIT AGENCY
6000 6TH STREET, BUILDING 1464
FORT BELVOIR, VIRGINIA 22060

SAAG-GC

5 July 2016

MEMORANDUM FOR Office of Government Ethics (Attn: Monica Ashar, Assistant Counsel),
Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917

SUBJECT: Comments on Proposed Amendments to 5 C.F.R. Part 2638 (Executive Branch
Ethics Program), RIN 3209-AA42

1. The following comments are my personal opinions. They do not reflect the official position of the Department of Defense, the Department of the Army, or the Army Audit Agency.

2. Section: § 2638.101(b)

Comment: Although the primary mission of the executive branch ethics program may be to “prevent conflicts of interest on the part of executive branch employees” (§ 2638.101(a)), the proposed regulation’s attempt to connect all ethics issues to conflicts of interest is awkward. For example, the concept of conflicts of interest stemming from “misuses of official position, official time, or public resources” or from “the receipt of gifts” is confusing and unconventional. The breadth of the program need not be a restatement of the program’s “primary mission.” The program’s breadth instead should logically extend to helping enforce the ethics responsibilities of employees, which are described in § 2638.102.

Recommendation: Change the second sentence of § 2638.101(b) to “The program’s mission includes helping employees uphold their ethical responsibilities concerning such matters as conflicts of interest arising from financial interests and personal relationships; misuses of official position, official time, or public resources; and the receipt of gifts.”

3. Section: §§ 2638.107(g)–(h)

Comment: The proposed regulation makes agency heads responsible for submitting to OGE “required reports of travel accepted by the agency” under 31 U.S.C. § 1353 during the relevant reporting period. This statute permits agencies to “accept **payment** . . . from non-Federal sources for travel, subsistence, and related expenses” in connection with employees’ attending certain meetings. Id. § 1353(a) (emphasis added). The rest of the statute consistently discusses acceptance of “payment for travel” as well. The phrase “acceptance of travel” appears only in the heading for the statute.

Recommendation: Change “required reports of travel accepted by the agency” to “required reports of **payment for** travel accepted by the agency” in § 2638.107(g)-(h) (emphasis added).

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4. Section: § 2638.202

Comment: The proposed regulation cites sections 402 and 403 of the Ethics in Government Act of 1978 as the basis for requiring each agency to furnish to the Director, OGE “all information and records in its possession” deemed necessary to the performance of the Director’s duties. This requirement, however, appears solely in § 403(a)(2), codified at 5 U.S.C. appx § 403(a)(2), not in s 402. Section 402 instead lists the broad responsibilities of the Director, and none of them expressly involve ordering agencies to furnish information. The most nearly applicable listed responsibility is the Director’s “requiring such reports from executive agencies as the Director deems necessary.” 5 U.S.C. appx. § 402(b)(10). In light of the clear language of § 403(a)(2), the citation to § 402 in this section of regulation is superfluous.

Recommendation: Change the first sentence of § 2638.202 from “Consistent with sections 402 and 403 of the Act” to “Consistent with section 403 of the Act”

5. Section: § 2638.204(b)

Comment: The proposed regulation excludes from the collection requirement public reports of those persons “required by section 103 of the Act to be transmitted to the Office of Government Ethics” Section 103(c) discusses reports “transmitted to” the Director of OGE, such as reports filed by the Postmaster General, designated agency ethics officials, and candidates for the office of President or Vice President. Section 103(b), however, discusses reports “filed with” the Director, namely the reports of the President, Vice President, independent counsel, and appointees of independent counsel. If the exclusion at § 2638.204(b) extends to both § 103(b) reports and § 103(c) reports, then the regulation should also mention reports “filed with” the OGE.

Recommendation: In § 2638.204(b), change “whose reports are required by section 103 of the Act to be transmitted to the Office of Government Ethics” to “whose reports are required by section 103 of the Act to be **filed with or** transmitted to the Office of Government Ethics” (emphasis added).

6. Section: § 2638.206

Comment: The proposed regulation requires agencies to provide the Director, OGE with notice of referrals to the Department of Justice “pursuant to sections 402(e)(2) and 403(a)(2) of the Act.” This requirement appears expressly in § 402(e)(2) of the Act. Section 403(a)(2) generally requires agencies to provide the Director with information and records that the Director determines to be “necessary for the performance of his duties,” and citing it here is unnecessary.

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Recommendation: In § 2638.206, change “pursuant to sections 402(e)(2) and 403(a)(2) of the Act” to “pursuant to section 402(e)(2) of the Act.”

7. Section: § 2638.207(a)

Comment: The proposed regulation states that by February 1st of each year, “the agency” must file a report concerning the agency’s ethics program. “The agency” is too narrow, and it should be replaced with a more expansive phrase to express that the requirement extends to all agencies.

Recommendation: Change the first sentence of § 2638.207(a) from “By February 1 of each year, the agency must file” to ““By February 1 of each year, **an** agency must file.”

8. Section: § 2638.209(b)(5)

Comment: The proposed regulation explains that the final consideration in the Director’s determining whether to issue a formal advisory opinion is “the interests of the executive branch ethics program.” This consideration is undefined, malleable, and largely unhelpful. It would be more useful for the Director to instead consider the implications of the issue on the ethics responsibilities of employees listed in § 2638.102. This cross-reference will improve internal consistency in the new regulation.

Recommendation: Change § 2638.209(b)(5) to “The importance of the question to upholding the ethics responsibilities of employees, as listed in § 2638.102.”

9. Section: § 2638.302(a)

Comment: In the proposed regulation, the definition of “live training” requires that the presenter “personally communicates a substantial portion of the material at the same time as the employees being trained are receiving the material” The regulation should provide better guidelines for determining whether the “substantial portion” standard has been satisfied. Example 5 should also clearly state whether the 40-minute video alone qualifies as being “live training.”

Recommendation: In § 2638.302(a), provide firmer guidance for the minimal requirements of “live training,” perhaps by amending the discussion in Example 5.

10. Section: §§ 2638.304(b)–2638.304(b)(1)

Comment: The proposed regulation at § 2638.304 lists some deadlines for completing initial ethics training in months (e.g., § 2638.304(b)) and other deadlines in days (e.g., § 2638.304(a)(2)(iii), § 2638.304(b)(2)). To improve consistency within this section and to facilitate computation of deadlines, all deadlines should be expressed in days.

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Recommendation: In §§ 2638.304(b)–2638.304(b)(1), change the deadline of “3 months” to “90 days.”

11. Section: §§ 2638.501–2638.502

Comment: The proposed regulation requires the Director, OGE to “refer possible criminal violations to an Inspector General or the Department of Justice” (§ 2638.501) or to “notify an Inspector General or the Department of Justice” regarding the violation of a criminal law (§ 2638.502). A referral or notification to an Inspector General (IG) seems somewhat ineffective in these circumstances. An IG is not a criminal investigator and is not especially qualified to assess whether a potential violation of criminal law exists. Furthermore, under the Inspector General Act of 1978, “each Inspector General [must] report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.” 5 U.S.C. appx. § 4(d). Because an IG is statutorily obligated to refer criminal violations to the Department of Justice (DoJ), the Director can expedite the investigative process by referring such matters directly to the Department.

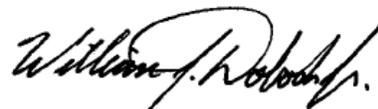
Recommendation: In §§ 2638.501–2638.502, require the Director to refer information of possible criminal violations to DoJ. Do not present the option of referring such matters to an IG.

12. Section: § 2638.603

Comment: The proposed regulation’s definition of “disciplinary action” with respect to military officers should be similar to the definition with respect to civilian employees. The statement that “comparable provisions may include those in the Uniform Code of Military Justice” is overly vague and largely beside the point.

Recommendation: Change the last sentence of the definition of “disciplinary action” in § 2638.603 as follows: “In the case of a military officer, disciplinary actions include administrative actions, including reprimands and eliminations; non-judicial punishment under Article 15, Uniform Code of Military Justice; and court-martial proceedings.”

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