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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2638

RIN 3209-AA07

#### Executive Agency Ethics Training Program Regulation Amendments

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule amends the OGE executive branchwide regulation on "Executive Agency Ethics Training Programs" to enable agencies to better focus their training resources on training employees in sensitive positions while ensuring that all executive branch employees receive sufficient training to enable them to understand the ethical responsibilities concomitant with their Government positions. While the current OGE regulation generally requires agencies to provide annual "verbal" ethics briefings to covered employees, the interim rule, once effective, will permit agencies to fulfill this requirement for most covered employees by means of a written briefing, provided generally that the employees receive verbal briefings at least once every three calendar years. Annual ethics briefings for employees who file public financial disclosure forms, however, will generally still have to be verbal and, starting next year (1998), will additionally be subject to a further requirement that a qualified individual be present during and after the briefings. This will focus agency ethics training resources upon employees in sensitive positions, while simultaneously freeing significant resources for use in other parts of the agency's ethics training program. Because this rule is being published as an interim rule, agencies will be able to take advantage of this flexibility in conducting their annual ethics briefings

for part of the current 1997 training year as well as in future years. As noted, the provision requiring qualified individual personal presence for public filer briefings will not take effect until 1998.

**DATES:** This interim regulation is effective May 12, 1997, except for § 2638.704(d)(2)(ii) and Examples 1 through 3 following that paragraph, which will become effective on January 1, 1998. Comments by agencies and the public are invited and are due on or before April 11, 1997.

**ADDRESSES:** Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: John C. Condray. Comments may also be sent electronically to OGE's Internet E-mail address at [usoge@oge.gov](mailto:usoge@oge.gov) (for E-mail messages, the subject line should include the following reference—"Comments on interim training regulation amendments"). Copies of the two OGE memorandums discussed in the Supplementary Information section may be obtained, without charge, by contacting Mr. Condray at OGE. Those documents are also available on OGE's electronic bulletin board TEBBS ("The Ethics Bulletin Board Service"). Information about TEBBS may also be obtained from Mr. Condray. Information concerning this interim rule, the OGE memorandums and other OGE regulations and publications, is also available on OGE's World Wide Web site at <http://www.access.gpo.gov/usage>.

**FOR FURTHER INFORMATION CONTACT:** John C. Condray, Office of the General Counsel and Legal Policy, Office of Government Ethics; telephone: 202-208-8000, extension 1152; TDD: 202-208-8025; FAX: 202-208-8037.

#### SUPPLEMENTARY INFORMATION:

##### A. Background and Analysis of Interim Rule Changes

Section 301 of Executive Order 12674 on Principles of Ethical Conduct, as modified by Executive Order 12731 (hereinafter referred to as Executive Order 12674), requires all executive branch agencies to ensure that all of their employees review the regulations that govern their conduct. Section 301 also requires agencies to provide mandatory annual briefings on ethics and standards of conduct for all employees appointed by the President, all employees in the Executive Office of

the President, all officials required to file public or confidential financial disclosure reports, all employees who are contracting officers and procurement officials, and any other employees designated by the agency head.

Agencies are also required to coordinate with the Office of Government Ethics (OGE) in developing annual ethics training plans. In accordance with these requirements, and consistent with its authority under the Ethics in Government Act of 1978, as amended, 5 U.S.C. appendix, OGE promulgated a final rule implementing these requirements on April 7, 1992. See 57 FR 11886-11891, as corrected at 57 FR 15219 (April 27, 1992). The current version of this rule is codified at subpart G of 5 CFR part 2638, entitled "Executive Agency Ethics Training Programs" (the "Training Regulation").

In the nearly five years since the Training Regulation became effective, OGE has received a number of comments from ethics officials at the agency level. Partly in response to these comments, OGE has twice revised portions of the regulation. See 57 FR 58399-58400 (December 10, 1992), as corrected at 57 FR 61612 (December 28, 1992), and 59 FR 12145-12149 (March 16, 1994).

While the basic structure of the Training Regulation as currently in effect is regarded as sound, some agencies have voiced concerns over the requirement that all employees covered by the annual training requirement (a total of approximately 387,000 executive branch employees) receive annual verbal briefings. These commenters indicated that providing the resources to meet this requirement prevents their agencies from devoting resources to other desirable ethics training goals. These include: developing specific programs for employees who occupy sensitive positions and face more difficult conflicts issues; providing resources to increase the effectiveness of the initial ethics orientation received by all employees; and providing update training for those employees who are not required to receive annual briefings. The latter category is particularly troublesome, as agencies pointed out that under the Training Regulation an employee could receive an initial ethics orientation and then no other ethics information during the rest of his or her

Government career. Of course, the Training Regulation is a minimum standard, and agencies are encouraged to go beyond the minimum standard when feasible. But OGE is sensitive to the concern that the Training Regulation might be preventing agencies from developing programs to address these concerns by dictating too strictly the use of scarce agency resources.

Because of the need to provide agencies with the ability to more efficiently use their resources as soon as possible, and in particular because of the need to provide this relief for agencies during the 1997 calendar year training cycle, OGE is making these interim rule amendments effective 90 days after the publication of this rule, on May 12, 1997, except for the "personal presence" requirement for public filer briefings which, as noted above, will take effect on January 1, 1998. This course of action should allow agencies adequate time to prepare for the new, amended regulatory provisions and, once they become effective, to conduct a good portion of their 1997 ethics training in accordance with the various more flexible requirements. Thus, agencies will have greater flexibility in allocating their training resources while still ensuring that the requirements of Executive Order 12674 are met.

#### *Annual Ethics Briefings*

The most significant changes made in the interim rule will affect the requirement that agencies provide certain "covered employees," as specified in section 301 of E.O. 12674 and restated at § 2638.704(b) of the Training Regulation, with annual ethics training. The interim rule will divide covered employees into two categories: (1) those who are "covered employees" because they file public financial disclosure reports (SF 278s); and (2) all other covered employees. While agencies will still be required to provide all covered employees with annual ethics training, now to be called "briefings," the presentation requirements for the briefing will vary depending on which of the two categories of "covered employee" an employee falls under. Under the interim rule, public SF 278 filers will generally have to receive a verbal ethics briefing every year (as is the case under the current version of the Training Regulation). In addition, starting in calendar year 1998, the annual briefings for public filers will have to be offered with the presence of a qualified individual able to answer questions. All other covered employees will generally only have to receive a verbal ethics

briefing at least once every three calendar years, with no requirement that a qualified individual be present. Written ethics briefings will be required for those calendar years where such employees do not receive a verbal ethics briefing.

The Office of Government Ethics has decided to distinguish between the level of annual ethics training provided for public financial disclosure filers and all other covered employees for the following reasons. Public filers occupy positions that involve policy-making. Congress has made the determination that individuals occupying these positions should disclose their financial interests on reports that are publicly available in order to promote public confidence in the integrity of the policy-making process. The Office of Government Ethics believes that the sensitivity and authority of these positions justify the heightened standard for annual ethics briefings as well. Not only does the authority concomitant with their positions create increased risks from a conflicts perspective, but the sensitivity and visibility of their positions increase the consequences of any real or apparent violation of ethics laws and regulations. From a practical standpoint, these individuals are easily identifiable. Agencies should be tracking the numbers and locations of employees in these positions as part of the management of their public financial disclosure systems. Although OGE believes that only public filers need receive the heightened briefings, comment is invited on this issue.

These interim rule amendments also retain the feature that allows an agency to count time spent in a *verbal* ethics briefing provided to the employee in accordance with new § 2638.704(d)(2) or (d)(3)(ii) against the requirement that an agency provide the employee with one hour of official duty time for the initial ethics orientation, if the briefing and orientation occur in the same calendar year. This provides an agency with an incentive to provide an incoming employee with a verbal ethics briefing early in the employee's Government service. The term "verbal" will also be added to § 2638.703(a)(3) on ethics orientation in the interim rule to avoid any confusion on this point. Providing such verbal training quickly is also helpful to new employees, because it will enable them to understand and apply the rules that govern their conduct to the activities they undertake as part of their everyday official duties.

In contrast, time spent in a *written* annual ethics briefing will not count against the time requirement for an

initial ethics orientation taking place in the same year. A written annual ethics briefing need only include a brief reminder of the restrictions contained in the Standards of Ethical Conduct, and then can move on to focus on other specialized ethics topics (for example, post-employment restrictions). Thus, it may not provide a comprehensive summary of the Standards as is contemplated for the initial ethics orientation. Agencies should note, however, that if an initial ethics orientation were also to meet the content requirements for a *written* annual ethics briefing due in the same calendar year, it could serve as both the initial ethics training and as the written annual ethics briefing for covered employees receiving their annual ethics briefing in accordance with § 2638.704(d)(2)(iii)(A)(2), (d)(2)(iii)(B), (d)(3)(i) or (d)(3)(iii) of the interim rule (see the discussion below). This interrelationship between the initial ethics orientation and annual ethics briefing requirements will enable agencies to make the best use of agency resources and employee time by combining initial and annual ethics briefings where such a combination is feasible.

#### *Annual Ethics Briefings for Public Filers*

As with the current Training Regulation, § 2638.704(d)(2)(i) of the interim rule states that agencies must supply employees who file Standard Form 278 Executive Branch Personnel Public Financial Disclosure Reports (SF 278s) with an annual verbal ethics briefing that is a minimum of one hour of official duty time in duration. Beginning next year, the interim rule amendments will require executive agencies to take the extra step of providing the personal presence of a "qualified individual," as defined at redesignated paragraph (b) of § 2638.702 in the interim rule, during and immediately following the briefing in order to respond to questions or concerns on the part of public filers receiving the briefing. Note that the qualified individual will not have to be physically present to fulfill this forthcoming requirement. The key is that those covered employees receiving the training have immediate and direct access to the qualified individual so that they may raise and resolve questions that arise during the briefing. The examples used in the regulation text, e.g., an ethics briefing provided through means of video conferencing where the qualified individual can respond to employee questions directly as part of the training even though the qualified individual is not physically present at

the training site, illustrate this point. This increased level of training will be required, starting in 1998, for the approximately 21,000 executive branch employees who file public financial disclosure reports. These employees constitute approximately 5.4 percent of the nearly 387,000 employees currently receiving annual ethics briefings, based on agency responses to OGE's 1995 ethics program questionnaires.

The qualified individual provision is similar to the requirement initially imposed when the Training Regulation was first promulgated in 1992, though that requirement entailed physical presence and was much broader in scope since it applied to all employees covered by the annual training requirement. As we indicated in the preamble to the publication of the April 1992 final rule document, OGE believes that the presence of an individual qualified to answer questions at the annual ethics briefing is the best way to address employee questions and concerns raised by the training. See 57 FR 11886, 11889 (April 7, 1992). Concerns over the ability of agencies to meet this requirement for all annual ethics briefings provided to the large number of employees subject to the annual briefing requirement, however, led OGE to conclude that while having a qualified individual present is often the most effective means of providing training, providing the most effective training was not a realistic minimum standard for all agencies to provide to all covered employees. The Office of Government Ethics accordingly dropped this requirement in a set of 1994 interim amendments to the Training Regulation in favor of requiring "verbal" training, either in person or by telecommunications, computer-based methods or recorded means. See 59 FR 12145, 12146-12147 (March 16, 1994).

This interim rule strikes a new balance between feasibility concerns and the desirability of having a qualified individual able to respond immediately to questions raised during the ethics briefing. These interim rule amendments will thus only require that a qualified individual be present during and immediately following the annual ethics briefings provided to those covered employees who hold the most senior and responsible positions, i.e., public SF 278 filers. The delayed effective date of January 1, 1998 for this requirement will allow agencies sufficient time to prepare for its imposition. The limited nature of the class affected (public SF 278 filers only) significantly offsets the feasibility concerns that led to the 1994 amendments that deleted the original

across-the-board in-person requirement. These concerns are further addressed in this interim rule by providing agencies with the option of conducting the required annual ethics briefing for the vast majority of covered employees who are not SF 278 filers through the use of a written ethics briefing for up to two out of every three years.

Moreover, the interim rule will retain the exception permitting agencies to provide the annual ethics training by a verbal briefing to public filers without the presence of a qualified individual (even when that new requirement becomes effective next year) or by written means (starting once the new rule becomes effective May 12, 1997). The basic exception is found at 5 CFR 2638.704(d)(2)(i) of the current rule and § 2638.704(d)(2)(iii)(A) of this interim rule. Pursuant to the interim rule exception, the Designated Agency Ethics Official or his or her designee can make a written determination that circumstances make it impractical to provide the required verbal briefing to a particular public SF 278 filer employee or a group of such employees in accordance with paragraphs (d)(2)(i) and (d)(2)(ii) of the new rule. In those cases, the annual ethics briefing could be provided, without the presence of a qualified individual, by telecommunications, computer-based methods or recorded means or by written means, provided that a minimum of one hour of official duty time is set aside for employees to attend the presentation or review the written materials.

5 CFR 2638.704(d)(2)(ii) of the current Training Regulation allows agencies to provide the annual ethics training to covered employees who are special Government employees by means of written briefings or other means at the agency's discretion. The interim rule includes an equivalent section, at § 2638.704(d)(2)(iii)(B), for special Government employees who are public SF 278 filers. Agencies should note that public filer special Government employees receiving their annual ethics training under this exception must receive a minimum of one hour of official duty time for their written briefings. As with the current Training Regulation, special Government employees who are expected to work fewer than 60 days in a calendar year would not generally be subject to this one-hour minimum requirement, as they are usually not required to file public financial disclosure reports.

#### *Annual Ethics Briefings for Other Covered Employees*

As noted, agencies currently must generally provide all covered employees with a one-hour verbal briefing every calendar year. The interim rule amendments will provide significant new flexibility to agencies in training covered employees who do not file public financial disclosure reports. Under new § 2638.704(d)(3), agencies will be able to meet the annual briefing requirement for such employees by providing them with written ethics briefings on an annual basis for up to two out of every three calendar years. Unlike the written briefings to be allowed in circumstances qualifying for an exception for public filers under the interim rule, there will be no minimum official duty time requirement for written ethics briefings provided under this section. The Office of Government Ethics believes that imposing a one-hour written briefing requirement for covered employees who are not SF 278 filers would be too burdensome for agencies administratively. Given the large number of employees eligible to receive written briefings, OGE believes that it would be very difficult for agencies to keep track of the time each affected individual employee spends reviewing the written ethics briefing materials. Nonetheless, agencies will still be required to provide such employees with sufficient official time to review the written materials provided. Moreover, at least once every three years, unless excepted, such covered employees would have to receive a verbal ethics briefing of one hour in duration. However, the verbal briefings provided to such employees will not require the personal presence of a qualified individual during and immediately following the briefing.

The interim rule amendments retain, as to the once-every-three-years verbal briefing requirement for certain nonpublic filer covered employees, the exceptions currently found at § 2638.704(d)(2) of the Training Regulation. These exceptions will permit agencies, at their discretion, to fulfill the annual briefing requirement through the use of written materials every year where: (1) there is a written determination by the Designated Agency Ethics Official, or his or her designee, that circumstances make it impractical to provide a verbal briefing once every three years for a particular employee or group of employees; or (2) for special Government employees expected to work fewer than 60 days in a calendar year as well as uniformed service officers who serve on active duty for 30

or fewer consecutive days. See § 2638.704(d)(3)(iii)(A), (d)(3)(iii)(B) and (d)(3)(iii)(C). As to the second exception listed, OGE is not currently aware of any situation where a special Government employee subject thereto would receive an appointment greater than two years in duration, thus requiring a verbal ethics briefing under the general rule of the interim amendments. This particular exception may therefore be unnecessary. Although retained in the interim amendments, OGE requests that any agencies that have covered special Government employees meeting the definition in this exception notify us during the comment period.

The interim rule amendments, at new § 2638.704(d)(3)(iii)(D), provide that agencies may also provide written briefings only for employees who are "covered" by the annual training requirement solely because of discretionary designation by their agencies pursuant to renumbered § 2638.704(b)(6), including any such discretionarily designated micro-purchasers. See the discussion below.

The interim rule, consistent with OGE practice to date in administering the Training Regulation, will not require agencies to use a particular system to track which method of training (written or verbal) has been provided to such covered employees. The Office of Government Ethics will instead continue the practice of allowing agencies to adopt their own means of tracking, both for the agencies' own records and for OGE oversight purposes.

*Annual Ethics Briefings for "Contracting Officers"; Separate Category for Prior "Procurement Officials" Dropped*

Numerous statutory and regulatory changes have occurred recently in the area of Federal acquisition requirements, including procurement integrity provisions. Of particular significance to the Training Regulation was the enactment last year of a complete revision to the procurement integrity law at 41 U.S.C. 423 and the issuance in early January of this year of final implementing Federal Acquisition Regulation (FAR) provisions thereunder. See section 4304(a) of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, and 62 FR 226-233 (January 2, 1997). The amended procurement law sets forth revised restrictions applicable to certain agency officials involved in the contracting process and also revises the related definitions, including those directly relevant to the Training Regulation.

In accordance with section 301(c) of Executive Order 12674 (issued in 1989

and modified in 1990 by E.O. 12731), the Training Regulation has specified two categories of contracting personnel who are "covered employees" subject to the annual ethics training requirement—"contracting officers" and "procurement officials." See current 5 CFR 2638.704(b)(5) and (b)(6). This interim rulemaking will update the Training Regulation provisions regarding annual training of agency officials involved in contracting functions in light of the procurement changes.

First, the old term "procurement official" (prior 41 U.S.C. 423(p)(3)), as referenced in E.O. 12674, is no longer found or defined in the amended procurement integrity statute nor the above-cited implementing FAR rule. There is only a reference to "procurement officers" [emphasis added] in the heading of one of the procurement integrity statutory restrictions, at amended paragraph (c) of 41 U.S.C. 423 regarding actions required of certain agency officials when contacted by offerors regarding non-Federal employment. That amended provision indicates that a "procurement officer" is an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold. The simplified acquisition threshold is defined in 48 CFR 2.101, as revised, as \$100,000, except for certain limited contracts outside the United States, where the threshold is \$200,000. For purposes of the demanding annual ethics briefing requirement under the Training Regulation, OGE has decided that the residual, informal reference to "procurement officers" [emphasis added] in section 423(c) of the amended procurement integrity statute is, thus far, too uncertain a concept, particularly when coupled with the removal of the "Procurement Integrity Certification for Procurement Officials" (Optional Form 333) requirement in the above-cited FAR final rulemaking under the amended procurement integrity law.

Therefore, OGE has decided to remove the separate covered employee category for "procurement officials" from § 2638.704(b). The Office of Government Ethics notes that many agency employees involved in contracts over the simplified acquisition threshold will be otherwise covered as contracting officers or confidential financial disclosure report filers. Agencies may also discretionarily designate certain of them to receive annual briefings if they deem it appropriate. See § 2638.704(b)(4), (b)(5) and (b)(6) of this interim rule.

In contrast, the new procurement integrity definition of "contracting officer" in amended 41 U.S.C. 423(f)(5) is similar to the old definition at prior section 423(p)(4) of the law. The specific category for annual training of "contracting officers," at § 2638.704(b)(5) of the Training Regulation, will therefore be retained with a reference to the new procurement law provision. There is one related important development brought about by the passage of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355. Among the steps taken by FASA to simplify acquisition procedures was the creation of simplified procedures for "micro-purchases," defined as those acquisitions of supplies or services (except construction), the aggregate amount of which does not exceed \$2,500 (\$2,000 for construction). An interim rule implementing this portion of FASA was published as Federal Acquisition Circular (FAC) 90-24, 59 FR 64784-64788 (December 15, 1994), with the Federal Acquisition Regulatory Council adopting a final rule, with changes to the interim rule, as published as part of FAC 90-40, 61 FR 39189-39199 (July 26, 1996). See 41 U.S.C. 428(f) and 48 CFR 2.101, as revised. To maximize the benefit of these simplified procedures, agency heads are encouraged to delegate micro-purchase authority to individuals who will be using the supplies or services being purchased. See 48 CFR 1.603(b), as revised. Under the July 1996 final rule in FAC 90-40, individuals delegated micro-purchase authority are now not required to be "contracting officers" for the purposes of the Federal Acquisition Regulation. See 48 CFR 1.603(b), as revised. (Under the prior, interim FAR rule, micro-purchase authority holders were deemed contracting officers (see 48 CFR 13.601(d) (1996 edition), now removed).)

In order to harmonize the Training Regulation with the goals of FASA which encourages agencies to delegate micro-purchase authority widely, OGE will not require agencies to provide annual briefings to micro-purchasers who are not contracting officers. (Of course, contracting officers who are also "micro-purchasers" will still need to receive annual training based on their contracting officer status.) Individual agencies may, if they deem it appropriate based on conflict of interest concerns, discretionarily designate some or all of their micro-purchasers who are not contracting officers (or otherwise in a specifically covered category of

employees, see § 2638.704(b) as covered employees subject to annual briefings under the discretionary designation provision at renumbered and revised § 2638.704(b)(6) (old 5 CFR 2638.704(b)(7)). In such cases, the interim rule at new § 2638.704(d)(3)(iii)(D) will permit agencies to provide annual briefings for any such discretionarily designated non-“contracting officer” micro-purchasers solely through distribution of written materials (without the requirement for verbal briefings at least once every three years). This exception for written briefings will likewise apply to any other employees who are “covered employees” for annual ethics training purposes solely because of discretionary designation by their agencies pursuant to new § 2638.704(b)(6).

#### *Other Issues*

The Office of Government Ethics is also amending 5 CFR 2638.701. This change will add language explicitly including the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635 (“Standards”), and any agency supplemental regulation thereto, as items that employees must be made aware of through agency ethics training programs. The interim rule will also explicitly reference the conflict of interest statutes, 18 U.S.C. chapter 11. These interim rule changes will not substantively change the requirements of subpart G; an agency meeting the requirements of 5 CFR 2638.703 and 2638.704 will continue to fulfill the general requirement of § 2638.701. Reference to the Standards and supplemental regulations thereto were left out of § 2638.701, when it was originally published in the Federal Register in April 1992, because they had not been published at that time. The change in the interim rule will update the § 2638.701 reference.

The interim rule amendments will also make certain other, minor changes to the Training Regulation. Executive Order 12674 requires agencies to coordinate with OGE in developing annual agency ethics training plans. The current Training Regulation, at 5 CFR 2638.702(a)(3), provides that agencies are to file this written plan for annual ethics training with OGE by August 31 of each calendar year. The interim rule, at revised and redesignated § 2638.702(c), will formally eliminate the requirement that agencies file their plans with OGE on an annual basis. While the filing requirement was useful during the initial stage of the implementation of the Training Regulation, the utility of the measure

has declined as agencies have become proficient in planning and providing the required ethics training. For this reason, OGE sent a memorandum to Designated Agency Ethics Officials (DAEO) on July 6, 1995 (DO-95-028), indicating that agencies should continue to develop written plans for annual ethics training, coordinating with OGE where necessary, but should maintain the plans at the agency rather than filing them each year with OGE. As noted in that memorandum, such coordination can include: consulting with OGE concerning upcoming OGE training materials, including videotapes, that may be useful in administering an agency’s training program; contacting OGE’s Ethics Information Center to obtain training materials from other executive branch agencies that may be adapted to the agency’s needs; or consulting with OGE concerning other issues or problems an agency is facing in providing ethics training. The interim rule will codify that change in policy.

Even though agencies will no longer be required to file their annual ethics training plans with OGE, agencies remain subject to the requirement of Executive Order 12674 and the Training Regulation that they develop annual agency ethics training plans. See the OGE memorandum to DAEOs of January 6, 1997 (DO-97-002). The Office of Government Ethics will include the plans as a program element subject to the periodic agency ethics program reviews that OGE conducts. The plans should be completed by January 1 of the calendar year that they cover. The interim rule will slightly adjust the information required in the plan to conform to the changes in the structure of the annual ethics briefing and will require agencies to include a brief narrative description of the agency’s annual ethics briefings. The Office of Government Ethics anticipates that a typical narrative will be only one or two paragraphs in length, and will include information concerning the projected content of the briefings, the method of presentation to be used, and the anticipated number of employees who will receive different types of presentations if the agency plans to use a number of different methods.

Since these interim rule amendments to the Training Regulation take effect on May 12, 1997, except for § 2638.704(d)(2)(ii) and Examples 1 through 3 following that section, which will take effect on January 1, 1998, OGE will allow agencies to count any 1997 calendar year training already completed under the current version of the Training Regulation before the effective date of these interim rule

amendments. Thus, agencies will not have to redo any 1997 ethics training properly conducted under the 5 CFR part 2638, subpart G training requirements effective at the time of training. The new, generally liberalized training requirements should be followed for the remainder of 1997.

While the interim rule amendments will substantially alter § 2638.704, on annual agency ethics training (designated as “annual ethics briefings” under the interim revision), they will not significantly alter § 2638.703, initial agency ethics orientation. Some commenters have indicated a desire that OGE amend the Training Regulation to require that the initial ethics orientation be verbal instead of allowing the use of written materials. The Office of Government Ethics encourages agencies to strengthen the initial ethics orientation, and believes that verbal training is generally more effective than using written materials. However, OGE believes that the current fiscal situation makes it unreasonable to require agencies to provide employees receiving their initial ethics orientation with verbal training. Such a requirement will be particularly difficult for those agencies with widely scattered facilities. The other changes to subpart G contained in the interim rule should provide agencies with the ability to shift some of their ethics training resources to provide a more comprehensive initial ethics orientation for their new employees. The Office of Government Ethics notes that many agencies have already made some effort to expand the scope of their initial ethics orientations.

The most recent results available from OGE’s Annual Agency Ethics Program Questionnaire (for CY 1995) showed that only 24 of 125 responding agencies provided their employees with nothing more than a copy of the Standards and an hour of official duty time for their ethics orientation. In addition to the potential for providing a more comprehensive initial ethics orientation, the changes made by the interim rule amendments will also place agencies in a better position to provide those employees who do not receive annual ethics briefings with periodic ethics-related updates or training to ensure that all employees better understand the statutes and regulations that govern their conduct.

For these reasons, the interim rule only makes minor changes to § 2638.703. The interim rule will amend § 2638.703(a)(3) to reflect changes to the annual ethics training requirement. The interim rule will also amend § 2638.703(b)(2), substituting “each employee” for “employees” to bring the

section into conformity with the language used in other parts of the section. The interim rule will add agency supplemental regulations to those materials that must be included with a copy of the Standards furnished for purposes of review only in accordance with § 2638.703(b)(1), as well as requiring that any agency supplemental ethics regulations be included in a summary provided to employees under § 2638.703(b)(2). Each of these subsections is also being amended to include the relevant agency supplemental regulations among the materials whose complete text must be retained and readily accessible in an employee's immediate office area for an agency to use these exceptions to § 2638.703(a)(1).

In addition to the above changes, the interim rule amendments also substitute the term "ethics briefing" for the term "ethics training" in § 2638.704 and in cross-references throughout subpart G. The new language parallels the language used in E.O. 12674, but does not represent a substantive change in the regulation.

As stated earlier, the goal of these interim rule amendments is to enable agencies to more efficiently use the resources that are currently available to the ethics training programs. Should these changes result in a diminishing level of resources for ethics training, OGE of course might have to seek to further amend the Training Regulation to reimpose the current across-the-board verbal briefing requirement.

#### B. Matters of Regulatory Procedure

##### *Administrative Procedure Act*

Pursuant to sections 553 (b) and (d) of title 5 of the United States Code, I find good cause for waiving the general notice of proposed rulemaking. Because the changes made by these interim rule amendments to the Training Regulation will enable agencies to more efficiently use their resources to provide required Government ethics orientation and annual briefings to their employees, it is essential to the administration of the executive branch ethics program that the changes made by this interim rule become effective in time for agencies to implement them during the course of their calendar year 1997 training cycle. However, this is an interim rule which will generally become effective on May 12, 1997, with a delayed effective date of January 1, 1998 for new § 2638.704(d)(2)(ii) and Examples 1 through 3 following that section. Moreover, this rule provides for a 30-day comment period. All interested persons are invited to submit written

comments to OGE on these interim rule amendments, to be received on or before April 11, 1997. The Office of Government Ethics will review all comments received and consider any modifications which appear warranted to these amendments in adopting a final rule in this matter.

##### *Executive Order 12866*

In promulgating these interim amendments to the executive branchwide 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. This interim rule has also been reviewed by the Office of Management and Budget under that Executive Order.

##### *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 entities because it affects only Federal executive branch agencies and their 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: February 4, 1997.

Stephen D. Potts,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending subpart G of part 2638 of chapter XVI of title 5 of the Code of Federal Regulations as follows:

#### **PART 2638—[AMENDED]**

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

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

#### **Subpart G—Executive Agency Ethics Training Programs**

2. Section 2638.701 is revised to read as follows:

##### **§ 2638.701 Executive agency ethics training programs; generally.**

Each executive branch agency shall maintain a program of ethics training designed to ensure that all of its employees are aware of: the Federal conflict of interest statutes, located at chapter 11 of title 18 of the United States Code; the Principles of Ethical Conduct, found in part I of Executive Order 12674, as modified; the Standards of Ethical Conduct for Employees of the Executive Branch, codified at 5 CFR part 2635, and any agency supplemental regulation thereto; and how to contact agency ethics officials when the employee needs advice concerning ethics issues. As a minimum, each agency program shall consist of the initial ethics orientation required by § 2638.703 of this subpart and the annual ethics briefing required by § 2638.704 of this subpart. For purposes of this subpart, the term "employee" shall include special Government employees (as defined in 18 U.S.C. 202(a)) and officers of the uniformed services.

3. Section 2638.702 is amended by removing paragraph (b), removing the paragraph designation (a), and redesignating paragraphs (a)(1), (a)(2) and (a)(3) as new paragraphs (a), (b), and (c), respectively; further redesignating in newly designated paragraph (b), paragraphs (i) through (v) as paragraphs (b) (1) through (5), respectively; removing the word "training" and adding the word "briefing" in newly designated paragraphs (b) introductory text and (b)(5); and revising newly redesignated paragraph (c) to read as follows:

##### **§ 2638.702 Responsibilities of the designated agency ethics official; review by the Office of Government Ethics.**

\* \* \* \* \*

(c) Develop each year a written plan for annual ethics training to be conducted by the agency. The written plan for annual ethics training shall be completed by the beginning of the calendar year covered by the plan. In developing their written plans for annual ethics training, agencies shall coordinate with OGE where necessary. The plan shall contain a brief narrative description of the agency's annual ethics training, and shall also include:

(1) An estimate of the total number of agency employees who will be provided annual ethics briefings, including:

(i) An estimate of the number of public filers described in § 2638.704(b)(3) of this subpart who must be provided annual ethics briefings, including:

(A) An estimate of the number of public filers to whom annual ethics briefings will be presented verbally with a qualified individual present in accordance with § 2638.704(d)(2)(ii) of this subpart;

(B) An estimate of the number of public filers to whom annual ethics briefings will be presented under the exception provided at 2638.704(d)(2)(iii)(A) of this subpart; and

(C) An estimate of the number of special Government employees who are public filers to whom the annual ethics briefing will be presented in accordance with the exception provided at 2638.704(d)(2)(iii)(B) of this subpart; and

(ii) An estimate of the number of covered employees other than public filers described in § 2638.704(b)(3) of this subpart who must be provided annual ethics briefings, including:

(A) An estimate of the number of covered employees who will receive a verbal annual ethics briefing in accordance with 2638.704(d)(3)(ii) of this subpart;

(B) An estimate of the number of covered employees who will receive a written ethics briefing in accordance with 2638.704(d)(3)(i) of this subpart;

(C) An estimate of the number of covered employees who will receive a written ethics briefing in accordance with the exception provided at § 2638.704(d)(3)(iii)(A) of this subpart;

(D) An estimate of the number of special Government employees and the number of officers in the uniformed services who will receive a written ethics briefing in accordance with the exceptions provided at § 2638.704(d)(3)(iii)(B) and (d)(3)(iii)(C) of this subpart; and

(E) An estimate of the number of covered employees who will receive a written ethics briefing in accordance with the exception provided at § 2638.704(d)(3)(iii)(D) of this subpart; and

(2) Any other information that the designated agency ethics official believes will facilitate OGE's review of the agency's ethics training program.

4. Section 2638.703 is amended by revising the second sentence of paragraph (a)(3) and revising paragraphs (b)(1) and (b)(2) to read as follows:

**§ 2638.703 Initial agency ethics orientation.**

(a) \* \* \*

(3) \* \* \* If the agency provides verbal ethics training during official duty time, including a verbal ethics briefing provided in accordance with § 2638.704(d) of this subpart, or a nominee or other new entrant receives verbal ethics training provided by the Office of Government Ethics or the White House Office, the period of official duty time set aside for individual review may be reduced by the time spent in such training.

(b) \* \* \*

(1) Furnishing each employee a copy of the Standards of Ethical Conduct for Employees of the Executive Branch at part 2635 of this chapter, and any supplemental regulation of the concerned agency, for the purposes of review only, provided that copies of the complete text of part 2635 and any supplemental regulation of the concerned agency are retained and readily accessible in the employee's immediate office for use by several employees; or

(2) Providing each employee with materials that summarize part I of Executive Order 12674, as modified by Executive Order 12731, 3 CFR, 1990 Comp., p. 306, the Standards of Ethical Conduct for Employees of the Executive Branch at part 2635 of this chapter, and any supplemental regulation of the concerned agency. To ensure that all employees have access to all of the information contained in these documents, an agency using this alternative must ensure that copies of the complete text of part 2635 and the agency's supplemental regulation thereto (if any) are retained and readily accessible in the employees' immediate office area.

5. Section 2638.704 is amended by removing the word "training" and adding the word "briefings" in its place in paragraph (b)(4), revising the section heading and paragraphs (a), (b)(5) and (d), removing paragraph (b)(6), redesignating paragraph (b)(7) as new paragraph (b)(6) and revising the text thereof, and revising the introductory text of paragraph (c), to read as follows:

**§ 2638.704 Annual ethics briefings.**

(a) *Annual ethics briefings.* Executive branch agencies must provide each employee identified in paragraph (b) of this section with an ethics briefing every calendar year. This briefing must meet the content requirements contained in paragraph (c) of this section and the presentation requirements contained in paragraph (d) of this section.

(b) \* \* \*

(5) Contracting officers within the meaning of 41 U.S.C. 423(f)(5); and

(6) Other agency employees designated by the head of the agency or his or her designee based on a determination that such briefings are desirable in view of their particular official duties.

(c) *Content.* Agencies are encouraged to vary the emphasis and content of annual agency ethics briefings from year to year as necessary within the context of their ethics programs. The emphasis and content are generally a matter of each agency's sole discretion. However, each briefing must include, as a minimum:

\* \* \* \* \*

(d) *Presentation.* The annual ethics briefing shall be presented in accordance with the following requirements:

(1) A qualified individual, as defined in § 2638.702(b) of this subpart, shall:

(i) Present the briefing, if the briefing is presented in person;

(ii) Prepare the recorded materials or presentation, if the briefing is presented by telecommunications, computer-based methods or recorded means; or

(iii) Prepare the written ethics briefing, if the annual ethics briefing requirement is satisfied through the use of a written ethics briefing in accordance with paragraphs (d)(2)(iii)(A)(2), (d)(2)(iii)(B), (d)(3)(i) or (d)(3)(iii) of this section.

(2) *Annual briefings for filers of public financial disclosure reports.* (i) The annual ethics briefings for covered employees described at paragraph (b)(3) of this section shall be verbal, either in person or by telecommunications, computer-based methods or recorded means. Employees must be provided a minimum of one hour of official duty time for this briefing.

(ii) A qualified individual, as defined in § 2638.702(b) of this subpart, shall be present during and immediately following the presentation. The qualified individual need not be physically present at the training site to meet this requirement. To meet the "presence" requirement, the covered employees receiving the briefing must have direct and immediate access to the qualified individual.

*Example 1 to paragraph (d)(2)(ii):* An agency provides annual ethics briefings for public filers in a regional office by establishing a video conference link between a qualified individual in the headquarters office and the regional office. Because the link provides for direct and immediate communication between the qualified individual and the employees receiving the briefing, this arrangement meets the presence requirement even though the qualified

individual is not physically located in the room where the briefing is received.

*Example 2 to paragraph (d)(2)(ii):* The agency described in the preceding example provides a briefing through a videotaped briefing instead of through a video conference link. The employees viewing the videotape are provided with a telephone at the training site and the telephone number of a qualified individual who is standing by during and immediately following the training to answer any questions. The briefing fulfills the physical presence requirement because the employees receiving the briefing have direct and immediate access to a qualified individual.

*Example 3 to paragraph (d)(2)(ii):* The physical presence requirement would not be met if the facts of Example 2 were varied so that the employees receiving the briefing did not have immediate access to the qualified individual, either because there was no phone provided at the training site or because the qualified individual was not standing by to respond to any questions raised. Merely providing the phone number of the qualified individual, without providing access to that individual who is standing by to answer questions raised during the briefing, does not provide the employees receiving the training with the direct and immediate access to the qualified individual necessary to satisfy the presence requirement.

(iii) *Exceptions.* An agency may provide the annual ethics briefing for employees described in paragraph (b)(3) of this section by means other than as specified in paragraphs (d)(2)(i) and (d)(2)(ii) of this section only under the following circumstances:

(A) Where the Designated Agency Ethics Official, or his or her designee, has made a written determination that circumstances make it impractical to provide the annual verbal ethics briefing with a qualified individual present, to a particular employee or group of employees in accordance with paragraphs (d)(2)(i) and (d)(2)(ii) of this section. In such cases, the annual ethics briefing may be provided without the presence of a qualified individual, provided that a minimum of one hour of official duty time is set aside for employees to attend the presentation or review the written materials, either by:

(1) Telecommunications, computer-based methods or recorded means; or  
(2) Written means.

*Example 1 to paragraph (d)(2)(iii)(A):* The State Department has one public filer (the Ambassador) in the American Embassy in Ulan Bator, Mongolia. Because of the difference in time zones and the uncertainty of an ambassador's

schedule, the designated agency ethics official for the State Department is justified in making a written determination that circumstances make it impractical to provide the annual ethics training as a verbal briefing, either with or without the presence of a qualified individual. The required annual ethics briefing can therefore be provided by written means in accordance with § 2638.704(d)(2)(iii)(A)(2). Note that an initial ethics orientation provided in the same calendar year in accordance with § 2638.703 of this subpart will meet this annual written ethics briefing requirement, provided the materials meet the content requirements stated at paragraph (c) of this section.

(B) In the case of special Government employees who are covered employees under paragraph (b)(3) of this section, an agency may (without the presence of a qualified individual) provide the annual ethics briefing by written or other means at the agency's discretion, provided that a minimum of one hour of official duty time is set aside for employees to attend the presentation or review the written materials.

(3) *Annual ethics briefings for all other covered employees.* (i) An agency may satisfy the annual ethics briefing requirement for covered employees other than those described at paragraph (b)(3) of this section for up to two out of every three calendar years through the distribution of a written ethics briefing to those employees. In such case, while not required to provide a minimum of one hour of official duty time, an agency must provide employees receiving their annual ethics briefings under this paragraph with sufficient official duty time to review the written materials provided. Note that an initial ethics orientation provided in the same calendar year in accordance with § 2638.703 of this subpart will meet this annual ethics briefing requirement (as well as that of § 2638.704(d)(3)(iii) of this section), provided the materials meet the content requirements stated at paragraph (c) of this section.

(ii) Except as permitted under paragraph (d)(3)(iii) of this section, the ethics briefing for covered employees other than those described at paragraph (b)(3) of this section shall be presented verbally at least once every three years, either in person or by telecommunications, computer-based methods or recorded means. Employees must be provided a minimum of one hour of official duty time for this verbal briefing. Unlike the annual ethics briefing described at paragraph (d)(2) of this section, for covered employees

described at paragraph (b)(3) of this section, a qualified individual need not be present during and immediately following the verbal presentation provided under this paragraph.

(iii) *Exceptions.* An agency can provide covered employees receiving their annual ethics briefings under this paragraph (d)(3) with written briefings only, in accordance with paragraph (d)(3)(i) of this section, every year without the verbal ethics briefing as described at paragraph (d)(3)(ii) of this section at least once in any three calendar year period, under the following circumstances:

(A) Where the Designated Agency Ethics Official, or his or her designee, has made a written determination that circumstances make it impractical to provide an ethics briefing verbally once every three calendar years to a particular employee or group of employees in accordance with paragraph (d)(3)(ii) of this section;

(B) In the case of special Government employees who are expected to work fewer than 60 days in a calendar year;

(C) In the case of officers in the uniformed services who serve on active duty for 30 or fewer consecutive days; or

(D) Where a particular employee or group of employees are covered employees solely because of agency discretionary designation pursuant to paragraph (b)(6) of this section.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 932

[Docket No. FV96-932-4 FIR]

#### Olives Grown In California; Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

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**SUMMARY:** The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule establishing an assessment rate for the California Olive Committee (Committee) under Marketing Order No. 932 for the 1997 fiscal year and subsequent fiscal years. The Committee is responsible for local administration of the marketing order which regulates the handling of olives grown in California. Authorization to assess olive handlers