

Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635

RIN 3209-AA04

Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments To Clarify the Coverage of Detailees to an Agency Under the Intergovernmental Personnel Act

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule; amendments.

SUMMARY: The Office of Government Ethics is proposing amendments to the regulation governing standards of ethical conduct for executive branch employees of the Federal Government, to clarify the coverage of employees of State or local governments or other organizations detailed to an agency under the Intergovernmental Personnel Act.

DATES: Written comments are invited and must be received before July 10, 2006.

ADDRESSES: You may submit comments in writing to OGE on this proposed rule by any of the following methods:

- E-Mail: usoge@oge.gov. Include the reference "Proposed Amendments to Part 2635" in the subject line of the message.

• Fax: (202) 482-9237.

• Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Richard M. Thomas, Associate General Counsel.

Instructions: All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209-AA04, for this proposed rulemaking.

FOR FURTHER INFORMATION CONTACT: Richard M. Thomas, Associate General Counsel, Office of Government Ethics; telephone: (202) 482-9300; TDD: (202) 482-9293; FAX: (202) 482-9237.

SUPPLEMENTARY INFORMATION:

I. Background

The Intergovernmental Personnel Act (IPA), 5 U.S.C. 3371, *et seq.*, provides two distinct mechanisms for assigning employees of State or local governments or other organizations to a Federal agency. Such IPA assignees may either be "appointed" in the Federal agency or "detailed" to the Federal agency. 5 U.S.C. 3374(a). An IPA appointee generally is "deemed an employee of the Federal agency for all purposes", with certain exceptions that are not relevant to Federal ethics requirements. 5 U.S.C. 3374(b). Consequently, it always has been clear that IPA appointees are subject to the same ethical requirements as other executive branch employees, including the standards of ethical conduct provisions in 5 CFR part 2635 and any supplemental agency standards of conduct.

IPA detailees, on the other hand, are deemed Federal employees only for those purposes specifically enumerated in the statute. 5 U.S.C. 3374(c)(2). Until the IPA was amended in 2001, IPA detailees were not deemed Federal employees for purposes of the Ethics in Government Act of 1978 (except for the provisions in title V, which simply amended 18 U.S.C. 207), although they were deemed employees for purposes of the criminal conflict of interest statutes (18 U.S.C. 203, 205, 207, 208, and 209), as well as chapter 73 of title 5 of the U.S. Code, which includes certain restrictions on gifts from outside sources and gifts between employees (5 U.S.C. 7353 and 7351). See OGE Informal Advisory Letter 79 x 1, which is available on OGE's Web site (<http://www.usoge.gov>). The 2001 amendments to the IPA, however, added the Ethics in Government Act of 1978 to the list of authorities with respect to which IPA detailees are deemed Federal employees. National Defense Authorization Act for Fiscal Year 2002, Public Law 101-107, section 1117, December 28, 2001; 5 U.S.C. 3374(c)(2).

The Office of Government Ethics issued its final rule establishing the "Standards of Ethical Conduct for Employees of the Executive Branch" in 1992, effective February 3, 1993. 57 FR 35006 (August 7, 1992). These regulations (the Standards), codified at 5 CFR part 2635, do not expressly address the status or conduct of IPA detailees. More important, on various

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occasions after the Standards were promulgated, OGE advised agency ethics officials that many of the requirements of part 2635 did not apply to IPA detailees because the scope of OGE's authority to regulate their conduct was unclear. For one thing, the Ethics in Government Act, which is OGE's organic Act and most general authority for rulemaking, did not apply to IPA detailees at the time that the Standards were promulgated.¹ Additionally, the Office of Personnel Management, not OGE, had specific authority to issue regulations governing IPA detailees. See Executive Order 11589, April 1, 1971, 36 FR 6343, 3 CFR, 1971-1975 Comp., p. 557, as amended by Executive Order 12107, December 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264 (delegating Presidential authority to OPM to issue IPA regulations).

OGE has advised agencies that IPA detailees may be subject to certain provisions of part 2635 that implement statutory requirements applicable to detailees under 5 U.S.C. 3374(c)(2). For example, many of the gift provisions in subparts B and C of part 2635 implement parts of chapter 73 of title 5, U.S. Code, for purposes of which IPA detailees were deemed Federal employees when the Standards were promulgated. OGE has also advised that agencies could require detailees to agree to follow the requirements of part 2635, by including such provisions in their IPA agreements (or related documents), pursuant to 5 U.S.C. 3374(c). However, this approach creates the potential for an uneven or incomplete application of part 2635, which would not further the fundamental purpose of establishing "a single, comprehensive, and clear set of executive-branch standards of conduct." Executive Order 12674, section 201(a), 54 FR 15159, 3 CFR, 1989 Comp., p.

¹ In this regard, the historical status of IPA detailees has been more uncertain than that of detailees under the recently established Federal Information Technology Exchange Program (IT Exchange Program). The IT Exchange Program was created under a 2002 law that, from the inception, treated detailees from certain for-profit business entities as agency "employees" for purposes of the Ethics in Government Act of 1978, among other things. See 5 U.S.C. 3701, *et seq.*; 70 FR 47711 (August 15, 2005) (final rule implementing provisions of the E-Government Act of 2002). OGE believes it is clear that detailees under the IT Exchange Program are covered "employees" under the OGE Standards in part 2635 and any supplemental agency regulations issued under § 2635.105 thereof.

215, as modified by Executive Order 12731, section 201(a), 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Now that the IPA has been amended to make detailees “employees” for purposes of the Ethics in Government Act, there is no further doubt as to OGE’s authority to cover IPA detailees under the Standards. Therefore, consistent with the goal of maintaining a single, comprehensive and clear set of Standards, OGE is proposing to amend part 2635 to make clear that all IPA detailees are subject to the Standards, as described below.

II. Proposed Amendments to the Standards

A. Definition of Employee

OGE proposes to amend the definition of “employee,” at 5 CFR 2635.102(h) of the Standards, to indicate that the term includes IPA detailees. This would resolve any doubts concerning the application of the Standards to IPA detailees.

B. Supplemental Agency Regulations

OGE also is proposing to amend 5 CFR 2635.105 of the Standards, the provision concerning supplemental agency standards of conduct regulations. This provision permits an agency, with the concurrence of OGE, to promulgate regulations in addition to the uniform, executive branchwide requirements of part 2635, to address circumstances specific to the particular agency, in view of its programs and operations. The proposed amendment would authorize an agency to apply all or portions of its supplemental requirements to its IPA detailees, by express provision in the supplemental regulations.

OGE has advised agency ethics officials that supplemental requirements generally are not applicable to IPA detailees, for the same reasons discussed above with respect to part 2635. Thus, agency officials have drafted certain supplemental restrictions, such as divestiture or outside activity rules, with the understanding that they would not apply to IPA detailees. As a result, some existing agency supplemental rules might not be viewed as necessary or appropriate for IPA detailees, particularly those detailees who are expected to serve on relatively short-term assignments. For example, an agency might not find it necessary or reasonable to impose certain divesture requirements on detailees who are expected to serve in an agency only for a year. In this connection, it also may be relevant that IPA detailees are not

eligible for certificates of divestiture, which is a tax benefit provided by Congress to mitigate some of the financial burden of complying with divestiture requirements. (Section 1043 of the Internal Revenue Code, 26 U.S.C. 1043, which is the authority for granting certificates of divestiture, is not included among the provisions of law in 5 U.S.C. 3374(c)(2) for purposes of which IPA detailees are deemed employees of an agency.)

It also is important to remember that supplemental agency requirements, by definition, are an exception to the general requirement of executive branch uniformity for standards of ethical conduct. See Executive Order 12674, section 301(a), 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by Executive Order 12731, section 301(a), 55 FR 42547, 3 CFR, 1990 Comp., p. 306. Therefore, OGE is less concerned about ensuring that all IPA detailees are subject to agency supplemental requirements.

At the same time, OGE also is aware that some agency ethics officials believe that certain agency supplemental restrictions are appropriate for IPA detailees. In some cases, for example, we understand that agencies have required IPA detailees to agree to follow not only the Standards in part 2635 but also supplemental agency standards. Therefore, in order to accommodate the needs of different agencies, OGE is proposing to amend § 2635.105 by adding a new paragraph (d), which would provide that IPA detailees are subject to supplemental agency requirements to the extent expressly provided in supplemental agency regulations.

Under this proposal, agencies that wish to subject IPA detailees to supplemental requirements would need to amend their supplemental regulations to state this intent. The proposed amendment uses the term “requirements” intentionally, because some supplemental agency regulations include provisions that do not impose additional requirements but actually relieve certain restrictions in part 2635, such as provisions that divide the agency into separate components for purposes of certain restrictions in 5 CFR 2635.202 and 2635.807. It is OGE’s intent that IPA detailees would still benefit from any such provisions in supplemental agency regulations that do not add additional requirements or restrictions, without the need for an amendment to the supplemental regulations. Additionally, agencies would have the discretion, provided that the general requirements of § 2635.105 are met, to make appropriate

adjustments to any supplemental regulations to account for any unique circumstances related to the use of IPA detailees in the agency’s programs and operations.

Agencies that already have required IPA detailees, by agreement, to abide by any supplemental regulations could continue to recognize any agreements in force as of the effective date of the future final rule amending § 2635.105. Additionally, agencies that wished to amend their supplemental regulations expressly to cover IPA detailees could continue to use IPA agreements to obtain commitments to follow current supplemental regulations, pending the promulgation of amendments, for a reasonable period determined in consultation with OGE.

III. Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments on this proposed amendatory rulemaking, to be received by July 10, 2006. The comments will be carefully considered and any appropriate changes will be made before a final rule is adopted and published in the **Federal Register** by OGE.

Regulatory Flexibility Act

As Acting Director of OGE, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed rule because it does not contain an information collection requirement that requires the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed amendatory rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the

future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

Executive Order 12866

In promulgating this proposed rule, OGE 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 proposed rule has not been reviewed by the Office of Management and Budget under that Executive order, since it deals with agency organization, management and personnel matters, and is not deemed to be "significant" thereunder.

Executive Order 12988

As Acting Director of the Office of Government Ethics, I have reviewed this proposed amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2635

Conflict of interests, Executive branch standards of ethical conduct, Government employees.

Approved: May 5, 2006.

Marilyn L. Glynn,

Acting Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is proposing to amend part 2635 of subchapter B of chapter XVI of title 5 of the Code of Federal Regulations, as follows:

PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

1. The authority citation for part 2635 continues to read as follows:

Authority: 5 U.S.C. 7301, 7351, 7353; 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 A—General Provisions

2. Section 2635.102 is amended by adding a new sentence after the second sentence of paragraph (h) to read as follows:

§ 2635.102 Definitions.

* * * *

(h) * * * It includes employees of a State or local government or other organization who are serving on detail

to an agency, pursuant to 5 U.S.C. 3371, *et seq.* * * *

* * * * *

3. Section 2635.105 is amended by adding a new paragraph (d) to read as follows:

§ 2635.105 Supplemental agency regulations.

* * * * *

(d) Employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, *et seq.*, are subject to any requirements, in addition to those in this part, established by a supplemental agency regulation issued under this section to the extent that such regulation expressly provides.

[FR Doc. E6-7222 Filed 5-10-06; 8:45 am]

BILLING CODE 6345-02-P

Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434-4809.

FOR FURTHER INFORMATION CONTACT: Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA-520 FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434-4809; telephone: (718) 553-4521.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made:

"Comments to Docket No. FAA-2006-24320; Airspace Docket No. 06-AEA-013". The postcard will be date/time stamped and returned to the commenter. All communications

received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket closing both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA-7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434-4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11-2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal