



United States Office  
Of Government Ethics

Report Number 09-017

## Highlights

### Model Practices

- FSIS has comprehensive written standard operating procedures.
- FSIS provides timely ethics information to employees via a newsletter.

### OGE Recommends

- That FSIS ensure that new entrant OGE Forms 450 are filed timely.
- That FSIS cease the use of the FSIS Form 4735-2.
- That FSIS include the name, title, office address, and phone number of USDA's DAEO in initial ethics orientation and annual ethics training materials.
- That FSIS ensure that prior approvals for outside employment comply with USDA's supplemental regulation.

If you have comments or would like to discuss this report, please contact Dale Christopher, Associate Director, Program Review Division, at 202-482-9224.

# Ethics Program Review U.S. Department of Agriculture Food Safety and Inspection Service

June 2009 Report

## Executive Summary

The United States Office of Government Ethics (OGE) has completed its review of the ethics program at the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS). The purpose of a review is to identify and report on the strengths and weaknesses of a program by evaluating: (1) agency compliance with ethics requirements found in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures for administering the program.

OGE identified two model practices in the areas of written standard operating procedures and ethics training. OGE also identified four deficiencies that require action to enhance FSIS' ethics program. These deficiencies are in the areas of financial disclosure, training, and outside employment.

This report has been sent to USDA's Designated Agency Ethics Official (DAEO) and USDA's Inspector General. USDA's DAEO is to advise OGE within 60 days of the specific actions FSIS has taken or plans to take to address OGE's recommendations.

OGE stands ready to assist FSIS in implementing the recommendations as well as other program initiatives that FSIS may choose to undertake. OGE will follow-up within six months from the date of this report's issuance on the status of OGE's recommendations.



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**Ethics Program Review**

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**Introduction**

**OGE MISSION**

The United States Office of Government Ethics (OGE) provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance initiatives.

**PURPOSE OF A REVIEW**

The purpose of a review is to identify and report on the strengths and weaknesses of an ethics program by evaluating: (1) agency compliance with ethics requirements found in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures in place for administering the program.

**REVIEW AUTHORITY AND SCOPE**

OGE has the authority to evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act of 1978, as amended (the Ethics in Government Act), and 5 CFR part 2638. OGE's review of the U.S. Department of Agriculture (USDA) focused on the elements listed below.

- Leadership involvement in the ethics program
- Program structure
- Financial disclosure systems
- Ethics training
- Ethics counseling
- Outside employment
- Enforcement of ethics laws and regulations
- Ethics agreements
- Travel payments from non-Federal sources

## **Ethics Program Review: USDA – FSIS**

OGE's review of USDA focused on the ethics programs at four USDA components: the Office of the Secretary (OSEC), Rural Development (RD), Agricultural Research Service (ARS), and Food Safety and Inspection Service (FSIS). This report details OGE's review of FSIS.<sup>1</sup>

### **Program Elements**

This report consists of descriptions, analyses, and conclusions regarding each program element reviewed.

#### **LEADERSHIP**

Commitment and action by agency leadership is the keystone for ensuring the integrity of an agency's ethical culture and for fostering public confidence in the decision-making processes of Government. In June 2006, the Secretary of Agriculture underscored the importance of ethics at USDA by issuing a memorandum to the entire agency reminding employees to maintain high ethical standards and to adhere to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The Secretary of Agriculture also discussed his commitment to ethics in a meeting with the Director of OGE in November 2006.

#### **PROGRAM STRUCTURE**

The Office of Ethics (OE) provides overall direction and support for the USDA ethics program. The Director of OE serves as the Designated Agency Ethics Official (DAEO) for USDA. The DAEO delegated the authority and responsibility for the FSIS ethics program to the FSIS Deputy Ethics Official (DEO). Additionally, FSIS has an Assistant Deputy Ethics Official. The FSIS Ethics Officer is responsible for the daily operations of the ethics program. At the time of OGE's review, the FSIS Ethics Officer was assisted by an Ethics Specialist and an Ethics Assistant. In addition, FSIS had nine Program Area Ethics Advisors that aided the Ethics Officer in providing counseling in their respective program areas.

#### **FINANCIAL DISCLOSURE SYSTEMS**

Title I of the Ethics in Government Act requires that agencies ensure confidence in the integrity of the Federal Government by demonstrating that officials are able to carry out their duties without compromising the public trust. High-level Federal officials demonstrate that they are able to carry out their duties without compromising the public trust by disclosing publicly their personal financial interests (SF 278). Title I also authorizes OGE to establish a confidential financial disclosure system for less senior executive branch personnel in certain designated positions to facilitate internal agency conflict of interest review (OGE Form 450).

Financial disclosure serves to prevent conflicts of interest and to identify potential conflicts by providing for a systematic review of the financial interests of both current and prospective officers and employees. The financial disclosure reports also assist agencies in administering their ethics programs in providing counseling to employees. *See* 5 CFR § 2634.104(b).

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<sup>1</sup> Reports detailing OGE's review of OSEC, ARS, and RD were issued separately.

## **Ethics Program Review: USDA – FSIS**

### Public Financial Disclosure System (SF 278)

USDA's OE collects, reviews, and certifies public financial disclosure reports for FSIS employees. OGE's examination of the public financial disclosure program at USDA is contained in OGE's report on the ethics program at USDA's OSEC (Report Number 08-008).

### Confidential Financial Disclosure System (OGE Form 450/450-A)

FSIS has developed written procedures that provide guidance for administering the confidential financial disclosure system. The development of written financial disclosure procedures is not required for component-level agencies such as FSIS, but it is a model practice that aids in the efficiency of the financial disclosure process. Such efficiency is important at FSIS as the agency had 844 confidential filers at the time of OGE's review.

To evaluate the filing, review, and certification of confidential reports at FSIS, OGE examined 169 out of the 844 confidential reports required to be filed in 2005. The following is a summary of OGE's examination of the 169 reports.

#### Type of Report

- 78 annual reports
- 71 OGE Optional Forms 450-A
- 19 new entrant reports
- 1 combined new entrant/annual report

169 total

#### Filing Timeliness

- 77 annual reports were filed in a timely manner.
- 1 annual report was filed late.
- 71 OGE Optional Forms 450-A were filed in a timely manner.
- 5 new entrant reports were filed in a timely manner.
- 13 new entrant reports were filed late.
- 1 new entrant report lacked a date of appointment and therefore filing timeliness could not be evaluated.
- 1 combined new entrant/annual report was filed timely.

169 total

OGE recommends that FSIS take steps to improve the filing timeliness of new entrant confidential financial disclosure reports.

#### Review/Certification Timeliness

- 96 reports were reviewed and certified in a timely manner.
- 2 reports had not been certified at the time of OGE's review.

## Ethics Program Review: USDA – FSIS

- 98 total<sup>2</sup>

### Confidential Conflict of Interest Certificate (AD-1202)

OGE previously approved FSIS' use of the Confidential Conflict of Interest Certificate (AD-1202). Prior to OGE's review, FSIS studied the use of AD-1202 and found it to be duplicative, stating that information collected on AD-1202 is captured by other mechanisms within the ethics office. Additionally, FSIS found that some employees required to file AD-1202 did not meet the criteria of a confidential filer found in 5 CFR § 2634.904. Therefore, FSIS decided to cease using the AD-1202. FSIS estimates that elimination of AD-1202 will have saved the agency approximately \$60,000 annually.

### Conflict of Interest Statement (FSIS Form 4735-2)

The Conflict of Interest Statement (FSIS Form 4735-2) requires employees to provide information that FSIS uses to make a conflict of interest determination. However, it is unclear from where FSIS derives authority to require employees to provide this information. In Part II of the form it states that "FSIS 4735.9 prohibits the assignment of employees to any establishment where circumstances exist which might prevent or give the appearance of preventing employees from objectively and impartially carrying out the duties and responsibilities assigned. A situation of this nature constitutes a conflict of interest." Part II goes on to list "... specifically prohibited conflict of interest situations." Further, the Privacy Act statement on FSIS Form 4735-2 states that the information on the statement will be used to "evaluate/resolve possible conflicts of interest..." Title I of the Ethics in Government Act, as amended, supersedes any other provision of law or regulation with respect to the reporting of information required for the purpose of preventing conflicts of interest or apparent conflicts of interest. *See* 5 U.S.C app. § 107(b). Therefore, it is OGE's opinion that FSIS does not have the authority to require employees to provide the information requested on FSIS Form 4735-2 for the purposes of preventing conflicts of interest.

Additionally, the Privacy Act statement on FSIS Form 4735-2 lists inaccurate authority for requiring employees to provide information.<sup>3</sup> Specifically, the Privacy Act statement reads, in part: "Mandatory response to the Conflict of Interest Statement is required by 5 U.S.C. 7301 Section 101." 5 U.S.C. § 7301 has no Section 101 and there is no provision within 5 U.S.C. § 7301 that mandates a response to FSIS Form 4735-2.<sup>4</sup> Further, the Privacy Act statement cites a non-existent regulation at 5 CFR Section 3635 as "providing for a fine of not more than \$10,000 or imprisonment for not more than 5 years, or both, for false or fraudulent statements made to an agency of the United States."

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<sup>2</sup> OGE Forms 450-A are not required to be reviewed or certified.

<sup>3</sup> The Privacy Act requires agencies to inform individuals who are asked to supply information (a) the authority which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; (b) the principal purpose(s) for which the information is intended to be used; (c) the routine uses for the information; and (d) the effects on the individual of not providing all or part of the information. *See* 5 U.S.C. 552a(e)(3).

<sup>4</sup> 5 U.S.C. § 7301 merely notes that the President has authority to prescribe regulations concerning the conduct of executive branch employees.

## Ethics Program Review: USDA – FSIS

In summary, the FSIS Form 4735-2 is presented to FSIS employees as a legitimate form that is required to be filled out for the prevention of conflicts of interest. Employees are also made to believe that serious consequences exist for not filing the form or for providing false information on the form. However, FSIS relies on non-existent authorities in order to mandate that employees provide the information requested by FSIS Form 4735-2, which has not been approved by OGE.

OGE informed USDA's DAEO and FSIS that OGE has not approved the use of FSIS Form 4735-2. USDA's DAEO informed OGE that FSIS is working on revising the FSIS Form 4735-2. Irrespective of FSIS' effort to revise the form, OGE recommends that FSIS suspend use of FSIS Form 4735-2. Further, any revisions or derivatives of FSIS Form 4735-2 that request information from employees for the purpose of preventing conflicts of interest, or that would impose additional reporting requirements on public or confidential financial disclosure filers, or that is intended to be used in lieu of the OGE Form 450 must first gain OGE's approval before use. See 5 U.S.C. app. § 107(b), 5 CFR § 2634.103(a)(2), and 5 CFR § 2634.905(a), respectively.<sup>5</sup>

### ETHICS TRAINING

An ethics training program is essential to raising awareness among employees about ethics laws and rules and informing them that an agency ethics official is available to provide ethics counseling. Each agency's ethics training program must include at least an initial ethics orientation for all employees and annual ethics training for covered employees.

#### Initial Ethics Orientation

Within 90 days from the time an employee begins work for an agency, the agency must provide the employee with an initial ethics orientation. An initial ethics orientation must include:

- the Standards;
- any agency supplemental standards;
- the names, titles, office addresses, and phone numbers of the DAEO and other ethics officials; and
- at least one hour of official duty time to review the items described above. See 5 CFR § 2638.703.

To meet the initial ethics orientation requirement, FSIS provides its new employees with an orientation binder containing, among other things, materials intended for initial ethics orientation. Ethics-related materials include "Ethics and Conflicts of Interest (FSIS Directive 4735.9)" and an "Ethics Orientation Workbook." These materials cover:

- the Standards,
- the 14 Principles,
- the supplemental standards of ethical conduct for employees of USDA, and

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<sup>5</sup> See also 5 CFR § 2634.601(b) and 5 CFR § 2634.901(b).

## Ethics Program Review: USDA – FSIS

- the contact information for all FSIS ethics officials.

The initial ethics orientation materials did not contain the name, title, office address, and phone number of USDA's DAEO. OGE recommends that FSIS include this information in future initial ethics orientation materials. *See* 5 CFR § 2638.703(b).

Orientation is provided by human resources staff to new FSIS employees on their entrance on duty date. According to an FSIS Human Resources Specialist, employees are given their first week to review orientation materials, including ethics materials.

The ethics office does not track which employees receive initial ethics orientation because all employees receive the orientation materials as standard operating procedure.

### Annual Ethics Training

Public financial disclosure filers are required to receive verbal annual ethics training. *See* 5 CFR § 2638.704(a). Verbal training includes training prepared by a qualified instructor and presented by telecommunications, computer, audiotape, or videotape. *See* 5 CFR § 2638.704(c)(2). Other covered employees (e.g., confidential filers) are required to receive verbal ethics training at least once every three years and written training in the intervening years. *See* 5 CFR § 2638.705(c). The content requirements for both public filers and other covered employees are the same. Agencies are encouraged to vary the content of annual training from year to year but the training must include, at least, a review of:

- the 14 Principles of Ethical Conduct,
- the Standards,
- any agency supplemental standards,
- the Federal conflict of interest statutes, and
- the names, titles, office addresses, and phone numbers of the DAEO and other ethics officials. *See* 5 CFR § 2638.704(b).

In 2005 FSIS provided annual training via its Ethics Training Workbook. FSIS employees received training by reviewing the workbook and returning the attached training certification form to the ethics office. The FSIS ethics staff also conducts ad hoc training presentations, though attendance at the presentations is not used to satisfy the annual training requirement. According to the Ethics Officer, all confidential filers receive the same training, however, specialized training for FSIS senior officials is provided by the USDA OE. The Ethics Training Workbook covered:

- the 14 Principles of Ethical Conduct,
- the Standards,
- the USDA supplemental standards,
- the Federal conflict of interest statutes, and
- the contact information of FSIS ethics officials.

The 2005 Ethics Training Workbook did not contain the name, title, office address, and phone number of USDA's DAEO. OGE recommends that FSIS include this information in

## **Ethics Program Review: USDA – FSIS**

future annual ethics training. *See* 5 CFR § 2638.704(b)(5).

### Other Ethics Training

FSIS also provides ethics information to employees through monthly articles published in the FSIS newsletter. Providing timely ethics information to employees helps to raise awareness and build an ethical culture.

### **ETHICS COUNSELING**

The DAEO is required to ensure that a counseling program for agency employees concerning ethics and standards of conduct matters, including post-employment matters, is developed and conducted. *See* 5 CFR § 2638.203. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program. *See* 5 CFR § 2638.204.

OGE's assessment of an ethics counseling program focuses on five factors: (1) accuracy, (2) timeliness, (3) transparency, (4) accountability, and (5) consistency. To determine whether an agency's counseling program successfully addresses these factors, OGE reviews and assesses the program's processes and written procedures. Further, OGE reviews selected samples of counseling to assess whether processes and written procedures are effective.

FSIS has a formal written procedure for memorializing counseling. The procedure provides guidance on whether counseling should be documented in a database or whether a formal advisory needs to be written. Counseling given verbally or via email is tracked by FSIS' database. Memorializing counseling in a consistent and transparent manner adds to the effectiveness of a counseling program.

To evaluate the counseling provided by the FSIS Ethics Office, OGE's USDA Desk Officer analyzed samples of memorialized ethics counseling. OGE's USDA Desk Officer found that some samples contained vague analyses, did not reference relevant authorities, and cited incorrect authorities. The Desk Officer has discussed her analysis with USDA's DAEO.

### **OUTSIDE EMPLOYMENT**

In accordance with USDA's supplemental regulation, prior written approval to engage in certain types of outside employment is required for all FSIS employees. *See* 5 CFR § 8301.104. FSIS requires employees to file the form "Request for Approval of Outside Employment or Activity" (FSIS 4735.3) to obtain prior approval to engage in outside employment.

OGE has concerns with FSIS 4735.3. First, the form does not meet all of the requirements of 5 CFR § 8301.102(c) and as a result does not give a reviewing official all of the information necessary to grant approval for the outside employment. Specifically, the form does not ask employees for the following information:

## Ethics Program Review: USDA – FSIS

- a description of the employee's official duties that relate in any way to the proposed employment;<sup>6</sup>
- the method or basis of any compensation (e.g., fee, per diem, honorarium, royalties, stock options, travel and expenses, or other);<sup>7</sup>
- a statement as to whether the compensation is derived from a USDA grant, contract, cooperative agreement, or other source of USDA funding;<sup>8</sup>
- for employment involving the provision of consultative or professional services, a statement indicating whether the client, employer, or other person on whose behalf the services are performed is receiving, or intends to seek, a USDA grant, contract, cooperative agreement, or other funding relationship;<sup>9</sup> or
- for employment involving teaching, speaking, writing or editing, the proposed text of any disclaimer required by 5 CFR § 2635.807(b).<sup>10</sup>

FSIS should revise the FSIS 4735.3 so that it requires employees to provide information in accordance with 5 CFR § 8301.102(c).

OGE's second concern with the FSIS 4735.3 is that it asks reviewing officials to consider factors not required by USDA's supplemental regulation. Specifically, Part II of FSIS 4735.3 requires that reviewing officials consider the "general attendance record of the employee" and the "amount of time and hours of work required by the outside employment or activity." Considering these factors when deciding whether or not to grant approval for an employee to engage in outside employment seems to go beyond the standard for approval set out in 5 CFR § 8301.102(d), which states that: "approval shall be granted by the agency designee unless it is determined that the outside employment is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635." FSIS should ensure that the appropriate considerations are taken into account before approving or disapproving any outside employment.

### ENFORCEMENT

The DAEO is required to ensure that (1) information developed by internal audit and review staff, the Office of the Inspector General, or other audit groups is reviewed to determine whether such information discloses a need for revising agency standards of conduct or for taking prompt corrective action to remedy actual or potential conflict of interest situations and (2) the services of the agency's Office of the Inspector General are utilized when appropriate, including the referral of matters to and acceptance of matters from that Office. See 5 CFR § 2638.203(b)(11) and (12).

FSIS has standard operating procedures for investigating possible standards of conduct and criminal conflict of interest violations. According to the procedures, the Ethics Office will gather readily available evidence and supporting documentation regarding allegations.

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<sup>6</sup> 5 CFR § 8301.102(c)(3)

<sup>7</sup> 5 CFR § 8301.102(c)(5)

<sup>8</sup> 5 CFR § 8301.102(c)(6)

<sup>9</sup> 5 CFR § 8301.102(c)(7)

<sup>10</sup> 5 CFR § 8301.102(c)(8)

## **Ethics Program Review: USDA – FSIS**

In cases of possible standards of conduct violations, the Ethics Office will send any collected evidence to FSIS' Labor and Employee Relations Division (LERD). LERD will then coordinate the investigation and, if necessary, assign administrative action.

In cases of possible criminal conflict of interest violations, the Ethics Office will send any collected evidence to the FSIS Internal Controls Staff. The Internal Controls Staff then determines whether the case should be forwarded to the USDA Office of Inspector General (USDA-IG). If USDA-IG accepts the investigation, it will investigate the possible violation and, if applicable, refer cases to the Department of Justice for prosecution. If the USDA-IG declines to investigate or if the Department of Justice declines to prosecute, the cases will be sent to LERD for possible administrative action. USDA's OE is responsible for concurrently notifying OGE of all referrals sent to the Department of Justice.

In all requests for investigation and administrative action, the Ethics Office stays apprised of the status of the case.

### **ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES**

An employee may accept payment of travel expenses from non-Federal sources on behalf of the employee's agency for official travel to a meeting or similar function when specifically authorized to do so by the agency. Agencies must submit semiannual reports of travel payments from non-Federal sources in excess of \$250 to OGE. *See* 31 U.S.C. § 1353.

USDA accepts travel payments from non-Federal sources under the authority of 31 U.S.C. § 1353. The procedures for requesting and receiving authorization for acceptance of travel payments from a non-Federal source are detailed in USDA Ethics Issuance 99-2. Ethics Issuance 99-2 delegates to each DEO the responsibility to determine whether it is appropriate to approve the acceptance of an offer from a non-Federal source to finance the travel expenses of an employee within the DEO's organization. USDA requires employees wishing to travel under the authority of 31 U.S.C. § 1353 to fill out a form titled "Approval and Report of Travel Funds Received from Non-Federal Sources" (Form AD-1101). The second page of Form AD-1101 contains a conflict of interest analysis section to be completed by the FSIS Ethics Official. The FSIS Ethics Official conducts the conflict of interest analysis and recommends to the DEO either approval or disapproval for acceptance of the payment from the non-Federal source.

Annually, by each 15<sup>th</sup> of May and November, the FSIS Ethics Official submits a record of travel payments accepted exceeding \$250 to OE using the SF 326. OE then sends OGE semiannual reports for all of USDA. OE filed the eight required semiannual reports for the period covering March 2005 through September 2008 with OGE.

### **Conclusion**

To enhance the USDA ethics program, OGE recommends that FSIS:

1. Take steps to improve the filing timeliness of new entrant confidential financial disclosure reports.
2. Cease the use of the FSIS Form 4735-2.

## **Ethics Program Review: USDA – FSIS**

3. Add the name, title, office address, and phone number of USDA's DAEO to initial ethics orientation and annual ethics training materials.
4. Ensure that prior approvals for outside employment comply with USDA's supplemental regulation; specifically with 5 CFR § 8301.102(c) and 5 CFR § 8301.102(d).

USDA's DAEO is to advise OGE within 60 days of the specific actions FSIS has taken or plans to take to address OGE's recommendations. OGE stands ready to assist FSIS in implementing the recommendations, as well as other program initiatives that FSIS may choose to undertake. OGE will follow-up with USDA's DAEO within six months from the date of this report's issuance on the status of OGE's recommendations.

If you have comments or would like to discuss the report, please contact Dale Christopher, Associate Director, Program Review Division, at 202-482-9224.