

United States Office of Government Ethics

Compliance Division

Ethics Program Review

Department of Defense
Office of the Secretary

Results

The United States Office of Government Ethics conducted a review of the Department of Defense Office of the Secretary's ethics program in July 2014. The review generally covered program activities for calendar year 2013.

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Objectives, Scope, and Methodology

The United States Office of Government Ethics (OGE) provides overall leadership and oversight of the executive branch ethics program which is designed to prevent and resolve conflicts of interest. 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 as set forth in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures for administering the program. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive agency ethics programs. *See* title IV of the Ethics in Government Act, 5 U.S.C. app. § 402, and 5 C.F.R. part 2638.

OGE conducted a review of the Department of Defense (DoD) Office of the Secretary's (OSD) ethics program in July 2014. The review generally covered program activities for calendar year 2013.

To assess OSD's ethics program, OGE examined a variety of materials including the 2013 Agency Ethics Program Questionnaire, samples of public and confidential financial disclosure reports filed in 2013, initial and annual ethics training provided in 2013, and ethics advice rendered to employees. Members of OGE's Compliance Division met with the Standards of Conduct Office Director and ethics personnel to discuss the information gathered, clarify issues identified during the review, and discuss ethics program operations in further detail. They also conducted interviews of DoD's Associate Director for the Senior Executive Management Office and personnel from the Office of Inspector General. In addition, OGE's Director and General Counsel met with DoD's Designated Agency Ethics Official and the Senior Advisor to the Secretary of Defense for Military Professionalism, who expressed strong support for fostering commitment to ethics on the part of DoD leaders and staff.

Agency Background

The Office of the Secretary of Defense (OSD) is the principal staff element of the Secretary of Defense in the exercise of policy development, planning, resource management, fiscal and program evaluation responsibilities. OSD includes the immediate offices of the Secretary and Deputy Secretary of Defense, Under Secretaries of Defense, Deputy Chief Management Official, Director of Defense Research and Engineering, Assistant Secretaries of Defense, General Counsel, Director of Operational Test and Evaluation, and such other staff offices as the Secretary establishes to assist in carrying out assigned responsibilities.

Ethics Program Structure

The DoD General Counsel, a Presidentially appointed, Senate-confirmed (PAS) official, serves as the Designated Agency Ethics Official (DAEO) for the DoD DAEO Remainder Component. The Standards of Conduct Office Director is the Alternate DAEO (ADAEO).

The DoD DAEO Remainder Component is comprised of OSD and the subordinate DoD components that are not designated as DAEO Components and do not have separate DAEOs. *See* Table 1. Each subordinate component has a Deputy DAEO who is responsible for independently administering the ethics program within that subordinate component. Deputy DAEOs are assisted by a cadre of civilian and military ethics counselors.

Table 1. DoD DAEO Remainder Component Subordinate Components

Defense Media Activity	Defense Security Cooperation Agency	Africa Command
Army-Air Force Exchange Service	Defense Technology Security Agency	Central Command
Defense Advanced Research Projects Agency	DOD Education Activity	European Command
Defense Acquisition University	Joint IED Defeating Organization	Northern Command
Defense Contract Management Agency	Missile Defense Agency	Pacific Command
Defense Health Agency	National Defense University	Southern Command
Defense Human Resources Activity	Washington Headquarters Services	Special Operations Command
Defense Micro Electronics Activity	White House Military Office	Strategic Command
Defense POW/MIA Accounting Agency	Joint Chiefs of Staff	Transportation Command

Standards of Conduct Office

The Standards of Conduct Office (SOCO), comprised of the ADAEO, five attorneys, two paralegals and an administrative assistant, is responsible for the administration of OSD's ethics program. In 2013 SOCO provided ethics services for approximately 2,100 full-time military members and civilian employees, 300 special Government employees (SGE) and 60 Intergovernmental Personnel Act employees. As part of these services, SOCO was responsible for processing approximately 640 public and 1,070 confidential reports filed in 2013 by OSD employees. In addition, SOCO ensures that OSD employees complete initial ethics orientation and annual ethics training and provides ethics advice.

SOCO's Role as DoD Ethics Policy Authority

In addition to administering OSD's ethics program, SOCO is responsible for coordinating and issuing authoritative ethics policy and procedures and helping to ensure their consistent interpretation throughout DoD. To fulfill these responsibilities, SOCO engages in a variety of activities, including:

- DoD Ethics Community Monthly Meetings - SOCO hosts monthly meetings for DoD ethics officials. At these meetings SOCO strives to engage the DoD ethics community to identify emerging areas of concern, discuss individual problems, share best practices, and, as necessary, coordinate a unified response to a given issue.
- Communication Efforts - For DoD DAEO Remainder Component subordinate components and DoD DAEOs, SOCO frequently transmits relevant information such as news from OGE Quarterly DAEO Meetings, updates on DoD-wide systems and implementation of the STOCK Act periodic transaction reporting requirement.
- Periodic Program Assessments/Assistance Visits - SOCO conducts periodic program assessments of the DoD DAEO Remainder Component subordinate component ethics programs which are managed by Deputy DAEOs.
- Ethics Materials Publication and Distribution - SOCO regularly prepares and distributes ethics materials for use throughout the DoD ethics community. SOCO also publishes the materials on its web site.
- Ethics Counselor Training- SOCO conducts training for hundreds of DoD civilian and military ethics counselors every year at the Army Judge Advocate General Law Center and School's week-long ethics course and at the DoD Ethics Counselor Short Course at the Washington Navy Yard.
- Briefings- SOCO routinely briefs the Combatant Command Staff Judge Advocates on emerging ethics issues and provides practical advice on ensuring consistent application of the various ethics rules.

- Ethics Counselor Desk Book- SOCO prepared and regularly updates the Ethics Counselor Desk Book. The Desk Book is a guide that provides a practical framework for the consistent application of the various ethics rules by ethics counselors throughout DoD. Each chapter of the Desk Book addresses a separate ethics topic and provides an introduction with explanation of the applicable references to rules, regulations and ethical principles in each area.
- DoD Committee on Standards of Conduct – The Committee periodically reviews DoD ethics and related issuances and interpretive guidance to resolve conflicting provisions and inconsistencies in the application of DoD’s supplemental standards of conduct regulation and the Joint Ethics Regulation. The Committee strives to develop a single conclusion or interpretation for adoption, publication and distribution throughout the DoD ethics community by SOCO.
- Ethics Community Outreach- SOCO officials participate in outreach activities with the ethics community of the executive branch, such as the 2014 OGE National Government Ethics Summit and the Interagency Ethics Council, an informal network of executive branch ethics officials that meets monthly to exchange ideas and share information on ethics-related issues. Additionally, SOCO reaches out to external stakeholders, such as the Defense Industry Initiative, through participating in speaking engagements.
- Encyclopedia of Ethical Failure- SOCO officials coordinate with DoD Inspector General personnel to gather data to include in the Encyclopedia of Ethical Failure. The Encyclopedia is used as a training tool to provide DoD personnel with real examples of federal employees who have intentionally or unwittingly violated the standards of conduct.

The Joint Ethics Regulation

The Joint Ethics Regulation (JER), DoD 5500.07-R, is authorized by DoD Directive 5500.07, Standards of Conduct, and governs the application and procedural implementation of the executive branch-wide Standards of Conduct and the Supplemental Standards of Ethical Conduct for Employees of the Department of Defense, 5 C.F.R. part 3601. The JER was issued to ensure that the Standards of Conduct and DoD supplemental regulation are applicable to enlisted personnel, as well as to give the rules the force and effect of a general order for applicability to military personnel. Thus, the JER generally serves as the ethics program standard operating procedures for all DoD DAEO components. SOCO officials explained that DoD components can create internal standard operating procedures establishing office-specific requirements. For example, internal procedures can be drafted to describe how to collect a financial disclosure report and where such reports are to be maintained. SOCO indicated that DoD components may not, however, substantively supplement the Standards of Conduct or the DoD supplemental ethics regulation. Additionally, all standard operating procedures must comply with the JER’s substantive requirements.

Ethics Program Challenges

SOCO officials noted that during 2013, SOCO managed its ethics program responsibilities while experiencing the continued effects of sequestration and subsequent furloughs. Additionally, the financial disclosure program was further impacted by the departure of the financial disclosure manager in May 2013 and the new financial disclosure manager's subsequent detail out of SOCO. The electronic financial disclosure system used by many DoD components also experienced prolonged technical problems during this period.

Leadership Support of the Ethics Program

Commitment and action by agency leadership is critical to ensuring the integrity of an agency's ethical culture and for fostering public confidence in the decision-making processes of government. DoD senior officials demonstrate their support for the ethics program and the importance of ethics training by leading ethics training sessions. In 2013 the annual ethics training theme was leader-led, values-based ethical decision-making. During these sessions, senior officials, including PAS officials, presented part of the ethics training by sharing their experiences as examples of how to behave ethically, while professional ethics officials presented the core government ethics training material. Additionally, during these sessions leaders took the opportunity to establish expectations for their employees and recognized good behavior.

Model Practices

As part of its ethics program reviews, OGE identifies model practices that other agencies may consider adopting to further enhance their own ethics programs. The following are model practices identified during OGE's review of OSD:

- SOCO conducts periodic program assessments of the DoD DAEO Remainder Component subordinate component ethics programs.
- SOCO conducts training for hundreds of DoD civilian and military ethics counselors every year.
- SOCO developed and regularly updates the Ethics Counselor Desk Book which provides a practical framework for consistent application of the various ethics rules.
- SOCO has developed comprehensive written procedures for the administration of all elements of OSD's ethics program.

Financial Disclosure

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. In order to help ensure this confidence, high-level federal officials publicly disclose their personal financial interests. Title I also authorizes OGE to establish a confidential financial disclosure system, in which less senior executive branch personnel in certain designated positions may be required to complete a confidential disclosure report. Financial disclosure serves to prevent, identify and resolve conflicts of interest by providing for a systematic review of the financial interests of officers and employees. The

financial disclosure reports assist agencies in administering their ethics programs and also assist in providing counseling to employees. *See* 5 C.F.R. part 2634.

Written Procedures

Section 402(d)(1) of the Ethics in Government Act requires that each executive branch agency establish written procedures for collecting, reviewing, evaluating, and where applicable, making publicly available financial disclosure reports filed by the agency's officers and employees. Chapter 7 of the JER covers the procedures for the management of the financial disclosure system for all of DoD, including OSD. OGE determined that the JER includes comprehensive financial disclosure written procedures to ensure the proper identification of filers and the collection, review, certification, retention, and where applicable, public availability of reports. Additionally, the written procedures include the penalties for the failure to file a financial disclosure report.

Administration of the Financial Disclosure Program

The OSD financial disclosure program is administered under the supervision of the ADAEO, who also serves as the SOCO Director. All SOCO staff attorneys review reports and provide advice and counseling to disclosure filers. A program manager is responsible for the day-to-day administration of the financial disclosure program with the support and assistance of the two paralegals and the administrative assistant.

As previously discussed in the Program Administration Section of this report, during 2013 the OSD financial disclosure program administered by SOCO was impacted by the effects of sequestration and subsequent furloughs and by the departure of the financial disclosure manager in May 2013. A new financial disclosure program manager was designated in September 2013. However, this new manager was then assigned to a detail out of SOCO from October 2013 through April 2014. Additionally, the electronic financial disclosure system used by some of the filers, the Army's Financial Disclosure Management System, experienced prolonged technical problems.

Identification of Filers and Collection of the Financial Disclosure Reports

SOCO identifies filers with the support and assistance of OSD Human Resources Offices and client liaisons, the White House Liaison (for the identification of PAS, non-career SES, and Schedule C employees) and the ethics officials at other DoD components, such as the military departments. Additionally, every year SOCO re-examines the master lists of filers for accuracy and to ensure the timely collection of reports from the covered employees. SOCO provides financial disclosure filers notices of the filing requirement, reminders, and late notices by email. SOCO permits electronic as well as hardcopy submissions for both public and confidential financial disclosure reports.

Review of the Financial Disclosure Reports

The OSD financial disclosure program includes multiple levels of review of the reports. In accordance with the JER, new entrant and annual reports undergo an intermediate review by the filer's supervisor. The reports are then received by the SOCO program staff (either the paralegal or administrative assistant) who conducts a technical review of the reports to ensure that the reports are complete, dated, and signed by the filer and supervisor. The paralegal then conducts a more substantive review of the reports and follows-up with filers when additional information is required. After any information requested is received, the paralegal prepares a summary of the report based on a review of the current and prior years' reports. The paralegal may also draft ethics guidance and recusal statements, as needed. The reports are then forwarded to the SOCO attorneys for substantive conflict of interest analysis and certification.

Conflicts Analysis

SOCO ethics officials stated that the offices in OSD are mainly responsible for oversight and development of broad DoD-wide policy within their jurisdictional areas. They also perform a liaison role with other federal agencies and Congress. Additionally, because OSD receives much of its support from ancillary DoD components, OSD employees are generally less likely than other employees to be required to participate in particular matters that would give rise to conflicts with their financial interests. For example, OSD does not conduct its own procurements, but rather receives procurement support from the Washington Headquarters Service. Therefore, potential conflicts for OSD personnel usually relate to seeking and negotiating for post-government employment with non-federal entities with which they engage in their DoD official capacity. Additionally, imputed interests, either from spousal interests or from the service in a personal capacity on a professional association, are another source of potential conflicts. Ethics officials explained that since many OSD filers are subject matter experts in their respective fields, it is not unusual for them to be asked to serve as officers in related professional associations in their official or personal capacities. These entities often seek DoD support, involvement, or action. Lastly, ethics officials indicated that conflicts of interest are also likely to arise in the context of funding decisions.

OSD financial disclosure reports undergo two levels of conflict of interest review. As stated earlier, financial disclosure reports undergo an initial review for conflicts by the filer's supervisor before the report is forwarded to SOCO. To conduct the secondary conflict of interest analysis, ethics officials rely on their knowledge of the offices, their missions and their priorities. Additionally, ethics officials compare the filers' reported assets and outside positions to lists of DoD contractors or grantees.

Furthermore, pursuant to the Senate Armed Service Committee policy, all DoD PAS officials divest any interest in defense contractors. SOCO ethics officials explained that this policy is in place to significantly reduce the risk that these senior officials will have conflicts of interest, regardless of whether their duties are likely to involve particular matters. Nonetheless, most PAS officials in OSD are confirmed with an ethics agreement that requires some form of screening arrangement to ensure they do not participate in particular matters affecting a financial holding pending divestiture or an organization with which they were formerly affiliated.

Examination of Financial Disclosure Reports

In 2013 SOCO was responsible for the review and certification of the approximately 640 public reports and 1,070 confidential reports required to be filed by OSD employees. To evaluate the administration of OSD's financial disclosure program, OGE examined a sample of these reports. OGE's examination of the sample included an assessment of the timeliness of filing, review, and certification, as well as an assessment of the overall quality of the supervisory and SOCO review of the reports.

Examination of Public Reports

To evaluate SOCO's administration of OSD's public financial disclosure process, OGE examined a sample of 38 new entrant, 41 annual, and 39 termination reports that were required to be filed by OSD officials in 2013. Table 2 below presents the results of OGE's examination.

Table 2. Examination of OSD's Public Financial Disclosure Reports

	New Entrant		Annual		Termination		Total	
Public Reports Sampled	38		41		39		118	
Filed Timely	38	(100%)	41	(100%)	39	(100%)	118	(100%)
Certified Timely (within 60 days)	29	(76%)	16	(39%)	32	(82%)	77	(65%)

Table 3 shows that all of the public reports examined by OGE were filed timely and that approximately two thirds of the reports examined (65%) were certified within 60 days. OGE determined that 21 of the 41 reports that were certified beyond the 60-day deadline because ethics officials were seeking additional information from filers necessary for certification.

In order to help ensure that all reports are certified within 60 days, SOCO ethics officials explained that the financial disclosure program has implemented new procedures that require the reports to be immediately transmitted to attorneys for substantive conflict review and certification if a paralegal's review finds no need for additional information. The new procedures also emphasize tracking the status of the reports to ensure timely certification within 60 days.

OGE also identified evidence that SOCO ethics officials conducted thorough reviews of the reports. The report files contained extensive notes from the ethics officials documenting requests for additional information from filers. Additionally, the files contained copies of cautionary letters provided to filers and formal recusal memoranda or disqualifications to address potential or actual conflicts of interest identified during ethics officials' review of the reports and approvals for outside positions. The files also included documentation of advice provided to filers on other ethics matters, such as attending dinners and events sponsored by non-government sources and post-employment issues, including copies of the Annual Certification by Public Financial Disclosure Filers, in which employees certify to having read and understood a summary of the negotiating for employment, procurement integrity, and post-government employment statutory restrictions that apply to DoD personnel. SOCO ethics officials also

instruct supervisors to reassign the tasks of the delinquent filers to ensure they do not work on matters which can affect the financial interests of non-Federal parties until the report is filed and a substantive conflict of interest review can be completed by ethics officials

OGE also observed that the filers from the selected sample of reports submitted periodic transactions reports (OGE Form 278-T), as necessary and as required by the STOCK Act.

Examination of Confidential Reports

To evaluate SOCO’s administration of OSD’s confidential financial disclosure process, OGE examined a sample of 28 new entrant and 32 annual reports that were required to be filed by OSD officials in 2013. Table 3 below depicts the results of OGE’s examination.

Table 3. Examination of OSD’s Confidential Financial Disclosure Reports

	New Entrant		Annual		Total	
Confidential Reports Sampled	28		32		60	
Filed Timely	18	(64%)	26	(81%)	44	(73%)
Certified Timely (within 60 days)	24	(86%)	23	(72%)	47	(78%)

Over a quarter (27%) of the confidential reports OGE examined were filed late. As previously discussed in the Program Administration section of this report, during 2013 SOCO was affected by sequestration cuts and subsequent furloughs, which impacted the OGE Form 450 filing season. Additionally, the electronic financial disclosure system used by some of the filers, the Army’s Financial Disclosure Management System (FDM), experienced prolonged technical problems.

However, ethics officials indicated that the financial disclosure program has implemented new procedures to ensure the timeliness in the report filing. According to ethics officials, the implementation of the new procedures has virtually eliminated late reports. The new procedures include sending additional reminders to filers prior to the report due date and sending a notice of late filing to filers within days of their missing the filing deadline directing that they file immediately. A copy of the late filing notice is sent to the delinquent confidential filers’ action officers (usually personnel with Human Resources liaison duties). Additionally, ethics officials notify the supervisors of confidential filers who have not filed within two weeks after being alerted of their requirement to file. This notice instructs supervisors to reassign the tasks of the delinquent filers to ensure they do not work on the matters which trigger their designation as a confidential filer until the report is filed and a substantive conflict of interest review can be completed by ethics officials.

Model Practice

- SOCO ethics officials instruct supervisors to reassign the tasks of the delinquent public and confidential filers to ensure they do not work on matters which effect the financial interests of non-Federal parties until the report is filed and a substantive conflict of interest review can be completed by ethics officials.

The majority of the confidential reports OGE examined (78%) were certified within 60 days and an additional four reports were certified beyond the 60 days deadline because ethics officials were seeking additional information necessary for certification. While late certification of OSD confidential reports does not appear to be a systemic problem, OGE reminds SOCO officials that they should accomplish final certification of reports within 60 days of their receipt when the reports do not require additional information or remedial action.

OGE also identified evidence of the SOCO ethics officials' comprehensive review of the confidential reports. For example, the report files contained correspondence from the ethics officials documenting requests for additional information from filers. Additionally, the files contained copies of cautionary letters provided to filers and formal recusal memoranda or disqualifications to address potential or actual conflicts of interest identified during ethics officials' review of the reports and approvals for outside positions. The files also included documentation of advice provided to filers on other ethics matters, such as attending dinners and events sponsored by non-government sources and post-employment issues.

Also, as with the public reports, new procedures require the confidential reports to be immediately transmitted to attorneys for substantive conflict review and certification if a paralegal's review finds no need for additional information. The new procedures also emphasize tracking the status of the reports to ensure timely certification within 60 days.

Education and Training

An ethics training program is essential to raising awareness among employees regarding ethics laws and regulations and informing them of agency ethics officials' availability to provide ethics counseling. Each agency's ethics training program must include at least an initial ethics orientation (IEO) for all new employees and annual ethics training for covered employees. Chapter 11 of the JER covers the ethics training standard operating procedures for DoD.

Initial Ethics Orientation

OGE regulations require that all new agency employees receive ethics official contact information along with the following material within 90 days of beginning work for an agency: (1) the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards) and any agency supplemental Standards to keep or review, or (2) summaries of the Standards, any agency supplemental Standards and the Principles of Ethical Conduct (the Principles) to keep. Employees must receive one hour of official duty time to review the material. *See* 5 C.F.R. § 2638.703.

IEO materials are provided to all personnel processing into OSD through the Human Resources Division. The IEO package covers the Standards, the DoD supplemental standards, the criminal conflict of interest statutes and the Principles of Ethical Conduct. The materials also include SOCO officials' contact information. PAS employees and certain other categories of new employees (e.g., IPAs and SGEs) receive IEO in-person from SOCO officials. OGE found that the content of IEO satisfied all relevant requirements.

SOCO tracks IEO compliance for OSD employees in different ways according to the type of employee who is in-processing. SOCO relies on email notifications from key offices to track IEO:

- New employee entrance on duty email - SOCO receives an email from the Human Resources Office regarding new employees every two weeks. SOCO uses the emails to track incoming personnel as well as transfers into OSD. SOCO contacts new employees or their points of contact to confirm employees' entrance on duty and also to confirm their financial disclosure filing status.
- "VIPPS" political appointee in-processing and out-processing email - SOCO receives an email alerting ethics officials to collect a new entrant financial disclosure report and to provide IEO when the Human Resources Office identifies the in-processing and out-processing of political appointees within OSD through VIPPS, its automated system.
- Non-PAS political appointee IEO email – SOCO receives email notices and attendance sign-in sheets related to non-PAS political appointees' receipt of IEO from the Human Resources Office.
- Monthly email about SGE consultants - SOCO receives a monthly email from the Human Resources office reporting the beginning and ending dates of SGE consultant appointments at OSD, including renewals of appointments.
- Monthly email about IPAs - SOCO receives a monthly email from the Human Resources office reporting the beginning and ending dates of IPA appointments at OSD, including extensions of appointments.

SOCO ethics officials reported that all 192 new OSD employees received the required IEO in 2013.

In 2014, SOCO mandated that most new OSD employees complete IEO through a SOCO-developed online module accessed through OSD's Learning Management System (LMS). The module must be completed within 90-days of the employee's appointment. The online IEO module is not used for political appointees (PAS, NC-SES, and Schedule C) and certain other categories of new employees (e.g., IPAs and SGEs) who continue to receive in-person IEO. SOCO receives periodic reports of completion in order to track IEO compliance by new OSD employees.

Annual Ethics Training Plan

OGE regulations at 5 C.F.R. § 2638.706 require agencies to develop, at the beginning of each year, a written plan for annual ethics training. The plan must contain a brief description of the agency's annual training and include estimates of the number of employees who will receive verbal and written training. SOCO's plan for OSD's 2013 annual ethics training contained a brief description of the annual training and included estimates of the number of employees required to receive verbal and written training.

Annual Ethics Training

OGE regulations require that all covered employees receive annual ethics training consisting of a review of: (1) the Principles, (2) the Standards (3) any agency supplemental standards; (4) the criminal conflict of interest statutes, and (5) ethics official contact information. Requirements for training length and delivery method vary by an employee's financial disclosure filing status. *See* 5 C.F.R. §§ 2638.704 and 705.

The annual training conducted by SOCO in 2013 met the regulatory training requirements. SOCO conducted the majority this training in person, with the direct participation of the senior leaders of the OSD offices. The training focused on values-based ethical decision-making. Participants at these live sessions were also given a written summary of the Principles, the Standards, the DoD supplemental standards, the criminal conflict of interest statutes, and SOCO officials' contact information. Employees who could not attend a live session received either verbal training through the LMS, other verbal-based online training or qualified for the non-verbal training impracticability determination and were provided written material.

SOCO ethics officials reported that 257 (approximately 62%) of public filers and 463 (approximately 68%) of confidential filers received annual ethics training in 2013. Ethics officials explained that the filers missed training provided in 2013 for a variety of reasons: some filers were on extended medical or administrative leave, left the organization before training was provided, were deployed or, in some cases, chose to receive training late in order to attend in-person training, such as the PAS-level, leader-led values-based ethics training.

As noted above, a number of filers did not receive annual ethics training in calendar year 2013, as required. However, make-up annual ethics training was provided during the first part of calendar year 2014. Based on documentation provided by ethics officials, OGE was able to determine that all of the filers who did not complete the training in 2013 received the make-up training in 2014.¹ Ethics officials indicated that all personnel who failed to complete annual ethics training in 2013 were specifically advised that completion of this requirement in early 2014 did not satisfy their 2014 training obligation.

SOCO also provides discretionary training throughout the year to emphasize specific ethics rules and requirements to different audiences within DoD, such as supervisors, acquisition

¹ A number of filers left DoD before the end of calendar year 2013 and before receiving annual training. Since an agency has until the end of a calendar year to complete annual ethics training, OGE does not consider the fact that these departed filers did not receive 2013 training to be a deficiency.

officials, new Senior Executive Service members, health care professionals and other target audiences.

Model Practices

- In 2013, the majority of annual ethics training was presented in-person with the participation of senior officials.
- SOCO provides discretionary training throughout the year to emphasize specific ethics rules and requirements to target audiences.

Advice and 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 C.F.R. § 2638.203. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program. *See* 5 C.F.R. § 2638.204.

SOCO ethics officials spend a significant amount of time administering the advice and counseling element of the OSD ethics program. The SOCO attorneys are responsible for providing advice to OSD employees. According to ethics officials, while most inquiries are made via e-mail, OSD employees located at headquarters often visit SOCO in person to ask ethics-related questions. SOCO attorneys usually respond to ethics inquiries within a 48-hour period, as evidenced by the sample of counseling examined by OGE. Written counseling files are stored on a shared computer drive to which all SOCO ethics officials have access.

Under Section 847 of the National Defense Authorization Act for Fiscal Year 2008, certain DoD officials must request and receive a written opinion regarding the applicability of post-government restrictions to the official's prospective employment before receiving pay from a DoD contractor if the following conditions are met: the official participated personally and substantially in an acquisition with a value in excess of \$10 million while serving in: (1) an Executive Schedule position, (2) A Senior Executive Service position, (3) a general or flag officer position, or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection evaluation board, or chief of a financial or technical evaluation team. SOCO ethics officials estimate that they prepare approximately 150 post-government letters a year. However, they indicated that very few OSD personnel actually satisfy the criteria of having participated personally and substantially in an acquisition with a value in excess of \$10 million.

OGE examined 12 samples of advice provided by SOCO ethics officials in 2013. The advice pertained to a variety of topics such as conflicts of interest and post-employment issues. Other issues addressed included endorsements, gift acceptance, fundraising and teaching and speaking. OGE determined the advice to be consistent with ethics laws and regulations.

Agency-Specific Ethics Rules

As authorized by Executive Order 12674 and implemented by 5 C.F.R. § 2635.105, an agency may modify or supplement the Standards of Ethical Conduct, with the concurrence of OGE, to meet the particular needs of that agency. A supplemental agency regulation is issued jointly by the agency and OGE and is published in title 5 of the Code of Federal Regulations.

DoD has a supplemental regulation at 5 C.F.R. part 3601 – Supplemental Standards of Ethical Conduct for Employees of DoD. The supplemental regulation is also referenced in Chapter 2 of the JER. Among other things, DoD’s supplemental regulation requires prior written approval for outside employment of financial disclosure filers with prohibited sources.²

As part of its review of SOCO’s advice and counseling program, OGE identified several written approvals for employees to engage in outside employment activities. These approvals appeared to be granted in compliance with the requirements of DoD’s supplemental standards.

To further assess compliance with the supplemental standards, OGE identified a sample of 10 outside employment activities disclosed in the sample of public and confidential financial disclosure reports OGE examined. According to SOCO ethics officials, seven of these activities did not involve a prohibited source and therefore did not require prior approval. However, ethics officials were unable to affirmatively document that written approval was granted for the remaining three activities.

Despite not being able to confirm that prior written approval was granted for the three activities in question, SOCO ethics officials stated that the required supervisory review of DoD financial disclosure reports functions as a back-up system to help meet the underlying purpose behind the supplemental requirement for prior approval, i.e., to prevent conflicts of interest. They added that two of the three filers had held their outside positions for several years and that during this time the filers’ supervisors had reviewed their financial disclosure reports and signed the reports indicating that the outside positions, along with the other reported interests, did not create a conflict of interest. The third filer reported his outside position on his termination report and ethics officials explained that supervisory review is not required for a termination report. Finally, ethics officials confirmed that the likelihood for a potential conflict was considered low as the official duties of the employees were unlikely to affect the financial interests of the outside employer, supervisor's acknowledged in their annual certification of the employee's disclosure that the positions did not pose a conflict, and the employees received annual ethics training with specific emphasis on financial conflicts (including imputed interests) and the requirement to execute a written disqualification should a potential conflict arise.

Irrespective of whether prior approval was granted for the three outstanding employment activities, OGE notes that supervisory certification of a financial disclosure report disclosing outside employment covered by the DoD supplemental standards of conduct regulation does not meet the regulation’s express requirement for prior written approval.

² SOCO has submitted to OGE proposed revisions to the supplemental regulations. The consultations between OGE and SOCO regarding these proposed revisions are ongoing to include specific changes to this rule.

According to SOCO ethics officials, SOCO is currently implementing a more formal process for meeting the prior approval requirement. They have developed a sample approval form with instructions, which they will be sharing with DoD's larger ethics community. They also stated that they will ensure DoD's supplemental regulation is prominently highlighted in SOCO's annual ethics training in 2015.

Recommendation

- OGE recommends that SOCO finalize and implement the more formal process for ensuring and documenting that all financial disclosure filers receive written approval before engaging in outside employment activities with a prohibited source, in accordance with the requirements of the DoD supplemental standards of conduct regulation.

The U.S. Senate Committee on Armed Services (SASC) imposes additional policy restrictions on DoD PAS officials and general and flag officers. For example, the SASC prohibits all DoD PAS officials from holding outside positions and requires complete divestiture of stock appearing on the list of contractors that have \$25,000 or more in contract awards with DoD, which is updated each fiscal year. Moreover, general and flag officers seeking confirmation for a position above a two-star are (1) prohibited from holding management positions at organizations that conduct business with DoD or focus business on military personnel, and (2) are required to divest stock interest in any of the DoD top 10 contractors, a list which is published on the SOCO website and updated annually.

Conflict Remedies

The criminal conflict of interest law at 18 U.S.C. § 208 prohibits an employee from participating in an official capacity in a particular matter in which he or she has a financial interest. Congress included two provisions that permit an agency to issue a waiver of the prohibition in individual cases. Under Executive Order 12674, agencies are to consult with OGE, when practicable, prior to issuing a waiver under section 208. The procedure for issuing waivers under section 208 is specified in Chapter 5 of the JER and in 5 C.F.R. part 2640. SOCO did not issue a waiver under 18 U.S.C. § 208 to any OSD employee in 2013.

Additionally, the Ethics in Government Act expressly recognizes the need for PAS nominees to address actual or apparent conflicts of interest by requiring written notice of the specific actions to be taken in order to alleviate a conflict of interest, commonly known as an "ethics agreement." All OSD PAS officials with ethics agreements satisfied the terms of their agreements in accordance with 5 C.F.R § 2634.802(b). In addition, all required evidence of action taken to comply with each agreement was submitted to OGE in accordance with 5 C.F.R. § 2634.802(a).

Usually OSD PAS officials maintain a screening arrangement to ensure continued compliance with the recusals required by their ethics agreements. The screening arrangements are implemented by the PAS official's immediate office staff.

Enforcement

Agencies must concurrently notify OGE when a case involving an alleged violation of a criminal conflict of interest statute is referred to the Department of Justice (Justice). Agencies are also required to report when Justice declines to prosecute a potential violation, any follow-up actions on a referral, and the disposition of the referral. *See* 5 C.F.R. § 2638.603. OGE's review of OSD's system of enforcement focused primarily on these requirements. OGE noted that SOCO ethics officials have established written procedures for the administration of the enforcement element of the ethics program.

The DoD DAEO Remainder Component reported one disciplinary action based wholly or in part upon violations of the criminal conflict of interest statutes (18 U.S.C §§ 203, 205, 207, 208, and 209) and 125 disciplinary actions based wholly or in part upon violations of the Standards (5 C.F.R. part 2635) in 2013. SOCO refers ethical violations to the appropriate DoD authorities. Allegations of violations of the criminal conflict of interest statutes are referred to the OIG for appropriate investigation by its Defense Criminal Investigative Service (DCIS). When warranted, DCIS refers cases to Justice in accordance with DoD Instruction 5525.07 and concurrently notifies OGE using the Notification of Conflict Referral Form OGE Form 202.

SOCO also refers cases involving non-criminal allegations to OIG as appropriate. For example, SOCO refers allegations of misconduct by senior officials to the OIG for investigation, as required by DODD 5505.06.

During its meeting with OGE, the OIG General Counsel and members of his staff confirmed that DCIS is responsible for notifying OGE of referrals made to Justice. However, they acknowledged that the reporting to OGE might not have been consistently done in the past. OIG officials explained that within the last year officials realized that the referrals were not being reported to OGE. Subsequently, DCIS took measures to ensure that the requirement to notify OGE was consistently satisfied.

OGE also examined the working relationship between SOCO and OIG officials. SOCO officials indicated that they regularly cooperate with the OIG and DCIS on investigations and audits, producing documents and giving statements, and providing other support as requested. OIG officials explained that generally a good working relationship exists with SOCO. For example, SOCO officials meet with them to gather data to include in the *Encyclopedia of Ethical Failure*, a guide used as a training tool that SOCO created to provide DoD personnel with real examples of federal employees who have intentionally or unwittingly violated the standards of conduct.

Model Practice

- With the assistance of OIG officials, SOCO created *the Encyclopedia of Ethical Failure*, a training tool to provide DoD personnel with real examples of federal employees who have intentionally or unwittingly violated the standards of conduct.

Special Government Employees

Special Government employees (SGE) are officers or employees of the executive or legislative branch, retained, designated, appointed or employed to perform their duties, full-time or intermittently, for not more than 130 days in any 365-day period. SGEs typically serve on agency advisory boards or commissions. SOCO ethics officials reported that OSD employs approximately 300 SGEs in various capacities, but primarily on 15 Federal Advisory Committees under the Federal Advisory Committee Act (FACA), and as experts and consultants. In 2013, OSD also had two non-FACA committees or equivalent.

OGE examined the ethics training and financial disclosure services provided to SGEs. Additionally, OGE evaluated OSD's processes and procedures for identifying and tracking SGEs.

SOCO ethics officials are involved in the SGE appointment process. A SOCO official must sign the DoD Form 2292 - Request for Appointment or Renewal of Appointment of Expert or Consultant - as part of the SGE appointment approval process. SOCO Ethics officials indicated that the Human Resources liaison or designated federal official for the appointing office are primarily responsible for tracking SGE work hours to ensure they do not exceed 130 days of work in any 365-day period. However, the limitation on work days is also highlighted by ethics officials during ethics training and through cautionary emails sent to SGEs. As an additional check to ensure that SGEs do not exceed the 130-day threshold, ethics officials request updated resumes from SGEs to learn if they are participating in other organizations as SGEs. The SOCO paralegals also research public records on the internet in order to identify SGEs' membership in or participation on any other FACA committees or federal boards.

OSD's SGEs generally file their financial disclosure reports upon appointment and then annually on the anniversary of their appointment dates.³ The financial disclosure reports for these SGEs are collected, reviewed, and certified by the SOCO ethics officials. SOCO assigns an attorney to each committee and the attorney reviews the committee meeting agendas and SGE members' financial disclosure reports for potential conflicts. The attorney also monitors any SGE member disqualifications. OGE examined 63 financial disclosure reports of SGEs and determined that all were filed and certified timely.⁴

SGEs receive customized ethics guidance about potential conflicts and SGE ethics obligations. They also receive written material: "An Ethics Guide for Consultants and Advisory Committee Members at the Department of Defense." In addition, the vast majority of SGEs also receive a verbal ethics briefing each year. The SOCO paralegals are responsible for keeping

³ Members of the Defense Policy Board and the Defense Science Board are required to submit DoD Confidential Conflict of Interest Statement (an alternative financial disclosure form approved by OGE). The majority of SGEs on all other advisory committees file the OGE Form 450.

⁴ The reports were selected from members of four FACA committees: Defense Policy Board, Reserve Forces Policy Board, Strategic Environmental Research and Development Program Scientific Advisory Board, National Commission on the Structure of the Air Force and one non-FACA committee: National Defense Panel-Quadrennial Defense Review Independent Panel.

track of the training in a database. OGE examined the training material and found that it met all relevant requirements.

In 2013, SOCO ethics officials provided ethics training to all SGEs in the sample examined by OGE. However, SOCO ethics officials indicated that in 2013 they had difficulty ensuring training for non-FACA reappointed SGEs. Specifically, not all non-FACA SGEs received written ethics materials or customized guidance in 2013. SOCO addressed this issue in 2014 and now all SGEs receive the SOCO Guide for Consultants and Experts.

Agency Comments

DoD provided the attached letter in response to our invitation to provide comments on the report.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

JUL 30 2015

GENERAL COUNSEL

The Honorable Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, N.W.
Suite 500
Washington, D.C. 20005-3917

Dear Mr. Shaub:

Thank you for the opportunity to review and comment on the U.S. Office of Government Ethics (OGE) draft program review report of the Office of the Secretary of Defense ethics program. We are pleased that OGE found the Office of the Secretary of Defense ethics program generally to be in compliance with applicable laws, regulations, and policies. We continually seek to improve our ethics program and the OGE program review provided us with another opportunity to do so.

The report contained the recommendation that SOCO finalize and implement a more formal process for ensuring and documenting that all financial disclosure filers, as required by the DoD supplemental standards of conduct, receive written approval before engaging in outside employment activities with a prohibited source. The report correctly notes that SOCO is in ongoing consultations with OGE regarding proposed revisions to the DoD supplemental standards of conduct, including the specific requirement that is the subject of the recommendation. In the interim, SOCO has taken concrete steps to help ensure compliance with this requirement, such as: development of a sample approval form with instructions; dissemination of this form throughout the DoD ethics community; prominently highlighting this requirement in our 2015 annual ethics training; and following-up with supervisors where there is no documentation of approval of outside employment activities with a prohibited source.

We would like to thank the OGE program review team for their professionalism and cooperation throughout the review process. If there are any questions, please do not hesitate to contact [REDACTED]

Sincerely yours,

Robert S. Taylor
Acting General Counsel and Acting Designated
Agency Ethics Official

