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Office of Government Ethics
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April 3, 2006

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Dear Mr. Runkel:

The Office of Government Ethics (OGE) recently completed a review of the National Archives and Records Administration's (NARA) ethics program. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (Ethics Act). Our objective was to determine the program's compliance with applicable ethics laws and regulations. We also evaluated the system and procedures for ensuring that ethics violations do not occur. Our fieldwork was conducted intermittently between August and October 2005 and focused on calendar year 2004 and 2005 activities. The following is a summary of our findings, conclusions, and recommendations.

HIGHLIGHTS

Our current examination found instances of both regulatory and statutory compliance with regard to some of the program elements we examined, including a strong advice and counseling program that addresses all ethics matters and is responsive to employees' needs in terms of timeliness. However, we are troubled by the scope of noncompliance found regarding several of the other program elements subject to our examination. More specifically, we found the lack of compliance with the ethics program requirements for special Government employees (SGEs) serving on NARA's advisory committees and the provisions on review of reports in 5 C.F.R. part 2634 with regard to the confidential financial disclosure system very disturbing. These requirements are there to prevent employees from being placed in jeopardy of violating substantive ethics laws and regulations, albeit unintentionally, such as those found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) (5 C.F.R. part 2635) and the criminal conflict of interest laws (18 U.S.C. §§ 203, 205, and 207-209). Moreover, we also have systemic concerns with regard to the prior approval system for outside activities and urge you to give some considerable attention to evaluating this program element.

Although this report details the substantive and systemic issues revealed during our review and our recommendations to address the issues and enhance the overall effectiveness of NARA's ethics program, it also provides a number of suggestions that we hope will help you manage the ethics program better. We note that we found these suggestions well received when they were presented. In fact, many of them you indicated were needed and you would begin to incorporate

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and/or were interested in considering, such as the use of an alternative disclosure form for some of your advisory committees. My staff, including the OGE Desk Officer assigned to NARA, Cheryl Kane-Piasecki, stands ready to provide any expertise or advice you may need to bring your ethics program into full compliance.

EMPLOYEE ETHICS SURVEY

During our ethics program review entrance conference, we reported on the results of the survey we conducted of NARA employees regarding the effectiveness of your ethics program and their perspective on the agency's ethical climate.¹ Overall, we found employee responses to our survey favorable. Most respondents indicated a familiarity with the rules of ethical conduct for executive branch employees and were aware of to whom they should go to have their ethics concerns addressed. The results also indicated that both the ethics advice and education and training they receive are useful in making them more aware of the ethics issues that help to guide their decisions and conduct in connection with their work.

BACKGROUND AND PROGRAM STRUCTURE

Under the direction of the Archivist, NARA is responsible for ensuring, for the citizen and the public servant, for the President and for the Congress and the Courts, ready access to essential evidence that documents the rights of American citizens, the actions of Federal officials, and the national experience. It does so by establishing policies and procedures for managing Government records; assisting and training Federal agencies in documenting their activities; administering records management programs; scheduling records; retiring non-current records; and managing the Presidential Libraries system.

You, as the Office of General Counsel's (OGC) Senior Counsel for Trust Fund and Foundation Policy, serve as the agency's Designated Agency Ethics Official (DAEO) for the approximately 2,700 NARA employees nationwide. Although the overall oversight responsibilities for coordinating and managing NARA's ethics program rest with you, prior to October 2004 the day-to-day administration of the program was assigned to an Ethics Program Specialist whose primary duties were confined to ethics and who also served as the agency's Alternate DAEO (ADAEO). In October 2004, in accordance with 5 C.F.R. § 2638.202(c), one of the Assistant General Counsels within OGC was appointed to replace the former Ethics Program Specialist who departed from the agency.

¹ The survey was conducted from December 11, 2003 to January 16, 2004. However, because NARA's program review was rescheduled from 2004 to 2005, the survey results were not provided to NARA until the ethics program review entrance conference.

SUPPLEMENTAL STANDARDS
OF CONDUCT REGULATION

Part 7601 of 5 C.F.R. requires NARA employees, other than SGEs, to obtain written approval before engaging in any outside employment whether or not for compensation. For purposes of this supplemental regulation, "employment" is defined as any form of non-Federal employment or business relationship involving the provision of personal services by the employee. It includes, but is not limited to, personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher, or speaker. It also includes writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the activities of a non-profit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization, unless the participation involves the provision of professional services or advice for compensation other than reimbursement for actual expenses.

For those who wish to engage in any outside employment, requests for approval must be submitted using NARA's NA 3015 form, Application to Engage in Outside Employment, Business, or Professional Activities, in accordance with the policies and procedures for prior review and approval of activities set forth in NARA's Administrative Procedures Manual (ADMIN. 201).

STAFFING AND OVERSIGHT CONCERNS

From the outset, we recognize that many of the deficiencies identified during our current review can likely be attributable to the departure of the former Ethics Program Specialist, who at the time of our review had not been replaced by someone dedicated to ethics full-time. While we recognize that one of the Assistant General Counsels within OGC was promptly appointed to the ADAEO position, we also realize that you and the current ADAEO have many non-ethics-related responsibilities that have precluded you both from devoting full-time attention to the day-to-day functions of the program.² Though we know the challenges faced in transitioning from a program structure administered day-to-day by a full-time ethics official to one administered on a part-time basis and realize that our review was conducted in the midst of this transition, it remains imperative nonetheless that the program elements described in subpart B of 5 C.F.R. part 2638 be met at all times to ensure the public's confidence in an ethical Government. For this reason, it is also imperative that your involvement in coordinating and managing the ethics program increase, as you are accountable to the Archivist for ensuring that the weaknesses found within the various program elements we examined are corrected. These elements include financial disclosure, education and training, and ethics services for SGEs. This increased involvement is particularly pertinent when you

² According to NARA's 2004 agency ethics program questionnaire, while you spend the greater amount of time on ethics, approximately 25 percent, the ADAEO currently spends approximately 15 percent of his time on ethics.

do not have the services of a full-time ethics official on which to rely to administer the day-to-day ethics functions.

While we were pleased to learn during the course of our review of your plans to soon hire another Ethics Program Specialist,³ who will again handle the day-to-day functions of NARA's ethics program on a full-time basis, and believe full-time attention to the program will help strengthen the program overall, we still see a need for more. For example, in accordance with section 2638.202(a), every executive branch agency must make available sufficient resources, including audit, legal, and administrative staff, as necessary, to enable the agency to administer its program in a positive and effective manner. One of the responsibilities of a DAEO is to serve as an effective catalyst in assessing the resources of the ethics program to determine whether or not his or her ethics duties can be effectively carried out. Since DAEOs are not required to do all of the program elements themselves, we believe an effective means for you to coordinate and manage NARA's ethics program, in addition to having the ADAEO and a full-time ethics official available, would be to give those who are already designated as deputy ethics officials a significant role in the administration of NARA's ethics program. Interestingly, while all NARA OGC attorneys, with the exception of the General Counsel, are designated as deputy ethics officials pursuant to 5 C.F.R. § 2638.204, they have been delegated none of the duties referred to in § 2638.203. Therefore, by utilizing the services of these deputy ethics officials we believe the ethics program would not only be strengthened further but it would also be more than adequate in preventing minor deficiencies from becoming major, especially when there is no full-time ethics official available.

Throughout this report, we make continual references to the deficiencies we identified that were associated with the departure of the former Ethics Program Specialist/ADAEO and where we believe the services of deputy ethics officials would be useful.

PRIOR APPROVAL OF OUTSIDE EMPLOYMENT

Our review of NARA's outside employment prior approval system focused primarily on whether the prior approval requirement in NARA's supplemental regulation, at 5 C.F.R § 7601.102, was being met, based on our examination of the outside employment reported on both the public and confidential financial disclosure reports we examined (see sections below on public and confidential financial disclosure systems). We identified 19 outside employment activities listed on the appropriate schedule/part of the public/confidential financial disclosure reports, but found only 3 approval forms (NA 3015) on file. We could not verify during our fieldwork for the remaining 16 employment activities whether prior approval had ever been obtained or NA 3015 forms had simply been misfiled. NARA confirmed for us after the conclusion of our fieldwork that only one of the four public reports on which we questioned the need for prior approval of outside employment needed such approval, which subsequently had been obtained and an NA 3015 form provided. However, the

³ Per our discussions with you, we were advised that the current ADAEO will continue to serve in his ethics capacity once a new Ethics Program Specialist is hired.

majority of the confidential reports on which we questioned the need for prior approval needed such approval, but no approval had been obtained nor had a NA 3015 form been properly filed.

We find this troubling since failure to obtain written prior approval precludes the transparency needed to ensure compliance with § 7601.102 and for the reviews of financial disclosure reports to be done in accordance with § 2634.605. This also places employees in jeopardy of being in actual or potential conflict of interest situations, including conflicts between their personal financial interests and their official duties or otherwise being at risk of violating the laws and regulations, including the Standards. Accordingly, we are recommending that NARA evaluate its outside employment prior approval system to ensure that all NARA employees (both filers and non-filers) have obtained prior approval in accordance with § 7601.102 (including having any employees whose outside employment we questioned obtain approvals after the fact, if warranted). Moreover, since copies of written approvals (or denials) should also be routinely maintained with the filer's financial disclosure report file for use in reviewing the financial disclosure report, we are also recommending that this become a routine practice during the review of financial disclosure reports.

In addition to the above, there were two other areas of concern regarding NARA's outside employment prior approval system:

First, during our examination of the 3 NA 3015 forms, we noticed that none of them included statements about the Privacy Act or the Standards, despite the form itself referring requesters to both statements on the reverse side of the form. Both statements serve to protect the employee in various ways.

Second, during our review of the ADMIN. 201, we noticed that the last update made to these procedures was in August 1996 when two significant changes were made to improve the organization and clarity regarding the coverage of outside employment. These changes included the addition of: 1) the special requirements applicable to persons holding non-career Senior Executive Service appointments;⁴ and 2) the requirement that prior approval be obtained by employees who wish to serve in a leadership position (officer, director, or similar position) of a non-profit, charitable, religious, professional, social, fraternal, or similar organization that is a prohibited source.

Regarding the latter change to the ADMIN. 201, upon comparing this requirement with the language found in the supplemental regulation, we believe the current outside activity employment approval requirement has been broadened by expanding the definition of employment subject to the prior approval requirement. To make this point, we note that the current language in NARA's supplemental regulation states that prior approval does not cover "participation in the activities of a non-profit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization, unless the participation involves the provision of professional services

⁴ Added were the restrictions provided in 5 C.F.R. §§ 2636.301 – 2636.307.

or advice for compensation other than reimbursement for actual expense [emphasis added].” Since the ADMIN. 201 is procedural in nature, it simply implements the supplemental regulation wherein employment has already been defined, which can be changed at NARA’s discretion by amending the regulation.

Therefore, we are recommending that NARA cease enforcing the broader outside employment prior approval requirement in the ADMIN. 201, pending NARA’s joint issuance with OGE, in accordance with 5 C.F.R. § 2635.105, of an amended supplemental regulation expanding the definition of employment consistent with the definition in the ADMIN. 201. Also, we are suggesting that the Privacy Act statement and brief statement about the Standards be indicated on the reverse side of the NA 3015 form (both the manual and electronic versions).

NARA ADVISORY COMMITTEES

Overall, we found this to be the weakest element of your ethics program and in need of the most attention. Ethics program services have not been provided to SGE members serving on some NARA advisory committees and uncertainty exists as to NARA’s role in providing ethics services to others. We find this degree of noncompliance very troubling because transparency in the Federal advisory committee system relies on advisory committee members being, or perceived as being, free from conflicts of interest and balanced, as a whole, to ensure that their points of view are not biased or imbalanced in any way. Therefore, ethical lapses in the management of these committees can destroy the basic integrity of this process. Moreover, allowing members to participate without having a current financial disclosure report on file subjects the filer, the committee, and the agency as a whole, to potential ethical violations and criticism by the media, public interest groups, and the Congress. This also includes term appointees who may not participate in a committee meeting during a given calendar year.

We note that in our last review of NARA’s ethics program conducted in 1998, we recommended that NARA complete a review of its advisory committees to ensure that all SGEs were identified and their new entrant reports collected initially and, if term appointees, annually thereafter. While those concerns eventually were found to be satisfied in a subsequent follow-up review (based on a determination that members of NARA’s advisory committees were considered SGEs and assurances that NARA would begin to collect their reports on an annual basis), the concerns raised in our current review confirm for us that your involvement in coordinating and managing this element of the ethics program must increase. As was discussed during our review, we believe this would be a good program element in which to utilize the services of the deputy ethics officials.

Our Current Review

During our review, we requested and were provided the charters of the five standing Federal Advisory Committee Act (FACA) advisory committees that are currently active at NARA, as well as the charter for NARA’s one non-FACA committee. These committees are: the Advisory Committee on Preservation; the Advisory Committee on Presidential Libraries; the Advisory Committee on the

Electronic Records Archives; the Advisory Committee on the Records of Congress; the National Industrial Security Program Policy Advisory Committee (NISPPAC); and the National Historic Publications and Records Commission, (NHPRC), the one non-FACA committee.

Of these committees, the NHPRC, the Advisory Committee on Preservation, and the Advisory Committee on the Electronic Records Archives, NARA's newest advisory committee, all have SGEs serving as members. However, at the time of our review, we found that the basic ethics program services, including the collection of confidential reports and the rendering of annual ethics training, were not being provided to the SGEs serving on the Advisory Committee on Preservation or the NHPRC. (We note that you advised us that you would be collecting new entrant confidential reports from the SGE members serving on the Advisory Committee on the Electronic Records Archives, as the first committee meeting would be scheduled prior to the end of this year). Additionally, although it was determined during our last review that NARA did not have the legal authority to collect financial disclosure reports from members of the Advisory Committee on the Records of Congress, since this committee is composed primarily of Congressional employees and persons appointed by Congress, it was agreed that steps would be taken to determine whether those members file financial disclosure reports with Congress and, if so, NARA would seek to obtain copies of those reports on an annual basis. During our current review, although we were provided a list of the members who were currently serving on this committee, which included three university members, the Historian of the United States Senate, and the Archivist, we found no evidence that steps had been taken to determine whether these members, with the exception of the Archivist, are required to file reports with Congress.

With regard to the two remaining committees, the Advisory Committee on Presidential Libraries and the NISPPAC, we were advised that all members on the Advisory Committee on Presidential Libraries serve as representatives and are not subject to the ethics program requirements. SGE or representative status, however, is uncertain with regard to the NISPPAC, as there has been some uncertainty as to what role NARA is to play in support of this committee.⁵ Though we were advised that NARA has also expressed concerns regarding this uncertainty, the fact remains that a proper determination as to whether there are SGEs serving on NISPPAC has never been made.

In light of these findings, we are recommending that appropriate steps be taken, in collaboration with NARA committee management officials, to establish procedures for the notification of filers, the completion, submission, review, and retention of financial disclosure

⁵ NISPPAC is responsible for advising the President, the Secretary of Defense, the Director of the Information Security Oversight Office, and other Executive branch officials on all matters concerning the polices of the National Industrial Security Program (NISP). Membership consists of representatives of those departments and agencies most affected by the NISP and non-Government representatives of contractors, licensees, and grantees involved with classified contracts, licenses, or grants, as determined by the Chairman.

reports, and the clarification of all SGE-related ethics responsibilities. We are also recommending that steps be taken to ensure that practices at NARA for designating the status of advisory committee members for ethics purposes are adequate to determine whether individuals who serve as members of committees, councils, boards, commissions, etc., are properly designated as SGEs, since certain ethics requirements apply to SGEs that do not apply to non-SGEs. These steps should include:

- Collecting new entrant confidential reports initially from all SGE advisory committee members and, if term appointees, annually thereafter in accordance with § 2634.903(b);
- Ensuring that all NARA advisory committee members who are SGEs receive initial ethics orientation in accordance with 5 C.F.R. § 2638.703, including orientation on the most significant conflict-of-interest laws that apply to them, and, if term appointees, written annual ethics training thereafter in accordance with the exception at § 2638.705(d)(2);
- Ensuring that committee management officials (Designated Federal Officials) are educated and trained on the ethics rules related to SGEs, as part of the education and training program conducted in accordance with 5 C.F.R. § 2638.203(b)(6) and subpart G of 5 C.F.R. part 2638;
- Developing and maintaining a tracking system to ensure that all SGEs timely submit their new entrant confidential reports and, if term appointees, annually thereafter;
- Determining whether committee members from the Advisory Committee on the Records of Congress file financial disclosure reports with Congress and, if they do, obtaining copies of those reports annually;
- Formally determining whether members of NISPPAC are SGEs; and
- Ensuring that all SGEs on the Advisory Committee on the Electronic Records Archives have been identified and informed of the filing requirement, and have completed their new entrant confidential reports for 2005.

Potential Benefits of an Alternative Disclosure Form

After reviewing the duties associated with these committees, we believe the potential benefits of using an alternative disclosure form, in lieu of members filing a new entrant OGE Form 450, may better serve one or more of these committees due to the unique conflicts concerns associated with the members. For example, an alternative form such as a self-certification for the Advisory Committee on Preservation, which is responsible for advising the Archivist on matters relating to preservation of permanently valuable materials which are currently part of NARA, or which may be accessioned in the future, may better serve NARA since most of the information reportable on the OGE Form 450 may not address fully any potential conflict of interest concerns that may arise regarding these members. Using an alternative form filed before each meeting would allow for timely conflict-of-interest determinations rather than waiting to make the determination after an annual review of a new entrant OGE Form 450. It could also help to ease the administrative burden associated with the

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filing, collection, and review of confidential disclosure reports. We encourage NARA to consider the benefits of using an alternative disclosure procedure for this committee and the others. As a reminder, this procedure must be approved in writing by OGE prior to being implemented, in accordance with 5 C.F.R. § 2634.905(c).

ENFORCEMENT

During our review, we discussed with NARA's Inspector General (IG) the requirements of 5 C.F.R. § 2638.203(b)(12) and determined that the services of this office are utilized when appropriate, including the referral by the DAEO of matters to and acceptance by the DAEO of matters from the IG's office. The IG advised us that there is and has been a continuing relationship between his office and the DAEO regarding matters of mutual interest including ethics-related matters.

To determine whether OGE is being concurrently notified about all referrals to the Department of Justice (Justice) of alleged violations of the conflict-of-interest laws, declinations by Justice to prosecute, and disciplinary actions taken by agencies in accordance with the requirements of 5 C.F.R. § 2638.603, we followed up with the IG regarding the one case about which we were advised was referred to the IG, in 2004. This case involved the investigation of a NARA employee who had potentially violated 5 C.F.R. § 2635.402(a) and 18 U.S.C. § 208(a), the status of which at the time of our review was unknown. We discussed this with the IG and although we learned that this case was referred to Justice, and was subsequently declined for prosecution, the IG was not aware of the requirements of § 2638.603. After discussing the requirements with him, he confirmed for us that his office would be responsible for notifying OGE of all referrals and other required follow-up information in the future.⁶ We also suggested to the IG that he begin to concurrently notify the DAEO, when making a referral to Justice regarding the conflict-of-interest laws, to help in monitoring this system. As a result of our discussions and the fact that we received assurance that OGE will be notified of referrals in the future, we are making no formal recommendation in this program area. However, as a good management practice, we encourage you and the IG to periodically update and clarify the roles of each of your respective offices in NARA's system of enforcement.

In addition, NARA's Director of Human Resources, who is responsible for tracking the administrative actions NARA takes or considers, advised us that from October 2004 to September 2005 there were nine disciplinary actions taken or considered against NARA employees for ethics infractions.

⁶ We advised the IG that when notifying OGE of referrals and other required follow-up information in the future, the OGE Form 202, Notification of Conflict of Interest Referrals, must be used.

WRITTEN PROCEDURES FOR ADMINISTERING THE FINANCIAL DISCLOSURE SYSTEMS

During our examination of NARA's written procedures for administering both its public and confidential financial disclosure systems, we noticed that the last update made to them was in November 1998. Although we found these procedures to generally comply with the requirements of section 402(d)(1) of the Ethics Act, we are recommending that you update them to more fully comply with the prescribed requirement. For example, under the "Public Financial Disclosure-Extension of Filing Due Date" section, the procedures indicate that an additional extension of time, of up to 45 days, may be granted to an employee by the OGE Director for good cause shown. However, as you know, OGE issued a final rule amending the regulation governing the granting of filing extensions and late filing fee waivers under the public financial disclosure system. Effective September 3, 2002, agencies were authorized to grant public filers the additional extension of time not to exceed 45 days, previously granted by the OGE Director and also were authorized to waive the late filing fee for public filers who submit their reports more than 30 days after the due date.

Other updates include: 1) changing the civil action amount from \$10,000 to \$11,000; 2) changing OGE's publication, "Public Financial Disclosure: A Reviewers Reference" (1994) to the 2004 edition; and 3) revising the sentence that says "No incumbent reports are required of SGEs, (5 C.F.R. § 2634.903)" found under the "Confidential Financial Disclosure-Other Filers" section. Although this statement is partially true, the sentence by itself is incomplete as SGEs are required to file new entrant reports annually upon each appointment or reappointment in accordance § 2634.903(b).

PUBLIC FINANCIAL DISCLOSURE SYSTEM

We identified three procedural issues in our review of NARA's public financial disclosure system and they are discussed here. The one deficiency, NARA not using the outside employment prior approval forms in reviewing the public reports, has already been discussed above in the prior approval of outside employment section. At the time of our review, the public reports required to be filed in 2005 were still undergoing review by NARA; therefore, our findings were based on our examination on the public reports required to be filed in 2004. We note that during the 2004 annual public filing cycle, the former Ethics Program Specialist/ADAEO was responsible for conducting both a technical and substantive compliance review of the reports before forwarding them to the DAEO for review and certification.

At the beginning of our examination we identified, based on our observation of the master list of NARA's public filers, a total universe of 25 filers that were required to file a public financial disclosure report in 2004, excluding reports filed by yourself; the Archivist, the only Presidential-appointed and Senate-confirmed NARA employee; and one Senior Executive Service position that was vacant during the time of our review. Of the 25 reports, we were provided with only 16 to examine at the time of our review, all of which were annual reports. All of them were filed, reviewed, and certified in a timely manner except for one report that was not certified. Of the 9

reports we did not examine, you later confirmed for us that all had been filed, reviewed, and certified. You also confirmed for us that the majority of public reports required to be filed in 2005 had been certified. We note that during the course of our examination, we identified three procedural issues regarding NARA's public financial disclosure system:

First, it initially appeared that the majority of the reports we examined had been reviewed late because they were certified on the last day in December 2004. Although we found evidence that appropriate follow-up had been conducted with filers, it was difficult to ascertain whether these notes reflected compliance with the 60-day review requirement since the dates of these conversations were not included. Notwithstanding this, we did confirm with you that all reports in question had been initially reviewed in a timely manner by the former Ethics Program Specialist/ADAE0. We suggest that, in the future, to eliminate any timeliness of review concerns, the initial reviewer should note the dates of any conversations he/she has with the filer, including whether the completion of a review is pending additional information, to show evidence that reviews are commenced within 60 days of the report being filed. This is important since public reports are subject to public availability.

Second, to expound further on the fact that the majority of the public reports we examined were certified on the last day in December, there is no explicit requirement for public reports to be certified within 60 days. However, every effort should be made to certify these reports as soon as it is determined that they are complete and in compliance with applicable laws and regulations.

Third, of the 16 public reports we examined, 4 public reports listed an outside activity. Although we were advised that only one of these filers was required to obtain prior approval and subsequently obtained approval, we found no evidence that prior approvals were being utilized during the review of these reports. As a reminder, prior approvals should always be utilized, particularly with regard to those outside activities in which public filers engage. To ensure this is done, as already mentioned, a copy of each written approval (or denial) should be routinely maintained with the filer's financial disclosure report file for use in reviewing financial disclosure reports.

With regards to our examination of your annual report and the new entrant report filed by the Archivist, we confirmed that both reports had been filed, reviewed, and forwarded to OGE in a timely manner. In addition, we found the Archivist's ethics agreement, which described the steps he intended to take to avoid any actual or apparent conflicts, to have been completed timely.⁷

⁷ Although the Archivist complied with his ethics agreement in May 2005, it was not until July 2005 when the agreement was fully implemented. This was due to the fact that he wished to remain on the United States Institute of Peace Chairman's Advisory Council pending a decision on this "position" from the White House Counsel. The White House Counsel eventually approved the Archivist's request in July.

CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEM

The deficiencies identified in our review of NARA's confidential financial disclosure system, discussed here, deal with the lack of timeliness in NARA's reviews of its confidential reports, and the lack of reviews at all. Again, as with the public financial disclosure system, the deficiency arising from NARA not using the outside employment prior approval forms in reviewing the reports was discussed above in the prior approval of outside employment section.

During our review, we selected a sample of 68 of the approximately 272 annual confidential reports that were filed in 2004⁸ and 12 new entrant reports filed in 2005, and found none were certified even though the great majority of these reports listed few holdings. In addition, we found fewer than 10 reports that showed evidence that an initial review had been rendered. In view of the importance of financial disclosure in preventing employees from committing ethics violations, this is very troubling because untimely reviews or the lack of any review diminishes an agency's ability to provide timely and specific conflict-of-interest advice, which is a fundamental purpose of the ethics program.

Furthermore, we raised similar concerns in our last ethics program review, after finding substantial delays in the start of several annual confidential filing cycles.⁹ Interestingly, we see similarities between the deficiencies noted in our last review and those currently identified; in both reviews the primary ethics official responsible for administering the system was absent from the program. Again, this demonstrates to us that your involvement as DAEO in coordinating and managing the ethics program must increase to help ensure the basic integrity of the system. Particularly during the periods when an ethics official confined to ethics is absent from the program, reports must be reviewed and should be certified no later than 60 days after being filed.¹⁰ This is

⁸ At the time of our examination, there was one report we selected for our sample that we could not examine because NARA could not locate the filer's report. Therefore, we selected another report to examine.

⁹ We found the 1996, 1997, and 1998 annual filing cycles to have been substantially delayed. In 1997, the delay was caused by the absence of the ethics official primarily responsible for administering the confidential financial disclosure system who was on detail outside the agency. In 1998, the filing cycle was again delayed for the same reason. Since the scope of our review was generally restricted to include only program requirements for calendar years 1997 and 1998, we mentioned the 1996 filing cycle only as a record of work and to document the late start of annual filing cycles.

¹⁰ Although a report is not specifically required to be certified within 60 days, it should be certified immediately following the completion of the review unless the reviewer is awaiting requested additional information.

important because reports signed by a reviewing official is certification that a report has been reviewed, each required item has been completed, and the filer is in compliance with applicable laws and regulations.

Accordingly, we are recommending that all confidential reports filed in 2005 are reviewed and certified, in accordance with 5 C.F.R. §§ 2634.909 (a) and 2634.605(a) and (2). We note that this is another program element in which to utilize the services of the deputy ethics officials.

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

NARA accepts payments from non-Federal sources for travel, subsistence, and related expenses incurred by agency employees on official travel under the authority of the General Services Administration (GSA) regulation at 41 C.F.R. chapter 304, implementing 31 U.S.C. § 1353. Employees who seek approval under this authority are required to complete a GSA Form 87 (Official TDY Travel Authorization) and to submit it to NARA's Financial Services Division (FSD), along with a copy of the invitational letter from the non-Federal source. The FSD is responsible for forwarding both documents to the ADAEO who ensures that the acceptances are approved in advance and are free from conflict-of-interest concerns. FSD officials are responsible for collecting the information to be reported, drafting the semiannual report using the required GSA standard form (SF) 326, and forwarding it to OGE.

We examined the travel payments from non-Federal sources reported on 2 NARA semiannual reports to OGE of travel payments of more than \$250 per event, covering the period from April 1, 2004 through March 31, 2005. We found the ADAEO's conflict of interest determinations supporting the approvals we examined were made timely and were guided by all relevant considerations regarding the conditions for travel acceptance described within the GSA regulation. In addition, we found the conflict-of-interest checklist used as part of the ADAEO's review process to be an excellent way to review the circumstances surrounding an offer to help ensure proper acceptance of payments from a non-Federal source.

It appears that travel payments accepted under § 1353 are being properly authorized, including conflict-of-interest analyses being conducted as part of the approval process, to enable NARA employees to attend events that are not required to carry out the agency's mission. However, we do have two suggestions regarding NARA's system for accepting and reporting travel payments from non-Federal sources:

First, we noticed that NARA's written procedures implementing 41 C.F.R. Chapter 304 were last revised in January 1995 and are referenced as interim guidance. Effective June 2003, GSA published its final rule amending the regulation. Accordingly, we are recommending that these procedures be evaluated and revised, as appropriate, to stay current with regulatory policy and/or agency procedural practices. For example, since GSA's final rule now requires the use of the SF 326 for reporting travel payments to OGE, this should be included in the written procedures.

Second, we noticed there was one travel payment listed on the April 2004 – September 2004 semiannual report and four payments listed on the October 2004 – March 2005 report that were received in a prior reporting period. In other words, one trip listed on the April – September 2004 report reflected a travel date in December 2003, while four trips listed on the October 2004–March 2005 reflected travel dates in September 2004. We discussed this with an FSD official and were advised that in both instances the information was collected too late to be reported during the appropriate reporting period and was included in the report for following reporting period.¹¹ We were advised, however, that all payments were reviewed prior to the trip commencing and were properly screened for conflicts. As we discussed with the FSD official, since OGE has been given the authority under § 1353 to retain these semiannual reports for public inspection, we are suggesting that when instances like this occur, FSD should note them in its letter transmitting the semiannual report. Doing so, would satisfy any questions of whether travel payments are approved timely.

EDUCATION AND TRAINING

OGE's ethics education and training requirements at subpart G of 5 C.F.R. part 2638 are generally being met at NARA, including documenting the ethics training plan and satisfying initial ethics orientation requirements. However, we believe certain improvements can be made to strengthen this program element further in view of the importance of ethics education and training in preventing employees from committing ethics violations. Our suggestions and recommendations for improvement are discussed below.

Annual Training Plan

OGE's training regulation, at 5 C.F.R. § 2638.706, has long-required that ethics officials develop a written plan at the beginning of each year. The plan must contain a brief description of the agency's annual ethics training; estimates of the number of employees who will receive verbal and written training, broken out between public filers and non-public filers; and estimates of the number of employees who will receive written training instead of verbal training, broken out according to the various exceptions to the verbal training requirements for public filers and non-public filers.

Although we found written plans had been developed for 2004 and 2005, we noticed that each year's plan provided only a written description of the agency's training plan and did not include the aforementioned numerical estimates. Although we are making no formal recommendation in this matter, we are strongly suggesting that to more fully meet the prescribed requirement and the overall intent of using the plan to prepare for each training cycle, the aforementioned numerical estimates

¹¹ Regarding the trip reported in December 2003, we were advised that the traveler went on extended 5 USC § 552(b)(6) soon after returning which prolonged the collection of the required information to be reported.

should be added to all future plans, including the plan that has been developed for this year.¹² As a good management practice, we are also suggesting that a completion date be included on these plans to help OGE, in the future, determine timeliness, as these plans are to be completed by the beginning of each calendar year.

Initial Ethics Orientations for Regular Employees

We were advised that an initial ethics orientation (IEO) is provided to all new NARA employees, usually during their first day on duty, by the personnel offices located within the NARA program offices and regional facilities. In addition, we were pleased to hear that an in-person orientation was provided to the new Archivist who was sworn in February 16, 2005.

NARA's IEO includes providing new employees with the Standards, NARA's supplemental regulation, and OGE's A Brief Wrap on Ethics pamphlet, which includes the 14 Principles of Ethical Conduct for Government Officers and Employees (Principles). New employees are given an hour of official time to review these materials and upon completion are required to submit to their personnel office an NA Form 11002, Acknowledgement of Receipt of Standards of Ethical Conduct for Employees of the Executive Branch, which certifies their receipt of IEO. You advised us that you rely on the assistance of these personnel offices to provide a report by facility of the names and employment status (e.g., permanent, temporary, intermittent, etc.) of employees who signed the NA Form 11002, which are used to track IEO. Based on our review of a sample of the July 2005 reports, which covered the period from January 2005 to June 2005 and had been submitted to you from the various NARA facilities, it appears that the tracking of IEO is effective.

We note that during our review, we were advised that there has been some discussion as to whether the NA Form 11002 will continue to be used to track IEO. While OGE does not prescribe to a specific method for tracking IEO completion, if NARA does decide to discontinue its use, we would suggest that NARA adopt other appropriate means to continue to track IEO for timely completion.

General Observation

While we found the reports provided by the various personnel offices useful to our review in independently verifying that ongoing IEO is provided to new employees of NARA, we noticed that these reports gave no indication as to whether the new employee was entering into a position

¹² Your written plan should also contain any other information that you believe will assist OGE in reviewing the agency's training program.

requiring them to file a confidential report.¹³ Accordingly, we are suggesting that NARA obtain additional information to include the employee's: 1) entrance on duty date; 2) job title; 3) work telephone number and/direct extension; 4) grade and position description; and 5) their supervisor's name (if known), when requesting IEO reports from the personnel offices. Although this additional information is not required to carry out IEO, we believe that by cross-referencing a more detailed IEO list against the DAEO's own new entrant confidential filers' list, NARA will be able to ensure, as appropriate, that new employees entering covered positions do not "fall through the cracks" and are identified and instructed to file their confidential reports timely. This will also help NARA ensure that the most up-to-date master list of confidential filers is maintained as well.

Annual Ethics Training in 2004

In 2004, to meet the annual training requirement, NARA's training plan indicated the objective of providing in-person training to all covered employees, including staff at NARA's regional facilities and presidential libraries.¹⁴ It also indicated the objective of providing procurement integrity briefings to members of NARA's procurement team. Although the majority of covered employees received training, not all were trained in 2004. With regard to more specific numbers, NARA's 2004 Agency Ethics Program Questionnaire (questionnaire) indicated that there were 4 public and 132 confidential filers who did not receive training. Though the reason listed on the questionnaire regarding the lapse of training completion for confidential filers was consistent with our findings in other areas with regard to the October 2004 departure of the former Ethics Program Specialist/ADAEO, we were advised that the lapse of training for the four public filers occurred because they were located outside the Washington, DC Metropolitan area and it was impractical to provide the training.

Since these public filers were unable to travel to attend the in-person training and a make-up training session could not be rescheduled prior to the end of the year, we remind you that verbal annual ethics training without a qualified instructor available or written training prepared by a qualified instructor, in accordance with the exception at 5 C.F.R. § 2638.704(e), would apply in this situation when it is impractical to provide verbal training with a qualified instructor available. To meet this exception in the future, please ensure that one hour of official duty time is provided for the training and a written determination is made regarding the impracticality of providing verbal training

¹³ New entrant confidential filers are routinely identified via the DAEO's receipt of the vacancy announcements that are sent out for the covered positions. Once received, the DAEO is responsible for notifying the covered employees of the filing requirement and for providing the necessary materials to them.

¹⁴ The training covered a discussion of the Principles, the Standards, the criminal statutes, and NARA's outside employment regulation. Also, special emphasis was placed on outside employment/activities as well as the Hatch Act.

with a qualified instructor available. In these cases, written training prepared by a qualified instructor would satisfy the verbal training requirement for a public filer (or group of public filers).

Annual Ethics Training in 2005

To meet the annual training requirement for 2005, we were impressed to see your training objectives were to provide a mixture of both in-person and written ethics training, covering a range of ethics issues, targeted to different audiences (both covered and non-covered employees). We note that by the end of our review we were unable to evaluate this area completely, particularly with regard to training completion for covered employees, since we were advised that the bulk of the annual training was to be done during the months of November and December. We did however examine the various power point presentations that would be used and found them to comply with the requirements of subpart G of 5 C.F.R. part 2638.

Initial Ethics Orientation and
Annual Ethics Training for SGEs

As we have already discussed in the NARA advisory committees section, we are recommending that NARA ensure that all SGE advisory committee members receive IEO on the conflict-of-interest laws and ethics regulations that apply to them when they first come on board, as well as written annual ethics training in accordance with the exception at 5 C.F.R. § 2638.705(d).

ADVICE AND COUNSELING SERVICES

As previously mentioned, the advice and counseling program is responsive to the needs of NARA employees in making ethical decisions, which is key in preventing conflicts of interest and other ethics violations from occurring. We not only found the advice rendered to comply with the requirements of 5 C.F.R. § 2638.203 (b)(7) and (8) but we believe this is one of the strongest parts of your program. We examined approximately 31 pieces of e-mail advice dispensed on varying ethics-related issues ranging from gift questions to seeking and post-employment matters and found virtually all of the advice to be prompt, clearly written, and thoughtful. Moreover, we found the application of the relevant law and regulation to be consistent and more than adequately documented.

RECOMMENDATIONS

We recommend that you take the following actions:

1. As DAEO, increase your involvement in coordinating and managing the ethics program to ensure that program elements are in compliance, as described in subpart B of 5 C.F.R. part 2638.
2. Evaluate NARA's outside employment prior approval system to ensure that all NARA employees (both filers and non-filers) have obtained prior approval in accordance with § 7601.102 (including having any employees whose outside employment we questioned obtain approvals after the fact, if warranted). Moreover, copies of written approvals (or denials) should be routinely maintained with the filer's financial disclosure report file for use in reviewing the financial disclosure report.
3. Cease enforcing the broader outside employment prior approval requirement in the ADMIN. 201, pending NARA's joint issuance with OGE, in accordance with 5 C.F.R. § 2635.105, of an amended supplemental regulation expanding the definition of employment consistent with the definition in the ADMIN. 201. Also, begin to include the Privacy Act statement and brief statement about the Standards on the reverse side of the NA 3015 form for both the manual and electronic versions.
4. In collaboration with NARA's committee management officials (Designated Federal Officials), establish procedures for the notification of filers, the completion, submission, review, and retention of financial disclosure reports, and the clarification of all SGE-related ethics responsibilities. Also, ensure that practices at NARA for designating the status of advisory committee members for ethics purposes are adequate. These steps include: 1) collecting new entrant confidential reports initially from all SGE advisory committee members and, if term appointees, annually thereafter in accordance with § 2634.903(b); 2) ensuring that all NARA advisory committee members who are SGEs receive initial ethics orientation in accordance with 5 C.F.R. § 2638.703, including orientation on the most significant conflict-of-interest laws that apply to them, and, if term appointees, written annual ethics training thereafter in accordance with the exception at § 2638.705(d)(2); 3) ensuring that committee management officials are educated and trained on the ethics rules related to SGEs, as part of the education and training program conducted in accordance with 5 C.F.R. § 2638.203(b)(6) and subpart G of 5 C.F.R. part 2638; 4) developing and maintaining a tracking system to ensure that all SGEs timely submit their new entrant confidential reports and, if term appointees, annually thereafter; 5) determining whether committee members from the Advisory Committee on the Records of Congress file financial disclosure reports with Congress and, if they do, obtaining copies of those reports annually; 6) formally determining whether members of NISPPAC are SGEs; and 7) ensuring that all SGEs of the Advisory Committee on the

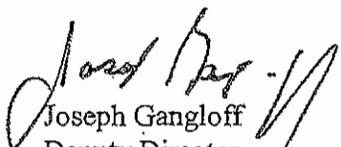
Electronic Records Archives have been identified and informed of the filing requirement and have completed their new entrant confidential reports for 2005.

5. Update NARA's written procedures for administering both its public and confidential financial disclosure systems to more fully comply with the requirements of section 402(d)(1) of the Ethics Act.
6. Ensure that the confidential reports filed in 2005 are timely reviewed and certified, in accordance with 5 C.F.R. §§ 2634.909 (a) and 2634.605(a) and (2).
7. Update NARA's written procedures governing the acceptance and approval of 31 U.S.C. § 1353 travel, as appropriate, to reflect current regulatory and/or agency procedural changes.

In closing, please advise me within 60 days of the specific actions NARA has taken or plans to take on our recommendations. A brief follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of OGE under subsection 402(b)(9) of the Ethics Act, as implemented in subpart D of 5 C.F.R. part 2638, it is important that NARA take timely actions to implement our recommendations.

Copies of this report are being sent via transmittal letter to the Archivist and NARA's IG. Please contact David A. Meyers at 202-482-9263, if we can be of further assistance.

Sincerely,


Joseph Gangloff
Deputy Director
Office of Agency Programs

Report number 06- 007

cc: Patricia C. Zemple
Associate Director, Program Services Division

Cheryl Kane-Piasecki
Senior Desk Officer