



United States
Office of Government Ethics

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June 2, 2006

Emma Monroig
Designated Agency Ethics Official
U.S. Commission on Civil Rights
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Dear Ms. Monroig:

The Office of Government Ethics (OGE) has recently completed its review of the United States Commission on Civil Rights' (Commission) ethics program. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (Ethics Act). Our objectives were to determine the ethics program's compliance with applicable ethics laws and regulations and to evaluate the Commission's systems and procedures for ensuring that ethics violations do not occur. Our review was conducted intermittently from July through November 2005 and focused on calendar year 2004 and 2005 activities. The following is a summary of our findings, conclusions, and recommendations.

For purposes of this report, we are aware that under the direction of new leadership, the Commission is currently working to overcome profound management and financial challenges, which have developed over a period of many years, to address longstanding concerns voiced by Congress, the Government Accountability Office (GAO), and others about the agency's management.¹ With regard to ethics, we recognize that the agency's Designated Agency Ethics Official (DAEO), was reappointed in April 2003.² We note this to underscore our recognition that many of the concerns raised in our current review arose before you took over the duties of the ethics program in 2003. However, we found many of the same "issues/concerns" identified in the last two reviews of the Commission's ethics program to persist.

HIGHLIGHTS

This report details the substantive and systemic issues found during our current review and recommends specific actions that will help ensure compliance with applicable ethics laws and regulations. Most notably, we are recommending that the Commission commit a high level of

¹ These challenges are well documented by a series of GAO and Office of Personnel Management (OPM) reports dating back to the 1990s. These reports document financial management, internal control, strategic planning, project planning, and internal communications failures, compounded by diminishing budgetary resources.

² Prior to this reappointment you had served in this capacity until May 1995, when you were reassigned from the position and detailed to another unit within the Commission.

agency support to the ethics program to help ensure that program improvements are sustained; revoke superseded provisions of the Commission's old Employee Responsibilities and Conduct regulation at 45 C.F.R. part 706;³ assess the merits of continuing to pursue a prior approval of outside employment requirement; refer a specific matter for civil prosecution to the Department of Justice (Justice); improve the advice and counseling services as well as aspects of the education and training program; and establish practices, procedures, policies, and guidance for advisory committees that reflect their members' status as special Government employees (SGEs).

While we are confident the Commission will work to resolve our current concerns, we see this also as a good time to reiterate the fundamental requirements that make up a strong ethics program in anticipation of the Commission's efforts to improve the program under new leadership. For this reason, our report also provides a number of suggestions, including what we consider to be agency model practices, the Commission should consider incorporating into the daily administration of the ethics program. Not only will the implementation of these suggestions help in better coordinating and managing the ethics program, but it will ultimately help to protect the basic integrity of Commission employees as well as ensure the public's trust in an ethical Government, which is one of the fundamental purposes of an agency's ethics program. As always, my staff, including the Desk Officer assigned to the Commission, Cheryl Kane-Piasecki, stands ready to provide expertise and advice to assist you in bringing the Commission's ethics program into full compliance.

BACKGROUND AND PROGRAM STRUCTURE

The Commission is an independent, bipartisan, fact-finding agency authorized under 42 U.S.C. 1975a(a) to investigate and monitor a broad range of civil rights issues, including complaints of individual voting rights and the study and collection of information relating to discrimination or denials of equal protection of the laws by reasons of race, color, religion, sex, age, disability, or national origin. The Commission is composed of eight members (Commissioners), not more than four of whom may be appointed from the same political party. Four members are appointed by the President, two appointed by the President pro tempore of the Senate, and two by the Speaker of the House of Representatives, with none of them requiring Senate confirmation.⁴ A Staff Director for the Commission, who is also appointed by the President with the concurrence of a majority of the Commissioners, serves as the agency's Chief Executive Officer responsible for

³ In 1979, the Commission adopted a set of Employee Responsibilities and Conduct rules into its standards of conduct regulation at 45 C.F.R. part 706. Part 706.7 of that rule in pertinent part required employees to obtain approval, in writing, from their supervisor before engaging in outside employment.

⁴ The Chairperson and Vice Chairperson of the Commission are designated by the President with the concurrence of a majority of the Commissioners. The Commissioners serve six-year terms. At the time of our review, there were two vacancies on the eight-member Commission.

providing leadership and direction to the agency's staff. The Commission has six regional offices that are responsible for coordinating the Commission's operations in their regions and for assisting the agency's state advisory committees in their activities. Each regional office is staffed with a director, civil rights analysts, and other administrative personnel.

The Commission's Solicitor serves as the agency's DAEO for approximately 50 Commission employees who are located at headquarters in Washington, DC and regional offices. Assisting the DAEO is an attorney advisor who was appointed as the agency's Alternate DAEO (ADAEO) in February 2005. Also, we were advised that the Human Resources Division performs limited duties with respect to providing ethics information to new Commission employees.

PRIOR OGE REPORTS

This is OGE's fifth review of the Commission's ethics program. Prior OGE reports of ethics reviews at the Commission were issued in 1985, 1992, 1996, and, most recently, in 2000. In each of these reviews areas in need of improvement were identified. Though we have been encouraged with some of the improvements the Commission has made to strengthen its ethics program following these reviews, we remain troubled by the fact that the Commission has had difficulties sustaining these improvements. Those of major concern deal with the Commission's failure to revoke the superseded provisions of its old Employee Responsibilities and Conduct regulation at 45 C.F.R. part 706, while retaining and renumbering as appropriate any surviving provisions, and the need to finalize a proposed supplemental regulation that would require prior approval of outside employment and be issued in accordance with 5 C.F.R. § 2635.105. We discuss this and other issues in greater detail below.

In 1985, OGE conducted its first review of the Commission's ethics program and made several recommendations for improvement. The most notable recommendations were for the Commission to establish a confidential financial disclosure system; to designate an Alternate DAEO; and to make updates to part 706.

In our second review in 1992, we again recommended actions to improve the ethics program. Most notably, recommendations were made for the Commission to improve its public financial disclosure review process; again to establish a confidential financial disclosure system; and to determine in writing the status of the Commission's state advisory committee members. Although most of these recommendations were implemented, program improvements had not been sustained at the time of our review in 1996.

In our 1996 review, we found the ethics program in need of substantial improvement to bring it into full compliance with applicable ethics laws and regulations. Problems existed in almost all program elements, including the public and confidential financial disclosure systems, the advice and counseling services, and the acceptance of travel payments from non-Federal sources. In addition, a determination was still needed with regard to the status of members of the state advisory committees. Because of the pervasiveness of the deficiencies identified, a Notice of Deficiency, pursuant to

5 C.F.R. § 2638.402(a), was issued ordering that action be taken by the DAEO. In June 1997, OGE notified the Commission, pursuant to § 2638.402(c)(2), that all deficiencies had been corrected.

In our most recent review in 2000, we found the program improved from our review in 1996. During the 2000 review, the Commission decided to require its employees to seek prior approval for outside employment as previously required by the Commission's regulation at 45 C.F.R. part 706, which had been superseded by OGE's regulation at 5 C.F.R. part 2635.⁵ As a result, we recommended that the Commission submit to OGE, for concurrence, a proposed supplemental regulation requiring prior approval. In view of the fact that part 2635 superseded many of the other provisions of part 706, we also recommended that the Commission revoke its superseded regulatory provisions, while retaining and renumbering as appropriate any surviving provisions. To help bring closure to both recommendations, the Commission submitted draft regulations to OGE in September 2000 and OGE provided a written response in October of the same year. Since we did not anticipate problems in approving these regulations, as the initial draft which had been submitted was substantially complete and the feedback we provided to the Commission was quite detailed, we closed both recommendations during our second six-month follow-up review conducted in 2001. This was done in good faith that finalized regulations would be published in the Federal Register. Though a final rule was published in November 2002 in the Federal Register revising the regulation, it did not revoke the superseded regulatory provisions nor was it a supplemental regulation, as we had recommended. Rather, the rule incorporated recommendations made from a Government Accountability Office (GAO) (then the General Accounting Office) audit to document the organizational structure, procedures, and program processes of the Commission.⁶ We address the issue of prior approval in more detail in the "AGENCY-SPECIFIC ETHICS RULES" section below.

⁵ We recommended this also in the report of our 1996 review; however, the Commission decided not to pursue the requirement during a subsequent follow-up review that was conducted in 1997 because of the vacancy in the Staff Director's position. OGE reminded ethics officials that until the agency decided to issue a supplemental standards of conduct regulation, in accordance with 5 C.F.R. § 2635.105, it could not require employees to seek prior approval before engaging in outside employment.

⁶ More specifically, the GAO report issued in 1997 noted that the Commission underwent a major reorganization in 1986, during which it eliminated several offices, including the Solicitor's Unit or Solicitor's Office. The report further noted that the Commission had been operating under obsolete documentation of its operating structure, as had been reflected by regulations that had not been revised since 1985. Furthermore, the position of Solicitor had not been formally filled since 1995 and attorneys within the Office of General Counsel had been handling matters assigned to the Solicitor's Office under the outdated 1985 regulations. In 1998 the Commission approved changes to its regulation as recommended by GAO. The proposed revisions to the regulation were published on April 10, 2002 in the Federal Register incorporating the GAO recommendations by reflecting the agency's organization, procedures, and practices.

Similarly, we also recommended in our earlier reports issued in 1992 and 1996 that the Commission take appropriate steps to determine whether members of the Commission's state advisory committees fell within the scope of financial disclosure and the criminal conflict-of-interest laws. While our 1992 recommendation was satisfied based on the Commission's projected plans to incorporate language into its reauthorization bill that would address this issue; we found during our 1996 program review that this was never followed through on. Accordingly, we recommended again in 1996 that action be taken to address this issue. Though we subsequently closed our 1996 recommendation based on the Commissions' determination that these members were excluded from confidential financial disclosure coverage because their services were provided in a non-employee "representative" status, our current review finds these members should be more appropriately considered SGEs instead. We address this issue in more detail in the "STATE ADVISORY COMMITTEES" section below.

ETHICS PROGRAM MANAGEMENT

Though we believe the Commission has been and still is committed to maintaining a viable ethics program for its employees, we recognize that the internal challenges faced at the Commission have made it difficult to do so. For example, over the years, the ethics program has suffered from constant turnover of its ethics staff, which has limited strong oversight and compliance monitoring of program elements.⁷ Also, non-ethics Commission matters taking precedence over ethics-related program matters has resulted in a lack of timeliness in meeting some ethics regulatory requirements.⁸ In addition to this, we also are aware of what can be described as "contentious working relationships" occurring between key players in the ethics program, which has also been a reason for the lack of timeliness in meeting regulatory requirements. Though we recognize these difficulties, it remains imperative that the agency's ethics program still comply at all times with the program requirements described in subpart B of 5 C.F.R. part 2638. Not only does compliance with these requirements help to ensure the public's confidence in an ethical Government, but it also prevents employees from violating substantive ethics rules, such as the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) (5 C.F.R. part 2635) and the criminal conflict of interest statutes (18 U.S.C. §§ 203, 205, and 207-209). Noncompliance, albeit unintentionally, will place employees in jeopardy of violating the Standards and criminal statutes.

Support from the top is critical in maintaining a viable ethics program, for employees as well as for the ethics officials who are responsible for administering the program on behalf of the agency. To help build a strong ethics program at the Commission, it is important for the Commission's leadership to become more involved in ethics by exercising their personal leadership in maintaining

⁷ Since 1995 high turnover has existed in the positions of both DAEO and ADAEO.

⁸ For example, the Commission has yet to revoke the superseded provisions of part 706 and/or finalize its proposed supplemental regulation requiring prior approval, despite the fact that OGE recommended this action in two earlier reviews. See sections on "PRIOR OGE REPORTS" and "AGENCY-SPECIFIC ETHICS RULES."

and carrying out the agency's ethics program, as required by 5 C.F.R. § 2638.202(a). Not only will this help to better coordinate and manage the ethics program, but it also ensures the public's trust in an ethical Government, which is the fundamental purpose of an agency's ethics program. For this reason, we are recommending the Commission's leadership to develop and incorporate specific ethics leadership strategies into the day-to-day management of the Commission's ethics program to provide the leadership necessary to facilitate improvement that results in a strong and effective ethics program. Although this can be done in a number of ways, we offer several suggested strategies for the Commission's leadership to consider:

- Becoming more vocally supportive of ethics (e.g., making announcements/speeches in support of the activities of the ethics office, including ethics in senior staff meetings, routinely or even occasionally providing "all hands" memos that reiterate the Commission's dedication to maintaining an ethical culture).
- Attending ethics education and training classes with employees to highlight the importance of ethics training to the agency.
- Supporting administrative action by ensuring that appropriate action is taken in the cases of ethics violations or delinquency of financial disclosure reports.
- Contributing personally to ethics program policies
- Incorporating ethics-related challenges/accomplishments as part of strategic plans and annual reports.
- Participating in OGE or other ethics community events.

In addition to the above, it is also essential that you, the DAEO, in carrying out the ethics program on behalf of the agency head, effectively oversee the program by regularly monitoring all elements and responding to issues and problems in a timely manner, as required by subpart B of 5 C.F.R. part 2638. Therefore, we are also recommending that you:

- Periodically assess (or review) the state of the ethics program during periods when the ethics program is not subject to an OGE ethics program review;
- Regularly update ethics policies and procedures, including written procedures required for various program elements;
- Regularly disseminate OGE and other pertinent ethics-related guidance, with advice on how the guidance applies to the Commission's ethics program;
- Keep records of advice that is rendered, when appropriate, on ethics and standards of conduct matters, including post-employment and conflict of interest matters;

- Have filers and reviewers pay more attention to the errors associated with incomplete information on financial disclosure reports;
- Timely submit to OGE semiannual reports of certain travel payments accepted, including negative reports; and
- Annually assess agency training needs, reflecting the results in the ethics training plan and training materials, and monitor attendance at ethics training sessions.

AGENCY-SPECIFIC ETHICS RULES

OGE's Office of General Counsel and Legal Policy has been working with the Commission since 2000, with our most recent feedback provided to the Commission on April 22, 2005, to keep both the supplemental and revocation processes moving along as expeditiously as possible. However, the time has come for the Commission to devote its full-time attention to bringing this element of its ethics program into compliance. While we have already coordinated with several Commission officials on this issue, commenting on the Commission's prior drafts of both the supplemental and revocation rulemakings, during our review we were advised that the DAEO had recently been given the responsibility for updating these regulations. As a result, we have detailed below the actions necessary to bring this element of the Commission's ethics program into full compliance.

Revocation of the Commission's Superseded Residual Standards of Conduct

As addressed above in the "AGENCY-SPECIFIC ETHICS RULES" section, part 706 of 45 C.F.R. contains the Commission's old Employee Responsibilities and Conduct regulation, including provisions addressing prior approval of outside employment and standards of conduct, which have been superseded by the Standards, and provisions addressing financial disclosure, which have been superseded by 5 C.F.R. part 2634. Therefore, to bring this part of the program into compliance, we are recommending, for a second time, that the Commission revoke these superseded provisions while retaining and renumbering any surviving provisions and publishing the amended regulation in the Federal Register. This is extremely important because failing to comply may cause employees to rely on out-of-date regulations, placing them in jeopardy of inadvertently violating current regulations.

Supplemental Requirement for Prior Approval of Outside Employment

We initially recommended, in our report of our 1996 review, that the Commission submit to OGE for concurrence, in accordance with 5 C.F.R. § 2635.105, a proposed supplemental regulation requiring prior approval of outside employment if the Commission wished to continue the requirement. As also addressed above in the "AGENCY-SPECIFIC ETHICS RULES" section, we

reiterated this recommendation in the report of our 2000 review and a substantially complete draft regulation was submitted by the Commission to OGE on which we provided detailed comments back to the Commission. However, the comments were not addressed and the Commission has yet to publish a final regulation. Accordingly, we are recommending that the Commission assess the merits of continuing to pursue this requirement. This should be done by determining if Commission employees can be placed in jeopardy of being in actual or potential conflict of interest situations, or otherwise violating ethics laws and regulations, if prior approval is not required. Should the Commission decide to go forward with a prior approval requirement, we are also recommending that the Commission work expeditiously with OGE to finalize this regulation and publish it in the Federal Register.

STATE ADVISORY COMMITTEES

Pursuant to 42 U.S.C. 1975a(d), the Commission charters and maintains advisory committees in each state and in the District of Columbia (DC).⁹ In accordance with the Commission's enabling legislation and the Federal Advisory Committee Act (FACA), state advisory committees are established to advise the Commission on civil rights matters within their respective states and in DC that pertain to discrimination or denials of the equal protection laws based on race, color, religion, sex, age, disability, or national origin, or on the administration of justice, and to aid the Commission in its statutory obligation to serve as a national clearinghouse for civil rights information. Committee membership reflects a diversity of skills and experiences, including, but not limited to, social science research, legal research and analysis, and statistical analysis. State citizens, including educators, lawyers, business and labor leaders, social scientists, researchers, and news gatherers, who demonstrate an interest in civil rights issues are some of the more important professions and activities or avocations that serve on these committees. Members serve for a fixed term set by the Commission upon the appointment of the member with the basic size of each committee consisting of at least 11 members; however, more members can be appointed (up to a total of 19) when warranted. Depending upon resources, each committee is encouraged to meet at least twice a year or more often, when possible, and to conduct a project during the committee's chartering term. In short, these committees along with the regional staff are considered to be the eyes and ears of the Commission.

Designating the Status of Committee Members SGEs vs. Representatives

Much of our delay in issuing this report was centered around our waiting to learn the findings and recommendations of the Commission's Working Group on state advisory committees and a possible determination on committee members' status as representatives or SGEs. The Working Group, established just shortly after our review began, made specific recommendations to the full

⁹ All relevant provisions of the Federal Advisory Committee Act of 1972 (Public Law 92-463, as amended) are applicable to the management, membership, and operations of the Commission's State Advisory committees and subcommittees, when applicable.

Commission for implementing administrative and policy reforms. These reforms included but were not limited to: the re-chartering of these committees; the committee membership selection process; the involvement of Commissioners in the committees' activities; and the cost-effective ways to conduct committee management and operations. While we found this review helpful, it did not provide us with a clear determination regarding members' status.¹⁰ Though the Commission has always considered these members to be representatives, our examination of the committees' enabling law, charter, State Advisory Committee Handbook, as well as the factors discussed in the OGE Informal Advisory Memorandum 82 x 22¹¹ and our recently clarifying DAEOgrams found these members to more appropriately meet the definition of "an officer or employee" instead, which would make them SGEs.

As defined at 18 U.S.C. § 202(a), an SGE is someone who provides a temporary service to the Federal Government with or without compensation for not more than 130 days during any consecutive 365-pay period. The individual can be brought on board through designation, appointment, or retention and can fulfill his or her temporary duties either full-time or intermittently (i.e., the SGE can work every day for 130 days or work one day a week for 52 weeks). Although SGE is a term used for conflict of interest purposes, it is the type of service a person is asked to perform, and the degree of operational control exercised by the Government official to whom the person's services are being rendered, that are determinative of whether the person is an SGE or a representative. Representative members are specifically appointed to a committee to provide the committee with the points of view of nongovernmental entities or of a recognizable group of persons (e.g., an industry sector, labor unions, environmental groups, etc.) that have interests in the subject matter under a committee's charge. Unlike employee members, representative members are not being appointed on committees to exercise their own individual best judgment on behalf of the Government. Instead, they serve as the voice of groups or entities with a financial or other stake in a particular matter before an advisory committee.

Making the proper determination is essential since those who are appointed as SGEs are subject to financial disclosure requirements (5 C.F.R. part 2634), the Standards, and all or some of the provisions of four criminal conflict-of-interest laws (18 U.S.C. §§ 203, 205, 207, and 208), while those appointed as representatives are not. In making these determinations, members should never be designated as representatives to avoid ethics rules.¹² Accordingly, we are recommending that you

¹⁰ On November 4, 2005, the Commission published in the Federal Register a proposed amendment to its regulation at 45 C.F.R. part 703 on its state advisory committee membership criteria to ensure both diversity and nondiscrimination are considered in its committee member appointment process.

¹¹ These factors were recently clarified in OGE DAEOgrams DO-04-022, dated July 19, 2004, and DO-05-012, dated August 18, 2005.

¹² As a general rule, the determination of a member's status should always be made at the time of the individual member's designation, appointment, or retention and it should be made known at the time of the member's selection so that the individual may know his or her obligations under the criminal

take appropriate steps, in collaboration with the Commission's regional offices, to establish practices, procedures, policies, and guidance for advisory committees that reflect their members' status as SGEs. For purposes of administering the ethics program this would mean that you must ensure that:

- Appointment letters or other committee appointment documentation state clearly the member's status as an SGE and inform members of their status and of the application of Government ethics rules to them;
- New entrant confidential financial disclosure reports (OGE Form 450) are collected from SGE advisory committee members, in accordance with 5 C.F.R. § 2634.903(b), and if term appointees, annually thereafter even if they did not participate in a committee meeting during the calendar year;
- A tracking system is developed to ensure that all SGEs timely submit their new entrant reports;
- New policies and procedures are developed that reflect current practices for administering these committees, such as in the written procedures for the confidential financial disclosure system;
- 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); and
- 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.

Reclassification of Committee Members

Prior to the issuance of this report, you met with the OGE Desk Officer and the review team to discuss the determination of committee members' status. You advised us that you had already begun the process of reclassifying all committee members from representatives to SGEs. However, you raised concerns about how this change of designation may impact the ethics program, as the administrative burden associated with administering the financial disclosure requirements for potentially 51 committees with at least 11 committee members serving on each would be tremendous for an agency of the Commission's size.

conflict of interest laws and other ethics rules.

To address these concerns, we are recommending, pursuant to 5 C.F.R. § 2634.905(c), that you work with the OGE Desk Officer to evaluate whether an alternative confidential disclosure system would be more appropriate to help screen SGEs for potential conflicts, in lieu of having members file new entrant OGE Form 450s. Should you decide that an alternative system would be more appropriate to prevent possible conflicts of interest, you must request OGE's permission to do so prior to its implementation.

WRITTEN PROCEDURES FOR ADMINISTERING FINANCIAL DISCLOSURE SYSTEMS

The Ethics Act requires that agencies document the process for collecting, reviewing, certifying, maintaining, and evaluating their public and confidential financial disclosure reports. While we found the Commission to have written procedures in place, we noticed that updates had not been made to them since December 1996. We are pleased to report, however, that prior to the conclusion of our review new procedures were drafted for our examination that complied more fully with the requirement by reflecting current practices for administering both financial disclosure systems. We strongly suggest these procedures remain updated to reflect significant changes as they occur to help ensure compliance with all applicable laws, regulations, and executive orders, as required by the Ethics Act.

FINANCIAL DISCLOSURE

Although we found both the public and confidential financial disclosure systems to generally accord with the Ethics Act and 5 C.F.R. part 2634, we identified several procedural issues with regard to the public system that you must be mindful of during future filing cycles.

Public Financial Disclosure System

As DAEO, you are responsible for identifying covered employees as well as for distributing the reporting forms and reviewing and certifying all public reports. We recognize that since the Commission has no Presidentially-appointed, Senate-confirmed employees your report is the only one forwarded to OGE for review and certification. We examined this report and confirmed that it was filed, reviewed, and forwarded to OGE in a timely manner. To evaluate the effectiveness of the public system for all other filers, we examined a total of 14 of the 16 public reports that were required to be filed in 2005, inclusive of the reports filed by Commissioners. Of the reports we examined, 5 were new entrant, 5 were annual, and 4 were termination reports. The two unexamined reports were annual reports and neither was available during our review, as we were advised that one filer was granted a filing extension and you were awaiting additional information from the other. Although our examination detected no real or apparent conflicts of interest, we observed four technical deficiencies:

First, our review of these reports found technical errors related to incomplete information. The vast majority of reports did not indicate dates of receipt; therefore, we based filing timeliness on the filers' signature dates. Using this method, there were no reports that were filed more than 30

days late with the exception of 3 new entrant reports for which timeliness of filing could not be determined due to the omission of the filers' new entrant appointment dates. Dates of receipt must be entered on the report, in accordance with 5 C.F.R. § 2634.605(a), to help assess compliance with the filing due date and 60-day review requirements. We also found some reports did not include categories of value/amount for the listed asset/income nor the types of income. To eliminate these errors in the future, we suggest that you have filers pay more attention to their reporting errors to ensure that they do not recur from year to year. We also suggest your increased correction of these errors to ensure that the forms are properly completed.

Second, we noticed that two new entrant reports were filed using an old June 1994 version of the form rather than the current March 2000 version. We remind you that it is important that filers use the current public disclosure form to ensure they properly avoid conflicts of interest before the fact. Our current version incorporates higher-category reporting, as required by amendments to the Ethics Act, for any assets, income, liabilities, and transactions over \$1,000,000 in value; reflects a higher reporting threshold for gifts and reimbursements; adds a continuation page for transactions (Schedule B, Part I); and includes a check-off box in the comments section of the front page of the form for indicating any filing extensions and, if so, indicating the number of days granted.

Third, we are aware that the budget appropriation of the Commission provides that the Commissioners can work no more than 75 days and the Chair no more than 125 days per year. As a result, they are considered SGEs. To avoid the administrative burden of managing the dual reporting cycles for SGEs and to eliminate the possibility of an SGE public filer filing both a public and confidential report in a one-year period, commissioners file SF 278s in lieu of filing an OGE Form 450. We remind you that these SF 278s may serve as either a public or confidential report, but should be treated as confidential until a Commissioner exceeds 60 workdays in the calendar year. At that point, the report would be treated as a public report and could be released to the public. Also, since the Commissioners are considered SGEs, they should file annual new entrant reports each year. This is important for technical compliance because a new entrant filer, unlike an annual filer, does not have to report transactions, gifts, or travel expenses.

Finally, during our overall assessment of the public system, we noticed that a former Commissioner did not file his 2004 annual report or a subsequent termination report due in 2005, despite documented attempts informing him to do so. Though we were pleased to see your persistence in trying to obtain this delinquent report, the fact that administrative action for his failure to file was not considered, in accordance with 5 C.F.R. § 2638.203(b)(9)(ii), is troubling and raises concerns that this matter might have gone unaddressed until being raised during the course of this review. We address this issue in more detail in the "ENFORCEMENT" section below.

Confidential Financial Disclosure System

To evaluate the administration of the confidential system, we examined all three of the confidential reports required to be filed in 2004. Of these three reports, one was a new entrant and two were annual reports. We noticed that none of these reports indicated dates of receipt. Therefore,

we based filing timeliness on the filers' signature dates. Using this method, there were no reports that were filed more than 30 days late. Other than this, we detected no technical deficiencies nor any real or apparent conflicts of interest.

ENFORCEMENT

The Commission does not have its own Inspector General nor does it utilize the services of an outside investigative organization to help ensure that certain program elements described at 5 C.F.R. § 2638.203(b)(11) and (12) are carried out. Instead, we were advised that in the event the Commission is required to make a criminal referral to Justice, or to investigate an alleged ethics violation prior to considering appropriate disciplinary or corrective action against an employee, the Staff Director would be the one responsible for doing so. Although OGE regulations do not require agencies that do not have their own Inspector General to utilize the services of another agency's investigative organization, we would strongly encourage the agency leadership to consider doing so. This could be done by means of a memorandum of understanding and we would be happy to work with the Commission in suggesting several investigative organizations that it might consider.

While we were advised that no alleged violations of the criminal conflict of interest laws were referred for prosecution to Justice, as addressed above in the "Public Financial Disclosure System" subsection, we noted during our examination of the public reports filed by Commissioners that there was a former Commissioner who had not filed his annual report due in 2004 or a subsequent termination report due 30 days after he resigned from the Commission in January 2005. After examining other reports filed by this individual, we were also troubled to find instances of late filing during previous annual filing years.¹³ In light of this, we are recommending this matter be referred for civil prosecution to Justice, as provided in 5 C.F.R. § 2634.701(b).

ADVICE AND COUNSELING SERVICES

As DAEO, you are responsible for providing Commission employees with advice and counseling on all ethics-related matters. While you advised us that you render the majority of your advice verbally, some advice is provided in written form. Pursuant to 5 C.F.R. § 2638.203(b)(7) and (8), we were unable to determine whether the advice and counseling services at the Commission are adequate in preventing ethics violations from occurring given our limited sample size and issues we identified. For example, only four written ethics-related determinations were issued during the time-frame associated with our review.¹⁴ During our examination of these determinations we found two

¹³ For example, in November 2002, this filer sent two separate \$200 checks to the Commission for failing to file both his 2000 and 2001 annual public reports on time. The filer signed and filed both years' reports in November 2002. The 2000 report was never reviewed or certified and the 2001 report was reviewed and certified in May 2003.

¹⁴ You advised us that additional pieces of written advice may have also been provided during this time-frame but due to a computer crash many of your files were lost.

dealing with outside activities to have provided the requesting employee with detailed descriptions of potentially applicable restrictions but did not provide a definitive answer to the question of whether the proposed activity was permissible. We also noticed that one other determination, which pertained to gifts from outside sources, clearly misapplied the widely attended gathering exception to the gift prohibitions.

We find these instances troubling, as an agency's counseling program is key toward preventing conflicts of interest and other ethics violations from occurring. To strengthen this program element, we are recommending that you routinely document in writing more of the advice that you render to help protect employees who, in good faith, seek and follow your advice and to ensure that the advice you render accurately and completely applies the provisions of any substantive statute or regulation.

When to Document Ethics Advice

As you may recall, in our recent DAEOgram D0-05-019, dated November 17, 2005, we shared some of the concerns and observations we have about when and how ethics officials should document ethics advice and suggested that this be used as a guide to help implement their agency's advice and counseling services successfully. Though we understand that it is not possible to document all oral advice, ideally ethics officials should maintain written documentation in circumstances where it is most likely questions could arise concerning the conduct at issue. As it pertains to the Commission's ethics program, here are a few reasons why this is important:

- As DAEO, you are most likely asked the same question more than once. Having a record of the response you provide can ultimately save you time and ensure that you provide uniform responses.
- Employees occasionally "shop around" for ethics opinions. Having a record of the advice you provided can prevent misunderstandings.
- Since the ethics program has suffered high turnover in its ethics staff, records of past advice and counseling can be a handy learning tool when training new ethics officials.
- Lastly, when considering topics for annual ethics training, many ethics officials find it useful to look over ethics advice rendered during the year. Often there is a common theme, which may be worth addressing during ethics training.

For these reasons, we are also recommending that a policy be developed, whether formal or informal, on the circumstances that weigh in favor of reducing ethics advice to writing. For example; advice that is provided to the Commissioners and to the Staff Director; advice regarding state advisory committee members; advice on the application of criminal laws to specific facts; and advice on any complicated or sensitive ethics issues. Additionally, as a good management practice, we suggest also that any written documentation of ethics advice that is rendered incorporate the following: (1) an indication of when the advice was given; (2) a summary of the relevant facts as

described by the employee; (3) a citation to the applicable legal authority; (4) an analysis of the application of the law to the facts; and (5) a conclusion. Members of my staff as well as your OGE Desk Officer stand ready to provide assistance to you as needed.

EDUCATION AND TRAINING

In view of the importance of ethics education and training in preventing employees from committing ethics violations, certain aspects of this system must be corrected for this system to comply with the provisions in subpart G of 5 C.F.R. part 2638.

Annual Training Plan

OGE's training regulation has long-required that agency ethics officials develop a written plan at the beginning of each year for accomplishing the agency's annual training program. During our 2000 review, we found the Commission's ethics training plan had been developed three months late. In our current review, you advised us that rather than documenting plans in 2004 and 2005, you and the ADAEO instead informally discussed with the Staff Director how you intended to accomplish training. While we encourage you to continue discussing your training objectives with the Staff Director and other senior officials, informal discussions do not meet the requirements specified in our training regulation, at 5 C.F.R. § 2638.706. Instead this regulation requires you to develop a written training plan. Therefore, we are recommending you document in writing the 2006 ethics training plan and all future plans, including how the Commission will provide verbal training to those who are required to receive it, especially to its most senior employees. We remind you that 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.

In addition, the training regulation provides that a training plan "may contain any other information that that [DAEO] believes will assist [OGE] in reviewing the agency's training program." Many agencies have used this suggestion to their advantage, by adding more information to their training plans since a comprehensive training plan can be integral in focusing on an agency's training needs as far as deciding who to train and how to train them; what to cover and how to deliver the training; and what facilities and resources will be needed to implement the training. As a result, the DAEO may wish to add certain information to the Commission's plan to include:

- Annual training and initial ethics orientation procedures, such as when to schedule annual training, where to schedule it, and when to send notices;

- Suggested time frames for launching the annual training cycle, such as when to schedule training, notify employees of scheduled training, disseminate training materials, have certifications of attendance from employees returned, and send out reminder letters about upcoming training; and
- Ethics training goals for the year, such as sending employees periodic reminders throughout the year.

Initial Ethics Orientation for Regular Employees

For many new employees, the initial ethics orientation that is provided will be their first exposure, and for some their only exposure, to ethics during their career at the Commission. Therefore, it is important to ensure that Commission employees know about conflicts of interest and other ethics violations by providing an informative and thorough orientation whenever new employees enter on duty. Because employees can be disciplined and even referred for criminal prosecution, it is crucial that the DAEO ensure that all new employees are properly trained.

During our review, you advised us that you rely on the assistance of the Human Resources Division to provide new Commission employees with the agency's Employee Handbook (Handbook), to satisfy the initial ethics orientation requirement. Though we found the contents of the Handbook to include ethics-related topics, such as outside employment and gifts, we found the Handbook alone did not satisfy the core requirements of 5 C.F.R. § 2638.703. More specifically, we found the Handbook did not include a summary of the Standards; the 14 Principles of Ethical Conduct at Part I of Executive Order 12674, as modified by Executive Order 12731; or the contact information for yourself and the ADAEO. In addition, we also found the Handbook did not include a citation to the training regulation and its purpose. Therefore, we are recommending the Commission incorporate fully the materials required by § 2638.703 when providing initial ethics orientation to new Commission employees. This could be done either by incorporating the required information into the Handbook or by having the required summaries available along with the Handbook. With regard to the lack of a citation to the training regulation and its purpose, we suggest the DAEO either incorporate this language into the Handbook or provide it separately to help inform employees that the ethics summaries they are reading are being distributed to them to help satisfy their initial ethics orientation requirement. (Our concern is that employees may not always read the materials if they do not understand that the information is being distributed in pertinent part to satisfy a requirement.) We would also suggest that a section be added in the Handbook that discusses the financial disclosure requirements for new entrant employees.

Annual Ethics Training for Regular Employees

For 2005, both covered and non-covered headquarters and eastern regional office employees were shown OGE's Integrity in Public Service: Earning the Public's Trust videotape and were also

provided with OGE's A Brief Wrap on Ethics pamphlet to help satisfy the annual training requirement. As a good record keeping procedure, we were pleased to see that the completion of annual ethics training is tracked using a sign-in sheet to certify training attendance. At the time of our fieldwork we found the majority of covered employees to have completed their annual training during a training session held in July 2005. We were advised that training for all remaining employees, both covered and non-covered, would be provided prior to the end of 2005. We applaud you for exceeding the minimum regulatory requirements by providing training to non-covered employees and encourage you to continue these efforts.

We note that annual training was not provided to covered employees in 2004. After discussing the circumstances surrounding why this was not accomplished, we reiterate the importance that the ethics program receive a high level of support and attention from top-level officials.

Ethics Training for Commissioners

Commissioners are provided with annual written ethics training in lieu of in-person, verbal training, in accordance with 5 C.F.R. § 2638.705 (d)(2). In an effort to meet the training requirement in 2005, a copy of the Standards and a summary of the ethics rules for SGEs were provided to each commissioner for their review. As noted above, as a good record keeping procedure, we are pleased to see that completion of training is tracked by having each Commissioner submit to you an e-mail acknowledging that they read and understood the material provided.

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

Though the Commission allows its employees to accept payments, on behalf of the agency, from non-Federal sources for travel, subsistence, and related expenses incurred on official travel under 31 U.S.C. § 1353, gifts of travel to Commission employees are rarely offered. However, we were advised of one travel payment greater than \$250 that was accepted by the Staff Director who was on official travel during the reporting period of April 1, 2005 to September 30, 2005. We confirmed that this payment was forwarded to OGE timely using the General Services Administration Standard Form 326 (SF 326) and appeared to be properly accepted.

We note that even though the Commission has had a limited history of accepting § 1353 travel payments, as there were no other travel payments accepted during other periods covered by the time-frames of our review, we did evaluate other areas to help us assess the agency's system of accepting § 1353 travel payments and reporting them to OGE. Though we identified two procedural issues during our evaluation that needed improvement, we are pleased to report that once they were brought to your attention swift action was taken to address our concerns:

- **Written procedures implementing 41 C.F.R. part 304-1-** While we found written procedures in place to accept travel payments from non-Federal sources, we noticed that updates had not been made to them since December 1991. As we discussed during our review, despite the infrequency of Commission employees accepting travel payment from non-Federal sources, the agency's written procedures should reflect the most up-to-date GSA changes made to 41 C.F.R. part 304-1. We note that as with the written procedures for financial disclosure, you swiftly drafted new procedures, which now reflect the most recent changes to the prescribed requirement. We remind you to keep these procedures updated to reflect significant changes as they occur.
- **Forwarding timely semiannual travel reports to OGE-** During our review of the semiannual reports the Commission has submitted to OGE in past, we noticed that with the exception of the negative report submitted to us covering the reporting period of October 1, 2004 through March 31, 2005, all other negative reports that were submitted since May 2001 have been submitted to OGE late, with the longest being submitted eight months late. Though we recognize there is no penalty for late or incomplete reports, this is yet another example of how the Commission's oversight of ethics-related matters must be strengthened. The Commission must make every effort to submit in a timely and complete fashion the semiannual reports, including negative reports, as OGE has been given the authority to retain these reports for public inspection.

RECOMMENDATIONS

The following recommendations are considered necessary to bring the Commission's ethics program into minimum compliance with current OGE regulations. The Commission should:

- 1) Ensure that specific ethics leadership strategies are developed and incorporated into the day-to-day management of the Commission's ethics program.
- 2) Take steps to increase oversight of the ethics program by regularly monitoring all program elements and responding to issues and problems in a timely manner, as required by subpart B of 5 C.F.R. part 2638. This can be done using combinations of the following: 1) periodically assess (or review) the state of the ethics program during periods when the ethics program is not subject to an OGE ethics program review; 2) regularly update ethics policies and procedures, including written procedures required for various program elements; 3) regularly disseminate OGE and other pertinent ethics-related guidance, with advice on how the guidance applies to the Commission's ethics program; 4) keep, when appropriate, records of advice that is rendered on ethics and standards of conduct matters, including post-employment and conflict of interest matters; 5) having filers and reviewers pay more attention to the errors associated with incomplete information on financial disclosure reports; 6) timely submit to OGE semiannual reports of certain travel payments accepted, including negative reports; and 7) annually assess agency training needs, reflecting

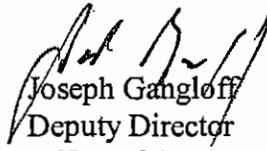
the results in the ethics training plan and training materials, and monitor attendance at ethics training sessions.

- 3) Revoke the superseded provisions at 45 C.F.R. part 706 while retaining and renumbering as appropriate any surviving provisions and publish the amended regulation in the Federal Register.
- 4) Assess the merits of continuing to pursue the prior approval of outside employment requirement. Should the Commission decide to go forward with a prior approval requirement, the Commission must work expeditiously with OGE to finalize this regulation and publish it in the Federal Register.
- 5) In collaboration with the Commission's regional offices, establish practices, procedures, policy, and guidance for advisory committees that reflect their members' status as SGEs. In doing so, we are recommending, pursuant to 5 C.F.R. § 2634.905(c), that you work with the OGE Desk Officer to evaluate whether an alternative confidential disclosure system would be more appropriate to help screen SGEs for potential conflicts, in lieu of having members file new entrant OGE Form 450s.
- 6) Refer for civil prosecution to Justice, as provided in 5 C.F.R. § 2634.701(b), the former Commissioner for failing to file his last annual and termination public reports.
- 7) Routinely document in writing more of the advice and counseling that is rendered to help protect employees who, in good faith, seek and follow your advice and ensure that the advice rendered accurately and completely applies the provisions of any substantive statute or regulation.
- 8) Develop a policy, whether formal or informal, on the circumstances that weigh in favor of reducing ethics advice to writing.
- 9) Document in writing the 2006 ethics training plan and all future plans, including how the Commission will provide verbal training to those who are required to receive it, especially to its most senior employees.
- 10) Incorporate fully the materials required by 5 C.F.R. § 2638.703 when providing initial ethics orientation to new Commission employees.

Ms. Emma Monroig
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In closing, I encourage the Commission to take advantage of any assistance that OGE can provide to improve the ethics program and to bring the program into compliance. OGE is ready to provide expertise and advice. Please advise me within 60 days of the actions you have taken or plan to take on each of the recommendations of our report. A brief follow-up review will be scheduled six-months from the date of this report. A copy of the report is being sent by transmittal letter to the Commission Chairman. 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 06-015⁰⁹

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

Cheryl Kane-Piasecki
Senior Desk Officer