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July 6, 2004

Javier E Marques  
Designated Agency Ethics Official  
Advisory Council on Historic Preservation  
Suite 809  
1100 Pennsylvania Avenue, NW  
Washington, DC 20004

Dear Mr Marques

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the Advisory Council on Historic Preservation (ACHP). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the ethics program's compliance with applicable statutes and regulations. We also evaluated ACHP's systems and procedures for ensuring that ethics violations do not occur. This review was conducted in March and April 2004.

#### HIGHLIGHTS

ACHP's ethics program has improved since OGE's last review of the program in 1997, but some areas are once again deficient. Our 1997 review found that ACHP's ethics program had not been routinely administered for years, including the failure to collect annual confidential financial disclosure reports and conduct annual ethics training. Although the failures are not as widespread this time, you continue to have problems in these two areas. We are particularly disappointed to see that virtually no annual ethics training has taken place since that recommendation in the previous report was closed in 1998. A lack of commitment to the ethics program is also apparent in your failure for many years to resolve the contention of one member of ACHP's governing body (the Council) that he is not a special Government employee (SGE) and not subject to financial disclosure requirements. In addition, you have been routinely late in notifying SGE Council members of the requirement to file and you currently have no way of determining if the designees of certain Council members have conflicts of interest. Furthermore, ACHP has no Alternate Designated Agency Ethics Official (Alternate DAEO) who can serve as your back-up. Nevertheless, we were encouraged by your efforts to address these deficiencies.

In order to strengthen your program, we recommend that you (1) ensure that an Alternate DAEO is appointed in accordance with 5 C F R § 2638.202(b), (2) in a timely manner, notify confidential filers, including Council members, of their requirement to file financial disclosure reports and collect these reports, (3) cease requiring financial disclosure reports from the two non-

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Federal ex officio members of the Council, and (4) collect and review financial disclosure reports from Federal agency head designees serving on the Council

## PROGRAM STRUCTURE

ACHP is headed by 20 statutorily designated members, who meet four times a year to address policy issues, direct program initiatives, and make recommendations to Government officials regarding historic preservation. Supporting this Council are approximately 35 full-time employees, most of whom are located at headquarters in Washington, DC. A few employees are also located at an ACHP office near Denver, Colorado and at the Aberdeen Proving Ground in Maryland.

As ACHP's Associate General Counsel, you serve as the DAEO, devoting about 15 percent of your time to administering the ethics program. Although at one time ACHP had one part-time and two full-time attorneys, you are now the sole legal counsel at ACHP.<sup>1</sup> While legal resources have declined, the workload of the agency has increased due to new initiatives, consequently, you are unable to devote sufficient time to the ethics program. You hope that this problem will be mitigated by the increased duties of a Writer-Editor/Web Manager at ACHP who serves as your Deputy Ethics Official. Now that she has attended some OGE training courses on financial disclosure you plan to turn over to her the administrative aspects of ACHP's financial disclosure program. She may also assist you with training.

You have not had an Alternate DAEO since you became the DAEO, but you intend to have your Deputy Ethics Official designated as such once she has received more training. We recommend that you do this with all possible haste, since each agency is required by 5 C.F.R. § 2638.202(b) to appoint an Alternate DAEO, who is responsible for running the ethics program in the event of the DAEO's absence.

## SPECIAL GOVERNMENT EMPLOYEES

You considered Council members, aside from the seven who are the heads of Federal agencies, as ACHP's only SGEs.<sup>2</sup> Three of the Federal agency heads and two non-Federal Council members are ex officio members specified in ACHP's statute, while the rest are appointed by the President. Each Federal agency head, as well as the two non-Federal ex officio members, may designate another officer of the department, agency, or organization to serve on the Council in his or her stead.

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<sup>1</sup> Due to budgetary constraints, ACHP has no General Counsel.

<sup>2</sup> These seven "heads of Federal agencies" currently consist of the Secretaries of Interior, Agriculture, Defense, and Transportation, the Administrators of the Environmental Protection Agency and General Services Administration, and the Architect of the Capitol. Hereafter, for ease of reference, they will be referred to as Federal agency heads.

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Financial Disclosure System for  
Council Members Needs Improvement

ACHP's ethics program is not meeting OGE requirements with regard to the collection of financial disclosure reports from Council members. ACHP's financial disclosure procedures, which you just updated and expanded, require you to annually notify SGEs by September 15 of their requirement to file an OGE Form 450. In addition, as we recommended during the last review, you obtain copies from OGE of the reports of Council members who are Federal agency heads (or from Congress in the case of the Architect of the Capitol) and review them for potential conflicts. Based on an agreement with OGE during follow-up to that review, you are not obtaining reports from designees.

For 2003, you did not notify SGEs of the need to file until February 11, 2004. Consequently, all reports were submitted late (except the Chairman's report, which he submitted without reminder), and a couple of reports had still not been received by June. We examined the most recent report on file for each Council member and found that reports were generally reviewed within a few days of receipt. A thorough review was indicated by your notes regarding entries of interest, especially on the reports filed by Federal agency heads and obtained from OGE. You certified other Council members' reports in a timely manner. Two reports had been returned to filers because they were incomplete. We identified few technical and no substantive deficiencies. Furthermore, we were pleased to see that you are reviewing Council agendas for legal and ethical issues prior to each meeting.

However, we believe that you have incorrectly been treating the two non-Federal ex officio Council members as SGEs. Although one has been filing consistently, the ex officio member from the National Trust for Historic Preservation (Trust) has never filed since joining the Council in 1999. The Trust's attorney originally cited privacy concerns, but then claimed that the Council member is not an SGE. Due to the unique status of these two non-Federal ex officio members, OGE consulted with the Department of Justice's (DOJ) Office of Legal Counsel on these members' status. It was concluded that, since neither of these two members are appointed in the civil service by an executive branch official, they are not executive branch employees (much less SGEs) for purposes of the application of executive branch ethics rules. Consequently, these members are neither subject to the financial disclosure obligation, nor any of OGE's ethics rules and regulations. We suggest that you make written determinations on the status of all other non-Federal Council members in order to avoid such confusion in the future.

Finally, we now believe that any Federal agency head designees who serve on the Council should file financial disclosure reports. During the follow-up to our last review, we agreed that designees could instead be provided with a memorandum advising them of the criminal conflict of interest laws and their responsibility to disclose any potential conflicts. However, you are no longer providing designees with such a memorandum, leaving them open to inadvertently violating 18 U.S.C. § 208. Since these designees often appear to participate personally and substantially in Council matters, their interests must be disclosed in order to ensure the integrity of the Council's

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actions Although we recognize that their occasional attendance makes collection of reports somewhat difficult, most designees are public filers at other Federal agencies, so you need only extend to them your current practice of obtaining and reviewing copies of the reports of Federal agency heads on the Council

#### SGEs Must Receive Annual Ethics Training

You have not been routinely providing annual ethics training to SGEs, though you did satisfy their initial ethics orientation requirement by providing them, upon appointment, with OGE's "Do It Right" booklet annotated to explain any differences due to their SGE status. Additionally, we were pleased to learn that the Chair and Vice Chair were verbally briefed soon after they were appointed to the Council in 2001.<sup>3</sup> In March of 2001, you sent all SGEs a memorandum on conflicts of interest along with OGE's pamphlet on that topic. Furthermore, a Web site for Council members contains a link to the OGE publication "Conflict of Interest and the Special Government Employee: A Summary of Ethical Requirements Applicable to SGEs." No training appears to have taken place in 2002 or 2003. However, at the time of our review, you had drafted a memorandum to SGEs that explained the Hatch Act rules. In order to satisfy the annual ethics training requirements for 2004, you subsequently attached the 14 Principles of Ethical Conduct to the memorandum and sent it to all SGEs.

#### EDUCATION AND TRAINING

We found that your initial ethics orientation program is adequate, but that you have not been providing annual ethics training to confidential filers as required. Although we recognize that you have taken steps to address this issue, we are concerned because of ACHP's history of only providing such training in response to OGE reviews and then once again failing to fulfill the training requirement.

#### Initial Ethics Orientation Is Adequate

As required by 5 C.F.R. § 2638.703, all new ACHP employees receive initial ethics orientation. You have personally been giving all new employees the "Do It Right" booklet. Although you do not require employees to certify that they have received or read the booklet, you assured us that all seven new employees in 2003 received their orientation materials.

#### Annual Ethics Training For Confidential Filers Needs Improvement

Until you took action in response to our review, the annual ethics training program did not meet OGE's requirements, especially with regard to training ACHP's confidential filers. The only

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<sup>3</sup> These members have the greatest need of ethics training due to their role on the Council and their outside positions involving state historic preservation.

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public filer you must train is ACHP's Executive Director. Due to his position and the fact that he served as the previous DAEO, you frequently discuss ethics matters with him, these discussions satisfy the requirement to provide verbal ethics training annually.

However, you have failed for many years to provide training annually to ACHP's confidential filers, both SGEs as detailed above and ACHP's two staff confidential filers. We note that prior to the review you were developing a PowerPoint presentation for use in providing verbal training to all ACHP staff, including employees at the Denver office via videoconferencing<sup>4</sup>. On May 19 and 20, 2004 you conducted this training, which both staff confidential filers attended<sup>5</sup>. Both this training and your plan to conduct such staff-wide training every third year hereafter exceed OGE requirements by providing training to non-covered employees. Furthermore, you have revised your training plan to note that staff confidential filers will receive written training materials in the other years.

#### FINANCIAL DISCLOSURE SYSTEMS

Financial disclosure reports from ACHP staff, although not filed timely, were timely reviewed and certified, and contained no technical or substantive deficiencies. ACHP's staff has only two public filers (including yourself) and two confidential filers, one of whom you identified as a filer (due to some new duties which involve contracts) only after the conclusion of our fieldwork. Despite the small number of filers, our examination of the three annual reports from staff indicated room for improvement in filing timeliness. The one confidential filer did not submit his report until February, when you notified him of the necessity of doing so. Additionally, the Executive Director's public report was submitted late (by fewer than 30 days) and you gave yourself an informal filing extension<sup>6</sup>. You anticipate that such problems will be alleviated by the Deputy Ethics Official's assumption of the duties of notifying filers to file their reports and tracking submission. In order to aid her in these new duties, you recently updated and expanded your financial disclosure procedures.

#### ETHICS AGREEMENTS

ACHP employees do not have many ethics agreements, but recusals appear to be used when necessary. Due to their involvement with state historic preservation offices, both the Chair and the Vice Chair of the Council entered into verbal recusals upon entering their positions. The Chair also has a written recusal on file for a specific matter in which he had an interest due to another outside activity. Your review of meeting agendas appears to effectively screen for potential conflicts, as

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<sup>4</sup> Non-ACHP ethics officials at the Aberdeen Proving Ground provide annual ethics training to ACHP's three employees there.

<sup>5</sup> Soon you intend to hold a make-up session for 11 employees who could not attend these sessions.

<sup>6</sup> You have agreed to seek an extension from the Alternate DAEO or Executive Director in the future.

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evidenced by your occasional recommendations that Council members recuse themselves from specific matters. No 18 U S C § 208(b)(1) or (3) waivers have been issued to ACHP employees during your time as DAEO.

#### TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

During the period October 1, 2002 through September 30, 2003 ACHP accepted one payment for travel-related expenses from a non-Federal source under 31 U S C § 1353. Although the acceptance appears to be appropriate, you cannot recall conducting a conflict of interest analysis in accordance with 41 C F R § 304-5.3 of the implementing regulation. In fact, you do not think anyone performed a conflicts analysis. Furthermore, due to staff changes the two semiannual reports for this one-year period were not submitted until you began preparing for this review.

Even before we began our review, you met with the Director of the Office of Administration and the Budget Analyst to develop procedures for accepting payments under 31 U.S.C. § 1353. These procedures call for the Budget Analyst to forward any such requests to you for an ethics review and require you to sign off on the travel authorization before it is forwarded to the Executive Director for final approval. The Budget Analyst is also responsible for submitting semiannual reports to OGE. Due to your new procedures, we are not making a recommendation on this issue.

#### ADVICE AND COUNSELING

Ethics counseling and advice services meet the requirements of 5 C F R § 2638.203(b)(7) and (8). You provide most of your advice verbally, but do dispense some advice in writing. We examined all written advice for the past few years and determined it was accurate, consistent with applicable statutes and regulations, and appeared to meet employees' needs. Since there is little turnover at ACHP, you have no organized post-employment counseling program. However, you have agreed to work with ACHP's Office of Administration to require departing employees to meet with the DAEO.

#### ENFORCEMENT

We were unable to assess this area, since to your knowledge ACHP has never had any allegations of ethics violations, and consequently never referred an alleged conflict of interest violation to DOJ. In the absence of an inspector general, you would probably handle any allegations that would arise, you stated that you would contact your OGE Desk Officer and then refer the matter to DOJ, if appropriate.

#### RECOMMENDATIONS

We recommend that you

1. Ensure that an Alternate Designated Agency Ethics Official (DAEO) is appointed in accordance with 5 C F R § 2638.202(b).

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- 2 In a timely manner, notify confidential filers, including Council members, of their requirement to file financial disclosure reports and collect these reports
- 3 Cease requiring financial disclosure reports from the two non-Federal ex officio members of the Council
- 4 Collect and review financial disclosure reports from Federal agency head designees serving on the Council

In closing, I wish to thank you for all of your efforts on behalf on the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled approximately 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 you take actions to correct these deficiencies in a timely manner. Please contact Christelle Klovers at 202-482-9255, if we may be of further assistance.

Sincerely,



Jack Covaleski  
Deputy Director  
Office of Agency Programs

Report Number 04- 014