



December 8, 2003

Anne K. Quinlan
Acting Designated Agency
Ethics Official
Surface Transportation Board
1925 K Street, NW.
Washington, DC 20423-0001

Dear Ms. Quinlan:

The Office of Government Ethics (OGE) recently completed a review of the Surface Transportation Board's (STB) 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 program's compliance with applicable laws and regulations as well as to evaluate its effectiveness in terms of the systems and procedures STB has established, beyond the minimal requirements, to ensure that ethics violations do not occur. The review was conducted in August and September 2003. The following is a summary of our findings and recommendations.

HIGHLIGHTS

STB has an essentially well-managed ethics program that generally complies with applicable ethics laws and regulations. STB's public and confidential financial disclosure systems appear effective in preventing potential conflicts of interest. The development of written procedures for administering these systems will bring them into full compliance. The ethics training program also appears well managed. However, new employees were not being provided all of the required initial ethics orientation materials. You have since remedied this shortcoming. Moreover, while our examination of the written ethics-related opinions rendered by the previous Designated Agency Ethics Official (DAEO) appeared lacking in a discussion of all the relevant regulatory requirements, the one piece of written advice prepared by you was complete, accurate, and in compliance with the regulations. In addition, we believe an understanding of your enforcement role and responsibility now exists to ensure that prompt and effective action would be ordered to remedy any ethics-related violations and that follow-up would be conducted to ensure that actions ordered are taken. Finally, STB has procedures in place to approve the acceptance of travel payments and related expenses from non-Federal sources under 31 U.S.C. § 1353. The timely forwarding of semiannual reports of these payments to OGE will bring STB into full compliance with the law.

PROGRAM STRUCTURE

STB's previous DAEO resigned from this position on June 19, 2003. You, as the Alternate DAEO, have been acting as DAEO until a full-time DAEO is selected by the Board members.¹ You are assisted in carrying out your ethics duties by STB's human resources office (HR), particularly in the areas of financial disclosure and ethics training.

SUPPLEMENTAL REGULATION

The Interstate Commerce Commission (ICC), which was the predecessor of STB, issued a supplemental standards of conduct regulation at 5 C.F.R. part 5001. During our last review in 1999, the previous DAEO stated that an attorney at STB was in the process of drafting a new regulation which would repeal the old ICC one and replace it with an STB regulation. Among other things, this was deemed necessary because STB has a much narrower scope of responsibility than did ICC. Therefore, the restrictions on having certain financial interests contained in the ICC regulation are far more restrictive than necessary in light of STB's more narrow mandate. During our current review, you reiterated that a new STB regulation was being drafted but had not been completed. As stated during our previous review, we remind you that the new STB supplemental standards of conduct regulation will require OGE concurrence and approval before being issued.

FINANCIAL DISCLOSURE SYSTEMS

STB's public and confidential financial disclosure systems appear effective in preventing potential conflicts of interest and generally accord with statutory and regulatory requirements. We especially commend the close cooperation between you and HR which allows for the timely identification of new entrant and termination filers, as well as the generation of complete and accurate master lists of annual filers. Although at the time of our review STB had no written procedures on how to collect, review, evaluate, and where appropriate, make publicly available, financial disclosure reports as required by section 402(d)(1) of the Ethics Act, you are working to correct this deficiency.

Public System

To evaluate the public system, we examined all of the reports required to be filed in 2002 by Presidentially-appointed, Senate-confirmed (PAS) employees. These reports were filed, reviewed, and certified timely, though there were some delays in forwarding reports to OGE. You explained that you had been waiting to certify all reports before forwarding them. However, you are now aware OGE would prefer to receive reports as soon as you certify them.

¹The three-member Board currently consists of one commissioner and thus a selection will not be made until at least one more commissioner is appointed.

We also examined all but one of the eight non-PAS reports filed in 2003.² All seven of the reports were filed, reviewed, and certified timely and contained few technical and no substantive deficiencies.

Confidential System

To evaluate the confidential system, we examined all 30 of the reports required to be filed from 2002 to the present, including 3 new entrant reports. All reports were filed, reviewed, and certified timely. Furthermore, we noted only one technical deficiency and no substantive issues.

Review Of Financial Disclosure Reports Vis-a-vis STB's Supplemental Regulation

The ICC supplemental standards of conduct regulation, applicable to current STB employees, prohibits employees, including commissioners, from being employed by or holding any other official relationship with any for-hire transportation company and from owning securities of or being in any manner pecuniarily interested in any such company. The regulation describes for-hire transportation companies as (1) any company that owns or controls and has more than 2 percent of its assets directly invested in or derives more than 2 percent of its income directly from a for-hire transportation company or (2) any company, mutual fund, or other enterprise which has an interest of more than 10 percent of its assets directly invested in or derives more than 10 percent of its income directly from for-hire transportation companies.

You explained that the only potentially prohibited interests for current STB employees are railroad companies, one pipeline company, and a few other companies and mutual funds. To ensure that filers' potentially prohibited reported interests in companies and mutual funds do not exceed the income or investment thresholds contained in ICC's supplemental standards of conduct regulation, you research the value and nature of the companies' and funds' income and investments using one of the on-line financial services Web sites. You stated that conflict of interest determinations should become more straightforward since the new STB supplemental regulation is not expected to define the prohibited interests using the percentage of investment and income thresholds currently contained in the ICC regulation.

ETHICS TRAINING

STB has a generally effective ethics training program. Procedures are in place to ensure that covered employees receive timely and beneficial annual ethics briefings. Ensuring that new employees have access to all required orientation materials will bring the training program into full compliance with regulatory requirements.

²You had not yet completed your review of the one report we did not examine.

Initial Ethics Orientation

To meet the initial ethics orientation requirement, HR provides written materials to all new employees. These materials consist of the OGE pamphlet entitled A Brief Wrap on Ethics, a copy of the ICC supplemental standards of conduct regulation, and contact information for STB ethics officials.³

We informed you that, in accordance with 5 C.F.R. § 2638.703, if employees are only provided a summary of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), the complete text of the Standards must be readily available in employees' immediate office area. We suggested providing new employees the address of the OGE Web page where the entire text of the Standards is maintained. You agreed to this suggestion.

Upon receiving the orientation materials, new employees must immediately certify with HR that they have received them. HR forwards you a copy of this certification form, which you use to determine whether the employee is required to file a financial disclosure report. Within 60 days new employees must return a second form to you certifying that they have read and understood the orientation materials. We commend you for implementing a certification process which enables you to timely identify new entrant financial disclosure filers and helps to ensure that employees have received and read the orientation materials.

Annual Ethics Briefings

To meet the annual ethics training requirement for covered employees you hold one or two live annual ethics briefings per year which both public and confidential filers attend, including PAS employees (who may also request a personal briefing). You use a sign-in sheet to track the completion of this requirement. Employees who miss the live briefing are given an ethics video and written materials to review and you stand by to answer any questions.

In 2002 training consisted of a general overview of the ethics rules and lasted one hour. You assured us that all covered STB employees received annual ethics training in 2002.

ADVICE AND COUNSELING

The written ethics-related opinions rendered by the previous DAEO appeared lacking in a discussion of all the relevant regulatory requirements. However, the one piece of written advice prepared by you was complete, accurate, and in compliance with the regulations.

³In addition to being provided the written materials, all PAS employees receive a personal briefing from you.

To evaluate the counseling provided, we examined the written counseling files dating from 2001 to the present. The files consisted of 14 opinions from 2001, none from 2002, and 4 from 2003. Most of the advice was rendered by the former DAEO.

The advice rendered by the former DAEO pertained mostly to the acceptance of travel and free attendance from non-Federal sources at speaking engagements of the Vice Chairman, the majority of which took place away from the Vice Chairman's duty location. In approving these acceptances, the former DAEO cited 31 U.S.C. § 1353 as the acceptance authority in three instances; at the other engagements, free attendance was approved using the widely attended gatherings exception to the gift acceptance prohibitions at 5 C.F.R. § 2635.204(g). In approving the acceptance of payments using the 31 U.S.C. § 1353 authority, the former DAEO advised that regardless of whether the source was considered prohibited under part 2635, it could nonetheless reimburse STB for expenses incurred, or provide for lodging and travel in-kind. However, there was no indication that he undertook a conflict-of-interest analysis regarding the source as required by 41 C.F.R. § 304-1.5 (the provision in the implementing regulation in effect when the advice was rendered).⁴ While we cannot definitively determine that such analyses were not performed, a discussion of them was not included in the written advice we examined. Although not specifically required by the statute or regulation, we suggest, as a good management practice, any such analysis be reduced to writing and related to the employee requesting the approval. Moreover, in the case of a prohibited source, such an analysis might have resulted in ethics officials disapproving an acceptance of payment(s).

The one piece of written advice rendered by you regarding a luncheon invitation was complete and appeared to be in compliance with the regulations.

ENFORCEMENT

As you have only recently assumed the role of acting DAEO, you were unsure of exactly what your enforcement-related duties were and which duties were the responsibility of the Department of Transportation's Office of Inspector General (DOT OIG).⁵ Therefore we met with you and officials from DOT OIG to discuss this division of responsibility. Based on our discussion, we believe an understanding of your respective roles now exists to ensure that prompt and effective action would be ordered to remedy any ethics-related violations and that follow-up would be conducted to ensure that actions ordered are taken in accordance with 5 C.F.R. § 2638.203(b)(9).

According to you and DOT OIG officials, in the past two years no alleged violations of the criminal conflict-of-interest laws by an STB employee have occurred. Additionally, no action has been recently taken against an STB employee for an ethics-related regulatory violation. If an alleged

⁴Chapter 304 of title 41, which upon becoming effective on June 16, 2003 (68 Fed. Reg. 12602 (March 17, 2003)) replaced 41 C.F.R. part 304-1, has an identical provision at § 304-5.3.

⁵The DOT OIG conducts various inspector general-related functions for STB, as STB does not have its own inspector general.

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criminal violation were to be referred to the Department of Justice or a United States Attorney for prosecution, DOT OIG would be responsible for making both the referral and the appropriate concurrent notification to OGE. DOT OIG would also be responsible for investigating alleged violations, whether or not they merit criminal prosecution. After completing an investigation, or following a declination to prosecute, DOT OIG would follow-up with the appropriate administration and/or management officials to see what administrative action, if any, has been taken against the employee(s).

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

STB has procedures in place to approve the acceptance of travel payments and related expenses from non-Federal sources under 31 U.S.C. § 1353 and the implementing regulation at Chapter 304 of title 41. You stated that such payment offers are extended almost exclusively to commissioners and that they and their assistants are fully aware of the approval procedures.

We examined STB's five acceptances of travel-related payments greater than \$250 from non-Federal sources between April 1, 2002 and March 31, 2003. All appeared to be approved and accepted in compliance with the law, regulation, and STB procedures. We recognize that the previously mentioned written determinations regarding travel payments, which lacked a discussion of the required conflict-of-interest analysis, were issued by the former DAEO. However, we remind you of the requirement to conduct this analysis and suggest that it be memorialized in writing.

All payments were reported to OGE using the SF 326. However, one of the semiannual reports was submitted a month and a half late. We recommend that in accordance with 41 C.F.R. § 304-6.5, all semiannual reports to OGE are forwarded in a timely manner.

RECOMMENDATIONS

To further enhance STB's ethics program and bring it into full regulatory and statutory compliance, we recommend you:

1. Establish written procedures on how to collect, review, evaluate, and where appropriate, make publicly available, financial disclosure reports, in accordance with section 402(d)(1) of the Ethics Act.
2. Ensure that all semiannual reports to OGE are forwarded in a timely manner, in accordance with 41 C.F.R. § 304-6.5.

In closing, I would like to thank you for your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions your agency has taken or plans to take on our recommendations. A brief follow-up review will be scheduled within six months from the date of

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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 timely actions to implement our recommendations. Please contact Dale Christopher at 202-482-9224 if we may be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Jack Covaleski". The signature is written in black ink and is positioned above the printed name.

Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 03- 025