

United States Office of Government Ethics

Program Review Division

Ethics Program Review

United States Trade and Development Agency

Results in Brief

The United States Office of Government Ethics (OGE) conducted a review of the United States Trade and Development Agency's (USTDA) ethics program in June 2012. The results of the review indicated that USTDA's ethics program generally appeared to be effectively administered and in compliance with applicable laws, regulations, and policies with some exceptions noted in the area of financial disclosure. Ethics officials promptly took action on program improvements identified during OGE's review in the areas of financial disclosure, ethics advice and counsel, and 1353 travel acceptance reports.

Highlights

- The General Counsel, one of the three senior positions at USTDA, also serves as the agency's Designated Agency Ethics Official (DAEO) which affords the ethics program significant accessibility to agency leadership.
- Employees filed public financial disclosure reports on time in 92% of cases.
- Ethics officials reviewed and certified public and confidential financial disclosure reports by the required deadline 92% of the time.
- Covered employees completed annual training in a timely manner 98% of the time.

Concerns

- Ethics officials had not destroyed, as required, public and confidential financial disclosures after the 6-year retention period.
- Uncorrected technical errors on financial disclosures could compromise ethics officials' conflict of interest analyses.
- Confidential financial disclosures were not annotated with a date of receipt.
- Reports of payments received from non-Federal sources for 2011 were not submitted to OGE by the required deadlines.

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Objectives, Scope, and Methodology

OGE provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance. The purpose of a review is to identify and report on the strengths and weaknesses of an ethics program by evaluating (1) agency compliance with ethics requirements as set forth in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures for administering the program. OGE has the authority to evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act and 5 CFR part 2638.

To assess USTDA's ethics program, OGE examined a variety of documents provided by ethics officials; other documents that USTDA submitted to OGE, including the 2011 Agency Ethics Program Questionnaire; and the advice and counseling rendered to USTDA employees. OGE conducted a review of USTDA's public and confidential financial disclosure reports and met with the Acting DAEO, Alternate DAEO (ADAEO), and Deputy Ethics Official (DEO) to obtain additional information about the strengths and weaknesses of USTDA's ethics program, seek clarification on issues that arose through the documentation analysis, and verify data collected.

Program Administration

USTDA is an independent foreign assistance agency whose mission is to help companies create U.S. jobs through the export of U.S. goods and services for priority development projects in emerging economies. USTDA has 45 full-time Government employees and one special Government employee (SGE).

The ethics program at USTDA is organizationally located within the Office of the General Counsel (OGC). The General Counsel serves as the DAEO, with two Assistant General Counsels serving as ADAEO and DEO respectively. Daily operations of the ethics program are managed primarily by the DEO. All USTDA ethics officials perform ethics as a collateral duty.

Senior management at USTDA consists of the agency's Director, Deputy Director, and General Counsel. As General Counsel, the DAEO is present during senior management functions and can provide the ethics program with a significant voice in ethics matters affecting the agency. At the time of the review, the General Counsel position was vacant and filled by the Deputy General Counsel in an acting capacity.

Financial Disclosure

Title I of the Ethics in Government Act requires that agencies ensure confidence in the integrity of the Federal Government by demonstrating that officials are able to carry out their duties without compromising the public trust. High-level Federal officials demonstrate that they are able to carry out their duties without compromising the public trust by disclosing publicly their personal financial interests (OGE Form 278). Title I also authorizes OGE to establish a

confidential financial disclosure system for less senior Executive branch personnel in certain designated positions to facilitate internal agency conflict of interest review (OGE Form 450).

Financial disclosure serves to prevent conflicts of interest and to identify potential conflicts by providing for a systematic review of the financial interests of both current and prospective officers and employees. The financial disclosure reports also assist agencies in administering their ethics programs in providing counseling to employees. *See* 5 CFR § 2634.104(b).

Nearly all of USTDA's 45 employees file public or confidential financial disclosure reports. OGE reviewers analyzed all public financial disclosures submitted during 2011 and all confidential disclosures submitted in 2012¹. USTDA employees filed public financial disclosures on or before the statutory filing deadline 92 percent of time. Confidential financial disclosure filers met the filing deadline on 75 percent of the 2012 reports, with the remaining 25 percent exceeding the deadline by an average of only 11 days.

Timely review and certification of financial disclosures by ethics officials is vital to identifying and preventing conflicts of interest. USTDA ethics officials reviewed and certified financial disclosures by the statutory deadline in 92 percent of all cases. Ethics officials indicated that they do not have a master list of companies that may pose potential conflicts of interest or a list of prohibited sources. Instead, they rely on their knowledge of companies conducting business with the agency to identify potential links between an outside company and an employee's financial interests. OGE is concerned that the wide range of companies interacting with USTDA may complicate ethics officials' conflict of interest analysis if based on ethics officials' knowledge alone. To that end, the ethics office is encouraged to develop a process for documenting those companies conducting business with USTDA in order to provide a more comprehensive source for potential conflicts of interest during financial disclosure review and certification.

A review of USTDA's financial disclosure reports revealed 10 reports contained technical errors in asset reporting by filers. While the errors were generally minor in nature, in six instances some assets may not have been fully identified resulting in an incomplete conflict of interest analysis. Confidential financial disclosures were also not annotated with a date of receipt by ethics officials, leaving officials unable to confirm timely report submission and establish the proper deadline for final certification². Ethics officials should consider attending some of OGE's training courses to reinforce the core technical reporting requirements for both public and confidential financial disclosure reports.

OGE reviewers identified a concern with USTDA's handling of financial disclosure reports. Ethics officials acknowledged that public and confidential financial disclosure reports had been retained beyond the required six-year destruction point. *See* 5 CFR 2634.604. During the course of the review, ethics officials promptly destroyed those reports beyond the retention period and provided OGE with written confirmation of their actions. USTDA ethics officials stated that procedures would be established to ensure future report destruction occurs in a timely manner.

¹ Public financial disclosures submitted in 2012 were still under review by ethics officials at the time of the review.

² OGE reviewers used the filer's signature date to establish an agency date of receipt for analysis purposes.

Recommendation

- Ensure confidential financial disclosures are properly annotated with a date of receipt.
- Update the financial disclosure process to ensure financial disclosures are properly retained and destroyed.

Suggestions

- Develop a process to identify, document, and maintain a list of companies involved with USTDA to (1) supplement ethics officials' knowledge of potential conflicts and (2) reduce the risk that ethics officials may be unaware of recent agency developments.
- Attend OGE's public and confidential financial disclosure training classes.

Education & Training

An ethics training program is essential to raising awareness among employees about ethics laws and rules and informing them agency ethics officials are available to provide ethics counseling. Each agency's ethics training program must include at least an initial ethics orientation (IEO) for all employees and annual ethics training for covered employees.

USTDA ethics officials are notified of new employees by the Human Resources (HR) staff. As a small agency with fewer than 50 employees, new USTDA personnel are readily identifiable by ethics officials – often without formal notification from HR. Ethics officials meet with new employees in person and provide them with a memorandum introducing both IEO and financial disclosure requirements and a copy of the *Standards of Ethical Conduct for Employees of the Executive Branch*. USTDA ethics officials have also provided some new employees with annual ethics training in lieu of IEO in accordance with 5 CFR 2638.703(c). OGE reviewers confirmed that IEO material provided by USTDA met the applicable content requirements and was provided to all new employees within the 90-day deadline.

Annual ethics training is provided to all USTDA employees electronically. In December 2011, ethics officials emailed the annual training requirements and links to electronic training to the entire USTDA staff. Ethics officials also requested email confirmation from employees upon completion of training. Annual training content included the Department of the Navy's publicly accessible online ethics training module and three supplemental OGE training modules addressing contractors, misuse of position, and gifts. OGE reviewers confirmed the annual training material met the applicable content requirements. USTDA ethics officials provided OGE reviewers with email confirmations showing all covered employees completed training. Only one USTDA employee did not complete annual ethics training in 2011. That training was completed in early January 2012, days prior to the employee leaving the agency.

Suggestion

- Provide annual ethics training earlier in the calendar year to ensure that all employees complete training by the end of the year.

Advice & Counsel

The DAEO is required to ensure that a counseling program for agency employees concerning ethics and standards of conduct matters, including post-employment matters, is developed and conducted. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program. Timely and accurate ethics counsel is essential to effective conflict of interest prevention.

USTDA's advice and counsel is primarily provided by the DEO. The ADAEO or DAEO may also consult on ethics issues as necessary. Advice provided to USTDA employees is maintained in hard copy and also saved electronically in the DEO's network folder. Simple ethics questions that do not need extensive answers are not typically memorialized. Given USTDA's regular interactions with U.S. business interests, advice and counsel focuses predominantly on USTDA employees' attendance at outside events where these interests may be represented. To improve processing of these attendance requests, USTDA developed a standard form for employees to complete that captures key elements of the particular request. Ethics officials use the information on the form as the basis for a formal ethics memorandum that is retained as noted above. OGE reviewed 61 samples of attendance requests from January 2011 through June 2012 and found them to be consistent and timely. OGE identified one area of concern with USTDA's use of a standard form when documenting outside activity requests: Most memoranda in the sample used very repetitive analysis language, sometimes only changing the details of the parties involved. While many of the events observed in the samples considered similar fact patterns, USTDA should be mindful that the final documented analysis be comprehensive and include sufficient detail to protect against possible conflicts of interest.

USTDA also provided two samples of ethics guidance provided to employees seeking future employment. Both samples were provided in a timely manner and addressed the employees' disqualifications from matters concerning their prospective employers. Although both employees were determined to be seeking employment prior to their requests for guidance, absent from the samples was an analysis of whether a conflict of interest had already taken place. Ethics officials subsequently confirmed with reviewers this analysis was conducted and no conflict of interests had taken place in either sample. Similar to USTDA's documented outside event attendance advice, these disqualification memoranda contained repetitive analysis language. Although sometimes efficient and effective, the use of standardized language in a legal analysis could result in ethics officials insufficiently documenting the full conflict of interest analysis.

Suggestion

- Ensure ethics advice and counsel is tailored appropriately to the circumstances involved and documented in enough detail to address all the ethics issues in a given situation.

Enforcement

USTDA reported no disciplinary actions based wholly or in part upon violations of the criminal conflict of interest statutes (18 U.S.C §§ 203, 205, 207, 208, and 209) or the standards of conduct provisions (5 CFR part 2635).

USTDA does not have its own Office of Inspector General (OIG) nor does the agency utilize the services of an outside investigative body to help ensure that certain program elements described at 5 CFR § 2638.203(b)(11) and (12) are carried out³. The OGC performs the investigative functions of an OIG for alleged statutory and regulatory ethics violations. In the event USTDA is required to make a criminal referral to the Department of Justice, the OGC has the responsibility of concurrently notifying OGE of the referral.

Suggestion

- OGE suggests USTDA enter into a memorandum of understanding with an investigative organization that can investigate violations of ethics laws and regulations to ensure program elements described at 5 C.F.R. § 2638.203(b)(11) and (12) are carried out.

Special Government Employees

A SGE is defined in 18 U.S.C. § 202(a) as “an *officer or employee*... who is retained, designated, appointed, or employed” by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

Accordingly, SGEs are Government employees for purposes of certain conflict of interest laws. See DAEOgrams DO-00-003A and DO-04-022, and OGE Advisory Memoranda 82 x 21, 82 x 22, and 00 x 1.

USTDA has one SGE who serves as a Contracts Manager and files a confidential financial disclosure. The SGE completed annual ethics training in lieu of IEO and has filed the required new entrant financial disclosure. The SGE receives annual training with regular USTDA employees. Ethics officials indicated that the HR office is responsible for monitoring the SGE’s work hours to ensure the 130-day limit on SGEs is not exceeded.

³ In comments provided to a draft of this report, USTDA identified a 1996 informal arrangement to use the OIG services of the U.S. Agency for International Development for ethics-related issues. OGE suggests USTDA explore formalizing that relationship.

USTDA does not currently have a formal process in place for identifying and designating SGEs. Only after a subsequent review of the SGE's employment agreement were ethics officials able to determine that the employee should be classified as a SGE. USTDA is therefore encouraged to establish procedures to manage future SGEs.

Suggestion

- Document procedures relating to SGEs to ensure prompt identification, proper designation, proper financial disclosure filing, and accurate tracking of work hours.

1353 Travel Acceptances

To support its mission and help link U.S. businesses to export opportunities, USTDA permits its employees to accept payments from non-Federal sources for travel, subsistence, and related expenses incurred on official travel under the authority of the General Services Administration (GSA) regulation at 41 CFR chapter 304, implementing 31 U.S.C. § 1353. Agencies are required to submit to OGE semiannual reports of payments from non-Federal sources (SF-326).

USTDA failed to submit both 2011 semiannual reports of payments by the statutory deadlines. Those reports were provided to OGE upon request of the reviewers.

Suggestion

- Develop procedures to ensure semiannual SF-326 reports are transmitted to OGE by the statutory deadlines.

Agency Comments

USTDA provided the following comments to this report on August 6, 2012:

The U.S. Trade and Development Agency ("USTDA") has received the draft report issued by the U.S. Office of Government Ethics ("OGE") on July 26, 2012, following its review of USTDA's ethics program ("Draft Report"). USTDA thanks OGE for the opportunity to review and comment on the Draft Report and provides the following comments under the same section headings in the Draft Report.

Results in Brief

OGE stated, in part, that "[t]he results of the review indicated that USTDA's ethics program generally appeared to be effectively administered and in compliance with applicable laws, regulations, and policies except in the area of financial disclosure." USTDA respectfully

disagrees with OGE's characterization of the agency's administration in the area of financial disclosure. While USTDA recognizes that there are improvements to be made in the area of financial disclosure, the agency has in place a system that we believe is effective in the review and identification of conflicts, as further described below under "Financial Disclosure."

OGE Comment: The report language has been updated to avoid giving the impression that USTDA's entire financial disclosure program was out of compliance.

Objectives, Scope, and Methodology

No comment.

Program Administration

No comment.

Financial Disclosure

OGE noted that USTDA does not have a master list of companies that may pose potential conflicts of interest or a list of prohibited sources. While there is no master list as OGE has correctly stated, USTDA has, however, implemented a system that focuses on the responsibility of individual staff members to identify potential conflicts, and USTDA provides periodic training to employees to increase and maintain their awareness of this issue. In addition, during the 278 or 450 report reviews, if based on their knowledge of the agency's work, agency ethics officials ascertain that a filer's assets include holdings in an entity with which the agency may have dealings, the ethics officials would address the matter directly with the filer, which may include disqualification from activities involving the entity in question. USTDA has used this system consistently for many years and found that it has been effective; furthermore, OGE has performed multiple audits of USTDA's ethics program over the last twenty years and has not previously suggested incorporating the use of a master list of companies into this system. At the same time, we recognize that our system could be improved and we will consult further with OGE and take steps to implement OGE's suggestions in this area.

With respect to the date of receipt of financial disclosure forms, USTDA confirms that the date of receipt is the filer's signature date on the confidential financial disclosures and the disclosures were reviewed and certified before the statutory review deadline. Going forward, USTDA ethics officials will annotate the forms with the date of receipt. Consistent with OGE's suggestion, the responsible ethics official at USTDA will attend OGE's public and confidential financial disclosure training classes to further improve review of the submitted financial disclosures.

With respect to USTDA's retention of public and confidential financial disclosures after the 6-year retention period, USTDA notes that in practice, all past reports are locked in a secured location. USTDA further confirms that as of July 6, 2012, the agency has destroyed the expired

public and confidential disclosures pursuant to OGE's direction. USTDA will develop procedures to ensure future report destruction occurs in a timely manner.

Education & Training

USTDA will provide annual ethics training earlier in the calendar year.

Advice & Counsel

With respect to the analysis contained in ethics memoranda, including those concerning event attendance and disqualification in connection with prospective employment, USTDA confirms that it analyzes each occurrence individually, and will continue to do so. Consistent with OGE's suggestion, USTDA will continue to ensure that ethics advice and counsel is documented in enough detail to address all the ethics issues that arise in a given situation.

Enforcement

USTDA notes that consistent with 5 C.F.R. §2638.203(b)(12), in 1996, the agency entered into an informal arrangement with the Office of Inspector General of the U.S. Agency for International Development (USAID) whereby the agency set forth its intent to make appropriate arrangements to work with USAID's Inspector General on particular ethics issues as they arise. Such matters include investigations of alleged misconduct of employees or contract personnel, or issues of conflict of interest, which might require investigations by USAID's inspector general before referral to the Department of Justice and/or OGE.

Consistent with 5 C.F.R. §2638.203(b)(11), USTDA will carefully consider the best mechanism available to the agency to develop information that may disclose a need for reviewing agency standards of conduct or for taking prompt corrective action to remedy actual or potential conflict of interest situations. The mechanisms the agency will consider include the use of internal audit or review staff, or external audit groups.

Special Government Employees

Prior to FY 2011, USTDA had not employed any special government employees and it is unlikely that USTDA will employ SGEs with any regularity in the future. Nevertheless, consistent with OGE's suggestion, USTDA will document its procedures relating to SGEs.

1335 Travel Acceptances

USTDA employees did not receive payments from non-Federal sources for travel, subsistence, and related expenses in FY 2011, and accordingly, both reports referenced in the Draft Report were negative. USTDA will develop procedures to ensure the semiannual SF-326 are timely transmitted to OGE.