

Managing Conflicts of Interest at the U.S. Federal Level

(with emphasis on the Executive Branch)¹

Each of the three branches of federal government of the United States – executive, legislative and judicial – have “ethics” programs designed to manage conflicts of interest on the part of the individual officers and employees of that branch. Each of those programs have similar elements but because the executive branch has the most extensive program, it will be highlighted here. It is extremely important to note while each of these ethics programs focuses upon individual integrity, they function within a larger framework of systems that are designed to support institutional integrity. These support systems make it possible for the ethics programs, focusing upon individual integrity, to run more smoothly and have “teeth.”

Institutional Integrity

Without going into an exhaustive list here, systems designed to support institutional integrity include an independent judiciary; open, public legislative processes following standardized procedures with a written, public record; independent executive offices charged with conducting effective investigations and prosecutions; open judicial, administrative and contracting processes following public, standardized procedures with written public records; public appropriation and budgeting processes; a generally merit-based civil service with adequate pay, training, standardized processes for imposing disciplinary sanctions or protecting employees from reprisal; public rights of access to Government proceedings, documents and information; and checks and balances of power across the three branches of Government. In addition, the Government functions under the eye of an engaged civil society and free press.

Individual Integrity

Building upon those institutional systems, the three branches of the U.S. government have developed Government ethics programs designed to prevent, address and manage individual conflicts of interest and the appearance of those conflicts. The common elements of these “ethics” programs include:

- § a body of *enforceable standards* comprised of complementary criminal statutes (applying to both the Government official and any private party working in consort with the official), civil “ethics” statutes, and administrative restrictions based upon core public service concepts;

¹This article reflects the subject of the presentation by Jane S. Ley, Deputy Director (GRSP), United States Office of Government Ethics at the OECD/OAS Forum on Ensuring Accountability and Transparency in the Public Sector (Dec. 5-6, 2001, Brasilia), Focus Group on “Managing Conflicts of Interest.”

- § public and, within the executive branch, confidential *financial disclosure systems* that are designed to identify and then to address potential conflicts of interest that are defined by the parameters of these statutes and regulations that comprise the standards;
- § systematic *training and counseling* services available to officers employees regarding all restrictions; and
- § *effective enforcement* mechanisms.

The elements of these programs did not come about together. Most have evolved over the last 30 years. But experiences during this period have led to changes in the program and will undoubtedly lead to more.

Enforceable, Fair Standards

Prior to the 1960s the United States addressed conflicts of interest of its federal officers and employees (including judges) almost exclusively through criminal statutes and proceedings. As a particular scandal developed new conflict laws were enacted to address the conduct. Scandals involving officials making unfounded claims against the Government treasury or personally profiting during the U.S. Civil War (1860s) from contracts for goods that never arrived or were defective, gave rise to a series of criminal laws designed to prohibit Government officials (and those who colluded with them) from personally profiting by their involvement in Government decisions and processes. The basic prohibitions encompassed by those early statutes remain today.

In the early 1960s renewed interest in public service as a respected profession, generated in part by the election rhetoric of President John F. Kennedy, brought increased attention to the relationships that should exist between Government employees and the public. This resulted in two major changes. First, the individual criminal statutes dealing with conflicts of interest were re-enacted together in one chapter of the criminal code and standardized terms were used throughout the provisions. Second, the Kennedy Administration began a project to establish an administrative (non-criminal) code of conduct for executive branch officials that addressed not only actual conflicts of interest but activities that give rise to the appearance of such conflicts. This approach was based upon a belief that the public's trust in the Government was damaged whenever it appeared that a conflict of interest had occurred. Thus, a shift in focus from simply criminal prohibitions to more preventive and aspirational standards began.

In 1965, following President Kennedy's assassination, President Johnson issued Executive Order 11222 setting forth six basic principles of public service and some specific restrictions regarding gifts and other issues. The Civil Service Commission (now called the Office of Personnel Management) developed a model regulation for executive branch agencies to use in developing their own regulatory standards of conduct based upon the Executive Order. Each agency was then responsible for interpreting and enforcing its own standards. While the Civil Service Commission had some limited role, there was essentially no centralized authority responsible for ensuring consistency of the program throughout the branch. Not surprisingly, over the next 15-20 years, it became apparent that while the words of each agency's standards were similar, the application by individual agencies was quite disparate.

After the Watergate scandal, a number of good governance measures were enacted in an effort to help restore the public's confidence in the Government. Included with those measures as a part of the 1978 Ethics in Government Act was the creation of the Office of Government Ethics. OGE was given the responsibility for the overall direction of executive branch policies relating to preventing conflicts of interest. OGE, as a small agency, leveraged its position by building upon the then current responsibilities of each agency head. OGE began by reinforcing the concept that each agency head was ultimately responsible for the ethics program of his or her agency but then requiring each agency head to appoint an ethics official and to provide sufficient resources so that the ethics official (and any additional necessary staff) could carry out the day-to-day activities of an ethics program composed of elements specified by OGE. As a part of its oversight responsibilities, OGE periodically reviews agency ethics programs to ensure that their programs are being carried out within a consistent framework. It is through this network of ethics officials that OGE began working and continues to work to bring some consistency to the program within the branch.

In 1989, President George H.W. Bush issued Executive Order 12674 setting forth fourteen fundamental principles of ethical service. The Order directed OGE to write "a single, comprehensive, and clear set of executive branch standards of conduct that shall be objective, reasonable, and enforceable." In carrying out this directive, OGE made a conscious decision to move from the more limited regulations developed in the 1960's to more extensive, detailed regulatory standards that addressed core subjects much more specifically. The specific subjects chosen were those that raised the most questions based upon agencies' years of experience with the application and enforcement of the earlier standards and the criminal statutes. Each section of the standards was followed by examples of its application.²

The intent of this change was to bring some consistency in interpretation among the agencies, to provide more actual concrete examples and thus notice to employees who were subject to the standards, and importantly, to create one set of written "government ethics" standards, that if followed, would prevent an employee from inadvertently violating a criminal conflict of interest or civil ethics statute. In drafting the standards, every attempt was made to ensure that an employee who followed the guidance of the administrative standards need not fear his or her conduct would violate a civil or criminal ethics statute covering generally the same type of conduct. On the other hand, an employee who chose to act in significant violation of the standards would, however, also run the risk that his or her conduct might trigger an underlying criminal statute. For example, depending upon the facts, accepting or soliciting a "gift" might actually be viewed as accepting a bribe or engaging in extortion; misusing Government resources might actually be criminal conversion of Government property.

²The Standards of Ethical Conduct for Executive Branch for Employees of the Executive Branch are found in Part 2635 of Title 5 of the Code of Federal Regulations. They can be accessed on OGE's website at http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg2.html. A Spanish translation of the standards can be accessed at http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg2.html.

These standards were drafted, reviewed internally within the executive branch and published for public comment. OGE received over 1000 comments from interested parties. Those comments were addressed and the final regulation was published in August of 1992. The effective date of the regulation (standards of conduct) was 6 months beyond publication in order to give agencies time to make their employees aware of the new code and its provisions.

These administrative standards of conduct have now been in effect for eight years. When they were new, agencies properly focused their training resources on the requirements of the standards as a minimum level of acceptable conduct. Now we believe employees should be comfortable with the standards and we are exploring ways to raise the level of discourse from simply complying with standards to aspiring to the highest principles on which those standards are based.

The administrative standards of conduct are not the only aspect of the ethics program that has gone through a change since the 1960's. As a part of the 1989 Ethics Reform Act, the criminal statutes were amended to include the options of civil and injunctive authority. Previously, a statutory conflict of interest could only have been charged as a felony or a misdemeanor; now civil actions could be brought and injunctions sought for the same conduct, giving prosecutors a wider range of options to address statutory violations.³ In addition, Congress enacted some civil ethics restrictions applicable to high level officials of all three branches that limit outside earned income, compensated and uncompensated service in certain fiduciary positions, and the receipt of honoraria. These restrictions were enacted in conjunction with a significant pay raise to relieve the pressure to accept private compensation in order to meet the expenses of living and working in Washington.⁴

Thus, over the last 40 years the U.S. federal government has moved away from purely criminal conflict of interest restrictions as the only standard governing public service. Now there are civil "ethics" restrictions primarily dealing with outside activities that produce compensation, conflict of interest statutes that provide the prosecutor with criminal or civil options for penalties, and, in the executive branch, comprehensive administrative standards of conduct designed to be a single source of guidance to employees with regard to all conflicts and ethics restrictions.

Public and Confidential Financial Disclosure

³These conflict of interest statutes can be accessed at http://www.usoge.gov/pages/laws_regs_fedreg_stats/statutes.html.

⁴5 U.S.C. App § 501 et. seq.

The 1965 Executive Order issued by President Johnson that required the first administrative standards of conduct, also required high level executive branch officials to file confidential financial disclosures with the Civil Service Commission and for the Commission to issue regulations requiring confidential financial disclosure reports from other agency employees in order to help the determine potential, actual or apparent conflicts of interest of the officers and employees. Each agency initially collected and reviewed these forms before sending copies of the senior officials' forms to the Commission. And, like the first standards of conduct, agencies managed this program in very disparate ways. Some agencies collected the reports and used them in very constructive ways to help counsel employees on how to avoid potential conflicts that were disclosed on the reports. Other agencies failed to collect or to properly review the reports and did not use them as a counseling tool.

This experience was one of the considerations of Congress when as a part of the 1978 Ethics in Government Act, it enacted the statutory requirement that high level officials of all three branches file public financial disclosure reports.⁵ The public financial disclosure was intended and continues to –

- increase public confidence in Government;
- demonstrate the high level of integrity of the vast majority of government officials;
- deter conflicts of interest from arising because official activities would be subject to public scrutiny:
 - deter persons whose personal finances would not bear public scrutiny from entering public service; and
 - better enable the public to judge the performance of public officials in light of an official's outside financial interests.

The information required to be reported is quite specifically set out by law and the information requested is directly related to conflict of interest statutes or regulations. (Just within the executive branch there are currently approximately 20,000 filers of public reports.)

As a prevention measure using the public financial disclosure requirement, OGE inserted itself into the confirmation process of the President's nominees to the highest positions in the executive branch. Each of the nominees is required to file public financial disclosure no later than five days after nomination although in practice the forms are filed quite early with the White House and are used as a consideration in the President's decision of whether to nominate the individual for a particular position. The forms are shared by the White House with OGE and the agency in which the individual would serve. When the individual is nominated, the agency conducts a final review and forwards a copy to OGE, who then certifies the form and sends an opinion letter to the Senate. OGE recognized this as an opportunity to review with the agency and the White House the financial holdings and relationships of a nominee and to require the nominee to agree to take whatever steps are necessary to avoid potential conflicts before he or

⁵The form currently used in the executive branch for public financial disclosure reports can be accessed on OGE's website at http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg3.html.

she assumed the new position. These steps can include divestiture, resignation from outside positions, recusal, waiver or a blind trust.

The critical step OGE took in 1979 that was not clearly set forth in the financial disclosure statute was to work with each of the Senate confirming committees to assure that OGE could complete this review before the Senate confirmed the individual. This had two advantages. The first was time. Normally, confirmation must occur before appointment. The second was consistency. Historically each Senate confirming committee had made their own decisions about financial conflicts not necessarily based upon applicable laws and regulations. By providing its analysis and opinion to the committees, OGE could shoulder more of this responsibility and the committees could focus on suitability rather than financial conflicts. Thus, OGE's review and opinion has become an integral part of the confirmation/appointment process and new appointees are now aware before they take office of the conflict of interest requirements to which they must adhere. This process is one of the most important conflict prevention tools for senior level officials available in the program.

Public financial reporting helps ensure that every citizen can have confidence in the integrity of the most senior officials of federal Government. However, in order to further guarantee the efficient and honest operation of the Government, the executive branch continues to require other, less senior, executive branch employees whose Government duties involve the exercise of significant discretion in certain sensitive areas, to report, on a confidential basis, their financial interests and outside business activities to their employing agencies. These confidential reports facilitate the agency's review of possible conflicts of interest and provide a vehicle on which to base individualized ethics counseling and training. Approximately 275,000 individuals file financial disclosure reports on a confidential basis throughout the executive branch.⁶

While the prevention of conflicts is a significant purpose for collecting and reviewing these disclosure reports, the reports can be used, however, to help in prosecutions of individuals who have violated conflicts or other statutes. In some instances the employee will disclose information that, on its face, will indicate a violation of a statute or regulation. The form is then used as a basis for further investigation and for possible prosecution. In other instances, information will become available about activities and interests of the employee in which a subsequent investigation reveals the employee has intentionally failed to properly report. In those cases, the employee can be charged criminally with knowingly filing a false statement on the financial disclosure form. This charge would be in addition to whatever other charges might be involved and is especially useful when the proof of the underlying illicit act is difficult to obtain or prove in a court proceeding but the proof of the false statement on the report is not.

Systematic Training and Counseling

⁶The form used to file confidential financial disclosure reports can be accessed on OGE's website at http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg3.html.

One of the real strengths of the ethics program of the executive branch, is the systematic training of employees with regard to the regulatory standards and conflict of interest statutes. In the executive branch, agencies are required to provide training to the highest level officials once a year. All new employees must be given an opportunity to familiarize themselves with the standards of conduct when entering Government service. In addition, every agency has an ethics official or officials who is available to answer any questions employees might have about the application of the statutes or the standards. Employees who seek advice from these ethics officials and follow that advice (even if the advice turns out to be wrong) will not suffer any penalty for their conduct. This aspect of the program is intended to encourage employees to ask questions first before they engage in conduct about which they are unsure.

In a recent survey of a cross section of executive branch employees, OGE found that employees who had received ethics training were more aware of the ethics requirements and more apt to seek guidance when questions arose. Not surprisingly, the survey showed that employees judged the ethical culture of their agencies by the actions of their immediate supervisors and their executive leadership.⁷ To OGE this was a clear indication that more training resources should be directed to those in supervisory positions.

Experience has also shown that as training increases, so does the use of counseling services. Training and counseling go hand in hand. The training sessions are intended to raise the consciousness of employees to the issues that can raise questions of conflict. If the employee subsequently has a question that is not clearly answered to his or her satisfaction by the written standards, the employee is strongly encouraged to seek assistance from an agency ethics counselor prior to engaging in the conduct that is of concern. Individual employee counseling is provided primarily at the agency level where there is apt to be a more direct understanding of the responsibilities of the employee in the programs administered by the agency. (OGE's training and counseling is more detailed and specific and is primarily provided to agency ethics officials.)

Effective Enforcement Mechanisms

The criminal statutes, the civil statutes and the standards of conduct each are enforced using standard procedures which are not unique to these restrictions and did not have to be designed specifically for these restrictions. Alleged violations of the criminal conflict of interest statutes are investigated by the agency Inspectors General or the Federal Bureau of Investigation just as alleged violations of other provisions of the criminal code.

Prior to 1989, only the most serious cases were prosecuted; less serious but nonetheless violations of the criminal conflicts laws were not pursued for reasons related to such things balancing prosecutorial resources and jury appeal. With the 1989 addition of civil penalties and injunctive relief and with the pro-active ethics program having been in existence for 10 years, the Department of Justice began to pursue more conflict allegations. Faced with a realistic

⁷The full results of this survey and a copy of the survey instrument can be found on OGE's website at http://www.usoge.gov/pages/daeograms/dgr_files/2001/do01007.pdf.

potential that actions would be brought against them, individuals under investigation began offering to settle the cases with a civil monetary payment. The payment was determined with reference to the amount of the fine that could have been imposed upon a finding of guilt after trial. Each settlement concluded with a written public statement containing both the Government's and the employee's views of the employee's conduct. These settlements achieved timely disposition of issues that might otherwise have required lengthy and complex investigations. They also have had the salutary affect of indicating to the public and to employees that the statutes are to be taken seriously. They also provide an extremely useful tool in educating employees using specific cases often involving identifiable high level officials. Each year, OGE also publishes each year a description of all prosecutions as well as all civil settlements. That document is sent to all ethics officials and is posted on OGE's website for public review.

The regulatory standards of conduct are enforced administratively by the agency in which the employee serves following standard procedures that must be followed in order to take any disciplinary action against an employee⁸. Thus, the standards of conduct did not have to include a detailed enforcement mechanism; they simply referenced the existing standard system. The enforcement authority has been consciously left as a responsibility of the head of each agency as an effective management tool and as a way of holding the head of the agency accountable for the standards of the agency. OGE reviews the agency ethics program to determine whether the program is being carried out properly.

Conclusion

The United States has moved from managing conflicts of interest through primarily reactive criminal prosecutions to a proactive training, education and counseling program focused upon the criminal, civil and administrative standards and the detection and resolution of potential conflict of interests from financial disclosure reports. This proactive program is supported by an effective enforcement system with a range of penalties.

The rights of employees to fair notice of the standards to which they will be held accountable does undoubtedly help make the U.S. system for managing conflicts appear heavily rule-based. These rules, however, flow from fundamental principles of public service which embody aspirational goals. It is the challenge of conveying both aspiration goals and enforceable standards to employees that makes the program challenging and vibrant.

⁸Administrative sanctions for a violation of the standards of conduct can include reprimand, reassignment, suspension, demotion or dismissal.