



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW, Suite 500  
Washington, DC 20005-3917

May 20, 2003

David L. Frank  
Legal Counsel and  
Designated Agency Ethics Official  
Equal Employment Opportunity Commission  
1801 L Street, NW.  
Washington, DC 20507

Dear Mr. Frank.

The Office of Government Ethics (OGE) has completed a review of the Equal Employment Opportunity Commission's (EEOC) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (Ethics Act). Our objective was to determine the ethics program's effectiveness, measured primarily by its compliance with applicable statutes and regulations. The review was conducted in January 2003.

#### HIGHLIGHTS

We found EEOC's program meets most requirements. The program is staffed by very capable ethics officials who are dedicated to providing the best possible services to EEOC's employees. However, we examined documents which indicated employees took actions in cases involving entities in which they may have had a disqualifying financial interest under 18 U.S.C § 208. Our report recommends that ethics officials revisit these cases and conduct a section 208 conflict of interest analysis of each. If it is found that there were any conflicts of interest, the appropriate actions must be taken. We also found that EEOC has no reliable procedures for ensuring that Schedule C employees file the required public financial disclosure reports when they enter or leave their positions. Our report further discusses the difficulty EEOC has in identifying some new entrant confidential filers. Additionally, it could not be confirmed that any of the Commissioners have ever received initial ethics orientation or, with the exception of one of the Commissioners, annual training.

#### ADMINISTRATION

EEOC's ethics program is largely centralized at headquarters with the Assistant Legal Counsel within the Office of Legal Counsel (the primary ethics official) being responsible for the day-to-day administration of the program. The primary ethics official coordinates the efforts of the legal staff members (Ethics Liaisons) and administrative support personnel who assist him in carrying out the various functions of the ethics program. In addition, Deputy

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Ethics Officials provide some services to the District Offices in which they work, with oversight from the primary ethics official.

POTENTIAL VIOLATIONS OF  
18 U.S.C. § 208

Documents provided during our review of the confidential financial disclosure system raised significant questions as to whether six employees assigned to three District Offices may have violated 18 U.S.C. § 208 by participating personally and substantially in particular matters in which they had a financial interest. Headquarters ethics officials sent memorandums to the three District Directors noting which employees disclosed interests (on their 2002 confidential reports) in entities against whom charges were pending within their respective districts. The memorandums asked the Directors to confirm that the indicated filers had no involvement in cases concerning the entities in which they disclosed an interest. The Directors reported that six employees had such involvement.

None of the District Directors conducted an 18 U.S.C. § 208 conflict of interest analysis. One determined that "none of these instances involved any decisions which would have a material effect on the financial interests of the individuals involved." In such cases, the District Directors remind those filers that they are not to have involvement in cases in which they have a financial interest. We would note that the "material effect" test articulated by one of the Directors is not the accepted standard under section 208, which does not have a de minimis or materiality requirement.

In a conference call with headquarters ethics officials, they confirmed that District Directors do not conduct conflict of interest analyses. Instead, they make a determination as to whether an employee's decision was affected by his or her financial interest in the entity being charged. Headquarters ethics officials, who are responsible for conducting any necessary conflict of interest analyses, do not usually put such analyses in writing. We would note that section 208 does not require any analysis of whether the disqualifying financial interest actually affected a decision by the employee.

Furthermore, during the conference call, EEOC stated that it would not consider the act of approving or disapproving a request for information made under the Freedom of Information Act (FOIA) by a District Office employee to be an act which could violate 18 U.S.C. § 208. OGE does not agree with this conclusion, as a matter of law. Generally, OGE believes that an employee has a financial interest in a FOIA request, within the meaning of section 208, if the employee owns stock in the requester. A company necessarily expends resources in requesting documents under FOIA and

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may expend additional resources to appeal any denial of its request. Consequently, we believe that the resolution of a FOIA request affects the financial interest of the requester. Moreover, it has been our longstanding view that stockholders, as part owners of a company, have a financial interest in any particular matter that directly and predictably affects the financial interests of the company. Consequently, an employee who owns stock in a company has a financial interest, under section 208, in any FOIA request submitted by that company. In some circumstances, an employee also may have a financial interest if he or she owns stock in a company that is not the requester but is the subject of the documents requested, for example, if those documents concern confidential commercial information of that company.

We identified for headquarters ethics officials each of the six employees who took official action in matters involving an entity or entities in which they had a financial interest. EEOC must analyze each case for conflicts of interest by first determining whether the employee's financial interest in the affected entity or entities was the ownership of securities which met the de minimis exemption criteria found at 5 C.F.R. § 2640.202 at the time the actions were taken (\$5,000 prior to April 18, 2002 or \$15,000 on or after April 18, 2002). If the interest exceeded the de minimis, EEOC must then determine whether there is information indicating that 18 U.S.C. § 208 was violated and refer the matter for possible investigation consistent with the requirements of 28 U.S.C. § 535. We understand that many agencies comply with section 535 by referring the matter to their Inspector General.

#### CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEM

We examined 55 of the 261 confidential financial disclosure reports required and filed in 2002. Most of these were filed, reviewed, and certified timely and without significant issues. As already noted, six employees disclosed that they had a financial interest in entities against whom charges were pending within their respective District Offices. As also noted, these filers took official action in those cases. These potential conflicts were identified as ethics officials compared disclosed holdings to lists of entities against whom charges were pending in each District Office. The list of entities was generated by EEOC's Charge Data System. We commend EEOC for using this efficient method to identify potential conflicts of interest. However, contrary to EEOC's practice of not committing a conflict of interest analysis to writing, we feel that it would be prudent to document any analysis that is done.

While there was no problem identifying newly hired EEOC employees, our examination of confidential reports revealed difficulty in identifying employees promoted or transferred to

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covered positions from within the agency. This weakness is mostly due to a recent change in providers of human resource services from the General Services Administration to the Department of the Interior and the different ways those providers handle position coding. The primary ethics official was aware of the problem and working to resolve the issue. We encourage you to work with your human resources services provider to establish procedures for the timely identification of all filers.

#### PUBLIC FINANCIAL DISCLOSURE SYSTEM

The public financial disclosure system is generally in compliance with 5 C.F.R. part 2634. We examined all 56 public reports required to be filed during 2002 for technical deficiencies, conflict of interest issues, and timeliness of filing, review, and certification. We found them to be generally well-reviewed by ethics officials using EEOC's Charge Data System, and (except for reports filed by Schedule C employees) filed, reviewed, and certified in a timely manner. These 56 reports did not include the reports filed by you and four employees who are Presidential appointees requiring Senate confirmation (PAS). We did verify, however, that your report and the PAS reports were filed, reviewed by the agency, and forwarded to OGE in a timely manner

During our examination of the public reports we determined that there are no reliable procedures for ensuring that Schedule C employees file new entrant reports when they enter their positions or termination reports when they leave those positions. Four of the five reports filed by Schedule C employees (three new entrant reports and one termination report) were filed more than 30 days late. Ethics officials are trying to determine what procedures can be implemented to notify them of the arrival and departure of Schedule C employees so that the employees can be timely informed of the filing requirements.<sup>1</sup> Since Schedule C employees can hold positions which are particularly vulnerable to conflicts of interest, EEOC must resolve the issue of timely filing for these employees in order to protect both the agency's interests and its Schedule C employees. Alternatively, ethics officials are considering whether they can justify exclusion from the filing requirement for at least some of the current Schedule C employees

#### INITIAL ETHICS ORIENTATION

EEOC met the requirements for providing initial ethics orientation to new employees in 2002, except as regards to PAS

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<sup>1</sup>There was evidence that at least three of the late filers were not made aware of the filing requirement until well after their filing deadlines had passed.

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employees. At the time of our review, ethics officials could not verify that current PAS employees had ever received initial ethics orientation. If no verification can be found, training must be provided. We were gratified to learn that other new headquarters employees, in addition to receiving the required written materials, also received verbal training provided by the primary ethics official.

Employees hired into District Offices are also routinely provided with a package of the requisite materials, fulfilling the requirement for written training. All employees were required to complete a certificate verifying they had reviewed the materials and then submit it to the primary ethics official. Completion of training was tracked by comparing a list of new hires against the certificates received.

#### ANNUAL ETHICS TRAINING

EEOC generally met the requirements for providing annual ethics training to covered employees in 2002, again with the exception of PAS employees. Ethics officials could not confirm that any of the Commissioners had ever received annual ethics training prior to this year when training was provided to one Commissioner. If it cannot be verified that training was provided, these employees must be trained as soon as possible. Headquarters ethics officials visited about half of EEOC's field offices and provided verbal training to local covered employees. The remaining covered employees at headquarters and in the field completed their training online.

#### ADVICE AND COUNSELING

We examined the limited written ethics-related advice and counseling rendered by EEOC ethics officials during 2002. Based on our examination, we concluded that all the advice and counseling was consistent with applicable statutes and regulations.

According to the primary ethics official, advice is available from approximately eight Ethics Liaisons, four other headquarters ethics officials, and the Deputy Ethics Officials in the field. Headquarters ethics officials receive 5 to 10 questions a week to which they usually respond to orally.

#### OFFICE OF INSPECTOR GENERAL

EEOC appears to be complying with 5 C.F.R. § 2638.203(b)(12), wherein the services of the Office of Inspector General (OIG) are utilized, including the referral of matters to and the acceptance of matters from OIG. However, there was some question concerning EEOC's compliance with § 2638.603, wherein agencies are to concurrently notify OGE concerning referrals for prosecution of

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alleged violations of criminal conflict of interest laws to DOJ as well as certain information on the subsequent disposition of the referrals.

There were two alleged violations of 18 U.S.C. § 207 in 2002. Ethics officials appeared to have taken appropriate action in both cases in terms of referring the cases to DOJ for prosecution, although they did not notify OGE. We were provided two memorandums and their attachments sent by ethics officials to DOJ's Public Integrity Section in the Criminal Division concerning the alleged violations. They document conversations between EEOC officials and an official within the Public Integrity Section regarding EEOC's opinion that the former employees had violated the statute. DOJ's response in both cases was to recommend that the matters be referred to EEOC's OIG for investigation. We consider each of these contacts to constitute a referral to DOJ. Ethics officials subsequently sent memorandums to the OIG notifying them of DOJ's response. While the former employee ceased the activity that was in question in one case, the OIG continued to monitor the remaining case.

The primary ethics official did not believe the actions taken constituted a referral to DOJ and therefore did not concurrently notify OGE. However, he did not object to forwarding such information to OGE in the future. We encourage ethics officials to contact their OGE Desk Officer in the future if there is any doubt as to what OGE would consider reportable information. The receipt of this information is an important means by which OGE can monitor EEOC's system of enforcement, including whether disciplinary action is considered when DOJ declines to prosecute.

#### PAYMENTS FOR TRAVEL FROM NON-FEDERAL SOURCES

The procedures in place to accept payments for travel from non-Federal sources pursuant to 31 U.S.C. § 1353, and from 26 U.S.C. § 501(c)(3) organizations pursuant to 5 U.S.C. § 4111 appear to be appropriate for ensuring such payments are accepted in accordance with applicable regulations. They provide for conflict of interest analysis and approval prior to acceptance. We examined two semiannual reports of payments accepted from non-Federal sources sent to OGE covering the period October 1, 2001 through September 30, 2002. All reported acceptances of payments were analyzed for conflict of interest issues. However, we found three cases in which approval was not granted until after travel had occurred. We advised ethics officials to ensure in the future that all acceptances are approved in advance except as provided in 41 C.F.R. § 304-3.13.

## CONCLUSIONS

EEOC's ethics program is administered by capable, experienced, and dedicated ethics officials. With the noted exceptions, it is in compliance with applicable statutes and regulations. The implementation of the recommendations below will help strengthen the program further.

## RECOMMENDATIONS

We recommend that you:

1. Analyze for conflict of interest each of the six cases in which a violation of 18 U.S.C. § 208 may have occurred and, as appropriate, refer the matter for investigation consistent with the requirements of 28 U.S.C. § 535.
2. Develop and implement procedures to identify new entrant and termination Schedule C employees so that they can be made aware of the filing requirements.
3. Either verify that initial ethics orientation and annual training was provided to EEOC's current Commissioners, or provide the required training as soon as possible.

In closing, I would like to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the actions you have taken or plan to take to satisfy the requirements of our recommendation. A brief follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested in the OGE Director under subsection 402(b) of the Ethics Act, as implemented in subpart D of 5 C.F.R. part 2638, it is important that our recommendation be implemented in a timely manner. A copy of this report is being sent via transmittal letter to EEOC's IG. Please contact Jerry Chaffinch at 202-208-8000, extension 1157, if we can be of assistance.

Sincerely,



Jack Covaleski  
Deputy Director  
Office of Agency Programs