



Ethics Program Technical Assistance Review

Federal Permitting Improvement Steering Council

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The United States Office of Government Ethics (OGE) conducted a technical assistance review of the Federal Permitting Improvement Steering Council (Permitting Council) ethics program between March and June 2022, after ethics officials reached out to OGE for consultation in implementing the agency's ethics program. The following summarizes the results of OGE's review.

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Objectives, Scope and Methodology

Objectives: OGE provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive agency ethics programs.¹ OGE uses this evaluation authority largely to conduct reviews of agency ethics programs. The purpose of this review is (1) to evaluate the progress the Permitting Council is making in establishing an effective ethics program in light of its recent creation as a permanent agency; and (2) to provide guidance to ensure the program is compliant with ethics requirements as set forth in relevant laws, regulations, and policies.

Scope: OGE's review examined the basic elements of the ethics program that should have been administered by the Permitting Council in 2021 and 2022 including: program administration, financial disclosure, and education and training.

Methodology: OGE conducted the review of the Permitting Council's ethics program between March and June 2022. As part of its review, OGE examined a variety of documents provided by the Permitting Council's ethics officials, including the Permitting Council's response to OGE's 2021 Annual Agency Ethics Program Questionnaire, the CY 2021 Inspection Questionnaire, records of public financial disclosure reports filed in 2021 and 2022, and ethics training materials. In addition, OGE met with agency ethics officials to clarify the information gathered, follow up on issues identified during the review, and discuss ethics program operations in further detail.

Agency Background

The Permitting Council was established in 2015 by Title 41 of the Fixing America's Surface Transportation Act (FAST-41), 42 U.S.C. § 4370m et seq., and made a permanent

¹ See title IV of the Ethics in Government Act, 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.

agency in November 2021 with the passage of the Infrastructure Investment and Jobs Act (IIJA) (Public Law 117-58). The Permitting Council is composed of the Permitting Council Executive Director, who serves as the Council Chair, the Deputy Secretaries or equivalents from 13 federal agencies², the Chair of the Council on Environmental Quality, and the Director of the Office of Management and Budget.

The Permitting Council had 10 full-time employees as of December 2021. However, as expressed in the Permitting Council's Strategic Plan 2022-2026, as the government expands its investments in the national infrastructure, the Permitting Council anticipates an increase in applicable projects that would benefit from the FAST-41 program. To effectively support these infrastructure projects, the Permitting Council expects a commensurate increase in staff.

Program Administration

The Permitting Council's General Counsel serves as the Designated Agency Ethics Official (DAEO). The Deputy General Counsel serves as the Alternate Designated Agency Ethics official (ADAEO). The Permitting Council's prior DAEO had very limited experience in the administration of the executive branch ethics program and left the position in February 2022 (and left the agency in March 2022), at which time the current DAEO and ADAEO were appointed. According to Permitting Council officials, the ADAEO was hired to establish an effective ethics program because of his previous experience in the field of ethics.

Financial Disclosure

Title I of the Ethics in Government Act requires that agencies administer public and confidential financial disclosure systems. Financial disclosure serves to prevent, identify, and resolve conflicts of interest by providing for a systematic review of the financial interests of officers and employees. The financial disclosure process also offers an opportunity for ethics officials to provide ethics-related counseling to report filers.

Financial Disclosure Written Procedures

Each executive branch agency must establish written procedures for collecting, reviewing, evaluating, and where applicable, making publicly available financial disclosure reports filed by the agency's officers and employees. OGE learned that at the time of this review, the Permitting Council was in the process of developing written procedures for administering the financial disclosure systems.

² The agencies represented on the Permitting Council are Department of Agriculture, Department of the Interior, Department of Defense, Nuclear Regulatory Commission, Advisory Council on Historic Preservation, Army Corps of Engineers, Department of Energy, Environmental Protection Agency, Department of Homeland Security, Office of Management and Budget, Department of Commerce, Department of Transportation, Federal Energy Regulatory Commission, Department of Housing and Urban Development and the Council on Environmental Quality.

Notices to the DAEO

The lead human resources official is required to notify the DAEO of all appointments to positions that require incumbents to file public or confidential financial disclosure reports no later than 15 days after the appointment. The lead human resources official must also notify the DAEO of terminations of employees in positions that require incumbents to file public financial disclosure reports no later than 15 days after termination.³

According to Permitting Council officials, given the Permitting Council's size, the Chief Human Capital Officer (OCHCO) is aware of all new appointments and departures. Moreover, appointments and departures are announced agency-wide. Officials added that the DAEO personally meets with each new employee and determines whether they are subject to public or confidential financial disclosure filing requirements.

Public Financial Disclosure

Within 30 days of assuming a covered public filing position, an individual must file a public financial disclosure report.⁴ The individual must subsequently file an annual report by May 15 each year and a termination report within 30 days of departing the public filing position.⁵ The reports are required to be reviewed for potential conflicts of interest and certified within 60 days of receipt by the ethics office, unless additional information is being sought from the filer or remedial action is being taken.⁶

The public financial disclosure system was not adequately managed in 2021. Ethics officials failed to collect the majority of the required public financial disclosure reports. Specifically, four employees were required to file new entrant reports in 2021. However, only one of them filed the required report. Three employees were required to file termination reports, but none of the employees filed the required report. Additionally, the former DAEO was required to file an annual report by May 15, 2021, but filed it late in January 2022.

Additionally, the ADAEO stated that some employees erroneously filed transaction reports in *Integrity*, the OGE-managed electronic filing system for public financial disclosure reports. The ADAEO also noticed that transaction reports that did not disclose any transactions were certified, while others were closed without certification.

Financial disclosure is a fundamental element of an agency's ethics program and key to identifying real or potential conflicts of interest. The failure to ensure that required public reports were filed and the lack of oversight that led to the erroneous filing of reports in *Integrity* may demonstrate that the Permitting Council needed more experienced ethics officials to administer the ethics program. The Permitting Council is addressing this vulnerability with the hiring of an experienced ethics official to administer the ethics program and serve as the ADAEO.

³ See 5 C.F.R. § 2638.105(a)(1) and (2).

⁴ See 5 C.F.R. § 2634.201(b).

⁵ See 5 C.F.R. § 2634.201(a) and (e).

⁶ See 5 C.F.R. § 2634.605.

Confidential Financial Disclosure

Within 30 days of assuming a covered confidential filing position, an individual must file a confidential financial disclosure report.⁷ The individual must also subsequently file an annual report by February 15 each year.⁸ The reports are required to be reviewed for potential conflicts of interest and certified within 60 days of receipt by the ethics office, unless additional information is being sought from the filer or remedial action is being taken.

The Permitting Council has not designated any positions as confidential filing positions. Moving forward, OGE encourages the Permitting Council to carefully evaluate each newly created position to determine if the incumbent should be required to file a confidential financial disclosure report.

Education and Training

Each executive branch agency must carry out a government ethics education program to teach employees how to identify government ethics issues and obtain assistance in complying with government ethics laws and regulations. The training program is to include: briefings for certain Presidentially appointed, Senate confirmed (PAS) officials; notices for prospective employees and newly appointed supervisors regarding their ethics-related obligations; initial ethics training for new employees; and annual ethics training for public and confidential financial disclosure report filers and certain other employees. An ethics education program is essential to raising awareness among employees about the ethics laws and rules that apply to them and the availability of agency ethics officials to provide ethics counseling.

Notices to Prospective Employees

Written offers of employment for positions covered by the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) must include: a statement regarding the agency's commitment to government ethics; notice that the individual will be subject to the Standards of Conduct and the criminal conflict of interest statutes; information on how to obtain additional information on applicable ethics requirements; and, where applicable, notice of the time frame for completing initial ethics training and information regarding the filing of new entrant financial disclosure reports.⁹

The DAEO is developing written procedures and working directly with the Permitting Council's Deputy Director of Administration and the OCHCO to ensure that such notices are consistently and timely provided. However, OGE reviewed one sample of a written notice given to a prospective Permitting Council employee in December 2021 and found that it did not contain any of the required content.

⁷ See 5 C.F.R. § 2634.903(b).

⁸ See 5 C.F.R. § 2634.903(a).

⁹ See 5 C.F.R. § 2638.303.

Notices to New Supervisors

An agency must provide each employee upon initial appointment to a supervisory position with certain written materials within one year of appointment. The written materials must include: contact information for the agency's DEO and the text of the regulation specifying the government ethics responsibilities of supervisors; a copy of, a hyperlink to, or the address of a web site containing the Principles of Ethical Conduct; and such other information as the DAEO deems necessary for new supervisors¹⁰.

The DAEO is developing written procedures and working directly with the Deputy Director of Administration and the OCHCO to ensure that such notices are consistently and timely provided. The Permitting Council did not issue any notices to new supervisors during the period covered by this review.

Initial Ethics Training

Each new employee subject to the Standards of Conduct must complete initial ethics training (IET) that meets the requirements of 5 C.F.R. § 2638.304 within three months of appointment, unless excluded by the DAEO. The training must be interactive and focus on government ethics laws and regulations that the DAEO deems appropriate. The training must address: financial conflicts of interest; impartiality; misuse of position; and gifts. In addition to the training presentation, the agency must provide the employee with either written copies of or written instructions for accessing: the summary of the Standards of Conduct distributed by OGE or an equivalent summary prepared by the agency; provisions of the agency's supplemental regulations or a summary thereof, as determined appropriate by the DAEO; and, instructions for contacting the agency's ethics office.¹¹

OGE reviewed the presentation the Permitting Council used to provide IET in January 2022 and determined that it met applicable content requirements. However, the required written materials were not sent to any of the Permitting Council's new employees.

Annual Ethics Training for Public Filers

Generally, live training must be provided each calendar year to each employee whose pay is set at Level I or Level II of the Executive Schedule. Live training must also be provided to other employees who are required to file public financial disclosure reports pursuant to 5 C.F.R. § 2634.201(a) every other year, with interactive training provided in the intervening years. The training presentation, whether live or interactive, must focus on government ethics laws and regulations that the DAEO deems appropriate. The training, whether live or interactive, must address: financial conflicts of interest; impartiality; misuse of position; and gifts. In addition to the training presentation, the agency must provide the employee with either written copies of or written instructions for accessing: the summary of the Standards of Conduct distributed by OGE or an equivalent summary prepared by the agency; provisions of the agency's supplemental

¹⁰ 5 C.F.R. § 2638.306

¹¹ See 5 C.F.R. § 2638.304.

regulations or a summary thereof, as determined appropriate by the DAEO; and, instructions for contacting the agency's ethics office.¹²

Ethics officials indicated that there are no records of the annual ethics training provided in 2021.

Annual Ethics Training for Confidential Filers and Certain Other Employees

Generally, interactive training is required to be provided each calendar year to employees who are required to file a confidential financial disclosure report pursuant to 5 C.F.R. § 2634.904; employees appointed by the President and employees of the Executive Office of the President; contracting officers described in 41 U.S.C. § 2101; and, other employees designated by the head of the agency. The training presentation must focus on government ethics laws and regulations that the DAEO deems appropriate. The training must address: financial conflicts of interest; impartiality; misuse of position; and gifts. In addition to the training presentation, the agency must provide the employee with either written copies of or written instructions for accessing: the summary of the Standards of Conduct distributed by OGE or an equivalent summary prepared by the agency; provisions of the agency's supplemental regulations or a summary thereof, as determined appropriate by the DAEO; and, instructions for contacting the agency's ethics office.¹³

As previously noted, the Permitting Council had no employees who were required to file confidential reports in 2021.

CONCLUSION

OGE conducted this technical assistance review to advise the Permitting Council in establishing an effective ethics program that complies with the requirements set forth in relevant laws, regulations, and policies. The review also evaluated the progress that ethics officials have made to achieve this goal. OGE found that the Permitting Council's ethics program is the early stages of development, but is progressing. Based on the results of its review, ethics officials should focus on the following as they continue to develop and strengthen their ethics program:

- Establish written procedures. Ethics officials must create the required written procedures for administering the Permitting Council's ethics program. Specifically, all agencies are required to have written procedures describing how the following ethics program elements are administered: public and confidential financial disclosure, sending the required notices to prospective employees and new supervisors, and initial and annual ethics training. While not required by statute or regulation, it is also a good management practice to have written procedures for all ethics program functions, e.g., referring potential violations of the criminal conflict of interest statutes to the Department of Justice and maintaining documentation required to respond to OGE's Annual Agency Ethics

¹² See 5 C.F.R. § 2638.308.

¹³ See 5 C.F.R. § 2638.307.

Program Questionnaire. Finally, written procedures help to ensure the consistency and continuity of the ethics program.

In the event an agency's experienced ethics officials become unavailable for any reason, the written procedures would be critical in maintaining an effective ethics program. This is particularly true in small agencies in which the corporate knowledge of how the ethics program is administered is vested in a small number of individuals.

- Ensure that ethics officials take advantage of the educational resources available through OGE. Such training will improve technical knowledge, as well as provide the opportunity for ethics officials to network with and learn from other ethics officials. OGE believes the appointment of an experienced ethics official as the new ADAEO is an important first step in increasing the depth of knowledge and expertise in the Permitting Council's ethics program.
- Ensure that the appropriate program offices, such as the office of Administration and the Chief Human Capital Officer, coordinate their efforts with the ethics office and fulfill their duty to support the ethics program as required by 5 C.F.R. § 2638.105.

OGE stands ready to assist the Permitting Council as it works to establish a fully compliant ethics program.

Agency Comments

The Permitting Council set about formalizing its ethics and other necessary agency programs upon becoming a permanent Federal agency in November 2021. After retaining new staff experienced in ethics issues, the Permitting Council brought to OGE's attention many of the issues addressed in this report, and sought OGE guidance and assistance in implementing a compliant ethics program for the new agency. The Permitting Council is committed to ensuring compliance with the Standards of Conduct and other applicable ethics laws, and appreciates OGE's efforts--including the production of the Technical Assistance review report--in helping the agency achieve this important goal. The Permitting Council looks forward to continuing to work with OGE to implement these important recommendations.