



United States Office
Of Government Ethics

Report Number 07-002

Highlights

Issues of Compliance

- FMCS does not have a supplemental standards of conduct regulation to require employees to seek prior approval to engage in outside activities. 5 C.F.R. § 2635.803.

Model Practices

- FMCS leadership is involved in the ethics program as evidenced by the Director's participation in an ethics-related meeting with OGE leadership.
- Annual ethics training is provided to certain non-covered employees, including all mediators.

OGE Suggests

- OGE suggests that FMCS consistently indicate the date of appointment on new entrant confidential financial disclosure reports and the date of agency receipt on all confidential reports.

OGE Recommends

- OGE recommends that FMCS resubmit to OGE a proposed supplemental standards of conduct regulation requiring prior approval for outside activities.

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Ethics Program Review

Federal Mediation and Conciliation Service

March 2007 Report

Executive Summary

The Office of Government Ethics (OGE) has completed its review of the ethics program at the Federal Mediation and Conciliation Service (FMCS). The purpose of a review is to identify and report on the strengths and weaknesses of the program by: (1) measuring agency compliance with ethics requirements found in the relevant laws, regulations, and policies and (2) evaluating ethics-related systems, processes, and procedures in place for administering the program. OGE determined that there is reasonable assurance that the performance and management of FMCS' ethics program is effective, with the exception of the continued use of an outdated and invalid regulation.

OGE recommends that FMCS resubmit to OGE, for concurrence, a proposed supplemental standards of conduct regulation containing a provision requiring employees to obtain prior approval for outside activities if FMCS desires to enforce the approval of outside activities. 5 C.F.R. § 2635.803. OGE suggests that FMCS consistently indicate the date of appointment on new entrant confidential financial disclosure reports and the date of agency receipt on all financial disclosure reports. This will allow reviewing officials to readily determine the timeliness of filing for these reports.

FMCS' newly-written procedures for the financial disclosure systems should help to minimize late filing of reports.

The report also discusses the model practices FMCS' ethics officials have implemented.

This report has been forwarded to FMCS' Designated Agency Ethics Official (DAEO). The DAEO is to advise OGE within 60 days of the specific actions FMCS has taken or plans to take on OGE's recommendation. OGE stands ready to assist FMCS in implementing the recommendation and suggestion, as well as other program initiatives FMCS may choose to undertake. OGE will follow-up with FMCS in six months on the recommendation and suggestion in this report.



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Ethics Program Review

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Introduction

OGE MISSION

The Office of Government Ethics (OGE) provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance initiatives.

PURPOSE OF A REVIEW

The purpose of a review is to identify and report on the strengths and weaknesses of the program by: (1) measuring agency compliance with ethics requirements found in the relevant laws, regulations, and policies and (2) evaluating ethics-related systems, processes, and procedures in place for administering the program.

REVIEW AUTHORITY AND SCOPE

OGE has the authority to evaluate the effectiveness of executive agency programs. This review of the Federal Mediation and Conciliation Service (FMCS) focused on outside employment and activities, financial disclosure systems, ethics education and training, enforcement of ethics laws and regulations, and advice and counseling. The review also addressed the acceptance of travel payments from non-Federal sources. Title IV of the Ethics in Government Act of 1978, as amended and 5 C.F.R. part 2638.

OGE conducted this review in May 2006 at FMCS in Washington, DC.

Findings

PROGRAM STRUCTURE

FMCS' ethics program is administered by officials in the Office of General Counsel. The General Counsel serves as the Designated Agency Ethics Official (DAEO) and an Attorney-Advisor serves as the Alternate DAEO. Both officials work part-time on their ethics duties. The Alternate DAEO handles the majority of the day-to-day administration of the ethics program. However, all advice and counseling is reviewed and approved by the DAEO to ensure consistency.

To foster a culture of ethics, an ethics program must strive beyond mere compliance with laws and statutes. To this end, FMCS' Director participated in a meeting with officials from OGE. The Director's participation in an ethics-related meeting demonstrates that the ethics program is important to FMCS' leadership. OGE is also pleased to report that during the course of the review FMCS' ethics officials subscribed to OGE's Ethics News and Information Service, ListServe. ListServe is the primary means by which OGE disseminates ethics information to the executive branch ethics community in a timely manner.

OGE'S LAST REVIEW OF FMCS

OGE last conducted a review of FMCS' ethics program in January 2001. Although OGE found FMCS' ethics program to be effectively administered and the ethics education and training element to exceed regulatory requirements, some elements of the program needed improvement. OGE issued five recommendations:

- Determine whether the resources allocated to FMCS' ethics program are sufficient to administer the program in a positive and effective manner, as required by 5 C.F.R. § 2638.202(a).
- Ensure that the previous DAEO remits the \$200 late filing fee or submits a request for and obtains a waiver of the fee from OGE, in accordance with 5 C.F.R. § 2634.704.
- Determine if reports are missing from the Acting Deputy Director, and if so, collect the missing reports along with any late fees, unless the filer submits a request for and obtains a waiver of the fee from OGE, in accordance with 5 C.F.R. § 2634.704.
- Collect OGE Form 450s from confidential filers required to file in 2000.
- If FMCS desires to enforce the approval of outside activities, resubmit to OGE, for concurrence, a proposed supplemental agency regulation containing a provision requiring prior approval for outside activities.

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During the first follow-up review in November 2001, all recommendations, with the exception of one, were closed. During the second follow-up review in January 2003, the remaining recommendation was closed based on FMCS' intention to resubmit to OGE for review a draft supplemental regulation. Work on the supplemental regulation began in May 1996, but staff turnover appeared to have derailed the project several times. During the initial phase of the current review, OGE learned that FMCS still requires prior approval for outside activities in spite of the fact that FMCS does not have a supplemental standards of conduct regulation issued pursuant to 5 C.F.R. § 2635.105.

OUTSIDE EMPLOYMENT AND ACTIVITIES

A major area of concern raised during the review is the issue of outside employment and other activities. Presently, FMCS does not have supplemental standards of conduct regulation providing the authority to require employees to seek prior approval to engage in outside activities. OGE previously advised FMCS that until its supplemental regulation was published, employees may seek advice regarding their outside employment activities; however, employees could not be required to obtain prior approval. FMCS continues to require its employees to obtain prior approval for outside activities though the agency has no valid authority to do so.

OGE recommends that FMCS remedy the supplemental regulation issue. While OGE recognizes FMCS' desire to continue requiring prior approval to engage in outside activities, without a supplemental regulation in place, FMCS has no authority to enforce such a requirement. OGE stands ready to work with FMCS on an expedited basis to review a proposed supplemental regulation.

During the review, OGE examined seven outside activity requests. FMCS' ethics officials appear to have performed thorough conflicts of interest analysis of each proposed activity: requests to engage in activities that substantially related to the work of the agency or created an appearance that the employee was using public office for private gain were disapproved.

FINANCIAL DISCLOSURE SYSTEMS

Overall, FMCS' public and confidential financial disclosure systems are generally compliant with applicable laws and regulations. However, one area of concern is that all confidential filers filed late reports in 2005 due to an oversight on the part of the Office of General Counsel. According to the Alternate DAEO, the oversight occurred in part because written procedures governing the delegation of responsibilities among ethics officials were not in place. However, since their appointments, the DAEO and Alternate DAEO have developed written procedures governing the financial disclosure systems. Other enhancements have also been made.

A software program called E-room has been formatted to send a series of reminders to the Office of General Counsel about upcoming financial disclosure filing deadlines. The first reminder will be sent two months prior to the filing deadline. At that time, the Alternate DAEO will identify all confidential filers and will distribute report forms to filers. Then, one month

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prior to the filing deadline, the E-room program will send a second reminder to the Office of General Counsel that reports are due in one month. The Alternate DAEO then will identify confidential filers who have not yet filed and will send them a reminder of the filing deadline. A final reminder will be sent to the Office of General Counsel two weeks prior to the filing deadline.¹ At this point, the Alternate DAEO will identify those who have not yet filed and will contact them by phone to remind them to file their reports by the deadline or request an extension, if needed. If a confidential filer is delinquent in filing the report, the Office of General Counsel will follow-up with the confidential filer's immediate supervisor.

Public Financial Disclosure

OGE examined all five public financial disclosure reports required to be filed in 2005. Of those five reports, three were annual reports, one was a new entrant report, and one was a combination annual/termination report. All of the reports were filed in a timely manner.

All public reports appeared to have been reviewed thoroughly with the assistance of FMCS' "SF 278 Review Checklist – 2005," as evidenced by reviewer's notes. As importantly, without exception, the public reports were reviewed and certified within one day of the filers' submissions. The timely review of public reports is necessary to promptly identify and remedy potential conflicts.

Confidential Financial Disclosure

In addition to the late filing issue, OGE's review revealed that four annual reports and the new entrant report did not indicate a date of receipt on the form, and in the case of the latter, the appointment date. OGE suggests that FMCS consistently indicate the date of appointment on new entrant confidential financial disclosure reports. This will allow reviewing officials to readily determine the timeliness of filing for these reports. Additionally, FMCS should consistently indicate the date of agency receipt on all confidential financial disclosure reports. OGE has historically considered the date of agency receipt to be the date the report is filed.

OGE examined all 22 confidential financial disclosure reports required to be filed in 2005. Of those 22 reports, 21 were annual reports, and 1 was a new entrant report. As previously discussed, all of the annual reports were filed late. FMCS' ethics officials explained that they were late in sending confidential filers a notification to file. The memorandum sent by the DAEO to confidential filers notifying them of their obligation to file was dated November 18, 2005. As a result, all annual confidential reports were submitted late. Ten of the annual reports were filed less than 30 days late and 7 were filed more than 30 days late.

In response to this lapse, the Office of General Counsel instituted new procedures to aid in the timely filing of confidential reports. First, to identify new entrant confidential filers, a representative from the Office of General Counsel attends weekly senior staff meetings and is made aware of new hires and their positions. Individuals whose duties include contracting and

¹ Similar reminders are sent to the Office of General Counsel to help ensure that public financial disclosure reports are filed timely.

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procurement activities or whose actions affect non-Federal activities are identified in these meetings and are then tracked by the Office of General Counsel.

EDUCATION AND TRAINING

The education and training program at FMCS is compliant with the provisions of 5 C.F.R. part 2638. In fact, FMCS exceeds mere compliance by using model practices such as targeted ethics training for non-covered employees. Some of the training offered targeted new mediators, managers, and field mediators. Additionally, a computerized "Ethics Refresher" course was offered to all confidential filers, managers, and mediators. Finally, FMCS' ethics training plans for 2005 and 2006 are detailed and thorough.

Initial Ethics Orientation Program

All 17 of the new employees required to receive initial ethics orientation in 2005 received it. As part of the new employee orientation, either a representative from the Human Resources Division or a new employee's immediate supervisor distributes written ethics materials including the Standards of Ethical Conduct for Employees of the Executive Branch and OGE's Ethics Handbook for Executive Branch Employees, as well as contact information for ethics officials. New employees are also required to watch the OGE video "Integrity in Public Service: Earning the Public's Trust." A representative from the Human Resources Division or a new employee's immediate supervisor maintains a record of each new employee's completion of initial ethics orientation. New employees are directed to the DAEO or Alternate DAEO if they have any ethics-related questions.

Annual Ethics Training Program

Twenty-two of the 25 employees required to receive annual ethics training in 2005 received it. According to FMCS' ethics officials, the three who had not received annual ethics training in 2005 were provided training in January 2006. FMCS' annual ethics training is available both in-person and in an online version and addresses a wide range of topics. Annual ethics training in 2005 covered gifts, conflicts of interest, misuse of position, criminal conflict of interest statutes, outside employment, and post-Government employment. FMCS' annual ethics training program meets all relevant requirements.

In order to meet the availability of a qualified instructor requirement found at 5 C.F.R. § 2638.704(d), public filers were directed to complete training during certain periods of time during which qualified instructors were available to answer any questions. Confidential filers were also provided with contact information in case they had questions.

Additional Training

In addition to the standard annual ethics training, certain employees were provided with a computerized course titled "Ethics Refresher." The course was offered to all confidential filers, managers, and mediators. The recipients of the "Ethics Refresher" course provided the DAEO with the date on which they reviewed the course. As mentioned earlier, more FMCS employees

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received annual ethics training than was required. By including all mediators in their annual ethics training plan, FMCS' annual ethics training program goes above and beyond the minimum requirements.

ENFORCEMENT

FMCS does not have an Office of Inspector General. According to FMCS' ethics officials, the Department of Justice would be contacted to serve that function if needed. In addition, FMCS is aware of the requirements prescribed in 5 C.F.R. § 2638.603 to ensure that OGE is concurrently notified of referrals to the Department of Justice involving the criminal conflict of interest statutes. Discussions with FMCS' ethics officials indicate that procedures are in place for the effective exchange of ethics-related information between FMCS ethics and Department of Justice officials to resolve enforcement issues.

For 2005, FMCS' ethics officials noted a single incident involving a violation of 5 C.F.R. part 2635. The incident resulted in disciplinary action against a mediator. The mediator was suspended for 30 days because she misused her position by requesting information about the status of her brother's job application while serving as a mediator for her brother's prospective employer. FMCS' ethics officials and the mediator's supervisor determined that, at a minimum, her actions created an appearance of a conflict of interest.

ADVICE AND COUNSELING

OGE reviewed a sample of the written advice and counseling provided to FMCS' employees. Some of the topics included gifts from outside sources; gifts between employees; conflicts of interest; impartiality; fundraising; misuse of position; political activities; teaching, speaking and writing; outside employment and activities; travel; and post-Government employment restrictions.

Generally, FMCS' ethics officials provided complete and accurate advice in accordance with applicable laws and regulations.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

FMCS has written procedures for accepting travel payments from non-Federal sources under 31 U.S.C. § 1353. OGE examined three semiannual reports submitted to OGE covering the period October 1, 2004 through March 31, 2006. During that time, FMCS accepted seven payments in excess of \$250. The travel payments were accepted in connection with speaking engagements at conferences and conventions. All travel payments were accepted in accordance with 31 U.S.C. § 1353 and agency procedures.

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RECOMMENDATION

To bring FMCS' ethics program into full compliance with applicable laws and regulations, OGE recommends that FMCS:

Resubmit to OGE, for concurrence, a proposed supplemental standards of conduct regulation containing a provision to require prior approval for outside activities if FMCS desires to continue to enforce the approval requirement.

FMCS' DAEO is to advise OGE within 60 days of the specific actions FMCS has taken or plans to take on OGE's recommendation. OGE stands ready to assist FMCS in implementing the recommendation and suggestion, as well as other program initiatives FMCS may choose to undertake. OGE will follow-up with FMCS in six months on the recommendation and suggestion in this report.