

United States Office of Government Ethics

Compliance Division

Ethics Program Review

Election Assistance Commission

Results in Brief

The United States Office of Government Ethics (OGE) recently conducted a review of the Election Assistance Commission's (the Commission) ethics program. The results of the review indicated that the Commission's ethics program has faced significant challenges in maintaining adequate staffing which has impacted the continuity of ethics program operations and its compliance with some regulatory requirements. OGE is aware that Commission officials are working to make the necessary program improvements and supports them in their efforts. However, OGE is making recommendations and suggestions for the improvement of the Commission's ethics program and will continue to monitor ethics officials' progress in bringing the ethics program into compliance.

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Objectives, Scope and Methodology

OGE provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. 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. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive agency ethics programs. *See* title IV of the Ethics in Government Act, 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.

OGE conducted a review of the Commission's ethics program during May and June, 2015. The review generally covered program activities from the beginning of calendar year 2014 through May, 2015. To assess the program, OGE examined a variety of materials including the Commission's response to OGE's 2014 Agency Ethics Program Questionnaire, the public and confidential financial disclosure reports filed in 2014 and 2015, and initial and annual ethics training provided in 2014. OGE also met with the Acting Executive Director and ethics personnel to discuss the information gathered, clarify issues identified during the review, and assess ethics program operations in further detail. In addition, OGE conducted an interview with the Election Assistance Commission's Inspector General.

Program Administration

The Election Assistance Commission was established by the Help America Vote Act of 2002 (HAVA). The Commission is an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration. The Commission is headed by four Commissioners who are appointed by the President and confirmed by the Senate.

The General Counsel typically serves as the agency's Designated Agency Ethics Official (DAEO) and an agency staff attorney serves as the Alternate DAEO (ADAEO). The program is supported by a paralegal who performs a variety of management support functions on a part-time basis.

The following conditions were observed during OGE's review:

- All Commissioner positions had been vacant since December 2011 until three Commissioners were sworn in in January 2015.
- In 2012, the Commission's General Counsel and DAEO left the agency. His position had not been filled. Thus, the Commission did not have a DAEO. The Commission was in the process of interviewing candidates to fill the General Counsel position.
- In 2012, the ADAEO also left the agency, leaving the Commission with no ethics attorneys.
- The Executive Director's position was also vacant. The Chief Operating Officer was acting as the Executive Director and overseeing the paralegal who was managing the administrative aspects of the ethics program.
- Some of the elements of the ethics program, such as the review of financial disclosure reports, had been contracted out to another federal agency for a limited period of time.

Extended vacancies within the ethics program and the resultant shortages in experienced ethics staff create inherent risks for an ethics program, including the inability to routinely comply with regulatory requirements. The Commission has comprehensive procedures that govern the administration of the ethics program. Such procedures should help provide for consistency and continuity of the ethics program, especially during periods of turnover. OGE suggests that the Commission incorporate language into the procedures establishing an order of succession regarding the ethics roles and responsibilities in the event the DAEO and ADAEO positions again become vacant in the future.

Recommendation

- Promptly appoint a Designated Agency Ethics Official and Alternate Designated Agency Ethics Official to ensure the effective oversight and administration of the Commission's ethics program.

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. To ensure this confidence, high-level federal officials publicly disclose their personal financial interests. Title I also authorizes OGE to establish a confidential financial disclosure system, in which less senior executive branch personnel in certain designated positions may be required to file confidential financial disclosure reports. 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 reports assist agencies in administering their ethics programs and also assist in providing counseling to employees. *See* 5 C.F.R. part 2634.

Written Procedures

Section 402(d)(1) of the Ethics in Government Act requires that each executive branch agency establish written procedures for collecting, reviewing, evaluating, and where applicable, making publicly available financial disclosure reports filed by the agency's officers and employees.

The Commission has comprehensive written procedures for how the agency is to administer its public and confidential financial disclosure systems. However, OGE identified an area where these procedures could be strengthened: the procedures did not address the filing of periodic transactions reports required by the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act). During OGE's review the Commission modified its procedures to incorporate the periodic transaction reporting in order to comply with the content requirements section 402(d)(1).

To evaluate the Commission's public financial disclosure system, OGE examined the eight annual reports¹ that were required to be filed in 2014. None of these reports had been certified. The Chief Operating officer explained that she examined the reports filed in 2014 for conflicts of interest. However, she asserted that she did not know that the reports needed to be signed as certified.

Subsequent to its onsite fieldwork, OGE learned that in 2013 the Commission had contracted out some of its ethics services to the Pension Benefit Guaranty Corporation (PBGC) OGE examined the public reports filed in 2013 and determined that they had been properly certified by PBGC ethics officials.

As a result of OGE's findings during the course of its review, the Commission recently entered into an agreement with the Federal Election Commission (FEC) to retain the services of an Ethics Counsel on a part-time detail for approximately three months to assist with the review of the Commission's financial disclosure reports. Notably, the FEC Ethics Counsel was the Commission's former ADAEO and thus has the necessary experience and knowledge to identify

¹ There were no new entrant or termination reports required to be filed in 2014.

potential conflicts of interest for the Commission filers. The Commission has sent the 2014 public reports to FEC for review.

Recommendation

- Review and certify all outstanding public financial disclosure reports filed in 2014 and timely review and certify all future public reports.

During its review of the public reports, OGE identified a public filer who held an outside position as a board member of an organization that sits representatives on one of the Commission's Federal Advisory Committee Act (FACA) boards. OGE inquired whether this situation created a conflict of interest. The Commission provided OGE with a written determination made by the previous DAEO concluding that there was no potential conflict of interest between the filer's outside board position and the filer's official duties. At the time of the determination, however, the Commission's boards were not holding meetings. Additionally, the filer's position and duties have changed. Moreover, some Commission officials have since expressed concerns regarding the appropriateness of the filer holding this outside position. Given this new set of facts, during the course of the review OGE recommended that the Commission make a new conflict of interest determination on this case.

As a result, the Commission officials promptly requested FEC to provide a determination regarding the potential conflict of interest presented by the public filer's outside board membership on an organization that sits representatives on one of the Commission's FACA boards. FEC determined that even considering the filer's new official duties, there was no potential conflict of interest between the filer's outside board position and the filer's position with the Commission. It also recommended keeping in place all the restrictions included in the prior DAEO's determination.

To evaluate the Commission's confidential financial disclosure system, OGE reviewed all nine annual reports² that were required to be filed in 2014. None of these reports were filed timely.

In addition, none of the confidential reports filed in 2014 had been certified. As with the public reports, the Chief Operating officer explained that she examined the reports filed in 2014 for conflicts of interest but was unaware that the reports needed to be signed as certified.

OGE also selected a sample of reports filed in 2015 and found that they were filed timely with the exception of the report for one employee who was on extended sick leave. However, none of these reports had been certified. During the course of OGE's review, the Commission sent the 2014 and 2015 confidential reports to FEC for review and certification.

Recommendation

- Review and certify all outstanding public financial disclosure reports filed in 2014 and 2015 and timely review and certify all future confidential reports.

² There were no new entrant reports filed in 2014.

Initial Ethics Orientation

OGE regulations require that all new agency employees receive ethics official contact information along with the following material within 90 days of beginning work for an agency: (1) the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards) and any agency supplemental Standards to keep or review; or (2) summaries of the Standards, any agency supplemental Standards, and the Principles of Ethical Conduct (the Principles) to keep. Employees must receive one hour of official duty time to review the material. *See* 5 C.F.R. § 2638.703.

During 2014 the Commission did not hire any new employees who would be required to receive initial ethics orientation. However, Commission officials indicated that new employees would receive the same materials that are provided for annual ethics training. OGE reviewed the annual training materials and found that they meet the requirements for initial ethics orientation.

In order to meet orientation requirements for the newly appointed Commissioners in 2015, the Commission's Office of Human Resources provided the new Commissioners with the ethics training materials within 90 days of their appointment, as required.

Annual Ethics Training Plan

OGE regulations at 5 C.F.R. § 2638.706 require agencies to develop, at the beginning of each year, a written plan for annual ethics training. The plan must contain a brief description of the agency's annual training and include estimates of the number of employees who will receive verbal and written training. The Commission had developed the required annual ethics training plans for 2014 and 2015.

Annual Ethics Training

OGE regulations require all covered employees receive annual ethics training consisting of a review of: (1) the Principles; (2) the Standards; (3) any agency supplemental Standards; (4) the criminal conflict of interest statutes; and (5) ethics official contact information. Training length and delivery method may vary by an employee's financial disclosure filing status. *See* 5 C.F.R. §§ 2638.704 and 705.

The Commission's Office of Human Resources provided all covered employees with annual ethics training in 2014 using materials that met the regulatory annual training requirement. However, during discussions with ethics officials OGE learned that the Commission provided ethics training only every two years, rather than every year as required. OGE reminds the Commission that ethics training is required every year for covered employees.

Recommendation

- Provide ethics training to all covered employees annually.

Advice and Counseling

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. *See* 5 C.F.R. § 2638.203. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program. *See* 5 C.F.R. § 2638.204.

The Commission did not provide any written ethics-related advice in 2014. Therefore, OGE was unable to determine what topics were covered or if the advice rendered was timely and consistent.

5 C.F.R. § 2638.203(b) states that an agency DAEO should ensure that records are kept, when appropriate, on advice rendered. While not required in all cases, documenting the circumstances, analysis and resolution of ethics-related matters is vital for developing a record of ethics matters and ensuring the consistency of the advice rendered. Therefore, OGE suggests the Commission document, as appropriate, its ethics-related advice, particularly in cases involving unique or complex issues or involving officials at the highest levels of the agency.

Conflict Remedies

The criminal conflict of interest law at 18 U.S.C. § 208 prohibits an employee from participating in an official capacity in a particular matter in which he or she has a financial interest. Congress included two provisions that permit an agency to issue a waiver of the prohibition in individual cases. Under Executive order 12674, agencies must consult with OGE, where practicable, prior to issuing a waiver under section 208.

Additionally, the Ethics in Government Act expressly recognizes the need for Presidentially appointed, Senate-confirmed (PAS) nominees to address actual or apparent conflicts of interest by requiring written notice of the specific actions to be taken in order to alleviate the conflict of interest, common known as an “ethics agreement.”

All of the Commission’s PAS officials complied with their ethics agreements during the period covered by this program review.

Enforcement

The Commission 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 disciplinary actions based wholly or in part upon violations of the Standards (5 C.F.R. part 2635) during calendar year 2014.

OGE's review examined the working relationship between the ethics office and Office of Inspector General officials. The review team met with the Inspector General (IG) and learned that, generally, a good working relationship exists between ethics officials and his office. The review team also discussed each office's role in referring potential violations of the criminal conflict of interest laws to the Department of Justice and for concurrently notifying OGE of the referral. The IG indicated that he would like to establish and document procedures to identify each office's responsibilities in notifying OGE once a new DAEO is appointed. OGE encourages the development of such procedures to ensure that the Commission consistently complies with the requirement to notify OGE of referrals made to the Department of Justice. Written procedures also promote continuity and uniformity in the administration of an ethics program.

Special Government Employees

Special Government employees (SGE) are officers or employees of the executive or legislative branch, retained, designated, appointed or employed to perform their duties, full-time or intermittently, for not more than 130 days in any 365-day period. SGEs typically serve on agency advisory boards or commissions. The determination that an officer or employee is serving as an SGE subjects that officer or employee to certain ethics laws and rules, and triggers certain financial disclosure reporting and ethics training requirements.

In 2005 the Commission's ethics officials in conjunction with the Department of Commerce's National Institute of Standards and Technology (NIST) drafted a policy paper for the Commission's Executive Director regarding members of the Commission's three FACA boards. The policy paper designated each board member as either an SGE or a representative, detailed the reasoning used in making the determination, and outlined the responsibilities of each position.

The Commission's three FACA boards were dormant from 2012 until early 2015. Two of the FACA boards were reactivated in April 2015: the Standards Board and the Board of Advisors. According to the 2005 policy paper, all members of the Standards Board were determined to be representatives, while some members of the Board of Advisors were determined to be SGEs. However, Commission officials did not consult the 2005 policy paper prior to the Board of Advisors meeting April 2015. Thus, the Commission failed to collect any required financial disclosure reports for any of its SGE members. Additionally, the SGE board members did not receive the required ethics training.

The remaining board, the Technical Guidelines Development Committee (TGDC), was in the process of being reactivated at the time of OGE's review. Subsequently, TGDC had its first meeting in July 2015. According to the 2005 policy paper, some of the members on the TGDC were determined to be SGEs. Commission officials indicated that NIST provides ethics services to the TGDC members. OGE verified that NIST officials provided ethics training for the TGDC members and collected their financial disclosure reports before the TGDC meeting.

Recommendations

- Ensure that all SGE confidential reports are collected before any advice is rendered by the employee to the agency, or in no event, later than the first committee meeting in accordance with 5 C.F.R. part 2634.903(3)(b), and are reviewed and certified within 60 days.
- Ensure that all SGEs receive ethics training every year in accordance with 5 C.F.R. § 2638. 705.

Agency Comments

The Commission provided the attached memorandum in response to our invitation to provide comments on the report.

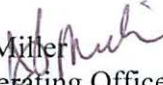


U.S. ELECTION ASSISTANCE COMMISSION
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October 1, 2015

MEMORANDUM

TO: Ciara Guzman
Ethics Program Analyst

FROM: Alice P. Miller 
Chief Operating Officer and Acting Executive Director

SUBJECT: Response to Plenary Report

In response to the findings of the review conducted by the United States Office of Government Ethics (OGE) of the US Election Assistance Commission's (EAC) Ethics program please find the response to the Plenary Report below.

Program Administration

- The agency agrees that a Designated Agency Ethics Official (DAEO) and Alternate Designated Agency Ethics Official (ADEO), need to be appointed. As is recognized in the report, the General Counsel typically serves as the DAEO and an agency staff attorney serves as the ADAEO. The Commissioners have interviewed candidates for the position of General Counsel and are in the process of making a selection. Once this is accomplished the position of General Counsel, which has been vacant since 2012, will again assume the responsibilities associated with the DAEO. The General Counsel will be authorized to hire a staff attorney to assist with the legal needs of the agency. Again, the agency has functioned without an in-house staff attorney since 2012 which has resulted in the lack of an appointed ADEO. Once the staff attorney position has been filled, the ADEO will be satisfied as well.

Financial Disclosure

- The outstanding public financial disclosure reports filed in 2014 are currently under review pursuant to the agreement that the agency has entered into with the Federal Election Commission. Once the review is complete, the reports will be promptly certified. It is the agency's intent to timely review and certify all future reports.
- Based on the recommendation for a new determination to be made regarding potential conflict of interest presented by an agency public filer's outside board membership on an organization, the agency has sought the advice and received a new conflict of interest determination. The new determination is attached to this response. The determination

essentially finds that the board membership does not create a conflict of interest but recommends that the previous restrictions that were outlined in the earlier review should continue to be followed.

- The reports for 2015 will be timely reviewed and certified. It is anticipated that the General Counsel will be in place and will take on this responsibility. However, in the unlikely event that the General Counsel has not been selected in time for the 2015 review of financial disclosure reports, the agency will again seek the appropriate review, as it has in the past, via memorandum of understanding with an agency that has the capability of providing support for this review.

Education and Training

- The Commission's Office of Human Resources (HR) provides employees with annual ethics training and has done so on a bi-annual basis. As a result of OGE's review and recommendation, the agency employees will be required to complete the ethics training annually. HR has scheduled ethics training for October 2015 to comply with the annual requirement for covered employees.

Advice and Counseling

- As the report indicates, the Commission did not provide any written ethic-related advice in 2014. However, as recommended, the Commission will document its ethics-related advice in the future, when such advice is provided to develop a record of ethics matters and to ensure consistency of the advice rendered.

Enforcement

- The Commission supports the suggestion of the Inspector General (IG) to develop procedures to identify each office's role in referring potential violations of the criminal conflict of interest laws to Department of Justice (DOJ) and for concurrently notifying OGE of the referral. Once a new DAEO is appointed the development of these procedures will be an assignment which can be undertaken. As, indicated in the report, such procedures will ensure that the Commission consistently complies with the requirement of notifying OGE of referrals made to DOJ and promotes unity and continuity in the administration of the ethics program.

Special Government Employees

- The Commission has identified 5 individuals who are Special Government Employees (SGE) that serve on the Board of Advisors. These members are senior level employees in the federal government who are required to receive ethics training from their home agencies and provide financial disclosure information to their agencies. The Commission did not provide the required training to the members or obtain copies of their financial reports prior to the first meeting. The Commission has been in contact with the SGE's and has requested copies of their reports. Also to be certain that the appropriate ethics training is received by the SGE's the Commission has arranged to provide the training to the members and will send each of them an electronic version of the training template

that is used for the Commission staff. The SGE's will be required to provide the Commission with the Certificate of Completion which will be appropriately filed.

- The Commission will ensure that the confidential reports are collected and appropriately reviewed and certified. It is hoped that the financial reports have been timely filed with the home agencies of the SGE's and the reports can be quickly obtained.
- Ethics training will be provided every year in accordance with 5 C.F.R. section 2638.705.

Attachment