



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

May 26, 2005

Lawrence D. Crocker, III
Designated Agency Ethics Official
Federal Energy Regulatory Commission
Room 91-09
888 First Street, NE.
Washington, DC 20426

Dear Mr. Crocker:

The Office of Government Ethics (OGE) recently completed a review of the ethics program at the Federal Energy Regulatory Commission (Commission). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the ethics program's effectiveness and compliance with applicable laws and regulations. We also evaluated the Commission's systems and procedures for ensuring that ethics violations do not occur. The review was conducted in April and May 2005. The following is a summary of our findings and recommendations.

HIGHLIGHTS

Our review revealed that several elements of the Commission's ethics program complied with or exceeded OGE requirements. However, improvements are necessary to bring the program into compliance with ethics laws and regulations. In particular, we identified deficiencies in the public and confidential financial disclosure systems. We also found that the Commission's enforcement of its supplemental standards of conduct regulation has been inconsistent.

Despite these deficiencies, we commend the Commission's practice of providing annual ethics training to all employees. In addition, while we made some suggestions to expand upon the written counseling we examined, we found the counseling to comply with applicable ethics laws and regulations. Finally, we found that recent payments of travel were properly accepted under the authority of 31 U.S.C. § 1353.

PROGRAM ADMINISTRATION

The Commission's ethics program is centrally managed out of the Office of the General Counsel, General and Administrative Law (GAL). As the Associate General Counsel for GAL, you serve as the Commission's Designated Agency Ethics Official (DAEO). A Staff Attorney within GAL serves as the Alternate DAEO.

PUBLIC FINANCIAL DISCLOSURE

To evaluate the Commission's public financial disclosure system, we examined a sample of 36 of the 64 public reports required to be filed by Commission employees in 2004. Our examination revealed that 34 reports were filed timely¹, all 36 were initially reviewed timely, and 35 were certified timely. The review of the reports appeared to be thoroughly conducted, as our examination did not identify any technical or substantive deficiencies.

We also examined all four of the public reports filed in 2004 for which copies were required to be transmitted to OGE in accordance with 5 C.F.R. § 2634.602(c). These consisted of your report, the former DAEO's report, and two Commissioners' reports. All four of the reports were filed, reviewed, and certified at the Commission in a timely manner. In addition, copies of your report and that of the former DAEO were transmitted to OGE in a timely manner. However, copies of both Commissioners' reports were transmitted late. In accordance with OGE DAEOgram DO-05-009 (April 13, 2005), annual public reports should be transmitted to OGE as soon as you have approved them, but by no later than August 1.

CONFIDENTIAL FINANCIAL DISCLOSURE

To evaluate the Commission's confidential financial disclosure system, we examined a sample of 110 of the approximately 540 confidential reports required to be filed by Commission employees in 2004. Our examination revealed that only 87 of these reports were filed timely. Moreover, while all but two of the reports we examined were initially reviewed timely, only 64 were certified timely.²

It is vital that financial disclosure reports be filed and certified in a timely manner to ensure that potential conflicts of interest are promptly identified and remedied. Late filing and protracted certification can put employees at risk of running afoul of the ethics rules.

Our examination of the confidential reports did not reveal any substantive deficiencies, however we did identify several technical reporting errors. These errors consisted of the failure of filers to provide dates of appointment or dates of filing, identify whether they were new entrant or incumbent filers, and sign their reports. These issues were discussed with your staff at the time of our review.

SUPPLEMENTAL REGULATION

The Commission's supplemental standards of conduct regulation (supplemental regulation) at 5 C.F.R. part 3401 prohibits an employee and the spouse or minor child of an employee, from

¹The two late filers received waivers of the \$200 late filing fee.

²Forty-five reports were not certified until two to six months after undergoing an initial review. One additional report had not been certified at the time of our review.

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acquiring or holding any securities of: a natural gas company; an interstate oil pipeline; a hydroelectric licensee or exemptee; a public utility; any electric utility engaged in the wholesale sale or transmission of electricity or having obtained an interconnection or wheeling order under Part II of the Federal Power Act; or the parent company of any of these entities.³ To assist your office in enforcing this prohibition, the Commission has developed a list of securities that employees are prohibited from holding (prohibited securities list).

Section 3401.102(b) allows you to grant a written waiver of the prohibition "...based on a determination that the waiver is not inconsistent with part 2635 of this title or otherwise prohibited by law and that, under the particular circumstances, application of the provision is not necessary to avoid the appearance of misuse of position or loss of impartiality, or otherwise to ensure confidence in the impartiality and objectivity with which Commission programs are administered. A waiver under this paragraph may impose appropriate conditions, such as requiring execution of a written disqualification."

During our review of a sample of the Commission's public and confidential financial disclosure reports, we identified several disqualification statements executed by filers who reported security interests that were listed on the prohibited securities list. However, we did not identify any corresponding waivers issued by you.

Commission ethics officials explained that, despite the wording of the supplemental regulation, you generally do not grant waivers; employees are only required to execute disqualification statements to comply with the supplemental regulation. They further explained that the prohibition contained in the supplemental regulation is essentially used only to discourage employees from acquiring prohibited securities **after** they begin working at the Commission. Despite this explanation, our review of the financial disclosure reports revealed instances where filers appeared to have acquired new or additional interests in prohibited securities while working at the Commission without having been granted waivers.

We are concerned that the disparities between the prohibition and the waiver requirement of the supplemental regulation and the Commission's actual practice may cause confusion among Commission employees and may unfairly penalize those employees who maintain strict adherence to the letter of the regulation, i.e., refraining from acquiring securities on the prohibited securities list, while other employees routinely acquire and hold them. Moreover, we are troubled that you are simply not enforcing compliance with your own rule.

Therefore, we recommend that you immediately evaluate if the prohibition and waiver elements of your supplemental regulation are necessary to ensure the integrity of the Commission's ethics program. If so, you must immediately begin consistently enforcing the prohibition on holding certain securities and, as appropriate, granting written waivers. Otherwise, you should remove these elements from the supplemental regulation and/or, with the approval of OGE, amend the regulation

³This prohibition is not based on any statutory requirement.

accordingly to conform with current practice. We should note that OGE is unlikely to approve any amendment that would simply "discourage" the acquisition or holding of interests in certain securities.

The Commission's supplemental regulation also requires employees to obtain prior written approval from you to engage in compensated outside employment with a prohibited source (5 C.F.R. § 3401.104). We identified 11 outside activities reported on the sample of public and confidential financial disclosure reports we examined. According to a Commission ethics official, none of the activities involved a prohibited source and therefore did not require prior written approval.

ETHICS TRAINING

Commission ethics officials, who are responsible for providing initial ethics orientation and annual ethics training Commissionwide, have ensured that both exceed the minimum requirements in subpart G of 5 C.F.R. part 2638.

Initial Ethics Orientation

Initial ethics orientation for new Commission employees consists of an hour and a half long verbal presentation conducted by Commission ethics officials. Employees also receive a variety of written materials as part of the orientation. These materials include, among other things, (1) Executive Order 12674, as modified by Executive Order 12731, (2) the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635), (3) the Commission's supplemental regulation (5 C.F.R. part 3401), (4) the conflict of interest statutes, and (5) the names, titles, office addresses, and telephone numbers of the DAEO and other Commission ethics officials available to answer questions regarding ethical responsibilities. Employees must sign an acknowledgment of receipt certifying that they received initial ethics orientation.

Annual Ethics Training

All Commission employees are required to receive annual ethics training, as directed by the Chairman of the Commission.⁴ In 2004, Commission ethics officials provided verbal annual training to headquarters employees, with regional office employees attending via a video conference link. The Commissioners and their staffs were provided more personalized training, with each Commissioner and staff trained separately. This tailored training allowed for coverage of specific issues particularly relevant to the Commissioners' positions and responsibilities. As with initial ethics orientation, employees must sign an acknowledgment of receipt certifying that they received annual training.

⁴In 2004, only five employees failed to receive annual ethics training due to extenuating circumstances, such as (b)(6) or military deployment.

ETHICS COUNSELING

To evaluate the ethics counseling rendered by Commission ethics officials, we examined a sample of approximately 150 pieces of counseling rendered from 2004 to the time of our review and found that, overall, they were accurate and in compliance with applicable ethics laws and regulations. However, we were somewhat concerned that seven pieces of e-mail counseling we examined, while accurate, were not as complete as they might be. While we recognize that the e-mails were merely "snapshots" and that there may have been conversations as well, we believe that there may have been some missed opportunities to further expand upon the advice provided. We discussed each of the seven e-mails with you and explained the additional information that we suggest be provided in the future when responding to similar questions.

ENFORCEMENT

According to Commission ethics officials, the Department of Energy's Inspector General would be utilized to investigate any allegations involving potential violations of the criminal conflict of interest laws and to notify OGE of allegations referred for prosecution to the Department of Justice. However, as such allegations have not arisen in the past few years, such utilization has not been necessary.

In 2003 and 2004, there were six actions taken against Commission employees for non-criminal ethics-related misconduct, all of which involved unauthorized use of Government property. The actions consisted of warnings, letters of reprimand, and suspension of employment.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

The Commission has written procedures for accepting travel payments from non-Federal sources under 31 U.S.C. § 1353. To evaluate the effectiveness of these procedures, we examined all 13 of the payments on the Commission's two most recent semiannual reports to OGE of payments in excess of \$250, covering the period from October 1, 2003 through September 30, 2004. All of the payments appeared to be accepted in compliance with 31 U.S.C. § 1353.

RECOMMENDATIONS

To bring the Commission's ethics program into full compliance with the ethics laws and regulations, we recommend you:

1. Ensure that copies of annual public financial disclosure reports required to be transmitted to OGE in accordance with 5 C.F.R. § 2634.602(c) are transmitted to our Office as soon as you have approved them, but by no later than August 1.

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2. Ensure that confidential financial disclosure reports are filed and certified in a timely manner.
3. Immediately evaluate if the prohibition and waiver elements of your supplemental regulation are necessary to ensure the integrity of the Commission's ethics program and, if so, begin consistently enforcing the prohibition on holding certain securities and, as appropriate, granting written waivers. Otherwise, you should remove these elements from the supplemental regulation and/or, with the approval of OGE, amend the regulation accordingly to conform with current practice.

In closing, I would like to thank you for your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions the Commission has taken or plans to take on our recommendations. A follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of OGE under subsection 402(b)(9) of the Ethics Act, as implemented in subpart D of 5 C.F.R. part 2638, it is important that you take timely actions to implement our recommendations. Please contact Dale Christopher at 202-482-9224, if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 05- 010