



U.S. Office of Government Ethics  
Program Review Division

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# Ethics Program Review

International Boundary and Water Commission

Report No. 11-016  
April 2011

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## Results in Brief

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The United States Office of Government Ethics (OGE) conducted a review of the International Boundary and Water Commission (the Commission) ethics program in February 2011. The results of the review indicated that the Commission's ethics program appears to be in compliance with applicable laws, regulations, and policies.

### Highlights

- The Commission conducted an ethics self-assessment to benchmark the strengths and weaknesses of the ethics program.
- Formal advice and counsel issued by the DAEO is provided in a consistent and detailed format.

### Concerns

- OGE believes the DAEO position is not placed at an appropriate organizational level that reflects the authority and experience the position demands.
- An undefined relationship with the Department of State (State) regarding the Commissioner's financial disclosure has allowed his ethics agreement to go unaddressed for almost 1 year.
- Jurisdictional debate exists between the State's Office of Inspector General (OIG) and the Commission which may affect the handling of criminal conflicts of interest. In addition, with no formal mechanism in place, the DAEO is left to handle civil and administrative matters that fall outside the purview of government ethics.

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## Objectives, Scope, and Methodology

OGE provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance. 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. OGE has the authority to evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act and 5 CFR part 2638.

To assess the Commission's ethics program, OGE examined a variety of documents provided by the Commission ethics office. OGE examined financial disclosure reports that were required to be filed at the Commission in 2010, covering calendar year 2009. We examined all public and confidential financial disclosure reports required to be filed in 2010. In addition, the OGE review team met with Commissioner Edward Drusina's designee, the Designated Agency Ethics Official (DAEO), the alternate DAEO (ADAEO), and the Chief Counsel to (1) obtain additional information on the Commission's ethics program, (2) seek clarification on issues and (3) verify data collected.

## Program Administration

The Commission's ethics program is administered within the Compliance Programs Office. The Internal Auditor also serves as the DAEO; the Compliance Officer serves as the ADAEO. The DAEO is responsible for the day-to-day administration of the ethics program. The ethics program has no dedicated budget.

OGE's primary concern is that the Internal Auditor's relatively junior position within the organization does not provide a level of authority commensurate with the responsibilities of the DAEO position. As of 2009, in 12 out of 14 agencies of similar size, the DAEO serves at the SES, SL or GS-15 level. OGE has previously stated that appointing a relatively senior official as DAEO supports the need for ethics to be seen as an essential rather than tangential consideration in leadership.

In agencies of this size, positioning the DAEO outside of the office of general counsel is also rare, occurring in only 2 out of 14 similarly sized agencies. In 10 of these agencies, the DAEO serves as General, Deputy or Chief Counsel. According to the Commission's Chief Counsel the ethics program was, until recently, located in the Legal Affairs Office. Returning the DAEO to the Legal Affairs Office better reflects the expertise and authority found in ethics programs across the executive branch.

In addition to concurrent DAEO and Internal Auditor responsibilities, the DAEO also appears to be the primary point of contact for many non-ethics related issues including criminal complaints, questions on the use of government vehicles, Equal Employment Opportunity concerns, and prohibited personnel practices. These circumstances are similar to those found in the State OIG March 2005 *Report of Inspection* which found the Internal Auditor position similarly overburdened with additional responsibilities.

Also at issue is the ethics program's relationship with State Department. For criminal conflict of interest investigations, State provides OIG services to the Commission although the matter of State OIG jurisdiction over the Commission has been left unresolved between both agencies. Additionally, the responsibility for processing the Commissioner's financial disclosure--a matter handled by State during his appointment--is also unclear. This ambiguous relationship between both agencies may have contributed to a situation addressed in the Financial Disclosure section of this report.

### Suggestion

- OGE strongly suggests the responsibilities of DAEO return to the Legal Affairs Office and be held at a level of authority appropriate for the position.
- Establish procedures to ensure non-ethics-related issues are addressed by the appropriate personnel.

## Financial Disclosure

The Commission has two public filers--the Commissioner and the DAEO. The remaining covered employees file confidential financial disclosure reports. OGE reviewed all public and confidential financial disclosure reports required to be filed in 2010. Written ethics program directives, which also cover the financial disclosure program--required by section 402(d)(1) of the Ethics in Government Act of 1978, as amended--are currently in draft form. Because these directives govern an area critical to criminal conflict of interest prevention, at a minimum OGE recommends the completion of the financial disclosure portion of the directives.

OGE identified one significant shortfall within the financial disclosure program. The Commissioner's new entrant SF 278 was certified by State on January 6, 2010, post-marked February 26, 2010, and received by the Commission's DAEO on April 2, 2010. The Commissioner's financial disclosure contained an ethics agreement with resignation and recusal requirements that--at the time of this review--had not been acted upon by the Commission's ethics office. Despite the efforts of the DAEO to clarify State involvement in the Commissioner's financial disclosure processing, the precise nature of both agencies' association remains uncertain. The unclear relationship with State contributed to circumstances where the most visible public figure for the Commission has held office for over one year without proper ethics protections in place. Although unaware of the ethics agreement's implications, the DAEO promptly and correctly identified the potential breakdown in the system, but no resolution was reached regarding the Commission's relationship with State. Financial disclosure review and certification is a primary function of the ethics program, a lapse in which could lead to a criminal violation of the conflict of interest statutes. It is of the utmost importance to OGE that this relationship and the responsibilities of each party are understood by all parties involved.

The existing process of identifying new financial disclosure filers through the use of Human Capital (HC) reports may also be further expanded to better identify employees in filing positions. OGE noted that the OCC/series number provided on the HC report might be an effective trigger for further review of an employee's filing responsibilities. Additionally, working with HC to add filing responsibilities to select position descriptions may serve this need even better, allowing for the capture of promotions to positions that require financial disclosure. Unidentified new filers can put the agency and its employees at substantial risk of a criminal conflict of interest should an employee work a number of months before his or her financial holdings or outside positions are scrutinized by an ethics official.

Although having the Internal Auditor functioning as DAEO presents programmatic challenges, the DAEO has leveraged his auditor's knowledge of agency vendors to provide excellent conflict of interest analysis on the financial disclosure reports he reviews. Technical errors were generally limited to asset underreporting.

### Recommendations

- Ensure the Commissioner's ethics agreement has been complied with in accordance with 5 CFR 2634 Subpart H.
- Verify no conflicts of interest have occurred relating to the commitments contained in the Commissioner's ethics agreement.
- Complete the financial disclosure section of the ethics program directives.
- Resolve State's financial disclosure role regarding the Commission and formally document each agency's responsibilities.

### Suggestion

- Further examine the reports available from HC regarding accessions, promotions and terminations to find the most effective mechanism for identifying changes in filing status.

## **Education & Training**

Initial ethics orientation was provided to all employees in a timely manner in 2010. Annual training given to covered employees included the most critical material for conflicts-prevention at the Commission, but inadvertently omitted some secondary elements required by 5 CFR 2638.705(b). During the course of the review, the DAEO identified possible solutions for bringing the training into full regulatory compliance.

### Recommendation

- Update the annual training to meet the full regulatory requirements.

## **Advice & Counsel**

The formal advice and counsel provided by the DAEO was generally accurate and rendered in a standard format that was consistent and logical for the recipient. As noted above, OGE does have concerns with the ethics office positioned outside of the Commission's primary legal office, in part because providing legally accurate and timely ethics guidance is considerably time-intensive for the Internal Auditor.

Departing employees are counseled on post-employment restrictions, one of the Commission's high-risk areas for ethical conflicts of interest, on a walk-in basis. Although HC provides departing employees with an out-processing checklist, which includes a box for the ethics office, in practice, departing employees rarely engage the ethics office as part of their out-processing. Counseling on post-employment restrictions is typically conducted when employees contact the ethics office on their own initiative.

OGE commends the DAEO for emphasizing this service of the ethics office during annual ethics training. However, to address the high-risk, high-visibility ethical concerns of the "revolving

door” between government and private sector employment, OGE believes it is in the Commission’s best interests to enhance the out-processing procedures to an extent that will capture the majority of departing employees.

#### Suggestion

- Enhance departing employees’ out-processing procedures to ensure the ethics office has an opportunity to provide post-employment counseling.

### **Agency-Specific Ethics Rules**

The Commission has no agency-specific supplemental ethics regulations. Obsolete outside activity restrictions have been removed from the Commission’s current Directives. The ethics office should also remove any additional obsolete outside activity restrictions that appear in other, less-current agency documentation.

### **Enforcement**

The Commission reported no disciplinary actions based wholly or in part upon violations of the standards of conduct provisions, the criminal conflict of interest statutes, and made no referrals to the Department of Justice of potential violations of the criminal conflict of interest statutes. However, the current enforcement and referral process is not clearly defined.

According to State OIG, their Office of Investigations provides oversight of the Commission through audits and investigations. Leading up to State’s 2005 report of inspection, correspondence between the Commission and State OIG raised the question of State jurisdiction over the Commission. At the time, the former agency head agreed to cooperate with State inspectors while leaving the jurisdictional question unresolved.

At present, the Commission considers the oversight relationship between agencies to be informal with lingering jurisdictional concerns. Conversely, State has no doubt as to their jurisdiction over the Commission, citing budgetary links between both agencies, past acceptance of State jurisdiction, State processing of the Commissioner’s appointment, and the identification of a signed memorandum of understanding between both agencies.

Although the means exist--via State--to investigate criminal conflict of interest allegations, OGE believes the apparently unresolved jurisdictional issue may leave the ethics program vulnerable. The procedures for handling criminal violations should not be left unresolved, subject to whatever internal pressures exist at the time of the violations. The DAEO should have unambiguous direction on what steps to take to address a criminal conflict of interests.

## Recommendation

- Clarify and formalize the relationship between the Commission and State OIG and the procedures for handling a criminal conflict of interest violation.

### 1353 Travel Acceptances

The required semi-annual reports of payments accepted from non-Federal sources were submitted to OGE in a timely manner. OGE commends the DAEO for underscoring the importance of identifying these payments during annual training, which is a proactive step beyond the regulatory requirements.

### Agency Comments

The Commission provided the following formal response by email on March 25, 2011:

“The USIBWC generally agrees with all of the OGE suggestions and recommendations, and each recommendation and suggestion that was noted in the report is addressed below:

OGE recommendations:

**1. Ensure the Commissioner’s ethics agreement has been complied with in accordance with 5 CFR 2634 Subpart H.**

Contact was made with the Department of State Ethics Program Officials back on 12/22/2010 (Sharon Andrews and Sharon Hardy @ 202-647-9731) and the Office of Legal Affairs is now developing procedures to fully implement this suggestion.

**2. Verify no conflicts of interest have occurred relating to the commitments contained in the Commissioner’s ethics agreement.**

The Office of Legal Affairs is now developing procedures to fully implement this suggestion.<sup>1</sup>

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<sup>1</sup> OGE Note: During the drafting of this report, the Commission confirmed no conflicts of interest occurred related to the commitments contained in the Commissioner's ethics agreement.

**3. Complete the financial disclosure section of the ethics program directives.**

The USIBWC Ethics Program Directive is nearly complete and the Office of Legal Affairs is now developing procedures to fully implement this recommendation.

**4. Resolve State's financial disclosure role regarding the Commission and formally document each agency's responsibilities.**

Contact has already been made with Department of State Ethics Program Officials (Sharon Hardy and Sharon Andrews @ 202-647-9731) and the Office of Legal Affairs is now developing procedures to implement this recommendation.

**5. Update the annual training to meet the full regulatory requirements.**

Web-based training that is 5 CFR 2638.705(b) compliant has now been developed and the 2011 Training Plan is attached. The Office of Legal Affairs is now managing this aspect of the USIBWC Ethics Program.

**6. Clarify and formalize the relationship between the Commission and State OIG and the procedures for handling a criminal conflict of interest violation.**

The current USIBWC DAEO has a standing agreement with the Office of Inspector General at State Department, and this agreement will be reconfirmed by the Office of Legal Affairs.

OGE Suggestions:

**1. OGE strongly suggests the responsibilities of DAEO return to the Legal Affairs Office and be held at a level of authority appropriate for the position.**

Pursuant to an agency reorganization announced 2/25/2011 and implemented March 13<sup>th</sup>, 2011, the Ethics Program is now located in the Office of Legal Affairs.

**2. Establish procedures to ensure non-ethics-related issues are addressed by the appropriate personnel.**

The Office of Legal Affairs is now developing procedures to fully implement this suggestion.

**3. OGE suggests further examination of the reports available from HC regarding accessions, promotions and terminations to find the most effective mechanism for identifying changes in filing status.**

The Office of Legal Affairs is now developing procedures to fully implement this suggestion.

**4. Enhance departing employees' out-processing procedures to ensure the ethics office has an opportunity to provide post-employment counseling.**

The Office of Legal Affairs is now developing procedures to fully implement this suggestion.

**Other important matters:**

**1. "Ethics program had no dedicated budget."**

The USIBWC has recently completed a re-organization whereby the Ethics Program will now fall directly under the Office of Legal Affairs.

**2. "Internal Auditor's relatively junior position."**

The USIBWC has recently completed a re-organization whereby the Ethics Program will now fall directly under the Office of Legal Affairs.

However, the agency notes that despite the "relatively junior position" of the current DAEO, USIBWC employees appear to have high confidence in the USIBWC Ethics Program as most employees "strongly agree" or "somewhat agree" that they have confidence in the Program (87.5%).

**3. "OIG March 2005 Report of Inspection OIG which found the Internal Auditor position similarly overburdened with additional responsibilities."**

The USIBWC has recently completed a re-organization whereby the Ethics Program will now fall directly under the Office of Legal Affairs.

Thank you for the opportunity to respond to this draft report and please advise us of any follow-up questions, comments, or concerns about this response letter.