

**United States Office of Government Ethics**

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Compliance Division

# Ethics Program Review

Commission for the Preservation of  
America's Heritage Abroad

## Results in Brief

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The United States Office of Government Ethics (OGE) conducted a review of the Commission for the Preservation of America’s Heritage Abroad (the Commission) ethics program in May 2013. The Commission has had a long-standing practice of assigning the functions of the Designated Agency Ethics Official (DAEO) to a non-federal employee. This review prompted the Commission and OGE to assess this practice. As a result, OGE advised the Commission to formally appoint federal employees to the positions of DAEO and Alternate DAEO (ADAEO). The Commission has formally designated two Commission Members, who are federal employees, to serve as DAEO and ADAEO. The review also found that improvements were needed in the areas of financial disclosure and ethics education and training. The Commission resolved most of these issues prior to the issuance of this report.

### Concern

- All SGE Members must be provided required annual ethics training in 2014.

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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 ethics programs 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 of 1978, 5 U.S.C. app. § 402, and 5 C.F.R. part 2638.

To assess the Commission’s ethics program, OGE examined documents provided by the Commission. These included: the 2012 Agency Ethics Program Questionnaire, the Commission’s confidential financial disclosure reports, an agenda for the Commissioners’ meeting conducted in April 2012, and other documents. In addition, members of OGE’s Program Review Branch met with Commission ethics officials to obtain additional information,

clarify certain matters, and verify the accuracy and origin of data collected. This was OGE's first review of the Commission's ethics program.

## Background and Program Administration

The Commission was established by U.S. Public Law 99-83 in 1985. The purpose of the Commission is to help preserve and protect cemeteries, monuments, and historic buildings in Central and Eastern Europe associated with the foreign heritage of United States citizens. The law directs the Commission to identify and report on particularly endangered properties and obtain, in cooperation with the Department of State, assurances from the governments of the region that the properties will be protected and preserved. The Commission consists of 21 Members appointed by the President. The Members are all special Government employees (SGE). Of these, seven are appointed in consultation with the Speaker of the U.S. House of Representatives and seven are appointed in consultation with the President Pro Tempore of the United States Senate. The Members are appointed for three year terms, although they continue to serve until they are replaced. They are not paid for their service. The President designates the Chair of the Commission from among the Members. The Commission is to meet at least twice a year.

The Commission's Executive Director, a contract employee, has historically been assigned to administer the agency's ethics program. This is in addition to the Executive Director's other duties which include advising and assisting in the management of the Commission's programs. The Commission had never formally designated a DAEO or ADAEO prior to OGE's review. The Commission Chair, the White House and OGE have been aware that the Executive Director position is not held by a federal Government employee. As part of its review of the Commission's ethics program, OGE determined that assigning the DAEO's responsibilities to a non-federal employee contravenes the governing policy.

The head of each executive branch agency is required to formally delegate functional authority to coordinate and manage the agency's ethics program to the designated and alternate agency ethics official. (*See* 2638.202(c)) The very nature of the DAEO's duties requires the exercise of substantial discretion in the application of Government authority and/or making decisions for the Government. *See* DAEOgram DO-03-011. Based on an analysis of OMB Circular A-76, OGE concluded that there are a core set of activities that are performed by ethics officials that may not be contracted out. Below is a list of some of the activities regularly performed by ethics officials that are inherently governmental and must be performed by Government employees:

### Inherently Governmental Activities

- Providing final written or oral opinions concerning the application of the conflict of interest laws or the Standards of Ethical Conduct for Employees of the Executive Branch, including giving advice directly to Government employees;

- Serving as an “agency designee” under the Standards, e.g., approving a Government employee’s request for outside employment or authorizing an employee’s participation in a widely attended gathering;
- Certifying public and confidential financial disclosure forms;
- Referring a criminal matter to the Department of Justice (DOJ); and,
- Exercising delegated authority to grant individual waivers under 18 U.S.C. § 208 (b) (1) and (b) (3).

OGE also determined that there are some ethics-related duties that could be considered “commercial” and could be performed by contractors such as the Commission’s Executive Director. These include the following:

Commercial Activities<sup>1</sup>

- Developing and conducting training;
- Maintaining, distributing, and collecting financial disclosure reports;
- Reviewing for technical completeness (but not certifying) financial disclosure reports;
- Preparing the draft version of written ethics advice or an advisory opinion, to be issued by an ethics official who is a Government employee; and,
- Maintaining ethics program records, including notifying OGE of criminal referrals to DOJ and notifying the DAEO or OGE of administrative action taken in response to an ethics violation.

Therefore, the Executive Director can administer some aspects of the ethics program such as conducting education and training, communicating with SGEs on details of draft versions of written ethics advice, and reviewing financial disclosure reports for technical completeness. However, binding the agency to a final written opinion can only be carried out by a Government employee.

The Commission is a small executive branch agency with no full-time federal employees. OGE recognizes that the Commission’s mission, organizational structure and staff resources are limited. However, it must carry out ethics-related responsibilities that are so intimately related to the public interest that they must be performed by a Government employee. Therefore, based on consultation with OGE, the Commission formally appointed the Commission’s Chair to the

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<sup>1</sup> According to Circular A-76, a “commercial activity”, generally is a recurring service that could be performed by the private sector, and is not so intimately related to the public interest as to mandate performance by a Government employee.

position of DAEO. Another Commission Member was appointed to the position of ADAEO. Both appointments were effective September 17, 2013.

## **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. High-level Federal officials demonstrate this by disclosing publicly their personal financial interests on OGE Form 278, Executive Branch Personnel Public Financial Disclosure Report. Title I also authorizes OGE to establish a confidential financial disclosure system for less senior executive branch personnel in certain designated positions to facilitate internal agency conflict of interest reviews. OGE implements this authority by requiring the covered executive branch personnel to complete OGE Form 450, Executive Branch Confidential Financial Disclosure Report. Financial disclosure serves to prevent conflicts of interest and to identify potential conflicts by providing for a systematic review of the financial interests of both current and prospective officers and employees. The financial disclosure reports assist agencies in administering their ethics programs and in providing counseling to employees. *See* 5 C.F.R. § 2634.104(b).

### Written Procedures for the Financial Disclosure Program

Section 402(d)(1) of the Ethics in Government Act of 1978 (Ethics Act) requires executive branch agencies to develop written procedures for collecting, reviewing, evaluating, and where applicable, making publicly available financial disclosure reports filed by the agency's officers and employees. Written procedures are intended to help provide for continuity and transparency within the ethics program. Written procedures can also provide ethics officials with the opportunity to assess the agency's processes and implement improvements. The Commission did not have the required written procedures at the time of the review but subsequently created written procedures which meet applicable requirements.

### Public Financial Disclosure

At the time of the review, the Commission had no public financial disclosure filers. However, OGE reminded the Commission that, once appointed, the DAEO must file a new entrant public financial disclosure report within 30 days of the date of appointment to that position. As noted, the Commission appointed a DAEO on September 17, 2013. The DAEO's report was filed with the agency on December 5, 2013, and has been submitted to OGE.

### Confidential Financial Disclosure

Only the Commission's SGE Members are currently required to file confidential financial disclosure reports. SGE Commission Members file new entrant confidential reports when they are appointed. Each year thereafter, the Members are required to file another new entrant confidential report. OGE gives each agency the authority to establish a single filing due date for all the agency's SGEs. *See* DAEOgram DO-03-021. In February 2012, the Executive Director

sent the Commission Members a memo with an attached confidential financial disclosure report, reminding them to return their completed reports by March 28, 2012.

OGE examined all 21 new confidential reports that were required to be filed in 2012 and determined that the majority of the reports were timely submitted, reviewed, and certified. One report was filed 30 days late. It also appeared that the reports were reviewed for conflicts by the Executive Director, as evidenced by his annotations during follow-ups with the Commission Members. Technical review and follow-up with the filers is considered a recurring service commercial activity and can be carried out by the Executive Director. The 21 new entrant confidential financial disclosure reports required to be filed in 2013 were filed timely. However, the reports had not been reviewed or certified before the conclusion of OGE's onsite work in May 2013. Review and certification of the 2013 reports were delayed because OGE and the Commission had not yet resolved the issue of which ethics-related functions the Executive Director, as a non-federal employee, had authority to carry out. Once a determination was made, reports were certified by the newly designated DAEO, who is a federal employee. Delayed review and certification of financial disclosure reports puts filers at risk of inadvertently violating criminal conflict of interest statutes. Delayed identification of a conflict of interest also can compromise agency programs and result in damage to an agency's reputation. Since OGE believes the issues that caused the delayed certification of reports have been resolved, no recommendations regarding this matter are warranted at this time.

## **Education and Training**

The Commission's education and training program generally complied with the requirements found at subpart G of 5 C.F.R. 2638, with the exception of the development of an annual training plan. The Commission provided the OGE review team with materials used for the 2012 initial ethics orientation and annual ethics training.

### Initial Ethics Orientation

In accordance with 5 C.F.R § 2638.703, agencies must provide new employees with an initial ethics (IEO) orientation that includes the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards), any agency supplemental standards, contact information for the agency's ethics officials, and one hour to review the materials. This training must be provided within 90 days of an employee's entry on duty. IEO is an important introduction to ethics-related rules that serves to educate employees regarding the standards of conduct to which they will be held accountable.

In 2012, when a new SGE was appointed, the Executive Director provided a verbal IEO ethics presentation to the new employee. The orientation was provided within 90 days of the SGE's entry on duty. The Executive Director provided OGE with IEO training materials which met applicable requirements. As noted in the previously referenced DAEOgram, DO-03-011, developing and conducting ethics training may be considered commercial activities and may be provided by a non-federal employee. The Commission had no new employees in 2013 as of the time of OGE's review.

## Annual Ethics Training

Executive agencies are required by 5 C.F.R. § 2638.704 and 5 C.F.R. § 2638.705 to provide covered employees with annual ethics training. The training must include a review of the Principles, the Standards, any agency supplemental standards, the federal conflict of interest statutes, and the names, titles, office address, and telephone numbers of the DAEO and other agency ethics officials available to advise employee on ethics issues. Ethics programs are also required to develop an annual ethics training plan each calendar year. (*See* 5 C.F.R. § 2638.706). Annual ethics training is a vital component of an agency's ethics program and is intended to assist employees in carrying out their official responsibilities in a manner consistent with ethics-related statutes and regulations. Additionally, annual training helps to prevent violations and maintain the public's confidence that Government officials act impartially and free of conflicts of interest.

Annual ethics training was provided to Commission Members and agency contractors who attended an agency meeting in April 2012. According to the Executive Director, he provided OGE's presentation *Get Advice or Pay the Price* along with a handout addressing the 14 Principles of Ethical Conduct, and the OGE pamphlet *A Brief Wrap on Ethics* to meet the annual training requirements. The Executive Director provided a list of the Members in attendance. All but two Members received annual ethics training. One Member could not attend training due to illness. The second Member did not attend the meeting and there was no other opportunity to provide the training. Commission Members did not receive required annual ethics training in 2013. The agency explained this occurred because of the confusion surrounding the issue of which ethics-related functions the Executive Director, as a non-federal employee, had authority to carry out. As noted, that issue has been resolved. The Executive Director advised OGE that the Commission did not have an annual ethics training plan for either 2012 or 2013. The Executive Director did provide the OGE review team with an annual ethics training plan for 2014.

## Recommendation

- Ensure all SGE Members receive required annual ethics training in 2014.

## **Advice and Counsel**

The DAEO is required to ensure that a counseling program for agency employees concerning all 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 Executive Director explained to the review team that he alone gave ethics advice to Commission Members and that ethics questions came to him by email and phone. The two ethics subjects that he receives the most questions about are potential conflicts of interest related to the Commission Members' outside employment and travel. The Executive Director provided

three examples of written advice he provided to SGEs in 2011. As stated in DO-03-011, providing final written or oral opinions concerning the application of conflict of interest laws or the Standards, including giving advice directly to Government employees is considered an inherently Governmental activity. Therefore, this function must be performed by Government employees only. The Executive Director may prepare a draft version of written ethics advice, but the final agency response can only be delivered by a Government employee.

## **Enforcement**

The Commission reported no disciplinary actions based wholly or in part upon violations of the Standards (5 CFR part 2635) in 2011 or 2012. The Commission also 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).

The Commission does not have an Office of the Inspector General (OIG) or its equivalent. According to the Executive Director, the Commission Chair did once seek assistance from an outside OIG to conduct an investigation which was unrelated to conduct governed by ethics-related statutes and regulations. The Chair was unsuccessful in obtaining assistance. Subsequently, the Commission entered into a relationship with the General Services Administration's Inspector General. This relationship should facilitate the Commission's response to any future ethics violations. As a contractor, the Executive Director could concurrently notify OGE of criminal referrals to DOJ and notify the Commission's DAEO or OGE of administrative action taken in response to an ethics violation. *See* DO-03-011.

## **1353 Travel Acceptances**

The Commission permits its employees to accept payments from non-federal sources for travel, subsistence, and related expenses incurred on official travel under the authority of the General Services Administration (GSA) regulation at 41 C.F.R. Chapter 304, implementing 31 U.S.C. § 1353. Semiannual reports of payments accepted under 31 U.S.C. § 1353 must be submitted to OGE by May 31 and November 30 of each year.

OGE received the three required reports from October 1, 2011 – March 31, 2013 covering the period covered by OGE's review.

## **Agency Comments**

The Commission was given the opportunity to review a draft version of this report. The agency's comments were incorporated into this report.