

Ethics Program Review

United States Department of Energy

Report No. 17-15
March 2017



The United States Office of Government Ethics (OGE) conducted a review of the United States Department of Energy (DOE) ethics program from June through August 2016. The review focused on data covering calendar year 2015.

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Objectives and Methodology

Objectives: OGE provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive agency ethics programs.¹ OGE uses this evaluation authority to conduct reviews of agency ethics programs. 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.

Methodology: To assess DOE’s ethics program, OGE examined a variety of documents including DOE’s response to OGE’s 2015 Annual Agency Ethics Program Questionnaire, written procedures for administering the program, samples of the public and confidential financial disclosure reports filed in 2015, ethics training materials, and a sample of the ethics advice and counseling provided to employees. OGE also met with agency officials to clarify the information gathered, follow up on issues identified during the review, and discuss ethics program operations in further detail.

Agency Background

The Department of Energy Organization Act of 1977 created DOE, which is led by the Presidentially appointed, Senate-confirmed (PAS) Secretary of Energy. The Department’s mission is to address the nation’s energy, environmental, and nuclear challenges through science and technology solutions.

¹ See title IV of the Ethics in Government Act, 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.

Program Administration

The DOE ethics program is headquartered within the DOE Office of the General Counsel and is led by the Assistant General Counsel for General Law, who serves as the Designated Agency Ethics Official (DAEO). The day-to-day administration of the program is carried out by approximately 90 ethics officials throughout the department who provide ethics services to personnel at headquarters and at 27 field locations.

The headquarters ethics office, in addition to providing ethics services to headquarters employees and maintaining oversight of ethics officials at field locations, reviews and certifies all public financial disclosure reports and provides advice and counseling to PAS employees. It also provides concurrence to ethics officials at field locations on matters such as conflict of interest waivers,² some impartiality determinations,³ and disciplinary actions related to violations of ethics provisions.

Ethics officials at DOE field locations provide ethics services to their respective field office employees. Ethics officials at field locations are responsible for collecting, reviewing, and certifying confidential financial disclosure reports, conducting training, and providing advice and counseling. This includes drafting conflict of interest waivers and impartiality determinations for concurrence from the headquarters ethics office.

Financial Disclosure

Title I of the Ethics in Government Act requires that agencies administer public and confidential financial disclosure systems. 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 process also offers an opportunity for ethics officials to provide ethics-related counseling to report filers.

Public Financial Disclosure

DOE's public financial disclosure system is centralized. The headquarters ethics office is responsible for reviewing and certifying all public reports filed by employees department-wide.

DOE has established a process to ensure the timely collection of new entrant public financial disclosure reports. In order to collect these reports, the headquarters ethics office receives notices of new hires from the Office of Human Capital (human resources) prior to the new hires' entrance on duty. The headquarters ethics office then notifies a new employee entering a covered public filing position of the requirement to file a public financial disclosure report. As a result of receiving the advance notices of new hires from human resources, headquarters ethics officials stated that they are typically able to review a new entrant public financial disclosure report before the filer enters the covered filing position.

²See 18 U.S.C. § 208(b).

³See 5 C.F.R. § 2635.502.

The headquarters ethics office is also responsible for notifying annual public filers of the requirement to file. These notifications are made using a master list of filers that is maintained by the headquarters ethics office.

Finally, the headquarters ethics office is responsible for collecting termination reports from covered departing employees. To facilitate this process, DOE requires all departing employees to complete a check-out list, which includes a meeting with the ethics office. During the check-out meeting, the ethics office notifies the departing employee of the requirement to file a termination report. The headquarters ethics also reminds employees of the requirement for departing public filers to file termination reports during annual ethics training.

In 2015, DOE had 735 non-PAS public filers. To evaluate the timeliness of public financial disclosure filing and certification, OGE examined a sample of 40 new entrant, 40 annual, and 40 termination non-PAS public reports that were required to be filed with the headquarters ethics office in 2015. Table 1 below presents the results of OGE’s examination.

Table 1. Examination of DOE’s Public Financial Disclosure Reports

| | New Entrant | Annual | Termination | Total |
|----------------------------|--------------------|---------------|--------------------|--------------|
| 278 Reports Sampled | 40 | 40 | 40 | 120 |
| Filed Timely | 34 (85%) | 40 (100%) | 35 (88%) | 109 (91%) |
| Certified Timely | 39 (98%) | 36 (90%) | 35 (88%) | 110 (92%) |

OGE found that the sampled DOE public financial disclosure reports were generally filed and certified timely.⁴ OGE also noted that headquarters ethics officials followed up with filers as necessary during their review of the reports to clarify or correct certain information.

Further, the headquarters ethics office provided training and guidance to employees during DOE’s transition to Integrity in 2015. To support this effort, the ethics office also entered information covering over 700 reports into Integrity.

In accordance with the STOCK Act, employees in positions requiring public financial disclosure are also required to file periodic transaction reports. In these reports, filers disclose purchases, sales or exchanges of stocks, bonds, commodities futures or other forms of securities when the transaction amount exceeds \$1,000. OGE’s review of a sample of financial disclosure reports indicated that periodic transactions reports were being filed as required.

Confidential Financial Disclosure

DOE’s confidential financial disclosure system is decentralized. Headquarters filers submit their reports to the headquarters ethics office while field employees submit their reports to their assigned field office ethics officials.

⁴ Although four reports of the total 11 late filings were submitted more than 30 days late, the DAEO waived the late filing fee in each case. The remaining seven late filings were submitted within the late filing fee grace period.

Ethics officials throughout DOE follow guidance contained in a directive that is periodically reviewed and updated by the DAEO to properly designate confidential filing positions. Using this guidance, ethics officials identify new employees entering covered confidential filing positions by accessing the DOE payroll system at the beginning of each week. Once identified, ethics officials then notify the new employees of the requirement to file.

Headquarters ethics officials also maintain a master list of confidential filers using the DOE payroll system that is updated annually and used to notify filers of the requirement to file an annual report. The master list covers confidential filers DOE-wide, with the exception of one component. This component has chosen to separately maintain its list of filers, but follows similar procedures for updating the list and notifying filers of the filing requirement.

In 2015, more than 7,300 confidential financial disclosure reports were required to be filed at DOE. To evaluate the timeliness of confidential financial disclosure filing and certification, OGE examined a sample of 50 new entrant and 50 annual reports that were required to be filed in 2015 DOE-wide. Table 2 below presents the results of OGE’s examination.

Table 2. Examination of DOE’s Confidential Financial Disclosure Reports

| | New Entrant | | Annual | | Total | |
|----------------------------|-------------|-------|--------|-------|-------|-------|
| 450 Reports Sampled | 50 | | 50 | | 100 | |
| Filed Timely | 26 | (52%) | 44 | (88%) | 70 | (70%) |
| Certified Timely | 37 | (74%) | 45 | (90%) | 82 | (82%) |

While the sample of annual reports OGE examined were generally filed and certified timely, the following two issues significantly affected the filing timeliness of new entrant reports: (1) A lag in time between employees entering on duty and being entered into the payroll system, and (2) one component providing an inappropriate across-the-board filing extension to all new entrant filers.

1. Regarding the first issue, as noted above, the headquarters ethics office relies upon DOE’s human resources offices to add new filers into the payroll system in order to identify new filers and notify them of the requirement to file. However, during OGE’s review, DOE ethics officials reported that a new employee is not always entered into the payroll system immediately upon being hired, but rather added as part of a batch new employees near the end of a pay period. Due to this routine lag, an ethics official may not become aware of the new filer until late in a pay period. OGE determined that 11 of 24 (45%) reports identified as late within the new entrant sample were due to such lags.
2. Regarding the second issue, 8 of the 24 late new entrant reports OGE identified were attributable to a single DOE component. In 2015, the component’s ethics official unilaterally provided new entrants with filing extensions until the annual report due date. To address this issue, OGE was informed that this official no longer performs ethics duties at the component and the current ethics officials at the component have been prohibited from using this practice. Additionally, DOE has updated its confidential financial disclosure written procedures to provide detailed instructions on granting filing

extensions and to clarify that the authority to provide extensions beyond 45 days rests exclusively with the DAEO or a designee. Based on actions by DOE to address the cause of the late filings and certifications at this component, OGE is not issuing a separate recommendation on this matter.

Recommendation

- Improve the filing timeliness of new entrant confidential reports by developing strategies to address the lag in time between employees entering into covered confidential filing positions and being entered into the DOE payroll system.

Education and Training

An ethics training program is essential to raising awareness among employees about the ethics laws and rules that apply to them and informing them of agency ethics officials' availability to provide ethics counseling. Each agency's ethics training program is required to include at least an initial ethics orientation for all new employees and annual ethics training for covered employees.⁵

Prior to January 1, 2017, to meet initial ethics orientation requirements, all new agency employees must receive ethics official contact information along with the following material within 90 days of beginning work: (1) the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) and any agency supplemental standards of conduct to keep or review; or (2) summaries of the Standards of Conduct, any agency supplemental standards of conduct, and the 14 Principles of Ethical Conduct (Principles) to keep. Employees must receive one hour of official duty time to review the material.⁶

To meet the annual ethics training requirements, covered employees must receive annual training consisting of a review of: (1) the Principles; (2) the Standards of Conduct; (3) any agency supplemental standards of conduct; (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.⁷

Initial Ethics Orientation

The human resources offices at DOE headquarters and either human resources or counsel at the field locations provide all new DOE employees with a copy of the Principles, the Standards of Conduct, and DOE's supplemental standards of conduct with the offer letters that are sent to new employees prior to their beginning work at the department. This process ensures that all employees receive the required initial ethics orientation in a timely manner.

⁵ See 5 C.F.R. §§ 2638.704 and 705 for definition of covered employees.

⁶ See 5 C.F.R. § 2638.703.

⁷ See 5 C.F.R. §§ 2638.704 and 705.

Annual Ethics Training

Public financial disclosure report filers at DOE receive live annual ethics training. Other covered employees, such as and confidential financial disclosure report filers, complete online training; however, supervisors at HQ and many field offices who complete the OGE 450 also attend in-person live annual ethics training.

Annual Training for Public Filers

DOE used three versions of live training in 2015 to train public filers. The majority of these filers were trained by the headquarters ethics office. However, two DOE components conducted their own training customized to cover the unique situations typically encountered by component employees.

OGE's review of the training content indicated that two of the three versions of annual training met content requirements, Nevertheless, one version of the training did not fully address the Standards of Conduct or the criminal conflicts of interest statutes in their entirety, and also omitted ethics officials' contact information.

OGE's review of DOE training records indicated that 99% of public filers received annual ethics training in 2015.

Annual Training for Confidential Filers and Other Covered Employees

Confidential filers and other covered employees at DOE receive online training. The online training begins with a recorded introduction from the Secretary of Energy, who emphasizes the importance of ethical conduct. The bulk of the training then focuses on conflicts of interest, misuse of position, invitations from outside sources, and participation in outside organizations. However, the training fails to address the criminal conflict of interest statute that covers post-employment, but otherwise meets the annual training requirements.

OGE's review of DOE training records indicates that 100% of confidential filers and other covered employees received annual ethics training in 2015.

In addition to providing initial ethics training to new employees and annual ethics trainings, DOE held specialized trainings at headquarters throughout the year. For example, the ethics team provided quarterly training to new supervisors and new members of the Senior Executive Service, training on seeking employment and post-employment restrictions at the mid-career retirement sessions, and training throughout the year to individual offices on various ethics topics. Many field ethics practitioners also provide training beyond the regulatory requirement.

Recommendation

- Amend annual ethics training content to fully meet OGE regulatory requirements.

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. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program.⁸

DOE's headquarters ethics office provides advice and counseling to headquarters employees, as well as any needed advice on financial conflicts of interest and outside activities for all public financial disclosure reports, irrespective of their duty location. The headquarters ethics office also concurs on all conflict of interest waivers and on outside activity approvals for non-career public filers, and provides advices on all required divestitures. Field location ethics officials provide advice and counseling to employees stationed at field locations, with the exception of the aforementioned services that are provided solely by the headquarters ethics officials.

Requests for advice are received by headquarters and field ethics officials via email, in-person, or by phone. Advice on significant issues is memorialized and stored electronically.

DOE estimated that headquarters and field ethics officials received and responded to over 14,000 formal and informal requests for advice in 2015. OGE reviewed a sample of the written advice and determined that the guidance was provided in a timely manner and appeared to be consistent with applicable laws and regulations. The sample covered a broad range of ethics topics including financial conflicts of interest, impartiality, misuse of position, post-employment, gifts, and outside activities.

Agency-Specific Ethics Rules

An agency may modify or supplement the Standards of Conduct, with the concurrence of OGE, to meet the particular needs of that agency.⁹ A supplemental standards of conduct regulation is issued jointly by the agency and OGE and is published in title 5 of the Code of Federal Regulations.

DOE's supplemental Standards of Conduct regulation requires that an employee, other than a special Government employee, must obtain written approval from the employee's supervisor and ethics counselor prior to engaging in certain outside employment.¹⁰ Approvals are not required to participate in the activities of a nonprofit, charitable, religious, public service or civic organization, unless such activities involve the provision of professional services or are for compensation. The regulation also specifies that approvals shall be granted unless there is a

⁸ See 5 C.F.R. §§ 2638.203 and .204.

⁹ See Executive Order 12674, as implemented by 5 C.F.R. § 2635.105.

¹⁰ See 5 C.F.R. part 3301.

determination that the outside employment is expected to involve conduct prohibited by statute or federal regulation.

OGE's examination of a sample of outside employment requests made by DOE employees indicated that approval and denials of the requests were properly supported and documented. Additionally, OGE determined from its examination of the outside activities listed in a sample of financial disclosure reports that the activities either received the required approval or were of a nature such that approval was not required.

Conflict Remedies

The criminal conflict of interest law prohibits an employee from participating in an official capacity in a particular matter in which he or she has a financial interest.¹¹ Congress included two provisions that permit an agency to issue a waiver of this prohibition in individual cases. Agencies must consult with OGE, where practicable, prior to issuing such a waiver.¹²

In 2015, DOE issued five waivers for regular employees and five waivers for special Government employees. DOE consulted with OGE on each of the waivers and provided OGE with final copies, as required.

Additionally, the Ethics in Government Act expressly recognizes the need for PAS nominees to address actual or apparent conflicts of interest by requiring written notice of the specific actions to be taken to alleviate the conflict of interest,¹³ commonly known as an "ethics agreement". Attorneys at DOE's headquarters ethics office ensure that PAS nominees understand the terms set forth in their ethics agreements by discussing the terms with them during the nomination process. Attorneys use the nominee process to develop a rapport with PAS employees so they are comfortable seeking assistance with ethics issues.

Two PAS nominees were confirmed in 2015. According to OGE's assessment, both appointees complied with their ethics agreements in a timely manner and DOE notified OGE of their compliance within the required timeframe.

Enforcement

In 2015, DOE reported no disciplinary actions based wholly or in part upon violations of the criminal conflict of interest statutes¹⁴ and 16 disciplinary actions based wholly or in part upon violations of the Standards of Conduct. The disciplinary actions ranged from letters of reprimand to a 60-day suspension.

DOE's Office of Inspector General is responsible for referring DOE employees to the Department of Justice (DOJ) and concurrently notifying OGE for potentially violating the conflict of interest statutes. DOE reported that two employees were referred to DOJ in 2015, but

¹¹ See 18 U.S.C. § 208.

¹² See Executive Order 12674.

¹³ See 5 U.S.C. app. § 110.

¹⁴ See 18 U.S.C. §§ 203, 205, 207, 208, and 209.

OGE was only concurrently notified of one referral. During the course of OGE’s review, DOE provided the second referral.

Recommendation

- Ensure OGE is concurrently notified of any referrals made to the Department of Justice involving alleged violations of the criminal conflict of interest statutes.

Special Government Employees

A special Government employee (SGE) is an officer or employee of the executive or legislative branch retained, designated, appointed or employed to perform official duties, full-time or intermittently, for not more than 130 days in any 365-day period.¹⁵

Expert and Consult SGE Financial Disclosure

SGEs typically serve on agency advisory boards or commissions, but a very small number of SGEs act as experts and consultants. SGEs are typically required to file public or confidential financial disclosure reports. Four non-advisory committee SGEs were required to file public financial disclosure reports in 2015. Table 3 presents the results of OGE’s examination of their reports:

Table 3. Examination of DOE’s SGE Public Financial Disclosure Reports

| | New Entrant | | Annual | | Termination | |
|--------------------------|-------------|--------|--------|--------|-------------|--------|
| 278 Reports Filed | 1 | | 1 | | 3 | |
| Filed Timely | 1 | (100%) | 1 | (100%) | 3 | (100%) |
| Certified Timely | 1 | (100%) | 1 | (100%) | 3 | (100%) |

As illustrated in Table 3 above, OGE found that the DOE SGE public financial disclosure reports were all filed and certified timely.

Advisory Committee SGE Financial Disclosure

In 2015, 169 SGEs served on 21 advisory committees at DOE. All SGEs who serve on DOE advisory committees are required to file confidential financial disclosure reports.¹⁶ SGEs on an advisory committee do not file annual confidential reports. Instead, each SGE is required to file a new entrant report each year upon their re-appointment or re-designation as an SGE for a new 365-day period. To evaluate the timeliness of SGE confidential financial disclosure report filing and certification, OGE reviewed a sample of reports for three of the 21 committees: the Defense Programs Advisory Committee (DPAC), the Biological and Environmental Research

¹⁵ See 18 U.S.C. § 202(a).

¹⁶ As allowed by 5 C.F.R. § 2634.905(a), DOE SGEs who serve on advisory committees file OGE-approved alternative confidential financial disclosure forms. The alternative form requires disclosure only of interests with the potential to be affected by policy deliberations likely to come before an SGE’s advisory committee.

and Advisory Committee (BERAC), and the Nuclear Science Advisory Committee (NSAC). Table 4 below presents the results of OGE’s review:

Table 4. Examination of DOE’s SGE Confidential Financial Disclosure Reports

| | | |
|----------------------------|----|-------|
| 450 Reports Sampled | 31 | |
| Filed Timely | 28 | (90%) |
| Certified Timely | 1 | (3%) |

OGE found that the sample of confidential reports was generally filed timely, but not certified timely. It is DOE practice to confer with each committee’s Designated Federal Officer (DFO) prior to certification to understand the nature of the matters before the committees, identify each committee’s universe of conflicts, and address any potential conflicting financial interests or relationships held by advisory committee members. This effort was initiated within 60 days of the time the reports were received for 77% of the filers. Nevertheless, 97% of the reports sampled were not certified timely, i.e., within 60 days of receipt. While the reports were not certified timely, OGE does note that 9 reports were certified less than 10 days beyond the 60 day certification deadline.

Recommendation

- Ensure SGE confidential financial disclosure reports are certified within 60 days of their receipt when the reports do not require additional information or remedial action.

SGE Training

All SGEs at DOE receive initial ethics orientation from an ethics official on the day they are sworn in. This policy ensures that all SGEs receive initial ethics orientation within the required period. OGE’s review of the initial ethics orientation material provided to DOE SGEs found that the material fully meets the content requirements.

In 2015, the DOE headquarters ethics office provided annual training to all 169 SGEs that served on advisory committees. In addition, OGE found that both expert/consultant SGEs required to file public financial disclosure reports received training. The annual training DOE provided to SGEs met content requirements.

Agency Comments

DOE’s comments in response to this report are attached as a separate letter below



Department of Energy
Washington, DC 20585

The Honorable Walter M. Shaub, Jr.
Director
Office of Government Ethics
1201 New York Ave., N.W.
Suite 500
Washington, D.C. 20005

MAR 06 2017

Dear Mr. Shaub,

We appreciate the opportunity to review and comment on the U.S. Office of Government Ethics (OGE) Ethics Program Review Report for the U.S. Department of Energy (DOE) covering calendar year 2015. We appreciate the time your team dedicated to this review.

DOE is firmly committed to maintaining a strong culture of ethics, and we have a dedicated, talented ethics team that leads this effort with the support of DOE senior leadership. We have taken measures to implement the recommendations in your report. We are proud of the work that ethics practitioners perform to ensure the integrity of DOE's programs. This is attributed, in part, to maintaining a robust training and guidance program. Ethics training is a significant focus of DOE's ethics program and DOE is committed to ensuring employees at all levels are furnished with information related to the criminal ethics statutes and regulations. While the 2015 on-line ethics training did not include detailed information regarding 18 U.S.C. 207, the 2015 ethics training meets current requirements provided in the revision of 5 C.F.R. Part 2638. We will ensure ethics training meets all requirements set forth in regulation.

As the report notes, DOE faces some challenges with respect to new employee confidential financial disclosure reports and financial disclosure reports filed by Federal advisory committee members. As noted in your report, we relied on the payroll system to identify which employees were required to complete a new entrant confidential financial disclosure report. Employees were often entered into the payroll system almost two weeks after they begun working at the Department which significantly contributed to confidential financial disclosure reports being filed past the 30 day requirement. As a result of the revision to 5 C.F.R. Part 2638, employees are now made aware in their offer letters of whether they file a confidential or public financial disclosure report. We recently coordinated the Office of Human Capital so that ethics practitioners are notified earlier of new hires who will be confidential financial disclosure report filers. We believe that this new process will address the timeliness with which we receive confidential financial disclosure reports from new entrant employees.

In addition, steps have been taken to ensure confidential financial disclosure reports submitted by Federal advisory committee members are reviewed and certified in a timely manner. Moving forward, ethics team members will continue to work with Designated Federal Officers (DFOs) in

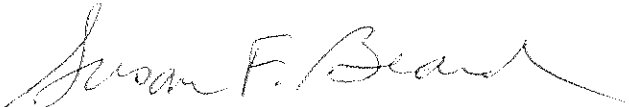


the manner described in the report, however, they will certify the report earlier in this process. Ethics attorneys will continue to communicate with the DFOs to ensure the integrity of their conflicts analysis of the work performed by members of the Federal advisory committees.

Lastly, the Office of Inspector General (OIG) acknowledges and takes seriously its responsibility to report Department of Justice referrals for possible violations of conflict of interest statutes. The missing notification, revealed as a result of OIG's accurate annual report, was submitted as soon as the oversight was discovered. The OIG has issued reminders to all agents and supervisors regarding this requirement and is currently exploring the feasibility of an automated notification in their electronic case management system to avert a recurrence. In the meantime, as an added control, the OIG will review all Federal Referrals as part of the semi-annual reporting process to ensure the appropriate notifications has been provided to OGE.

As noted, we have already begun implementation of the recommendations and are using this report as an opportunity to focus on the continued growth and strengthening of DOE's ethics program. We appreciate OGE's commitment to supporting DOE's ethics program.

Sincerely,

A handwritten signature in cursive script that reads "Susan F. Beard". The signature is written in dark ink and is positioned above the printed name.

Susan F. Beard
Designated Agency Ethics Official
Assistant General Counsel for General Law