



United States Office
Of Government Ethics

Ethics Program Review

Federal Highway Administration

July 2010 Report

Introduction

OBJECTIVE, SCOPE, AND METHODOLOGY

As part of the Office of Government Ethics' (OGE) monitoring activities, OGE conducted a focused review of the financial disclosure program administered at the Federal Highway Administration (FHWA), United States Department of Transportation (DOT). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978 (Ethics Act), as amended. OGE's primary objective was to determine the financial disclosure program's compliance with applicable ethics laws and regulations. OGE also evaluated processes and procedures to assess the strengths and weaknesses of FHWA's financial disclosure system and its impact on the agency's ability to prevent and detect ethics violations through the use of financial disclosure reports.

To meet this objective, OGE's review was limited to the examination of the public and confidential financial disclosure reports that were required to be filed at FHWA in 2009, covering calendar year 2008. Based on OGE's observation of FHWA's master list of financial disclosure filers, OGE examined 46 public financial disclosure reports and 400 confidential financial disclosure reports. The 46 public reports consisted of 38 incumbent reports and 8 new entrant reports.¹ The 400 confidential reports consisted of 287 OGE Form 450 reports, 93 Optional OGE Form 450-A (OGE Form 450-A), and 20 new entrant reports. OGE examined the reports to determine whether reports were filed, reviewed, and certified timely. OGE's on-site fieldwork for this review was conducted in November 2009.

¹OGE did not examine the public reports filed by the FHWA Administrator, Deputy Administrator, and Chief Counsel as these reports are reviewed and certified by DOT's Designated Agency Ethics Official (DAEO).

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RESULTS IN BRIEF

In our last review of FHWA's ethics program conducted in March 1997, several recommendations were made for improvement in the areas of financial disclosure and ethics training. Specifically, OGE recommended that FHWA take the following action: (1) collect missing public reports and collect late filing fees unless filers request and obtain waivers from OGE; (2) conduct a final review and certify public reports in a timely manner; (3) ensure that new entrant and annual confidential are filed in a timely manner; (4) conduct a final review and certify confidential reports in a timely manner; (5) ensure that new employees are provided initial ethics orientation within 90 days of entering position and (6) monitor the status of confidential financial disclosure systems for Special Government Employees (SGE) assigned to advisory committees to ensure that initial ethics training and subsequent training and counseling are provided to SGEs.

In our current examination, OGE found FHWA's financial disclosure program much improved since our last review and to generally accord with statutory and regulatory requirements. However, several issues were identified during our examination that were brought to the attention of ethics officials. First, OGE found the timeliness of new entrant confidential filing to remain a challenge. Therefore, OGE is recommending that FHWA continually monitor and improve its new entrant confidential filing process to ensure timeliness of filing. Second, although FHWA's written procedures were found to generally comply with the requirements of the Ethics Act, OGE identified areas where they could be strengthened. Thus, OGE recommends that the Ethics Office modify these procedures to ensure compliance with the Ethics Act. Third, several technical errors were also identified during our examination of both public and confidential reports. Based on assurances received from the Ethics Office, OGE is making no formal recommendations but is making suggestions for improvement regarding these matters.

BACKGROUND AND ETHICS PROGRAM STRUCTURE

Under the direction of the FHWA Administrator, a Presidentially appointed and Senate confirmed appointee, FHWA is charged with the broad responsibility of ensuring that America's roads and highways continue to be the safest and most technologically up-to-date. Headquartered in Washington, DC, FHWA is comprised of a workforce of over 2,000 employees located within its headquarters office and throughout its field offices in every State and Puerto Rico.

The ethics program at FHWA is located within the Office of the Chief Counsel, hereafter referred to as the Ethics Office. The Deputy Chief Counsel serves as the administration's Deputy Ethics Official (DEO) and has oversight responsibility for the overall ethics program. The day-to-day management of FHWA's ethics program is carried out under the direction a Senior Attorney, hereafter referred to as FHWA's primary ethics official, who serves the program as a collateral duty. Assisting the primary ethics official is an attorney-advisor who supports the ethics program in varying capacities also as a collateral duty.

The Ethics Office also utilizes the support of the Assistant Chief Counsels (and their staffs) within the field offices to help provide ethics training and advice and counseling services

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to field-based employees and to assist in the management of the confidential system for filers within the FHWA field offices.

PRINCIPAL FINDINGS

Recommendation: Improve The Timeliness Of New Entrant Confidential Filing

A new entrant confidential report must be submitted no later than 30 days after a filer enters a position or office that requires the filing of a financial disclosure report. *See* 5 CFR § 2634.903(b). Of the 20 new entrant confidential reports OGE examined, 10 were filed late. The Ethics Office acknowledged having difficulties identifying new entrant filers, particularly those employees who are not new to the agency but have been assigned new duties and thus are now required to file a confidential report. According to FHWA ethics officials, most of the new entrant identification difficulty arises from employees who are assigned as a Contracting Officer's Technical Representative (COTR) as a collateral duty. Although the Ethics Office relies on Human Resources and the Procurement Division to assist them in identifying employees who have new COTR duties, notification of these employees are not being the Ethics Office does not receive consistent and timely.

Beyond the need to comply with the regulatory requirement that new entrant reports are to be filed within 30 days, timely filing of new entrant reports ensure that ethics officials can quickly determine whether conflicts of interest exist and, if so, take prompt remedial action. Timely action is particularly important since COTRs are involved in contracting and procurement--two areas that pose high risks. Therefore, OGE recommends that the DEO implement corrective action to ensure that new entrant reports are filed timely. Of course, the corrective action will require increased coordination with HR. In discussions with ethics officials, OGE suggested that COTR employees could be provided an OGE Form 450 during the COTR training and that the Ethics Office could send out emails quarterly to all managers reminding them of the filing requirement and requesting the names of any employees who had been assigned COTR responsibilities within the past quarter.

Recommendation: Modify Written Procedures

The Ethics Act requires the DAEO to develop DOT-wide written procedures that provide the overall framework for administering both the public and confidential financial disclosure systems. While written procedures have been developed, OGE found that they did not cover the operations of the DOT component systems. Therefore, each operating administration within DOT is required to document how they collect, review, certify, and maintain financial disclosure reports. Although FHWA's written procedures were found to generally comply with the requirements of the Ethics Act, OGE identified areas where they could be strengthened. For example, the written procedures did not address the process for requesting and granting individual filing extensions, the process for collecting the \$200 late filing fee and requesting waivers of the \$200 late filing fee (for public reports only), or the process for remedying possible violations when they are found. As a result, OGE recommends that the Ethics Office modify these procedures to more fully comply with the prescribed requirement. Should significant

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changes to FHWA's financial disclosure system occur in the future, these procedures should be updated to reflect those changes.

In view of the importance of having a succession plan to help maintain the consistent administration of an ethics program, OGE also encourages the Ethics Office to develop written procedures that reflect the current practices for administering other elements of FHWA's ethics program as well. OGE considers an agency's use of individualized written procedures to be a model agency practice and a valuable resource to both employees and ethics officials.

TECHNICAL ISSUES IDENTIFIED

In addition to the findings noted above, OGE also identified several technical issues during its examination of both public and confidential reports that the Ethics Office must be mindful of during future filing cycles. Based on assurances received from the Ethics Office, OGE is making no formal recommendations for improvement regarding these matters.

Ensure That The Agency Date Of Receipt Stamp Is Consistently Provided On All Reports

Dates of receipt must be entered on each report to help assess compliance with the filing due date and 60-day review requirements. *See* 5 CFR § 2634.903(b). During the review of both public and confidential reports, OGE noticed that dates of receipt were not consistently stamped on all reports. Therefore, in cases where the agency date stamp was not used OGE based filing timeliness on the filers' signature dates. Using this method, OGE confirmed that all reports were filed timely. OGE reminds the Ethics Office that a financial disclosure report is considered filed when the agency receives it. Therefore, the agency date of receipt stamp is critical in determining timeliness of filing and review. OGE was assured that this would become routine practice during future filing cycles.

Ensure That OGE Form 450-As Are Properly Filed

The OGE Form 450-A may be used by an incumbent filer in lieu of the OGE Form 450 if the filer can certify that his/her spouse or dependent children have not acquired new reportable interests and that the filer has not had a significant change in duties or change of position description assignment. *See* 5 CFR § 2634.905(b). This form may be used for a maximum of 3 consecutive years. However, each presidential election year all employees in designated positions must file the OGE Form 450. Of the 93 OGE Form 450-As that OGE examined, 7 had an accompanying OGE Form 450 that was filed more than 3 years ago. As a result, OGE suggested that these 7 employees file the complete OGE Form 450 in 2010. OGE also suggested that the Ethics Office develop a process to ensure that the OGE Form 450-A is used based on the requirements described in 5 CFR § 2634.905(b).

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Ensure That Intermediate Reviews Are Conducted Prior to Confidential Reports Being Certified

OGE noticed a limited number of confidential reports that appeared to have been certified before the intermediate review by supervisors had been conducted. In these cases, the confidential report had been submitted to the Ethics Office without the supervisor providing the intermediate review. Prior to sending the report back to the supervisor the Ethics Office reviewed and signed the report. Reports should not be certified until the review is completed so that there is assurance that no conflict of interest exists. Therefore, OGE suggests that the Ethics Office develop a tracking system that would show the progress of a report. If unreviewed but certified reports are found, then OGE also suggests that the certification signature be removed and the report returned to the supervisor for review.

RECOMMENDATIONS

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 FHWA take timely and effective action to resolve the following recommendations. These recommendations are considered necessary to bring FHWA's financial disclosure program into minimum compliance with current OGE regulations.

OGE recommends that FHWA take the following actions:

1. Improve timeliness in new entrant confidential filing.
2. Modify FHWA's written procedures for administering both its public and confidential financial disclosure systems.

AGENCY COMMENTS

A draft of this report was provided to FHWA for its review and comment. In a memorandum dated April 22, 2010, the DEO provided comment on the corrective actions that FHWA either has taken or plans to take to address both these recommendations. OGE will review the status of FHWA's progress in addressing these recommendations as part of a brief follow-up review that will be scheduled within six months from the date of this report.

Here, we provide a summary of FHWA's comments from the draft report.

In response to our first recommendation, the DEO indicated that the Ethics Office plans to work more closely with the Office of Human Resources to help identify new employees who must file a confidential report. In addition, to help ensure the timely identification of employees who have been assigned new COTR duties, the Ethics Office will also begin to work more closely with FHWA's Acquisitions Office which conducts mandatory COTR training. Doing so will allow the Ethics Office to develop a tracking system that identifies new COTRs as they receive their contracting-related responsibilities and help the Ethics Office request a financial disclosure report from these filers as soon as they assume their responsibilities.

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In response to our second recommendation, the DEO indicated that the Ethics Office was in the process of developing more detailed written procedures for administering FHWA's financial disclosure program. This will help provide clear directions on how to properly carry out the program and to ensure that FHWA has a fully developed succession plan. These written procedures will include proper intake procedures, proper documentation of requests for extension procedures, and how to properly process deficiencies in disclosure reports.

The DEO also commented on the technical issues that were identified during the examination. In his comments, the DEO indicated that FHWA will begun to incorporate many of the suggestions OGE provided throughout the review.

OGE will review the status of FHWA's progress in addressing these recommendations as part of a follow-up review that will be scheduled within six months from the date of this report.