



U.S. Office of Government Ethics
Program Review Division

Ethics Program Review

Administrative Conference of the United States

Report No. 12-42
March 2012

Results in Brief

The United States Office of Government Ethics (OGE) conducted a review of the Administrative Conference of the United States (ACUS) ethics program between January and February 2012. In general, the results of the review indicate that the majority of the elements of ACUS's ethics program appear to be in compliance with applicable laws, regulations, and policies. However, some aspects of annual training and special Government employee (SGE) financial disclosure need to be improved before the program is in full compliance.

Concerns

- Public filers were not provided with live annual training.
- Some alternate confidential financial disclosure forms were not available for inspection.
- Confidential financial disclosure filers were not provided with annual training in 2011.

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 ACUS's ethics program, OGE examined a variety of documents provided by ACUS's ethics office. OGE examined all public and confidential financial disclosure reports that were required to be filed at ACUS in 2011, covering calendar year 2010 and a sample of OGE approved alternate confidential financial disclosure reports required to be filed by special Government employees in both 2010 and 2011. In addition, the OGE review team met with ACUS's Designated Agency Ethics Official (DAEO) and the ADAEO to (1) obtain additional information ACUS's ethics program, (2) seek clarification on issues and (3) verify data collected.

Program Administration

ACUS was re-established as an agency in 2010 after ceasing its operations in 1995 and was not fully staffed until October 2010. As a result, ACUS is still in the process of standing up the agency and creating a more formalized ethics program. ACUS's ethics program is administered within the Office of General Counsel. The General Counsel (GC) serves as the DAEO. The Deputy General Counsel serves as the ADAEO. The DAEO is primarily responsible for the day-to-day administration of the ethics program.

ACUS consists of 14 full-time employees and has a membership of approximately 66 SGEs. The ACUS chairman is a Presidentially Appointed Senate Confirmed (PAS) official and is a member of the ACUS Council. Of the ten additional ACUS Council Members, five are SGEs appointed by the President for three-year terms. The Assembly of ACUS includes 40 public members – all of whom are SGEs. In addition, there are 5 Liaison Representatives, and 16 Senior Fellows who are non-voting SGEs. The other five members of the Council are appointed from other federal government agencies. In addition, federal government employees from designated federal agencies serve in the Assembly along with non-voting government liaison representatives and government Senior Fellows.

Financial Disclosure

Written Procedures

When OGE began its onsite review, ACUS's written procedures for the administration of its financial disclosure system did not meet all of the requirements at Section 402(d)(1) of the Ethics in Government Act. Upon completion of the onsite review, ACUS provided OGE with written procedures for financial disclosure that met the applicable requirements.

Public Financial Disclosure

OGE reviewed the four public financial disclosure reports required to be filed at ACUS in 2011. The reports were filed, reviewed and certified timely. OGE noted a technical reporting error on one report and discussed it with the DAEO.

Confidential Financial Disclosure

OGE reviewed all four confidential financial disclosure reports required to be filed by ACUS employees in 2011. All reports were filed, reviewed and certified timely. Two of the four confidential financial disclosure reports filed in 2011 were OGE Form 450-As. OGE noted that the corresponding OGE Form 450s filed in 2010 were not certified as required by 5 CFR §2634.605(b)(2). The DAEO indicated that the previous DAEO had omitted his certification and that reports would be properly certified in the future.

OGE noted during an interview with the DAEO that two of the four confidential filers filed the OGE Form 450-A for the 2012 filing season. To meet the requirement at §2634.905(b)(5), agencies allowing alternate filing three consecutive years must have confidential filers file the OGE Form 450 rather than the OGE Form 450-A in years divisible by four. Since the two confidential filers had already filed their OGE Form 450-As in 2012, the DAEO indicated that she would ensure all confidential filers file the OGE Form 450 in 2016 as required by §2634.905(b)(5). Until then, ACUS confidential filers will file OGE Form 450-As for no more than three consecutive years as allowed by §2634.905 (b)(4).

Education & Training

Initial Ethics Orientation

OGE examined ACUS's Initial Ethics Orientation (IEO) packet and found it to be in compliance with 5 CFR § 2638.703. Ethics officials stated all new employees required to receive IEO in 2011 received it.

Annual Training Plan

ACUS did not have annual training plan for 2011 or 2012. By the end of OGE's review, ACUS provided a written training plan for 2012 that met the requirements at § 2638.706.

Annual Ethics Training

In 2011, ACUS's annual training for public filers did not meet the requirements set forth at 5 CFR § 2638.704(a) as the four public filers received no verbal training. Instead, the public filers were provided OGE's pamphlet *A Brief Wrap on Ethics*. The DAEO acknowledged that the requirement was not met and plans to provide public filers with annual verbal training beginning in 2012.

ACUS's four confidential filers did not receive verbal or written annual training in 2011 as required by § 2638.705. ACUS's 2012 training plan states that confidential filers will receive verbal training every three years beginning 2012 and written training in the intervening years as required.

All ACUS employees were provided with OGE's pamphlet *A Brief Wrap on Ethics* in January 2012. The DAEO indicated that they will provide verbal annual training to all employees in 2012 using one of OGE's on-line training modules.

Recommendation

- Provide public filers with verbal training annually as required by § 2638.704(a).
- Provide confidential filers with verbal training as required by § 2638.705.

Advice & Counsel

The DAEO is the primary provider of ethics-related advice and counsel. Advice and counsel is rendered via email, telephone and in-person. All advice and counsel is memorialized in an ethics folder on the DAEO's computer desktop. In the event the ADAEO gives advice and counsel, he has access to the ethics folder. Sharing ethics advice among ethics officials ensures consistency, accuracy, and helps with succession planning.

OGE reviewed a sample of the ACUS's written advice and counsel issued to agency employees and found that all but one piece of advice and counsel that we reviewed appeared to be accurate.

OGE noted one opinion incorrectly advised an employee to seek prior approval for an outside activity. OGE reminded the DAEO that no prior approval is required for outside activities without agency-specific supplemental regulations.

Enforcement

ACUS reported no disciplinary actions based wholly or in part upon violations of the standards of conduct provisions (5 CFR part 2635). There were 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). ACUS made no referrals to the Department of Justice of potential violations of the criminal conflict of interest statutes. The DAEO is responsible for concurrently notifying OGE of referrals made to the Department of Justice.

Due to its size and structure, ACUS does not have an Office of Inspector General (OIG). ACUS does not utilize the services of an outside investigative organization. Although OGE regulations do not require agencies without an OIG to use the services of another agency's investigative organization, OGE suggests ACUS enter into a memorandum of understanding (MOU) with an investigative organization that can investigate violations of ethics laws and regulations and that can ensure program elements described at 5 C.F.R. § 2638.203(b)(11) and (12) are carried out.

Suggestion

- Consider establishing a formal memorandum of understanding with investigative organization to provide investigatory services to ACUS for potential ethics violations.

Special Government Employees

An SGE is defined in 18 U.S.C. § 202(a) as “an *officer or employee*... who is retained, designated, appointed, or employed” by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days. Accordingly, SGEs are Government employees for purposes of certain conflict of interest laws. See *DAEOgram DO-00-003A* and OGE’s informal Advisory Memoranda 82 x 21, 82 x 22, and 00x 1, and *DAEOgram DO-04-022*.

Alternate Confidential Financial Disclosure for SGEs

In June 2010, the Office of Government Ethics approved an alternate confidential financial disclosure report (referred to as “report” for the remainder of this section) for ACUS SGEs. The report was approved for semiannual use at the plenary sessions. The Chairman of ACUS voluntarily expanded the use of the report beyond plenary sessions as a matter of prudence. ACUS required SGEs to complete the reports prior to attendance at a meeting of any committee where a new topic was discussed and prior to the semiannual plenary sessions.

ACUS ethics officials reported that in 2010 it was administratively difficult to collect the reports from SGEs prior to each committee meeting where a new topic was discussed. As a result, they

created a more practical system to increase collection of the reports. OGE found that all but ten of the 48 reports required were collected for the committee meetings held in 2011; seven of the missing reports belonged to SGEs who attended the committee meetings via telephone.

Although the expanded use of the report continued in 2011, the DAEO indicated that collecting the reports prior to each committee meeting where a new topic will be discussed, in addition to the plenary sessions, is unnecessary. The DAEO reported that there is little potential for conflicts of interest for ACUS SGEs and that semiannual use of the reports would effectively screen for conflicts of interest. Since OGE originally approved the alternate report for semiannual use at the plenary sessions, OGE suggested that the DAEO formally seek approval from OGE to return to semi-annual use of the alternate report. If ACUS had collected only reports for plenary sessions in 2011, the number of reports filed would have decreased from 126 to 77.

OGE also examined 53 out of 77 reports collected during the June 2011 and December 2011 plenary sessions. The 53 reports were filed and reviewed timely. The majority of the reports were submitted via the agency's electronic filing system. The DAEO did not certify the forms as required by 5 CFR § 2634.605(b)(2). In lieu of printing out the electronically submitted report and signing it, the DAEO told OGE that she replied back to each filer via e-mail confirming receipt and review of the report. OGE verified that the DAEO confirms receipt and review of the electronically submitted reports. While OGE encourages the DAEO to continue notifying filers when reports have been reviewed and certified, an e-mail confirming receipt and review of the report does not meet OGE guidance on the use of digital signatures. *See* DAEOgram DO-09-004. The DAEO should certify the report with a signature and date in accordance with 5 CFR § 2634.605(b)(2) or with a digital signature that meets the guidelines set forth in DAEOgram DO-09-004.

Twenty five of the 77 reports required for the June 2011 and December 2011 plenary sessions were not available for OGE examination. The DAEO indicated that seven of the 25 had been timely collected and reviewed.¹ The DAEO indicated that five reports from the June 2011 session had not been filed. OGE learned on February 9, 2012 that approximately 12 of the reports collected from the December session could not be accounted for. OGE advised the DAEO that ACUS should advise the National Archives and Records Administration (NARA) of the disappearance of the reports. OGE also advised ACUS to work with NARA to remedy the loss or destruction of the reports and to determine whether or not the filers worked on matters that could have posed a conflict of interest. The loss or inadvertent destruction of the reports raises concerns about the integrity of ACUS's internal controls.

On February 28, 2012, ACUS requested that filers of the 12 missing reports provide copies of the reports or complete new reports for the December 2011 plenary session. ACUS has received three reports and provided documentation that NARA was notified about the missing reports on February 29, 2012.

¹ OGE did not examine those seven reports.

Recommendation

- Assess the impact of the loss or destruction of records and take action to bring the SGE financial disclosure program into compliance.
- Collect financial disclosure reports prior to each committee meeting where a new topic will be discussed and for plenary sessions or seek approval from OGE to return to semi-annual use of the alternate report.
- Certify alternate financial disclosure reports with a signature and date in accordance with 5 CFR § 2634.605(b)(2) or with a digital signature that meets the guidelines set forth in DAEOgram DO-09-004.
- Enhance internal controls to improve the security of financial disclosure reports.

Ethics Training for SGEs

OGE reviewed the materials used to provide training to SGEs in 2011. The materials provided to the SGEs in 2011 met the requirements for IEO and annual training as outlined in 5 CFR § 2638.705(d)(2) and § 2638.703. SGEs are provided a training packet upon appointment to the Assembly of ACUS and prior to the first meeting each year. OGE recommends that ACUS amend written materials to explicitly state the names, titles, office addresses and telephone numbers of the DAEO and other agency officials available to advise the employee on ethics issues in accordance with § 2638.703(b).

Recommendation

- Amend written materials to explicitly state the names, titles, office addresses and telephone numbers of the DAEO and other agency officials available to advise the employee or SGE on ethics issues in accordance with § 2638.703(b).

1353 Travel Acceptances

ACUS has consistently submitted to OGE in a timely manner the required semi-annual reports of payments accepted from non-Federal sources.

Agency Comments

OGE provided ACUS with a draft copy of this report for comment. Their comments are included in the appendix of this final report.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

March 8, 2012

Rashmi Bartlett
Associate Director
Program Review Division
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005

Re: Administrative Conference of the U.S. Comments on OGE Ethics Program Review

Dear Ms. Bartlett:

The Administrative Conference of the U.S. (the Conference or ACUS) resumed full operations after a 15-year hiatus in October 2010. In the short amount of time since October 2010, the Conference (and its 15 FTEs) has developed and implemented procedures for complying with various requirements on ethics, the Freedom of Information Act, the Federal Advisory Committee Act, acquisitions, telecommuting, etc. Establishing a rigorous agency ethics program was a priority from the outset. We welcomed the opportunity for a program review by OGE officials to help us identify and address any weaknesses in our newly-established ethics program.

We are grateful for the time and effort Office of Government Ethics (OGE) staff put into this review and report. We intend to address each of the recommendations expeditiously in the manner outlined below.

Financial Disclosure

1. Provide public filers with verbal training annually as required by §2638.704(a).
2. Provide confidential filers with verbal training as required by § 2638.705.

All Conference employees (not just public and confidential filers) will receive verbal and written training per the agency's written 2012 training plan.

Enforcement

1. Consider establishing a formal memorandum of understanding with an investigative organization to provide investigatory services to ACUS for potential ethics violations.

Although this is simply a suggestion by OGE, and is not a legal requirement, the Conference will likely pre-draft an MOU/agreement with another agency (TBD) for use at a later date if the need for such services arises. Such services would be needed rarely based on the agency's prior experience and the low risk level.

Special Government Employees (SGEs)

Background

From an administration/management perspective, the Conference's SGE financial disclosure system has been the most challenging aspect of the agency's ethics program. At any given time, the Conference has approximately 60-70 SGEs (confidential filers) who were required to file an alternate (and abbreviated) financial disclosure form in lieu of the OGE Form 450. This alternate form was approved by OGE in 1994, and again in 2010, for use by Conference SGEs at each semi-annual plenary meeting. The alternate form was approved by OGE largely because of the low risk of conflicts of interest, given the subject matter the Conference typically deals with.

After this alternate form was approved by OGE, the Chairman voluntarily opted to require the form at each committee meeting where a new topic was introduced. This system was in place for about a year and a half, and I have determined, based on this experience, that the additional requirement for submissions prior to committee meetings (undertaken voluntarily by the Conference) is unmanageable and unnecessary. Since the six Conference standing committees meet 4-8 times annually (in addition to the two plenary meetings), collection of the forms became an administrative burden. More importantly, because of the extremely low possibility of conflicts, I have determined that it was not necessary to collect all of these forms.

1. Assess the impact of the loss or destruction of records and take action to bring the SGE financial disclosure program into compliance.

During the course of OGE's review, it was discovered that 12 of the alternate financial disclosure forms were missing. Because systems had been put in place to ensure the collection of the forms, it is assumed that at least some number of the forms were lost. This lapse has been reported to the National Archives and Records Administration (NARA), and steps are being taken to replace/reconstruct the records. As for the impact of the lost records, I have determined that there is no impact, except that the 12 SGEs will have to submit a replacement form. The alternate forms do not contain a great deal of personally identifiable information; nor do they contain dollar amounts for investments/assets. Moreover, the vast majority of SGEs indicate "none" where asked to identify interests and investments that may pose a conflict. Finally, the documents were likely discarded in the trash and therefore not accessed by individuals who are not authorized to see the documents.

2. Collect financial disclosure reports prior to each committee meeting where a new topic will be discussed and for plenary sessions or seek approval from OGE to return to semi-annual use of the alternate report.

The agency recently sought and obtained approval to return to the system of financial disclosure collection initially approved by OGE (i.e., at the semi-annual plenary meetings). Although the Conference's voluntary system was never required by OGE, and OGE had previously approved the semi-annual collection, OGE staff advised us that we needed to seek new approval from OGE for the semi-annual collections. This approval was granted on March 7, 2012.

3. Certify alternate financial disclosure reports with a signature and date in accordance with 5 CFR § 2634.605(b)(2) or with a digital signature that meets the guidelines set forth in DAEOgram DO-09-004.

Initially, the Conference required submission of a paper financial disclosure form from its SGEs. These forms were faxed, emailed or provided in person prior to the meetings. There is a signature line provided for the SGE and for the DAEO, who must certify the forms. For ease of use, the Conference created a version of the alternate form that could be completed and submitted electronically. In fact, the electronic form (which is now used by the majority of Conference SGEs) has helped ensure better tracking of the forms, and has increased compliance greatly. There is no mechanism to encrypt or digitally sign the electronic forms. Filers simply enter the requested information on the form, include a CAPTCHA phrase to ensure that a human (as opposed to a computer) has completed the form, and send it to a dedicated Conference mailbox via email. As the agency's DAEO, I reply to the submitter (usually the same day) using the email address that the filer has supplied for our official records, and indicate that I have received and reviewed the document. I provide advice to filers when they list outside activities or assets, but this is rare since most filers indicate "none."

This method seemed to be a best practice, and indeed in compliance with the law. All of the Conference's SGEs and their email addresses are known by Conference staff and the DAEO. There is little risk that someone other than the SGE can submit the form. Moreover, my email "signature" with my title and contact information, along with the date and time of my reply, are included in my reply. Nevertheless, OGE officials advised us that because there is a signature/date line on the paper version of the form—the form that was approved by OGE—we must either develop a way to sign the electronic forms digitally, or print each electronic record and sign and date it manually.

The law provides that "If the reviewing official determines that the report meets the requirements...of this section, he shall certify it by signature and date." 5 CFR § 2634.605(b)(2). The terms "signature and date" are not defined in the regulations. OGE officials stated that their guidance defines what a digital signature is, DAEOgram DO-09-004.

The agency intends to explore two options as a result of this recommendation. Digital signature is not a feasible option due to its complexity, cost and the need for both parties to have special software and/or equipment for this purpose. We will seek advice from OGE on whether it is permitted to eliminate the certification (signature and date) requirement altogether, since not all OGE financial disclosure forms require certification—for example, the OGE Form 450A. If necessary, we will print and sign the forms

per the recommendation. However, as a matter of efficiency and cost-effectiveness, maintaining this documentation in electronic form would be preferable.

4. Enhance internal controls to improve the security of financial disclosure reports.

The agency has already enhanced its internal controls to improve the security of financial disclosure reports. The revised and improved procedures were articulated in the letter to NARA that explained the loss of agency records. Most significantly, to ensure greater security and reduce the likelihood of future document mishandling, a single individual will be assigned to collect and track the documents at each plenary meeting. That person will be held accountable for their safe keeping.

5. Amend written materials to explicitly state the names, titles, office addresses and telephone numbers of the DAEO and other agency officials available to advise the employee or SGE on ethics issues in accordance with section 2638.703(b).

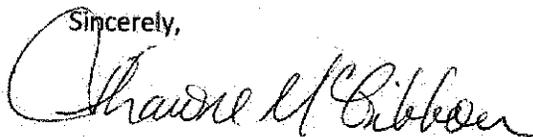
Upon initial appointment of agency SGEs and employees, some information about the DAEO was prominently included in their orientation packets. ACUS intends to amend/update its written orientation and other training materials to state DAEO contact information more explicitly for both employees and SGEs.

Conclusion

In general, if we could make a recommendation to OGE, it would be to take into account the size, structure, mission, and level of risk when reviewing agencies' ethics programs. Sometimes a one-size-fits-all application of each detail in the regulations may not be appropriate. We appreciate that the requirements are there for a reason. Perhaps greater focus on outcomes or performance (e.g. whether employees actually know who the DAEO is) would be a better way to measure compliance.

We would like to thank Leigh Snyder and Kingsley Simons for their thorough and professional work during the course of this review.

Sincerely,



Shawne McGibbon
General Counsel/DAEO