



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

April 9, 2009

Edgar M. Swindell
Designated Agency Ethics Official
Department of Health and Human Services
710-E Hubert H. Humphrey Building
200 Independence Avenue, SW.
Washington, DC 20201

Dear Mr. Swindell:

The United States Office of Government Ethics (OGE) has completed its review of the ethics program at the Centers for Medicare and Medicaid Services (CMS). Enclosed are an executive summary and report on the results of this review.

The purpose of an OGE review is to identify and report on the strengths and weaknesses of an ethics program by evaluating: (1) agency compliance with ethics requirements found in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures in place for administering the program.

OGE's review identified several model practices that have been implemented by CMS. These practices relate to leadership support for the ethics program and ethics training initiatives that exceed requirements.

OGE identified one issue that requires monitoring: CMS had a large backlog of uncertified confidential reports. Since the completion of OGE's onsite fieldwork, CMS eliminated all backlogged reports. OGE suggests that CMS continue to monitor the confidential financial disclosure system to ensure compliance with the requirements of subpart I of 5 CFR § 2634.

If you have comments or would like to discuss the report, please contact me at 202-482-9224. You may also contact Joseph E. Gangloff, OGE's Deputy Director, at 202-482-9220.

Sincerely,

Dale A. Christopher, Jr.
Associate Director
Program Review Division

Enclosures



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

April 9, 2009

Daniel R. Levinson
Inspector General
Department of Health and Human Services
330 Independence Avenue, SW.
Washington, DC 20201

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A handwritten signature in black ink, appearing to read "Dale A. Christopher, Jr.", written over a white background.

Dale A. Christopher, Jr.
Associate Director
Program Review Division

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United States Office
Of Government Ethics

Report Number 09-011

Highlights

Model Practices

- CMS leadership demonstrates a high level of support for the ethics program.
- CMS exceeds the minimum annual ethics training requirements.
- CMS informs departing employees of post-employment restrictions.

OGE Suggests

- CMS remain vigilant in ensuring that the confidential financial disclosure system is administered in an effective and efficient manner.

If you have comments or would like to discuss this report, please contact Dale Christopher, Associate Director for Program Reviews, at 202-482-9224 or dachrist@oge.gov

Ethics Program Review

The Department of Health and Human Services Centers for Medicare and Medicaid Services

April 2009 Report

Executive Summary

The United States Office of Government Ethics (OGE) has completed its review of the ethics programs at the following components within the Department of Health and Human Services (HHS): the Office of the Secretary (OS), the Health Resources and Services Administration (HRSA), and the Centers for Medicare and Medicaid Services (CMS). OGE's review also focused on the administration of the ethics program HHS-wide by the Office of the General Counsel's Ethics Division (OGC-Ethics Division). This report details OGE's review of CMS's ethics program. (Reports detailing OGE's review of OS and the OGC-Ethics Division and HRSA will be issued separately.)

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OGE's review of CMS identified one area that requires improvement: CMS had a large backlog of uncertified confidential reports. Since the completion of OGE's onsite fieldwork, CMS eliminated all backlogged reports. OGE suggests that CMS continue to monitor the confidential financial disclosure system to ensure compliance with the requirements of subpart I of 5 CFR part 2634.

This report has been sent to HHS' Designated Agency Ethics Official and Inspector General.



**United States Office
Of Government Ethics**

Report Number 09-011

Ethics Program Review

Department of Health and Human Services Centers for Medicare and Medicaid Services

April 2009 Report

Introduction

OGE MISSION

The United States Office of Government Ethics (OGE) provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance.

PURPOSE OF A REVIEW

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 found in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures in place for administering the program.

REVIEW AUTHORITY AND SCOPE

OGE has the authority to evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act of 1978, as amended (the Ethics in Government Act), and 5 CFR part 2638. OGE's review of the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services (HHS), focused on the elements listed below.

- Leadership involvement in the ethics program
- Program structure
- Financial disclosure systems
- Outside employment and activities
- Ethics training
- Ethics counseling services
- Enforcement of ethics laws and regulations
- Travel payments from non-Federal sources

Ethics Program Review: HHS-CMS

OGE also conducted reviews of HHS' Office of the Secretary (OS) and the Health Resources and Services Administration (HRSA). In addition, OGE's review focused also on the administration of the ethics program HHS-wide by the Office of the General Counsel's Ethics Division (OGC-Ethics Division). This report details OGE's review of CMS. (Reports detailing OGE's review of OS and the OGC-Ethics Division and HRSA will be issued separately.)

Fieldwork for this review focused on calendar years 2005 and 2006. OGE gathered additional, updated information from CMS ethics officials via email in October 2008.

Program Elements

This report consists of descriptions, analyses, and conclusions regarding each program element reviewed.

LEADERSHIP

Commitment and action by agency leadership is the keystone for ensuring the integrity of an agency's ethical culture and for fostering public confidence in the decision-making processes of Government.

OGE's review found that CMS leadership provided for increased ethics staff and higher visibility within the agency's organizational structure. The CMS ethics program has benefited from the actions of CMS leadership. OGE encourages CMS leadership to continue to provide the support necessary to ensure that the agency's ethics program is strong and effective.

PROGRAM STRUCTURE

The Associate General Counsel for Ethics (in the OGC-Ethics Division), serves as the HHS Designated Agency Ethics Official (DAEO) and has oversight responsibility for the HHS-wide ethics program. The DAEO relies in significant part on the cooperative efforts of a network of Deputy Ethics Counselors (DEC) to help administer the semi-autonomous ethics program within each HHS staff and operating division. Assisting each DEC in carrying out their ethics-related duties are management and/or personnel specialists who serve as primary ethics contacts or coordinators for the program and have the responsibility for carrying out the day-to-day administration of the program.

At CMS, the ethics function resides organizationally within the Office of Operations Management (OOM) and is administered by the Director of OOM, who serves as the CMS DEC. The day-to-day operation of the ethics program is carried out by the Management Operations Staff, hereafter referred to as the Ethics Office. An Ethics Program Administrator, who serves as the agency's primary ethics contact, along with two Ethics Program Specialists make up the Ethics Office staff. Their duties include, but are not limited to, managing CMS' financial disclosure systems, implementing the requirements for the ethics training programs, and providing ethics counseling to employees CMS-wide.

Ethics Program Review: HHS-CMS

FINANCIAL DISCLOSURE SYSTEMS

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 that they are able to carry out their duties without compromising the public trust by disclosing publicly their personal financial interests (SF 278). 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 review (OGE Form 450).

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 also assist agencies in administering their ethics programs in providing counseling to employees. See 5 CFR § 2634.104(b).

Public Financial Disclosure System (SF 278)

To evaluate the effectiveness of the public system, OGE examined 55 public reports that were required to be filed in 2006. These 55 reports consisted of:

Type of Report

- 44 annual reports
- 4 new entrants reports
- 3 termination reports
- 4 combined annual/termination reports

55 Total

Filing Timeliness

- All 55 reports were filed timely.

Review/Certification Timeliness

- All 55 reports were reviewed and certified timely.

In addition to the reports noted above, OGE also examined 14 reports filed by high-level non-Presidential appointees, for which the OGC-Ethics Division has the responsibility of providing the final review and certification. OGE found the reports to be filed, reviewed, and forwarded to OGE timely.

Ethics Program Review: HHS-CMS

Confidential Financial Disclosure System (OGE Form 450)

OGE identified one deficiency relating to the administration of the confidential financial disclosure system. Specifically, CMS had a large backlog of uncertified reports at the time of OGE's onsite fieldwork. The backlogged reports reflect a time when the Ethics Office had not yet reached the staffing levels that the OGE review team found during the time of its onsite fieldwork. OGE recognizes that this was also a time of transition for certain elements of the CMS confidential financial disclosure system. The transition was from a decentralized review and certification process, whereby confidential reports filed in the region were forwarded to the filers' supervisors for review and certification, to a centralized process, whereby all confidential reports CMS-wide are reviewed and certified by the Ethics Office.

At the time of OGE's onsite fieldwork, the Ethics Office was still trying to review and certify a substantial number of backlogged confidential reports. Of the 2,489 reports that were required to be filed in 2005, 640 reports were still awaiting certification by the Ethics Office. According to the Ethics Office, much of the delay in certification resulted from the fact that the Ethics Office, at that time, was operating under limited staffing. Prior to the conclusion of OGE's review, the Ethics Office confirmed with OGE that all 640 reports that were awaiting review and certification had been reviewed and certified.

In October 2008, CMS ethics officials stated that the 2007 filing season was completed timely and there were only 19 uncertified OGE Forms 450 from the 2008 filing season. The success of the 2007 and 2008 filing seasons show a considerable improvement in the administration of the confidential financial disclosure system. OGE suggests that CMS continue to monitor the confidential financial disclosure system to ensure compliance with the requirements of subpart I of 5 CFR part 2634.

To evaluate the filing, review, and certification of confidential reports at CMS, OGE selected 123 2005 reports for examination. Initially, of the 123 reports selected, 24 reports were found missing. However, all were eventually recovered except for 6 reports. According to ethics officials, these 6 reports were filed by filers who had either resigned or retired during the annual filing cycle. As a result, OGE selected 6 additional reports for examination. These 123 reports consisted of:

Type of Report

- 18 new entrants reports
- 69 annual reports
- 36 OGE Optional Form 450-A reports (OGE Form 450-As)

123 Total

Filing Timeliness

- 102 reports were filed timely
- 21 reports were filed late.

123 Total

Ethics Program Review: HHS-CMS

Review/Certification Timeliness

- All 123 reports were reviewed certified by CMS timely.

OUTSIDE EMPLOYMENT AND ACTIVITIES

OGE examined 25 outside employment positions or activities that required prior approval under the HHS supplemental standards of conduct regulation. OGE found the appropriate approval form (HHS-520) and/or annual reporting form (HHS-521) on file for each outside employment position or activity and found evidence that employees were receiving prior approval, when appropriate, before engaging in outside employment or activities.

ETHICS TRAINING

An ethics education and training program is essential to raising awareness among employees about ethics laws and rules and informing them that an agency ethics official is available to provide ethics counseling. Each agency's ethics training program must include at least an initial ethics orientation for all employees and annual ethics training for covered employees.

OGE found established processes in place at CMS to ensure that new employee ethics orientations and annual briefing requirements are met in accordance with the education-related provisions of subpart G of 5 CFR part 2638. OGE also found the Ethics Office doing a good job in keeping employees knowledgeable of the relevant post-employment restrictions which they may be subject to upon leaving CMS.

Initial Ethics Orientation

Within 90 days from the time an employee begins work for an agency, the agency must provide the employee with an initial ethics orientation. An initial ethics orientation must include:

- the Standards of Ethical Conduct for Executive Branch Employees (Standards) and any agency supplemental standards,
- the names, titles, office addresses, and phone numbers of the DAEO and other ethics officials, and
- at least one hour of official duty time to review the items described above. See 5 CFR § 2638.703.

For new CMS employees, the initial ethics orientation requirement is satisfied through the provision of written ethics materials as part of the new employee orientation. New employees are provided with:

- the Standards,
- HHS's supplemental standards of conduct regulation,
- the Hatch Act, and

Ethics Program Review: HHS-CMS

- the names, titles, office addresses, and phone numbers of the HHS DAEO, CMS DEC, and other CMS ethics officials.

The Ethics Office also provides in-person training at various times throughout the year to help satisfy the initial ethics orientation requirement. During the in-person training, OGE's Integrity in Public Service: Earning the Public Trust videotape is shown.

Based on a review of the Ethics Office's initial ethics orientation records, at the time of OGE's onsite fieldwork, 460 new CMS employees received timely initial ethics orientation.

Annual Ethics Training

Public financial disclosure filers are required to receive verbal annual ethics training each year. See 5 CFR § 2638.704(a). Verbal training includes training prepared by a qualified instructor and presented by telecommunications, computer, audiotape, or videotape. See 5 CFR § 2638.704(c)(2). Other covered employees (e.g., confidential filers) are required to receive verbal annual ethics training at least once every three years and may receive written annual training in the intervening years. See 5 CFR § 2638.705(c). The content requirements for both public filers and other covered employees are the same. Agencies are encouraged to vary the content of annual training from year to year but the training must include, at least, a review of:

- the 14 Principles of Ethical Conduct,
- the Standards,
- any agency supplemental standards,
- the Federal conflict of interest statutes, and
- the names, titles, office addresses, and phone numbers of the DAEO and other ethics officials. See 5 CFR § 2638.704(b).

During the time period covered by OGE's review, all CMS employees were required to receive annual ethics training via the OGC-Ethics Division's computer-based training module, which focused on outside employment and activities. According to annual training records examined by OGE at the time of its review, it appeared that all covered employees were provided with the required training.

Additional Training Initiatives

In addition to the formal training programs highlighted above, OGE also acknowledges the extra efforts that the Ethics Office makes to keep CMS employees aware of the relevant seeking and post-Government service employment restrictions. The Ethics Office offers face-to-face presentations to interested employees who are contemplating retiring or departing from Federal service. OGE attended a presentation conducted by the Ethics Office and found it to be informative and well-gearred to the variety of employees in attendance. The presentation included a viewing of OGE's The Revolving Door video and provided an overview of the relevant post-employment restrictions.

Ethics Program Review: HHS-CMS

ETHICS 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. *See* 5 CFR § 2638.203. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program. *See* 5 CFR § 2638.204.

OGE's assessment of an ethics counseling program focuses on five factors: (1) accuracy, (2) timeliness, (3) transparency, (4) accountability, and (5) consistency. To determine whether an agency's counseling program successfully addresses these factors, OGE reviews and assesses the program's processes and written procedures. Further, OGE reviews selected samples of advice to assess whether processes and written procedures are effective.

To meet the counseling requirements at CMS, the Ethics Office provides both verbal and written counseling to CMS employees on varying ethics-related issues. OGE examined a sample of ethics-related counseling ranging from use of the travel payment acceptance authority at 31 U.S.C. § 1353 to seeking and post-employment matters. OGE found the counseling to be consistent with applicable ethics laws and regulations.

ENFORCEMENT

The DAEO is required to ensure that (1) information developed by internal audit and review staff, the Office of the Inspector General, or other audit groups is reviewed to determine whether such information discloses a need for revising agency standards of conduct or for taking prompt corrective action to remedy actual or potential conflict of interest situations and (2) the services of the agency's Office of the Inspector General are utilized when appropriate, including the referral of matters to and acceptance of matters from that Office. *See* 5 CFR § 2638.203(b)(11) and (12).

OGE found the Ethics Office aware of the requirements of 5 CFR § 2638.203(b)(11) and (12) to review information developed by, and to coordinate with, HHS's Office of the Inspector General, when appropriate, on ethics-related matters.

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

An employee may accept payment of travel expenses from non-Federal sources on behalf of the employee's agency for official travel to a meeting or similar function when specifically authorized to do so by the agency. Agencies must submit semiannual reports of travel payments from non-Federal sources in excess of \$250 to OGE. *See* 31 U.S.C. § 1353.

OGE found CMS to be appropriately authorizing the acceptance of payments of travel expenses, in accordance with 31 U.S.C § 1353. OGE examined the 35 travel payments in excess of \$250 accepted on behalf of CMS for the period covered by OGE's review. OGE found the payments to have been forwarded timely for inclusion into HHS' semiannual report to OGE.

Ethics Program Review: HHS-CMS

Summary

OGE identified several model practices that have been implemented by CMS. These practices relate to leadership support for the ethics program and ethics training initiatives that exceed requirements.

OGE's review of CMS identified one area that requires improvement: CMS had a large backlog of uncertified confidential reports. Since the completion of OGE's onsite fieldwork, CMS eliminated all backlogged reports. OGE suggests that CMS continue to monitor the confidential financial disclosure system to ensure compliance with the requirements of subpart I of 5 CFR § 2634.

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