

**United States Office of Government Ethics**

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Compliance Division

# Ethics Program Review

Surface Transportation Board

## Results in Brief

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The United States Office of Government Ethics (OGE) conducted a review of the Surface Transportation Board's (Board) ethics program in March 2013. Our review found that the Board's ethics program is generally sound and in substantial compliance with applicable requirements. However, certain improvements can be made to strengthen the program. OGE makes one formal recommendation to address a weakness in the area of financial disclosure and offers several suggestions for improvement regarding other ethics program areas. OGE makes suggestions based primarily on its broad experience with agencies throughout the Executive branch and the model practices they have implemented to improve the effectiveness of their ethics programs.

### Highlights

- The Deputy Ethics Official successfully completed OGE's New Ethics Official Certificate Program<sup>1</sup> in 2012 and routinely attends formal training offered by OGE.
- Ethics officials screen prospective employees for potential conflicts and brief them on ethics-related standards prior to the agency making an offer for employment.
- Ethics officials are proactive in raising employees' awareness of ethics-related issues.
- Ethics officials provide in-person, post-employment briefings to employees leaving Federal service as part of the Board's employee check-out process.

### Concerns

- The Board must update written procedures governing the administration of the financial disclosure systems to fully comply with the requirements of section 402(d)(1) of the Ethics in Government Act of 1978 (Ethics Act).

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<sup>1</sup> OGE's Certificate Program is designed to teach new ethics practitioners the essential elements of administering an executive branch ethics program.

## 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 authority to evaluate the effectiveness of executive agency ethics programs pursuant to Title IV of the Ethics in Government Act and 5 CFR part 2638.

To assess the Board's ethics program, OGE examined a variety of documents that were provided by agency ethics officials. These included: the annual ethics program questionnaire; public and confidential financial disclosure reports that were required to be filed in 2012; and, advice and counseling provided to Board employees. Other documents that the Board forwarded to OGE were also examined. In addition, members of OGE's Program Review Branch met with the Board's ethics officials to obtain additional information about the strengths and weaknesses of the Board's ethics program, clarify certain matters, and verify the accuracy and origin of data collected.

## Agency Background

Created in 1996 by Congress under the ICC Termination Act of 1995, the Board was established to assume some of the regulatory functions that had been administered by the Interstate Commerce Commission (ICC) when it was abolished.<sup>2</sup> Under the bipartisan leadership and direction of three Presidentially-appointed and Senate-confirmed appointees (PAS), who each serve five-year terms, the Board is responsible for adjudicating disputes and regulating interstate surface transportation through various laws pertaining to the different modes of transportation.

The Board has broad economic regulatory oversight of freight railroads, including rates; service; construction, acquisition and abandonment of rail lines; carrier mergers; and interchange of traffic among carriers.<sup>3</sup> While much of the Board's work involves freight railroads, the Board also has certain oversight of pipeline carriers, intercity bus carriers, moving-van companies, trucking companies involved in collective activities, and water carriers engaged in non-contiguous domestic trade. Additionally the Board oversees Amtrak's on-time performance and has wide discretion to tailor its regulatory approach to meet the nation's changing transportation needs. Assisting the Board in carrying out its responsibilities is a staff of approximately 140 employees, located at its headquarters in Washington, DC, with experience in economics, law, accounting, transportation analysis, finance, and administration.

<sup>2</sup> Other ICC regulatory functions were either eliminated or transferred to the Federal Motor Carrier Safety Administration or to the Bureau of Transportation Statistics, both within the Department of Transportation.

<sup>3</sup> OGE notes that while the Board is independent, it is administratively affiliated with the Department of Transportation.

## Program Administration

The ethics program at the Surface Transportation Board is organizationally located within the Office of the General Counsel. The General Counsel serves as the Board's Designated Agency Ethics Official (DAEO) and the Deputy General Counsel serves as the agency's Alternate DAEO (ADAEO). While both have oversight responsibility for the ethics program, the day-to-day management of the program has been delegated to a Deputy Ethics Official (DEO) who is an Attorney-Advisor on the General Counsel's staff. The DEO is responsible for carrying out the majority of ethics functions, including providing the final review and certification of public and confidential financial disclosure reports. OGE found that both the DAEO and ADAEO provide the support necessary to allow the DEO to effectively administer the ethics program.

Both the DAEO and DEO assumed their ethics positions in March 2012. While both are new to the ethics program, the ADAEO has 12 years of ethics experience. The ADAEO is an important resource for both the DAEO and DEO and offers extensive institutional knowledge.

### Model Agency Practice

OGE identifies model practices and shares them when it appears they may benefit an agency's ethics program. The following is a model practice OGE noted the Board implemented to enhance its ethics program:

- The Board has a continuous learning strategy in place to enhance the agency's ethics program. The DEO successfully completed OGE's New Ethics Official Certificate Program in 2012 and routinely attends formal training provided by OGE throughout the year.

## Financial Disclosure

Title I of the Ethics in Government Act requires that agencies ensure confidence in the integrity of the Federal Government by demonstrating that officials are able to carry out their duties without compromising the public trust. High-level Federal officials demonstrate this by disclosing publicly their personal financial interests by completing OGE Form 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 implements this authority by requiring the covered executive branch personnel to complete 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 assist agencies in administering their ethics programs and in providing counseling to employees. *See* 5 C.F.R. § 2634.104(b).

## Written Procedures for the Financial Disclosure Program

OGE guidance implementing section 402(d)(1) of the Ethics in Government Act of 1978 (Ethics Act) requires executive branch agencies to develop written procedures for collecting, reviewing, evaluating, and where applicable making publicly available financial disclosure reports filed by the agency's officers and employees.<sup>4</sup> Written procedures also help to provide for continuity and transparency within the ethics program. Written procedures can also provide ethics officials with the opportunity to assess its processes and implement improvements.

OGE's current review found that the Board's written procedures for the administration of the public and confidential financial disclosure systems are out of date. The last time the procedures were updated was in May 2006. OGE's 2009 review of the Board's ethics program also reported that the Board's written procedures, while thorough, were out of date. The report issued as a result of the 2009 review suggested that the written procedures be updated to reflect current requirements and processes; however, the Board has not corrected its procedures as OGE suggested.

During the 2009 review of the Board's ethics program, OGE noticed that the written procedures did not reflect the current due dates for confidential reports. Language in the written procedures stated that October 31<sup>st</sup> was the due date for filing confidential reports. However, amendments to OGE's financial disclosure regulation were made in 2006 which changed the reporting period to a calendar year cycle and moved the filing deadline from October 31<sup>st</sup> to February 15<sup>th</sup>. This led OGE to suggest that ethics officials revise the Board's financial disclosure procedures to reflect the correct due date for filing confidential reports.

During OGE's current review of the Board's written procedures,<sup>5</sup> it was noted that they have become further out of date. For example, in 2010, OGE replaced the Standard Form (SF) 278 public report with a new form for collecting public reports in the executive branch, the OGE Form 278. As a result, references made to the SF 278 should also be updated to refer to the OGE Form 278. OGE recommends that the Board revise its written procedures to reflect all current technical changes as well as any significant procedural changes that have occurred since 2006.

### Recommendation

- Update the Board's written procedures for administering both its public and confidential financial disclosure systems to more fully comply with the requirements of section 402(d)(1) of the Ethics Act.

### Suggestion

- In view of the importance of having a succession plan to help maintain the consistent administration of an ethics program, OGE encourages ethics officials to consider developing written procedures that reflect the current practices for administering other

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<sup>4</sup> See, OGE's DAEGRAM 09-03-92: Developing written procedures for the public and confidential financial disclosure systems.

<sup>5</sup> Reference to STB Administrative Issuance, No. 7-155

elements of the Board'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.

### Public Financial Disclosure

The Board has ten public financial disclosure filers, including the agency's three PAS officials and the DAEO. The public reports filed by these four employees are required to be forwarded to OGE for final review and certification. OGE confirmed that all four annual reports that were required to be forwarded to OGE in 2012 had been timely forwarded pursuant to 5 C.F.R. § 2634.602.<sup>6</sup>

OGE examined the six remaining public reports that were required to be filed and retained by the Board in 2012 and determined that each report was timely submitted, reviewed, and certified. OGE also did not find any substantive areas of concern regarding the review and certification of these reports. All six reports were filed by incumbent filers.

During its last review of the Board's ethics program, OGE suggested that ethics officials ensure that dates of receipt be entered on each financial disclosure report. This is to help assess compliance with the filing due date and 60-day review requirements. During the current review, OGE found that the Board has included date stamping reports with the date of receipt as part of their financial disclosure process.

### Confidential Financial Disclosure

Reports filed by the Board's 32 confidential financial disclosure report filers were generally filed and reviewed timely. It also appeared that these reports were reviewed for conflicts by the DEO, as evidenced by reviewer annotations during follow-ups with some filers. This assessment is based on OGE's examination all 32 confidential reports that were required to be filed in 2012.

## **Supplemental Ethics Regulation**

Since January 1, 1996, the Board has applied the requirements of the supplemental regulation found at 5 C.F.R § 5001. This supplement to OGE's standards of conduct regulation was originally submitted to OGE for concurrence by the ICC, the Board's predecessor agency. The supplemental regulation prohibits the Board's employees from holding financial interests in for-hire transportation companies. The supplemental regulation also requires employees to obtain prior approval before engaging in outside employment, with or without compensation.

Board employees who seek prior approval are required to do so by submitting an "Application for Authorization of Outside Employment" form. OGE's examination of the Board's outside employment prior approval system focused primarily on whether the prior approval requirement in the Board's supplemental regulation was being met. OGE examined six outside employment/activities reported on financial disclosure reports and three prior approval requests

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<sup>6</sup> OGE also confirmed that the termination public report filed in 2012 by the former DAEO had been timely forwarded to OGE.

submitted by non-filers. OGE found that prior approval requests submitted by both filers and non-filers had appropriate supervisory and ethics official approval and concurrence. OGE also did not find any of the financial disclosure reports examined to reveal prohibited financial interest subject to this regulation.

## **Education and Training**

OGE found the Board's education and training program to exceed the minimum training requirements found at subpart G of 5 C.F.R. 2638. Ethics officials have committed to providing in-person initial ethics orientation (IEO) to new employees and in-person annual ethics training to all covered employees. OGE also found the Board was satisfying the requirements at 5 C.F.R. § 2638.706 by documenting its annual ethics training plan.

### Initial Ethics Orientation

Agencies must provide new employees with an initial ethics orientation (IEO) that includes the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards), any agency supplemental standards, contact information for the agency's ethics officials, and one hour to review the materials. This training must be provided within 90 days from the time an employee begins working for an agency. See 5 C.F.R. § 2638.703. The Board meets and exceeds the minimum IEO requirements of by providing all new employees with the required information as well as a copy of the 14 General Principles of Ethical Conduct for Federal Employees (Principles), during the employees' first week of employment. In addition, ethics officials meet with each new employee during their orientation to provide an in-person overview on the importance of the ethics rules, allowing for discussion and questions.

New employees are required to sign two attestation forms to acknowledge the receipt of IEO. The first form is signed to acknowledge receipt of the required training materials and is filed with the Human Resources Office. The second form is signed to acknowledge the employee's review and understanding of the material. New employees have 60 days to complete and return the second attestation form to ethics officials. Once the form has been received by ethics officials, initial ethics orientation training for the new employee is considered complete. OGE recognizes the requirement for employees to confirm they have reviewed required materials to be a model practice.

Based on OGE's review of the Board's internal tracking system and samples of the attestation forms collected during IEO sessions in 2012, OGE determined that all 13 new employees required to receive IEO were provided with the required training.

### Annual Ethics Training

Agencies are required to provide covered employees with annual ethics training. The training must include a review of the Principles, the Standards, any agency supplemental standards, the Federal conflict of interest statutes, and the names, titles, office address, and telephone numbers of the DAEO and other agency ethics officials available to advise the employee of ethics issues.

*See* 5 C.F.R. § 2638.704 and 5 C.F.R. § 2638.705. Annual ethics training is a vital component of an agency's ethics program and is intended to assist employees in carrying out their official responsibilities in a manner consistent with ethics-related statutes and regulations. Additionally, annual training helps to prevent violations and maintain the public's confidence that Government officials act impartially and free of conflicts of interest.

The Board provided annual ethics training that met content requirements to all covered employees. However, some employees were not trained until January 2013. In-person annual ethics training was required for both public and confidential financial disclosure filers in 2012. The DEO provided a presentation that satisfied the prescribed annual training content requirements in November, 2012. Since some filers did not attend this training, a make-up session was held in January 2013. In addition to the in-person training session held in January, a videotape of the in-person session held in November was made available to satisfy the annual training requirement. The DEO confirmed that all who were required to receive annual ethics training in 2012 ultimately were trained.

While not all covered employees received the required training timely, OGE recognizes that the Board took appropriate corrective action. OGE also recognizes that the ability to identify and correct problems is a hallmark of a well-administered program. OGE suggests that the Board consider conducting training earlier in the year to help ensure annual training is provided timely. OGE also reminds the Board that the make-up training conducted in 2012 should not be counted as annual training for 2013.

#### Discretionary Ethics Training

In addition to conducting the requisite initial and annual ethics training, OGE also found that ethics officials provide a host of discretionary training throughout the year. This discretionary training helps to improve Board employees' knowledge of the ethics laws and regulations. From seasonal email reminders regarding pertinent ethics topics to targeted training on the Board's canons of ethics for those admitted to practice before the Board, OGE believes these additional training opportunities help to raise awareness of ethics issues and ultimately protect the Board from problems created by the inadvertent violation of ethics rules.

#### Model Agency Practices

OGE identifies model practices and shares them when it appears they may benefit an agency's ethics program. The following are model practices OGE noted the Board implemented to enhance its ethics program:

- Ethics officials give employees an in-person overview on the importance of the ethics rules during IEO.
- New employees are required to confirm they have reviewed required IEO materials.
- Ethics officials screen prospective employees for potential conflicts and brief them on ethics-related standards prior to the agency making an offer for employment.
- Ethics officials are proactive in raising awareness of ethics-related issues throughout the year.

### Suggestion

- Consider conducting training earlier in the year to help ensure that annual ethics training is provided timely.

## **Advice and Counsel**

OGE found the Board's ethics counseling and advice services to meet the requirements of 5 C.F.R. § 2638.203(b)(7). OGE also found that records are kept, where appropriate, on advice rendered, as required by 5 C.F.R. § 2638.203(b)(8). Employees are encouraged to contact ethics officials via e-mail, telephone, or in-person. The DEO is primarily responsible for providing ethics advice to Board employees. All advice and counseling examined during the review appeared to be appropriate and was provided timely. The DEO provides in-person, post-employment briefings to departing employees as part of the Board's employee check-out process. OGE considers providing post-employment guidance to departing employees to be a model practice.

### Model Agency Practice

OGE identifies model practices and shares them when it appears they may benefit an agency's ethics program. The following is a model practice OGE noted the Board implemented to enhance its ethics program:

- In-person, post-employment briefings are provided to those departing from Federal service as part of the Board's employee check-out process.

### Suggestion

- OGE noticed that the DEO does not document his written counseling files on a shared electronic drive which is accessible to both the DAEO and ADAEO. OGE regulations do not prescribe to a specific way to store advice files; however, as a good management practice, OGE suggests that written counseling be stored in a way that makes it accessible to other ethics officials. Doing so helps to ensure consistency in the advice provided and saves time when responding to common questions, provided fact patterns are similar. It also helps to provide accountability.

## **Enforcement**

The Board does not have its own Office of Inspector General (OIG) or an equivalent office. The Board would contact the Department of Transportation's OIG should the need to investigate an alleged ethics violation occur. The Assistant Director of Investigations who also serves as the OIG Chief, Compliant Operations Center, serves as the Board's primary contact for OIG-related services. However, the Board does not have a formal arrangement with Transportation's OIG.

OGE discussed the Board's system of enforcement with both the DEO and the OIG's Assistant Director of Investigations. OGE found that neither was certain of which office would be responsible for concurrently notifying OGE if a case involving an alleged violation of a criminal conflict-of-interest statute was referred to the Department of Justice (Justice). After discussing with both officials the requirements of 5 C.F.R. § 2638.603, it was determined that the OIG would be responsible for notifying OGE of all criminal conflict of interest referrals and other required follow-up information. OGE also sent the Assistant Director of Investigations a copy of OGE Form 202, Notification of Conflict of Interest Referral, for notifying OGE of referrals. As a result of our discussions and the fact that OGE was assured that notification of referrals will be provided in the future, we have no formal recommendation in this program area. However, as a good management practice, we encourage both offices to periodically update and clarify the roles of each of their respective offices in the Board's system of enforcement.

### Advisory Committees

The Board has three advisory committees. These committees include the National Grain Car Council, the Rail Energy Transportation Advisory Committee, and the Railroad-Shipper Transportation Advisory Council. Both the National Grain Car Council and the Rail Energy Transportation Advisory Committee were established under the provisions of the Federal Advisory Committee Act<sup>7</sup> while the Rail-Shipper Transportation Advisory Council was established under the ICC Termination Act of 1995.

These committees are established to discuss and provide advice and guidance on the emerging issues and concerns regarding the transportation of grain and energy resources by rail and matters of concern to rail shippers and railroads. Members of the Rail Energy Transportation Advisory Committee and the Railroad-Shipper Transportation Advisory Council serve three-year terms. Members of the National Grain Car Council serve two-year terms. Membership on each committee reflects a representation of individuals who are knowledgeable of the issues affecting the purpose of each committee.

The DAEO has determined that members serving on these committees provide their services in a non-employee "representative" status and are not special Government employees. Based on an examination of the committees' enabling charter as well as OGE's clarifying guidance on Federal Advisory Committee appointments,<sup>8</sup> it appears that ethics officials have appropriately designated these members as representatives.

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<sup>7</sup> The Federal Advisory Committee Act was passed in 1972 to provide an orderly procedure for Federal agencies to use in seeking the advice, assistance, and input of persons outside the Government. FACA governs how advisory committees are established, operated, and terminated.

<sup>8</sup> These factors were clarified in OGE DAEOgrams DO-04-022, dated July 19, 2004, and DO-05-012, dated August 18, 2005.

## 1353 Travel Acceptances

Federal agencies may accept payments from non-Federal sources for travel, subsistence, and related expenses incurred on official travel under the authority of the General Services Administration regulation at 41 CFR chapter 304, implementing 31 U.S.C. § 1353. Semiannual reports of payments accepted under 31 U.S.C. § 1353 must be submitted to OGE by May 31 and November 30 of each year.

Notwithstanding the general authority to accept payments, the Board's policy is that payments will only be accepted in extraordinary circumstances when an employee's attendance at the meeting or similar function is sufficiently important to the mission of the agency and when adequate Federal funds are not available to pay for some or all of the travel expenses.

According to the Board's internal guidelines, the Board's Chair will determine in advance of travel when extraordinary circumstances warrant an exception to the Board's policy. The Chair's decision is based, in part, on a written recommendation from the Board's DAEO. The Board's guidelines also indicate that employees are to complete Form DOT F 1500.3 (Travel Authorization for Temporary Duty) and provide supporting documentation to the DAEO. The DAEO is responsible for rendering a conflict-of-interest review prior to the request being forwarded to the Chair for approval.<sup>9</sup>

The DEO is responsible for forwarding semiannual reports to OGE. OGE examined the Board's last two reports covering the periods from October 1, 2011 through March 31, 2012 and April 1, 2012 through September 30, 2012. Both reports were negative and submitted using the required GSA Standard Form 326. The reports were submitted in a timely manner.

## Agency Comments

The Surface Transportation Board appreciates the work of the Office of Government Ethics (OGE) in preparing this report. The Board anticipates implementing all of the report's recommendations and suggestions by the end of this fiscal year and looks forward to working with OGE in the future to continue to improve the Board's ethics program.

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<sup>9</sup> Supporting documentation includes: (1) the letter of offer from the non-Federal source; and (2) a memorandum from the employee to the DAEO that contains sufficient information to help the DAEO make a conflict-of-interest determination.