



January 7, 2004

Steven J Morello
Designated Agency Ethics Official
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104

Dear Mr Morello

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the U.S Army Aviation and Missile Command (AMCOM), at the Redstone Arsenal (RA), Alabama This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act) Our objective was to determine the ethics program's effectiveness, measured largely by its compliance with applicable statutes and regulations The review was conducted from June through October 2003 The following is a summary of our findings and conclusions

HIGHLIGHTS

Substantial effort will need to be expended to bring the AMCOM ethics program into full compliance with ethics requirements Deficiencies were revealed in the ethics education and training program, by the lack of procedures to ensure that employees disqualify themselves appropriately while seeking post-retirement employment, in the misapplication of the requirements of 5 C F R part 2635 and 41 C F R part 304-1, and in the confidential financial disclosure program Further, the Chief Counsel of AMCOM should ensure that counseling and advice issued to AMCOM employees is in compliance with current statutes and regulations The correction of these deficiencies will enable AMCOM to prevent conflicts of interest more effectively and ensure that AMCOM has an effective ethics program

PROGRAM STRUCTURE

The AMCOM ethics program is established in the General Law/Intellectual Property Law Division (GLIPLD) of the AMCOM Legal Office (LO) An Attorney-Advisor is the primary ethics counselor (EC) and expends approximately 50 percent of his time on the ethics program Four additional attorney-advisors assist in the ethics program, primarily in the review and certification of OGE Forms 450 and in the providing of counseling and advice According to the EC, these attorney

advisors expend approximately 20 percent of their time on the ethics program. A paralegal has recently been assigned to work on the ethics program and, notwithstanding that she is in a learning process, has already made great strides to improve the management of the confidential financial disclosure program.

Due to the large number of confidential financial disclosure report filers, ethics points of contact (EPC) are established in the AMCOM program offices and directorates prior to the annual confidential filing cycle. The EPCs are appointed by the directors and program managers of the various AMCOM functions. The paralegal has prepared an EPC training program, which all EPCs will be required to attend before the 2003 filing cycle begins.

EDUCATION AND TRAINING

Initial Ethics Orientation Program Requires Attention

The AMCOM initial ethics orientation (IEO) program is not compliant with the provisions of 5 C F R § 2638.703. The EC advised us that there are no written procedures regarding the notification and scheduling of IEO for new employees hired or transferred to covered positions at AMCOM or RA and there are no assurances that all those required to receive IEO have done so. He stated that there is a verbal agreement with personnel officials to provide him with information concerning new employees, however, it is not effective. The EC indicated that he usually has to request a list of new employees from personnel and schedule IEO for those identified. The EC cannot state whether all new employees are identified to him, however, he believes he provided IEO to approximately 65 people during 2002. There are no tracking procedures to memorialize the IEO. We recommend that the EC establish an IEO program in accordance with § 2638.703 and track employee attendance.

Annual Ethics Training For SF 278 Filers Is Provided By The EC

Verbal ethics training was provided for the 23 AMCOM public financial disclosure report filers, as required by § 2638.704. The majority of the employees received the training in person from the EC. Some of the employees received the training verbally while in travel status to other facilities and their attendance was verified to the EC by e-mails from the temporary duty locations.

Annual Ethics Training For Other Employees Requires Attention

Annual ethics training for other employees fell short of the requirements at 5 C F R § 2638.705 and the Department of Defense (DOD) Joint Ethics Regulation (JER). According to the EC, the training consisted entirely of an article published in the RA newspaper which all confidential

disclosure report filers assigned to AMCOM at RA were to read. The required training was brought to the attention of the employees by appropriate supervisory personnel who were apparently advised of the requirement during staff meetings. We recommend that the EC establish an annual ethics training program for other employees in accordance with § 2638 705 and track employee attendance.

ENFORCEMENT

According to the EC, during the past several years neither LO nor the U S. Army Criminal Investigation Command (CID) have referred any violations of the criminal conflict of interest statutes, as required by 28 U S C § 535, to the Department of Justice. The EC indicated that he was aware of the requirements of 5 C F R § 2638 603. Further, he advised that there were no recent administrative actions taken or considered regarding standards of conduct matters.

In discussions with the AMCOM Inspector General (IG) and a CID representative, it was determined that there is a working relationship between the IG and the LO concerning matters of mutual interest. The CID representative advised us that most of their legal advice comes from the RA Garrison Staff Judge Advocate's Office, however, if a matter involves AMCOM or an AMCOM employee, the LO is also consulted.

ETHICS AGREEMENTS

Procedures to ensure disqualifications arising from seeking employment are not carried out in accordance with 5 C F R §§ 2635 604 and 3601 105(c) of the DOD supplemental standards of conduct. The EC provided us with copies of written memorandums of disqualification. Two of the memorandums indicated that the employees were disqualifying themselves from participating in matters involving the companies listed, citing 5 C F R § 2635 601 and the JER as the authority for the disqualifications. Discussions with the EC revealed that these disqualifications were for the purpose of enabling employees to seek post-retirement employment without violating subpart F of 5 C F R part 2635. One employee, identified as a weapon system manager, listed 39 companies from which he was disqualifying himself, 24 of which are on the current contractor list for AMCOM. Another employee, identified as chief of the logistics division, listed 132 companies, 58 of which are on the current AMCOM contractor list. We advised the EC that blanket disqualifications are not the correct procedure for dealing with employees seeking post-retirement employment. Moreover, procedures should ensure such disqualifications include screening arrangements in accordance with § 2634 804(b)(1).¹

We recommend that the EC establish procedures to ensure disqualifications arising from seeking employment are carried out in accordance with 5 C F R §§ 2635 604 and 3601 105(c) of the DOD supplemental standards of conduct.

¹ There are no Presidentially-appointed, Senate-confirmed (PAS) employees at AMCOM. There are no 18 U S C § 208(b)(1) waivers concerning AMCOM.

COUNSELING AND ADVICE

Ethics counseling and advice services meet the requirements of 5 C F R. § 2538 203(b)(7) and (8) We examined a sample of the ethics-related counseling and advice rendered by the EC Based on our examination, we concluded that most of the written advice complied with applicable ethics laws and regulations Our examination did reveal a possible misapplication of the widely attended gathering provision of 5 C F R § 2635 204(g) and the improper use of the authority at 31 U S C § 1353 for reimbursement of local travel

The EC advised that five attorneys in the GLIPLD are responsible for responding to ethics questions Attorneys from other divisions in the LO refer ethics-related inquiries to the designated attorneys According to the EC, the ethics advice is provided both orally and in writing, and he personally reduces 70 percent of his advice to writing The topics that are most prevalent include post-employment, gifts, contractor and Government employee relationships, conflicts of interest, and seeking outside employment

Examination of written determinations and other documents concerning attendance at the 2002 Armed Forces Salute Luncheon (AFSL) and the 2002 Advanced Planning Briefing for Industry (APBI) revealed possible misapplication of the widely attended gathering provisions of 5 C F R § 2635 204(g) and the provisions of 31 U S C. § 1353 Extensive discussions were held between OGE officials and AMCOM ethics officials regarding these issues The AMCOM Chief Counsel, who was not involved in the writing of the 2002 determinations, advised that he will ensure future written determinations concerning attendance at AFSL and APBI functions will comport to the requirements of 5 C F R part 2635 and 41 C F R part 304-1 with regard to the prohibitions on soliciting gifts Further, he assured us that the provisions of 31 U S C. § 1353 would not be used for local travel

The EC advised that post-employment briefings are provided two times a month The briefings cover 18 U S C § 207, procurement integrity, and disqualifications while seeking employment

FINANCIAL DISCLOSURE SYSTEMS

The financial disclosure systems appear to be well managed except for the late filing of new entrant confidential reports We examined a sample of 100 of the 3,586 confidential reports required to be filed in 2002, consisting of 97 annual and 3 new entrant reports All reports were filed timely except for the three new entrant reports, and the reviews of the reports were timely and thorough The new entrant reports were filed from more than three months to more than six months late We recommend that procedures be established to ensure that new entrant reports are filed timely in accordance with 5 C F R § 2634 903(b) ²

² This was an issue during the last program review conducted by OGE in 1994 at the AMCOM predecessor organization, the U S Army Missile Command While a recommendation was not made at that time, the report addressed the matter

In addition, we examined all 23 public reports required to be filed in 2003, none of which were from PAS employees. All reports were filed timely, except the new entrant report filed by the Acting Chief Counsel, and the reviews of the reports were timely and thorough. The Acting Chief Counsel, who assumed the position on October 11 and was not expected to be in the position for more than 60 days in 2002, continued in the position into 2003 and did not file his report until May 2, 2003. We reminded the EC that in situations such as this 5 C F R § 2634 204©)(1) requires that the Acting Chief Counsel submit a report within 15 calendar days after the 60th day of duty (i.e., by no later than December 25, 2002).

31 U S C § 1353 TRAVEL PAYMENTS

With one exception all of the acceptances appear to comply with the controlling procedures and regulations. Procedures in the JER exist to ensure proper acceptance and reporting of travel payments accepted by AMCOM employees under 31 U S C § 1353 and the implementing General Services Administration regulation at 41 C F R Chapter 304. To determine if the procedures were being used appropriately we examined AMCOM's two most recent submissions of the travel acceptances to AMCOM's immediate superior headquarters.³

One AMCOM employee was invited for an extended stay at two universities in Italy to participate in research of mutual interest. The period of the trip was from December 2001 to February 2002. The universities paid the employee's living expenses during the extended stay and the employee's transportation expenses were paid by the U S Government. This trip does not meet the criteria for acceptance of expenses under 31 U S C § 1353. AMCOM should determine if the gift of living expenses is permissible under other Department of the Army gift acceptance authority. Moreover, we recommend that § 1353 be cited as authority to accept travel reimbursements from non-Government sources only when the proper criteria are met.

RECOMMENDATIONS

To bring the AMCOM ethics program into compliance with current regulations, we recommend that the EC

1. Establish an IEO program in accordance with 5 C F R § 2638 703 and implement a tracking system to enable you to determine if all employees attend.
2. Establish an annual ethics training program for other employees in accordance with 5 C F R § 2638 705. Further, the EC should establish a tracking system to enable him to determine whether all of the covered employees are trained.

³ See also our discussion of the improper use of the authority at 31 U S C § 1353 for local travel included in our Counseling and Advice section. That acceptance was not reported in the submissions to Army Materiel Command because the value was less than \$250.

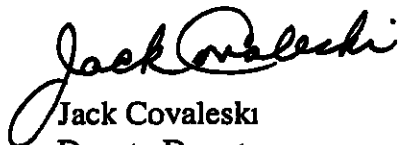
Mr Steven J Morello

Page 6

- 3 Establish appropriate procedures regarding written memorandums of disqualification by employees seeking post-retirement employment in accordance with subpart F of 5 C F R part 2635
- 4 Establish procedures to ensure the timely filing of new entrant confidential financial disclosure reports in accordance with 5 C F R § 2634 903(b)
- 5 Ensure that 31 U S C § 1353 is cited as the authority to accept travel reimbursements only when the travel meets the proper criteria

Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. In view of the corrective action authority vested with the Director of the 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 ethics officials take actions to correct these deficiencies in a timely manner. A copy of this report is being sent by transmittal letter to the U S Army IG and the Commanding General, AMCOM. Please contact Charles R. Kraus at 202-482-9256 if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

cc Mr Fred Allen
Chief Counsel
U S Army Aviation and Missile Command
ATTN AMSAM-L
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Report Number 04-001



United States
Office of Government Ethics

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December 20, 2004

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Designated Agency Ethics Official
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Dear Mr Mora

The Office of Government Ethics (OGE) recently completed a review of the ethics program at the Department of the Navy (the Navy). This review focused primarily on the immediate offices of the Secretary of the Navy (SECNAV) and the Chief of Naval Operations (OPNAV), and the offices of the four Assistant Secretaries of the Navy (ASN), consisting of the Assistant Secretary for Financial Management and Comptroller, the Assistant Secretary for Installations and Environment, the Assistant Secretary for Manpower and Reserve Affairs, and the Assistant Secretary for Research, Development, and Acquisition.¹

This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objectives were to determine the ethics program's effectiveness and compliance with applicable laws and regulations. We also evaluated the Navy's systems and procedures for ensuring that ethics violations do not occur. The review was conducted from August through October 2004.

HIGHLIGHTS

Based on the results of our review, we have concluded that the Navy's ethics program is effectively administered by dedicated and knowledgeable civilian and military officials. We especially commend the Assistant General Counsel (Ethics) (AGC (Ethics)) for actively managing and coordinating such a large and decentralized program. We also laud the efforts of ethics counselors from the office of the Deputy Assistant Judge Advocate General (Administrative Law) (DAJAG (Administrative Law)) for effectively overseeing those portions of the program dedicated to the support of the Navy's military personnel and for their cooperative endeavors with the AGC (Ethics). Finally, we commend the ethics counselors at the four ASNs and other offices included

¹The Office of the Chief Information Officer and the Office of the General Counsel's Litigation Office, as well as any office for which the Assistant General Counsel (Ethics) or officials from the office of the Deputy Assistant Judge Advocate General (Administrative Law) serve as primary ethics counselors, were also included in our review.

in this review for their efforts on behalf of the programs at their respective organizations. The consistent cooperation between the AGC (Ethics), DAJAG (Administrative Law), and ethics counselors Navy-wide reflects favorably upon the program as a whole. We believe that this type of cooperation and coordination is vital to the successful administration of such a large and decentralized program.

PROGRAM STRUCTURE

As the Navy's General Counsel, you are the Designated Agency Ethics Official (DAEO) and the Navy's Judge Advocate General is the Alternate DAEO. The AGC (Ethics) is primarily responsible for the day-to-day management and coordination of the Navy's overall ethics program. The AGC (Ethics) is physically co-located with DAJAG (Administrative Law) which, with support from the AGC (Ethics), oversees those portions of the program dedicated to the support of the Navy's military personnel. Finally, ethics counselors throughout the Navy are responsible for the day-to-day administration of the ethics program at their respective organizations or activities (such as the ASNs), including initial review of public financial disclosure reports, final review and certification of confidential financial disclosure reports, providing ethics-related advice, and conducting ethics training.

PUBLIC FINANCIAL DISCLOSURE SYSTEM

The public financial disclosure system Navy-wide is effectively managed through a cooperative effort by the AGC (Ethics), DAJAG (Administrative Law), local ethics counselors, and officials from both civilian and military personnel offices. The coordination between these individuals ensures that public financial disclosure report filers are identified and notified of the filing requirements in a timely manner and that reports are appropriately filed, reviewed, and certified.

The civilian public reports (except those filed by Presidential appointees requiring Senate confirmation (PAS)) are filed initially with the appropriate local ethics counselor and are finally reviewed and certified by the AGC (Ethics).² The public reports filed by military personnel are also initially filed with their respective local ethics counselors, however, they are finally reviewed and certified at DAJAG (Administrative Law).

Non-PAS Public Reports

To evaluate the effectiveness of the public system for both civilian and military filers, we examined a sample of 44 of the approximately 150 public reports filed in 2004 by Navy personnel from SECNAV, OPNAV, the four ASNs, and the other offices included in our review. All but one

²PAS reports are filed directly with the AGC (Ethics)

of these reports were filed in a timely manner³ and all were reviewed and certified in a timely manner

The review of these reports appeared to be quite thorough, as was evidenced by the several layers of review that each report underwent before being finally certified. As further evidence of the thorough review process, many report files contained handwritten notes and/or copies of e-mail correspondence documenting reviewers' conversations with filers to clarify or correct certain entries. We also noted several copies of cautionary memoranda used by reviewing officials to apprise filers of potential conflicts arising from their reported financial interests and the possible need to disqualify themselves from certain matters should they come before them for action.

In addition to the technical review of the reports conducted by Navy ethics officials, our examination revealed that reports appear to undergo a thorough substantive review, as we did not identify any conflicts of interest.

PAS Public Reports

We also examined all five annual public reports required to be filed in 2004 by PAS filers. Four of the reports were filed by the annual filing deadline. The fifth report was filed within the 90-day filing extension period granted to the filer. All five of the reports were reviewed, certified, and forwarded to OGE in a timely manner.

CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEM

The Navy's decentralized confidential financial disclosure system is administered primarily by local ethics counselors at the Navy's various organizations and activities. Ethics counselors at each organization or activity certify the reports after they have undergone an initial review by the filers' immediate supervisors and possibly other reviewing officials, such as paralegals or administrative assistants. Local ethics counselors work in concert with their respective human resources offices, administrative officers, and supervisors to identify confidential filers and notify them of the filing requirements, especially with regard to new entrant filers entering into covered confidential filing positions.

To evaluate the confidential system, we examined a sample of 204 of the approximately 315 confidential reports required to be filed by employees within SECNAV, OPNAV, the four ASNs, and the other offices included in our review. Of these reports, 186 were filed in a timely manner and 196 were reviewed and certified in a timely manner.

Of the 18 late reports we examined, 11 were filed by new entrants. During the exit conference, we explained that the late filing of new entrant reports is one of the most common

³The one late filer paid the \$200 late filing fee.

findings of our reviews of agencies with large, decentralized systems While we did not consider the number of late new entrant filers to be egregious, and thus not warranting a formal recommendation, we urged ethics counselors to be diligent in ensuring that employees entering into covered filing positions are identified and notified of the new entrant filing requirement in a timely manner

As with the public reports, the review of the confidential reports appeared to be conducted in a conscientious manner, our examination did not reveal any substantive deficiencies While we did uncover a few minor technical deficiencies, we have already discussed them with the appropriate ethics counselors and do not feel that formal recommendations addressing these deficiencies are necessary to maintain the integrity of the system

Confidential System for Advisory Committee Members

Within OPNAV and SECNAV there exist two Federal advisory committees the Chief of Naval Operations Executive Panel (CNO Executive Panel) and the SECNAV Advisory Subcommittee on Naval History The members of these committees have been designated as special Government employees (SGE) and as such are required to file confidential financial disclosure reports upon initial appointment and annually thereafter on the anniversary of their appointment date

To evaluate the confidential system for these two committees, we examined samples of 14 of the 28 confidential reports required to be filed by members of the CNO Executive Panel and 7 of the 13 reports required to be filed by members of the SECNAV Advisory Subcommittee on Naval History in 2003 Based on our examination of the filers' dates of appointment and discussions with OPNAV ethics officials, all but one of the reports appeared to be filed in a timely manner In addition, all of the reports were reviewed and certified in a timely manner We did not uncover any substantive or technical deficiencies during our examination of the reports

According to OPNAV ethics officials, committee management officials from both committees routinely review meeting agendas against members' financial disclosure reports to assist them in identifying potential conflicts of interest prior to upcoming meetings OPNAV officials explained that in accordance with new procedures, they too will begin receiving agendas of committee meetings from both committees for use in conducting their reviews

ETHICS EDUCATION AND TRAINING

As noted during previous OGE ethics program reviews, the Navy places considerable emphasis on training, often exceeding OGE's minimum training requirements We commend the Navy for routinely providing additional training, not only to covered employees, but to new and seasoned ethics counselors as well

Initial Ethics Orientation

To meet the initial ethics orientation requirement, the Secretariat Human Resources Office provides written orientation materials, prepared by the AGC (Ethics), to new civilian Navy employees and instructs them to take at least one hour to review the materials. These materials consist of a summary of the ethics rules entitled, "Employees' Guide to the Standards of Conduct," a current list of ethics counselors, and information on how to contact them.⁴ New civilian employees are required to certify that they have received the orientation materials and return the signed certification statement to the appropriate human resources office.

New military personnel are provided initial ethics orientation as part of their indoctrination training prior to reporting for duty at their first assigned activity.

In addition to receiving the written orientation materials, new civilian and military employees are often provided with an additional orientation when they report to a newly-assigned organization or activity. This additional orientation is typically part of a standardized check-in process whereby new employees are required to visit their assigned ethics counselor, among other offices, upon entrance on duty.

Annual Ethics Training

Annual verbal ethics training for covered Navy employees is typically provided electronically using the online training modules prepared by the Department of Defense's (DOD) Standards of Conduct Office (SOCO). However, in-person briefings are also routinely provided on a one-on-one or small-group basis. For example, the AGC (Ethics) provides all Navy PAS officials at least one hour of in-person one-on-one training annually, with the participation of the cognizant ethics counselors if so desired.

Based on our examination of relevant documentation and discussions with the AGC (Ethics), ethics counselors from DAJAG (Administrative Law), and ethics counselors at the four ASNs, all but a handful of covered employees assigned to the offices included in our review received annual training in 2003. Typically, this training was provided using one or more of the DOD SOCO-developed online modules, although some ethics counselors mandated, or offered as an option, live training.

Almost all of the ethics counselors included in our review maintained records of who received annual training in 2003 (e.g., certificates of completion, sign-in sheets, etc.), enabling us to determine whether covered employees received training. However, one ethics counselor admitted

⁴The same materials are provided to new Senior Executive Service employees by the Office of Civilian Human Resources (Senior Executive Service Manager).

that her office had not maintained such records for her covered employees (although she assured us that all had received the training) Upon identifying this oversight while preparing for our review, the ethics counselor developed a system for tracking training attendance which is currently being used to ensure employee completion of 2004 annual training at this organization

In addition to providing annual training to covered regular employees, OPNAV ethics counselors provide annual training to all SGE committee members from both OPNAV and SECNAV advisory committees Committee members were provided written materials to meet the annual training requirement in 2003

While we commend all the Navy ethics counselors included in our review for providing accurate and timely training to their employees, we were especially impressed with a practice developed by the Special Counsel to the CNO Because of the CNO's busy schedule, it can be challenging for him to allocate time in his schedule to focus on ethics training Therefore, the Special Counsel instituted a practice of loading a computer-based training module on a laptop computer that the CNO takes with him on a trip using a military aircraft Once airborne, one of the CNO's aides, who has been thoroughly briefed on the training, runs through the module with the CNO The Special Counsel, as the ethics counselor for the CNO, stands by via a phone connection to answer any questions the CNO may have during the training We applaud this creative effort to ensure that the Navy's highest ranking military official receives the required annual ethics training

Additional Training Efforts

The AGC (Ethics) and ethics counselors from DAJAG (Administrative Law) provide a variety of ongoing ethics training each year in addition to the routine provision of initial ethics orientation and annual ethics training

For example, the AGC (Ethics) maintains an ethics Web site, "The Ethics Compass," containing a myriad of ethics-related information Visitors to the site may submit questions to which the AGC (Ethics) responds Also, DAJAG (Administrative Law) recently developed its own section on the "Navy Knowledge Online" Web site as a resource for both military and civilian personnel in the legal community

The AGC (Ethics) and DAJAG (Administrative Law) also routinely disseminate ethics advisories (Ethics-Grams) on various and timely ethics issues via an extensive e-mail distribution list These Ethics-Grams are also posted on their respective Web sites

In addition to providing training to non-ethics personnel, the AGC (Ethics) and DAJAG (Administrative Law) provide a significant amount of training for ethics counselors throughout the Navy on a routine basis

For example, each year the AGC (Ethics) and ethics counselors from DAJAG (Administrative Law) conduct 5 90-minute Ethics Roundtables for Navy and Marine Corps ethics counselors worldwide via video teleconferencing. During these sessions, for which agendas are developed by the AGC (Ethics), ethics counselors are provided updates on new developments in the ethics arena, share lessons learned, and participate in open discussions on ethics-related issues.

Additionally, ethics counselors from DAJAG (Administrative Law) developed and provided a two-day ethics program for senior ethics counselors, one conducted on the east coast, the other on the west coast. The AGC (Ethics) participated in both of these programs. A similar program, tailored for new ethics counselors, was provided twice in 2003. Additionally, a three-day program was offered in 2003 for both new and experienced ethics counselors alike.

The AGC (Ethics) and ethics counselors from DAJAG (Administrative Law) also participate in the annual week-long Basic Ethics Course for ethics counselors sponsored by the Judge Advocate General's School of the U.S. Army in Charlottesville, Virginia.

We commend these efforts to train and educate ethics counselors as an excellent way to ensure accurate and consistent management of the Navy's large and geographically dispersed ethics program.

ADVICE AND COUNSELING PROGRAM

Counseling is provided by the ethics counselors at each of the Navy's individual organizations and activities. The AGC (Ethics) provides overall guidance to the ethics counselors and often assists them in providing accurate advice. In addition, the physical co-location of the AGC (Ethics) and DAJAG (Administrative Law) fosters a collaborative approach to providing ethics counseling, ensuring that consistent and accurate advice is provided throughout the Navy.

To evaluate the quality of advice provided by the AGC (Ethics), DAJAG (Administrative Law), and ethics counselors at the four ASNs and other organizations included in our review, we examined a sample of ethics-related written determinations rendered by these officials from 2003 to the present. The advice we reviewed covered the entire spectrum of the ethics rules, including gifts, post-employment, conflicts of interest, and travel. We found the advice to be thorough, accurate, and rendered in a timely fashion. Moreover, ethics counselors often provided counseling beyond merely responding to the question posed in an effort to ensure that employees understood all of the potential pitfalls in taking a particular course of action.

ENFORCEMENT

An effective working relationship exists between ethics counselors, the Navy's Office of Inspector General (OIG), and the Naval Criminal Investigative Service (NCIS). Accordingly, it appears that the requirement at 5 C.F.R. § 2638.203(b)(12) is being met, wherein the services of OIG

and NCIS are being utilized by ethics officials, including the referral of matters to and the acceptance of matters from OIG and NCIS. The OIG and NCIS officials with whom we met agreed that there is ongoing communication and interaction between their offices and the AGC (Ethics), DAJAG (Administrative Law), and local ethics counselors. In addition to this routine coordination, other cooperative initiatives have taken place or are planned to be implemented. For example, in January 2004, the Navy's Judge Advocate General and Inspector General provided a joint standards of conduct briefing to the Navy's most senior leadership officials attending the Three and Four Star Conference. In addition, the AGC (Ethics) hopes to provide an ethics counselor to assist in scheduled IG audits by conducting ethics evaluations.

Investigations regarding alleged violations of the criminal conflict of interest laws are handled by NCIS. The status and results of these investigations are routinely shared with you by NCIS or through the AGC (Ethics). NCIS is also responsible for referring any such cases to the Department of Justice (DOJ) for possible prosecution and, in accordance with 5 C F R § 2638.603, concurrently notifying OGE of any such referral.

At the start of our review, NCIS had made no referrals to DOJ of alleged violations of the criminal conflict of interest laws by any employee at the organizations included in our review in the past year. However, at the time of our review, one possible violation of 18 U S C § 208 was still under investigation by NCIS. Since the completion of our review, NCIS completed its investigation of the case and referred it to DOJ, which declined to prosecute. Since the employee in question has already retired from the Navy, no further disciplinary action is planned.

In addition, there have not been any standards of conduct or related violations resulting in disciplinary or administrative action in the past year involving any employee at the organizations included in our review. We were informed that the responsibility for taking any such disciplinary or administrative action rests with the individual command or organization to which the offending employee is assigned. However, the CNO and the Vice Chief of Naval Operations routinely monitor cases involving flag officers throughout the Navy.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

The Navy has procedures in place to approve the acceptance of payments of travel and related expenses from non-Federal sources under 31 U S C § 1353. These procedures are spelled out in Chapter 4 of the DOD Joint Ethics Regulation and further refined by SECNAV INSTRUCTION 4001.2G.

To evaluate the effectiveness of these procedures, we examined all 21 gifts of travel in excess of \$250 accepted during the reporting period from October 1, 2003 to March 31, 2004 by OPNAV and SECNAV (we did not identify any payments accepted during this period by any of the ASNs). All of the payments appeared to be approved and accepted in accordance with 31 U S C § 1353.

Mr Alberto J Mora

Page 9

In closing, I wish to thank the AGC (Ethics), DAJAG (Administrative Law), ethics counselors from the four ASNs and other offices included in our review, and all other Navy officials who participated in this review for their cooperation and their efforts on behalf of the ethics program. A follow-up review is usually scheduled within six months from the date of this report. However, since this report contains no formal recommendations, this will not be necessary. A copy of this report is being forwarded to the Naval Inspector General. Please contact Dale Christopher at 202-482-9224 if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04- 024



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December 20, 2004

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Dear Mr Feldman

The Office of Government Ethics (OGE) has completed its review of the Federal Deposit Insurance Corporation's (FDIC) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the program's compliance with applicable statutes and regulations. We also evaluated FDIC's systems and procedures for ensuring that ethics violations do not occur. The review was conducted in July and August 2004.

HIGHLIGHTS

FDIC has an exemplary ethics program administered by a very strong team of dedicated ethics officials. The program meets or exceeds all of our regulatory requirements. We found that FDIC thoroughly investigates potential ethics violations and takes prompt and effective action against those who are found to have committed violations. However, our report does note that FDIC did not promptly notify OGE of a referral to the Department of Justice concerning an alleged violation of 18 U.S.C. § 207. We do, however, acknowledge that FDIC has taken steps to ensure that OGE will be notified of all referrals in the future. The public and confidential financial disclosure systems are well administered. All required ethics training, including that mandated for Presidentially-appointed Senate-confirmed (PAS) employees, is provided. Additional training opportunities are readily available for all employees. We were also pleased to find that ethics officials quickly took action to inform employees of a change in the statute which affects certain provisions of FDIC's supplement to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). Since the ethics program is in compliance with regulatory requirements, our report makes no formal recommendations.

PROGRAM STRUCTURE

The current staffing level for the ethics program appears appropriate given the agency's size, organizational structure, and mission. As FDIC's Executive Secretary, you also serve as the DAEO. The Ethics Program Manager, who is also the Alternate DAEO, manages the program with the collaborative efforts of two Ethics Program Specialists, a Senior Program Assistant, and a Secretary. In addition, there are 71 Regional and Field Office Deputy Ethics Counselors (DEC) in place to assist

Mr Robert E Feldman

Page 2

in administering the program throughout FDIC This organization of resources appears to be highly effective in meeting the needs of FDIC employees for ethics-related services

ENFORCEMENT

Ethics officials have an active and effective working relationship with the Office of the Inspector General (OIG), which allows them to review information developed by the OIG and to use the services of that office, as appropriate, in accordance with 5 C F R § 2638 203(b)(11) and (12) Through discussions with both ethics officials and the Inspector General (IG), it was clear that the two offices work closely to investigate cases of potential violations of the Standards and the criminal conflict of interest statutes We view this as important since it allows for the proper disposition of ethics-related violations

FDIC thoroughly investigates potential ethics violations and takes prompt and effective action against those who commit violations, as required by 5 C F R § 2638 203(b)(9) This conclusion is based on our review of documentation recording the actions taken by FDIC against nine employees in 2003 for violating the Standards The employees were found to have violated rules regarding gifts, misuse of position, misuse of Government resources and information, and indebtedness Actions taken ranged from admonishment to suspension FDIC's actions in these cases have served to enforce the Standards and demonstrate to all employees the consequences of unethical conduct

FDIC did, however, fail to provide OGE with concurrent notification, as required by 5 C F R § 2638 603, of a conflict of interest referral the agency made in 2003 to the Department of Justice (DOJ) During the course of the review, OGE was provided with the completed "Notification of Conflict of Interest Referral" form, on which FDIC also noted that DOJ had declined to prosecute the employee The referral was for an alleged violation of 18 U S C § 207 The case involved foreign entities and ongoing litigation, which were cited by ethics officials as factors which complicated making concurrent notification to OGE As soon as ethics officials became aware of the referral, they took action to see that OGE was notified It was the only referral made to DOJ since 1998

At the time the referral was made, there was a misunderstanding as to who was responsible for concurrently notifying OGE of referrals In discussing the failure to concurrently notify OGE, the IG explained that his office makes referrals to DOJ, but, he believed that concurrent notification to OGE was a "management" responsibility Accordingly, the IG did not notify ethics officials that the referral had been made As soon as ethics officials became aware that the referral had been made, they notified OGE It has since been decided that the IG will meet quarterly with ethics officials to specifically discuss employee investigations to identify any cases involving the potential violation of a criminal conflict of interest statute Ethics officials will now be aware of potential referrals and, if any of the investigations result in a referral, ethics officials will now be responsible for notifying OGE These quarterly meetings, coupled with the already ongoing exchange of information between the two offices, should ensure that FDIC meets the requirement to concurrently notify OGE of any future referrals

FINANCIAL DISCLOSURE SYSTEMS

Both the public and confidential financial disclosure systems are well administered and meet relevant requirements. Ethics officials have developed procedures to efficiently manage both systems, assist filers as necessary in completing reports, and thoroughly review reports to detect conflicts of interest.

FDIC's National Employee Ethics Tracking System (NEETS), which we recognized in the report of our 1998 review of FDIC's ethics program, is a sophisticated management tool which allows ethics officials to closely track the filing of public and confidential reports, as well as ethics training completion, throughout FDIC. Although we only examined a small sample of the actual reports filed, a demonstration of the NEETS computer program showed that all public and confidential reports throughout FDIC were accounted for and that almost all were filed, reviewed, and certified timely. The system allows ethics officials to follow up with individuals or their supervisors to ensure covered employees file reports as required. We commend FDIC for maintaining such a highly effective system for tracking information concerning financial disclosure filing. We also note FDIC's generous offer to make NEETS available to other agencies and provide them with instruction in operating the system. We see this as another indication of ethics officials' dedication to the ethics program within the entire executive branch.

Public System

We examined a sample of 30 of the 110 public reports required to be filed by non-PAS FDIC employees in 2004. All of the reports we examined were annual reports and only one was filed late, by less than 30 days. All reports were reviewed and certified timely. This is indicative of the efficiency with which ethics officials administer the ethics program in general, and the financial disclosure systems in particular. We identified no substantive issues on any of the reports we examined.

We were impressed with the great efforts made by ethics officials in determining whether disclosed interests represented real or potential conflicts of interest. Making these determinations is the most important part of reviewing reports and it was readily apparent that FDIC's ethics officials are very effective in doing so. We saw ample evidence of reviewers' notations and discussions with filers to conclude that ethics officials are dedicated to protecting both FDIC and individual filers from conflicts of interest.

We examined the four public reports required to be filed by FDIC's PAS employees in 2004. All of the reports were filed, reviewed, and certified timely. As with the non-PAS reports, it was apparent that they were thoroughly reviewed for conflicts of interest. The reports were transmitted to OGE pursuant to 5 C.F.R. § 2634.602 in a timely manner.

Confidential System

We examined a sample of 49 of the 3,422 confidential reports required to be filed in 2003 and found that almost all were filed and reviewed timely. Consistent with our observations of the

Mr Robert E Feldman

Page 4

review of public reports, the review of confidential reports for conflicts of interest was thorough We identified no substantive issues in our review of the reports

Supplemental Financial Disclosure Reporting

FDIC uses several well-designed supplemental financial disclosure report forms, approved by OGE, to help employees avoid conflicts of interest During our examination of public and confidential reports, we also examined the accompanying supplemental forms We found them to be properly completed and reviewed by ethics officials in accordance with established procedures

ETHICS AGREEMENTS

There was only one ethics agreement created during the period January 2003 through July 2004 The agreement was created by a new PAS employee in 2003 and actions required to be taken pursuant to the ethics agreement were completed timely, in accordance with 5 C F R § 2634 802(b) Evidence of action taken was submitted timely to OGE, in accordance with 5 C F.R § 2634 804(a)

ETHICS EDUCATION AND TRAINING

FDIC meets and in some ways exceeds OGE's ethics education and training requirements The 2003 and 2004 training plans were comprehensive and documented prior to the beginning of each calendar year FDIC provides required training to all covered personnel, including PAS and other senior employees who file public financial disclosure reports, confidential filers, and those employees who are new to the agency Training is tracked using certification statements completed by employees verifying they have received training The statements are also used to update the NEETS system so that ethics officials can easily determine which covered employees have not yet received required training

Exceeding requirements, FDIC makes ethics training videos available through the FDIC intranet directly to employees' computer monitors These videos are scheduled periodically so that employees may view them as their schedules allow They are in addition to the annual training and initial ethics orientation courses used to meet basic requirements Ethics officials often attend senior staff meetings to discuss ethics issues and provide guidance as necessary They also distribute bulletins discussing various ethics topics such as gifts, interaction with contractors, and political activities, to further inform FDIC employees

FDIC has also instituted a rigorous training program for its DEC's The program consists of a two-day course of formal instruction provided by senior FDIC ethics officials The course covers the spectrum of standard ethics program issues including roles and responsibilities of a DEC, the financial disclosure process, outside activities, ethics agreements, gifts, the Standards, impartiality, and other issues The course includes exercises and appears to be well-designed to prepare DEC's to fulfill their duties and provide excellent service to FDIC's employees

Initial Ethics Orientation

FDIC ethics officials exceed requirements for providing initial ethics orientation by providing an in-person presentation for all new employees. The training is conducted once each pay period as part of a three-day general new employee orientation program. All required subject matter is covered and one hour is allowed for the in-person presentation and employee review of ethics materials.

FDIC ethics officials were able to document that all PAS employees appointed during the current and preceding three calendar years received initial ethics orientation. The in-person training was conducted one-on-one (which OGE considers to be a best practice) by the DAEO or the Alternate DAEO, and tailored to meet the needs of these senior employees.

Annual Ethics Training For Public Filers

FDIC met all requirements for providing annual ethics training to public financial disclosure filers in 2003. All public filers received in-person verbal ethics training presented by a qualified instructor, usually the Alternate DAEO. The training met the content requirements established by 5 C F R § 2638 704(b) and lasted at least one hour.

Ethics officials were able to verify that all but one current PAS employee received annual training in each of the three previous calendar years¹. Their training also met content requirements, lasted at least one hour, and was designed to meet the specific needs of those who were trained.

Annual Ethics Training For Other Covered Employees

Annual training was provided to other covered employees in 2003. Approximately one-third of FDIC's 3,422 confidential filers were given in-person verbal ethics training. The rest were given written ethics training. Training via both methods met content requirements. Both verbal and written ethics training was prepared by a qualified instructor. Verbal training was also presented by a qualified instructor. Ethics officials were available during training to answer questions.

ETHICS COUNSELING AND ADVICE

Ethics counseling and advice services meet the requirements of 5 C F R § 2638.203(b)(7) and (8). While ethics advice is sometimes given orally, it is most often dispensed in written form, usually by e-mail. We examined all of the written determinations provided to FDIC's current PAS employees and a sample of approximately 35 other written determinations provided to other employees during the period covered by this review. In addition, we examined a number of informational bulletins provided through general distribution. Overall, we found that the advice and information was accurate and consistent with applicable statutes and regulations.

We also acknowledge and commend the additional measures you have taken to meet the needs of FDIC's employees for ethics-related guidance. These measures include (1) aggressively

¹ One PAS employee, confirmed in December 2003, received annual training in 2004.

Mr Robert E Feldman

Page 6

advertising the availability of ethics officials to answer employees' questions; (2) regularly issuing bulletins concerning topics of general concern, (3) requiring all departing employees to out-process through your office to ensure post-employment training is provided if appropriate, and (4) surveying employees concerning the quality, usefulness, and timeliness of the counseling and advice you provide. We encourage you to continue these practices as a means of preventing inadvertent violations of the Standards and criminal conflict of interest statutes.

FDIC ADVISORY COMMITTEE ON BANKING

Ethics officials have determined that members of the Advisory Committee on Banking, FDIC's only advisory committee, are all representatives, rather than special Government employees. Ethics officials used the appropriate guidance in making their determination, including, the committee's charter, a review of the Federal Advisory Committee Act, OGE's DAEOgrams, and other guidance provided by our Office. They also consulted directly with OGE staff in making their determination. FDIC's Chairman chairs the committee, determines the number of members on the committee, and appoints them. The committee members have each been apprised of their status as representatives. They were further advised of their individual roles as committee members, e.g., to represent and advocate for the banking industry, the financial services community, the public affairs community, etc. Since members are representatives, they are not required to file financial disclosure reports or receive ethics training.

SUPPLEMENTAL REGULATIONS

FDIC has issued, with concurrence from OGE, a supplement to the Standards, at 5 C.F.R. part 3201. The supplemental regulation addresses a variety of ethics issues unique to FDIC and was discussed in the report of our 1998 review. On December 19, 2003 the President signed S. 1947, the *Preserving Independence of Financial Institution Examinations Act of 2003* (the Act), the passage of which requires, at a minimum, that FDIC amend the supplemental regulation to remove outdated language.

The Act amends sections 212 and 213 of title 18 of the United States Code. While these sections continue to prohibit a financial institution from extending a loan to anyone who examines or has authority to examine that institution, the new legislation amends the criminal code to allow for some narrow exceptions. These exceptions allow FDIC examiners to obtain credit cards and primary residential home loans from institutions they examine or have the authority to examine, provided that they are obtained under the same terms and conditions as are available to other cardholders and borrowers. FDIC was prompt in providing notification of these changes to all FDIC employees and in issuing its "Interim FDIC Ethics Policy on Credit Cards and Home Mortgages" (Interim Policy). The Interim Policy provides a detailed explanation and guidance for using the new exceptions.

We discussed the amendment of FDIC's supplemental regulation with ethics officials, confirming that OGE would have to concur in any amendment to the supplement to remove outdated language (as well as to add any new provisions implementing the changes to the criminal code). However, the Act constitutes independent statutory authority for FDIC to establish its own regulation implementing the changes to the criminal code. Thus, while FDIC would have to obtain OGE concurrence to remove outdated language, which is largely a formality since it is superseded by the

Mr Robert E Feldman
Page 7

new legislation, the new provisions may be put in place as an FDIC regulation, independent of the supplemental regulation. At our last meeting, ethics officials were undecided on whether they would seek to issue an implementing regulation under FDIC's own authority, or seek OGE's concurrence to implement the new provisions through a change to its supplemental regulation. While we await FDIC's decision on this issue, we commend ethics officials' efforts to immediately make employees aware of the changes and issue an interim policy.

**TRAVEL PAYMENTS FROM
NON-FEDERAL SOURCES**

FDIC does not accept payments for travel, subsistence, and related expenses from non-Federal sources under 31 U.S.C. § 1353. FDIC consistently provides OGE with timely (negative) semiannual reports.

In closing, I wish to thank you and your staff for all of your efforts on behalf of the ethics program. A brief follow-up review is typically scheduled within six months from the date of this report. However, as this report contains no formal recommendations to improve the program, no such follow-up will be necessary. A copy of the report is being forwarded to FDIC's IG via transmittal letter. Please contact Doug Chapman at 202-482-9223, if we can be of further assistance.

Sincerely,


Jack Covalleski
Deputy Director
Office of Agency Programs

Report Number 04 - 025



October 13, 2004

John A. Rogovin
Designated Agency Ethics Official
Federal Communications Commission

(b) (6)

445 12th Street, SW
Washington, DC 20554

Dear Mr. Rogovin:

The Office of Government Ethics (OGE) has completed a review of the Federal Communications Commission's (FCC) ethics program. Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated FCC's systems and procedures for ensuring that ethics violations do not occur. The review was conducted in June and July 2004. The following summarizes our findings:

HIGHLIGHTS

FCC's ethics program continues to be sound and well managed. Again, we were impressed with ethics officials' commitment to providing high quality services to employees. Since our last review in 1997, ethics officials have sustained strong financial disclosure systems, an exemplary counseling and advice services program, and ongoing training initiatives of employee awareness of the ethics laws and regulations.

PROGRAM STRUCTURE

The level of staffing dedicated to administering the ethics program appears to be appropriate considering the broad spectrum of ethical issues that could arise during most of the year. However, because of the vast number of confidential reports, you agreed to request additional assistance for the annual confidential financial reporting cycle.

For the over 2,000 FCC employees who are located in headquarters in Washington, DC and in field and regional offices around the country, you, as FCC's General Counsel, serve as the Designated Agency Ethics Official (DAEO). The Assistant General Counsel (Ethics), who serves as Alternate DAEO, coordinates and manages the day-to-day functions of FCC's ethics program. To assist the Alternate DAEO in performing the required functions, the ethics program staffing also consists of a Senior Ethics Counsel, an Ethics Counsel, an Ethics Program Specialist, and a Program Analyst (Ethics). Attorneys are primarily responsible for providing advice and ethics training, the

Mr John A Rogovin
Page 2

ethics program specialist principally administers the financial disclosure systems, and the program analyst approves the acceptance of certain gifts

FCC'S SUPPLEMENTAL REGULATION

With concurrence from our Office, FCC issued supplements to both the standards of conduct and the financial disclosure requirements. FCC's supplement to the standards of conduct, at 5 C F R part 3901, requires professional employees to obtain approval before engaging in certain outside activities. The supplemental financial disclosure requirement, at 5 C F R part 3902, applies to all employees required to file either a public or confidential financial disclosure report and requires that they also file a supplemental report--FCC Form A54A. The purpose of the FCC Form A54A is to require disclosure of income and interests in property and assets valued below the minimum reporting thresholds for the SF 278 and OGE Form 450, to ensure that FCC employees comply with the prohibitions in section 4(b)(2)(A) of the Communications Act (the Act), at 47 U S C § 154(b).¹ Among other things, employees are prohibited by section 4(b)(2)(A)(iv) from being employed by, holding any official relation to, or owning any stocks, bonds, or other securities of any company significantly regulated by FCC.

FCC ADVISORY COMMITTEES

The ethics officials informed us that the members of FCC's seven committees created under the Federal Advisory Committee Act are not special Government employees. Therefore, the members are not required to file a financial disclosure report. The Government Accountability Office is currently reviewing the FCC designations of advisory committee members, and will report their findings later this year.

FINANCIAL DISCLOSURE SYSTEMS

FCC's public and confidential systems are generally well managed and maintained. Their comprehensive written procedures document how the financial disclosure systems are administered. We examined all of the over 1,400 public reports (excluding those filed by Presidentially-appointed, Senate-confirmed (PAS) employees and by you) and confidential reports, including most of the supplemental reports, required to be filed in 2003. We found that they appeared to contain no conflicts of interest nor violations of section 4(b)(2)(A) of the Act. Although the public reports were filed and reviewed timely, many of the confidential reports were filed late and a few were reviewed

¹ We noted that ownership of certain holdings may be transferred to employees' spouses or dependent children for purposes of FCC's organic act that applies. FCC is responsible for administering the Act, not OGE.

late The public reports filed by the PAS employees, the four Commissioners, were filed, reviewed, and forwarded to OGE timely²

We discussed with ethics officials some possible solutions to more effectively administer FCC's centralized financial disclosure systems which, in addition to the public and confidential reports, require from filers the same number of supplemental reports The ethics officials agreed, as the solution for receiving reports and information timely, to seek the assistance from the employees' managers early in the collection and review process They also agreed, as the solution for reviewing the reports timely, to acquire additional staff during the peak confidential reporting cycle to assist in the collection and technical review of the reports

Public Financial Disclosure System

Our examination of the 87 public reports, excluding the Commissioners' reports, consisted of 66 incumbent reports filed in 2003, and 14 new entrant and 7 termination reports filed in 2003 until the time of our review We also examined 64 of the 80 supplemental reports (terminating employees are not required to file the supplemental report) The reviewing official advised us that there were no corresponding prior outside activity approvals required for the activities listed on the reports, since the activities did not involve the outside practice of the same profession as that of the employees' official positions (5 C F R § 3901 102(a))

Confidential Financial Disclosure System

Our examination of over 1,300 confidential reports filed in 2003 consisted of 1,300 incumbent and 13 new entrant reports At the beginning of our fieldwork, 13 employees had not yet filed a report, but all had filed by the end of our fieldwork However, only 85 percent of the employees had filed supplemental reports Thirty-eight confidential reports were not reviewed timely A few notices to employees to divest of or transfer to their spouse or dependent child, prohibited securities in communications companies were sent more than 90 days after the reports were filed Moreover, at the beginning of our fieldwork, ethics officials were waiting for additional information from 39 filers, which had been reduced to 9 filers by the end of our fieldwork We discussed with ethics officials the late filing and review of confidential reports They agreed to resolve these problems by assigning additional staff during the peak of the annual confidential filing cycle to assist in the collection and technical review of the reports so that the reviewing official could focus on the more substantive issues

As part of our examination we raised specific questions regarding outside activities and possible holdings in prohibited communications stocks The reviewing official advised us that only 1 of the 13 outside activities questioned needed approval, which was found on file, and 2 of the 35 holdings questioned needed to be divested or transferred to the filer's spouse or dependent child

² An annual report was not required in 2003 for the fifth Commissioner, since he worked less than 60 days in 2002

Mr John A Rogovin
Page 4

One holding was divested and the other was transferred to a spouse or dependent child. Neither holding posed an actual conflict of interest.

To determine whether confidential filers had any actual 18 U S C § 208 violations, we provided the ethics officials with a list of 37 filers' names along with the communication stocks held in a spouse's or dependent child's name. The ethics officials confirmed that there were no violations. In fact, the ethics officials informed us that only a few of the stock holdings were above the de minimis exemptions at 5 C F R § 2640.202.

EDUCATION AND TRAINING

New employees primarily are provided the required initial ethics orientation materials by the personnel office.³ However, new commissioners and their staff receive in-person ethics training from ethics officials. Additionally, when there are groups of employees hired, for instance summer interns, ethics officials hold new employee orientation sessions. These orientation sessions include an ethics briefing and handouts of ethics materials.

All but one public filer and all confidential filers received annual ethics training in 2003. Most public filers attended one of four annual ethics training sessions. Since all covered employees were provided verbal ethics training during CY 2002, only public filers were required to receive verbal ethics training in 2003. Each of the four sessions, which started on October 30 and ended on December 10, 2003, was conducted by a qualified instructor and lasted 90 minutes. Additionally, ethics officials also provided in-person sessions to two of the Commissioners and their staff, as requested. Public filers who did not attend one of the aforementioned sessions were required to view a 60-minute videotape of a previous ethics session. Confidential filers were permitted to attend the verbal sessions and were provided written training via quarterly "Ethicsgrams," which all FCC employees receive. Topics of the 2003 Ethicsgrams included participation in outside organizations, reimbursable travel, criminal restrictions on financial interests, letters of recommendation, outside teaching, volunteer legal services, and holiday gifts and invitations.

As documented in FCC's 2004 annual training plan, FCC plans to provide verbal ethics briefings to its public filers and distribute written materials to its confidential filers in 2004.

COUNSELING AND ADVICE

Ethics officials provide an extensive amount of counseling and advice to FCC employees both orally and in writing. We were impressed with the efforts taken to dispense and document the advice rendered. In addition to attorneys' personal files, your well-maintained subject matter filing system allows for easy retrieval of documents, which helps to ensure that consistent advice is provided when similar issues or questions arise. Also, your chronological file allows you to track the quantity of ethics questions asked by employees. We examined a sample of 50 pieces of written

³ New employees at the field and regional offices are mailed the ethics materials.

advice from the subject matter files for the 2003-2004 timeframe, as well as 72 pieces of written advice from the chronological file for the June 1-June 25, 2004 timeframe. They appeared to be accurate, comprehensive, and timely. Our examination of the subject matter files included gifts, impartiality concerns, endorsements, outside activities, seeking employment, misuse of position, and post employment. Our examination of the chronological file disclosed that 41 employees received approval to attend a widely attended gathering either as a speaker or a participant.

ETHICS AGREEMENTS

FCC granted three 18 U S C 208 (b)(1) waivers, one in 2003 and two in 2004. The waivers indicated that OGE was consulted with informally and was forwarded a copy of the waivers.

According to ethics officials, avoidance of conflicts of interest is stressed from the time an employee starts working for FCC and throughout the employee's career. Managers generally do not ask employees whether they have potential conflicts before assigning work. It is the employee alone who is held accountable for disqualifying him or herself from acting on matters where he or she has a financial interest.

GIFTS OF TRAVEL PAYMENTS

The process of approval of the acceptance of gifts of travel from non-Federal sources under 31 U S C. § 1353 appears effective. However, we found that FCC is not using Standard Form (SF) 326, in accordance with 41 C F R § 304-6.4, to report semiannually to OGE payments of more than \$250 per event. On August 2, 2004, FCC requested permission from OGE to use a form other than the SF 326, which was subsequently denied.

We examined FCC's last semiannual report for the period October 1, 2003-March 31, 2004. We found that payments appeared to be appropriately accepted for meetings or similar functions. The types of travel consisted of attendance at conferences, conventions, expos, forums, meetings, panels, seminars, shows, summits, symposiums, and workshops.

ENFORCEMENT

Prompt and effective administrative actions were taken for violations of the standards of conduct. We were informed by the Labor Relations Specialist, Labor Relations and Performance Management Service Center, Office of Managing Director (Labor Relations) that during the period from January 2003 through January 2004 two employees received suspensions for misuse of Government property (computer and credit card). We suggested that ethics officials contact Labor Relations to determine whether to add an enforcement component to the ethics training program.

Effective communications exist between ethics and Office of the Inspector General (OIG) officials. Although there have been no recent alleged criminal conflicts of interest violations, we

Mr John A Rogovin
Page 6

were assured that, if needed, OGE would be concurrently notified of matters referred to the Department of Justice by OIG

In closing, we wish to thank you and your staff for your efforts on behalf of the ethics program. Since no improvements to your program were recommended, we will not need to conduct a six-month follow-up review. A copy of this report is also being sent to FCC's Inspector General. Please contact Jean Hoff at 202-482-9246 if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04 - 021



September 2, 2004

Paul R. Corts
Designated Agency Ethics Official
Department of Justice
950 Pennsylvania Avenue, NW
(b) (6)
Washington, DC 20530

Dear Mr. Corts

The Office of Government Ethics (OGE) has completed its review of the Department of Justice's (DOJ) U.S. Parole Commission's (Commission) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated the Commission's systems and procedures for ensuring that ethics violations do not occur. This review was conducted intermittently from July through August 2004.

HIGHLIGHTS

The Commission's ethics program is sound and appears to be appropriately tailored to meet the needs of agency employees. While we found no deficiencies, this report makes several suggestions to enhance the program, including annually sending employees an advisory on some topical issue.

PROGRAM STRUCTURE

Current staffing for the ethics program appears appropriate given the Commission's size, organizational structure, and mission. An Assistant General Counsel is the long-serving Deputy Designated Agency Ethics Official (DDAEO) for the approximately 80 employees, all of whom are located in Chevy Chase, Maryland. The Commission does not have any special Government employees.

PUBLIC AND CONFIDENTIAL SYSTEMS

The public and confidential systems are in compliance with applicable laws and regulations. We examined all five public reports required to be filed in 2003 and 2004 and found they were timely filed.¹ However, some of these reports, as well as others required to be

¹ The only public reports filed at the Commission are those from Presidentially-appointed, Senate-confirmed (PAS) employees. None of these employees has an ethics agreement.

Mr. Paul R. Corts

Page 2

transmitted to OGE from PAS employees throughout DOJ, are not being timely transmitted, in accordance with 5 C.F.R. § 2634.602(c)(1) and the clarifying guidance OGE provided in a recent DAEOgram.² We also examined the two confidential reports required to be filed in 2003 and found that they were timely filed and reviewed. We detected no conflicts of interest. While we agree with the DDAEO that the possibility of financial conflicts of interest is extremely remote for Commission employees, we reminded the DDAEO of the financial reporting requirement that interests in property be fully disclosed, in accordance with 5 C.F.R. § 2634.301.

ETHICS EDUCATION AND TRAINING

We found that OGE's ethics training requirements are being met and also exceeded in some ways. The initial ethics orientation is met when new employees in-process through DOJ and they receive required written materials, including DOJ's Handbook. In addition, they receive an overview briefing, which includes a question-and-answer segment, and view an OGE videotape. Concerning annual ethics training, our regulatory requirement is being exceeded in that the DDAEO provides ethics training to all employees annually.

Based on our examination of sign-in rosters, we confirmed that in 2003 all covered employees received annual ethics training. According to the DDAEO, in-person training consisted of a lecture focusing on several of the 14 Principles of Ethical Conduct. In addition, the DDAEO also provided to attendees information on the gift acceptance prohibitions and outside employment restrictions. The DDAEO told us that she plans a similar approach for conducting annual ethics training in 2004.

The DDAEO assured us that all current PAS employees received initial ethics orientation briefings and that they have been annually trained since assuming their positions. Customarily, PAS employees have attended in-person training along with other Commission employees. We advised her that OGE advocates that PAS employees be trained in-person, one-on-one by you or the Alternate DAEO.

ETHICS COUNSELING AND ADVICE

Ethics counseling and advice services meet the requirements of 5 C.F.R. § 2638.203(b)(7) and (8). According to the DDAEO, overall, Commission employees ask few ethics-related questions. We examined the six written determinations that she had issued from 2001 to the present and found the advice was accurate and consistent with applicable laws and regulations.

In order to ensure that employees, who ask few ethics-related questions, are kept abreast of ethics matters, we suggested that several actions be taken, including (1) annually sending

² See DAEOgram DO-04-014, dated June 16, 2004.

Mr Paul R Corts

Page 3

employees an ethics advisory on some topical issue, (2) reminding them that a variety of ethics-related information is available on OGE's and DOJ's ethics Web sites, and (3) providing departing employees with post-employment written materials, as appropriate

OUTSIDE EMPLOYMENT

DOJ's supplement to the standards of conduct regulation at 5 C.F.R. part 3801 requires that employees obtain approval before engaging in certain outside employment. We could not assess the condition of this aspect of the ethics program since, according to the DDAEO, no Commission employees have recently sought approval for outside employment.

ENFORCEMENT

Also, we could not assess whether the Commission promptly and effectively deals with those employees who engage in unethical conduct (5 C.F.R. § 2638.203(b)(9)) since there have not been any recent alleged violations of the criminal conflict-of-interest laws or the standards of conduct. In addition, we could not assess whether information developed by DOJ's Office of Inspector General (OIG) is reviewed by ethics officials or whether OIG services are used as appropriate (5 C.F.R. § 2638.203(b)(11) and (12)), since there have not been any recent instances of use.

Though no recent conflict of interest matters have been referred to the Attorney General involving Commission employees, DOJ officials' collective knowledge of the requirement that OGE be concurrently notified of any referral made (5 C.F.R. § 2638.603) has led us to believe that this requirement would be satisfied.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

Lastly, we could not assess the acceptance of payments for travel, subsistence, and related expenses from non-Federal sources since the Commission does not accept this type of payment. According to the DDAEO, she routinely provides negative reports to your staff when they call for information needed to prepare the semiannual report for submission to our Office.


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In closing, I would like to thank you for all the efforts taken on behalf of the ethics program. Since we are making no recommendations, no follow-up review is planned. A copy of

Mr Paul R. Corts
Page 4

this report is being sent to the OIG Please contact Ilene Cranisky at 202-482-9227 if we can be of further assistance.

Sincerely,


Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04 - 019

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September 2, 2004

Thomas A Stock
Designated Agency Ethics Official
Federal Mine Safety and Health
Review Commission

(b) (6)
601 New Jersey Avenue, NW
Washington, DC 20001

Dear Mr Stock

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the Federal Mine Safety and Health Review Commission (Commission) This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended Our objective was to determine the ethics program's compliance with applicable statutes and regulations We also evaluated the Commission's systems and procedures for ensuring that ethics violations do not occur This review was conducted in July and August 2004

HIGHLIGHTS

The Commission's ethics program is basically sound and generally in compliance with applicable statutes and regulations We were pleased to see that you have obtained the support of the Commission's Chairman -- support made evident by his January 2004 memorandum to all employees emphasizing the importance of the ethics program Additionally, the Commission has a fine ethics training program However, other areas have room for improvement. For instance, we were disappointed that you had not made efforts to collect one public filer's termination report Additionally, some employees acquired prohibited holdings, perhaps partially due to insufficient oversight of the enforcement of the Commission's supplemental regulation. As you have taken actions to address these concerns, we will not make any formal recommendations in this report

PROGRAM STRUCTURE

The Commission is an independent adjudicative agency that provides administrative, trial, and appellate review of legal disputes arising under the Federal Mine Safety and Health Amendments Act of 1977 The Commission itself is made up of five full-time Presidentially-appointed, Senate-confirmed commissioners Supporting these commissioners is a staff of approximately 55 full-time employees, including many administrative law judges Two Commission employees are located in a Denver office

As the Commission's General Counsel, you devote approximately five percent of your time to your role as Designated Agency Ethics Official (DAEO). The Alternate DAEO devotes approximately 25 percent of her time to ethics. At the present, she serves as both a staff attorney under you and an acting counsel for a commissioner. She is shortly expected to move to the counsel position full-time and may give up her ethics duties at that time. You are confident any successor will be able to manage the ethics program, especially since the current Alternate DAEO will still be at the Commission and can provide some training.

FINANCIAL DISCLOSURE

The Commission's financial disclosure system is generally sound, though improvement is possible. The development of written procedures during our review should aid in the administration of the system, proving especially useful for a new Alternate DAEO. Currently, there are 21 public filers.¹ The only position requiring the filing of a confidential report is that of the Alternate DAEO, but the incumbent currently files a public report since she is serving as an acting counsel, which is a Schedule C position. Since you were still in the process of reviewing the current year's reports, our examination of reports covered all annual reports filed in 2003 and any new entrant or termination reports filed from then until the present.

The most serious problem we uncovered was that one ALJ never filed a termination report. You explained that the filer retired after being threatened with disciplinary action and, as you believed he would be uncooperative, you did not seek to obtain a report from him. While we sympathize with the difficulty of collecting reports, especially in such situations, termination reports are required by 5 C.F.R. § 2634.201(e) and a concerted effort must be made to obtain them. Following our discussions, you sent the filer a letter requesting his termination report, consequently, we are not making a formal recommendation. However, if he still fails to file, he should be advised that he can be referred to the Department of Justice for civil prosecution for knowing and willful failure to file the report.

Our review of the remaining reports (11 annual and 4 new entrant reports from the Executive Director, counsels, and ALJs) showed that all reports were filed timely.² Due to the dates of their nominations, only one of the commissioners was required to file an annual report in 2003. Both this report and your annual report were filed, reviewed, and forwarded to OGE in a timely manner. Four of the reports had not yet been certified, though the Alternate DAEO stated that two have since been certified.

While our review seemed to indicate that a number of reports were reviewed by the Commission more than 60 days after receipt, the Alternate DAEO assured us that she conducts

¹ These filers are you and the five commissioners (whose reports are forwarded to OGE after being reviewed by the Commission), the Executive Director, five counsels to the commissioners, and nine administrative law judges (ALJ).

² Annual filers were granted a blanket 45-day filing extension, in part because of the Alternate DAEO's absence from the Commission while on detail to another agency. The extension allowed her to coordinate the filing of reports upon her return.

an initial review of all reports within a couple weeks of receipt. She does not sign as the other reviewer, however, until all discrepancies have been resolved and no conflicts exist. In reviewing reports, you and the Alternate DAEO utilize both a general knowledge of potential conflicts and a list of financial interests prohibited by the Commission's supplemental standards of conduct regulation at 5 C.F.R. part 8401, wherein employees, their spouses, and minor children are prohibited from having a financial interest in any company or other person engaged in mining activities subject to the Federal Mine Safety and Health Act of 1977. Detailed notes and research, as well as the lack of technical and substantive deficiencies, testify to the thoroughness of reviews. Most reports were certified relatively timely after review, but two reports had an eight-month lag between review and certification. We understand that this was due partially to your medical absence, but also to the need for further follow-up with filers. We strongly encourage you to track not only filing, but also review and certification in order to ensure that reports are both reviewed and certified in as timely a manner as possible.

The two still-uncertified reports are awaiting corrective action. These two filers reported holdings in a fund that invests in entities prohibited by 5 C.F.R. § 8401 102(a). Specifically, the fund concentrates its investments in entities in the gold sector. These employees asked whether such a holding was permitted under the supplemental regulation since they do not have control over the underlying interests, and if not, whether the Commission could grant a waiver or consider amending its regulation. You concluded that this holding is clearly not allowed under the regulation since the exception to the prohibition, at § 8401 102(b), specifically excludes a publicly traded or publicly available investment fund which indicates an "objective or practice of concentrating its investments in the securities of any company or other person engaged in mining activities subject to the Federal Mine Safety and Health Act." After lengthy consideration by ethics officials and others, the Commission finally decided on July 9, 2004 to neither grant a waiver under § 8401 102(d) nor amend the regulation. Accordingly, the employees were notified that they had 60 days in which to divest their holdings in this fund. Once divestiture is complete, you will certify these two remaining reports.

AGENCY-SPECIFIC ETHICS PROHIBITIONS, RESTRICTIONS, AND REQUIREMENTS

The Commission can improve its enforcement of its supplemental standards of conduct regulation at 5 C.F.R. part 8401. While we found no substantive problems (other than the two aforementioned employees having prohibited holdings, of which you were already aware), you could improve enforcement by making employees more aware of the restrictions and cross-checking outside employment listed on financial disclosure reports with your records of approved outside employment.

As mentioned above, one section of this regulation prohibits employees from having a financial interest in certain mining interests. The Commission used to maintain a list of prohibited financial interests, which was updated and circulated to employees each year. You have found it difficult to keep up with the constant restructuring of mining companies, and consequently have not updated or circulated the list since 2002. Although the list does not include a listing of prohibited sector funds, this lack of reminders may have contributed to the two filers' holdings in a gold sector fund. After considering the problem, you have decided that

periodic training of all employees at the Commission on its supplemental regulation would be a more effective tool of enforcement than circulation of an inevitably incomplete list.

In addition, the Commission's supplemental regulation requires employees classified at GS-13 or above, as well as all Commission attorneys, to obtain prior approval before engaging in outside employment, whether paid or unpaid. If the employee's immediate supervisor approves the employment, the matter is brought to ethics officials for consideration. If you determine that the employment does not violate ethics rules, you draw up a memorandum approving the activity and maintain this memorandum in your ethics files. However, neither you nor the Alternate DAEO cross-check outside activities listed on financial disclosure forms with these approval memoranda. We suggest that you employ this good management practice.

Generally, employees listing outside employment on their financial disclosure reports had appropriate approval. Our examination of financial disclosure reports revealed six forms of employment for which approval was necessary. After checking the files, the Alternate DAEO was able to find approval for five of these, all of which were appropriate. The sixth involved a longtime position of a filer, who stated that he had received approval many years ago. While you are seeking to determine if any record of this approval exists, the employee has been asked to submit another request for approval. You have already verbally approved the employment and will shortly do so in writing.

ETHICS AGREEMENTS

Four commissioners entered into ethics agreements during their confirmation process. All took the necessary actions timely and OGE was timely notified of compliance. With regard to disqualifications, you are designated as their screener. No non-commissioners have ethics agreements, nor are there any 18 U.S.C. § 208(b)(1) or (b)(3) waivers.

EDUCATION AND TRAINING

The Commission not only meets OGE's requirements for both initial ethics orientation and annual ethics training, but also employs some best practices. Due to the small size of the agency, you are aware of any new employees and, shortly after they come on board, the Alternate DAEO personally provides them with training materials and answers any ethics questions they have. The training materials include the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), the Commission's supplemental regulation, the 14 Principles of Ethical Conduct, and ethics officials' contact information. Commissioners usually receive OGE's pamphlet entitled "A Brief Wrap on Ethics" as well. Ethics issues are discussed during the nomination process and again when commissioners receive the training materials. All current commissioners received initial ethics orientation when they came on board, as did the four new staff members in 2003.

All employees required to receive 2003 annual ethics training did so. Training focused on the Hatch Act, though it included the 14 Principles of Ethical Conduct, and was done online using one of the four ethics modules the Commission has developed. These ethics modules facilitate the training process, especially as one covered employee is located in Denver. We

commend the Commission for developing training which is specifically relevant for its employees. You and the Alternate DAEO work hard to ensure compliance with the requirement at 5 C.F.R. § 2638.704(d) that a qualified instructor be available during and immediately after the training; before starting the module, employees are required to contact an ethics official. After completion, employees print out a certification form, sign it, and submit it to the Alternate DAEO, who uses the certifications to track training, a best practice OGE advocates.

This year, you had originally planned to provide annual ethics training to the 21 covered employees on the topic of outside activities. However, in light of recent issues with employees having financial interests in prohibited entities, you decided to train on the topic of conflicts of interest. During our review, you developed a training plan to document this. The Commission does not currently have a module on this topic, but you intend to modify the Department of Agriculture's conflicts of interest module to make it directly applicable to the Commission by including discussion of its supplemental regulation among other things. Furthermore, you have decided to go beyond the requirements this year in expanding training to cover all Commission attorneys.

ADVICE AND COUNSELING

The five pieces of written advice we examined were thorough, accurate, and easy to follow. You and the Alternate DAEO coordinate all advice. You stated that you receive about one inquiry per month and dispense most advice verbally. Per our suggestion, you intend to implement a computerized log wherein you and the Alternate DAEO can both enter and view short summaries of advice dispensed verbally. In addition, you provide post-employment counseling upon request.

ENFORCEMENT

We were unable to assess this area, since to your knowledge the Commission has never received any allegations of violations of either ethics statutes or the Standards, consequently, the Commission has never referred a conflict of interest violation to the Department of Justice nor conducted an ethics investigation. In the absence of an inspector general, you would likely receive any allegations and conduct any initial investigation. If the investigation became complicated, investigatory services would be contracted out.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

The Commission has an unwritten policy of not accepting travel payments from non-Federal sources under 31 U.S.C. § 1353. You have been submitting negative semiannual reports in a timely manner.

In closing, I wish to thank you and the Alternate DAEO for all of your efforts on behalf of the ethics program. No six-month follow-up is necessary in view of the fact that we have no

Mr. Thomas A. Stock
Page 6

recommendations for improving the ethics program at this time Please contact Ed Pratt at 202-482-9270 if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04- 020



August 19, 2004

James G Chandler
Designated Agency Ethics Official
International Joint Commission

(b) (6)
1250 23rd Street, NW
Washington, DC 20440

Dear Mr Chandler

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the U S section of the International Joint Commission (IJC)¹ This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act) Our objective was to determine the ethics program's compliance with applicable statutes and regulations We also evaluated IJC's systems and procedures for ensuring that ethics violations do not occur This review was conducted in June and July 2004

HIGHLIGHTS

Although a number of improvements are necessary, IJC's ethics program is basically sound The education and training you provide is especially good However, you have overlooked other areas such as the requirement to issue a supplemental standards of conduct regulation if IJC imposes any additional ethics rules, the administration of the ethics program for the International Boundary Commission (IBC), the acceptance of travel payments from non-Federal sources, and the need to have written financial disclosure procedures We commend you for taking steps during our review to correct these problems In order to bring IJC's ethics program fully into compliance with the applicable statutes and regulations, we recommend that you either issue a supplemental standards of conduct regulation or cease requiring employees to obtain prior approval to participate in certain outside activities

PROGRAM STRUCTURE

IJC is an independent binational organization tasked with managing and protecting boundary waters between the United States and Canada IJC is headed by three Presidentially-appointed, Senate-confirmed (PAS) commissioners from the U S and an equal number from Canada Each country has its own section and there is a regional office located in Windsor, Ontario The U S section has approximately 10 employees in its Washington, DC office These employees, along with five U S employees in the regional office, one employee located in

¹ Unless otherwise noted, in this report IJC refers only to the U S section of the International Joint Commission

Mr James G Chandler

Page 2

Buffalo, New York, one employee in Lansing, Michigan, and the U S commissioners are U S Government employees subject to the executive branch ethics rules

As IJC's Legal Advisor and sole attorney, you devote approximately five percent of your time to your role as Designated Agency Ethics Official (DAEO) During pre-review, we discussed the benefits of having an Alternate DAEO who could serve as your back-up You immediately took action to identify an appropriate individual, and on June 22, 2004 Frank L Bevacqua, IJC's Public Information Officer, was appointed Alternate DAEO

INTERNATIONAL BOUNDARY COMMISSION

In addition to your duties at IJC, you serve as IBC's DAEO as well, under an agreement you made approximately 10 years ago with the Deputy Commissioner at IBC IBC is a separate bilateral organization, its mission is to keep the U S -Canadian border clear and visible It has one U S commissioner (who is currently also the IJC's Chairman) and its U S office is located in the same building as IJC, although it has only one staff employee there Additionally, there is one employee in each of three field offices

While we commend you for your initiative in assuming DAEO duties for IBC, the small size of IBC has led you to overlook some of these duties For instance, two field office employees were hired within the last year and you were unaware of this until, during our review, you broached the subject with the Deputy Commissioner Additionally, you have not been submitting semiannual reports to OGE of IBC acceptances of travel payments from non-Federal sources under 31 U S C § 1353 More importantly, during our review, you realized that the Deputy Commissioner at IBC should be filing a confidential financial disclosure report On a positive note, you do generally provide annual ethics training to IBC employees, although you stated that you did not do this last year

Since you have already taken action to address these oversights and ensure they do not recur, we are not making a formal recommendation on this issue You recently met with IBC's Deputy Commissioner to discuss coordination on the ethics program As soon as the two new IBC employees return from working in the field, you intend to send them the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) to satisfy their initial ethics orientation requirement Although IBC's Deputy Commissioner assured you that IBC never has and never would accept any travel payments under 31 U S C § 1353, you have promised to note the absence of such payments on IJC's semiannual reports to OGE Further, you assured us that IBC's Deputy Commissioner will shortly be filing a new entrant confidential report and will file an annual report in October His requirement to file has been memorialized in IJC's financial disclosure procedures

AGENCY-SPECIFIC ETHICS PROHIBITIONS, RESTRICTIONS, AND REQUIREMENTS

IJC's requirement for prior approval of outside activities is unenforceable, with respect to U S employees, since IJC has not issued a supplemental standards of conduct regulation in accordance with 5 C F R §§ 2635 105 and 2635 803 On February 10, 2004, both Canadian and U S commissioners approved the new IJC Policy on Conflict of Interest from Outside Activities,

applicable to both countries' employees. However, as this requirement is more stringent than the Standards allow, it could only be enforced if IJC issued a supplemental agency regulation with OGE's concurrence and co-signature.

Since issuing a supplemental regulation can be a time-consuming process, we urge you to reconsider whether this policy is necessary, or whether there are other means of achieving your goal of preventing conflicts of interest relating to an employee's outside activities. Many agencies choose merely to strongly encourage employees to seek advice from ethics officials before engaging in outside activities. This policy can be strengthened by careful attention to outside activities listed on employees' financial disclosure forms. IJC may even decide to expand the number of confidential financial disclosure filers in order to check whether conflicts exist for a larger number of employees. Finally, additional training on the issue can make employees more aware of potential conflicts and the consequences of violating ethics statutes and regulations.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

IJC did not have any procedures in place for identifying and conducting conflicts analyses of travel payments from non-Federal sources under 31 U.S.C. § 1353. You have been submitting negative semiannual reports to OGE because you did not believe that any acceptances would have exceeded the \$250 reporting threshold. However, you admitted that you would not necessarily even be aware if an employee accepted payments under this authority and that no conflicts analysis has been performed on any acceptances, including those under \$250 of which you were aware.

During our review, you agreed to develop written procedures and amend IJC's Travel Request Form to include a question as to whether any expenses are being paid for by a non-Federal source. Within a matter of days you had done this. The new procedures provide for the Travel Manager to forward any Travel Request Forms to you for a conflicts analysis and provide you with the necessary information to compile the semiannual reports to OGE. During our exit conference, you noted that commissioners do not complete the Travel Request Form, but schedule all their travel directly through the Travel Manager. You plan to make the commissioners aware of the need to obtain a conflicts analysis and approval before accepting travel payments from non-Federal sources and to periodically remind the Travel Manager of this requirement.

ENFORCEMENT

IJC does not have an inspector general, but you advised us that you would likely receive any ethics allegations and conduct any necessary investigations. You have never received an allegation of a criminal conflict of interest violation and, consequently, never made such a referral to the Department of Justice. However, one commissioner did commit a non-criminal ethics violation in 2003.

The commissioner accepted \$200, which he subsequently donated to charity, for writing an op-ed article relating to his official duties. Right before publication, an IJC employee alerted you of this outside activity. You immediately spoke with the commissioner and told him that as

a full-time Presidential appointee he was barred by Section 102(a) of Executive Order 12674, as modified, from accepting any earned income, correctly noting that his donation of the money did not impact upon this prohibition. Unfortunately, by that time the article had already been published. Ten days after publication you issued a written memorandum to the commissioner reiterating this advice. The commissioner then spoke with the White House ethics office, which concurred with your advice and recommended an immediate ethics refresher training course. A month later, you officially closed the matter, confident that the violation was unintentional and would not happen again. Shortly thereafter, an OGE Desk Officer presented annual ethics training to IJC public filers that focused on this issue, misuse of position, and the prohibition on teaching, speaking, and writing related to one's official duties.

We appreciate your prompt action in ensuring that the commissioner understood the prohibition on Presidential appointees receiving outside earned income. However, we are concerned that your advice did not touch on misuse of position and the prohibition on teaching, speaking, and writing related to one's official duties, provisions of the Standards that the commissioner may also have violated. We understand that the absence of these topics in your written advice was due to the need to quickly provide counsel and resolve the issue. While we strongly encourage you to thoroughly cover all aspects of a matter in any advice you issue, we believe that the subsequent training sufficiently covered these topics.

ADVICE AND COUNSELING

Since the aforementioned piece of advice and a general reminder about the Hatch Act are the only written pieces of advice we were able to examine, we cannot make an informed evaluation of the quality of advice. You stated that you receive about one inquiry per month and dispense most advice verbally. We encourage you to maintain a written record of advice given, so that advice cannot be questioned later. In addition, in the event your new Alternate DAEO must dispense advice in your absence, he could refer to this body of written advice for examples, we also encourage him to consult with IJC's OGE Desk Officer.

You provide post-employment counseling to commissioners and the Executive Secretary. Commissioners receive both a verbal briefing and OGE's DAEOgram on post-employment restrictions when they out-process through you. You also brief a departing Executive Secretary verbally, but to a lesser extent than commissioners. After some discussion, you are considering expanding the scope of your post-employment program to at least include all filers.

ETHICS AGREEMENTS

Two commissioners have ethics agreements in the form of disqualifications and, while you assured us there was little likelihood of noncompliance, certain information in your screening arrangements was not current. Both commissioners took the necessary actions timely and OGE was timely notified of compliance. The previous Executive Secretary had been designated as their screener. However, the Executive Secretary position is now occupied by another individual and she was not informed of her screening duty until we brought the matter up at the time of our review. We urge you to periodically review the screening arrangements to determine whether a new screener needs to be designated or they otherwise need to be updated. IJC does not have any other ethics agreements, nor any 18 U.S.C. § 208(b)(1) or (b)(3) waivers.

FINANCIAL DISCLOSURE

IJC's financial disclosure system is sound and well described in the written procedures you developed in response to our review. Currently, the only filers are the three commissioners, the Executive Secretary, one Schedule C employee, and you, all of whom file public reports². At the time of our review, one PAS employee and one other filer had received extensions and, consequently, had not yet submitted their reports³. We reviewed the other reports covering calendar year 2003, as well as the previous year's reports for those two filers, and found that all reports were filed, reviewed, certified, and, as appropriate, forwarded to OGE timely. Our review of reports revealed only one problem: one filer's report was missing Schedule B. You do not believe the filer has anything to report on this schedule, but you promised to clear up the matter.

EDUCATION AND TRAINING

IJC has an excellent training program, meeting OGE's requirements in the areas of both initial ethics orientation and annual ethics training. You are aware of any new employees at IJC and you personally give them the Standards when they in-process in Washington, DC. There had not been any new employees recently, but you assured me that all three commissioners received an initial ethics orientation within 30 days of assuming their positions.

All IJC employees received verbal 2003 annual ethics training. Public filers received in-person training from an OGE Desk Officer, except for the Schedule C employee in Lansing, who viewed the State Department's "On the Couch" video. Other employees, including the ones in the Windsor office, also viewed this video. You tracked completion using sign-in sheets and having Windsor office employees e-mail you. The one employee located in Buffalo completed a computer-based ethics module on misuse of position.

Since this year is an election year, you plan to have all employees complete the U.S. Department of Agriculture's computer-based ethics modules on the Hatch Act, post-employment, and seeking employment. We remind you that a qualified instructor needs to be available to answer any questions during and immediately after each employee's completion of such training. In addition to computer-based training, you intend to hold a conference call with the OGE Desk Officer and commissioners to discuss any specific concerns they have.

RECOMMENDATION

We recommend that you

Issue supplemental standards of conduct regulation or cease requiring employees to obtain prior approval to participate in certain outside activities.

² The Director of the Windsor, Ontario regional office alternates between an American and a Canadian, currently the Director is Canadian. When filled by an American, the position requires the filing of a confidential financial disclosure report.

³ These reports were subsequently filed on time.

Mr James G Chandler
Page 6

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendation in our report. A follow-up review will be scheduled approximately six months from the date of this report. 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 you take actions to correct these deficiencies in a timely manner. Please contact Christelle Klovers at 202-482-9255 if we may be of further assistance.

Sincerely,



Jack Covalleski
Deputy Director
Office of Agency Programs

Report Number 04- 017



August 19, 2004

Charles S Brown
Designated Agency Ethics Official
National Science Foundation
4201 Wilson Boulevard
(b) (6)
Arlington, VA 22230

Dear Mr Brown

The Office of Government Ethics (OGE) has recently completed its review of the National Science Foundation's (NSF) ethics program. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (Ethics Act). Our objective was to determine the ethics program's compliance with applicable ethics laws and regulations and to evaluate NSF's systems and procedures for ensuring that ethics violations do not occur. Our current review was conducted intermittently from January through April 2004. The following is a summary of our findings and conclusions.

HIGHLIGHTS

We are pleased to report that the ethics program at NSF complies with applicable ethics laws and regulations and has many strong program elements that effectively ensure the public's confidence in an ethical Government, including a noteworthy counseling and advice program and an outstanding education and training program. As the agency's Designated Agency Ethics Official (DAEO), it is apparent that you and the Alternate DAEO (ADAEO) take your duties and responsibilities very seriously and are dedicated to the highest standards of integrity for NSF and its employees. We discussed with you several procedural issues that you have either already corrected or have assured us would be corrected in the future. Of these, most importantly was your expeditious change in the process for granting 18 U.S.C. § 208 (b)(3) waivers to members of NSF advisory committees. As a result, we have no formal recommendations but have highlighted these issues within the body of this report as evidence that NSF's ethics program continues its effectiveness.

ADMINISTRATION OF ETHICS PROGRAM

NSF's activities are guided by the National Science Board (NSB) which consists of 24 part-time members who are appointed by the President and confirmed by the Senate (PAS). The NSF

Mr Charles S Brown
Page 2

Director, who serves as an ex officio member of the NSB, and the Deputy Director are the agency's only other PAS appointees

As the Assistant General Counsel, within NSF's Office of General Counsel (OGC), you have long-served as the agency's DAEO for the approximately 1,300 NSF employees who are located at headquarters in Arlington, Virginia. You are assisted in the day-to-day management of the ethics program by the ADAEO, a Legal Analyst, and the approximately 42 Conflicts Officials who are primarily responsible for providing guidance to their staff in resolving conflict-of-interest issues arising in the handling of proposals and awards. These Conflicts Officials, usually Division Directors or Deputy Division Directors, are located throughout the agency and are designated by their Assistant Director and/or staff office heads. We were advised that both you and the ADAEO serve as Conflicts Officials for the Office of the Director and the NSB.

FINANCIAL DISCLOSURE

NSF's public and confidential financial disclosure systems appear very effective in preventing potential conflicts of interest and generally accord with statutory and regulatory requirements. Although at the time of our fieldwork, we found the written procedures for both financial disclosure systems to only generally meet the fundamental requirements of section 402(d)(1) of the Ethics Act, we commend you on your development of written procedures which now fully meet these requirements. Despite the overall effectiveness of both systems, we discussed with you several procedural issues noted during our examination of both systems.

Public Financial Disclosure System

We examined all 168 public financial disclosure reports (SF 278s) required to be filed in 2003 by employees other than yourself, the 24 NSB members, and the NSF Director and Deputy Director. Of the 168 reports, there were 131 annual, 26 new entrant, and 11 termination or combined annual/termination reports. The majority of these reports were filed, reviewed, and certified timely and were reviewed in a thorough and comprehensive manner. We found no substantive deficiencies and only a limited number of technical reporting deficiencies. Additionally, we examined a sample of the accompanying cautionary letters attached to these reports and found them very useful in keeping filers apprised of potential conflicts.

Notwithstanding this, we did notice that 16 of the 168 examined public reports had not been certified due to the ADAEO needing additional information from the filer.¹ Although these reports were generally submitted and initially reviewed timely and were found to have no real or apparent conflicts, we were advised that technical clarification was needed for certification. We note that by the time of our exit conference, the ADAEO certified all remaining reports. As we discussed with you during our exit conference, although we realize there is no explicit requirement for public reports

¹ Of these 16, 7 were annual, 6 were new entrant, and 3 were termination reports

to be certified within 60 days, each report should be certified as soon as the examination determines there is no violation of applicable statutes and/or regulations

Additionally, we examined and confirmed timeliness of filing, review, and forwarding to OGE of your annual report as well as the annual reports for both the Director² and Deputy Director (Our examination of the public reports filed by NSB members are discussed in greater detail in the section entitled "Financial Disclosure System for National Science Board Members")

Confidential Financial Disclosure System

NSF uses various confidential financial disclosure reports for different categories of employees Regular NSF employees file the standard confidential financial disclosure report (OGE Form 450), while special Government employee (SGE) members of NSF's general advisory committee, as well as peer review panelists (inclusive of proposal review panels, site visitors, and committee of visitors), file an OGE-approved alternative confidential report in lieu of the OGE Form 450 Additionally, members of the NSB, in accordance with NSF's statutory authority, are required to file a financial disclosure report under title I of the Ethics Act (even though they work 60 days or less in a calendar year) However, these reports are to be held confidentially and are exempt from any law otherwise requiring their public disclosure Accordingly, NSF uses the SF 278 to fulfill this filing requirement

Confidential System For Regular Employees

We reviewed the master list of combined new entrant and annual confidential filers and examined a sample of 127 of the approximately 633 confidential financial disclosure reports that were required to be filed in 2003 Our sample consisted of 21 new entrant and 78 annual OGE Form 450s and 28 OGE Optional Form 450-As (OGE Form 450-As) With the exception of 4 new entrant and 15 annual OGE Form 450 reports, all other examined reports were submitted timely Considering the size of our sample and the number of confidential filers required to file, we believe the number of examined reports submitted late is insignificant All reports were reviewed within the required 60 days and certified soon after review Although we found few reports that included any review annotations, the reports appeared to have been reviewed thoroughly, as evidenced by the limited number of technical reporting omissions

In addition, you currently ensure compliance with 5 C F R § 2634 905(d) by having annual NSF filers who wish to file the OGE Form 450-A in lieu of the OGE Form 450 come to your office to certify to you as to having no new interests and/or positions since last filing an OGE Form 450 We believe this to be an outstanding practice for an agency of your size and we encourage your continued efforts

² We were advised that the NSF Director departed the agency on February 21, 2004

Confidential System For SGE Advisory
Committee Members

When serving on an NSF advisory committee, NSF advisory committee members file an annual alternative disclosure form, Confidential Conflict-of-Interest Statement for NSF Advisory Committee Members (Form 1230A),³ in lieu of the OGE Form 450. We were advised that advisory committee members typically serve a term of two or three years on a committee and provide NSF organizational units with general policy advice on board policy matters. Committees usually meet once or twice per year.

In our last review of NSF in 1998, we found limited compliance with the filing requirements of the alternative procedure. We are pleased to report that we have now found compliance with the filing requirements based on our examination of the Form 1230As filed by approximately 252 members of NSF's 14 advisory committees. Moreover, the Form 1230As were thoroughly reviewed.

18 U S C § 208 (b)(3) Waivers
Issued Using The Form 1230A Itself

We noted that 3 of the 14 committees indicated by simple check-off at the bottom of the Form 1230A that a waiver had been granted. Twenty-six waivers had been issued, with copies of the 1230A being submitted to OGE as compliance with 5 C F R § 2640.303. At the time of our fieldwork, you indicated that this check-off box was considered to be the actual grant of a waiver, and you had been using this process since OGE's approval of the alternative procedure. As we discussed with you in several follow-up meetings, we believe this process does not fully meet the requirements at 5 C F R § 2640.302 for issuing 18 U S C § 208 (b)(3) waivers. All waivers must hereafter be executed in separate documents indicating that consideration of the factors contained in § 2640.302 (b) lead to the decision to issue the waiver.

We commend you for expeditiously changing the process for granting 18 U S C § 208 (b)(3) waivers to members of NSF advisory committees. Under your new process, if a reviewing official now believes that a member may have a disqualifying interest with respect to any future particular matter or matters expected to come before his or her committee, but believes the need for the member's services outweighs the potential for a conflict, the official will now immediately contact you or the ADAEO. We were advised that you and/or the ADAEO will be responsible for reviewing the relevant facts and circumstances, deciding whether a waiver is appropriate, and (if appropriate)

³The Form 1230A was approved in 1993 by OGE as an alternative procedure, in accordance with 5 C F R § 2634.905(c). Form 1230A requires disclosure of all financial interests and all positions or arrangements with any educational, nonprofit, or other institution or organization with which a member is connected as an employee, officer, director, trustee, partner, or consultant, where some reasonable possibility exists that he or she might be affected by the committee's deliberations or advice. It also asks the member to report any other interests, affiliations or relationships that might affect his or her impartiality while serving on the committee.

Mr Charles S Brown
Page 5

helping to prepare the waiver document. Additionally, you have agreed to revise the sentence, *"Because of the general nature of such matters, it would be impossible to place a reliable dollar value on any financial interests of the companies listed above or on the member's individual financial interests"* to indicate the speculative effect. Finally, you have decided to delete the waiver check box at the bottom of the NSF Form 1230A to avoid any confusion by reviewing officials.

Confidential System For Peer Review Panelists

SGE members of peer review panels, inclusive of proposal review panels, site visitors, and committee of visitors (panelists), are required to file an alternative disclosure form in lieu of the OGE Form 450. This form, Confidential Conflict-of-Interest Statement for NSF Panelist (Form 1230P), was approved in 1993 by OGE as an alternative procedure. Panelists are required to sign the form prior to each meeting to certify that, to the best of their knowledge, they have no affiliations or relationships that would prevent them from impartially performing their duties of reviewing applications and recommending the award of grants.

In our last review of NSF, we had concerns that some panelists were certifying their Form 1230Ps without knowing the identities of the applicants submitting proposals. We are pleased to report that we no longer have these same concerns due to NSF's ability to disseminate applications to panelists electronically via its online FastLane system prior to meetings. This enables panelists to have the knowledge they need to properly certify their Form 1230Ps prior to meetings.

To evaluate the effectiveness of the 1230P system, we met collectively with 3 of the 42 Conflicts Officials to discuss their role in administering their division's 1230P system. We examined a large sampling of the 1230Ps signed in 2003 within all three divisions and found the forms to have been filed and reviewed in accordance with the alternative procedure.

Financial Disclosure System For National Science Board Members

At the time of our examination, we examined only 18 of the 24 SF 278 reports required to be filed and held confidentially in 2003 by members of the NSB. As was the case with the public system, we were advised that the remaining six reports were not yet certified pending additional information from the filer. Prior to the conclusion of our fieldwork, however, the ADAEO was able to certify five of the six reports, and one report was still pending. We urge you to certify the remaining report and in the future to certify these reports as soon as the examination determines there is no violation of applicable laws and/or regulations.

Pursuant to 5 C F R § 2634.704, one NSB member was subjected to the \$200 late filing fee for failure to file his report timely. All other reports were filed, reviewed, and certified timely. Although we found no substantive deficiencies, we did observe a few technical deficiencies, including the omission of reporting status and date of appointment on several reports. However, we

Mr Charles S Brown
Page 6

found most reports to have a good deal of review annotations and/or documentation associated with each review

PRIOR APPROVAL OF OUTSIDE EMPLOYMENT

Our review of the outside employment prior approval system focused primarily on whether the approval requirement in NSF's supplemental standards of conduct, at 5 C F R § 5301 103, was being met, based on our examination of the outside employment/activities reported on both the public and confidential financial disclosure reports. Of the 22 listed outside employment/activities we questioned, we were advised that only 1 required prior approval and it had been supported with the appropriate supervisory approval. As a general practice, copies of written approvals and/or the advice generated from them are not routinely maintained with the filer's financial disclosure files for use in reviewing the financial disclosure reports. We believe this would be a good management practice to ensure that filers have properly received prior approval to engage in the outside employment and also to enable reviews to be conducted in accordance with 5 C F R §§ 2634 909(a) and 2634.605. You advised us that you would make this a routine practice from now on.

EDUCATION AND TRAINING

We found NSF's education and training program to exceed the minimal training requirements found at subpart G of 5 C F R part 2638, as evidenced by your commitment to provide in-person initial ethics orientation training to new employees and in-person, verbal annual ethics training to all non-SGE financial disclosure filers. In addition to conducting the requisite initial ethics orientation and annual ethics training, we were impressed with the host of discretionary training you provide throughout the year to keep employees knowledgeable of the ethics laws and regulations and the high priority you assign to maintaining a strong training program.

NSF's Ethics Program Web Site

We found the ethics section on OGC's Web page located on NSF's Web site to serve as a very useful and comprehensive ethics tool for all NSF employees. Our content examination of this page found the ethics coverage to be extremely useful and informative. This outstanding resource features separate modules for financial disclosure filing, frequently asked questions, links to internal agency documents, the post-employment restrictions, and helpful ethics resource links. Immediate access to both OGE regulations and agency specific regulations, along with points of contact information for all NSF ethics officials are also provided.

Initial Ethics Orientations for Regular Employees

You advised us that one-on-one, in-person initial ethics orientation training is provided to all new NSF Directors and Deputy Directors when they enter on duty. Once a week, you also provide in-person initial ethics orientations to new NSF employees, usually during their first day on duty.

Mr Charles S Brown
Page 7

You also rely on the assistance of NSF's Division of Human Resource Management, which provides you a monthly list of all NSF new hires, departures, transfers, and promotions, to help you ensure that all new entrant filers are timely identified. In addition to these in-person briefings, new employees are also provided with written materials and information that satisfy the requirements found at 5 C F R § 2638 703

Annual Ethics Training
For Regular Employees

To satisfy the annual training requirement in 2003, you advised us that you conducted approximately 28 (two hour) in-person ethics training sessions for all NSF financial disclosure filers, including visiting scientists and detailees under the Intergovernmental Personnel Act. Although you require in-person, verbal training for all financial disclosure filers, all other employees are also encouraged to attend one of the many training sessions held throughout the year. In addition to your presentation, representatives from NSF's Office of the Inspector General (OIG) provide attendees with a brief summation of their responsibilities in the areas of investigations, audits, oversight, and misconduct in science.

You accomplished in-person training for the approximately 900 employees who were required to receive it in 2003.⁴ You indicated that you relied primarily on the discussion of various NSF-specific case studies as well as NSF's Manual Number 15, Conflicts of Interest and Standards of Ethical Conduct, to explain to participants the criminal conflict-of-interest laws, the basic standards of ethical conduct regulations, NSF's supplemental standards of conduct, and the rules covering other pertinent ethics issues. In 2003, training participants were also provided a guide, Avoiding Conflicts In Handling Proposals and Awards. As a good management practice, we acknowledge your use of both sign-in sheets to verify attendance and evaluation forms for the attendees' use in evaluating the overall presentation and effectiveness of your case-study training.

Ethics Training For
National Science Board Members

We were advised that all new NSB members are provided with in-person initial ethics orientations on the most significant conflict-of-interest laws and ethics regulations that apply to them. However, NSB members are provided with annual written ethics training in lieu of in-person, verbal training, in accordance with 5 C F R § 2638 705 (d)(2). In 2003, each member was provided a copy of NSF's Summary of Basic Conflict-of-Interest and Ethics Rules for Members of the National Science Board.

⁴Although all financial disclosure filers were required to receive verbal ethics training, there were a few confidential filers who received written training, in accordance with 5 C F R § 2638 705(d)(1), either because of scheduling difficulties or because they were off-site and could not attend one of the training sessions.

Ethics Training For Other SGEs

In our last review of NSF, we found that panelists were receiving very little in the way of ethics training and recommended that you provide them with annual written ethics training that met the minimum content requirements of subpart G of 5 C F R part 2638. You subsequently did so. We also found that the advisory committee members were receiving very little in the way of ethics training, but that you already were developing written annual ethics training similar to that provided to NSB members. We are pleased to report that you have continued to provide this training to panelists and advisory committee members, in accordance with 5 C F R § 2638.704(d)(2).

Additional NSF Ethics Training Efforts

As previously mentioned, we believe you do an outstanding job in keeping NSF employees knowledgeable of ethics laws and regulations and are particularly impressed with your efforts in providing discretionary training throughout the year to both financial disclosure filers and non-filers. You advised us that at least once a year you provide specialized in-person ethics training exclusively to employees of the OIG, to the Director's Policy Group, which is essentially made up of NSF's top level management, and to all Conflicts Officials on their ethics responsibilities.

ADVICE AND COUNSELING SERVICES

Effective and useful ethics advice and counseling is provided to all NSF employees. Employees are encouraged to contact you and/or the ADAEO via all forms of communication, including e-mail, telephone, and in-person. We were advised that most inquiries are made and advice rendered via e-mail correspondence.

Our examination of the advice and counseling services found that NSF has complied with 5 C F R § 2638.203 (b)(7) and (8) by developing and conducting a counseling program for employees concerning all ethics matters, including post-employment. When appropriate, records are kept on the advice rendered. We reviewed a large number of the e-mail responses that were dispensed on a variety of issues (covering approximately a 12-month period) and found these determinations to be comprehensive and consistent with the appropriate laws and regulations. We also found the advice to be responsive to employees' needs in terms of timeliness.

Additionally, post-employment counseling is provided to all departing NSF public and confidential filers. Departing filers are required to schedule an exit interview with you prior to their departure so they may receive in-person counseling and written materials. All departing employees are provided with the post-employment restrictions within a document entitled A Guide to Post-Employment Restrictions for former NSF Staff. Counseling is also available to all other employees on a per request basis. Departing public filers are provided with their termination report and instructions for its completion during this time.

ENFORCEMENT

We discussed with you and NSF's Inspector General (IG) the requirement to notify OGE when a case involving the potential violation of a criminal conflict-of-interest statute is referred to the Department of Justice (Justice). You both agreed that the OIG would concurrently notify OGE of all referrals and any other matters required to be reported to us by 5 C F R § 2638 603. You were also both aware of the requirement to provide subsequent reports on the disposition of the case, including reporting any disciplinary action taken if the case is declined for prosecution. While there were no recent violations of the criminal conflict-of-interest laws referred for prosecution to Justice during the period covered by our review, we believe you will comply with the prescribed procedures if a referral is made in the future. The only case related to criminal conflict-of-interest statutes to arise during the time covered by this review is currently under investigation. Additionally, we were advised that there were no disciplinary actions taken for violations of the standards of conduct during the period covered by this review.

From our discussions with all parties concerning the relationship that exists between the ethics staff and the OIG, we believe that the services of the OIG would be utilized when appropriate, including the referral of matters to and the acceptance of matters from OIG, as required by 5 C F R § 2638 203(b)(12).

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

NSF accepts payments from non-Federal sources for travel, subsistence, and related expenses incurred by agency employees on official travel under 31 U S C § 1353. NSF employees who seek approval under this authority are required to complete an NSF Form 1311. Employees forward it to you for review and approval at least one week prior to the commencement of their travel. Upon approval, employees are then assigned an OGC tracking number and the original form is returned to the originating office.

To determine whether travel payments accepted under this authority were properly authorized, we examined all of the 171 travel payments from non-Federal sources that were reported on 2 NSF semiannual reports to OGE of travel payments of more than \$250 per event, covering the period from October 1, 2002 through September 30, 2003. Upon our examination of these reports, we addressed with the ADAEO two procedural issues noted during our review.

First, NSF used its own reporting form for the last two semiannual travel reports. Effective June 16, 2003, GSA published its final rule requiring the use of the Semiannual Report of Payments Accepted from a Non-Federal Source (SF 326) form to report payments to OGE. Agencies can be granted permission from OGE to do otherwise. Prior to the conclusion of our fieldwork, NSF requested and was granted OGE's permission to use its own form. Moreover, we encourage you to submit, in lieu of paper submissions, all future semiannual travel reports via e-mail to OGE's new 1353 travel electronic mailbox at 1353travel@oge.gov.

Mr Charles S Brown
Page 10

Second, there were 21 instances of travel payments totaling less than \$250 included on the semiannual reports. Agencies are only required to submit semiannual reports, including negative reports, to OGE of travel payments totaling more than \$250 per event. The ADAEO provided assurances that only payments meeting the required reporting threshold would hereafter be included on future NSF semiannual travel reports.

In closing, I wish to thank you and your staff for all of your efforts on behalf of the ethics program. A brief follow-up review is typically scheduled within six months from the date of this report. However, as this report contains no formal recommendations to improve the program, no such follow-up will be necessary. A copy of the report is being forwarded to NSF's IG via transmittal letter. Please contact David A. Meyers at 202-482-9263 if we can be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

Report number 04- 018



July 26, 2004

Edgar M Swindell
Designated Agency Ethics Official
Department of Health and Human Services
(b) E Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Dear Mr Swindell

The Office of Government Ethics (OGE) recently completed a review of the ethics program at the National Institutes of Health (NIH), focusing specifically on the Clinical Center (CC), the National Cancer Institute (NCI), the National Institute of Allergy and Infectious Diseases (NIAID), and the Office of the Director (OD). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the program's compliance with applicable ethics laws and regulations, rather than investigate any particular case of employee misconduct. We also evaluated NIH's systems and procedures for ensuring that ethics violations do not occur. The review was conducted from January through May 2004.

In addition, while our review was ongoing, outside consulting and the receipt of awards by NIH employees was the subject of inquiry of both Houses of Congress. A blue ribbon panel commissioned by the NIH Director issued a report with recommendations to address Congress' concerns, and the NIH Director made proposals for improvement in the NIH ethics program in testimony before Congress. Accordingly, this report addresses some of the matters discussed in the Department of Health and Human Services (HHS) and NIH statements made to Congress. Finally, because outside activities by NIH employees have been the subject of our reviews for more than 15 years, this report summarizes the history of NIH policies and practices relating to outside activities and our reviews of the issues that have been raised over that period, as well as the findings and recommendations of our current review.

Currently you are developing proposals to remedy the issues raised by the Congress and similar issues identified during our review. These proposals are in draft and as such are not discussed in this report.

SCOPE OF REVIEW

Based on the results of our pre-review, which included discussions with you and NIH ethics officials, we focused primarily on the overall structure and administration of NIH's ethics program,

Mr Edgar M Swindell

Page 2

the public and confidential financial disclosure systems, and the policies and procedures for approving the participation in outside activities and the acceptance of awards by NIH employees

HIGHLIGHTS

Our examination revealed that the ethics program needs to be improved. One major concern we have is that the structure of the ethics program at NIH seems to allow for minimal involvement and oversight on your part. Program management duties are bifurcated between you and the NIH Deputy Director. This apparent disconnect between you and the employees who administer the day-to-day operations of the program appears to have contributed to some of the problems identified in our review and in recent testimony before Congress. While we commend the steps that you and the NIH Director have taken recently to improve the program, further action is needed.

During our examination, we identified areas in need of improvement in the program elements we reviewed. In particular, requests for approval of outside activities often were untimely, and for some outside activities, no requests for approval were ever made. We also have systemic concerns with regard to the approval of the acceptance of awards by NIH employees. Also, while many aspects of the financial disclosure systems were sound, we identified some deficiencies in the consistent collection of confidential reports and the timely certification of public reports.

Finally, steps need to be taken to ensure that NIH ethics officials are correctly applying the relevant provisions of the Standards of Ethical Conduct in outside activity and award determinations.

PRIOR OGE REVIEWS

OGE has conducted four reviews of NIH's ethics program since 1987. Although we examined a number of different program elements during these reviews, the majority of our findings focused on NIH's policies and procedures relating to the outside activities of its employees.

OGE conducted its first review of NIH's ethics program in 1987. The findings of this review focused almost exclusively on NIH's policies and procedures for approving outside activities. The findings included our determination that there had occasionally been a "blurring" of the distinction between what should be properly authorized as official business and outside activities. We reported that this had led to possible violations of the NIH Manual Chapter 2300-735-4, "Outside Work and Activities," issued in 1985 (the Manual), the HHS standards of conduct regulation,¹ and 18 U.S.C. § 208(a). We also reported that the apparent blurring of this distinction was contrary to certain OGE

¹Prior to the Standards of Ethical Conduct, 5 C.F.R. part 2635, becoming effective in 1993, agencies issued standards of conduct regulations under the old executive branch model standards of conduct at 5 C.F.R. part 735. Much of part 735 and the agency regulations thereunder were superseded by part 2635. Currently, 5 C.F.R. § 2635.105 provides for the concurrence by, and joint issuance with, OGE of supplemental agency regulations.

Mr Edgar M Swindell

Page 3

guidance on the acceptance of compensation for speeches, lectures, and articles related to an employee's official Government duties ²

OGE conducted its second review at NIH in 1991. As with the 1987 review, the most serious problems we identified were with NIH's system for approving outside activities. These problems appeared to be due to both an HHS policy that was inconsistent with OGE regulations and an ineffective NIH review process involving Deputy Ethics Counselors relying on poor guidance in the Manual. We concluded that NIH's permissive attitude toward outside activities and its fear that further restricting outside activities might hinder recruitment and retention of scientific personnel also played a major role in the problems and issues we identified. We recommended that your predecessor assist NIH in establishing an NIH ethics office to be directed by an HHS ethics official.

In our 1995 report, our findings again focused largely on NIH's outside activity approval system, particularly the Manual revised as of August 30, 1993 (the August 1993 Manual). During this review we identified several NIH restrictions and limitations that were broader in scope than provided for by the Standards of Ethical Conduct and one restriction that was narrower in scope. Further explanation of the findings of our 1995 review is addressed below in the "OUTSIDE ACTIVITIES" section.

Our most recent review of NIH's ethics program took place in 2000. Our most significant finding again dealt with outside activities. At one of the institutes included in our review, we found that the requisite approvals were not on file for all outside activities reported on employee financial disclosure reports. At the time of our review, the institute's Deputy Ethics Counselor had only recently taken over the day-to-day management of the institute's ethics program and, therefore, could not definitively determine if all appropriate approvals had been granted.

PROGRAM ADMINISTRATION

As the HHS Designated Agency Ethics Official (DAEO), you are responsible for coordinating and managing the ethics program departmentwide. The Deputy Associate General Counsel for Ethics Advice and Financial Disclosure (a newly created position) serves as the Alternate DAEO.

Each NIH institute and center (IC), including OD, has a Deputy Ethics Counselor (DEC) in charge of the IC's ethics program and one or more Ethics Coordinators who assist in the program's day-to-day administration. All of NIH's 27 ICs have DEC's who are deputy directors or executive officers, except for a few cases where the IC director serves as the DEC.

²Much of this guidance, contained in OGE Informal Advisory Memorandum 85 x 18, was later incorporated in 5 C F R § 2635 807

Mr Edgar M Swindell

Page 4

The NIH Deputy Director recently was appointed DEC for NIH as a whole, as well as for OD, a position long held by the previous Deputy Director. The NIH DEC is assisted in the day-to-day administration of the NIH and OD ethics program by a three-person NIH Ethics Office. In addition, however, an attorney from your office (the HHS Office of General Counsel/Ethics Division (OGC/ED)) serves as the on-site NIH Ethics Counsel. She is the only NIH ethics official that reports to you. She is responsible for, among other things, reviewing and certifying the financial disclosure reports filed by DECs who are IC directors (non-director DEC reports are filed with the NIH Ethics Office) and providing advice and counseling. Under a recent organizational redesign of OGC/ED, another attorney and a secretary have been assigned to serve with the NIH Ethics Counsel. Eventually, either the NIH Ethics Counsel or the new attorney will be named NIH Senior Ethics Counsel.

ETHICS PROGRAM MANAGEMENT

Under 5 C F R §§ 2638 201 and 2638 203, the DAEO is required to coordinate and manage the agency's ethics program. You have delegated this authority to the NIH DEC and the DECs assigned to the ICs, and thus do not have direct involvement in the NIH program. This program structure appears to have prevented you from carrying out your coordination and management duties, and may have resulted in some of the deficiencies identified during this review and during Congressional hearings. Ceding authority to NIH officials to direct the NIH ethics program might be a viable arrangement if NIH had a history of adequately addressing the types of problems confronting NIH at this time. Unfortunately, the opposite is true. Both prior OGE reviews and recent testimony before Congress indicate that NIH has had a permissive culture on matters relating to outside compensation for more than a decade. We believe that strong leadership on your part is essential to ensuring that the deficiencies in this area do not continue.

Moreover, we believe there is confusion at NIH as to who is responsible for the ethics program. This result stems, in part, from your having an OGC/ED satellite ethics office at NIH as well as a separate NIH ethics office. During our Exit Conference, we discussed the possibility of merging these two staffs into one NIH ethics office, with possibly additional staff being added, to ensure that the program is carried out effectively. We suggested that this office should be headed by a strong ethics professional who would serve as the HHS Deputy DAEO for NIH and who would report directly to you. In order to ensure that the DAEO's office is more engaged in the management and reform of the NIH ethics program, we thought it appropriate to recommend that the head of this central NIH ethics office be a member of your own staff, rather than an official primarily answerable to NIH.

At the time of the Exit Conference, both you and the NIH DEC opposed this recommendation. Among the arguments against this proposal, the NIH DEC believes the appointment of an OGC/ED official to oversee the program would be an unnecessary step in ensuring your direct involvement. He acknowledged that for purposes of carrying out his ethics duties, which include the oversight of the NIH program as a whole, he is fully accountable to you.

Mr Edgar M Swindell

Page 5

He added that as the Deputy Director for NIH, he is better positioned to institute the needed changes in the program and ensure their consistent implementation. He stated that many of the problems identified in the NIH ethics program are the result of, in some part, the permissive culture that has existed at NIH and that as a senior-level NIH employee, he would be better able to reshape this culture. Finally, both you and the NIH DEC agreed that instituting a new ethics program structure at this point would be premature, as you have implemented, or are currently developing, various new policies and procedures to correct the deficiencies identified during the recent Congressional hearings and in the course of our review.

In response to these arguments, we have decided to forego making a formal recommendation for the reorganization of the NIH ethics program at this time. However, we are recommending that certain steps be taken to ensure your direct coordination and management of the program.

First, you should meet periodically with NIH management so that you will be fully cognizant of current and emerging ethics issues at NIH and be able to react to them accordingly. These meetings should ensure that you are aware when policies and procedures at NIH are not effective, and enable you to make changes as needed. Second, you should meet with NIH ethics officials and NIH management to determine what policies need to be developed to deal with the issue of outside consulting by NIH employees and develop an NIH-specific section of the HHS supplemental regulation for submission to our Office for concurrence and joint issuance (addressed below in the "OUTSIDE ACTIVITIES" section). Finally, to formalize the responsibilities of the IC DECs, their position descriptions should contain a description of their ethics duties. The NIH DEC should rate each DEC annually on the ethics portion of his or her work.

While we are not formally recommending a reorganization of the program at this time, we will periodically review the success of your changes in policies and procedures, beginning with our initial six-month follow-up review. Based on our assessment of the success of these changes, we will decide whether a reorganization is necessary.

OUTSIDE ACTIVITIES

Under HHS' supplemental standards of conduct regulation, and as implemented in the Manual revised as of February 17, 1998 (the current Manual), NIH employees are required to receive written approval prior to engaging in certain outside employment and activities. Because of recent serious concerns about NIH policies on outside activities, this report contains the following detailed summary of (1) our 1995 report on NIH's outside activity approval procedures, (2) the current HHS supplemental standards of conduct regulation, (3) our current review of the outside activity procedures, (4) the recent changes to these procedures, and (5) our observations on the current case-by-case review of requests for approval, and the need for supplemental rules.

1995 OGE Report

In June 1995, we issued a report on NIH's ethics program which focused largely on NIH's policies and procedures for approving outside activities. In this report, we explained that HHS'

preserved standards of conduct regulation required that employees obtain administrative approval prior to engaging in certain types of outside activities of a professional or consultative nature ³

The report further explained that NIH had documented its internal guidance on the policies and procedures governing outside activities in the August 1993 Manual. During the 1995 review we identified several restrictions and limitations in the Manual that were broader in scope than provided for by the Standards of Ethical Conduct, and one restriction that was narrower than the Standards.

At the time, NIH officials conceded that some of the guidance provided in the August 1993 Manual was broader in scope than the Standards of Ethical Conduct. However, they added that the Manual had been revised to address some of the concerns identified during OGE's 1991 review of NIH's ethics program.

In the 1995 report, we recommended that if NIH wished to continue these prohibitions and limitations, HHS should consider including them in the agency's proposed supplemental regulation. In response to this recommendation, the then-NIH Director issued a directive to all IC directors and senior staff in November 1995 rescinding the outside activity policies that were more restrictive than the Standards of Ethical Conduct. The August 1993 Manual was revised to reflect these changes in policy, resulting in the current Manual ⁴. According to the memorandum, based on a discussion among the IC directors, the more restrictive policies were removed rather than proposed for inclusion in a supplemental regulation for OGE concurrence and joint issuance. Therefore, the subsequently-issued HHS supplemental standards of conduct (detailed below) do not contain any of the aforementioned broader restrictions and limitations.

Current HHS Supplemental Standards Of Conduct Regulation

On July 30, 1996, HHS, with OGE concurrence, issued a supplemental standards of conduct regulation at 5 C F R part 5501. As previously noted, this regulation does not contain the narrower or any of the broader restrictions or limitations that were in the August 1993 Manual. However, this regulation requires that employees obtain approval prior to engaging in certain outside activities, whether or not compensated.

³At the time of the 1995 review, HHS had submitted its proposed supplemental regulation, including a prior approval requirement, to OGE for concurrence, in accordance with 5 C F R § 2635 105. This supplemental regulation was to supercede the requirements contained in HHS' preserved standards of conduct under the old executive branch model standards.

⁴Our review of the current Manual revealed that all of the required revisions to the previous version have in fact been made.

First, employees are required to obtain prior approval to engage in consultative or professional services, including service as an expert witness⁵

Second, employees are required to obtain prior approval to engage in outside teaching, speaking, writing, or editing that relates to the employee's official duties within the meaning of 5 C F R § 2635 807(a)(2)(i)(B) through (E) or would be undertaken as a result of an invitation to engage in the activity that was extended to the employee by a person who is a prohibited source within the meaning of 5 C F R § 2635 203(d), as modified by section 5501 102

Third, employees are required to obtain approval prior to providing advice, counsel, or consultation to a non-Federal entity as an officer, director, or board member, or as a member of a group, such as a planning commission, advisory council, editorial board, or scientific or technical advisory board or panel. However, prior approval is not required if the service is provided without compensation (other than reimbursement of expenses to a political, religious, social, fraternal, or recreational organization) and the position held does not require the provision of professional services within the meaning of 5 C F R § 5501 106(b)(3)

Fourth, the standard for approval is that the outside activity is not expected to involve conduct prohibited by law or regulation, including 5 C F R parts 2635 and 5501. In this connection, section 2635 802 prohibits an employee from engaging in outside employment or any other outside activity that conflicts with the employee's official duties if it (1) is prohibited by law or by agency supplemental regulation or (2) under sections 2635 402 and 2635 502, would require the employee's disqualification from matters so central or critical to the performance of his or her official duties that the employee's ability to perform the duties of the position would be materially impaired.

Much of the criticism leveled at NIH relates directly to its implementation of these provisions. In particular, the Standards of Ethical Conduct also caution that an outside activity may be prohibited under other provisions in the Standards. See 5 C F R § 2635 802(b). Notably, section 2635 801(c) emphasizes that these "include the principle that an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity." As discussed in more detail below, it is not clear to us what standards NIH was applying in its outside activity approval process.

⁵Consultative services are defined in the regulation as the provision of personal services by an employee, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, a hospital, or other similar facility. Professional services are defined as the provision of personal services by an employee, including the rendering of advice or consultation, which involves the skill of a profession as defined in 5 C F R § 2636 305(b)(1).

Current Outside Activity Prior
Approval Procedures

In the current Manual, NIH has documented procedures to implement the outside activity prior approval requirements contained in the HHS supplemental regulation. In accordance with the current Manual, requests for approval of outside activities are initiated by the employee completing an HHS-520 form, Request for Approval of Outside Activity, and appropriate supplemental attachments. The HHS-520 requires the reporting of basic information regarding the nature of the outside activity, the name of the employer, the estimated time to be devoted to the activity, and any relationship between the employee's official duties and the proposed activity.⁶ To further facilitate the review of proposed outside activities, the supplemental attachments require an explanation of how the proposed outside activity is different from the scientific activities performed as part of the employee's official duties, specific consulting and outside professional practice information, and the employee's position description.

As an additional oversight effort, the current Manual also requires employees to submit an annual update for each continuing (versus one-time) activity that was performed during the previous 12 months.⁷

Current Review

To evaluate HHS'/NIH's policies and procedures for ensuring outside activities are approved in accordance with the HHS supplemental regulation and the current Manual, we examined a sample of 155 outside activities reported on the public and confidential financial disclosure reports we reviewed from filers at the 4 ICs. During our examination, we assessed whether sufficient information was contained in the outside activity requests to allow the reviewing and approving officials to determine if any conflicts of interest existed between the employee's official duties and the proposed outside activity. However, while we examined the activities with an eye toward ensuring that all required information was provided in the requests, we were generally not in a position to identify potential conflict-of-interest situations because a lack of scientific expertise prevented us from determining how the employees' official duties may have related to their outside consulting activities. Finally, we assessed the timeliness of the requests and approvals, i.e., whether the requests were submitted and approvals were granted prior to the activity taking place.

⁶Based on your January 27, 2004 directive, employees are now also required to provide compensation information on the HHS-520

⁷Although the use of the HHS-521 (the form previously used to collect the annual update information) is no longer required, the information collected thereon is required, i.e., whether the outside activity is still continuing and the number of hours the employee was engaged in the activity

Mr Edgar M Swindell

Page 9

Our examination revealed that a significant number of reported outside activities were not approved in a timely manner and many appeared not to have been approved at all. Of the 155 activities we examined, 81 were approved prior to the employee engaging in the activity. However, 39 were approved after the activity start date. Moreover, we did not find any approvals for 35 of the outside activities we examined.

We examined 73 outside activities at NCI. Of these, 53 (73 percent) were approved prior to the activity taking place, while 16 (22 percent) were approved after the start date. Four (five percent) of the outside activities sampled from this institute did not have approvals on file.

Of the 49 outside activities we examined from OD employees, 19 (39 percent) were approved prior to the activity taking place, and 11 (22 percent) were approved after the start date. Nineteen (39 percent) of the activities did not have approvals on file.

At CC, we found that 6 (40 percent) of the 15 outside activities we examined were approved prior to the activity taking place, while 9 (60 percent) were approved late. We did not find any approvals for an additional 11 activities which were listed as outside activities on the sample of financial disclosure reports we examined. We were informed by CC ethics officials that all 11 activities were actually official duty activities and thus did not require approval as an outside activity. If these were in fact official duty activities, they should not have been reported on the financial disclosure reports.

Of the 18 outside activities we examined at NIAID, 3 (17 percent) were approved prior to the activity taking place, 3 (17 percent) were approved after the activity start date. More notably, 12 (66 percent) of the outside activities reported at NIAID had no approvals on file.

In regard to the annual update on the HHS-521, or by other method, of continuing activities, none of the four institutes appear to be collecting this information on a consistent basis. In many cases, the required annual supplemental information was collected only once, sporadically over several years, or sometimes not at all. While the reporting of this information is still required by the current Manual, the NIH OD Ethics Officer stated that it was her understanding that the annual updates were no longer required unless there was a substantive change in the activity, thus essentially rendering it a new activity requiring a completely new approval. We recommend that this issue be clarified and either (1) improve the procedures for collecting the required annual information regarding continuing outside activities or (2) eliminate the requirement from the Manual.

While obviously we are concerned about the lack of timely and consistent initial approval and subsequent annual reporting, NIH has taken the initiative to improve this situation. The NIH Director has mandated that all employees engaged in ongoing outside activities requiring approval under the HHS supplemental regulation obtain re-approval if they intend to continue engaging in the activity.

During our examination, we particularly tried to identify the number of outside activities that involved employees consulting for, or serving on the advisory boards of, biotech or pharmaceutical companies. Of the public filers from the four ICs, six did consulting work for a biotech or pharmaceutical company and two were board members. A total of 17 confidential filers were involved in consulting work for these types of companies and 3 served on boards. The majority of the confidential filers (10) who were or who continue to be involved in consulting work with a biotech or pharmaceutical company were from NCI.

Notwithstanding the timeliness issue, the requests we examined for which approvals were on file appeared to generally contain the information required by the HHS supplemental regulation and the current Manual. Nevertheless, we believe our overall findings provide evidence of the difficulties inherent in a case-by-case approval method and lend additional weight to our recommendation to implement specific supplemental restrictions on certain outside activities, as discussed below. And while we cannot say that any particular request that we examined was approved in violation of the Standards of Ethical Conduct, other consulting arrangements examined by the House Energy and Commerce Oversight and Investigations Subcommittee seem to demonstrate that NIH officials may not have applied all relevant provisions of the Standards when reviewing requests for approval. As mentioned above, outside activities that technically are not prohibited under 5 C F R § 2635.802 may still be prohibited under other provisions of the Standards of Ethical Conduct, such as the appearance of the use of public office for private gain. It is not clear to us how NIH officials analyzed the requests they received, and whether they applied all relevant provisions of the Standards.

Recent Changes To Approval Procedures

During the course of our review, NIH amended its procedures for approving outside employment and activities by NIH employees. These changes were implemented primarily through the formation of the NIH Ethics Advisory Committee (NEAC).

NEAC is co-chaired by the NIH DEC and the Deputy Director for Intramural Research, and consists of 10 other rotating members appointed by the co-chairs and 2 ex officio members (the NIH OD Ethics Officer and a representative of the OGC/ED). The 10 rotating members consist of IC directors and deputy directors, scientific directors, clinical directors, certain extramural directors, OD senior staff, and others. Under the new approval procedures, NEAC reviews

- (1) Without regard to compensation or dollar amounts, all outside activity and cash award requests from IC directors and deputy directors, scientific directors, clinical directors, certain extramural directors, and OD senior staff, and,
- (2) All requests from other NIH staff to accept or participate in
 - "lecture awards" where compensation equals or exceeds \$2,500,

Mr Edgar M Swindell
Page 11

- outside activities with biotechnology or pharmaceutical companies,
- outside activities where total anticipated compensation exceeds \$10,000 or is expressed as a future income stream, and
- activities for which compensation proposed is stock, stock options, or other equity position

All requests from OD senior staff and IC directors go through the appropriate IC DEC, then to NEAC for recommended approval/disapproval, and finally, if recommended for approval, to the NIH DEC for final approval

All requests from deputy directors, scientific directors, clinical directors, and certain extramural directors go to the appropriate IC DEC for recommended approval/disapproval, then to the appropriate IC director for supervisory review and recommendation, back to the appropriate IC DEC for review and routing, then to NEAC for review and recommendation, and finally to the NIH DEC for final approval

Covered requests from other NIH staff are submitted to their initial supervisor for review and recommendation, forwarded to the appropriate IC DEC for review, submitted to NEAC for review and recommendation, and then submitted to the NIH DEC for final approval

While we recognize the formation of NEAC as a positive step in enhancing NIH's outside activity approval process, we recommend that after review and recommendation by NEAC, the NIH Senior Ethics Counsel make the final approval decision. This would address some of the concerns expressed above under "ETHICS PROGRAM MANAGEMENT." In addition, as discussed in more detail below, NEAC must apply appropriate standards and criteria to each request it receives. Your office should develop a set of guidelines to help NEAC determine when an activity is permissible under the Standards of Ethical Conduct.

Supplemental Rules For Outside Activities

OGE strongly recommends that HHS and NIH develop and propose new supplemental standards of conduct specifically to address the kinds of consulting activities that have raised concerns and that pose the unfortunate potential for widespread public questioning of the integrity of NIH employees. After HHS and NIH decided in 1995 to forego any supplemental restrictions specific to the outside activities of NIH employees, presumably, it was anticipated that case-by-case application of the Standards of Ethical Conduct in 5 C F R part 2635 would be adequate to prevent any actual or apparent ethical problems. Subsequent experience has shown, however, that the case-by-case approach has not been adequate to protect the reputation of the agency and its employees.

Apart from questions about what criteria NIH has used to evaluate outside activities for compliance with the Standards of Ethical Conduct, our review also indicates that NIH's case-by-case regime has suffered from systemic problems of untimely and even nonexistent approvals. Although we do have some suggestions below for ways in which NIH can improve its case-by-case review of proposed consulting activities, we believe that recent history suggests it would be risky for NIH to place too much reliance on such reviews in lieu of specific supplemental restrictions on the types of consulting activities that have occasioned the most public concern.

This report does not contain a specific prescription for the particulars of a supplemental regulation, but rather a set of more general considerations that OGE believes are important for HHS and NIH to take into account in fashioning any supplemental restrictions. A program review report is not the appropriate vehicle for the specifics of a proposed supplemental regulation, so much depends on the actual language of any proposed provision, and OGE must work closely with you to ensure that the language agreed to is adequate and not likely to yield unintended consequences. However, the following observations should be taken into account in drafting a proposed supplemental regulation.⁸

1. Some of the preliminary proposals that have been aired publicly, including the proposals of the Blue Ribbon Panel and the tentative proposals announced in the NIH Director's Congressional testimony of June 22, place fewer restrictions on intramural researchers than on employees involved in NIH's extramural programs. Other than certain "senior level" employees (see more below), intramural researchers generally would not be subject to the same across-the-board restrictions as extramural officials with respect to consulting activities with pharmaceutical and biotechnology companies. As we understand it, the rationale for permitting more latitude on the part of intramural researchers is to keep NIH's intramural program attractive to researchers who might otherwise work in settings, such as academia, where they are generally free to pursue their intellectual interests through collaborations with industry. In addition, HHS and NIH believe that the compensated exchange of scientific information with industry is an important incentive that will promote cutting-edge research.

OGE certainly recognizes that the development of any set of restrictions on the outside activities of NIH employees involves balancing and accommodating competing concerns, including concerns about recruitment and retention and the creation of a work environment that adequately permits scientists to pursue their research interests. Nevertheless, we believe that NIH should seriously consider whether the distinctions between extramural and intramural officials are sufficient to justify a more lenient approach with respect to the outside activities of the latter.

⁸Additionally, we would draw your attention to the enclosed letter to Representative Dingell—especially paragraphs 2, 5, 9, 10 and 14—which highlights certain questions that HHS and NIH may want to consider in connection with possible supplemental rule proposals. Letter to Marilyn L. Glynn, Acting Director, OGE, to Representative John D. Dingell, Ranking Member, Committee on Energy and Commerce, June 17, 2004.

Many of the very consulting activities that have become the subject of public controversy have involved intramural researchers. In fact, from OGE's perspective, probably the most compelling argument that can be made for any absolute prohibition on consulting with drug companies is that some NIH officials actually are involved in making clinical decisions affecting the health and safety of patients and other intramural research subjects, and those subjects need to be confident that decisions about their care are free from any potential influence from extraneous business connections. Even those intramural officials who do not perform research on human subjects still may be in a position to study the products of particular drug companies, and it is possible that such research could affect, or create the appearance of affecting, the interests of those companies or their competitors. Overall, it appears to us that intramural researchers are more likely to have official duties that directly involve drug companies--for example, cooperative research and development agreements or other arrangements to use a particular company's products--than do extramural officials. It seems somewhat counterintuitive to place the more restrictive limits on extramural officials, who generally are not as directly involved with drug companies and whose duties more typically involve funding arrangements with universities. This is not to say that potential conflicts of interest cannot arise among extramural officials--after all, much extramural research involves the products of drug companies--but only to suggest that HHS and NIH consider whether the potential for conflicts among intramural researchers may be at least as great, if not greater.

2 Some of the proposals that have been discussed publicly place more restrictive limits on the consulting activities of "senior" employees. OGE, of course, agrees that concerns about the appearance of using public office for private gain are more likely to arise in the case of higher level employees. Much will depend, however, on how HHS and NIH define "senior level." We recommend that the class of senior level officials not be drawn too narrowly. It would be unfortunate if a cornerstone of any new supplemental rule is a set of restrictions that does not even cover many of the NIH positions whose occupants have been the subject of recent controversy.⁹

3 We also note that a number of proposals that have been discussed publicly involve expanded public availability of certain kinds of information about the activities and financial interests of NIH employees. Some of the questions that might be raised by such proposals were already addressed in my April 19, 2004 letter to the Co-Chairs of the Blue Ribbon Panel (enclosed). Without reiterating all the points made in that letter, we do want to emphasize again our view that expanded disclosure is not a substitute for appropriate substantive standards of ethical conduct. Activities creating the appearance that an employee is using public office for private gain are not cleansed of all taint simply because they are open and notorious.

⁹In this connection, we observe that your most recent "equal classification" request concerning public filers at NIH identifies over 500 positions (in addition to those NIH positions already covered by financial disclosure requirements) involving "particularly high levels of responsibility." Letter of HHS DAEO to OGE Acting Director, May 7, 2004.

4 We have similar concerns about proposals involving limits on the amount of time NIH employees may spend and the amount of income they may receive in connection with outside activities. Whatever the merits of such proposed restrictions, we do not believe that time and compensation ceilings alone, or in combination with inadequate substantive restrictions, are an appropriate solution. Indeed, we are concerned that such proposals, if not accompanied by other adequate and effective restrictions, could give the appearance that some level of misuse of office is tolerable.

5 Finally, to whatever extent that NIH continues to rely on a case-by-case review of certain types of consulting activities--i.e., those activities that would not be covered by any new supplemental prohibition but would be assessed in light of the Standards of Ethical Conduct--OGE recommends that NIH develop specific criteria for reviewers to apply in deciding whether to approve a consulting activity. These criteria would not themselves be part of a supplemental regulation, but should be part of an internal guidance document, such as an NIH outside activities manual. The purpose would be two-fold: (1) to regularize the decision-making of a large and diverse number of approving officials, and (2) to translate the generic standards found in the OGE rules, such as the proscription against using public office for private gain, into practical operating guidance tailored to the specific circumstances of NIH as a biomedical science agency. OGE has already articulated a number of general factors that agencies should use in determining whether a consulting activity would create the appearance that any employee is using his public office for private gain. See DAEOgram DO-04-011, May 27, 2004, and attachment. NIH now will need to operationalize this guidance. Among other things, NIH should identify common situations, such as specific types of official duties and consulting activities, and indicate what circumstances are most likely to raise concerns. OGE is mindful that the scientific enterprise is complex and that it is not always easy to mark the lines between an employee's official scientific work and his outside research, but this is all the more reason that the agency itself should provide its reviewers with guidance that is as explicit as possible.

ACCEPTANCE OF AWARDS

In addition to evaluating NIH's procedures for ensuring that outside activities are approved in accordance with the HHS supplemental regulation, we also evaluated NIH's procedures for approving the acceptance by employees of bona fide awards given for meritorious public service or achievement in accordance with 5 C.F.R. § 2635.204(d)(1). In doing so, we paid particular attention to awards requiring the provision of a lecture or presentation to determine whether they were bona fide awards or, instead, compensation for teaching and speaking governed by the outside activities restrictions at section 2635.807.

5 C.F.R. § 2635.204(d)(1) states that an employee may accept a bona fide award (other than cash or an investment interest) with an aggregate market value of \$200 or less from a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties or from an association or other organization the majority of whose

Mr Edgar M Swindell

Page 15

members do not have such interests. Otherwise, bona fide awards having an aggregate market value in excess of \$200 and awards of cash or an investment interest may be accepted only upon a written determination by an ethics official that the award is made as part of an established program of recognition under which (1) awards have been made on a regular basis, and (2) selection of award recipients is made pursuant to written standards. The current Manual states that awards are not to be treated as outside activities, awards may be accepted either on official duty time or personal time, and employees must apply for approval to accept awards from their DEC, regardless of value or type, on the HHS form, Approval of an Award from an Outside Organization.

Current Review Of Awards

To evaluate NIH's procedures for ensuring that awards are approved in accordance with 5 C F R § 2635 204(d)(1), we examined 50 awards accepted by employees from the 4 ICs from 2003 through the time of our review. OGE's review of this subject was prompted, in part, by concerns expressed by the House Energy and Commerce Oversight and Investigations Subcommittee. These concerns involved essentially two questions: (1) was the awards rule being used to approve payments that were really speaker's fees, and (2) were certain awards being received from impermissible sources? OGE's own examination of NIH awards during the review period confirmed that some of the approved awards do, in fact, raise these same questions. The information about specific awards was not sufficient for OGE to determine whether any payments actually were accepted in violation of the rules, and, in any event, OGE's central purpose is to evaluate and make recommendations concerning NIH systems, rather than individual conduct. However, as discussed below, NIH needs to revise its system for reviewing awards, consistent with guidance recently issued by OGE in response to questions raised by the Subcommittee about the criteria used by NIH and HHS to review proposed awards.

First, certain awards were described as "lectureships" or had similar designations. As you know, OGE recently issued guidance, originally as part of Congressional testimony concerning the acceptance of awards by NIH employees, in which we emphasized the importance of distinguishing between true awards for meritorious public service or achievement, and mere speaker's fees, particularly in the context of "lectureships" and "lecture awards." See DAEOgram DO-04-011, May 27, 2004, and attachment. It is not apparent, from the information available to us, whether the "lecture awards" approved by NIH would have been consistent with the OGE guidance, but there is no indication that these awards were given the kind of scrutiny that would be required under the OGE guidance.

Second, the available information raises questions about whether some of the awards may have been offered by impermissible sources, i.e., persons with interests that may be substantially affected by the duties of the employee. Some of the awards were offered by universities, which may have been grantees of the employee's office, and other awards were offered by nonprofit organizations whose mission would appear to overlap with the subject area of the employee's position. In either case, it is not clear from the documentation how NIH reviewed the proposed awards to determine whether there was any foreseeable connection between the employee's duties

Mr Edgar M Swindell
Page 16

and the interests of the offeror Our recent guidance on awards provides several factors for agencies to consider in determining whether a particular award is offered by an impermissible source See id Based on the available information, it is not clear whether the approval of these awards would have been consistent with the OGE guidance

In light of the foregoing, NIH should develop internal procedures and criteria for reviewers in connection with future award requests so that the recent OGE guidance will be implemented consistently across all the ICs The NIH guidance should be reviewed by you to ensure that it is both adequate and consistent with the Department-wide approach to this subject

We are aware that the NIH Director, in his June 22 testimony before the Subcommittee, proposed to develop procedures for "pre-screening" awards programs, including involvement by a committee of "non-government individuals" Although OGE has not received sufficient details to assess the merits of this proposal, there will be limitations to any pre-screening system While it may be possible to develop a standing list of awards programs that have been judged to meet the two-pronged regulatory test of "an established program of recognition," such determinations must be made by an "agency ethics official," under section 2635 204(d)(1) As we have stated in another context, providing final interpretations and determinations under the Standards of Ethical Conduct is an "inherently governmental activity" and may not be delegated to non-employees DAEOgram DO-03-011, June 30, 2003 (Note also that individuals serving on advisory committees to make recommendations about such matters may be deemed "special Government employees," depending on the circumstances) Moreover, it will almost always be the case that the determination of whether a particular award is from a permissible source will depend on the circumstances of the individual case, including the duties of the particular individual and the nature of any matters the source may have before the agency

FINANCIAL DISCLOSURE

While many aspects of the financial disclosure systems we reviewed were sound, we identified some deficiencies in the consistent collection of confidential reports and the timely certification of public reports To evaluate the financial disclosure systems at the four ICs included in our review, we examined all of the available public reports and a sample of the confidential reports filed at the ICs in 2003 As a part of our typical review of these reports, we examined the outside activities disclosed on the reports to ensure that, if required, prior approval for these activities was granted Our findings with regard to the outside activities we examined are described above in the "OUTSIDE ACTIVITIES" section

CC

To evaluate CC's public financial disclosure system, we examined all four public reports required to be filed in 2003 Three of these reports were filed in a timely manner The one late report was filed in January 2004 The filer of this report had been serving in a public filing position in an acting capacity in 2002 and 2003 She assumed the position on a full-time basis in 2004 at

which time she filed the public report we examined. During the filer's acting status in 2002 and 2003, the CC DEC mistakenly believed the filer was not required to file a public report. We informed the CC DEC that because the filer had served in an acting capacity for more than 60 days in calendar years 2002 and 2003, she was in fact subject to the public filing requirement during that period. The CC DEC subsequently collected public reports from the filer covering the periods during which the filer was in an acting status and waived the \$200 late filing fees for those reports, as the filer was not timely notified of the filing requirements.

While all four reports were initially reviewed in a timely manner, three of them were not certified in a timely manner (approximately six to eight months after the initial review date). The CC Ethics Coordinator stated that she had not provided the reports to the DEC for certification in a timely manner. She explained that the reports had gotten "lost in the shuffle." She added that, in the future, she will provide the reports to the DEC immediately following the completion of her initial review.

We also examined a sample of 43 of the 188 confidential reports required to be filed in 2003. All of the reports were filed in a timely manner. In addition, all of the OGE Forms 450 were reviewed and certified in a timely manner. For those reports we examined which were OGE Optional Forms 450-A, and thus did not require certification, we also examined the filers' most recently filed OGE Forms 450. The only deficiency we identified on those reports was that the DEC had not certified two of them (although both had been initially reviewed by the Ethics Coordinator). The DEC has since certified both of these reports.

NIAID

At NIAID, we examined the two public reports required to be filed in 2003. Both of the reports were filed, reviewed, and certified in a timely manner.

To evaluate NIAID's confidential system, we examined a sample of 99 of the 560 reports required to be filed in 2003. As far as we could determine, only five of these reports were filed late¹⁰. In addition, all but one of the OGE Forms 450 were reviewed and certified in a timely manner. As with the CC, for those reports we examined which were OGE Optional Forms 450-A, we also examined the filers' most recently filed OGE Forms 450. Virtually all of these reports were filed, reviewed, and certified in a timely manner.

NCI

At NCI, we examined all 13 public reports required to be filed in 2003. All of the reports were filed, reviewed, and certified in a timely manner.

¹⁰We could not determine the filing timeliness of an additional five new entrant reports as they did not contain the dates the filers were appointed to the filing positions.

We also examined a sample of 51 of the 1,463 confidential reports required to be filed in 2003. Thirty of the reports we examined were OGE Forms 450. Twenty-seven of these reports were filed in a timely manner and 27 were reviewed and certified in a timely manner.¹¹

The remaining 21 reports we examined were OGE Optional Forms 450-A. All of these reports were filed in a timely manner and the filers' most recently filed OGE Forms 450 were generally filed in a timely manner. However, several of these OGE Forms 450 appeared to be reviewed and certified quite late, over a year from the date of filing for some reports.

OD

To evaluate the public system for the highest-level NIH employees, we examined 47 of the 53 reports required to be filed by NIH directors and OD senior staff members in 2003.¹² All but five of these reports were initially filed with the NIH Ethics Office. The remaining five reports, filed by directors who are also DECs, were filed with the NIH Ethics Counsel.

All 47 of the reports were filed in a timely manner. Additionally, all of the reports were initially reviewed in a timely manner. However, 11 of the reports filed with the NIH Ethics Office were not certified until from 4 to 7 months after being filed.

We also examined a sample of 78 of the 450 OD confidential reports required to be filed with the NIH Ethics Office in 2003 (no confidential reports are filed with the NIH Ethics Counsel). These consisted of 36 OGE Forms 450 and 42 OGE Optional Forms 450-A.

Thirty-five of the reports we examined (consisting of both OGE Forms 450 and OGE Optional Forms 450-A) were filed between March and June 2003. According to an NIH Ethics Office official, there was a lapse in collecting confidential reports during the 2002 annual filing cycle because of insufficient staffing in the NIH Ethics Office. To remedy this situation, the NIH Ethics Office required dual filing in 2003: one filing in early to mid-2003 to make up for the failure to collect reports in October 2002 and a second in October 2003 to meet the 2003 annual filing requirement.

¹¹We could not determine the filing timeliness of one new entrant report because the filer did not provide the date he was appointed to the filing position. We also could not determine the review and certification timeliness of another report because NCI had not provided the date on which it received the report.

¹²The six remaining reports (all terminations or new entrants) were still undergoing review by NIH ethics officials at the time of our examination.

Thirty-four of the remaining 43 reports (consisting of both OGE Forms 450 and OGE Optional Forms 450-A) appeared to be filed in a timely manner. We could not determine the filing timeliness of the outstanding nine reports because the NIH Ethics Office had not provided the dates on which it received the reports.

Only 4 of the 36 OGE Forms 450 we examined appeared to be reviewed and certified late. However, due to the aforementioned failure to note dates of receipt for nine reports, we could not determine the review and certification timeliness for these reports.

RECOMMENDATIONS

To improve the overall effectiveness of NIH's ethics program, we recommend you

1. Take certain steps to ensure that you directly coordinate and manage the program. First, you should meet periodically with NIH management so that you will be fully cognizant of current and emerging ethics issues at NIH and be able to react to them accordingly. These meetings should ensure that you are aware when policies and procedures at NIH are not effective, and enable you to make changes as needed. Second, you should meet with NIH ethics officials and NIH management to determine what policies need to be developed to deal with the issue of outside consulting by NIH employees and develop an NIH-specific section of the HHS supplemental regulation for submission to our Office for concurrence and joint issuance. Finally, to formalize the responsibilities of the IC DEC's, their position descriptions should contain a description of their ethics duties. The NIH DEC should rate each DEC annually on the ethics portion of his or her work.
2. Ensure that NIH continues efforts to re-examine ongoing outside activities.
3. Ensure that outside activities are approved in accordance with the requirements of the NIH Manual and the HHS supplemental standards of conduct regulation, including the activities that we identified for which no requests were submitted.
4. Ensure that the requirement to collect annual updated information on ongoing outside activities is clarified, and then either (1) improve the procedures for collecting the required annual information or (2) eliminate the requirement from the current Manual.
5. Ensure that after review and recommendation by NEAC, the NIH Senior Ethics Counsel has final approval/disapproval over outside activity requests.

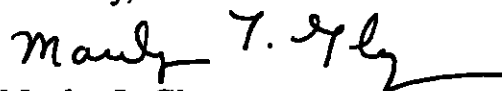
Mr Edgar M Swindell

Page 20

- 6 Develop and propose new supplemental standards of conduct specifically to address the kinds of consulting activities that have raised recent concerns
- 7 Help NIH develop guidelines to use in determining whether an individual outside activity request should be approved The guidelines should make clear that NIH must apply all relevant provisions of the Standards of Ethical Conduct to each request it is considering
- 8 Develop internal procedures and criteria for NIH award reviewers in connection with future award requests so that the recent OGE guidance will be implemented consistently across all the ICs
- 9 Ensure that CC and OD public financial disclosure reports are certified in a timely manner
- 10 Ensure that OD annual confidential reports are collected in a timely manner

In closing, I would like to thank you for your efforts on behalf of the ethics program Please advise me within 60 days of the specific actions your agency has taken or plans to take on our recommendations A follow-up review will be scheduled within six months from the date of this report 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 you take timely actions to implement our recommendations A copy of this letter is being forwarded to the NIH Director and the HHS Inspector General via transmittal letter Please contact me at 202-482-9292, if we may be of further assistance

Sincerely,



Marilyn L Glynn

Acting Director

Enclosures

Report Number 04- 013



July 6, 2004

Javier E Marques
Designated Agency Ethics Official
Advisory Council on Historic Preservation
(b) (6)
1100 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Mr Marques

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the Advisory Council on Historic Preservation (ACHP). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the ethics program's compliance with applicable statutes and regulations. We also evaluated ACHP's systems and procedures for ensuring that ethics violations do not occur. This review was conducted in March and April 2004.

HIGHLIGHTS

ACHP's ethics program has improved since OGE's last review of the program in 1997, but some areas are once again deficient. Our 1997 review found that ACHP's ethics program had not been routinely administered for years, including the failure to collect annual confidential financial disclosure reports and conduct annual ethics training. Although the failures are not as widespread this time, you continue to have problems in these two areas. We are particularly disappointed to see that virtually no annual ethics training has taken place since that recommendation in the previous report was closed in 1998. A lack of commitment to the ethics program is also apparent in your failure for many years to resolve the contention of one member of ACHP's governing body (the Council) that he is not a special Government employee (SGE) and not subject to financial disclosure requirements. In addition, you have been routinely late in notifying SGE Council members of the requirement to file and you currently have no way of determining if the designees of certain Council members have conflicts of interest. Furthermore, ACHP has no Alternate Designated Agency Ethics Official (Alternate DAEO) who can serve as your back-up. Nevertheless, we were encouraged by your efforts to address these deficiencies.

In order to strengthen your program, we recommend that you (1) ensure that an Alternate DAEO is appointed in accordance with 5 C F R § 2638.202(b), (2) in a timely manner, notify confidential filers, including Council members, of their requirement to file financial disclosure reports and collect these reports, (3) cease requiring financial disclosure reports from the two non-

Mr Javier E Marques
Page 2

Federal ex officio members of the Council, and (4) collect and review financial disclosure reports from Federal agency head designees serving on the Council

PROGRAM STRUCTURE

ACHP is headed by 20 statutorily designated members, who meet four times a year to address policy issues, direct program initiatives, and make recommendations to Government officials regarding historic preservation. Supporting this Council are approximately 35 full-time employees, most of whom are located at headquarters in Washington, DC. A few employees are also located at an ACHP office near Denver, Colorado and at the Aberdeen Proving Ground in Maryland.

As ACHP's Associate General Counsel, you serve as the DAEO, devoting about 15 percent of your time to administering the ethics program. Although at one time ACHP had one part-time and two full-time attorneys, you are now the sole legal counsel at ACHP.¹ While legal resources have declined, the workload of the agency has increased due to new initiatives, consequently, you are unable to devote sufficient time to the ethics program. You hope that this problem will be mitigated by the increased duties of a Writer-Editor/Web Manager at ACHP who serves as your Deputy Ethics Official. Now that she has attended some OGE training courses on financial disclosure you plan to turn over to her the administrative aspects of ACHP's financial disclosure program. She may also assist you with training.

You have not had an Alternate DAEO since you became the DAEO, but you intend to have your Deputy Ethics Official designated as such once she has received more training. We recommend that you do this with all possible haste, since each agency is required by 5 C.F.R. § 2638.202(b) to appoint an Alternate DAEO, who is responsible for running the ethics program in the event of the DAEO's absence.

SPECIAL GOVERNMENT EMPLOYEES

You considered Council members, aside from the seven who are the heads of Federal agencies, as ACHP's only SGEs.² Three of the Federal agency heads and two non-Federal Council members are ex officio members specified in ACHP's statute, while the rest are appointed by the President. Each Federal agency head, as well as the two non-Federal ex officio members, may designate another officer of the department, agency, or organization to serve on the Council in his or her stead.

¹ Due to budgetary constraints, ACHP has no General Counsel.

² These seven "heads of Federal agencies" currently consist of the Secretaries of Interior, Agriculture, Defense, and Transportation, the Administrators of the Environmental Protection Agency and General Services Administration, and the Architect of the Capitol. Hereafter, for ease of reference, they will be referred to as Federal agency heads.

Mr Javier E Marques

Page 3

Financial Disclosure System for
Council Members Needs Improvement

ACHP's ethics program is not meeting OGE requirements with regard to the collection of financial disclosure reports from Council members. ACHP's financial disclosure procedures, which you just updated and expanded, require you to annually notify SGEs by September 15 of their requirement to file an OGE Form 450. In addition, as we recommended during the last review, you obtain copies from OGE of the reports of Council members who are Federal agency heads (or from Congress in the case of the Architect of the Capitol) and review them for potential conflicts. Based on an agreement with OGE during follow-up to that review, you are not obtaining reports from designees.

For 2003, you did not notify SGEs of the need to file until February 11, 2004. Consequently, all reports were submitted late (except the Chairman's report, which he submitted without reminder), and a couple of reports had still not been received by June. We examined the most recent report on file for each Council member and found that reports were generally reviewed within a few days of receipt. A thorough review was indicated by your notes regarding entries of interest, especially on the reports filed by Federal agency heads and obtained from OGE. You certified other Council members' reports in a timely manner. Two reports had been returned to filers because they were incomplete. We identified few technical and no substantive deficiencies. Furthermore, we were pleased to see that you are reviewing Council agendas for legal and ethical issues prior to each meeting.

However, we believe that you have incorrectly been treating the two non-Federal ex officio Council members as SGEs. Although one has been filing consistently, the ex officio member from the National Trust for Historic Preservation (Trust) has never filed since joining the Council in 1999. The Trust's attorney originally cited privacy concerns, but then claimed that the Council member is not an SGE. Due to the unique status of these two non-Federal ex officio members, OGE consulted with the Department of Justice's (DOJ) Office of Legal Counsel on these members' status. It was concluded that, since neither of these two members are appointed in the civil service by an executive branch official, they are not executive branch employees (much less SGEs) for purposes of the application of executive branch ethics rules. Consequently, these members are neither subject to the financial disclosure obligation, nor any of OGE's ethics rules and regulations. We suggest that you make written determinations on the status of all other non-Federal Council members in order to avoid such confusion in the future.

Finally, we now believe that any Federal agency head designees who serve on the Council should file financial disclosure reports. During the follow-up to our last review, we agreed that designees could instead be provided with a memorandum advising them of the criminal conflict of interest laws and their responsibility to disclose any potential conflicts. However, you are no longer providing designees with such a memorandum, leaving them open to inadvertently violating 18 U.S.C. § 208. Since these designees often appear to participate personally and substantially in Council matters, their interests must be disclosed in order to ensure the integrity of the Council's

Mr Javier E Marques

Page 4

actions Although we recognize that their occasional attendance makes collection of reports somewhat difficult, most designees are public filers at other Federal agencies, so you need only extend to them your current practice of obtaining and reviewing copies of the reports of Federal agency heads on the Council

SGEs Must Receive Annual Ethics Training

You have not been routinely providing annual ethics training to SGEs, though you did satisfy their initial ethics orientation requirement by providing them, upon appointment, with OGE's "Do It Right" booklet annotated to explain any differences due to their SGE status. Additionally, we were pleased to learn that the Chair and Vice Chair were verbally briefed soon after they were appointed to the Council in 2001.³ In March of 2001, you sent all SGEs a memorandum on conflicts of interest along with OGE's pamphlet on that topic. Furthermore, a Web site for Council members contains a link to the OGE publication "Conflict of Interest and the Special Government Employee: A Summary of Ethical Requirements Applicable to SGEs." No training appears to have taken place in 2002 or 2003. However, at the time of our review, you had drafted a memorandum to SGEs that explained the Hatch Act rules. In order to satisfy the annual ethics training requirements for 2004, you subsequently attached the 14 Principles of Ethical Conduct to the memorandum and sent it to all SGEs.

EDUCATION AND TRAINING

We found that your initial ethics orientation program is adequate, but that you have not been providing annual ethics training to confidential filers as required. Although we recognize that you have taken steps to address this issue, we are concerned because of ACHP's history of only providing such training in response to OGE reviews and then once again failing to fulfill the training requirement.

Initial Ethics Orientation Is Adequate

As required by 5 C.F.R. § 2638.703, all new ACHP employees receive initial ethics orientation. You have personally been giving all new employees the "Do It Right" booklet. Although you do not require employees to certify that they have received or read the booklet, you assured us that all seven new employees in 2003 received their orientation materials.

Annual Ethics Training For Confidential Filers Needs Improvement

Until you took action in response to our review, the annual ethics training program did not meet OGE's requirements, especially with regard to training ACHP's confidential filers. The only

³ These members have the greatest need of ethics training due to their role on the Council and their outside positions involving state historic preservation.

Mr Javier E Marques

Page 5

public filer you must train is ACHP's Executive Director. Due to his position and the fact that he served as the previous DAEO, you frequently discuss ethics matters with him, these discussions satisfy the requirement to provide verbal ethics training annually.

However, you have failed for many years to provide training annually to ACHP's confidential filers, both SGEs as detailed above and ACHP's two staff confidential filers. We note that prior to the review you were developing a PowerPoint presentation for use in providing verbal training to all ACHP staff, including employees at the Denver office via videoconferencing⁴. On May 19 and 20, 2004 you conducted this training, which both staff confidential filers attended⁵. Both this training and your plan to conduct such staff-wide training every third year hereafter exceed OGE requirements by providing training to non-covered employees. Furthermore, you have revised your training plan to note that staff confidential filers will receive written training materials in the other years.

FINANCIAL DISCLOSURE SYSTEMS

Financial disclosure reports from ACHP staff, although not filed timely, were timely reviewed and certified, and contained no technical or substantive deficiencies. ACHP's staff has only two public filers (including yourself) and two confidential filers, one of whom you identified as a filer (due to some new duties which involve contracts) only after the conclusion of our fieldwork. Despite the small number of filers, our examination of the three annual reports from staff indicated room for improvement in filing timeliness. The one confidential filer did not submit his report until February, when you notified him of the necessity of doing so. Additionally, the Executive Director's public report was submitted late (by fewer than 30 days) and you gave yourself an informal filing extension⁶. You anticipate that such problems will be alleviated by the Deputy Ethics Official's assumption of the duties of notifying filers to file their reports and tracking submission. In order to aid her in these new duties, you recently updated and expanded your financial disclosure procedures.

ETHICS AGREEMENTS

ACHP employees do not have many ethics agreements, but recusals appear to be used when necessary. Due to their involvement with state historic preservation offices, both the Chair and the Vice Chair of the Council entered into verbal recusals upon entering their positions. The Chair also has a written recusal on file for a specific matter in which he had an interest due to another outside activity. Your review of meeting agendas appears to effectively screen for potential conflicts, as

⁴ Non-ACHP ethics officials at the Aberdeen Proving Ground provide annual ethics training to ACHP's three employees there.

⁵ Soon you intend to hold a make-up session for 11 employees who could not attend these sessions.

⁶ You have agreed to seek an extension from the Alternate DAEO or Executive Director in the future.

Mr Javier E Marques
Page 6

evidenced by your occasional recommendations that Council members recuse themselves from specific matters No 18 U S C § 208(b)(1) or (3) waivers have been issued to ACHP employees during your time as DAEO

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

During the period October 1, 2002 through September 30, 2003 ACHP accepted one payment for travel-related expenses from a non-Federal source under 31 U S C § 1353 Although the acceptance appears to be appropriate, you cannot recall conducting a conflict of interest analysis in accordance with 41 C F R § 304-5.3 of the implementing regulation In fact, you do not think anyone performed a conflicts analysis Furthermore, due to staff changes the two semiannual reports for this one-year period were not submitted until you began preparing for this review

Even before we began our review, you met with the Director of the Office of Administration and the Budget Analyst to develop procedures for accepting payments under 31 U.S.C § 1353 These procedures call for the Budget Analyst to forward any such requests to you for an ethics review and require you to sign off on the travel authorization before it is forwarded to the Executive Director for final approval The Budget Analyst is also responsible for submitting semiannual reports to OGE Due to your new procedures, we are not making a recommendation on this issue

ADVICE AND COUNSELING

Ethics counseling and advice services meet the requirements of 5 C F R § 2638.203(b)(7) and (8) You provide most of your advice verbally, but do dispense some advice in writing We examined all written advice for the past few years and determined it was accurate, consistent with applicable statutes and regulations, and appeared to meet employees' needs Since there is little turnover at ACHP, you have no organized post-employment counseling program However, you have agreed to work with ACHP's Office of Administration to require departing employees to meet with the DAEO

ENFORCEMENT

We were unable to assess this area, since to your knowledge ACHP has never had any allegations of ethics violations, and consequently never referred an alleged conflict of interest violation to DOJ In the absence of an inspector general, you would probably handle any allegations that would arise, you stated that you would contact your OGE Desk Officer and then refer the matter to DOJ, if appropriate

RECOMMENDATIONS

We recommend that you

- 1 Ensure that an Alternate Designated Agency Ethics Official (DAEO) is appointed in accordance with 5 C F R § 2638.202(b)

Mr Javier E Marques

Page 7

- 2 In a timely manner, notify confidential filers, including Council members, of their requirement to file financial disclosure reports and collect these reports
- 3 Cease requiring financial disclosure reports from the two non-Federal ex officio members of the Council
- 4 Collect and review financial disclosure reports from Federal agency head designees serving on the Council

In closing, I wish to thank you for all of your efforts on behalf on the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled approximately six months from the date of this report. 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 you take actions to correct these deficiencies in a timely manner. Please contact Christelle Klovers at 202-482-9255, if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04- 014



July 6, 2004

Mary L. Walker
Designated Agency Ethics Official
Department of the Air Force
1740 Air Force Pentagon
Washington, DC 20330-1740

Dear Ms. Walker

The Office of Government Ethics (OGE) recently completed its review of the Air Force's ethics program within four activities located at Kirtland Air Force Base. These activities include the 377th Air Base Wing (Wing), the Air Force Inspection Agency (AFIA), the Air Force Safety Center (AFSC), and the Air Force Operational Test and Evaluation Center (AFOTEC). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the ethics program's compliance with applicable statutes and regulations. We also evaluated the systems and procedures for ensuring that ethics violations do not occur. The review was conducted in March and April 2004. The following is a summary of our findings and conclusions.

HIGHLIGHTS

The Wing's ethics counselors assisted supervisors in taking administrative action, which appeared effective but not prompt, against an employee who may have violated 18 U.S.C. § 208. They also assisted in actions, which we considered to be both prompt and effective, against an employee who violated the Standards of Ethical Conduct for Employees of the Executive Branch (Standards).

The Wing and AFOTEC were not ensuring that all new employees received initial ethics orientation. However, they were already in the process of instituting new procedures to correct this prior to the beginning of our review. All four activities met or exceeded annual ethics training requirements.

Notwithstanding these and other problems noted in this report, the ethics program within the four activities we reviewed appears to be sound. Ethics officials were already addressing the problems prior to our site visit, precluding the need for us to make any recommendations. Ethics counselors appear to be more than competent and very diligent in providing the best possible ethics services.

PROGRAM STRUCTURE

The ethics program within the Wing, AFIA, and AFSC is administered by the activities' respective Staff Judge Advocates (SJA). AFOTEC's Legal Counsel administers the ethics program within AFOTEC. Staffing levels appear to be appropriate to the size of each activity. The Wing's SJA and four

Ms Mary L Walker
Page 2

members of his staff are appointed ethics counselors and are involved in various capacities, as required. The SJAs within AFIA and AFSC are the only ethics counselors for their activities, but each relies on an administrative assistant for support. AFOTEC has one recognized, but not formally appointed, ethics counselor who performs all ethics functions. In order to comply with the Department of Defense's Joint Ethics Regulation (JER), AFOTEC's ethics counselor should be formally appointed as such.

ENFORCEMENT

The Wing's ethics counselors assisted supervisors in taking administrative actions against two employees, a civilian for possibly violating 18 U S C § 208 and a military officer for multiple violations of the Standards and the Uniform Code of Military Justice (UCMJ). In both cases the actions appeared to be effective, but in one case we questioned whether the action could be considered prompt. Section 2638 203(b)(9) of 5 C F R requires the Designated Agency Ethics Official (DAEO) to ensure "Prompt and effective action including administrative action is undertaken to remedy (iv) Potential or actual violations of other laws governing the conduct or financial holdings of officers or employees of that agency."

The possible violation of 18 U S C § 208 involved a civilian employee who, in his official capacity, was responsible for writing a statement of work, tasking, and providing direction and justifications for the future funding of a particular contractor. At the same time, and in his private capacity, he was performing work for a subcontractor that directly related to the matters for which he had official responsibility. The case was informally discussed with the local U S Attorney, who communicated no interest in pursuing the matter. Ethics counselors did not consider this contact to be a referral or declination requiring notification to OGE. The employee was subsequently suspended for three days without pay for violating ethics standards, for engaging in work that constituted an "apparent conflict of interest," and to promote the efficiency of the service. The employee's supervisor, a lieutenant colonel, received a letter of admonishment for failing to take appropriate action when he had knowledge of the "apparent conflict of interest" and for submitting a false statement related to the case.

While we consider the action taken to be effective, we question whether or not it was, as also required, prompt. The employee performed the work in question by the summer of 2000. The Air Force Office of Special Investigations (AFOSI) began investigating the matter in early 2001 and had completed its investigation by July 2002. The employee did not dispute or contend any of the relevant findings. The notice of intent to suspend the employee was not signed until March 2003. We question whether action would have had to have been taken much sooner after the investigation was completed in order to be considered prompt. Ethics counselors related that the supervisor, who alone had the actual authority to discipline the employee, was known to be dilatory in such matters. We therefore encourage that supervisors are reminded, in the future, that it is not only important to take effective action in these cases, but also to make sure such action is taken promptly.

Administrative action was also taken against another lieutenant colonel for multiple violations of the Standards and the UCMJ. The individual received nonjudicial punishment in the form of an Article 15 for accepting loans from subordinates, falsifying a travel voucher, and misappropriating Government equipment. Punishment consisted of forfeiture of pay and a reprimand.

We consider the action taken in this case to be prompt and effective. The violations occurred between approximately July 2001 and July 2003. The violations were brought to the attention of the individual's commander in early September 2003. A Commander Directed Investigation was ordered on September 17 and completed on October 10. The punishment was imposed on November 11.

In addition to the requirement at 5 C F R § 2638 203 (b)(9), the DAEO is to ensure that the services of the Inspector General (IG) are utilized by ethics officials, including referring matters to and accepting matters from the IG (§ 2638 203(b)(12)), and that information developed by the IG is reviewed to determine whether such information discloses a need for taking prompt corrective action (e.g., recusal, waiver, divestiture) to remedy actual or potential conflict of interest situations (§ 2638 203(b)(11)). Based on discussions with ethics counselors and IG and AFOSI representatives, we concluded that there is compliance with § 2638 203(b)(12), but could not conclude whether there was compliance with § 2638 203(b)(11) as there was no evidence of any corrective actions having been taken.

Finally, 5 C F R § 2638 603 requires agencies to concurrently notify OGE of referrals for prosecution to the Department of Justice of alleged violations of the criminal conflict-of-interest statutes, as well as to notify OGE promptly of any declinations to prosecute and follow-up disciplinary or corrective action initiated, taken, or to be taken. Based on discussions with ethics counselors and IG and AFOSI representatives, there have been no such referrals, however, it appeared that the relationship between the parties is such that the requirements of § 2638 603 would be met.

INITIAL ETHICS ORIENTATION

The Wing and AFOTEC were not ensuring that all new civilian employees were receiving initial ethics orientation within 90 days, as required by 5 C F R § 2638 703. However, new procedures have been implemented to correct this. AFIA and AFSC already ensured the required training was received.

All new civilian employees hired by the four activities in-process through the base Civilian Personnel Office (CPO) in-processing includes a series of general orientation briefings conducted quarterly by CPO and incorporates initial ethics orientation provided by the Wing's ethics counselors. The ethics counselors provided us with lists of employees generated by the Training Operations Branch (TOB) within CPO. The ethics counselors used these lists to record attendance at initial ethics orientation. The lists consisted of, but did not distinguish between, employees who had transferred to Kirtland and those who were first-time hires. (Those employees who were transferred had presumably received initial ethics orientation at previous assignments.) The lists clearly show many employees did not attend initial ethics orientation. However, there was no way to determine which employees were transferees who were not required to receive initial ethics orientation and which were first-time hires who were required to attend. If an employee failed to attend the initial ethics orientation, there was no follow-up to ensure the training was eventually provided. Now TOB provides a list consisting only of the first-time hires, which the Wing's ethics counselors use to track completion of initial ethics orientation. Any employee on the list who fails to attend is contacted by an ethics counselor and rescheduled for training.

Prior to implementation of the new procedures, AFIA's and AFSC's in-processing procedures already required new employees to check in with the activities' respective SJAs. Any AFIA or AFSC first-time hires who do not attend initial ethics orientation as part of general in-processing would be trained at the time they in-process through their respective SJA's office. This ensures that all new

employees in these two activities receive the required training and allows ethics counselors to address issues specific to their activities

The materials used to provide initial ethics orientation by the Wing's ethics counselors during the quarterly orientation briefings, and by AFIA for employees who did not attend a briefing, met the relevant content requirements. There were no new employees at AFSC who did not receive initial ethics orientation as part of their in-processing through CPO. The AFSC ethics counselor was aware of the content requirements, and we are confident he would provide the required materials as necessary.

ANNUAL ETHICS TRAINING

All four activities met or exceeded the annual training requirements as defined in 5 C F R §§ 2638 704 and 2638 705. All of the covered employees required to receive annual training in 2003 were trained. We confirmed that the materials used to conduct training met the relevant content requirements. All of the activities have effective means of positively affirming attendance at training sessions.

AFIA, the Wing, and AFSC actually exceeded annual training requirements. AFIA has only four individuals who are required by 5 C F R § 2638.705 to receive annual ethics training, yet the ethics counselor provides in-person annual ethics training to all military personnel and civilian employees twice a year. He feels it is appropriate in view of the nature of AFIA as an inspection agency. Additionally, the Wing provides tailored ethics training to some contractor employees to complement the training they receive concerning the Procurement Integrity Act. The ethics training gives them an understanding of the rules in effect for Government employees which may help prevent them from inadvertently creating potential conflicts for Government employees. AFSC provides in-person training to covered employees and encourages non-covered employees to review training materials stored on a local computer network drive. Those who access the materials are asked to sign a log documenting their review of the information. According to the log, maintained by an administrative assistant, many non-covered employees did review these materials, effectively completing annual ethics training.

ADVICE AND COUNSELING SERVICES

Ethics advice and counseling services meet the requirements of 5 C F R § 2638 203(b)(7) and (8). We examined a sample of ethics-related advice and counseling rendered by ethics counselors from the four activities we reviewed. We concluded that all of the written advice, which covered a variety of subjects, complied with applicable ethics statutes and regulations. It was provided in a timely manner and was comprehensive in addressing the relevant issues. Ethics counselors provided complete analyses of the issues raised, identified the relevant authorities, and, on occasion, cautioned that even if an activity was permitted, it may not be prudent.

PUBLIC FINANCIAL DISCLOSURE

In 2003, 17 public financial disclosure reports were required to be filed by the General Officers and Senior Executive Service members assigned to 3 of the activities. AFIA has no positions whose incumbents are required to file public reports. All of the reports were filed, reviewed, and certified timely. There were no substantive deficiencies, and only minor technical issues which were resolved through discussions with ethics officials.

CONFIDENTIAL FINANCIAL DISCLOSURE

The Wing had difficulty in collecting 3 reports from annual confidential report filers, and reports for 11 new entrant filers were filed well beyond the required filing deadline. AFIA, AFSC and AFOTEC appear to have met all relevant requirements.

We examined a sample of 75 of the 493 reports required to be filed within the Wing in 2002.¹ Three of the reports required to be filed had not been filed at the time of our site visit. One filer stated his financial records are stored out of state and, as soon as they can be retrieved, he will complete and submit a report for 2002. Ethics officials will continue to follow up to ensure the report is filed. The remaining two filers have submitted their reports since our visit. The Wing's ethics counselors stated that administrative action would probably not be taken against any of the delinquent filers. The three reports which had not been filed at the time of our visit represent a very small fraction of the 493 reports required to be filed. We do not consider this to be indicative of a systemic problem or a serious deficiency.

There were 23 new entrant reports in the sample of reports from the Wing. Of those, 11 were filed between two and a half and nine months late. Until recently, ethics counselors have had difficulty identifying individuals entering covered positions. They have made extensive efforts to coordinate with personnel officials to ensure position descriptions are annotated to identify positions whose incumbents are required to file confidential financial disclosure reports. The CPO has been developing a new automated personnel database system which can generate reports of individuals entering covered positions. These reports will allow for the timely identification of new entrants so they can be notified of the filing requirements. This should greatly improve the timeliness of new entrant filing.

AFIA, AFSC, and AFOTEC have small numbers of filers who are easy to identify. We examined all of the reports required to be filed within these activities in 2003 and noted no systemic problems. Except for one report filed within AFSC, all reports were filed, reviewed, and certified timely. The report filed in AFSC was a new entrant report that was filed late because the ethics counselor was on extended leave and was not available to notify the filer of the filing requirements.

¹We examined the 2002 reports filed within the Wing because our review was originally scheduled to take place in 2003 and we had previously requested that the 2002 reports be made available. We decided not to ask ethics officials to provide the 2003 reports since they had already pulled the 2002 reports from their files and it would have created an additional burden to gather the 2003 reports. We reviewed the 2003 reports filed within AFIA, AFSC, and AFOTEC because there were few reports and little effort was required to provide them.


Ms Mary L Walker
Page 6

31 U S C § 1353 TRAVEL PAYMENTS

We examined two of the Wing's semiannual reports of travel acceptances from non-Federal sources of more than \$250 per event, covering the period April 1, 2002 through March 31, 2003, which were forwarded to the Department of the Air Force headquarters for submission to OGE. There were six acceptances of travel payments which were reported, all appeared to comply with the statute, the implementing regulation at 41 C F R Chapter 304, and the JER AFIA, AFSC, and AFOTEC ethics counselors did not have any acceptances of such travel payments to report

In closing, I would like to thank everyone involved in this review for their cooperation on behalf of the ethics program. No six-month follow-up is necessary in view of the fact that we have no recommendations for improving the ethics program at this time. We are sending a copy of this report by transmittal letter to the Inspector General of the Air Force. Please contact Douglas L. Chapman at 202-482-9223 if we may be of further assistance.

Sincerely,


Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04-⁰¹⁶013



June 30, 2004

Edgar M Swindell
Designated Agency Ethics Official
Department of Health and Human Services
(b) E Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Dear Mr. Swindell:

The Office of Government Ethics (OGE) recently completed a review of the Substance Abuse and Mental Health Services Administration's (SAMHSA) ethics program within the Department of Health and Human Services (HHS). Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated SAMHSA's systems and procedures for ensuring that ethics violations do not occur. The review was conducted during March and April 2004. The following is a summary of our findings.

HIGHLIGHTS

Our review of SAMHSA's ethics program disclosed that all elements are in compliance with applicable laws and regulations. Since our last review improvements were made to ensure timely public filing, timely confidential filing for regular and special Government employees (SGE), and timely approval of outside activity requests. These improvements, which would not have been possible without the support of SAMHSA's Administrator, can be directly attributed to the ethics advisor whose time is now fully devoted to the ethics program and who has been with the program since 1995.

PROGRAM STRUCTURE

SAMHSA's Director of the Office of Program Services serves as the Deputy Ethics Counselor (DEC) for SAMHSA's ethics program. She is assisted by an ethics advisor who is responsible for administering the day-to-day duties and for ensuring the efficient and effective operation of SAMHSA's ethics program. Although the ethics program is primarily centralized with the ethics advisor, each center within SAMHSA has an ethics contact (CEC).¹ The CEC assists the ethics advisor in determining potential conflicts that relate to the health programs, and is responsible

¹SAMHSA is comprised of three centers that carry out the agency's mission: the Center for Mental Health Services (CMHS), the Center for Substance Abuse Prevention (CSAP), and the Center for Substance Abuse Treatment (CSAT).

for the initial approval of outside activity requests. In addition, each of SAMHSA's six Federal Advisory Committee Act committees (committees) has an executive secretary who assists the ethics advisor with the collection of members' financial disclosure reports.²

PUBLIC FINANCIAL DISCLOSURE SYSTEM

Our examination of the public financial disclosure system disclosed that the system appears effective and is in compliance with applicable laws and regulations. This was based on our examination of 20 of the 22 public financial disclosure reports required to be filed in 2003. Our examination excluded two reports that were required to be reviewed by you.³ We found that the reports were filed, reviewed, and certified timely. Additionally, we found that three employees with potential conflicts had recusal agreements on file and four current employees who listed outside activities had corresponding outside activity approvals on file.

CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEM

Although some problems were found with the collection, review, and certification of reports from the advisory committee members, our examination of the confidential financial disclosure system overall disclosed that the system appears effective and is in compliance with applicable laws and regulations. We found that the advisory committee members who did not file a confidential report in 2003 represented less than two percent of all the confidential filers. To avoid a recurrence of these problems, the ethics advisor took immediate action to implement new procedures. We suggest that the ethics advisor closely monitor the new process to ensure full compliance.

Non-Advisory Committee Employee Reporting

Our examination of approximately 370 non-advisory committee employees' confidential reports, which were comprised of the OGE Form 450 (450) and the OGE Optional Form 450-A (450-A) reports required to be filed in 2003, disclosed that less than 3 percent filed late and less than

²SAMHSA's six committees are: the SAMHSA National Advisory Council, the CMHS National Advisory Council, the CSAP National Advisory Council, the CSAT National Advisory Council, the Advisory Committee for Women's Services, and the Drug Testing Advisory Board.

³The two public reports were filed by one Presidentially-appointed, Senate-confirmed (PAS) employee and one Schedule C employee.

1 percent were reviewed and certified late⁴ Additionally, our examination of the reports did not identify any potential conflicts that needed to be remedied. We questioned information listed on 18 reports that we thought posed potential conflicts, but we were informed that only one asset would have posed an actual conflict had the employee not had a recusal agreement already on file. We also confirmed that 18 employees who listed outside activities on their reports had corresponding outside activity approvals on file

As for four new entrant reports required to be filed since the 2003 annual filing cycle, we found that two reports were filed, reviewed, and certified timely, one report was in the process of being collected, and one report was filed timely and in the process of being reviewed

Our examination disclosed that 35 percent, or 128, of the 370 confidential filers, filed the 450-A in lieu of filing the 450 Only one 450-A filer did not have a corresponding 450 on file Subsequently, the ethics advisor informed us that he collected the missing 450

Advisory Committee Member Reporting

On November 13, 1997, OGE approved SAMHSA's use of an alternative system in the form of a verification certificate In lieu of filing a new entrant 450 each year, SGEs who serve terms of more than one year on advisory committees file a 450 upon appointment and reappointment, and the verification certificate is required in intervening years However, executive secretaries actually collected verification certificates prior to each committee meeting, which, depending on the number of meetings attended by a member, could result in up to four verification certificates filed in a year by the member⁵

We found that not all advisory members filed in 2003 Our examination disclosed that 88 percent, or 49, of the 56 advisory committee members filed either a 450 in 2003 or a verification certificate in 2003 and a corresponding 450 in a prior year Additionally, we found that not all attendees filed prior to each meeting Our examination disclosed that 79 percent, or 88, of the 111 reports or verification certificates required to be filed in 2003 were filed by members who attended meetings Of total reports filed, 18 percent, or 16 reports, were filed late and 8 percent, or 7 reports, did not indicate that they were reviewed or certified.⁶

⁴Although the 450-A does not need to be reviewed and certified, we noted that most 450-As were reviewed and signed by the DEC

⁵Verification certificates are not collected more often than once a quarter

⁶The total excludes the reports required from members participating in teleconference meetings since a log of participants was not kept

Upon learning of our findings, the ethics advisor immediately revised the written procedures for the collection, review, and certification of advisory committee members' 450s and verification certificates, and forwarded the procedures to the centers' executive secretaries for implementation. These procedures stipulate that 450s and certificates should be filed no later than two weeks before a meeting to give reviewers sufficient time to analyze them and take any needed actions (e.g., recusals or waivers). To facilitate out-of-town members filing prior to the meeting, facsimile copies may be accepted.

As for the advisory committee reporting in relation to the overall confidential financial disclosure system, we found that the advisory committee members who did not file a confidential report in 2003 resulted in less than two percent of all the confidential filers. Although this number is low, it is important to remember that delinquent or missing reports impair an agency's ability to provide timely and specific conflict of interest advice, a fundamental purpose of an agency ethics program.

ETHICS ADVICE AND COUNSELING

SAMHSA's counseling program appears to be effective. We examined approximately 80 pieces of written advice provided to employees over the last year, including notes to the file. Although a few of the ethics advisor's analyses appeared ambiguous, we found that the advice was consistent with the applicable laws and regulations. The types of issues addressed included conflicts of interest, fundraising, gift acceptance, impartiality, seeking and post employment, outside activities, recusal and waiver agreements, and general guidance.

ENFORCEMENT

Both the ethics advisor and Senior Counsel to the Inspector General informed us that there have not been any criminal conflict of interest referrals to the Department of Justice from January 1, 2003 to present. However, within the last year the ethics advisor referred two alleged standards of conduct violations to HHS' Office of Inspector General which resulted in administrative actions. One case involved a seeking employment issue for which the employee received verbal counseling. The other case involved a business relationship with a previous employer and resulted in the employee attending a four-day basic project officer training course.

ETHICS TRAINING

SAMHSA's ethics training program appears to be effective. Most filers completed annual ethics training in the 2003, those who did not were granted extensions and completed 2003 annual training in early 2004. New employees receive the agency's initial ethics orientation within 90 days from the time an employee begins work.

Mr. Edgar M Swindell
Page 5

Initial Ethics Orientation

The ethics advisor is responsible for new employees initial ethics orientation. SAMHSA's personnel office sends an the entry-on-duty notice to the ethics advisor when new employees come on board. Employees are then instructed via e-mail to complete computer-based ethics training. The ethics advisor is available during regular working hours to answer questions.

Annual Ethics Training

The ethics advisor made ethics guidance available to filers throughout 2003 via ethics information on the SAMHSA intranet, and e-mails on outside activity policy updates, and seeking and post-employment guidance. According to the ethics advisor, SAMHSA's Administrator and his Special Assistant met their annual ethics training requirement by attending your small group annual ethics training session held on November 20, 2003. Advisory committee members were sent written materials in 2003, as authorized under 5 C F R § 2638.705(d)(2). The remaining filers were notified via e-mail to complete the computer-based annual ethics training on the National Institute of Health's Web site. The ethics advisor was available during regular working hours to answer questions.

We examined SAMHSA's records for employees trained for 2003 and found that 77 percent, or 10, of the 13 remaining public filers completed the 2003 annual ethics training in 2003 and the remaining (23 percent, or 3) public filers completed the training in early 2004. Also, 84 percent, or 308, of the 366 confidential filers completed training in 2003 and the remaining (16 percent, or 58) confidential filers completed training in early 2004. The ethics advisor informed us that the filers who completed training in early 2004 were granted extensions and certified that they completed the training within the extended time.

Administrator's Support

On October 3, 2003, SAMHSA's Administrator demonstrated his support of the ethics program by sending an e-mail to filers. In that message, he emphasized that he considered knowledge of and adherence to Federal ethics principles to be a critical component of each employee's job. He also emphasized the importance for those who must file financial disclosure reports, take ethics training, and file outside activity requests to comply with all regulatory deadlines.

ACCEPTANCE OF GIFTS OF TRAVEL FROM NON-FEDERAL SOURCES UNDER 31 U S C § 1353

The process of approval and reporting of the acceptance of gifts of travel from non-Federal sources under 31 U.S.C. § 1353 appears effective. We examined SAMHSA's last semiannual report to HHS for the period ending September 30, 2003. With the HHS Program Support Center's permission, SAMHSA provides the information in Excel file format instead of using the Standard

Mr Edgar M Swindell
Page 6

Form 326 We found that the payments were properly approved The types of travel consisted of attendance at conferences, courses, meetings, and symposiums

In response to our discovery that one employee accepted a personal reimbursement of taxi fare and per diem allowances from a non-Federal source, SAMHSA plans to send periodic reminders to employees that they cannot personally accept payment from non-Federal sources for gifts of travel under 31 U S C § 1353. This issue should have been raised during the review of the employee's confidential disclosure report because, as part of that review, the ethics advisor advised the employee that § 1353 travel was not reportable

In closing, I would like to thank you and the SAMHSA staff for your efforts on behalf of SAMHSA's ethics program A brief follow-up review is typically scheduled within six months from the date of this report However, as this report contains no formal recommendations to improve the program, no such follow-up will be necessary A copy of this report is being forwarded to HHS' Inspector General via transmittal letter Please contact Jean Hoff at 202-482-9246 if we may be of further assistance

Sincerely,



Jack Covalesski
Deputy Director
Office of Agency Programs

Report Number 04-⁰¹⁵012



July 22, 2004

Dev Jagadesan
Designated Agency Ethics Official
Overseas Private Investment Corporation
1100 New York Avenue, NW.
(b) (6)
Washington, DC 20527

Dear Mr Jagadesan

The Office of Government Ethics (OGE) has completed its review of the Overseas Private Investment Corporation's (OPIC) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated OPIC's systems and procedures for ensuring that ethics violations do not occur. This review was conducted in May and June 2004.

HIGHLIGHTS

We are primarily concerned that ethics officials are not properly reviewing public and confidential reports for conflicts of interest in accordance with 5 C.F.R. § 2634.605. Instead, you have been relying on filers to identify conflicts under a method that does not satisfy OGE's requirements. Moreover, we question ethics officials' ability to certify reports given that they do not conduct conflict of interest reviews. Consequently, confidential reports must be reviewed for conflicts, beginning with those due from incumbents by October 31, 2004. Concerning public reports, you advised us that most of the improperly reviewed reports filed by incumbents in May 2004 have now been re-reviewed for conflicts and none were detected. A few reports remained to be recertified as you were awaiting additional information from filers.

We are satisfied that other parts of your ethics program are meeting our regulatory requirements. However, we discussed with you (and this report contains) several suggestions for improving some of your program's administrative procedures. As the newly appointed Designated Agency Ethics Official (DAEO), we encourage you to adopt our suggestions. In addition, we suggest that you take advantage of future OGE training and conferences to enhance your understanding of the executive branch ethics program.

PROGRAM STRUCTURE

The current staffing level for the ethics program appears appropriate given the agency's size, organizational structure, and mission. The Deputy General Counsel held the DAEO position at the start of our review. However, on June 1, you were appointed DAEO and, in your capacity as an Associate General Counsel, you now manage the ethics program for the approximately 200 OPIC employees located in Washington, DC. A Senior Counsel for Administrative Law serves as Alternate DAEO (ADAEO) and has held this position for less than two years. He administers the program on a day-to-day basis. Another attorney has recently been appointed to serve as a Deputy Ethics Official. In addition, two administrative support staff members provide program support.

BOARD OF DIRECTORS

OPIC's Board of Directors (Board) consists of 15 members, 8 from the private sector and 7 from the Federal Government, all of whom are appointed by the President and confirmed by the Senate (PAS employees).¹ All private sector members are special Government employees (SGE) who file SF 278 reports upon nomination and subsequently file confidential financial disclosure reports.²

The Board meets four times per year, provides policy guidance to OPIC, and approves all major insurance, finance, and investment projects. We found that ethics officials are thoroughly reviewing private sector Board members' financial disclosure reports for conflicts prior to each meeting. Based on the ADAEO's description of this effort, in addition to the documented procedures we examined, we are satisfied ethics officials' reviews help to ensure that conflicts are detected and prevented. However, we are still concerned about the process used for detecting and preventing conflicts on the part of Board members who are PAS employees from other Federal agencies. As our 1998 report suggested, we believe that ethics officials should be reviewing copies of members' financial disclosure reports prior to their attendance at meetings. When we last met, you told us that you intend to review reports, but are deliberating on the process to use to accomplish this.

FINANCIAL DISCLOSURE SYSTEMS

Our most serious concern is that the financial disclosure reports, other than those filed by PAS employees, were not being reviewed in accordance with 5 C.F.R. §§ 2634.605 and 2634.909(a). While reports were being reviewed for technical completeness and accuracy, they were not being reviewed for conflicts of interest. The longstanding practice at OPIC has been

¹One of the Federal Government Board members, OPIC's President and Chief Executive Officer, is a full-time PAS employee of OPIC. OPIC's other full-time PAS employee, the Executive Vice-President, is not a Board member.

²During the timeframe of our review, one private sector Board position was vacant.

Mr Dev Jagadesan

Page 3

for filers to determine whether a financial interest would pose a conflict of interest, after which ethics officials certify the reports relying entirely on the filers' determinations. In making these determinations, filers identify any financial interests that conflict with projects on which they are working, submit (along with their financial disclosure report) a signed "recusal memorandum," and, presumably, act accordingly.

This practice is very troublesome to us. As the purpose of OPIC is to promote economic growth in developing countries and emerging markets by encouraging U.S. private investment, OPIC filers interact extensively with U.S. businesses in offering private financing (i.e., direct loans and guarantees) and political risk insurance to businesses. Most importantly, except for ethics officials' reviews of financial disclosure reports for completeness and accuracy, OPIC is not complying with the provisions in § 2634.605. Under § 2634.605, ethics officials are to be very engaged in the review of filers' financial disclosure reports, including

- determining, to the reviewing officials' satisfaction, that each required item is completed and that no reported financial interest violates any ethics law, Executive order, or regulation (§ 2634.605(b)(1)),
- certifying reports based on a determination that they meet the requirements of subparagraph (b)(1) (§ 2634.605(b)(2)),
- determining whether additional information is needed before certifying reports and requesting and reviewing any additional information (§ 2634.605(b)(3)),
- notifying filers and affording them opportunities to respond, if information disclosed in reports reveal violations (§ 2634.605(b)(4)),
- determining whether remedial action (e.g., divestiture, resignation, qualified blind or diversified trust, waiver, recusal, etc.) is required by filers before certification (§ 2634.605(b)(4)),
- requesting in writing that filers take remedial action (usually within three months of being notified) (§ 2634.605(b)(4) and (5)), and
- certifying reports only after filers have taken requested remedial actions (§ 2634.605(b)(6)(i))

When we last met, we advised you to stop certifying financial disclosure reports unless our review requirements are met. For public reports, you told us that you had begun to comply with this requirement and that most of the improperly reviewed reports filed by incumbents in May 2004 had already been re-reviewed for conflicts and that you found none. For a few reports you were awaiting follow-up information from filers before recertifying them. Moreover, a few filers were given filing extensions and you had not yet received their reports.

Concerning OGE Form 450 reports, we advised you that beginning with the next incumbent filing timeframe in October 2004, you must ensure that conflict reviews are conducted, unless our Office grants approval for some type of alternative system in lieu of using the OGE Form 450³ We had several discussions with you concerning the most effective way to detect and prevent financial conflicts at OPIC when using the OGE Form 450 and the option of creating an alternative system in lieu of using the OGE Form 450

In 1998, when we last reviewed OPIC's ethics program, ethics officials indicated that they were conducting conflict reviews Our report stated that ethics officials "use a current list of OPIC clients to identify possible conflicts of interest during the review of financial disclosure reports" However, at that time, ethics officials advised us that they felt their review was insufficient To address this, they instituted an earlier version of what is now the recusal memorandum signed by filers Since it was clear to us that our requirement to review financial disclosure reports was being satisfied, we raised no concerns about the adequacy of the conflict review process at that time

Though we are concerned about ethics officials' lack of conflict reviews, our examination of financial disclosure reports did not detect any actual or apparent conflicts We did question some of the holdings reflected on a sample of both public and confidential reports, but, based on the additional follow-up work conducted by the ADAEO, we are satisfied that none of these holdings presented a conflict In addition, we determined that the administrative aspects of the public and confidential systems appear to work well

Public System

Approximately 30 public reports were required to be filed in 2003 Our examination of all reports, including reports filed by the previous DAEO and OPIC's two full-time PAS employees (the President and Chief Executive Officer and the Executive Vice President), found that almost all were filed and reviewed timely In addition, it was clear that the review of reports for completeness and accuracy was thorough based on the many corrections and additions made to the reports by the ADAEO

In 2003, for public reports filed by the agency's two full-time PAS employees and the former DAEO, which are required to be transmitted to OGE pursuant to 5 C F R § 2634.602, we found that two of the three were timely transmitted We advised you of the requirement to transmit reports to our Office as soon as they are certified⁴

³For clarification, you are not permitted to suspend the OGE Form 450 filing requirement pending approval of an alternative system

⁴In addition, see DAEOgram DO-04-014, dated June 15, 2004

Confidential System

We examined a sample of 27 of the approximately 140 confidential reports required to be filed in 2003 and found that almost all were filed and reviewed timely. Similar to our observation about the review of public reports, the ADAEO's review of confidential reports for completeness and accuracy was thorough. We noted many corrections and additions he made to the reports. However, these reports need to be reviewed for conflicts of interest.

ETHICS AGREEMENTS

We identified four ethics agreements made since 2001, all by PAS employees. We determined that all of the actions required to be taken pursuant to the ethics agreements were completed timely, in accordance with 5 C F R § 2634.802(b). In all but one instance, requisite evidence of action taken was submitted timely to OGE, in accordance with 5 C F R § 2634.804(a).

ETHICS EDUCATION AND TRAINING

We found that OPIC meets or exceeds many of OGE's ethics education and training requirements. However, we made some suggestions to enhance the education program and clarified some of our regulatory provisions. Though OPIC regularly documents its ethics training plan, we discussed with you the fact that the plan should include a brief description of the agency's annual training, in accordance with 5 C F R § 2638.706(c)(1). We commend OPIC for exceeding our initial ethics orientation requirements based on the fact that in-person briefings are provided to new employees. Concerning annual training, though it appears that all those employees requiring ethics training in 2003 had been trained, we suggest that ethics officials routinely maintain records to reflect that fact. Also, while we found that our training requirements were generally satisfied, we called your attention to our regulation's content requirements at 5 C F R § 2638.704(b).

Initial Ethics Orientation

We are pleased to find that OPIC exceeds OGE's initial ethics orientation requirements. In addition to new employees receiving required written materials when they in-process through the Human Resources Department, they are also given additional useful ethics-related information. Moreover, all new employees are personally briefed by either you or the ADAEO shortly after they begin work at OPIC. Materials given to new employees include a copy of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), your agency's supplement to the Standards of Conduct, OGE's publication entitled "Do It Right," two ethics-related memorandums, and other OPIC policy documents. While most new employees, including most student interns, are given a personal ethics briefing by the ADAEO, the previous DAEO had assured to us that he personally provided ethics orientation briefings to all new senior officials, including all new PAS employees. You told us that you intend to continue this beneficial practice.

Annual Ethics Training For Public Filers

The former DAEO stated that he provided in-person verbal ethics training to all of the approximately 30 public filers, including PAS employees, in 2003. He also told us that the training provided to OPIC's two full-time PAS employees was one-on-one, which is a practice we advocate. For other public filers, he explained that in 2003 he provided training while accompanying them on official Government travel by discussing various ethics-related topics that arose at that time. While we expressed our concern about whether the training content requirement, at 5 C F R § 2638 704(b), was met during these "training sessions," the previous DAEO assured us that it was. In addition, we expressed concern that he did not keep records to show that he provided training to all public filers.

The former DAEO also stated that verbal annual ethics training for public filers had already been given in 2004. He met with all filers for two hours in a classroom setting and covered a variety of topics, including the Hatch Act and post-employment issues.

As a new DAEO, we encourage you to ensure that annual ethics training meets our regulation's content requirements. In our discussions with you, we clarified that providing only written material to public filers is not a suitable method to meet the annual training requirements given the fact that the exception at 5 C F R § 2638 704(e)(1) cannot be justified. We also suggested that, as a good management practice, records be maintained to show that public filers were trained. For recording annual training dates for public filers, you may want to annotate the spreadsheet used to track the submission of SF 278s. Similarly, for new public filers, you may also want to record when you provide initial ethics orientation briefings.

Annual Ethics Training For Nonpublic Filers

The ADAEO confirmed that all nonpublic filers required to receive training in 2003 had done so. Annual training in 2003 for OPIC's approximately 140 confidential filers was primarily accomplished by them completing one of two interactive computer-based training (CBT) modules. Filers were required to provide the ADAEO with electronic certification statements confirming they had completed a training module. Those few who were unable to complete the CBT modules were provided appropriate written materials.

In 2004, the ADAEO stated that he plans to provide in-person training to nonpublic filers covering various ethics-related topics. We attended one training session held in May covering travel-related issues. While the training did incorporate most of our training regulation's content requirements, it did not include a review of OPIC's supplemental regulation or the Federal conflict of interest statutes (5 C F R § 2638 704(b)(3) and (4)). We were told, however, that these requirements were included in a subsequent training session and would be incorporated into future sessions.

ETHICS COUNSELING AND ADVICE

Ethics counseling and advice services meet the requirements of 5 C F R § 2638 203(b)(7) and (8) While ethics advice is sometimes provided orally, it is often dispensed in written form, usually by e-mail Covering 2003 up to the present, we examined the one and only written determination provided to a PAS employee and also examined a sample of approximately 45 other written determinations provided to other individual employees In addition, we examined a few informational memorandums provided to all employees Overall, we found that the advice and information was accurate and consistent with applicable laws and regulations

We commend the fact that you have instituted several good management practices which enhance your counseling and advice program Those practices include (1) occasional distribution of ethics informational memorandums to all employees, (2) maintaining a useful and informative Intranet ethics Web site (The Compass), and (3) a standardized method to ensure that all departing OPIC employees are given a post-employment briefing and written materials We encourage you to continue these practices

OUTSIDE EMPLOYMENT

OPIC's supplement to the standards of conduct regulation at 5 C F R part 4301 requires all employees to obtain approval from you before engaging in any outside employment Based on the few examples of the employment authorizations we examined, it appears that employees are, in fact, obtaining prior approval But, we discussed and suggested several administrative-related practices to enhance ethics officials' oversight of those employees who pursue outside employment activities For example (1) consider having supervisors initially review employees' requests for approvals of outside employment prior to your approval,⁵ (2) establish some type of cross-checking method to ensure that those outside positions held by employees required to file financial disclosure reports have been appropriately approved and reported, and (3) on a regular basis obtain updated information on employees' outside employment activities

SPECIAL GOVERNMENT EMPLOYEES

Until recently, OPIC had two types of SGEs its private sector Board members and members of the agency's Africa Investment Advisory Council (Council) However, during the timeframe of our review, we were told that the Council had disbanded Though we found some minor financial disclosure reporting anomalies concerning these SGEs, we believe those issues are now inconsequential

⁵A supervisor's knowledge of employees' duties and responsibilities could be beneficial in determining whether approval should be granted

For Board members who are SGEs, we found that annual ethics training and financial disclosure requirements are being satisfied. According to the previous DAEO, all private sector Board members received required ethics training in 2003 and 2004. In addition, we found that all four OGE Form 450 reports required to be filed in 2003 were filed and reviewed timely.⁶

ENFORCEMENT

We could not assess whether you are ensuring that OPIC promptly and effectively deals with those employees who engage in unethical conduct (5 C F R § 2638 203(b)(9)) based on the fact that there have not been any recent alleged violations of the criminal conflict-of-interest laws or the Standards of Conduct. In addition, we could not assess whether information developed by an office of inspector general (OIG) is reviewed by ethics officials or whether OIG services are used as appropriate (5 C F R § 2638 203(b)(11) and (12)), since there have not been any recent instances of use.

The Agency for International Development's (AID) OIG has statutory authority to provide investigative services to OPIC. We were told that if a misconduct issue were to arise, ethics officials would perform their own preliminary investigation before calling upon AID's OIG. Though no conflict of interest matters have been referred to the Department of Justice (DOJ), ethics officials advised us that, if warranted, they would consult with both AID's OIG and OGE prior to making a referral and would concurrently notify OGE of any referral made to DOJ (5 C F R § 2638 603).

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

On an occasional basis, OPIC accepts payments for travel, subsistence, and related expenses from non-Federal sources under 31 U S C § 1353. Though we found that the agency has routinely complied with the requirement to timely forward semiannual reports to our Office accounting for those acceptances, we found some reporting inaccuracies. The last three semiannual reports forwarded to our Office (covering the timeframe from October 1, 2002 through March 31, 2004) indicated that OPIC accepted a total of eight payments. However, discussions with the ADAEO revealed that five of the eight acceptances were reported in error. He advised us that he discussed these reporting errors with appropriate OPIC administrative staff and that this should not recur.

Concerning the three remaining payments accepted by OPIC from non-Federal sources for travel, we found that those appeared to have been accepted in accordance with 31 U S C § 1353. We discussed with the ADAEO some of our suggestions to improve and streamline the approval process and other ways to ensure that OGE is properly notified of acceptances under this authority. For example, maintain a "tackler" recordkeeping system to compare approved

⁶Of the seven active SGE Board members, only four were required to file OGE Forms 450 in 2003.

Mr Dev Jagadesan
Page 9

acceptances versus actual expense information provided by travelers, and modify the template used by employees requesting agency acceptance of travel expenses to include both the dates of travel and dates of attendance at the related event

RECOMMENDATIONS

We recommend that you

- 1 Ensure, as necessary, that all public reports filed by incumbents in May 2004 are recertified after completing conflict of interest reviews in accordance with 5 C F R § 2634 605
- 2 Ensure that confidential reports filed by non-PAS employees, starting with those filed by incumbents in October 2004, are reviewed for conflicts of interest in accordance with 5 C F R §§ 2634 605 and 2634 909(a), or gain approval from our Office to use an alternative system in lieu of using the OGE Form 450

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of the Office of Government Ethics 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 ethics officials take actions to implement recommendations in a timely manner. Please contact Ilene Cramsky at 202-482-9227 if we can be of further assistance.

Sincerely,


Jack Covalesski
Deputy Director
Office of Agency Programs

Report Number 04 - 012



June 3, 2004

James J Keightley
Designated Agency Ethics Official
Pension Benefit Guaranty Corporation
1200 K Street, NW
(b) (6)
Washington, DC 20005-4026

Dear Mr Keightley

The Office of Government Ethics (OGE) has completed its review of the Pension Benefit Guaranty Corporation's (PBGC) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated PBGC's systems and procedures for ensuring that ethics violations do not occur. This review was conducted intermittently from January through April 2004.

HIGHLIGHTS

While certain areas of PBGC's ethics program are sound and suited to your agency's mission, size, and employees, other areas require improvement. Well-run aspects of your program include satisfying OGE's ethics training regulatory requirements and providing useful and accurate advice when employees ask ethics-related questions. However, we found deficiencies in the financial disclosure systems for both regular employees and special Government employee (SGE) members of PBGC's one advisory committee. In addition, in the enforcement area, we want you to notify us not only of any administrative action (including disciplinary action) taken concerning the two ethics cases referred to in this report, but if action is not taken, please confirm that it was affirmatively considered.

PROGRAM STRUCTURE

It appears that ethics staffing of your program is appropriate given the agency's size and organizational structure. As the General Counsel, you serve as the Designated Agency Ethics Official (DAEO) for approximately 800 PBGC employees, all of whom are located in Washington, DC. An Assistant General Counsel serves as Alternate DAEO (ADAEO) and devotes about 20 percent of his time to ethics-related duties. His supervisor, a Deputy General Counsel, also serves as an ethics official. In addition, several Office of General Counsel (OGC) staff attorneys serve as Ethics Counselors, one of whom serves as a primary ethics point of contact and another

Mr James J Keightley

Page 2

who recently took charge of tracking financial disclosure reports and conducting preliminary reviews of those reports

ENFORCEMENT

The handling by your office and the OIG of two ongoing ethics cases which are discussed below revealed instances of non-compliance with 5 C F R § 2638 603 and raised questions with respect to PBGC's compliance with § 2638 203(b)(9), (11), and (12) Indeed, we do not believe that in the first case described below you ensured that PBGC took prompt and effective administrative action against the employee In addition, discussions with ethics and OIG officials revealed a longstanding difficult relationship between the two offices which impeded effective coordination on employee misconduct cases Though we still have some concerns about the overall effectiveness of the working relationship between the two offices, based on comments from both you and OIG officials, it appears that the relationship is getting better To ensure the viability of PBGC's enforcement process when dealing with future employee misconduct cases, we encourage that you and OIG officials continue to improve upon your working relationship

Section 2638 603 requires agencies to concurrently notify OGE of referrals for prosecution to the Department of Justice (DOJ) of alleged violations of the criminal conflict-of-interest statutes, as well as to notify OGE promptly of any declinations to prosecute and disciplinary or corrective action initiated, taken, or to be taken Section 2638 203(b)(9) requires the DAEO to ensure that the agency takes prompt and effective administrative action against agency employees to remedy ethics violations Subparagraph (b)(11) of § 2638 203 requires the DAEO to ensure that information developed by OIG is reviewed to determine whether such information discloses a need for taking prompt corrective action to remedy actual or potential conflict-of-interest situations Subparagraph (b)(12) of § 2638 203 requires the DAEO to ensure that the services of OIG are utilized by ethics officials, including referring matters to and accepting matters from OIG

Case Involving the Director Insurance Operations Department

Ethical violations involving the Director, Insurance Operations Department (IOD) have been longstanding OIG officials initially began investigating him in 1997 based on allegations that he had improperly accepted a gift and showed favoritism to a PBGC contractor during the awarding of contracts Since that time, according to OIG officials, there have been a series of intertwining investigations involving this employee

In July 2000, the General Accounting Office (GAO) initiated its own investigation concerning contracting irregularities at PBGC GAO's investigation focused on the propriety of two of the contracts awarded by the Director, IOD In its testimony before the Senate Special Committee on Aging and the Committee on Small Business on September 21, 2000, GAO reported they found that the Director, IOD had "demonstrated a lack of impartiality" with respect to awarding one of the contracts and had "created the appearance of improperly influencing the award of the two contracts"

under examination GAO planned on referring this matter to PBGC and to DOJ for additional action

We understand that in early-2001 OIG officials referred the Director, IOD to DOJ's Public Integrity Section and the U S Attorney for the District of Columbia alleging an 18 U S C § 208 violation However, our Office was not concurrently notified, as required by 5 C F R § 2638 603 In September 2001, DOJ declined to prosecute this case ¹ We also understand that OIG officials subsequently referred this matter, in June 2003, to DOJ's Civil Division and that a determination is still pending

We were informed that in August 2003 an OIG investigative report covering wrongdoings on the part of the Director, IOD was transmitted to you After receipt of this report, you asked the OIG to provide additional evidence to support its report findings, which we were told was provided in December 2003 When we met with you in March 2004, you told us that this matter had been under review for several months and that you had retained outside counsel to ensure consistency in the application of any disciplinary action that may be meted out Subsequent to our exit briefing with you, on April 16 the Deputy Executive Director issued a notice to the Director, IOD, proposing a 14-day suspension without pay, and counseled him in writing Please notify us of the final decision on whether or not proposed action is taken

Case Involving the Director, Strategic Planning Department

Allegations of misconduct by the Director, Strategic Planning Department (SPD) were raised to the OIG in January 2002 OIG officials began an investigation in June 2002 based on allegations that she was still a partner in the firm she was employed with prior to her employment with PBGC and that she had steered PBGC contracts to her friend and former partner According to OIG officials, they substantiated that the Director, SPD participated in various procurement actions which resulted in her former partner obtaining multiple non-competitive contracts with PBGC

In January 2003, OIG officials referred this case to DOJ's Fraud and Public Corruption Section, which declined prosecution One year later, in January 2004, the OIG referred this case to DOJ's Public Integrity Section alleging violations of 18 U S C. §§ 205 and 208, which was declined in February 2004 ² Also in February, according to OIG officials, DOJ's Fraud and Corruption Section referred this case to DOJ's Civil Division and received a declination that same month

¹OIG officials notified OGE of this referral and DOJ's disposition in February 2004 OIG officials told us they plan to implement a new process for improved identification of cases and notification to OGE to ensure that we are concurrently notified of referrals and promptly notified of any declinations and disciplinary or corrective action initiated or taken

²As in the other case, OGE was not notified of the referral and declination until February 2004

We were informed that in December 2003, an OIG investigative report covering various charges against the Director, SPD was transmitted to you and that PBGC management officials were briefed on this case. According to OIG officials, they provided supplemental investigative information to management and you in February 2004. You have also retained outside counsel in this case to ensure consistency in the application of any disciplinary action that may be meted out as well as to conduct additional investigative work. Accordingly, as required by 5 C.F.R. § 2638.603, notify us of any disciplinary action taken. If action is not taken, notify us whether it was affirmatively considered.

FINANCIAL DISCLOSURE SYSTEMS

Various aspects of PBGC's public and confidential financial disclosure systems need strengthening to ensure that recently made improvements are institutionalized. At the start of our review in January, we found that many financial disclosure reports required to be filed in 2003 were missing and that many reports had not been reviewed and/or certified. These findings raised our concerns about the viability of these systems to detect potential conflicts of interest. We advised ethics officials about our concerns and they took immediate action to locate, review, and certify the missing reports. While our examination of reports did not detect any potential conflicts (and subsequent reviews conducted by ethics officials found none), we were concerned about the adequacy of disclosed information on some reports. These concerns were addressed by the close of our review.

PBGC has longstanding written procedures for administering its financial disclosure systems which we found generally met the fundamental requirements of the Ethics Act. However, we believe that these procedures need to be updated to more accurately reflect how the systems are now being administered. Since ethics officials agreed to make changes and incorporate the suggestions we made, we are not making a formal recommendation.

We also discussed methods to streamline and improve the overall processing and tracking of financial disclosure reports. We were advised that many of our suggestions would be implemented. For example, as a first step, one Ethics Counselor has reorganized the filing and tracking system. In addition, she has assumed responsibility for tracking receipt of financial disclosure reports as they are submitted to OGC. Moreover, she will initially review all reports and monitor those reports that will be certified by other ethics officials.

Public System

We examined 30³ of the 31 public reports required to be filed in 2003 and found all were filed timely. However, the review and certification of many reports was protracted—exceeding a year

³We did not examine one report which was under review by ethics officials

for some Ethics officials explained that many reports were misfiled and forgotten instead of being forwarded to the ADAEO and you for final certification

During our review, once ethics officials had certified most public reports, we questioned them on whether the financial information disclosed in a few reports was accurate and complete. Ethics officials advised us that except for two of the reports for which requested additional data was pending, they had followed up with filers, obtained all required information, and assured that there were no potential conflicts of interest.

Concerning the delayed forwarding of your May 2003 public report to our Office pursuant to 5 C F R § 2634 602, apparently, it too was misfiled and forgotten about along with other public reports. In addition, when it was forwarded to the Executive Director for certification, it languished. The report was ultimately certified by the ADAEO and forwarded to OGE in January 2004. We advised ethics officials that your report is not required to be certified by the Executive Director (as called for in your current written procedures for administering the public system) but rather can be certified by the ADAEO.

Confidential System

We found similar breakdowns in the confidential system as with the public system. Although we did not independently verify that all of the approximately 170 confidential reports required to be filed in 2003 were accounted for, ethics officials told us that all had been collected. Based on our review of a sample of 35 reports, we found that most were filed and initially reviewed by supervisors timely. However, certification by ethics officials was protracted. Mostly due to poor record keeping and a mismanaged tracking system, ethics officials were not aware of the extent of uncertified reports until we raised our concerns when we examined the files.

During our review, once ethics officials had certified most confidential reports, we questioned them on whether the financial information disclosed on a few reports was accurate and complete. By the close of our review, ethics officials advised us that all required information had been obtained and that there were no potential conflicts of interest.

SPECIAL GOVERNMENT EMPLOYEES

In 2003, due to the press of other legal work, ethics officials forgot to collect the required new entrant confidential reports filed annually by six of the seven PBGC advisory committee members, all of whom are SGEs. However, they did timely collect and review the required report from one member, who was newly appointed in 2003. As a way to remedy future oversights and to avoid the administrative burden of having advisory committee members file at the time of their anniversary/reappointment dates, ethics officials plan to implement OGE's suggestion to use May 15 for their SGE report filing anniversary date (See DAEOgram DO-03-021, dated October 23, 2003).

Ethics officials advised us that all advisory committee members received in-person annual ethics training in April 2003. For 2004, they intended to distribute written ethics training materials to all members when they distribute the OGE Forms 450. Ethics officials also planned to provide in-person training at one of the advisory committee's meetings in 2004. Furthermore, from now on, in addition to tracking the receipt and review of advisory committee confidential reports, ethics officials will be recording the dates when written materials are distributed and in-person training is provided.

WAIVERS

From 2003 to the present, PBGC did not issue any waivers pursuant to 18 U.S.C. § 208(b)(1) or (b)(3); however, in 2002, three were issued. While consultations took place with our Office prior to granting these waivers, copies were not forwarded in accordance with 5 C.F.R. § 2640.303. Instead, we collected copies of the three waivers at the start of our review. Similar to the observation we made in 1999 when we last conducted a review at PBGC, we remind you of the requirement to forward copies of waivers to our Office.

ETHICS EDUCATION AND TRAINING

The requirements of subpart G of 5 C.F.R. § 2638 are being met at PBGC in providing initial ethics orientation and annual ethics training and documenting your agency's annual ethics training plan. We commend that in addition to providing OGE-required ethics training, for the last few years ethics officials have also conducted "business ethics" training for all employees. According to the results of OGE's employee ethics survey,⁴ respondents who received recent training indicated that it was very useful in making them more aware of ethics issues and in guiding their decisions and conduct in connection with their work. As a good record-keeping practice, ethics officials intend to annually record covered employees' receipt of ethics training along with tracking information on the receipt and review of those employees' financial disclosure reports.

Initial Ethics Orientation

The initial ethics orientation requirement is immediately satisfied for new employees when they enter on duty through the Human Resources Department (HRD) and are given required written materials. Information given to new employees includes a copy of the Standards of Conduct, a memorandum summarizing the regulation, a list of frequently asked questions, and information about PBGC ethics officials. According to ethics officials, all new senior officials are also given personalized ethics orientation briefings shortly after they begin work.

⁴OGE surveyed PBGC employees in the November through December 2003 time frame. Complete results of this survey were transmitted to you in March 2004.

We commend that in 2003 ethics officials instituted the practice of offering ethics orientation classes to all new employees (in addition to the orientation materials provided by HRD) We encourage that these classes continue to be offered as a means to raise ethical awareness, especially among non-covered employees

Annual Ethics Training

We determined that the annual ethics training requirement was satisfied in 2003 based on attendance records we examined and ethics officials' assurances Almost all covered employees attended in-person classroom training which covered various aspects of the ethics rules and laws All public filers received either classroom or personalized training For the few confidential filers who did not attend a classroom session, ethics officials confirmed that they instead used an OGE computer-based training (CBT) module

In 2004, ethics officials planned to provide in-person training to all public filers Though in-person training may also be provided to all confidential filers (including providing specialized training to some office groups), officials are also considering offering additional CBT options to them We discussed the possibility of using CBT developed by other agencies and adapting it for PBGC use If this were to be done, it would be useful to add these training modules to your Intranet Ethics Page for use by all employees

ETHICS COUNSELING AND ADVICE

PBGC's ethics counseling and advice services meet the requirements of 5 C F R § 2638 203(b)(7) and (8) Though advice is most often provided orally, it is also dispensed in written form, usually by e-mail We examined approximately 25 written determinations that were provided to employees from 2003 to the present and found that they were accurate, consistent with applicable laws and regulations, and appeared to meet employees' needs According to OGE's employee survey results, respondents who sought advice from agency ethics officials indicated that the advice they received was very useful and that ethics officials were extremely helpful

A commendable practice that you have in place is that you provide post-employment information to all departing employees In addition, there is an Ethics Page on PBGC's Intranet However, since limited written advice is dispensed and primarily only basic information displayed on the Ethics Page, we suggest, in an effort to highlight ethical behavior and rules, that ethics officials on a regular basis either distribute written information to all employees or post new entries on the Intranet addressing topical ethics matters In addition, because ethics officials dispense most of their advice orally, as a good management practice, we advocate retaining some type of written record of the advice provided to employees

We commend that PBGC recently removed its longstanding residual ethical conduct regulation at 29 C F R. part 4904 This action clarifies for employees that PBGC does not require them to obtain prior approval before engaging in outside employment and other activities

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

We found that all 13 payments from non-Federal sources for travel, subsistence, and related expenses incurred by employees on official travel from October 1, 2002 through September 30, 2003 were accepted in accordance with 31 U S C § 1353 However, due to ethics officials' oversight, the semiannual report required to be sent to our Office covering the period of October 1, 2002 through March 31, 2003 was not forwarded Instead, in December 2003, officials provided a report covering October 1, 2002 through September 30, 2003 Ethics officials assured us that the next semiannual report (covering October 1, 2003 through March 31, 2004) would be timely forwarded

We discussed methods to streamline the administrative aspects of approving offers of payments of travel and expediting the required reporting to our Office In addition, we discussed the need for PBGC Notice Number 92-5⁵ to be updated to remove references to the General Services Administration's interim regulation, PBGC's regulations on ethical conduct, and the honoraria prohibition While we understand that this agency notice does not fall under OGC's jurisdiction, ethics officials advised us that they would work with appropriate PBGC officials to revise it

RECOMMENDATIONS

We recommend that you

- 1 Ensure that the newly developed financial disclosure tracking systems capture reliable and accurate information concerning the filing and review of public and confidential reports
- 2 Ensure that public and confidential reports are timely reviewed and certified
- 3 Collect the required confidential reports from advisory committee members
- 4 Ensure that public and confidential report filers disclose accurate and complete information


⁵In our 1999 report, this document was referred to as PBGC Directive IM 10-4

Mr James J Keightley
Page 9

- 5 Notify us not only of any administrative action (including disciplinary action) taken concerning the two ethics cases discussed in this report, but if action is not taken, confirm that it was affirmatively considered

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of the Office of Government Ethics 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 ethics officials take actions to implement recommendations in a timely manner. We are sending a copy of this report by transmittal letter to the Inspector General. Please contact Ilene Cramsky at 202-482-9227, if we can be of further assistance.

Sincerely,


Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04 - 011



May 28, 2004

Rudy Sanchez
Designated Agency Ethics Official
Selective Service System
1515 Wilson Boulevard
Arlington, VA 22209-2425

Dear Mr Sanchez

The Office of Government Ethics (OGE) has completed its review of the Selective Service System's (Service) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated the Service's systems and procedures for ensuring that ethics violations do not occur. This review was conducted intermittently from March through May 2004.

HIGHLIGHTS

While our examination of your program found a few system- and process-related faults, we are pleased that corrections and improvements were made both before and during the time frame of our review to ensure that your program complies with applicable ethics statutes and regulations. Our concern about the Service's program focuses on its continued viability based on the high turnover rate in Designated Agency Ethics Officials (DAEO), five different employees (including you) have served as DAEO since 2000. Subsequent to our exit briefing with ethics officials, which was held on May 6 when you held the Alternate DAEO (ADAEO) position, we were told that the Service's new Acting Director had appointed you as DAEO. The former DAEO was appointed ADAEO. While this change comports with the concerns we raised about the former DAEO's temporary appointment status, it again highlights the turnover rate issue.

PROGRAM STRUCTURE

Current staffing level for the ethics program appears appropriate given the agency's size, organizational structure, and mission. At the time of our review, the agency's Executive Officer had been serving for a year as DAEO for the approximately 160 Service employees located at headquarters in Arlington, Virginia, a Data Management Center, and three regional offices around the country. While the Service did not have an ADAEO for many years, just before the start of our review, you, as the agency's one attorney-advisor, were appointed to fill that position. You had long

Mr. Rudy Sanchez

Page 2

provided legal advice for the ethics program before your ADAEO appointment. The switch in appointments between you and the former DAEO was made on May 12.

We believe that most of the ethics program breakdowns outlined in this report can be attributed to the high turnover rate in DAEOs over the past few years. Despite the Service's ongoing restructuring and management changes, we encourage you to maintain a stable ethics program structure as a means by which to sustain the program's viability.

ETHICS AGREEMENTS

There are no ethics agreements in effect for current employees. However, the nominated Service Director (whose Senate hearing was held on January 28, 2004, but who has not yet been confirmed) does have a pending ethics agreement.¹ After the submission of his nominee report to our Office, he subsequently entered into an agreement with the Service's Senate confirmation committee which we were not aware of until the time of our exit briefing with you. We clarified with your predecessor the requirements of 5 C F R. § 2634.803(a)(2) concerning immediately notifying OGE of agreements such as this. In addition, we clarified the following requirements that actions(s) to comply with the agreement be taken within the time frame prescribed in the agreement (§ 2634.802(b)), that there be written evidence of the action(s) taken (§ 2634.804(b)), and that such supporting documentation be forwarded to OGE shortly after the actions are taken (§ 2634.804(a)(1)).

ENFORCEMENT

Based on the fact that there have been neither any recent alleged violations of the criminal conflict-of-interest laws nor the standards of conduct, we were unable to assess whether you are ensuring that the Service promptly and effectively deals with those employees who engage in unethical conduct (5 C F R. § 2638.203(b)(9)). In addition, we could not assess whether information developed by an office of inspector general (OIG) is reviewed by ethics officials or whether OIG services are used as appropriate (5 C F R. § 2638.203(b)(11) and (12)).

The Service has an agreement with the Smithsonian Institution OIG to provide investigative services. According to discussions with you, an OIG official, and a Service employee who serves in a liaison capacity with the OIG, there have been no recent investigations involving employee misconduct. If ever required, it is likely that the OIG and DAEO would jointly and concurrently notify OGE of any referrals to the Department of Justice alleging violations of the criminal conflict-of-interest laws, in accordance with 5 C F R. § 2638.603(b).

¹The Service Director is the agency's only Presidentially-appointed, Senate-confirmed (PAS) position. We were advised that the Service now has an Acting Director serving on a part-time basis who is a PAS employee from another agency.

Mr Rudy Sanchez

Page 3

ETHICS COUNSELING AND ADVICE

There is a process in place to provide ethics counseling and advice to employees to meet the requirements of 5 C F R § 2638 203(b)(7) and (8), however, overall, minimal advice is dispensed since Service employees ask few ethics-related questions. The two e-mail determinations provided to individual employees in the past year showed that the advice was accurate and consistent with applicable laws and regulations.

To keep employees informed of ethics matters, ethics officials have issued a few e-mails to them referencing ethics rules and OGE's Web site. Ethics officials also assured us that departing Service employees are given either a post-employment briefing or written materials depending on their situation. When we last met, we spoke about the benefits of establishing an intranet ethics Web site at your agency as a way to easily provide ethics-related information on matters germane to Service employees.

ETHICS EDUCATION AND TRAINING

Based on recently made improvements, we found that OGE's ethics education and training requirements are now being met at the Service. Though the Service's ethics training plan had not been routinely documented in the past, in accordance with 5 C F R § 2638 706, in 2004 a written plan was developed with assistance provided by the Service's OGE Desk Officer. We are satisfied that initial ethics orientation is met for new employees shortly after they in-process through the Human Resources Division. Materials given to new employees include a copy of the Standards of Conduct. In addition, ethics officials recently instituted a practice of sending a welcome notice to them via e-mail, which ensures meeting the requirements of 5 C F R § 2638 703(b) and (c).

Our review of an attendance roster from an April 2003 annual ethics training class confirmed that in-person training was provided to all covered employees by two OGE desk officers. By the time of our last meeting, we were informed that you had recently trained all four public filers in order to fulfill their 2004 ethics training requirement and that you plan to train other covered employees in October 2004.

We were also told that you intend to personally provide an ethics orientation briefing to the new Director after his confirmation and appointment. In addition, you intend to annually provide personalized ethics training to him. We advocate these ethics training practices.

FINANCIAL DISCLOSURE SYSTEMS

Based on the changes and corrections instituted during our review, we determined that the Service's public and confidential financial disclosure systems are now in compliance with OGE's financial disclosure requirements, and related processes are back on-track. During our review ethics officials (1) documented the agency's procedures for administering the financial disclosure systems,

Mr Rudy Sanchez

Page 4

in accordance with the Ethics Act, (2) certified financial disclosure reports that the previous DAEO had not certified and assured to us that there were no conflicts of interest, (3) collected a long overdue termination public report from the previous Director,² (4) disposed of financial disclosure reports older than six years, and (5) made additional annotations to reports to clarify reported entries. We were also assured that for the annual confidential financial disclosure filing cycle, ethics officials would not request employees to file OGE Forms 450 earlier than October 1.


We determined that all 6 public³ and all 18 confidential reports required to be filed in 2003 were filed, reviewed, and certified timely. It appeared that the review of the reports was thorough based on the few notations and corrections made on them.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

We could not assess the acceptance of payments for travel, subsistence, and related expenses from non-Federal sources since the Service does not accept this type of payment. However, we found that for the last several years the Service had not submitted all of the required semiannual negative reports to our Office. During the time frame of our review, ethics officials provided the negative reports to OGE, in addition to providing a negative report for the most recent time frame (covering October 1, 2003 through March 31, 2004).

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. No six-month follow-up review is necessary in view of the fact that we have no recommendations for improving your program at this time. Please contact Ilene Cranisky at 202-482-9227 if we may be of further assistance.

Sincerely,


Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04 - 010

²The previous Director, who left the agency in January 2003, did not file his termination report until March 2004. Due to confusion on the part of previous DAEOs, it was not until the start of our current review that the collection of his report was pursued. Based on the circumstances described in the correspondence accompanying the previous Director's report, your predecessor appropriately granted him a waiver of the \$200 late filing fee.

³In 2003, two termination, two new entrant, and two annual public reports were required.



May 20, 2004

G. John Heyer
Designated Agency Ethics Official
Committee for Purchase From People
Who Are Blind or Severely Disabled
Jefferson Plaza 2, (b) (6)
1421 Jefferson Davis Highway
Arlington, VA 22202-3259

Dear Mr Heyer

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the Committee for Purchase From People Who Are Blind or Severely Disabled (Committee). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the ethics program's compliance with applicable statutes and regulations. We also evaluated the Committee's systems and procedures for ensuring that ethics violations do not occur. This review was conducted in April 2004.

HIGHLIGHTS

The Committee's ethics program generally meets OGE's requirements, but there are some areas that require improvement. As we found during our last review in 1995, the Committee's financial disclosure system is not in compliance with ethics statutes and regulations. Accordingly, we recommend that you have special Government employees (SGE) file confidential reports as required by 5 C F R § 2634.904(b), keep previously filed SF 278s from these filers confidential, and ensure that employees file new entrant reports within 30 days of assuming a covered position at the Committee.

On a positive note, we commend you for providing in-person, one-on-one initial ethics orientations for all employees. We further note that you go above and beyond OGE's training requirements by providing specialized training, covering gifts from outside sources, to new employees at two central nonprofit agencies that work closely with the Committee, yet are independent of it.

PROGRAM STRUCTURE

The Committee was created in 1971 to administer the Javits-Wagner-O'Day Program, which provides employment opportunities for blind or severely disabled Americans by orchestrating Government purchases of products and services provided by nonprofit agencies employing such

Mr G John Heyer

Page 2

people The Committee is headed by 15 Presidentially-appointed members, 11 of whom represent other Federal agencies The remaining four are private citizens who serve as SGEs Supporting them are approximately 28 full-time employees

In your capacity as the Committee's General Counsel, you serve as the Designated Agency Ethics Official (DAEO), devoting about 10 percent of your time to administering the ethics program After we notified you during pre-review work that the Committee needed an Alternate DAEO, the Deputy Executive Director agreed to serve in this capacity He was formally designated as Alternate DAEO on April 21, 2004 Although he recently attended OGE's course on public financial disclosure, he will likely serve solely as your back-up for the time being

COMMITTEE MEMBERS INCLUDING SGEs

Although there are some problems with the financial disclosure system for Committee members, you do an admirable job training SGEs The only SGEs are the four Committee members, but you also require Committee members from other Federal agencies to submit their financial disclosure reports to you at the same time they submit them to their parent agencies' ethics officials In addition, we are glad to see you are reviewing the reports for potential conflicts of interest by comparing them with the agendas of Committee meetings

Financial Disclosure

You have been requiring SGEs to file public reports because they meet the pay threshold, however, you recently determined that they only work approximately 33 days per year Thus, under 5 C F R §§ 2634 201 and 2634 204, they should only be required to file confidential reports Henceforth, until such time as you determine they will work more than 60 days in a calendar year, SGEs should file new entrant confidential financial disclosure reports each year Furthermore, you must ensure that their previously filed SF 278s remain confidential

Another problem is that at the time of our review you did not have reports from any Committee members appointed after May 2003 These missing reports included a new entrant report from one SGE and copies of the most recent annual reports filed by six Committee members from Federal agencies In fact, you did not request reports from these Committee members until the 2004 annual filing cycle In order to ensure that they are not acting on Committee matters in which they have a financial interest, you must take steps to obtain reports from new entrant SGEs within 30 days of their entering a covered position and from new Committee members from other Federal agencies prior to any meetings

Aside from these problems, the financial disclosure system for Committee members appears to be operating effectively We examined all of the confidential financial disclosure reports due from Committee members (both SGEs and representatives from other Federal agencies) by your May 2003

Mr G John Heyer

Page 3

annual filing deadline and found that they generally had been filed, reviewed, and certified timely and contained no apparent substantive deficiencies¹

Education and Training

All SGEs are thoroughly briefed on the ethics rules. As per your training plan, you gave each of the three new SGEs in 2003 an individual initial ethics orientation immediately after he was sworn in. Annual ethics training is provided in the same way as for staff, and all four SGEs completed this training in 2003. You do not provide annual ethics training to Committee members from other Federal agencies since they should receive it from their parent agency.

FINANCIAL DISCLOSURE SYSTEMS

Like the financial disclosure system for Committee members, the public and confidential systems for regular employees need improvement, especially in the area of new entrant reports. In addition, your written procedures have not been updated since you developed them in response to a recommendation in our last review report. Due especially to the addition of an Alternate DAEO, it is important that you revise your procedures so that they remain an accurate guide for administering the program.

We examined all financial disclosure reports required to be filed by regular employees in 2003. The 2 public reports and 13 confidential reports (from all employees at the GS-13 or above grade level) were generally filed, reviewed, and certified timely and your report was timely forwarded to OGE. One confidential report had not been certified, but you assured us you had reviewed it upon submission, consequently, you certified it immediately to remedy the oversight. Reports contained a few technical deficiencies, but no apparent substantive ones.

The Committee has no mechanisms for ensuring that new entrants file reports timely. Although one filer was promoted into a confidential filing position in October 2002, she did not file a combined new entrant/annual report until a year later. Another individual was promoted into a covered position in December 2003, she completed annual ethics training for 2003, but still had not filed a new entrant confidential report by the time of our review.

ETHICS AGREEMENTS

The Committee has only one current ethics agreement, a recusal. Despite your advice that this recusal was unnecessary, one Committee member recused himself, out of an abundance of caution, from matters involving a particular company for which his son-in-law's cousin works. We

¹With regard to reports from Committee members from other Federal agencies, your practice is to review them and certify that the filers' disclosures do not reveal any potential conflicts of interest with their duties as Committee members.

Mr G John Heyer
Page 4

were glad to see that, in order to ensure that the recusal is carried out, you notified the appropriate Committee staff to ensure that the member is excluded from votes involving that company. There are no 18 U.S.C. § 208(b)(1) or (b)(3) waivers.

EDUCATION AND TRAINING

While your annual ethics training program meets the requirements of 5 C.F.R. part 2638, your initial ethics orientation program exceeds these requirements. In addition, you go above and beyond the requirements by semiannually providing specialized training to new contractor employees at the Committee's two central nonprofit agencies. This training focuses on gifts from outside sources, so that these contractors will know the restrictions placed on their giving gifts to Committee employees.

In 2003, all four new Committee employees received initial ethics orientation promptly. As a part of their general orientation, you brief new employees individually on the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) and other applicable ethics rules. We applaud you for this best practice of providing in-person, one-on-one training. Employees are also given a copy of the Standards and a 1993 summary of these rules.

You satisfy the annual ethics training requirement by having covered employees complete a Web-based training module. In 2003, both public and confidential filers used one of the modules on OGE's Web site. Employees are required to send you certificates of completion by the end of the year, which all 20 covered employees did in 2003. Furthermore, your training plan notes that alternative training methods, such as verbal briefings and video and audio tapes, will be used to train any covered employees with special needs that make computer-based training impractical.

ADVICE AND COUNSELING

We examined all six pieces of written advice you provided covering 2002 to the present and determined that the advice was thorough, accurate, and appeared to meet employees' needs. You dispense advice, either verbally or in writing, approximately once a month.

Although there is little turnover at the Committee, you do provide post-employment counseling to those employees who take jobs in the private sector. Additionally, you inform any Committee members from Federal agencies who leave Government service that the post-employment rules apply to the Committee as well as to their parent agency.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

During the period October 1, 2002 through September 30, 2003, the Committee accepted no payments for travel-related expenses from non-Federal sources under 31 U.S.C. § 1353, in fact, it has only made one acceptance during your tenure. You stated this is because virtually all offers come from prohibited sources. The Committee did not submit the last three semiannual reports, all

Mr G John Heyer
Page 5

negative, to OGE until reminded to do so in February of 2004. However, you believe that such timeliness issues will be resolved by reminders you will receive now that you have recently subscribed to the ethics listserve.

ENFORCEMENT

We were unable to assess this area, since to your knowledge the Committee has never had any allegations of violations of either ethics statutes or the Standards and, consequently, never referred a conflict of interest violation to the Department of Justice (DOJ). In the absence of an inspector general (IG), you would probably initially handle any allegations that arise. Under an interagency agreement, the General Services Administration should provide IG services when needed. Your financial disclosure procedures also include a section on enforcement, which states that you will use OGE Form 202 to notify OGE of any conflict of interest referrals to DOJ and any subsequent dispositions of the referrals.

RECOMMENDATIONS

We recommend that you

1. Ensure SGEs file confidential reports as required by 5 C F R § 2634.904(b) and previously filed SF 278s from these filers are kept confidential.
2. Ensure employees, including SGEs, file new entrant reports within 30 days of assuming a covered position at the Committee.

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled approximately six months from the date of this report. 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 you take actions to correct these deficiencies in a timely manner. Please contact Christelle Klovers at 202-482-9255, if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs



April 1, 2004

Mary L. Walker
Designated Agency Ethics Official
Department of the Air Force
1740 Air Force Pentagon
Washington, DC 20330-1740

Dear Ms. Walker:

The Office of Government Ethics (OGE) recently completed its review of the Department of the Air Force's (Air Force) ethics program within the Office of the Secretary. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the ethics program's compliance with applicable statutes and regulations. We also evaluated the systems and procedures for ensuring that ethics violations do not occur. The review was conducted from December 2003 through February 2004. The following is a summary of our findings and conclusions.

HIGHLIGHTS

All elements of the ethics program meet or exceed the relevant requirements. Education and training efforts were creative and tailored to specific audiences. The establishment of a network of Points of Contact (POC) within the Office of the Secretary for administering the financial disclosure systems and the education and training program appears to be an excellent way to manage the ethics program. The counseling and advice provided by ethics counselors was found to be comprehensive and responsive to the needs of those seeking assistance. Ensuring that high level employees receive post-employment briefings and providing cautionary memorandums to financial disclosure report filers are both strong points of the program.

PROGRAM STRUCTURE

We found the ethics program to be adequately staffed by very capable ethics counselors who possess the requisite expertise and subject matter knowledge to provide excellent ethics-related services to their constituents. Ethics functions within the General Counsel's office, which, heretofore, were separately organized to serve military and civilian personnel, were recently consolidated within the Fiscal and Administrative Law (FAL) component. This consolidation has provided for greater consistency in the administration of all program elements throughout the entire Air Force. Moreover, POCs within each office in the Office of the Secretary act as liaisons for processing financial disclosure reports and coordinating ethics training. This network of POCs provides ethics counselors within the Office of the Secretary with a useful layer of additional accountability, whereby POCs ensure that new

financial disclosure filers are identified timely, any disclosure problems are identified and addressed timely, and initial ethics orientation and annual ethics training are provided as required

EDUCATION AND TRAINING

All requirements for initial ethics orientation and annual ethics training were met or exceeded. In addition, ethics counselors are proactive in addressing ethics-related issues through brochures and publications available to all employees. They are also seeking to develop a "values-based" ethics program oriented towards preventing ethics violations.

Initial Ethics Orientation Program

Most new civilian employees within the Office of the Secretary are provided initial ethics orientation as part of their overall new employee orientation, while new military personnel generally were provided initial ethics orientation on prior military assignments. Ethics counselors regularly conduct in-person initial ethics orientation sessions for new Presidentially-appointed, Senate-confirmed (PAS) employees and special Government employee (SGE) members of the Air Force Scientific Advisory Board (SAB), which encompasses all of the SGEs within the scope of this review.

Annual Ethics Training Program

Annual ethics training for the majority of covered employees is accomplished by providing materials via a Web-based program. The appropriate materials are posted and information is provided concerning ethics counselors who are available during duty hours to answer any questions. Particular groups of employees who are more likely to encounter ethics-related issues are provided in-person training. These groups have included PAS employees, newly promoted GS-15s and Senior Executive Service members, new Air Force Legislative Fellows, and General Officers. The training is tailored to address the most relevant issues they are likely to encounter.

ADVICE AND COUNSELING SERVICES

Ethics advice and counseling services meet the requirements of 5 C F R § 2638.203(b)(7) and (8). We examined a sample of ethics-related advice and counseling rendered by the ethics staff. Based on our examination, we concluded that all of the written advice, which covered a variety of subjects, complied with applicable ethics statutes and regulations. It was provided in a timely manner and was comprehensive in addressing the relevant issues.

Within the Office of the Secretary, departing employees who are in pay grade GS-11 or higher, and their military equivalents, are required to out-process through FAL, ensuring that they have the opportunity to receive post-employment briefings. This is particularly important in view of the number of employees who seek employment with private defense contractors after, or even before, leaving Federal employment. We also note that you provide post-employment counseling to all other employees upon request. We recognize that ethics counselors' willingness to make themselves available to all employees is a hallmark of a strong ethics program.

ENFORCEMENT

Ethics counselors are aware of the requirement to notify OGE when a case involving the potential violation of a criminal conflict of interest statute is referred to the Department of Justice. They are also aware of the requirement to provide subsequent reports on the disposition of the case, including any disciplinary action taken if it is declined for prosecution. Procedures are in place to govern how this is accomplished. While there have been no referrals during the period covered by our review, we believe you would comply with the prescribed procedures if/when a referral is made in the future. The only case related to the criminal conflict of interest statutes to arise during the time covered by this review is currently under investigation. We are confident that you will inform us, as specified in the Department of Defense Joint Ethics Regulation (JER), if the case is ultimately referred to the Department of Justice.

There were no detected violations of the standards of conduct during the period covered by this review. The Air Force has published general guidance in dealing with misconduct. The guidance does not specifically address the standards of conduct, but does include a general table of punishments for misconduct. Ethics counselors are confident that they would be made aware if a violation of the standards of conduct was detected and would be able to ensure that prompt and effective action was taken or affirmatively considered.

It is clear, from discussions with all parties, that an effective working relationship exists between ethics counselors, the Air Force's Office of the Inspector General (OIG), and the Air Force's Office of Special Investigations (AFOSI). This relationship would ensure that the services of OIG/AFOSI would be utilized when appropriate, including the referral of matters to and the acceptance of matters from OIG/AFOSI, as required by 5 C F R § 2638.203 (b)(12).

FINANCIAL DISCLOSURE SYSTEMS

Both the public and confidential financial disclosure systems generally met the requirements of 5 C F R part 2634. Since FAL is now responsible for the review of all public reports, as well as all Office of the Secretary confidential reports, whether filed by military personnel or civilian employees, we believe that reporting issues will be addressed in a consistent manner.

Public Financial Disclosure System

We examined a sample of 76 of the 535 public reports filed in 2003. The reports filed by military personnel were reviewed by ethics counselors in the Judge Advocate General's office in accordance with the procedures in place at the time they were filed (prior to the consolidation of ethics functions). We noted several instances among these reports where the underlying assets of mutual funds were not disclosed although there was no indication that the funds were excepted investment funds (EIF). Other assets were reported without providing the type or value of income. One filer reported AT&T stock as an EIF. In each case, the Deputy Designated Agency Ethics Official was advised of the issue and able to resolve it.

We did not note any unresolved issues regarding the public reports filed by civilian employees, including six reports filed by PAS employees. It was apparent that ethics counselors thoroughly

Ms Mary L Walker
Page 4

reviewed these reports and resolved all issues that were identified. The public reports were filed, reviewed, and certified, and copies of PAS reports transmitted to OGE, as required. Moreover, PAS and other public filers complied with any ethics agreements, as required.

Confidential Financial Disclosure System


We examined a sample of 70 of the 368 confidential reports filed by regular employees in 2002 and 2003 and 32 of the 71 reports filed by SGE members of SAB in 2003. Many of the regular employees and almost all of the SGE filers received cautionary memorandums. These are used when an ethics counselor concludes that no reported item violates, or appears to violate, any applicable statute or regulation, but the filer has financial interests in non-Federal entities doing or seeking to do business with the Department of Defense. The only problem we noted with the confidential reports was most of the SGE filers indicated that they were filing annual reports. According to ethics counselors, they will reinforce with SGEs the requirement that they file new entrant reports.

13 U S C § 1353 TRAVEL PAYMENTS

We examined Air Force's two most recent reports of travel acceptances. Both appeared to comply with applicable requirements. Procedures in the JER exist to ensure proper acceptance and reporting of travel payments accepted by Air Force employees under 31 U S C § 1353 and the implementing General Services Administration regulation at 41 C F R Chapter 304.

In closing, I would like to thank everyone involved in this review for their cooperation on behalf of the ethics program. No six-month follow-up is necessary in view of the fact that we have no recommendations for improving the ethics program at this time. We are sending a copy of this report by transmittal letter to the Inspector General of the U S Air Force. Please contact Doug Chapman at 202-482-9223 if we may be of further assistance.

Sincerely,



Jack Covalesski
Deputy Director
Office of Agency Programs



March 18, 2004

Theodore Gloukhoff
Designated Agency Ethics Official
American Battle Monuments Commission
Courthouse Plaza II, (b) (6)
2300 Clarendon Boulevard
Arlington, VA 22201

Dear Mr Gloukhoff

The Office of Government Ethics (OGE) recently completed its review of the ethics program at the American Battle Monuments Commission (ABMC). This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the ethics program's compliance with applicable statutes and regulations. We also evaluated ABMC's systems and procedures for ensuring that ethics violations do not occur. This review was conducted in February 2004.

HIGHLIGHTS

While much of ABMC's ethics program is sound and appropriate for its size and mission, some areas need improvement. During our last review in 1997, we made no formal recommendations, but did make several suggestions we expected you to implement. We were disappointed to find that you had not acted on these suggestions. For instance, ABMC continues to publish its residual standards of conduct at 36 C.F.R. part 400. Our current review also found that the annual ethics training program is lacking in many areas. ABMC's prompt and serious response to an employee's ethical violation leaves no doubt, however, that ABMC takes ethics seriously. The financial disclosure system is also well managed, as evidenced by the timely submission and review of reports.

In order to strengthen your program, we recommend that you: (1) revoke your residual standards of conduct, (2) provide verbal annual ethics training to covered regular employees in accordance with 5 C.F.R. §§ 2638.704 and 2638.705, and (3) provide ethics training to ABMC's commissioners annually.

PROGRAM STRUCTURE

ABMC is headed by 11 Presidentially-appointed commissioners who serve as special Government employees (SGE). Supporting them are approximately 390 full-time employees, only

Mr Theodore Gloukhoff

Page 2

18 of whom are located at headquarters. The remaining are mostly foreign nationals who maintain American military cemeteries and monuments located in the European, Mediterranean, and Latin American/Pacific regions ¹

As ABMC's Director of Personnel and Administration, you serve as the Designated Agency Ethics Official (DAEO), devoting about five percent of your time to administering the ethics program. The Director of Finance serves in a back-up capacity as the Alternate DAEO. Additionally, the Director of the Mediterranean Region and the Deputy Director of the European Region are responsible for providing ethics training to employees in their respective regions ²

AGENCY-SPECIFIC ETHICS RULES

ABMC must revoke its residual standards of conduct regulation at 36 C.F.R. part 400. At the time of our 1997 review of the ethics program, we suggested you rescind this part of the ABMC regulation. Although you plan to revoke these residual standards soon, you have not yet done so. Your failure to revoke these outdated standards threatens to point employees and others to incorrect and incomplete ethics rules.

EDUCATION AND TRAINING

We found that your initial ethics orientation program is adequate, but that you are not providing verbal annual ethics training as required. ABMC does exceed our requirements, however, in that many non-filers receive annual ethics training.

Initial Ethics Orientation

In 2003, all four new headquarters ABMC employees received initial ethics orientation. You personally identify any new employees and give them a copy of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). All employees must certify that they have received, read, and understood the Standards.

In the regions, personnel offices are responsible for providing initial ethics orientation to U.S. national employees stationed there. As for foreign nationals, during our 1997 review we advised you that if they are considered Federal employees, they need to be given an initial ethics orientation. You informed us that they are now designated as Federal employees and receive their initial ethics orientation through the Department of State.

¹The former two regions are overseen by directors. However, the superintendents of ABMC cemeteries in the Latin American/Pacific Region report directly to headquarters.

²For report writing ease, they will henceforth be referred to as deputy ethics officials.

Mr Theodore Gloukhoff
Page 3

Annual Ethics Training

In contrast to ABMC's initial ethics orientation program, its annual ethics training program does not meet OGE's requirements. You failed to provide verbal training annually to public filers and at least every third year to regular employees at headquarters who are confidential filers. However, you did exceed requirements by providing written training to many uncovered employees. Furthermore, we note that while you did not revise your annual ethics training plan despite our suggestion to do so during the 1997 review, you provided us with a revised plan for 2004 that meets the requirements of 5 C F R § 2638 706.

For the past couple of years, you have circulated the Standards to all regular employees at headquarters and required them to sign that they have read the booklet. While we admire your determination to provide ethics training to all employees, regardless of whether they are required to receive it under OGE's regulations, we remind you that ABMC's three public filers must receive verbal ethics training annually. Additionally, although you have made a determination in accordance with 5 C F R § 2638 705(d)(1) that providing verbal ethics training to your three confidential filers located overseas is impractical, no such exception applies to the remaining three confidential filers located at headquarters. They must receive verbal ethics training at least every third year. You agreed with our suggestion to use computer-based training modules on OGE's Web site to satisfy the verbal training requirement.

In the regions, ABMC exceeds OGE's training requirements. While you personally provide employees in the Latin American/Pacific region with ethics training, you rely on your two deputy ethics officials to provide training to employees in their respective regions.³ They assured you that they had conducted annual ethics training in 2003. Furthermore, the three filers located overseas attend a cemetery superintendents conference every other year, at which annual ethics training is usually conducted by an ethics official from the Department of Defense.

SPECIAL GOVERNMENT EMPLOYEES

Although you have neglected to train ABMC's SGEs, you generally administer the financial disclosure system for them well. The only SGEs are the 11 commissioners, who meet semiannually to establish ABMC's operating policy and inspect its facilities.

You had considered excluding the commissioners from filing confidential financial disclosure reports, but decided that potential conflicts of interest, though remote, do exist, therefore, it would be in the best interest of ABMC for them to continue to file. We examined all of the confidential financial disclosure reports due by commissioners in November 2003 and found that they generally had been filed, reviewed, and certified timely and contained no substantive

³Only one other regional employee besides the two deputy ethics officials is required to receive annual ethics training under OGE's training regulation, but your goal is to train all U S national employees. You also encourage foreign national employees to complete annual training.

Mr Theodore Gloukhoff

Page 4

deficiencies. However, due to an administrative oversight, the one commissioner who was appointed in March 2003, long after all the other commissioners, did not file a new entrant report until November even though he participated in the commission's April meeting.

Furthermore, you did not provide initial ethics orientation to that new commissioner, nor have you provided any ethics training to commissioners for several years. You advised us that you considered your distribution of OGE's written instructions accompanying the OGE Form 450 as fulfilling the annual ethics training requirement for the commissioners. As SGEs the commissioners do not need to receive verbal training; however, these instructions do not meet the content requirement at 5 C F R § 2638 705(b) for written annual ethics training. To satisfy the training requirement, you have agreed to distribute materials such as OGE's February 15, 2000 DAEOgram (DO-00-003) on ethics requirements applicable to SGEs.

ENFORCEMENT

ABMC appears to place high value on maintaining an ethical culture, promptly taking disciplinary action in response to any ethical violations. In the absence of an inspector general, you perform all such duties. Although you have never referred a conflict of interest violation to the Department of Justice, you stated that if the need arose you would contact your OGE Desk Officer.

In 2003 you investigated a violation of the Standards by an employee in one of your regions. During your investigation, conducted immediately after receiving the allegation, the employee admitted to knowingly misusing Government property. Shortly thereafter you proposed removing the employee and, according to you, he retired as a result. We applaud your swift response.

FINANCIAL DISCLOSURE SYSTEMS

You effectively manage ABMC's financial disclosure system in accordance with your written procedures. As the Director of Personnel and Administration, you are well positioned to create each year's master list of filers. We do remind you, however, to destroy all public and confidential financial disclosure reports after six years, pursuant to 5 C F R §§ 2634 603(g)(1) and 2634 604(a), respectively.

We examined all financial disclosure reports required to be filed by regular employees in 2003, no new entrant or termination reports were due during this time. All three public reports and six confidential reports were filed, reviewed, and certified timely and your report was timely forwarded to OGE. We found a few technical deficiencies, but no conflicts of interest. According to you, there is little potential for conflicts and you would be knowledgeable of any potential conflicts due to the small size of the agency. We also note that no ABMC employee has any ethics agreements.

ADVICE AND COUNSELING

We were unable to evaluate your advice and counseling program, since you dispense all advice (only two or three opinions a year) verbally and do not maintain a written record. OGE

Mr Theodore Gloukhoff
Page 5

strongly encourages ethics officials at all agencies to keep a written record of advice when appropriate

There is little turnover at ABMC, and consequently you have no organized post-employment counseling program. However, you do keep employees aware of any restrictions that would affect them. For instance, you recently informed the Executive Director that due to changes in the Senior Executive Service compensation system, he would now be covered by the one year cooling off period under 18 U S C § 207

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

ABMC has an unwritten policy of never accepting payments for travel-related expenses from non-Federal sources under 31 U S C § 1353. Nonetheless, as required, ABMC continues to submit negative semiannual reports.

RECOMMENDATIONS

We recommend that you

- 1 Revoke your residual standards of conduct at 36 C F R part 400
- 2 Provide verbal annual ethics training to covered regular employees in accordance with 5 C F R §§ 2638 704 and 2638 705
- 3 Provide ethics training to ABMC's commissioners annually in accordance with 5 C F R § 2638 705

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled approximately six months from the date of this report. 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 you take actions to correct these deficiencies in a timely manner. Please contact Christelle Klovers at 202-482-9255, if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs



March 18, 2004

Mark S Kaizen
Associate Chief Counsel
Internal Revenue Service
General Legal Services, (b) (6)
950 L'Enfant Plaza, SW
Washington, DC 20024-2123

Dear Mr Kaizen

The Office of Government Ethics (OGE) has recently completed its review of the Internal Revenue Service's (IRS) ethics program. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (Ethics Act). Our objective was to determine the ethics program's effectiveness, as measured by its compliance with applicable ethics laws and regulations. Our current review was conducted intermittently from June through November 2003 and focused on IRS' National Office, which consists of two separate and distinct entities: the Office of the Chief Counsel (Counsel) and the larger IRS organization (which is commonly referred to as the Service). The following is a summary of our findings, conclusions, and recommendations for improvement.

HIGHLIGHTS

We found the IRS ethics program to have many strong program elements that effectively ensure the public's confidence in an ethical Government, including a well-managed public system and a noteworthy counseling and advice program. We found vast improvements in the Service's confidential system (many of the deficiencies identified during our 1999 program review of IRS focused on this area), and noted the use of technology in the ethics program as an outstanding and effective resource.

The most significant change made to the ethics program since our last review was the establishment of the Service-wide Ethics Program Operations (SEPO) to manage the Service's ethics program. SEPO has made significant strides in managing the operational aspects of Service's ethics program, however, the program may suffer in the long-term unless it receives a high level of visibility within the Service and has sufficient staffing resources. Therefore, IRS leadership needs to commit a high level of support and attention to ensure that Service's ethics program receives the proper resources and assistance needed to be administered in a positive and effective manner, as required by 5 C F R § 2638 202(a).

Moreover some improvements are necessary to help further enhance the effectiveness of IRS' ethics program These improvements are

- developing procedures to ensure that all new employees entering and those transferring into covered positions within the Service file a new entrant confidential financial disclosure report in accordance with 5 C F R § 2634 903(b),
- developing procedures that outline the notification, completion, submission, review, and retention process for the Art Advisory Panel's financial disclosure system and that also clarify the responsibilities of both the Art Appraisal Services and SEPO,
- having financial disclosure reviewers use the prior approvals for outside employment when reviewing confidential disclosure reports to assure compliance with 5 C F R § 3101 104 and to enable the reviews to be conducted in accordance with §§ 2634 909(a) and 2634 605, and
- developing procedures to ensure that IRS' travel acceptances are no longer reported to OGE in error

When these issues are addressed, the IRS ethics program will be in full compliance

ADMINISTRATION OF ETHICS PROGRAM

IRS, a bureau of the Department of the Treasury (Treasury), consists of approximately 115,000 employees (including seasonal employees) IRS is divided into two components, Counsel and Service Counsel is comprised of approximately 2,400 employees and is headed by the Chief Counsel, a Presidentially-appointed and Senate confirmed employee (PAS), who serves as the chief law officer for the IRS ¹ IRS, including Service, is headed by the Commissioner, the only other PAS employee

You are the Designated Ethics Official (DEO) and are responsible for the overall administration of the ethics program agencywide However, day-to-day management of IRS' ethics program is divided between Counsel and SEPO

Ethics Staffing Within Counsel

Within the Ethics and General Government Law Branch, hereafter referred to as the Ethics Office, the Branch Chief is assisted by nine attorneys, one paralegal, and a secretary A senior attorney and an attorney technical advisor serve as primary ethics contacts The Ethics Office renders legal advice agencywide and manages IRS' public financial disclosure system It utilizes other offices including Counsel's Personnel, Policy and Operations Division (PPOD), the Labor and

¹ The Chief Counsel serves as an Assistant General Counsel for Treasury and reports directly to Treasury's General Counsel

Employee Relations Division (LERD), the Training and Communications Division (TCD), and the Executive Resource Board (ERB), as well as the Service's Office of Executive Leadership Services (OELS) to handle the other aspects of Counsel's ethics program

Ethics Staffing Within Service

To improve the ethics program and address deficiencies found in our 1999 program review, fundamental changes were made to the entire Service ethics program. Two Human Resource Specialists (or Program Managers) were assigned as the full-time ethics staff to carry out the day-to-day duties of Service's ethics program (currently SEPO is made up of only one Program Manager and two Human Resource Assistants). This staff coordinates the Service-wide ethics program with the Ethics Office, provides administrative program support for Service's 100,000 plus full- and part-time employees, administers the confidential financial disclosure system for Service's approximately 2,093 confidential filers, administers the Service ethics training program, and facilitates a Business Unit Coordinator network upon which it is highly dependent. There are approximately 11 Business Unit Coordinators (Coordinators) and 8 sub-Coordinators located throughout the Service to help in carrying out ethics program duties. The Coordinators serve as their Unit's central point-of-contact on the confidential disclosure system and distribute confidential financial disclosure forms and annual ethics training material to their respective employees. Coordinators work with their sub-Coordinators in gathering confidential disclosure and annual ethics training information for reporting to SEPO.

Although our current review found the management of Service's ethics program to have improved considerably since our last review, mainly due to the establishment of SEPO, there is concern that without a high level of visibility and sufficient staffing resources, the program will suffer in the long-term. IRS leadership needs to commit a high level of support and attention to ensure that Service's ethics program receives the resources and assistance needed to be administered in a positive and effective manner, as required by 5 C F R § 2638.202(a).

CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEM

Counsel and Service have separate confidential financial disclosure systems. Counsel's system is operating well except for reviewers not using the outside employment prior approvals when reviewing confidential reports. (This is discussed in more detail in the "Prior Approval of Outside Employment" section below.)

For Service's system, we found vast improvements since our 1999 review. SEPO is doing a good job in meeting most of the confidential financial disclosure system requirements. It has done this through centralized confidential report filing, development of detailed confidential system instructional guidance to Coordinators, confidential report filers, and confidential report reviewing officials, and use of technology to administer the system. However, timely identification of new entrant filers and, as with Counsel, the non-use of outside employment prior approvals when reviewing confidential reports, are areas that need improvement.

Counsel's Confidential System

We reviewed the master lists of new entrant and annual confidential filers who were required to file in 2002 and examined a sample of 123 of the approximately 561 confidential financial disclosure reports required to be filed. The sample consisted of 23 new entrant and 88 annual OGE Form 450s and 12 OGE Optional Form 450-As (Form 450-As). Though we found few reports that included any review annotations by reviewing officials, the reports appeared to have been reviewed thoroughly, as evidenced by the lack of technical reporting omissions. Although we found the majority of these reports to have been timely submitted and reviewed, we did note that the majority of reports did not indicate the date of agency receipt, as required by 5 C F R 2635 605(a). Therefore, we based filing timeliness on the filers' signature dates. Using this method, no annual reports were filed more than 30 days late. Counsel's officials assured us that all reports would be date stamped during the current and future filing cycles.

Service's Confidential System

SEPO monitors the Service's confidential system and is the central repository for all Service reports. Coordinators provide notification and distribute forms and information to their Unit's confidential filers, ensure that all filed reports are properly completed prior to being forwarded to SEPO, work with the sub-Coordinators, if applicable, and compile statistical information concerning the filing for inclusion in OGE's annual Agency Ethics Program Questionnaire. As within Counsel, the confidential reports' initial review is done by the filer's immediate supervisor with final review and certification done by the second-level supervisor.

We examined all 31 of the new entrant reports required to be filed in 2002 and found 16 of the 31 were filed late, with the latest being filed 13 months late. The majority of these late reports were captured during the 2002 annual filing cycle. The reports were reviewed timely once filed. To ensure that new employees are identified and file in a timely manner, proper coordination needs to occur between SEPO, the servicing personnel office, and the new employee's supervisor. Procedures must be developed and implemented to ensure that, as required by § 2634 903(b), all employees file a new entrant confidential financial disclosure report not later than 30 days after entering or transferring into a covered position.

For annual filers, we examined a sample of 73 of the 2,093 reports required to be filed in 2002. The majority of these reports were filed on time, with only two being submitted late. Although few reports included any review annotations made by reviewing officials, the reports appeared to have been reviewed thoroughly, as evidenced by the lack of technical reporting omissions. Several reports did not indicate the date of agency receipt, as required by 5 C F R § 2635 605(a). SEPO officials assured us that all reports would be date stamped during the current and future filing cycles.

ADVISORY COMMITTEE

Of IRS' seven advisory committees, the Art Advisory Panel of the Commissioner of Internal Revenue (Art Advisory Panel) is the only one whose members are designated as special Government employees (SGEs). Although we believe the ethics program for these SGEs is generally administered well, we found there was some confusion regarding the filing requirements. To eliminate this confusion, procedures need to be developed for the notification of filers, the completion, submission, review, and retention of financial disclosure reports, and to clarify responsibilities of both the Art Advisory Panel and SEPO.

According to the Ethics Office, Art Advisory Panel members had not been required to file new entrant reports annually because of a misunderstanding of a section of OGE's financial disclosure regulation found at 5 C F R § 2634 903(a) and (b). Since members were not redesignated/reappointed each year, a new entrant report was not filed annually. The Ethics Office received clarification of the requirements of § 2634 903(a) and (b) while at an OGE Government Ethics Conference and all members filed a new entrant confidential disclosure report in 2002 and were to file a new entrant report each year thereafter.

We examined all 20 of the confidential reports required to be filed in 2002 and found all reports were filed and reviewed timely. We found no substantive deficiencies, but noted that the majority of filers had not indicated their reporting status on the first page of the report as "New Entrant." Members should indicate their filing status as "New Entrant" each year on their report. This is important for technical compliance and because a new entrant filer, unlike an annual filer, does not have to report gifts and travel reimbursements.

We believe that an alternative disclosure system, in lieu of filing an OGE Form 450, may better serve the Art Appraisal Service because of the unique conflict concerns associated with members. An alternative disclosure system could provide the Art Appraisal Service with the ability to make more timely conflict of interest determinations rather than waiting to make the determination after an annual review of a new entrant OGE Form 450. It could also be tailored to provide more thorough conflict of interest information to help in determining whether Art Advisory Panel members, during their period of service, participated in private appraisals of works of art involved in Federal taxation, including any outside involvement with a work that has come before them as a member. Therefore, we encourage you to consider an alternative disclosure system and remind you that it must be approved in writing by OGE prior to it being implemented, in accordance with 5 C F R § 2634 905 (c).

PRIOR APPROVAL OF OUTSIDE EMPLOYMENT

Section 3101 104(a) of 5 C F R requires all Treasury employees to obtain prior written approval before engaging in any outside employment or business activities, with or without compensation, unless the employing bureau exempts categories of employment or activities pursuant

Mr Mark S Kaizen

Page 6

to § 3101 104 (b) Approval is granted based on a determination that the employment or activity is not expected to involve conduct prohibited by statute or regulation IRS employees are additionally subject to prohibited outside employment in § 3101 106 and Counsel attorneys are subject to prohibited outside employment in § 3101 107

Our review of the prior approval system focused on whether the approval requirement was being met, based on an examination of the outside employment/activities reported on the financial disclosure reports we examined for both Counsel and Service Although all of the reported outside employment/activities we examined were supported with the appropriate prior written approvals, neither the Ethics Office nor SEPO is provided copies of the approvals for use when reviewing the confidential reports We remind you that using these approvals when reviewing the reports assures compliance with the prior approval requirement at 5 C F R § 3101 104 and enables reviews to be conducted properly in accordance with §§ 2634 909(a) and 2634 605

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

As a matter of IRS policy, travel and related expenses are not accepted from non-Federal sources pursuant to 31 U S C § 1353 However, Counsel does permit employees to accept travel reimbursements for domestic travel under 5 U S C § 4111 from organizations exempt from taxation under § 501(c)(3) of title 26 of the U S C ("501 (c)(3)") During our 1999 review, we observed on Treasury's semiannual report to OGE (reflecting payments of \$250 or more for travel and related expenses accepted throughout Treasury under § 1353), three payments attributed to IRS employees from "501(c)(3)" organizations under § 4111 that were incorrectly reported as § 1353 payments To remedy the problem we were advised that the reporting requirements would be clarified with Treasury's travel officials

Despite these efforts, this travel continues to be included in error with Treasury's semiannual report to OGE In our most recent examination of Treasury's four semiannual reports submitted to OGE, for the period of October 1, 2001 to March 31, 2003, we found 61 payments attributed to IRS employees under 5 U S C § 4111 that were incorrectly reported as 31 U S C § 1353 payments IRS should cease reporting to Treasury payments under 5 U S C § 4111 for inclusion in the semiannual reports to OGE

PUBLIC FINANCIAL DISCLOSURE SYSTEM

The public financial disclosure system for both Counsel and Service is centrally administered and well-managed by the Ethics Office, with cooperative assistance provided by Counsel's ERB and Service's OELS Procedures are in place to ensure filers' receipt of notifications to file Reports receive a thorough compliance review with good documentation of the review

To evaluate the administration of the public system, we examined 116 (combined Counsel and Service) public reports of the approximately 438 public reports required to be filed in 2002 We

Mr Mark S Kaizen

Page 7

examined 56 of the 57 Counsel public reports² and a sample of 60 of the Service's 381 public reports submitted by employees other than the IRS Commissioner and Chief Counsel³ We found these reports to have been filed and reviewed in a timely manner Moreover, they had been thoroughly reviewed as evidenced by the many annotations on the reports

We also examined for timeliness of filing, review, and forwarding to OGE, the termination report filed by the former Commissioner We note that the former Commissioner's termination report was filed and reviewed in a timely manner but was forwarded to our Office eight months from the date the Commissioner terminated

Late Filing of Public Reports

In 2002, of the approximately 438 public reports, there were 10 public filers who were granted waivers of the \$200 late filing fee Pursuant to 5 C F R § 2634 701(a), the Ethics Office referred one delinquent public filer to the Department of Justice (Justice) for willful failure to file both his 2001 annual and termination reports We were advised that this case is still pending

Transfer of the Public System to SEPO

Currently, OELS is responsible for managing the Service's public financial disclosure system, including serving as the central repository for all Counsel and Service public reports We were advised, however, that prior to the next public reporting filing cycle, SEPO would be responsible for maintaining the master list of Service public filers, notifying filers and distributing the reporting material, tracking report submission status, and serving as the central repository for all Counsel and Service public reports This would combine public and confidential financial disclosure reports in one location

We were assured that the administration of the public system would not suffer due to the new added responsibilities that will transfer to SEPO However, we are concerned whether current staffing levels will be able to absorb the additional workload

ADVICE AND COUNSELING SERVICES

Effective and useful ethics advice and counseling is provided to all Counsel and Service employees by the Ethics Office Our examination of the advice and counseling services found that IRS has complied with 5 C F R § 2638 203(b)(7) and (8) by developing and conducting a counseling program for employees concerning all ethics matters, including post employment, wherein records are kept, when appropriate, on the advice rendered We reviewed a large number of formal opinions

² We did not examine one report because at the time of our review, the public report was being used to review the filer's 2003 annual public report

³ On July 31, 2003, the Chief Counsel terminated his position Currently, the Chief Counsel position is vacant

Mr Mark S Kaizen

Page 8

and electronic mail responses issued by the Ethics Office on a variety of issues (covering approximately a 12-month period) and found these ethics determinations to be comprehensive and consistent with all applicable regulations and statutes

EDUCATION AND TRAINING

The education and training program within IRS is highly decentralized. Within Counsel, the Ethics Office utilizes the PPOD, the LERD, and the TCD to help administer Counsel's ethics training program. SEPO is primarily responsible for administering the Service's training program.

In our 1999 review, we found lapses where the initial ethics orientation material was not being provided to all new employees. We are pleased to report in our current review that initial ethics orientation, as well as annual training, within both Counsel and Service satisfy the requirements found at 5 C F R part 2638.

IRS Ethics Program Web Sites

In our 1999 program review report, many of the deficiencies noted were centered largely around making the IRS ethics program more accessible, particularly on the Service-side, and ensuring that all employees were made aware of all applicable ethical requirements. In our current review, we found both Counsel's and Service's Intranet ethics program Web sites serving as very useful and comprehensive ethics tools for all employees. Our examination of content on both Web sites found the ethics coverage to be very useful and informative.

Initial Ethics Orientations Within Counsel

Within Counsel, the PPOD and its Area/Office Managers in the field (through coordinating efforts with the Ethics Office) are responsible for identifying new Counsel employees and distributing the initial ethics orientation material to them. LERD is responsible for monitoring and tracking whether the orientation material was received by all new Counsel employees (both National Office and Field Office) and for providing the Ethics Office, on a quarterly basis, a status report. Based on LERD's records, there were 131 new Counsel employees hired in 2002. Of these, 112 employees signed and submitted a form acknowledging receipt of the orientation material timely. We were advised that LERD subsequently collected forms from the 19 remaining employees. All 61 new Counsel employees hired through July 2003 were found to have signed their acknowledgment forms timely.

Initial Ethics Orientations Within Service

Each of the Service's 23 personnel offices is responsible for identifying new Service employees and distributing the initial ethics orientation material to them while SEPO is responsible for monitoring and tracking the employees' receipt of the material. While new Service employees can access the orientation material via the Service's Web site, some personnel offices provide new employees with a hard copy of the material. Based on a review of SEPO's training records, we are

satisfied that all new Service employees hired in 2002 were provided with their initial ethics orientation material timely

Annual Ethics Training for Counsel and Service

In 2002, annual training consisted of a computer-based training (CBT) module on both Counsel and Service Web sites, addressing conflicts of interest and impartiality, and including a review of the pertinent ethics statues, regulations, and principles. We were advised that training for 2003 was to consist of a CBT module on outside employment and the Hatch Act. Additional training modules were to offer instruction on other ethics issues. Although SEPO is responsible for notifying Service public filers of their training requirement, the Ethics Office is responsible for monitoring, tracking, and documenting the completion of the training for Service public filers. We were advised that all Counsel and Service employees required to be trained completed their training.

The Commissioner and Chief Counsel completed a CBT module to satisfy the 2002 annual ethics training requirement. However, we encourage you to also consider providing them, on an annual basis, personalized in-person ethics training.

Additional Ethics Training Within Service

SEPO has done a good job of increasing overall awareness for the Service-wide ethics program. All Service employees, regardless of whether they are required to receive annual ethics training, are required to receive five mandatory agency employee briefings, of which ethics is one. The ethics briefing highlights things to remember about Government ethics and brings exposure to SEPO and the Ethics Office.

In March 2003, a new segment dedicated to ethics was established in the Service's "Employee Relations Compass" newsletter. This segment, entitled "News from the DEO," highlights a particular ethics regulation and/or updates to ethics rules and regulations. Moreover, the first installment reintroduced Service employees to the DEO and his role in the Service's ethics program. It also outlined the procedures for seeking ethics advice.

ENFORCEMENT

The Treasury Inspector General for Tax Administration (TIGTA)⁴ is responsible for making conflict of interest referrals to Justice and notifying OGE. TIGTA notified OGE of all of its 27

⁴ TIGTA was established in January 1999 in accordance with the IRS Restructuring and Reform Act of 1998 to provide independent oversight of IRS activities, the IRS Oversight Board, and the Counsel. TIGTA assumed most of the responsibilities of the IRS' former Inspection Service. It is organizationally placed within Treasury, but is independent of the Department and all other Treasury offices, including the Treasury Office of the Inspector General (OIG).

referrals made to Justice during 2001-2002 along with information regarding the final disposition of the 27 referrals

We found that both Counsel and Service have effective systems to ensure that prompt and effective administrative actions are considered to remedy violations of the ethics laws and Standards of Conduct. Service utilizes several components, including the Centralized Investigation Receipt and Control Unit, the Centralized Adjudication Unit, and the Commissioner's Compliant Processing and Analysis Group, to ensure that action is taken to remedy ethics violations. We examined 13 administrative actions taken during 2002, which appeared to have been prompt and effective.

Within Counsel, to ensure that all allegations of misconduct are promptly and thoroughly investigated, and that in all instances employees are treated in a fair and uniform manner, Counsel established a Professionalism Program to handle allegations or evidence of serious misconduct or unprofessional behavior that did not present issues that must initially be referred to TIGTA.⁵ According to Counsel's most recent report on professionalism, it received 29 allegations that Counsel employees had committed misconduct or violated professional standards in 2002. Six of these allegations were transmitted to the Deputy Chief Counsel (Operations) from offices within Counsel or other sources. All six were subsequently transmitted to TIGTA for investigation or other action. The remaining 23 allegations were forwarded to the Deputy Chief Counsel (Operations) by TIGTA, with a request that the Deputy Chief Counsel (Operations) investigate the matter and report back to TIGTA upon final disposition. Of the 29 cases under active consideration in 2002 by either TIGTA or Counsel, 16 were closed. Of the 16 that were closed, 6 were substantiated and disciplinary actions were taken, 9 were not substantiated, and in 1 case an employee separated before the review was completed. Additionally, Counsel took disciplinary actions in 51 other cases which were not transmitted directly to the Deputy Chief Counsel (Operations) or referred back to the Deputy Chief Counsel by TIGTA. These actions included admonishment, removal, reprimand, and suspension. All disciplinary actions taken by Counsel appeared to have been prompt and effective.

Finally, based on discussions with ethics and TIGTA officials, and especially as evidenced by IRS' compliance with the notification requirements of 5 C F R § 2638.603, we believe that an effective working relationship has been established between the Ethics Office and TIGTA.

CONCLUSIONS AND RECOMMENDATIONS

IRS has many effective elements in its ethics program. We found the public financial disclosure system to be well-functioning, with timely filing, review, and certification of public reports. The ethics advice and counseling system is effective and responsive to the needs of IRS employees, as evidenced by the timely responses to employee inquiries. We also acknowledge the

⁵Under these procedures, all allegations or evidence of an employee's serious or significant failure to comply with the accepted standards of legal practice, to include non-frivolous allegations of professional misconduct, any ethical violation, failure to protect the statute of limitations, failure to coordinate a legal position with responsible offices, and repeated failures to meet pleading deadlines, must be referred to Counsel's Deputy Chief Counsel (Operations).

outstanding use of technology to help administer the ethics program within Counsel and Service and encourage you to continue these efforts. However, improvements are needed, especially to the ethics program within Service.

To further enhance the IRS ethics program, we recommend that you take actions to assure that

- 1 Procedures are developed and implemented to ensure that, as required by 5 C F R § 2634 903(b), all new employees entering and transferring into covered positions within the Service file a new entrant confidential financial disclosure report
- 2 Art Advisory Panel procedures are developed and implemented for the notification of filers, for the completion, submission, review, and retention of financial disclosure reports, and to clarify responsibilities of both the Art Advisory Panel and SEPO
- 3 Confidential financial disclosure reviewers use the prior approvals for outside employment when reviewing the confidential reports to assure compliance with 5 C F R § 3101 104 and to enable the reviews to be conducted in accordance with §§ 2634 909(a) and 2634 605
- 4 IRS ceases reporting to Treasury payments under 5 U S C § 4111 for inclusion in Treasury's semiannual reports to OGE of travel payments of more than \$250 from non-Federal sources under 31 U S C § 1353

In closing, I wish to thank you and your staff for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions IRS has taken or plans to take on our recommendations. A brief follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of the Office of Government Ethics 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 IRS take timely actions to implement our recommendations. Copies of this report are being sent via transmittal letter to the Treasury Designated Agency Ethics Official and the Treasury Inspector General for Tax Administration. Please contact David A. Meyers at 202-482-9263 if we can be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs



March 16, 2004

Wayne E. Costa
Acting Designated Agency Ethics Official
National Capital Planning Commission
401 Ninth Street, NW, (b) (6)
Washington, DC 20576

Dear Mr. Costa

The Office of Government Ethics (OGE) has completed a review of the National Capital Planning Commission's (Commission) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the effectiveness of the ethics program, largely measured by its compliance with applicable statutes and regulations. The review was conducted during October 2003.

HIGHLIGHTS

The Commission's program needs several improvements to comply with applicable ethics laws and regulations. We are concerned that the Alternate Designated Agency Ethics Official (DAEO) has received limited training to review and certify financial disclosure reports, that the Director, Urban Design and Plan Review Division (UDPR Director) may not be receiving proper advice to participate in particular matters before the Commission, that employees assuming a covered position are not filing a timely new entrant confidential financial disclosure report as required by 5 C.F.R. § 2634.903(b), that the Commission's requirement for employees to obtain prior approval for outside activities is unenforceable, and that you are not providing annual ethics training that covers specific issues that come before the Commission. While this report primarily addresses OGE's concerns, it also recognizes the effective elements of the Commission's ethics program.

PROGRAM STRUCTURE

You, as acting DAEO, are responsible for coordinating and managing the ethics program in accordance with 5 C.F.R. § 2638.203. Your duties include interpreting laws, regulations, and Executive orders, formulating oral and written opinions relating specific facts to applicable law, and briefing employees on the Federal ethics regulations. The Alternate DAEO, who is an Executive Assistant, is responsible for the administration of the financial disclosure systems, including distributing blank forms and tracking the receipt of and certifying the completed reports. Additionally,

Mr Wayne E Costa

Page 2

the Alternate DAEO ensures that employees complete the ethics training requirement by monitoring employees' attendance at ethics training sessions and/or the receipt of ethics materials

According to the Alternate DAEO, she received a limited amount of training when she assumed her ethics responsibilities. The DAEO provided her with an overview of potential conflicts of interest, and the OGE Desk Officer provided an overview of managing the ethics program, including the review of confidential financial disclosure reports. However, more training is needed to aid the Alternate DAEO in reviewing and certifying financial disclosure reports. We recommend that the Alternate DAEO attend the SF 278 and OGE Form 450 training offered by OGE.

**COMMISSION SHOULD HEED OGE ADVICE
TO AVOID APPEARANCES OF CONFLICT**

After seeking OGE advice concerning the application of 5 C F R § 2635 502, the Commission appears to have not followed the advice provided by OGE on September 18, 2002. As a result, we are concerned whether the UDPR Director is receiving proper advice to participate in particular matters before the Commission.

In a letter to the DAEO, dated September 18, 2002, OGE noted that the Commission's UDPR Director has a covered relationship with the District of Columbia (DC) because her spouse is an employee of the District. Furthermore, the DC Office of Planning (DCOP), which employs the spouse as its Director, has a direct interest in certain specific party matters brought before the Commission. We advised that when DCOP has a direct interest in the matters brought before the Commission, it would seem very likely that a reasonable person might question the impartiality of the UDPR Director's participation. We also stated that it would be extremely difficult to make or defend a determination that the UDPR Director's participation would outweigh the concern that a reasonable person would question her impartiality.

On February 10, 2003, the UDPR Director was notified that she may be required to recuse herself if the Commission's Deputy Executive Director determines that DCOP's interest in a matter is substantial enough to warrant recusal. In a letter to the Commission dated September 5, 2003, the U S General Services Administration (GSA) requested that the Commission exclude the UDPR Director from participating in matters involving a U S Department of Transportation (Transportation) headquarters project since DCOP had a continuing substantial interest in the proposed zoning for the Transportation project. Nonetheless, in the Commission's response to GSA, the Commission replied that the UDPR Director's recusal from the Transportation project was not warranted based upon its determination that the interest of DCOP was not direct and substantial. We found it particularly disturbing that in its response, the Commission used OGE's advice as a defense to conclude that the UDPR Director's recusal from the Transportation project was not warranted, since we clearly advised that DCOP's direct interest in a particular matter would make such a determination extremely difficult.

Notwithstanding the above events, on October 7, 2003, the Deputy Executive Director instructed that the UDPR Director be recused from participating in future matters involving the

Mr Wayne E Costa
Page 3

Transportation project, as well as GSA and the JBG Companies. This recusal was prompted by a September 25, 2003 e-mail message from the UDPR Director to the Deputy Executive Director, evidencing the UDPR Director's continuing involvement in the Transportation project. We are concerned that the UDPR Director did not recuse herself immediately once she was aware of DCOP's direct involvement in the project.

Under 5 C F R § 2635 502(a), where an employee knows that a person with whom he has a covered relationship is or represents a party to a particular matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and receives from the agency designee authorization to participate in accordance with section 2635 502(d). Accordingly, the Deputy Executive Director, as agency designee, may authorize the UDPR Director to participate in such matters in which her spouse's employer, the DC government, is a party based on a determination, made in light of all relevant circumstances, that the interest of the Government in the UDPR Director's participation outweighs the concern that a reasonable person may question the integrity of the Commission's programs and operations. Although not required by section 2635 502(d), you are advised to have the Deputy Executive Director consult with you in making a determination to ensure that all factors under section 2635 502(d) have been considered. Moreover, the Deputy Executive Director should exercise his discretion under this provision by documenting in writing any such authorization.

**ATTENDEES AT COMMISSION MEETINGS
FILE FINANCIAL DISCLOSURE REPORTS
AS REQUIRED**

All members of the Commission (or their alternates) who are considered executive branch employees and who attended Commission meetings in 2003 filed financial disclosure reports.

The Commission has 12 commissioners, 5 of whom are citizen members and 7 of whom are ex officio members. Of the five citizen commissioners, three are appointed by the President and two are appointed by DC's Mayor. The seven ex officio commissioners include three executive branch officials, two Federal legislative branch officials, and two officials of the DC government. Each ex officio commissioner, in turn, has identified from 1 to 5 alternates, 1 of whom the commissioner can delegate to attend the Commission's monthly meeting in the commissioner's absence (currently there are 17 such alternates).

The five citizen members are considered to be special Government employees and are required to file new entrant confidential financial disclosure reports each year during their terms. The three ex officio executive branch members and their alternates (currently there are nine such alternates) are also required to file financial disclosure reports. However, the DAEO does not require reports from the other four ex officio members (the two Federal legislative branch officials and two officials of the DC government) and their alternates because they are not executive branch employees. We noted that at

Mr Wayne E Costa
Page 4

the September and October 2003 Commission meetings, all five of the citizen members and the three alternates who attended in the absence of their respective executive branch ex officio commissioners, filed a confidential report

PROCESS IS NEEDED FOR CAPTURING NEW ENTRANT CONFIDENTIAL FILERS

Our review of the confidential financial disclosure system identified 6 of 8 regular employees, who should have filed new entrant reports within 30 days of assuming their positions in 2003 but who did not file until the 2003 annual filing cycle. The Alternate DAEO explained to us that she was not notified at the time the employees assumed their covered positions in 2003 and, therefore, the reports they filed during the 2003 annual filing cycle were considered their new entrant reports. However, at the exit conference, ethics officials informed us that a policy was initiated after our fieldwork to ensure future new entrants file a timely financial disclosure report.

Our review of six annual confidential financial disclosure reports filed for FY 2002 disclosed that they were filed timely. Additionally, all 14 reports (annual and new entrant) were reviewed and certified timely. Moreover, we were unable to ascertain any potential conflicts of interest.

SUPPLEMENTAL REGULATION IS REQUIRED TO ENFORCE APPROVAL OF OUTSIDE ACTIVITIES

Our previous program review report of 1997 recommended that, if the Commission desired to enforce its approval of outside activities by the Executive Director, it would have to do so through the issuance of a supplemental standard of conduct regulation, in accordance with 5 C.F.R. § 2635.105. Section 2635.803 provides that where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees to obtain prior approval before engaging in specific types of outside activities. On December 8, 1998, we were informed that the Commission determined that it would no longer require approval, therefore, no supplemental standard of conduct regulation was needed.

On May 1, 2002, the DAEO decided to reestablish the policy requiring approval for certain outside activities. However, the Commission still has not issued a supplemental regulation. We reiterate that the Commission needs a supplemental regulation to enforce its policy. Until the supplemental regulation is issued, the Commission must cease and desist enforcing this policy. Nonetheless, the DAEO may continue to render advice to employees who inquire as to whether any proposed outside activities or employment would conflict with their official duties.

DAEO NEEDS TO CONDUCT ANNUAL ETHICS TRAINING

Initial ethics orientation requirements are met by distributing ethics materials during the general in-processing of all employees. However, we are concerned that employees are not receiving annual ethics training geared specifically for issues before the Commission.

The Commission has relied upon OGE staff to conduct both the 2002 and 2003 annual ethics training sessions for the commissioners and the Commission staff. However, it is the DAEO's duty to initiate and maintain the Commission's ethics education and training program as required by 5 C F R §§ 2638.203(b)(6) and 2638.701 and to ensure that the training is geared specifically to issues that would come before the Commission. Although OGE is willing to assist agencies with their training requirements, the Commission needs to develop a plan for annual ethics training that covers specific issues coming before the Commission, using its available resources and including resources available from other agencies and the Internet.

We reviewed the Commission's system for tracking employees' attendance at annual ethics training and found it to be effective. Ethics officials planned to have six of the Commission staff, including three covered employees who were unable to attend the October 2, 2003 annual ethics training session, view an ethics videotape by the end of 2003.

UPDATES TO PROCEDURES FOR FINANCIAL DISCLOSURE ARE NEEDED

The Commission has detailed written procedures for financial disclosure that should be updated to reflect changes in 5 C F R part 2634 that have transpired since 1997. For example, the reviewing official, for good cause shown, has always been authorized to grant to any public filer or class thereof an extension of time for filing which shall not exceed 45 days. Now the reviewing official, for good cause shown, may grant an additional extension of time which shall not exceed 45 days. The employee shall set forth in writing specific reasons why such additional extension of time is necessary. The reviewing official must approve or deny such requests in writing, and such records shall be maintained as part of the official report file. Previously, only OGE could authorize the second 45-day extension.

PUBLIC FINANCIAL DISCLOSURE SYSTEM IS ADMINISTERED EFFECTIVELY

The public financial disclosure system seems to be effectively administered. We found that, considering one 45-day extension granted for good cause shown, the public reports required to be filed in 2003 by all of the four regular employees were filed, reviewed, and certified timely. We discussed

Mr Wayne E Costa
Page 6

a few technical issues concerning the review process with the Alternate DAEO. Moreover, she would benefit from attending SF 278 review training offered by OGE.¹

ADVICE AND COUNSELING IS NOT TO BE CONSIDERED PRIVILEGED

The DAEO provides both oral and written ethics advice in response to employees' questions, including post-employment advice, as required by 5 C F R § 2638 203(b)(7). However, according to the DAEO, employees have not requested post-employment advice.

Our examination of the three examples of written ethics advice, regarding appearance issues (except for those discussed previously) appeared to be complete and consistent with the ethics laws and regulations. However, the advice was marked as privileged and confidential attorney-client communication. According to 5 C F R § 2635 107, disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. Additionally, agencies are required by 28 U S C § 535 to report to the Attorney General any information, allegation, or complaint received relating to a violation of title 18 of the United States Code.

ENFORCEMENT ACTIONS HAVE BEEN LIMITED

The Commission does not have an inspector general. The DAEO advised us that when an investigation is needed, the Commission requests the services from another agency. The Commission had one case in the last year, involving the misuse of Government resources, that resulted in administrative action being taken against the employee. The 15-day suspension taken against the employee appeared to be prompt and effective, in accordance with 5 C F R § 2638 203(b)(9). The Commission has not made any criminal conflict of interest referrals to the Department of Justice.

TRAVEL PAYMENTS ARE ACCEPTED FROM NON-FEDERAL SOURCES

Travel payments from non-Federal sources appeared to be appropriately accepted under 31 U S C § 1353. We examined the two payments reported in the semiannual report to OGE of payments of more than \$250 per event covering the period from April through September 2003. We found that the report was forwarded to OGE timely and that the payments appeared to be properly accepted for a seminar and a workshop. A negative report covering the period from October 2002 through March 2003 was forwarded immediately once we informed ethics officials that OGE had not received it.

¹The Alternate DAEO was unable to register for 2003 training because all seats were filled.


RECOMMENDATIONS

To more fully comply with ethics regulatory requirements, we recommend that you

- 1 Ensure that the Alternate DAEO has sufficient training to review and certify financial disclosure reports
- 2 Ensure that the Deputy Executive Director consults with you in making any determination under 5 C F R § 2635 502(d) to authorize participation by the UDPR Director in matters in which her spouse's employer, the DC government, is a party, and have the Deputy Executive Director document any such authorization in writing
- 3 Ensure that covered employees file a new entrant report within 30 days of assuming their position as required by 5 C F R § 2634 903(b)
- 4 Ensure the Commission ceases and desists enforcing the policy requiring employees to request approval for outside activities, until an agency supplemental regulation is issued in accordance with 5 C F R § 2635 105
- 5 Develop a plan for providing annual ethics training that covers specific issues coming before the Commission, using its available resources and including resources available from other agencies and the Internet

In closing, I would like to thank everyone involved in this review for their cooperation and their efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions the agency plans to take on our recommendations. A brief follow-up review will be scheduled within six months from the date of this report. 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 our recommendations be implemented in a timely manner. Please contact Jean Hoff at 202-482-9246, if we may be of further assistance.

Sincerely,


Jack Covaleski
Deputy Director
Office of Agency Programs



February 26, 2004

Steven J Morello
Designated Agency Ethics Official
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104

Dear Mr Morello

The Office of Government Ethics (OGE) recently completed its review of the ethics program at Fort Huachuca, Arizona, including the US Army Intelligence Center and the Garrison (USAIC/FH) and the headquarters office of the Network Enterprise Technology Command (NETCOM)¹ This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the ethics program's effectiveness, measured largely by its compliance with applicable statutes and regulations. The review was conducted in October 2003. The following is a summary of our findings and conclusions.

HIGHLIGHTS

Fort Huachuca's ethics program generally complies with the applicable laws and regulations. We note that steps were taken prior to and during our review to address deficiencies in the confidential financial disclosure and enforcement areas of the ethics program. However, the confidential financial disclosure system should be monitored closely, especially with respect to the filing of new entrant reports and the performance of a final review and certification on all reports.

PROGRAM STRUCTURE

The Fort Huachuca ethics program is established in the Administrative Law Division of the Office of the Staff Judge Advocate (OSJA). The number of personnel assigned to the ethics program appears adequate. The Staff Judge Advocate (SJA), Deputy SJA, Chief of the Administrative Law Division (Chief), three attorney-advisors, and one Legal Assistant/Paralegal (LAP) staff the ethics program. With the exception of the LAP, each of the foregoing staff members is a designated ethics counselor. While the SJA ultimately exercises local oversight of the ethics program, the SJA

¹For simplicity, we will refer to all organizations which were reviewed collectively as Fort Huachuca, unless otherwise noted.

Mr Steven J Morello

Page 2

entrusts the Chief with the daily oversight responsibilities. The Chief, in turn, entrusts the attorney-advisors and the LAP with the day-to-day ethics program duties. One Attorney-Advisor functions as the primary ethics counselor (PEC) and is responsible for performing the majority of the substantive ethics program duties, he expends approximately 15 to 20 percent of his time on the ethics program. The Deputy SJA and the other two attorney-advisors assist in the program on an as-needed basis. The LAP provides administrative support to the ethics program, he expends approximately 50 percent of his time on the program.

Support Of Senior Commanders Is Beneficial

There is a good working relationship between OSJA and the command officers. The ethics program has the full support of the commanding generals of USAIC/FH and NETCOM. The PEC assured us that he receives the cooperation he needs from these senior officials and their staff members. Such high-visibility support contributes to the viability of the ethics program.

FINANCIAL DISCLOSURE SYSTEMS

The financial disclosure systems will be fully compliant with the provisions of 5 C F R part 2634 and the Joint Ethics Regulation (JER) once procedures are implemented to ensure the timely filing of confidential financial disclosure reports by military employees. We noted that actions to address certain deficiencies, including the lack of final review and certification of many confidential reports, were taken as a result of a pre-OGE review inspection.

We were unable to assess the ethics agreement system, as no employees entered into ethics agreements.

Confidential Financial Disclosure System Should Be Monitored Closely

We examined a sample of 98 of the 630 confidential reports required to be filed in 2002, consisting of 69 annual and 29 new entrant reports. We found a few technical errors which we discussed with the ethics staff, but did not find any substantive deficiencies. With the possible exception of one new entrant and one annual report, all reports received an initial review in a timely manner.²

We were concerned that 18 (or 62 percent) of the new entrant reports in our sample were being filed from 1 to as many as 12 months late. The newly instituted standard operating procedure involving the Civilian Personnel Advisory Center (CPAC) should assist in alleviating this problem.

²These two reports lacked a date stamp of agency receipt. Therefore, the timeliness of the initial review could not be determined for these two reports.

Besides providing a list of all new employees, CPAC will provide the ethics staff with a list of those required to file confidential reports. Because CPAC deals only with civilian employees, we strongly encourage the ethics staff to implement a similar procedure with the office which in-processes Fort Huachuca's military employees. Eight (or 44 percent) of the late new entrant reports were filed by military personnel. These procedures should assist in the filing of a new entrant report within 30 days of an employee's assumption of a position requiring the filing of a confidential report. The timely filing of new entrant reports will assist the ethics staff's identification of any potential or actual conflicts of interest in a timely manner.

We trust that the actions already taken and any steps yet to be taken will ensure full compliance with subsections 7-306(l) and 7-303(a) of the JER, concerning the review of reports and the filing of new entrant reports, respectively. The training that the LAP has received and the training that the PEC plans on providing to supervisors and points of contact (POC) responsible for reviewing confidential reports should help to ensure full compliance. We suggest that the confidential system be monitored closely for full compliance.

Public Financial Disclosure System Appears To Be Well-Managed

With the exceptions of 1 incumbent report from a filer who had been deployed, 2 incumbent reports from a filer who files with a different command, and 1 termination report for which review was still pending, we examined 12 public financial disclosure reports required to be filed in 2002 and 2003. Minor technical errors were brought to the attention of the ethics staff but no substantive deficiencies were found. With the possible exception of one incumbent report, all reports examined were filed and reviewed in a timely manner.³

EDUCATION AND TRAINING

The education and training program is fully compliant with the provisions of 5 C F R part 2638. We noted that action was taken to correct certain problems during our review.

Initial Ethics Orientation Program Is In Compliance

The initial ethics orientation (IEO) program at Fort Huachuca is fully compliant with the provisions of 5 C F R § 2638 703. The PEC advised us that the required copy of the Supplemental Standards of Ethical Conduct for Employees of the Department of Defense (DOD supplement) at 5 C F R part 3601 is not given to new employees. In addition, the required copy of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) at 5 C F R part 2635 or a summary of the Standards is not given to new employees. (Subsequently, the PEC took action to

³This report lacked a date for both the initial and final reviews. Therefore, the timeliness of review could not be determined for this report.

address these issues) At the time of our review, IEO materials provided to new Government employees included a handout containing the 14 Principles of Ethical Conduct (14 Principles), an ethics quiz (based on actual situations which primarily involved certain provisions of the Standards), and a slide presentation which covered the 14 Principles and answers to the quiz We duly note the novel approach to the presentation of IEO topics via a quiz

Fort Huachuca requires that new Government employees receive IEO within 30 days In this respect, Fort Huachuca exceeds the regulatory requirement which provides that employees are to receive IEO within 90 days of beginning work IEO is also provided to non-Government personnel, they receive IEO via a training video The PEC estimated that he provided IEO to approximately 70 people during 2002

When told of the need to provide or make available all required ethics materials to new Government employees, the ethics staff drafted written standard operating procedures for the IEO program CPAC will instruct new employees to contact OSJA for IEO and will provide OSJA with a list of all new Government employees and their POC information The LAP will call the new employee and the POC to advise them of the need for the new employee to attend the next monthly IEO session Names on the CPAC list will be compared to sign-in sheets and the collected quizzes to confirm that training was received CPAC will also provide new employees with an ethics information sheet that includes references to where electronic copies of the Standards and the JER, the latter of which contains a copy of the DOD supplement, are available for review This will be in addition to receiving verbal training

Annual Ethics Training Program Is In Compliance

The annual ethics training (AET) program at Fort Huachuca is fully compliant with the provisions of 5 C F R §§ 2638 704 and 2638 705 In 2002, all 636 covered employees received annual ethics training The materials provided to employees included the 14 Principles, an ethics quiz, and a slide presentation which covered the 14 Principles and answers to the quiz

The PEC acknowledged that Fort Huachuca's requirement to have all confidential filers annotate their financial disclosure reports to reflect the date on which they were trained was not wholly reliable or efficient because not all filers annotated their reports prior to submission Therefore, the tracking of AET is now done via a comparison of the ethics quizzes collected and the signatures on the sign-in sheets to a newly-created database containing various categories of information regarding ethics requirements for each covered employee

All employees, regardless of whether they are required to receive AET, are encouraged to attend the sessions In this respect, Fort Huachuca exceeds the minimum annual training requirements The PEC estimated that one-third of attendees are not required to receive the training Additionally, several AET sessions are held each year

Mr Steven J Morello
Page 5

Other Training Efforts
Are Noteworthy

We commend the ethics staff for providing additional training opportunities upon request, which further demonstrate support for the ethics program on post and the seriousness with which ethics education is regarded. The PEC is also available to conduct on-site training for other NETCOM office locations (off post) and provides quarterly ethics training at NETCOM Information Assurance Workshops. During our review, the PEC conducted a training session requested by the Joint Interoperability Test Command. We appreciate the opportunity to have observed this training session. It was apparent that the participants, in general, were familiar enough with ethics regulations to pose questions which resulted in clarifications to several questions on the ethics quiz.

Ethics Staff Keep Abreast
Of Ethics Issues

We also commend the ethics staff for their effort to remain current with developments on the ethics front. All of the Fort Huachuca ethics counselors and the LAP subscribe to OGE's Ethics News and Information e-mail list service and the DOD Standards of Conduct Office's e-mail list. They also receive ethics counselor broadcast messages issued by the Department of the Army's Standards of Conduct Office (DA SOCO).

ENFORCEMENT

Fort Huachuca is in compliance with the provisions of 5 C F R § 2638 203(b)(9), ensuring that prompt and effective action, including administrative action, is taken to remedy ethics violations, and § 2638 203(b)(12), ensuring that the services of inspectors general (as well as the resident office of the U S Army Criminal Investigation Command (CID)) are utilized when appropriate. We were unable to assess compliance with § 2638 603, requiring agencies to notify OGE of referrals to the Department of Justice (DOJ) of alleged violations of the conflict of interest statutes and the disposition of referrals, as Fort Huachuca had made no referrals in the past two years.

From 2002 to the time of our review, Fort Huachuca took administrative action against four employees who had violated 5 C F R § 2635 101(b)(5), which states that "[e]mployees shall put forth honest effort in the performance of their duties." The actions taken in these cases were demotion, removal from position, transfer, and an agreement to meet specific work-related standards. Removal was sought for a fifth employee who violated 5 C F R §§ 2635 101(b)(7) and 2635 702, which state that employees shall not use public office for private gain. At the time of our review, the resolution of this case was pending. Despite the apparent promptness and effectiveness of the actions taken, newly adopted memorandums of agreement (MOA) between OSJA and both Offices of Inspector General are meant to ensure that prompt and effective action is taken to remedy ethics violations.

Although OSJA maintains a good working relationship with both Offices of Inspector General and CID, the MOAs solidify the enforcement responsibilities of these offices. Moreover,

a written standard operating procedure was developed between OSJA and CPAC for informing OSJA of any case involving violations of the conflict of interest statutes referred to but declined by DOJ which might warrant administrative action

31 U S C § 1353 TRAVEL PAYMENTS

The acceptance of travel payments appears to comply with the applicable procedures and regulations. Procedures in the JER exist to ensure proper acceptance and reporting of travel payments accepted by Fort Huachuca employees under 31 U.S.C. § 1353 and the implementing General Services Administration regulation at 41 C.F.R. Chapter 304.

We examined Fort Huachuca's two most recent semiannual reports of travel acceptances of more than \$250 per event, which were forwarded to DA SOCO for submission to OGE. Only one acceptance of a travel payment was reported, it appeared to comply with the statute and regulation.

ADVICE AND COUNSELING SERVICES

Ethics advice and counseling services meet the requirements of 5 C.F.R. § 2638.203(b)(7) and (8). We examined a sample of 31 pieces of ethics-related advice and counseling rendered by the ethics staff. Based on our examination, we concluded that all of the written advice complied with applicable ethics laws and regulations.

Although all of the ethics counselors are authorized to issue advice, the bulk of the advice we examined was dispensed by the PEC and the Attorney-Advisor for contract law. On the occasions when the SJA or Deputy SJA renders advice, it is done with input from the PEC or the Attorney-Advisor for contract law. According to the PEC, ethics advice is provided both orally and in writing (the PEC estimated that 35 percent of the advice is provided in writing). Based on our sample, the topics that are most prevalent are gifts and post-employment.


A weekly post-employment briefing is available to employees. An information paper is provided at the briefing. A post-employment video, created by the PEC, is available for viewing. Post-employment issues are also addressed in the regular ethics training sessions. According to the PEC, OSJA intends to have itself added to the personnel out-processing list to ensure that all departing employees will seek post-employment counseling.

We commend the ethics staff for disseminating regular communications to employees regarding current ethics issues via publication in the post's newspaper, on NETCOM's intranet, and through global e-mails to all employees. Such regular communications to all employees underscore the importance of the ethics program at Fort Huachuca.

Mr Steven J Morello
Page 7

In closing, I would like to thank everyone involved in this review for their cooperation on behalf of the ethics program. No six-month follow-up is necessary in view of the fact that we have no recommendations for improving Fort Huachuca's program at this time. We are sending a copy of this report by transmittal letter to the inspectors general of the U S Army, USAIC/FH, and NETCOM and to the commanding generals of USAIC/FH and NETCOM. Please contact Tracy M Quan at 202-482-9271 if we may be of further assistance.

Sincerely,


Jack Covaleski
Deputy Director
Office of Agency Programs

cc Colonel Anthony Helm
Staff Judge Advocate
Office of the Staff Judge Advocate
Fort Huachuca, AZ 85613-5000

Report Number 04- 004



February 12, 2004

Steven Y Winnick
Designated Agency Ethics Official
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-2152

Dear Mr Winnick

The Office of Government Ethics (OGE) has completed its review of the Department of Education's (ED) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the effectiveness of the ethics program, largely measured by its compliance with applicable statutes and regulations. This review was conducted from October 2003 through January 2004.

Based on the findings of our pre-review work, we excluded examining the overall administration of ED's public and confidential financial disclosure systems.

HIGHLIGHTS

ED's ethics program is essentially sound and appears to be appropriately tailored to the needs of agency employees. However, some improvements are needed. Strong parts of your program include the ethics training program, the provision of useful ethics advice, and an enforcement process that promptly and effectively deals with employee ethical breaches. In addition, we commend the efforts expended to provide ethics-related services to several independent entities which are not organizationally part of ED.

To strengthen your program, we recommend that you ensure that (1) waivers issued pursuant to 18 U.S.C. § 208(b)(1) and (b)(3) are granted in accordance with subpart C of 5 C.F.R. part 2640 and (2) confidential financial disclosure reports are filed timely by special Government employees (SGE) at independent entities.

PROGRAM STRUCTURE

It appears that, generally, the management and staffing of your program is appropriate. We note, however, that by the close of our review, in January, two significant staffing changes had just occurred. We do not believe that these staffing changes will have any long lasting effect on the ethics program based on the experience and skill level of your current staff.

Mr Steven Y Winnick
Page 2

As Deputy General Counsel for Program Service, you have long-served as ED's Designated Agency Ethics Official (DAEO) and oversee management of the Ethics Division. However, the Alternate DAEO (ADAEO) administers the day-to-day aspects of the program. One of the significant staffing changes that occurred by the close of our review was that a long-serving ADAEO stepped down from her position. She, however, remains in the Ethics Division as a part-time attorney.¹ A new ADAEO assumed the position in January and she attended our last meeting with you.

During our review, the Ethics Division was comprised of four other attorneys, three ethics program specialists, and an ethics program assistant. The other significant change that occurred by the close of our review was that a long-serving ethics program specialist retired from her position. At the time of our last meeting, you told us that you plan to fill this position.

WAIVERS

We found that ED did not issue waivers pursuant to 18 U.S.C. § 208(b)(1) and (b)(3) in accordance with subpart C of 5 C.F.R. part 2640. In the waivers we examined, ethics officials (1) did not consult with our Office prior to granting waivers nor consistently forward copies of them to us in accordance with 5 C.F.R. § 2640.303 and (2) did not adequately describe the waived disqualifying financial interest nor address the factors described in 5 C.F.R. § 2640.301(b). Also, we believe that supervisory oversight was lacking when Ethics Division attorneys were authorized to issue waivers.

We are pleased to report that you have already implemented corrective actions to address our concerns. For example, on November 18, the Secretary changed the Delegation of Authority so that authority to issue waivers primarily rests with you. However, the authority to issue waivers is reserved to the Secretary for issuing waivers to you, as well as to the Deputy Secretary, the Under Secretary, or the General Counsel with your concurrence. Also, shortly after the start of our review, Ethics Division attorneys began consulting with OGE when drafting waivers. According to the ADAEO, this practice will continue. She also explained that after waivers are issued, they will immediately be forwarded to our Office. However, thus far no new waivers have been issued. We believe consulting on waivers prior to issuance should ensure that the waived disqualifying interests and the §2640.301(b) factors are fully described and that the test for assuring a direct and predictable effect will be met.

According to documents forwarded to our Office, in addition to records supplied by the ADAEO, it appeared that, in 2003, ED had issued approximately 40 waivers pursuant to 18 U.S.C. § 208(b)(1) and (b)(3). We found various deficiencies in many of these. Almost none contained the analysis of the factors enumerated in 5 C.F.R. § 2640.301(b). Most significantly, the waivers generally failed to analyze how the employee's financial interest or his imputed financial interests

¹For writing ease for this report, we refer to the former ADAEO as the ADAEO.

might be affected. For example, ED issued several waivers to high level officials who were negotiating for employment. ED had essentially used pro forma language in these which contained no discussion of why the financial interest created by the negotiation for employment, which is usually considered significant, was not substantial in these cases. Instead, these waivers simply asserted the fact that negotiation for employment was occurring. Without the analyses supporting the conclusions reached, OGE is unable to determine whether we might have objected to the waivers had we been consulted.

In addition, as we discussed at our last meeting in January, a White House memorandum dated January 6, 2004 stated a new policy which prohibits agency personnel from granting waivers under 18 U.S.C. § 208 to Senate-confirmed Presidential appointees for the purpose of negotiating for outside employment unless agency personnel have first consulted with the Office of the Counsel to the President.

We also found that several waivers were issued when there was already an applicable exemption pursuant to 18 U.S.C. § 208(b)(2) in place. Most notably this occurred for advisory committee members who were covered by an exemption at 5 C.F.R. § 2640.203(g). The determinations we examined incorrectly cited the exemption as the reason why the "waivers" were appropriate. We are pleased to note that the misunderstanding over the applicability of an exemption versus waiver is now being addressed through ongoing discussions among ethics officials.

We firmly believe that the above cited deficiencies would have been highlighted and addressed had consultations taken place. The consultations could have also aided in determining whether a waiver was actually needed. We also believe that many of the deficiencies would have also been prevented had there been more supervisory control over the issuance of waiver process. As noted earlier, we are satisfied that corrective measures have been put in place to address these problems. Also, ED's November change in waiver delegation authority supports that you have already complied with the additional guidance in the White House's January memorandum which directed that existing delegations of the authority to grant waivers be assessed to ensure that an appropriate level of seniority and responsibility is involved in the decision-making process. Finally, the ADAEO told us that many of the waivers issued in 2003 are being reassessed to ensure that the particular matter under scrutiny would have a direct and predictable effect on the potentially disqualifying interest. As necessary, employees may be issued additional written advice.

SPECIAL GOVERNMENT EMPLOYEES

Ethics officials do a commendable job and expend much effort in dealing with the various ethical issues surrounding ED's many SGEs. Currently, SGEs include three experts who provide consultative services to the Secretary.² In addition, there are numerous SGEs who serve on one of

²We did not include those SGEs who are nominees for Presidentially-appointed, Senate-confirmed (PAS) positions.

Mr Steven Y Winnick
Page 4

ED's 12 advisory committees Moreover, many SGEs serve at the independent entities to which ED provides ethics services

We examined various records related to a sample of these SGEs to ensure that ethics requirements were being satisfied and found that they generally were But, many SGEs who serve at independent entities did not file timely confidential financial disclosure reports Also, we encourage ethics officials' ongoing initiative of determining whether SGEs who serve on some advisory committees should file an alternative confidential disclosure report in lieu of the OGE Form 450

Advisory Committees

We agree with determinations made by ethics officials on the employment status (i e , SGEs versus representatives) of advisory committees' members Also, we believe that officials made an appropriate determination when they decided to exempt the Jacob K Javits Program Fellowship Board members from filing financial disclosure reports

Of ED's 12 advisory committees, we focused our examination on 3, all of which are comprised of SGEs who file OGE Forms 450 ³ Ethics officials are in the process of examining these committees to determine whether members should continue to file OGE Forms 450 or whether an alternative confidential disclosure report would better suit their needs for identifying potential financial conflicts, considering the limited likelihood of conflicts

In 2003, the majority of confidential reports from members of NACIQI, FIPSE, and NCFMEA were filed, reviewed, and certified timely However, a few members did not file reports in 2003 and a few reports were filed late According to the ADAEO, those who did not file, did not participate in meetings in 2003 Reports appear, for the most part, to have been thoroughly reviewed, as evidenced by extensive follow-up and the drafting of ethics agreements

According to the records we examined, an Ethics Division attorney provided annual ethics training in 2002 to most committee members, but a few did not receive in-person training For annual training in 2003, almost all had received in-person training by December Appropriate written ethics materials were sent to those who did not receive in-person training

Outside Entities

In addition to providing ethics-related services to ED employees, ethics officials spend a significant amount of time and effort providing services to the employees of four independent

³Our sample included the National Advisory Committee on Institutional Quality and Integrity (NACIQI), the National Board of the Fund for the Improvement of Postsecondary Education (FIPSE), and the National Committee on Foreign Medical Education and Accreditation (NCFMEA)

entities, which are comprised of both members (who are SGEs) and regular employees (who are staff) We focused our review on three of the four the National Assessment Governing Board (NAGB), the National Council on Disabilities (NCD), and the National Institute for Literacy (NIL) ⁴ Because NIL is in actuality an interagency group made up of the Secretaries of ED, the Department of Labor, and the Department of Health and Human Services, we narrowed our examination to NIL's advisory board (NILAB)

Overall, the financial disclosure systems and ethics training program are generally well managed by ED ethics officials ⁵ We examined the most recent financial disclosure reports required from SGEs and the staff of these entities Most reports were reviewed timely, but many confidential reports from NAGB and NCD SGEs were filed late ⁶ Also, the certification process was protracted for many reports due to obtaining additional information and issuances of waivers for committee members Reports were thoroughly reviewed by ethics officials as evidenced by the few technical deficiencies and no apparent conflicts of interest

Ethics officials diligently provided annual ethics training to NAGB, NILAB, and NCD members as part of their regular meetings in 2002 and 2003 But, in 2002, ethics officials were only partially successful in ensuring that staffs of these outside entities were trained In 2003, we noted improvement in staffs completing annual ethics training

To ensure the overall better management of the ethics services provided to outside entities, we encourage ethics officials to involve staff leadership at NAGB and NCD to raise awareness of ethics program requirements These officials could aid in ensuring timely report submission (including notifying ethics officials of new entrants or departing employees) and in ensuring annual ethics training completion

SUPPLEMENTAL STANDARDS OF CONDUCT REGULATION

ED's supplement to the standards of conduct regulation, at 5 C F R part 6301, requires that employees obtain prior approval before engaging in certain outside activities or employment We verified that employees are doing so by examining 15 of the approximately 70 approved requests in 2003 All appeared to be appropriate and in compliance with ED's outside activity approval process

⁴We did not examine the National Commission on Libraries and Information Science

⁵Members of NCD and NILAB file OGE Forms 450, but NAGB members file a confidential financial disclosure form pursuant to alternative instructions approved by OGE in January 2003 Most staff file OGE Forms 450, however, at NAGB and NIL some staff file SF 278s

⁶According to the ADAEO, during 2002, ED did not receive notification from White House officials on NCD nominees and new member appointments as it had in the past and as it currently does

Mr Steven Y Winnick
Page 6

In addition, we noted two good management practices that contribute to ED's well-run outside activity approval system which we encourage that you continue. First, copies of approvals are maintained with employees' financial disclosure files, which we believe aids in the review of their disclosure reports. Second, as a way to organize the flow of paperwork, ethics officials keep a running list showing when the requests are received and when the assigned Ethics Division attorney completes a conflicts review.

ETHICS EDUCATION AND TRAINING

OGE's ethics education and training requirements, at 5 C F R part 2638, are not only being met but also exceeded in many ways. We confirmed that ethics officials consistently document the agency's ethics training plan. Above and beyond our requirement to provide annual training to covered employees, ED annually trains all employees paid at the rate of GS-9 and above. Concerning monitoring completion of initial ethics orientation and annual training, we are impressed by the fact that ED's training tracking system records when employees complete training, especially considering that almost 4,000 employees are trained annually. We are also impressed by ED's incorporation of a values-based training approach to supplement its compliance-based annual ethics training.

Initial Ethics Orientation

Initial ethics orientation is immediately satisfied for new employees through the receipt of the required written ethics materials when they start work. Our orientation requirement is exceeded in that all new headquarters employees receive in-person training from an Ethics Division attorney when they attend a mandatory one-hour ethics session which is part of a full-day orientation for new employees. We attended one of these sessions in November and found it to be informative and well-g geared to the variety of new employees in attendance. We commend the use of a question-and-answer format as a way to engage employees.

Your program also exceeds our orientation requirement by providing new PAS employees individualized ethics briefings shortly after they enter on duty, a practice we encourage you to continue. As a good record-keeping procedure, we were pleased to observe that in-person orientation dates are recorded on your ethics training tracking system.

Values-Based Training

ED also went beyond the requirements of our training regulation by incorporating a values-based ethics training component to supplement its existing compliance-based annual ethics training. In 2002, the agency administered an agencywide ethics survey to assess ED's organizational culture with respect to ethics issues in order to provide a basis for the development and delivery of this new training approach and to identify ways ED's ethical structure could be strengthened.

Ethics officials told us that the initial effort to incorporate a values-based approach was to train approximately 500 "rating officials"⁷ These employees were required to attend one of the many three-hour sessions held for them in 2002 and ethics officials attested to the fact that almost all of those required to attend did so According to the ADAEO's description, and based on our examination of various documents, ethics officials provided a detailed presentation to attendees which reviewed ethics regulations and laws and covered the process of ethical decision-making

Annual Training In 2002

Your records reflect that most employees required to receive annual ethics training in 2002 did so We were impressed with the variety of training offered to employees Although approximately 50 public filers did not receive training during the 2002 calendar year, the ADAEO told us that most attended a make-up training session in February 2003 which was specifically geared for them Also, though it is your practice to provide individualized annual ethics training to all PAS employees, this did not occur in 2002 because these employees instead participated in the values-based training program

Annual Training In 2003

By the close of our review in December, almost all of those required to receive annual ethics training had done so During this past year, ED training primarily focused on a values-based approach agencywide and ethics officials provided in-person classroom training to most employees paid at the rate of GS-9 and above We attended one of these training sessions in November In addition to covering ethics rules, the Ethics Division attorney led participants through several case study scenarios which thoughtfully addressed the process of ethical decision-making It was clear to us that attendees were engaged in the training based on their questions and comments In addition to in-person training, ethics officials offered computer-based training modules

According to the ADAEO, individualized training was provided to all PAS employees in 2003 In addition, by December, over 90 percent of all public filers and non-public filers attended in-person training All remaining covered employees were expected to complete on-line training

ETHICS COUNSELING AND ADVICE

Ethics counseling and advice services meet the requirements of 5 C F R § 2638 203(b)(7) and (8) While ethics advice is sometimes provided orally, it is often dispensed in written form, usually by e-mail We examined approximately 40 written determinations that were provided to all PAS employees and some SGEs in 2003 In addition, we examined general advice notices provided

⁷Managers identified those employees who were rating officials, i.e., those who appraise/rate other employees The rating official designation did not necessarily comport with being a public or confidential filer

to all employees Overall we found that the advice was accurate, consistent with applicable laws and regulations, and appeared to meet employees' needs The advice covered outside activities, gift acceptance, post-employment, endorsements, fund-raising, and potential conflicting interests

A best practice that you have in place is that you provide post-employment information to all departing employees Also, your occasional issuances of ED Notices is a good method to keep all employees aware of topical ethics issues that arise from counseling and advising employees ED's Intranet (ConnectED) ethics Web site is another useful way that you reach out to employees We commend the issuance of your May 2003 Ethics Tool Kit, a compendium of references and information covering all aspects of ethics Noteworthy is the fact that the Ethics Tool Kit includes information on identifying and reporting ethical violations

ETHICS AGREEMENTS

All of the actions required to be taken pursuant to PAS employees' ethics agreements were completed timely, in accordance with 5 C F R § 2634 802(b) In all but a few cases, requisite evidence of action taken was submitted timely to OGE, in accordance with 5 C F R § 2634 804(a) From 2001 up to the present, 14 PAS employees took required actions following their Senate confirmation to fulfill their ethics agreements

ENFORCEMENT

In accordance with 5 C F R § 2638 203(b)(9), ED appears to promptly and effectively deal with those employees who engage in unethical conduct Also, ED is complying with 5 C F R § 2638 603 by notifying OGE of referrals for prosecution to the Department of Justice (Justice) of alleged violations of the criminal conflict-of-interest laws, as well as any related declinations Finally, the requirements of 5 C F R § 2638 203(b)(11) and (12) are being satisfied pertaining to reviewing ethics-related information developed by Office of Inspector General (OIG) audits and making appropriate use of OIG services Ethics and OIG officials stated that they have a very good working relationship with one another and that they, as necessary, coordinate employee misconduct cases and other ethics matters We commend the ADAEO for recently providing specialized training to OIG staff focusing on the conflict of interest laws

From 2002 up to the present, the agency investigated and took administrative action against several employees who had violated various ethical standards Eight employees from headquarters were disciplined in 2002⁸ based in part on their violations of standards of conduct provisions, mostly for failing to meet their financial obligations (5 C F R § 2635 809) Discipline for these eight cases ranged from issuing an official reprimand to a 60-day suspension and reassignment

⁸Information about discipline meted out in 2003 was not readily available, therefore, we did not review those case files

Mr Steven Y Winnick
Page 9

According to information provided by ethics officials, ED also took action against five other employees who were accused of committing various ethical violations in 2002 and 2003. In addition, the ADAEO told us that ethics officials had just recently referred to the OIG a matter involving a former PAS employee for violating 18 U S C § 207. Of those five cases where the agency has already taken action, the ethical wrongdoings included time and attendance violations and an ethics agreement violation. Of the five involved employees, four resigned or were fired. By the time of our last meeting, you told us that the one remaining employee was recently reprimanded.

In 2003, the OIG referred three employees for alleged violations of the criminal conflict-of-interest laws (involving either 18 U S C § 208 or 209) to Justice. One was declined for prosecution and two are pending disposition. Pursuant to 5 C F R § 2638.603, OGE was concurrently notified of all three referrals and the declination. For the one matter declined, ED counseled the employee about her unintentional violation and determined that further discipline was not warranted. For the remaining two referrals, though employees have left ED, ethics officials are aware of the requirement to report to OGE on Justice's disposition of these matters.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

ED accepted 60 payments greater than \$250 from non-Federal sources for travel, subsistence, and related expenses incurred by employees on official travel from April 1, 2002 to March 30, 2003. We found that these payments were accepted in accordance with 31 U S C § 1353. The required semiannual reports were generally forwarded to OGE timely.

RECOMMENDATIONS

We recommend that you

1. Ensure that waivers issued pursuant to 18 U S C § 208(b)(1) and (b)(3) are granted in accordance with subpart C of 5 C F R part 2640.
2. Ensure that confidential financial disclosure reports are filed timely by SGEs of NAGB and NCD.

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of the Office of Government Ethics 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 ethics officials take actions to correct these deficiencies in a timely

Mr Steven Y Winnick
Page 10

manner We are sending a copy of this report to the Inspector General Please contact Ilene Cranisky at 202-482-9227, if we can be of further assistance

Sincerely,

A handwritten signature in black ink that reads "Jack Covaleski". The signature is written in a cursive style with a large, looping initial "J".

Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04 - 002



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

November 8, 2004

Alberto J. Mora
Designated Agency Ethics Official
Department of the Navy
1000 Navy Pentagon
Washington, DC 20350

Dear Mr. Mora:

The Office of Government Ethics (OGE) has recently completed a review of the ethics programs at the Department of the Navy's (Navy) Commander, Navy Region Northeast (CNRNE), Groton, Connecticut; Naval Submarine Base (SUBASE), Groton; and Naval Station Newport (NAVSTA) in Newport, Rhode Island. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the programs' compliance with applicable ethics laws and regulations and to evaluate the systems and procedures at all three activities that ensure that ethics violations do not occur. Our current review was conducted during June 2004. The following is a summary of our findings and conclusions.

HIGHLIGHTS

Overall, we have concluded that the ethics programs at CNRNE, SUBASE, and NAVSTA all have effective systems, processes, and procedures in place to prevent ethics violations from occurring and to ensure the public's confidence in an ethical Government. We are pleased to report that all three activities surpass the minimum initial ethics orientation and annual ethics training requirement. The only issue we raised dealt with the timely identification of new entrant confidential financial disclosure filers. However, despite these difficulties, we applaud the efforts that have already been made in trying to remedy this problem through the development of new procedures that will help ensure that in the future new employees entering and those transferring into covered positions file a new entrant confidential financial disclosure report in accordance with 5 C.F.R. § 2634.903(b).

ADMINISTRATION OF ETHICS PROGRAM

The Navy Region Northeast (Region) was established in June of 1999 to provide military command and support over assigned shore activities for the operating forces of the Navy. The Region's military responsibilities encompass twelve states/six Canadian provinces comprised of seven installations, inclusive of associated tenant commands and other Naval activities.

In regards to the ethics program, there is one Regional Ethics Counselor, four installation Ethics Counselors, and three Office of General Counsel (OGC) Ethics Counselors. The Staff Judge Advocate (SJA) for CNRNE acts as Regional Ethics Counselor and also is responsible for administering the ethics program for CNRNE, with the respective SJAs at SUBASE and NAVSTA responsible for administering the program for their organizations.¹ All officials have been designated as Ethics Counselors (EC) under the Department of Defense (DOD) Joint Ethics Regulation (JER), and will hereafter be referred to as such for purposes of this report. Each of the ECs receive support from other attorneys, paralegals, and administrative staff within their offices.

EDUCATION AND TRAINING

We found that all three activities are fully meeting, and in some cases surpassing, the minimum initial ethics orientation and annual ethics training requirements found at 5 C.F.R. part 2638. We commend the ECs and their staffs for ensuring that employees often receive more than the requisite training.

Initial Ethics Orientation

Under CNRNE's new procedures to timely identify new employees entering on duty at CNRNE, all new employees are sent by e-mail a copy of the CNRNE Employee's Guide to the Standards of Conduct to satisfy the requirements found at 5 C.F.R. § 2638.703. New employees are also able to obtain ethics information from CNRNE's intranet Web site, where the JER, the DOD supplemental regulation, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), and Executive Order 12674 are all accessible. Although these procedures have only recently been implemented, we were advised that to date approximately 10 new employees have already been timely identified and provided with initial ethics orientation (IEO) training.

New employees who enter on duty at NAVSTA and SUBASE are required to attend a command indoctrination program. This program is conducted monthly with the respective ECs presenting a live ethics orientation session as part of the program.

Annual Ethics Training

Each year, to satisfy the annual training requirement, all three organizations require their covered employees to complete the DOD Standards of Conduct Office's (SOCO) online ethics training module, which in 2003 focused primarily on Government travel. After completing the training, employees are required to file a certification of completion with each EC, which is tracked simultaneously with the tracking of the annual confidential reports. Our examination of the certifications on file, including some that we questioned, confirmed that all covered employees had

¹ In addition to administering CNRNE's ethics program, the CNRNE SJA provides support to all installation and OGC Ethics Counselors as well.

Mr. Alberto J. Mora

Page 3

in fact completed the training. This year's SOCO-prepared online ethics training module will focus on working with contractors.

Additional Training Efforts

In addition to the formal training programs, we acknowledge the extra efforts that all three organizations make to routinely keep employees aware of ethics-related issues. CNRNE, SUBASE, and NAVSTA all make it a practice to provide this information through a variety of media, such as sending routine e-mails to employees regarding various ethics topics and providing verbal ethics training to employees and department heads upon request.

Additionally, we found CNRNE's intranet Web site to be an outstanding resource and comprehensive ethics tool for providing periodic updates, points of contact information, immediate access to both OGE regulations and the JER, and general guidance on areas governing ethics in Government.

CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEMS

All three of the organizations we examined effectively managed their annual confidential financial disclosure systems, even though the 2003 filing cycle was the first year that all ECs throughout the Region were directly involved with the confidential disclosure review process.² The CNRNE EC acknowledged and our examination confirmed that the timely identification of new entrant confidential filers is a problem throughout the Region. Although we were advised that this has been a real challenge due to the great geographic disparity of the Region, we applaud the steps that have already been taken by the CNRNE EC to remedy this problem through the development of new procedures to help identify new entrant filers and timely provide them with their confidential report.

To accomplish this, CNRNE will begin to coordinate with the Region's Comptroller for access to the payroll system to help identify new civilian employees and with the Region's Manpower office to help identify new military employees receiving orders to CNRNE. Once identified, all new employees will be instructed via e-mail to check with their supervisor to determine whether or not they are required to file a confidential report. The supervisor will be responsible for notifying the ECs who will provide information on the new entrant filing requirements, inclusive of instructions on how to download the electronic version of OGE Form 450, to all those entering into a covered position. We were advised that these procedures will also enable new employees to receive their required IEO more timely because instructions for completing this training will also be included within the e-mail (as discussed in the "Education and Training"

² Prior to the 2003 filing cycle, all confidential reports were reviewed and certified by the CNRNE EC at the regional level.

Mr. Alberto J. Mora

Page 4

section). Although we are not making a formal recommendation in this area, we strongly suggest that ongoing monitoring of the procedures be done to ensure they are effective in operating as designed.

Additionally, we were advised that the 2003 filing cycle also marked the first year of compliance with the Navy's internal policy of including as confidential disclosure filers: employees who have blanket purchase authority and are contracting officer's representatives, purchase cardholders with the authority to spend in excess of \$100,000, and purchase card authorizing officials who approve in excess of \$100,000.³

CNRNE Confidential System

To evaluate CNRNE's confidential system, we examined all 47 of the confidential financial disclosure reports required to be filed in 2003. These consisted of 15 new entrant and 31 annual OGE Form 450s and 1 OGE Optional Form 450-A. Although the majority of the annual reports were timely filed, eight reports were filed late. All annual reports were reviewed thoroughly, as evidenced by the number of reports that were sent back to the filers for additional clarification or corrections regarding technical deficiencies. Additionally, we examined a sample of the accompanying cautionary memoranda attached to these reports and found them very useful in keeping filers apprised of potential conflicts.

Of the 15 new entrant reports, 8 were filed late, 6 of which were captured during the annual filing cycle. Additionally, we could not determine filing timeliness for two other reports because we could not ascertain the filers' appointment dates. Nevertheless, all reports were reviewed timely once filed.

SUBASE Confidential System

At SUBASE we examined all 85 of the confidential disclosure reports required to be filed in 2003. These consisted of 26 new entrant and 59 annual OGE Form 450s. Our examination of the 59 annual reports found only 1 report that was filed late. All were reviewed thoroughly, as evidenced by the limited number of technical reporting omissions. We also examined a sample of the accompanying cautionary memoranda attached to these reports and found them very useful in keeping filers apprised of potential conflicts. Although we found limited technical deficiencies, we did notice seven instances where the most recent version of the OGE Form 450 was not used. Notwithstanding this, we were assured that all filers will be provided with the most recent version of the form in the future.

Our examination of the 26 new entrant reports found the majority of these reports to either have no date of appointment recorded or, in two cases, an incorrect appointment date. As at

³CNRNE is working directly with the purchase card program manager to help identify new employees who are assigned purchase card responsibilities that meet the threshold for filing.

Mr. Alberto J. Mora

Page 5

CNRNE, we also found several reports that were captured during the annual filing cycle. Once received, however, all were reviewed timely.

NAVSTA Confidential System

We examined all 118 reports that were required to be filed by NAVSTA employees in 2003. Our sample included 116 annual and 2 new entrant OGE Form 450s. We found no substantive deficiencies during our examination of these reports. Of the 116 annual reports, only two reports were filed late. Notwithstanding this, all were reviewed timely and thoroughly as evidenced by the limited number of technical reporting omissions and by the notes made by the NAVSTA EC when reviewing each report. A sample of the accompanying cautionary memoranda attached to these reports were also examined and were found to be very useful in keeping filers apprised of potential conflicts. Similar to our finding at SUBASE, we did notice three instances where the most recent version of the OGE Form 450 was not used. After discussing this matter with the NAVSTA EC, we are confident that all filers will be provided with the most recent version of the form in the future.

Our examination of NAVSTA's two new entrant OGE Form 450s found both of them to have been filed, reviewed, and certified in a timely manner.

ACCEPTANCE OF TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

All three organizations have accepted relatively few travel payments from non-Federal sources for travel, subsistence, and related expenses incurred by agency employees on official travel under the authority of 31 U.S.C. § 1353. In fact, according to the SUBASE EC, SUBASE did not accept any such payments during the period covered by our review.

We examined the four travel payments accepted by CNRNE under this authority during the period of April 1, 2003 through March 31, 2004. Based on our examination of the underlying documentation supporting these acceptances, we conclude that these acceptances were in compliance with the relevant requirements.

Additionally, although we were advised that only one travel payment was accepted during the period of April 1, 2003 through September 30, 2003, we noticed that eight other acceptances were listed on the Region's Semiannual Report of Payments Accepted from a Non-Federal Source report that was forwarded to the Navy for semiannual reporting to OGE of travel payments of more than \$250 received from non-Federal sources under 31 U.S.C. § 1353. The CNRNE EC advised us that the eight payments accepted by the Navy Band Northeast were mistakenly included on the report because, at the time, there was some confusion as to whether travel payments accepted by the band for various summer concerts performed were gifts of travel under 31 U.S.C. § 1353. The CNRNE EC was subsequently advised by Navy officials that band concerts should be accepted under the authority of DOD's Component Gift Acceptance Statute at 10 U.S.C. § 2601.

ADVICE AND COUNSELING SERVICES

ECs and their respective staffs provide effective and useful ethics advice and counseling to their employees on a wide range of issues. The CNRNE EC also provides assistance to the other ECs in providing ethics-related advice to their employees when needed. Employees are encouraged to contact the ECs via all forms of communication, including e-mail, telephone, and in-person. However, most inquiries are made and advice rendered via e-mail or through formal written correspondence.

We examined a sample of the e-mail advice dispensed by all three organizations on a variety of issues dealing with topics such as gift acceptance, fund-raising, post-employment restrictions, and interaction with outside entities. We found these determinations to be comprehensive and consistent with the appropriate laws and/or regulations as well as responsive to employees' needs in terms of timeliness, as responses were generally rendered promptly to the questions that were posed.

ENFORCEMENT

The ECs at SUBASE and NAVSTA both serve as Special Assistant United States Attorneys (SAUSA) for the States of Connecticut and Rhode Island, respectively, and are responsible for prosecuting potential violations of the criminal conflict-of-interest laws. We discussed with both of them the requirement to notify OGE concurrently when a case involving an alleged violation of a criminal conflict-of-interest law is referred to the Department of Justice (Justice). They both agreed that in their role as SAUSA, they would be the officials responsible for notifying OGE of all referrals and any other matters required to be reported to OGE by 5 C.F.R. § 2638.603. While there were no recent alleged violations of the criminal conflict-of-interest laws referred for prosecution to Justice by either organization during the period covered by our review, we are satisfied that if a referral is made in the future both ECs will comply with the prescribed procedures.

Additionally, we were advised by the SUBASE EC of five administrative actions that were taken against SUBASE employees, all for violations of the Standards. After examining these actions, in accordance with Section 2638.203(b)(9), we found them all to have been prompt and effective in remedying violations of the Standards, as all actions were taken within one month of SUBASE officials learning of the violation.

At CNRNE, the Deputy to the Commander also serves as the Inspector General (IG) for CNRNE. Based on our discussions with both the CNRNE EC and the IG, we believe that the services of the IG would be utilized when appropriate, including the referral of matters to and the acceptance of matters from the IG, as required by 5 C.F.R. § 2638.203(b)(12). Although there were no recent alleged violations of the criminal conflict-of-interest laws referred for prosecution to Justice during the period covered by our review, we were advised of one administrative action that was taken by CNRNE for violation of the Standards during the period covered by this review. After examining the documentation related to this action, we found the action to have been prompt and effective in remedying the violation.

Mr. Alberto J. Mora

Page 7

In closing, I wish to thank all of the ECs and their staffs for their efforts on behalf of the ethics program. A brief follow-up review is typically scheduled within six months from the date of this report. However, as this report contains no formal recommendations to improve the program, no such follow-up will be necessary. Please contact David A. Meyers at 202-482-9263, if we can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "Jack Covaleski". The signature is written in a cursive style with a large, looping initial "J".

Jack Covaleski
Deputy Director
Office of Agency Programs

Report number 04- 022



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

November 16, 2004

Thomas K. Emswiler
Designated Agency Ethics Official
Federal Retirement Thrift
Investment Board

(b) (6)

1250 H Street, NW.
Washington, DC 20005

Dear Mr. Emswiler:

The Office of Government Ethics (OGE) has completed its review of the Federal Retirement Thrift Investment Board's (FRTIB) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the program's compliance with applicable statutes and regulations. We also evaluated FRTIB's systems and procedures for ensuring that ethics violations do not occur. This review was conducted in September 2004. The following is a summary of our findings.

HIGHLIGHTS

FRTIB's ethics program continues to be well managed, even with a new ethics staff in place since our last review in 1999. Our findings signify that FRTIB's ethics program appears to be in compliance with the ethics statutes and regulations.

PROGRAM STRUCTURE

The level of staffing dedicated to administering the ethics program appears to be appropriate, considering the size and organizational structure of FRTIB. FRTIB is located in Washington, DC and consists of approximately 100 full-time employees.¹ FRTIB's five board members serve as part-time employees; they only attend the monthly board meetings. You, as the Designated Agency Ethics Official (DAEO), and the Alternate DAEO administer FRTIB's ethics program in addition to your other duties in the Office of General Counsel. Whereas most ethics duties are shared, the Alternate DAEO is solely responsible for the financial disclosure systems.

¹ FRTIB also has two call centers which are staffed by contractor employees. Contractor employees are not subject to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) and other Government ethics requirements.

FRTIB'S SUPPLEMENTAL REGULATION

With concurrence from our Office, FRTIB issued its supplement to the Standards. FRTIB's supplement to the Standards, at 5 C.F.R. part 8601, requires employees, other than special Government employees, to obtain approval before engaging in certain outside employment.

FRTIB'S ADVISORY COUNCIL

Under 5 U.S.C. § 8473, FRTIB established an Employee Thrift Advisory Council (Council) composed of fifteen members. With the exception of the uniformed services member, who is a Government employee, Council members are neither regular Government employees nor special Government employees (SGE). According to FRTIB's Director of the Office of External Affairs, the Council members perform duties defined under the statute and reflected in their appointment letters. Additionally, the members meet once or twice a year; they represent recognizable groups, which also nominate them for membership on the Council; and they work as a group. The members are not compensated by FRTIB; they are not spokesmen for the FRTIB; they do not perform a Government function in an independent capacity; and they are not supervised by a FRTIB employee. We suggested, as a best practice, that future appointment letters include a statement that the members are not SGEs and, therefore, not subject to the Standards and other Government ethics requirements.

FINANCIAL DISCLOSURE SYSTEMS

We found that the financial disclosure systems appeared to be well managed, based on our examination of the public and confidential reports filed for 2003. In addition to our findings, we suggested, as a best practice, that the reviewer record the review start date in the comments section of the financial disclosure report when certification is going to be delayed pending the receipt of additional information from the filer.

Public Financial Disclosure System

Our examination of the 10 public reports filed for 2003, including your reports required to be transmitted to OGE for review in accordance with 5 C.F.R. § 2634.602(c)(1), disclosed that you filed both a new entrant report in December 2003 and an annual report for 2003. However, you were not required to file an incumbent report for 2003 since you worked less than 60 days as DAEO in 2003. Nonetheless, our examination disclosed that the public reports were filed, reviewed, and certified timely and revealed no technical or substantive issues.

Our examination also disclosed that one filer listed an outside position. We confirmed that the filer received prior approval in 1998 in accordance with FRTIB's supplemental regulation.

Confidential Financial Disclosure System-
Regular Government Employees

Our examination of all confidential reports, including one new entrant report, required to be filed in 2003 disclosed that all 14 filers submitted either an OGE Form 450 or OGE Optional Form 450-A. We reminded ethics officials that all incumbent (annual) confidential filers must complete an OGE Form 450 for 2004 in accordance with 5 C.F.R. § 2634.905(d)(4). We found that all of the reports were filed timely and that most of the reports were reviewed and certified in a timely manner. We could not determine the timeliness of the reviews of a few reports, as certification was delayed pending the receipt of additional information from the filers. Additionally, the ethics official could not recall the review start dates. We suggested, as a best practice, that when certification is going to be delayed pending the receipt of additional information from the filer, the reviewer indicate the review start date in the comments section of the report. It was difficult to determine whether there were potential conflicts, but we were assured by the ethics officials that there were none based on FRTIB's two-tiered review process that includes the filer's supervisor performing the initial review of the reports.

Our examination also disclosed that two filers listed an outside position. We confirmed that they received prior approval, one in 1988 and the other in 2002, in accordance with FRTIB's supplemental regulation.

Confidential Financial Disclosure System-SGEs

Our examination of the five reports from SGEs² disclosed that while three follow-on new entrant reports were filed timely by November 30, which is the deadline used in lieu of their SGE report filing anniversary date, one report was filed late. The remaining SGE, who filed his nominee report in December 2002, should have been requested to file an updated report once he was confirmed in June of 2003; he will be required to file an updated new entrant report by November 30 of 2004. Additionally, our examination disclosed that most of the reports were reviewed and certified later than 60 days after they were filed. The ethics officials informed us that the reports were initially reviewed within 60 days, but they delayed certifying the reports. Again, we suggested, as a best practice, that the reviewer indicate the review start date in the comments section of the report.

EDUCATION AND TRAINING PROGRAM

FRTIB continues to exceed the ethics training requirements. FRTIB provides initial ethics orientation to all new employees and in-person annual ethics training to all covered employees. In addition, every departing employee receives an in-person post-employment briefing.

² The reports are from FRTIB's five board members who, as Presidential appointees confirmed by the Senate, are term SGEs.

As part of in-processing, new employees are required to meet with the Alternate DAEO. At this meeting, the Alternate DAEO provides them with an ethics briefing and the initial ethics orientation materials. However, we found that FRTIB's supplemental regulation was erroneously omitted from the orientation materials. To remedy this omission, the Alternate DAEO immediately sent the supplemental regulation to all current employees via e-mail. The Alternate DAEO informed us that, since our fieldwork, he provided a new employee with the initial ethics orientation materials that included the supplemental regulation.

Covered employees were provided with three types of annual ethics training in 2003. They attended either an ethics lecture provided by the General Counsel and Alternate DAEO at the November 17 board meeting or an ethics training session provided by the Alternate DAEO on December 1. Those who did not attend a live session completed the interactive Web-based computer training modules. We examined FRTIB's tracking records and found that all employees required to be trained completed the 2003 annual ethics training.

It is FRTIB's policy to give every staff-level employee an in-person exit ethics briefing, which consists primarily of a review of post-employment restrictions. Employees are also reminded to return Government property, not use telephone cards or Government credit cards, etc., and not divulge non-public information. Additionally, FRTIB mails information on the post-employment restrictions to departing executive directors and board members routinely, and to other employees who did not meet with an ethics official prior to leaving FRTIB.

ADVICE AND COUNSELING SERVICES

Our examination of the recent written advice and counseling disclosed that the advice was comprehensive and consistent with ethics statutes and regulations. The ethics advice and counseling covered financial disclosure, gifts from outside sources, misuse of position, outside activities, post-employment, seeking employment, and widely attended gatherings.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

Although authorized to accept payments of travel and related expenses from non-Federal sources under 31 U.S.C. § 1353, FRTIB forwarded negative semiannual reports to OGE for the periods ending September 30, 2003 and March 31, 2004, as required by 41 C.F.R. § 304-6.5. You informed us that the next semiannual report should include two payments of travel and related expenses, which were properly approved in accordance with 31 U.S.C. § 1353 and 41 C.F.R. chapter 304.

ETHICS AGREEMENTS

FRTIB granted one 18 U.S.C. § 208(b)(1) waiver in 2002 and one 5 C.F.R. § 2635.402(d)(2)(ii) waiver in 2003. The waivers indicated that FRTIB consulted with OGE informally and forwarded copies to OGE.

Mr. Thomas K. Emswiler

Page 5

ENFORCEMENT

Since FRTIB does not have an office of inspector general, you referred one alleged violation of a criminal conflict-of-interest statute directly to the Department of Justice in August 2004. The alleged violation was by a former employee. However, OGE was not concurrently notified of the referral. To remedy this, you immediately completed the OGE Form 202 during the fieldwork and submitted it to OGE.

You informed us that there have not been any alleged violations of the Standards at 5 C.F.R. § 2635, but, if there were, prompt administrative action would be taken.

In closing, we wish to thank you and your staff for your efforts on behalf of the ethics program. No six-month follow-up review is necessary in view of the fact that we have no recommendations for improving the ethics program at this time. Please contact Jean Hoff at 202-482-9246 if we may be of further assistance.

Sincerely,



Jack Covalesski
Deputy Director
Office of Agency Programs

Report Number 04 - 023



February 18, 2004

Anna L. Wolgast
Designated Agency Ethics Official
Environmental Protection Agency

(b) (6)

Ariel Rios Building North

(b) (6)

(b)

Washington, DC 20460

Dear Ms. Wolgast:

The Office of Government Ethics (OGE) recently completed a review of the Environmental Protection Agency's (EPA) ethics program. This review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended. Our objective was to determine the program's compliance with applicable laws and regulations. We also evaluated EPA's systems and procedures for ensuring that ethics violations do not occur. The review was conducted from September 2003 through January 2004. The following is a summary of our findings.

SCOPE OF REVIEW

Based on the results of our pre-review, including several discussions with EPA ethics officials, this review focused primarily on the public financial disclosure system and the overall administration of the ethics program for EPA's Federal advisory committees. However, the latter part of the report details our findings with regard to selected other elements of the ethics program, particularly those that are especially noteworthy and exceed minimum requirements.

HIGHLIGHTS

Our review of EPA's public financial disclosure system and the program for its Federal advisory committees revealed that vast improvements have been made to both program elements since the Alternate Designated Agency Ethics Official (ADAEO) assumed his position in 2001. All previously uncertified public reports have now been reviewed and certified and several new procedures have been implemented to ensure that all public filers are identified and notified of the filing requirements. Additionally, the development of an alternative confidential financial disclosure system and an improved ethics training program for special Government employee (SGE) members of EPA's Federal advisory committees appear to have corrected previously identified deficiencies in this program element. Finally, various additional best

practices have been implemented which exceed mere compliance with the ethics laws and regulations.

PROGRAM STRUCTURE

In addition to your position as EPA's Principal Deputy General Counsel, you also serve as its Designated Agency Ethics Official (DAEO). The Senior Counsel for Ethics serves as the ADAEO, a position he has held since June 2001. Another attorney, who serves as the Deputy Ethics Official (DEO) for the Office of the General Counsel (OGC), is also involved in the overall administration of the ethics program EPA-wide.¹

In addition to the ethics office, there are more than 150 DEOs, who are responsible for the day-to-day administration of the program at EPA's various program and regional offices. These DEOs often receive support from assistants in carrying out their ethics responsibilities. At the regional level, there are two DEOs for each region, one of whom is typically the Regional Counsel.

PUBLIC FINANCIAL DISCLOSURE SYSTEM

During our pre-review discussions in August 2003, the ADAEO conceded that upon entering his position in June 2001, he was confronted with stacks of uncertified SF 278s.² Moreover, he stated that EPA had not previously compiled an accurate master list of employees required to file public reports. Therefore, at that time he was unable to determine if all appropriate employees were filing.

According to the ADAEO, a major shortcoming in the public system was inadequate support from EPA's personnel office, which had been remiss in identifying employees required to file public reports, notifying them of the filing requirement, and compiling and maintaining an accurate master list of these employees. At the time of our pre-review discussions, the ADAEO stated that the OGC DEO was focusing solely on identifying public filers and developing an accurate and up-to-date master list. In addition, the ADAEO was working with personnel to develop a system to consistently identify public filers and notify them of the filing requirement. He was also developing a checklist for departing employees which would require them, among other things, to meet with him prior to their departure so that he could ensure they were aware of the termination public filing requirement. Any departing employees who do not complete all the tasks required by the checklist would not receive their final paycheck.

Finally, the ADAEO stated that prior to beginning his tenure at EPA, employees occupying "administratively determined" positions, i.e., positions exempt from competitive

¹For simplicity, you, the ADAEO, and the OGC DEO will be collectively referred to as the "ethics office" throughout this report.

²The ADAEO and OGC DEO have since reviewed and certified all of the reports.

service, had not been filing public reports. He added that employees were often detailed to or hired into covered public filing positions in an acting capacity for extended periods of time. Because of their "acting" status, EPA had not been requiring them to file reports.³

Results Of Our Review

Since our initial discussions with the ADAEO during the pre-review, several improvements have been made to the public financial disclosure system.

First, revised procedures have been established by the ethics office to improve the overall management of the public system. The ethics office worked closely with the personnel office to establish a system to ensure that all employees required to file public financial disclosure reports are aware of the new entrant, annual, and termination filing requirements.

Under the revised procedures, employees entering a covered position are informed of the new entrant filing requirements during an in-person entry briefing. Additionally, individuals detailed into a public filing position are informed that if they are being detailed for more than 60 days, they are required to file a public report within 30 days of entering into the position.

As previously mentioned, the ethics office is also working with personnel to revise the EPA check-out procedures so individuals who are leaving a public filing position are required to check a box on the departing employee checklist indicating that they have been informed that they are required to file a termination report within 30 days.

Additionally, the ethics office has compiled an accurate master list of public filers. With monthly input from the personnel office, the White House, and both headquarters and regional DEOs, the ethics office is now able to update this list on a continual basis. The list of filers is on a computer database enabling the ethics office to easily identify which filers are part of which organization within EPA.

To evaluate the public system, we examined all 10 of the incumbent reports required to be filed in 2002 by Presidentially-appointed, Senate-confirmed (PAS) employees. All of these reports were filed timely, including any filing extensions, and were forwarded shortly after being reviewed and certified at EPA. However, four reports appeared to have been reviewed and certified more than 60 days after being filed.

³In accordance with 5 C.F.R. § 2634.201(a), an employee who performs the duties of a covered position for a period in excess of 60 days in any given calendar year must file a public report.

We also examined 115 of the approximately 475 non-PAS public reports required to be filed from 2002 to the time of our review. Almost all of the reports we examined (108) were filed timely, including any filing extensions. However, 43 of the 115 reports appeared to have been reviewed and certified more than 60 days after being filed.

The ADAEO asserted that the vast majority of the public reports we examined had received an initial review within the allotted 60 days, but the initial review date simply was not indicated on the reports. We suggested that in the future efforts should be made to annotate the reports with the date on which the initial review is conducted.

FEDERAL ADVISORY COMMITTEES

In 2001, the General Accounting Office (GAO) issued a report expressing concerns about the ethics training provided to SGE members of EPA's Federal advisory committees as well as concerns regarding the financial disclosures of these members. In response to that report, the ethics office has taken several steps to improve the SGE ethics training program and financial disclosure system.

Ethics Training

To address GAO's concerns regarding the ethics training provided to SGE advisory committee members, the ethics office, with the invaluable assistance of an ethics advisor from EPA's Science Advisory Board (SAB), developed specialized ethics training for these SGEs. This training is available on a CD ROM and is also available on EPA's intranet ethics Web site.

The training is divided into six major topics: conflict of interest; misuse of information; Hatch Act; gifts and outside teaching, speaking, and writing; post-employment restrictions; and financial disclosure. Summaries of each topic include a brief explanation, definitions of important terms, and real-world examples pertinent to EPA SGEs. Certain topic summaries also provide links to more detailed relevant information like EPA ethics advisories, GAO reports, and information on Hatch Act restrictions. The summaries are followed by short quizzes that test the user's understanding of the information presented. The training also includes the OGE video "The Ethical Choice." Upon completion of the training course, each user receives a certificate that confirms they have completed the training.

In addition to the computerized training, an in-person ethics briefing is routinely presented by the ADAEO prior to the start of a committee meeting. The ethics office also provides live training from time to time to SGE committee members at the request of the individual committees.

Financial Disclosure

In response to the GAO report, the ethics office worked with the SAB and other EPA advisory committees, as well as OGE, to develop an alternative confidential financial disclosure

form to be filed by SGE advisory committee members in lieu of the OGE Form 450. This form, the EPA Form 3110-48, is much more detailed than the OGE Form 450 and requires the disclosure of all information necessary for EPA ethics officials to make determinations regarding possible conflicts of interest. According to the ADAEO, this has proven extremely helpful in ensuring that conflict issues are identified early in the process and resolved before the committee meets.

To evaluate this new system, we examined its administration at two EPA advisory committees, the SAB and the Scientific Advisory Panel (SAP). This review included discussions with officials from both committees and an examination of a sample of the alternative confidential reports filed by committee members.

SAB Results

According to SAB officials, the use of the EPA Form 3110-48 has resulted in the collection of more detailed, timely, and relevant information from current and potential members. This information has enabled the SAB Staff Office to make more informed decisions when considering individuals to engage in a new advisory activity.⁴

While the SAB Staff Office appears to be generally satisfied with its experience with the Form 3110-48, the form has presented some new challenges. The use of the form has increased the paperwork burden on the SAB and the Staff Office. Additionally, the form has increased the amount of review work required of the SAB Staff Office because of the need to collect and review multiple submissions and updates of the form from the same person. To alleviate some of this burden, the SAB Staff Office is considering, among other things, the development of an electronically filable version of the Form 3110-48 and a "short form" containing only Sections 1 and 9 that could be used by filers if there are not reportable changes from their previously filed Form 3110-48.

We examined Forms 3110-48 and updates filed in 2002 and 2003 by 56 of the approximately 100 SAB members. Based on our examination of the forms and associated updates, we conclude that they were filed, reviewed, and certified in compliance with the procedures developed by SAB and approved by OGE.

⁴ A new advisory activity is defined as a new panel or change in a panel's charge or review such that there exists a high probability of issues concerning conflicts of interest (as defined under 18 U.S.C. § 208) or an appearance of lack of impartiality (as defined under 5 C.F.R. § 2635.502) that were not considered under the initial ethics review of potential panelists. An update to a previously filed Form 3110-48 is required every time an SGE is to engage in a new advisory activity.

SAP Results

The SAP also requires the filing of the EPA Form 3110-48, from both full-time and ad hoc (consultant) SGE members. As with the SAB, SAP administrative officials found the Form 3110-48 to elicit more relevant and useful information than the OGE Form 450. The SAP officials added that the form has been extremely helpful not only in identifying actual conflicts for potential members, but also in identifying potential appearances of conflict, about which the panel is extremely sensitive.

We examined all of the Forms 3110-48 and associated updates filed in 2003 by the 7 full-time SAP members and a sample of 20 forms and updates filed in 2002 and 2003 by ad hoc members. As with the SAB, we found the forms and updates to be filed, reviewed, and certified in compliance with the procedures developed by SAB and approved by OGE.

BEST PRACTICES

During our review we were impressed with the ethics office's efforts to not only meet the applicable requirements, but to exceed mere compliance with the ethics laws and regulations. Notably, the ethics office has computerized many portions of its ethics program. This use of technology facilitates a more efficient use of ethics officials' time and resources. It also ensures uniform procedures for certain portions of the program EPA-wide, which is a critical element in effectively administering a geographically dispersed and decentralized program. To ensure the consistent management of the ethics program throughout EPA, the ethics office also conducts routine meetings with headquarters and regional DEOs to keep them continuously informed of ethics issues and requirements. Finally, EPA has formalized many of its ethics-related processes in the form of written directives and policy handbooks, further ensuring that the program is administered uniformly throughout the agency. We commend EPA for initiating and implementing the following practices for the overall good of the program.

Ethics "Knowledge Base"

The practice of the ethics office, and its expectations for DEOs, is that advice is rendered in writing whenever possible, primarily through the use of e-mail. The e-mail advice is recorded and saved in EPA's computerized ethics "knowledge base" which is accessible to all members of the ethics office. The knowledge base is divided into sections by subject matter, and the advice is organized by date. This collection of advice serves as an invaluable resource for ethics officials when responding to ethics-related questions and helps to ensure that consistent advice is provided.

Ethics Web Site

EPA uses its intranet ethics Web site to keep its ethics program visible and to communicate with employees EPA-wide. The ethics office, in collaboration with the OGC law librarian, recently launched a new version of the site, which was originally developed in the late

1990s. This site serves as a one-stop resource for ethics guidance memoranda, answers to frequently asked questions, and access to financial disclosure forms and computer-based training courses. The site also includes a monthly ethics newsletter.

Training Tracking System

EPA has developed a computerized ethics training database to track employee completion of its on-line training modules. The database contains the names of all employees who have completed one of the training modules, as well as the time and date on which they completed it. When employees submit the on-line training certification upon completing one of the training modules, the database is automatically updated. This tracking system enables the ethics office and DEOs EPA-wide to monitor the completion of the training requirement in real time.

Computerized System For Accepting Gifts Of Travel From Non-Federal Sources Under 31 U.S.C. § 1353

Given the large number of scientists in its employ, EPA receives frequent requests from non-Federal sources offering to pay for travel and related expenses for scientists' attendance at meetings and similar functions under 31 U.S.C. § 1353. To streamline the approval process for these types of offers, the ethics office uses a computerized system for approving the acceptance of payments from non-Federal sources for travel by EPA employees.

A computerized form, EPA Form 2610-3, is accessible to all employees through the EPA intranet, and, upon completion, it is automatically forwarded to the ethics office for approval. In all cases, the travel is approved either by the ADAEO or the OGC DEO, usually within 24 hours. The results of these approvals are then placed in a database which permits easy compilation of the semiannual reports required to be sent to OGE.

The ethics office is hopeful that within the next several months, all of the forms will be initially reviewed by the appropriate DEO, who is most familiar with the traveling employee's duties and thus best able to identify potential conflicts with the source, before the form is submitted to the ethics office for final approval.

On-line Process For Widely Attended Gatherings

The ethics office is working with EPA information technology personnel to create an on-line process to consider requests by EPA employees to attend events using the widely attended gatherings (WAG) exception to the gift acceptance prohibitions at subpart B of 5 C.F.R. part 2635. A form is being developed, similar to the EPA online travel request form, on which employees will answer questions such as whether there is a gift of free attendance, whether other gifts are offered, such as travel expenses, lodging, or entertainment collateral to the event or

meals, and whether it is a widely attended gathering of mutual interest to a number of parties. Once the form is completed by the employee and submitted, it will automatically go to the appropriate DEO for review and determination of agency interest. Once a decision is made by the DEO, the employee will be informed electronically.

Efforts To Ensure Consistent Program Management

To foster consistent lines of communication and consistent management of EPA's ethics program, a small headquarters ethics group was formed in September 2002, consisting of experienced ethics officials from each of EPA's 14 program offices, including the Office of Inspector General. This group meets monthly to discuss ethics issues that have arisen in the various offices and to receive updates from the ethics office.

In addition, monthly conference calls with the regional DEOs have also been initiated. These calls, which typically last about one hour, provide an opportunity for the ethics office to explain and discuss new developments and issues of importance to the regions. The agendas used for the regional conference calls are similar to those used for the headquarters ethics group meetings.

Finally, the ethics office organizes and manages an EPA-wide ethics conference for ethics officials which is held every two years. More than 150 ethics officials from both headquarters and the regions attend these conferences.

Office of Cooperative Environmental Research

During our review, we met with representatives from EPA's Office of Cooperative Environmental Research (OCEM). This office, in addition to managing four of EPA's advisory committees, provides policy, coordination, oversight, advice, and technical assistance for the EPA-wide committee management program.

At the time of our review, OCEM had just completed a usable draft version of the Federal Advisory Committee Handbook and the Membership Package Submission Instruction Guide. The purpose of these materials is to provide general guidance and to serve as a source of reference for Designated Federal Officers (DFO) EPA-wide.

The responsibilities of a DFO include, among other things, approving committee meetings in advance, approving meeting agendas, recommending which meetings should be closed to the public, and ensuring that detailed minutes are kept for each committee meeting. The Federal Advisory Committee Handbook provides detailed explanations and examples to assist the DFOs with these responsibilities.

Additionally, DFOs are responsible for preparing the official submission folder (membership package) necessary to appoint members to EPA's advisory committees. OCEM officials stated that several DFOs had voiced a need for a standardized submission process. The Membership Package Submission Instruction Guide was developed specifically for this purpose. The guide was designed not only for current DFOs, but also with new DFOs in mind, thus being purposely very detailed. In addition to standardizing the submission process, the guide contains template letters and memoranda, as well as samples of various forms used by DFOs.

We commend the OCEM officials for their proactive approach to providing DFOs standardized guidance for carrying out their committee management responsibilities and helping to ensure the management of the committees is consistently administered.

In closing, I would like to thank you for your efforts on behalf of EPA's ethics program. A brief follow-up review is typically scheduled within six months from the date of this report. However, as this report contains no formal recommendations to improve the program, no such follow-up will be necessary. A copy of this report is being forwarded to EPA's Inspector General via transmittal letter. Please contact Dale Christopher at 202-482-9224 if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs