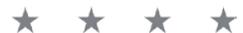




# Ethics Program Review

U.S. Department of Defense  
Office of the Secretary

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The United States Office of Government Ethics (OGE) conducted a review of the ethics program of the Department of Defense (DoD) Office of the Secretary (OSD). OGE conducted the review from February through June 2019. The following summarizes the results of the review.

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## Objectives, Scope and Methodology

**Objectives:** OGE provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive agency ethics programs.<sup>1</sup> OGE uses this evaluation authority largely to conduct reviews of agency ethics programs. The purpose of a review is to identify and report on the strengths and weaknesses of an ethics program by evaluating (1) agency compliance with ethics requirements as set forth in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures for administering the program.

**Scope:** OGE examined all elements of the OSD ethics program administered by OSD’s Standards of Conduct Office (SOCO). These elements include: program administration, financial disclosure, education and training, ethics counseling, agency-specific ethics rules on outside employment, conflict remedies, enforcement, and special government employees. OGE also examined the oversight and guidance SOCO provides for DoD’s ethics program department-wide.

**Methodology:** OGE examined a variety of documents provided by SOCO ethics officials, including DoD’s response to OGE’s Annual Agency Ethics Program Questionnaire for 2018, written procedures for administering the ethics program, samples of public and confidential financial disclosure reports filed in 2018, ethics training materials, and a sample of the ethics counseling provided to employees. In addition, OGE met with agency ethics officials to clarify the information gathered, follow up on issues identified during the review, and discuss ethics program operations in further detail.

<sup>1</sup> See 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.

## **Agency Background**

DoD employs over 2 million service members and over 700,000 civilian personnel in over 160 countries. The Secretary of Defense, a presidentially appointed, Senate-confirmed (PAS) official, is the principal defense policy advisor to the President and exercises authority, direction, and control over DoD.

OSD is the principal staff element of the Secretary of Defense for policy development, planning, resource management, fiscal activities, and program evaluation. It includes the immediate offices of the Secretary and Deputy Secretary of Defense, Under Secretaries of Defense, Director of Defense Research and Engineering, Assistant Secretaries of Defense, General Counsel, Director of Operational Test and Evaluation, Assistants to the Secretary of Defense, Director of Administration and Management, and such other staff offices as the Secretary establishes to assist in carrying out assigned responsibilities.

## **Program Administration**

The DoD ethics program is largely decentralized. Some of the major subordinate components, such as the Defense Logistics Agency, have their own Designated Agency Ethics Official (DAEO) and Alternate DAEO (Alternate DAEO), while others do not. The organizations with their own DAEOs and ADAEOs are designated as “DAEO components.”

At OSD, which was the primary focus of OGE’s review, the DoD General Counsel, a PAS official, serves as the DAEO. The General Counsel also serves as DAEO for subordinate DoD components that do not have their own DAEOs. The Director of SOCO, a member of the Senior Executive Service, serves as the Alternate DAEO (ADAEO) for OSD and the subordinate components without DAEOs.

### **Standards of Conduct Office**

SOCO provides direct ethics services, such as administering the financial disclosure and ethics training programs, for OSD, as well as for other non-DAEO components. SOCO consists of the Director, five senior attorneys, two paralegals, an administrative support employee, and various interns and detailees.

In addition to providing direct services to OSD and the non-DAEO components, SOCO provides general ethics program leadership throughout the department, including developing overall policy guidance for DAEO components. As part of its leadership role, SOCO also chairs the Committee on Standards of Conduct. This committee is composed of senior ethics officials from across DoD and meets to coordinate ethics policy, training, and the implementation of regulations department-wide.

### **Senior Leadership Support**

OGE also found examples of senior leadership taking an active role in supporting the ethics program and engaging DoD employees in ethics related issues. This included conducting and facilitating ethics related training events and periodic DoD-wide

communication by the Secretary of Defense and other senior leadership to send a clear message reminding DoD personnel of their obligations and responsibilities. Messages discussed the importance of maintaining an ethical mindset and targeted specific topics such as engaging with industry in an ethical manner.

### Model Practice

OGE identifies model practices and shares them when it appears they may benefit other executive branch agency ethics programs. OGE considers the following to be a model practice implemented at OSD.

- DoD's senior leadership actively supports OSD's ethics program to help raise employee awareness of ethics related responsibilities.

## Financial Disclosure

Title I of the Ethics in Government Act requires that agencies administer public and confidential financial disclosure systems. Financial disclosure serves to prevent, identify, and resolve conflicts of interest by providing for a systematic review of the financial interests of officers and employees. The financial disclosure process also offers an opportunity for ethics officials to provide ethics-related counseling to report filers.

### Financial Disclosure Written Procedures

Each executive branch agency must establish written procedures for collecting, reviewing, evaluating, and where applicable, making available to the public financial disclosure reports filed by the agency's officers and employees.<sup>2</sup> OGE examined OSD's written procedures and determined that they meet applicable requirements.

### Notices to DAEO

The lead human resources official is required to notify the DAEO of all appointments to positions that require incumbents to file public or confidential financial disclosure reports no later than 15 days after the appointment. The lead human resources official must also notify the DAEO of terminations of employees in positions that require incumbents to file public financial disclosure reports no later than 15 days after termination.<sup>3</sup> This helps to ensure the timely collection of financial disclosure reports.

Based on its evaluation of OSD's notification procedures and its evaluation of a sample of notices, OGE determined there is reasonable assurance that human resources promptly notifies SOCO of appointments to and terminations from OSD positions that require incumbents to file financial disclosure reports.

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<sup>2</sup> See 5 U.S.C. app. § 402(d)(1).

<sup>3</sup> See 5 C.F.R. § 2638.105(a)(1) and (2).

## Public Financial Disclosure

Within 30 days of assuming a covered public filing position, an individual must file a public financial disclosure report.<sup>4</sup> The individual must subsequently file an annual report by May 15 each year and a termination report within 30 days of departing the public filing position.<sup>5</sup> The reports are required to be reviewed for potential conflicts of interest and certified within 60 days of receipt by the ethics office, unless additional information is being sought from the filer or remedial action is being taken.<sup>6</sup>

To evaluate the administration of OSD’s public financial disclosure system, OGE examined a sample of 40 new entrant, 40 annual, and 40 termination public reports that were required to be filed in 2018. Table 1 below presents the results of OGE’s examination.

**Table 1. OGE’s Examination of OSD Public Financial Disclosure Reports**

	New Entrant	Annual	Termination	Total
<b>Reports Examined</b>	40	40	40	120
<b>Filed Timely</b>	35 (88%)	39 (98%)	37 (93%)	111 (93%)
<b>Reviewed Timely</b>	39 (98%)	39 (98%)	39 (98%)	117 (98%)
<b>Certified Within 60 Days</b>	35 (88%)	35 (88%)	34 (85%)	104 (87%)

OGE’s examination of the sampled reports indicated that the vast majority were filed, reviewed, and certified timely. Moreover, OGE did not identify any deficiencies regarding SOCO’s substantive review of the reports for potential conflicts of interest.

## Confidential Financial Disclosure

Within 30 days of assuming a covered confidential filing position, an individual must file a confidential financial disclosure report.<sup>7</sup> The individual must also subsequently file an annual report by February 15 each year.<sup>8</sup> The reports are required to be reviewed for potential conflicts of interest and certified within 60 days of receipt by the ethics office, unless additional information is being sought from the filer or remedial action is being taken.<sup>9</sup>

To evaluate the administration of OSD’s confidential financial disclosure system, OGE examined a sample of 30 new entrant and 30 annual confidential reports that were required to be filed in 2018. Table 2 below presents the results of OGE’s examination.

<sup>4</sup> See 5 C.F.R. § 2634.201(b).

<sup>5</sup> See 5 C.F.R. § 2634.201(a) and (e).

<sup>6</sup> See 5 C.F.R. § 2634.605.

<sup>7</sup> See 5 C.F.R. § 2634.903(b).

<sup>8</sup> See 5 C.F.R. § 2634.903(a).

<sup>9</sup> See 5 C.F.R. § 2634.605.

**Table 2. OGE’s Examination of OSD Confidential Financial Disclosure Reports**

	New Entrant		Annual		Total	
<b>Reports Examined</b>	30		30		60	
<b>Filed Timely</b>	29	(97%)	30	(100%)	59	(98%)
<b>Reviewed Timely</b>	30	(100%)	30	(100%)	60	(100%)
<b>Certified Within 60 Days</b>	25	(83%)	30	(100%)	55	(92%)

OGE’s examination of the sampled reports indicated that almost all were filed, reviewed, and certified timely. Moreover, OGE did not identify any deficiencies regarding SOCO’s substantive review of the reports for potential financial conflicts.

### **Education and Training**

Each executive branch agency must carry out a government ethics education program to teach employees how to identify government ethics issues and obtain assistance in complying with government ethics laws and regulations. The training program is to include: briefings for certain PAS employees; notices for prospective employees and newly appointed supervisors regarding their ethics-related obligations; initial ethics training for new employees; and annual ethics training for public and confidential financial disclosure report filers and certain other employees.<sup>10</sup> An ethics education program is essential to raising awareness among employees about the ethics laws and rules that apply to them and the availability of agency ethics officials to provide ethics counseling.

#### **Ethics Briefing for Certain Agency Leaders**

PAS officials, except for those in positions identified in 5 C.F.R. § 2634.201(c)(2), must complete an ethics briefing to discuss their immediate ethics obligations no later than 15 days after their appointment, unless the DAEO grants an extension. Any extension of more than 15 days requires the DAEO to make a written determination that extraordinary circumstances make it necessary to provide the briefing at a later date.<sup>11</sup>

Nine new OSD PAS officials were confirmed during the period covered by the review, and OGE confirmed that all nine received the ethics briefing as required.

#### **Notices to Prospective Employees**

Written offers of employment for positions covered by the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) must include: a statement regarding the agency’s commitment to government ethics; notice that the individual will be subject to the Standards of Conduct and the criminal conflict of interest statutes; information on how to obtain additional information on applicable ethics requirements; and, where applicable,

<sup>10</sup> See 5 C.F.R. Part 2638 Subpart C.

<sup>11</sup> See 5 C.F.R. § 2638.305.

notice of the time frame for completing initial ethics training and information regarding the filing of new entrant financial disclosure reports.<sup>12</sup>

Based on a review of the procedures established by SOCO to provide notices to prospective employees and a review of a sample of notices that were sent in 2018, OGE determined that there was reasonable assurance that prospective OSD employees received the required information along with their written offers of employment during the period under review.

### **Notices to New Supervisors**

An agency must provide each employee upon initial appointment to a supervisory position with certain written materials within one year of the appointment. The written materials must include: contact information for the agency's ethics office and the text of the regulation specifying the government ethics responsibilities of supervisors<sup>13</sup>; a copy of, a hyperlink to, or the address of a web site containing the Principles of Ethical Conduct; and such other information as the DAEO deems necessary for new supervisors.<sup>14</sup>

Based on a review of the procedures established by SOCO to provide notices to new OSD supervisors and a review of a sample of notices that were sent in 2018, OGE determined that there was reasonable assurance that new supervisors received the required information during the period under review.

### **Initial Ethics Training**

Each new employee of the agency subject to the Standards of Conduct must complete initial ethics training (IET) that meets the requirements of 5 C.F.R. § 2638.304 within three months of appointment, unless excluded by the DAEO. The training must be interactive and focus on government ethics laws and regulations that the DAEO deems appropriate. The training must address financial conflicts of interest, impartiality, misuse of position, and gifts. In addition to the training presentation, the agency must provide the employee with either written copies of or written instructions for accessing: the summary of the Standards of Conduct distributed by OGE or an equivalent summary prepared by the agency; provisions of the agency's supplemental regulations or a summary thereof, as determined appropriate by the DAEO; and, instructions for contacting the agency's ethics office.<sup>15</sup> Agencies must also establish written procedures for IET that the DAEO annually reviews.

According to the written standard operating procedures provided to OGE by SOCO, new OSD PAS officials receive training during the first week following their appointment, unless they received the training immediately prior to appointment. New non-PAS political appointees are required to attend live ethics training within three months of their appointment. All other new employees are trained through an online interactive training system. This system is automatically

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<sup>12</sup> See 5 C.F.R. § 2638.303.

<sup>13</sup> See 5 C.F.R. § 2638.103.

<sup>14</sup> See 5 C.F.R. § 2638.306.

<sup>15</sup> See 5 C.F.R. § 2638.304.

updated with new employee information, enabling it to independently notify new hires of the training requirement. SOCO tracks the completion of all IET, whether live or interactive.

OGE reviewed the IET material provided to new OSD employees in 2018 and determined that it met applicable content and format requirements. OGE also determined that all 723 new OSD employees received IET in 2018 and 690 (95%) of these employees received the training within three-months of appointment. Finally, OGE determined that OSD has established written procedures for IET, which the DAEO reviews annually, as required.

#### Model Practice

- SOCO conducts monthly and annual audits of its online interactive training system to ensure that the system is accurately identifying new employees and assigning the required new entrant training.

#### **Annual Ethics Training for Public Filers**

Generally, live training must be provided each calendar year to each employee whose pay is set at Level I or Level II of the Executive Schedule. Live training must also be provided to other employees who are required to file public financial disclosure reports pursuant to 5 C.F.R. § 2634.201(a) every other year, with interactive training provided in the intervening years. The training presentation, whether live or interactive, must focus on government ethics laws and regulations that the DAEO deems appropriate. The training, whether live or interactive, must address financial conflicts of interest, impartiality, misuse of position, and gifts. In addition to the training presentation, the agency must provide the employee with either written copies of or written instructions for accessing: the summary of the Standards of Conduct distributed by OGE or an equivalent summary prepared by the agency; provisions of the agency's supplemental regulations or a summary thereof, as determined appropriate by the DAEO; and, instructions for contacting the agency's ethics office.<sup>16</sup>

OGE reviewed the annual training provided to OSD public filers in 2018 and determined that it met applicable content and format requirements. OGE also examined training records and determined that SOCO provided annual ethics training to all OSD public filers in 2018. All PAS public filers and the vast majority of non-PAS public filers received live training; the remaining non-PAS public filers received interactive training.

#### **Annual Ethics Training for Confidential Filers and Certain other Employees**

Generally, interactive training is required to be provided each calendar year to employees who are required to file a confidential financial disclosure report pursuant to 5 C.F.R. § 2634.904; employees appointed by the President and employees of the Executive Office of the President; contracting officers described in 41 U.S.C. § 2101; and, other employees designated by the head of the agency. The training presentation must focus on government ethics laws and regulations that the DAEO deems appropriate. The training must address financial conflicts of interest, impartiality, misuse of position, and gifts. In addition to the training presentation, the

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<sup>16</sup> See 5 C.F.R. § 2638.308.

agency must provide the employee with either written copies of or written instructions for accessing: the summary of the Standards of Conduct distributed by OGE or an equivalent summary prepared by the agency; provisions of the agency's supplemental regulations or a summary thereof, as determined appropriate by the DAEO; and, instructions for contacting the agency's ethics office.<sup>17</sup>

OGE reviewed the annual training provided to OSD confidential filers in 2018 and determined that it met applicable content and format requirements. OGE also examined training records and determined that all but one of OSD's confidential filers received annual ethics training in 2018.

### **Ethics Counseling**

The DAEO, acting directly or through other officials, is responsible for providing advice and counseling to prospective and current employees regarding government ethics laws and regulations, and providing former employees with advice and counseling regarding post-employment restrictions applicable to them.<sup>18</sup> A robust ethics counseling program is necessary to ensure that employees receive the guidance they need to comply with the ethics rules.

OGE reviewed a sample of the ethics-related counseling that SOCO ethics officials provided to OSD employees in 2018. The counseling addressed gifts, post-employment restrictions, conflicts of interest, and recusals. OGE found the counseling to be consistent with applicable laws and regulations.

### **Agency-Specific Ethics Rules**

An agency may modify or supplement the Standards of Conduct, with the concurrence of OGE, to meet the particular needs of that agency.<sup>19</sup> A supplemental standards of conduct regulation is issued jointly by the agency and OGE and is published in title 5 of the Code of Federal Regulations.

DoD has a supplemental regulation codified at 5 C.F.R. part 3601. This regulation, Supplemental Standards of Ethical Conduct for Employees of DoD, includes a prior written approval requirement for financial disclosure filers who want to engage in outside employment with prohibited sources.

To evaluate OSD employees' compliance with DoD's prior approval requirement, OGE reviewed the outside activities that were reported on the public and confidential financial disclosure reports that were examined during the evaluation of OSD's financial disclosure systems. These reports disclosed 13 outside employment activities, 2 of which would appear to require prior approval under DoD's supplement regulation. While one of the two outside positions received prior approval, the other one did not. OGE was informed that OSD no longer provides separate approvals for outside activities that appear on financial disclosure reports.

<sup>17</sup> See 5 C.F.R. § 2638.307.

<sup>18</sup> See 5 C.F.R. § 2638.104 (c)(4).

<sup>19</sup> See Executive Order 12674 and 5 C.F.R. § 2635.105.

According to SOCO, because DoD financial disclosure reports include supervisory reviews of subordinate financial disclosure reports, disclosed outside positions are implicitly approved during supervisory review and certification of the reports. SOCO therefore determined separate approvals to be duplicative and unnecessary. SOCO also provided OGE a draft of the proposed changes to DoD’s supplement regulation at 5 C.F.R. part 3601 that seeks to remove the requirement for financial disclosure filers to obtain separate prior approvals for outside employment and business activities.<sup>20</sup>

Despite the pending proposed change, the supplemental regulation currently in effect makes clear that outside employment with a prohibited source requires *prior* approval. Certifying a financial disclosure report that lists such an outside employment activity which has already been undertaken does not constitute prior approval to engage in the activity.

### Recommendation

1. Ensure that financial disclosure filers obtain prior approval for outside activities involving prohibited sources as required by the DoD supplemental regulation until relevant revisions of the supplemental regulation are finalized.

## **Conflict Remedies**

The primary criminal conflict of interest law prohibits an employee from participating in an official capacity in a particular matter in which he or she has a financial interest.<sup>21</sup> Congress included two provisions that permit an agency to issue a waiver of this prohibition in individual cases. Agencies must consult with OGE, where practicable, prior to issuing such a waiver.<sup>22</sup> OSD issued one waiver during the period covered by the review. OGE was consulted, as required.

Additionally, the Ethics in Government Act expressly recognizes the need for PAS nominees to address actual or apparent conflicts of interest by requiring written notice of the specific actions to be taken in order to alleviate the conflict of interest.<sup>23</sup> This written notice is commonly known as an “ethics agreement.” In 2018, OSD had 27 PAS officials. OGE received timely certifications of ethics agreement compliance from all 27 of these officials.

## **Enforcement**

Executive branch offices are required to notify OGE when they refer a potential violation of a conflict of interest law to the Department of Justice (DOJ).<sup>24</sup> OSD did not make any such referrals to DOJ in 2018. Moreover, SOCO confirmed that in 2018 OSD did not have any

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<sup>20</sup> OGE notes that the prior approval issue also arose during its previous review of OSD in 2015. At that time, SOCO officials also stated that proposed revisions to the DoD supplemental regulation would include specific changes to the prior approval requirement. However, the supplemental regulation has still not been finalized.

<sup>21</sup> See 18 U.S.C. § 208.

<sup>22</sup> See Executive Order 12674.

<sup>23</sup> See 5 U.S.C. app. § 110.

<sup>24</sup> See 5 C.F.R. § 2638.206.

disciplinary actions based wholly or in part upon violations of the criminal conflict of interest laws or the Standards of Conduct.

## Special Government Employees

A special government employee (SGE) is an officer or employee of the executive or legislative branch retained, designated, appointed, or employed to perform official duties, full-time or intermittently, for not more than 130 days in any 365-day period. SGEs are required to file financial disclosure reports and receive ethics training.<sup>25</sup>

OSD is responsible for overseeing 13 advisory committees established under the Federal Advisory Committee Act (FACA). These 13 committees employed nearly 270 SGEs during the period covered by OGE's review. SOCO administers financial disclosure and ethics training requirements for these SGEs.

OGE reviewed a sample of three committees to assess whether OSD's ethics program was in compliance with requirements relevant to SGEs. The committees selected for review were the Defense Science Board, the Defense Business Board, and the Defense Policy Board.

### Financial Disclosure

#### **Defense Science Board**

In 2018, the Defense Science Board had over 130 SGE members, many of whom served on the various subcommittees within the committee. The members filed OGE-approved alternative confidential financial disclosure reports. OGE examined a sample of 53 reports filed by members in 2018. OGE determined that all 53 reports were filed and certified timely.

#### **Defense Business Board**

In 2018, the Defense Business Board had 11 SGE members. OGE examined the confidential financial disclosure reports of all 11 members and determined that all of the reports were filed timely and 10 of the 11 reports were certified timely.

#### **Defense Policy Board**

In 2018, the Defense Policy Board also had 11 SGE members. The members are required to file OGE-approved alternative confidential financial disclosure reports. OGE requested all 11 reports for examination; however, only 5 were provided. While SOCO was unable to locate the remaining six members' reports, there were records to indicate that at least some of the reports had been filed and reviewed. According to SOCO officials, the reports may have been misplaced either because SOCO re-organized their electronic records or because the former Secretary froze the FACA appointment process for more than a year, which led to delays and gaps in collection of renewal documents, including financial disclosure reports. SOCO also stated that it is coordinating with human resources and advisory committee DFOs to make improvements to the

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<sup>25</sup>See 18 U.S.C. § 202(a).

FACA appointment and annual renewal processes. These improvements include making modifications to the hiring system and establishing uniform procedures for conducting and tracking SGE appointments, renewals, financial disclosure reports, and training.

### Ethics Training

In 2018, ethics training for SGE committee members consisted of the provision of written materials to the members during the appointment or appointment-renewal process and subsequent live training during a committee meeting. OGE determined that the training met the applicable content and format requirements.

### **Defense Science Board**

Only 42 (79%) of the 53 SGE members of the Defense Science Board whose financial disclosure reports OGE examined received the required ethics training in 2018.

### **Defense Business Board**

All SGE members of the Defense Business Board received the required ethics training in 2018.

### **Defense Policy Board**

Only 7 (64%) of the 11 SGE members of the Defense Policy Board received the required ethics training in 2018.

### Recommendations

2. Make every reasonable effort to locate, review and certify all of the missing confidential financial disclosure reports filed by Defense Policy Board members in 2018.
3. Within six months, report back to OGE on the status of the planned improvements to the FACA appointment and annual renewal processes
4. Ensure that all SGE advisory committee members receive the required ethics training.