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September 2, 2004

Thomas A Stock  
 Designated Agency Ethics Official  
 Federal Mine Safety and Health  
 Review Commission  
 Suite 9500  
 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.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> 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.

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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  
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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 Covalesski  
Deputy Director  
Office of Agency Programs

Report Number 04- 020