



# Ethics Program Review

United States Department of Commerce

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The United States Office of Government Ethics (OGE) conducted a review of the United States Department of Commerce’s (Commerce) ethics program covering calendar year 2021, and in some instances, calendar year 2022.

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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’s review examined all elements of Commerce’s ethics program including, program administration, financial disclosure, education and training, ethics advice, conflict remedies, enforcement, and ethics-related services provided to special government employees (SGEs).

**Methodology:** OGE examined a variety of documents provided by Commerce, including Commerce’s responses to OGE’s 2021 and 2022 Annual Agency Ethics Program Questionnaires (Annual Questionnaire) and FY2022 Ethics Program Review Questionnaire, written procedures for administering the ethics program, samples of public and confidential financial disclosure reports filed in 2021 and 2022, ethics training materials, examples of ethics counseling provided to employees, and materials for administering the ethics requirements to SGEs. In addition, OGE clarified with ethics officials the information gathered and followed up on issues identified during the review.

<sup>1</sup> See 5 U.S.C. § 13122 and 5 C.F.R. part 2638.

## Agency Background

Headquartered in Washington, DC, Commerce's mission is to create the conditions for economic growth and opportunity for all communities. Commerce operates under the leadership of the Secretary, a presidentially appointed, Senate-confirmed official (PAS). Commerce employs more than 47,000 people in 13 bureaus throughout the United States and maintains trade offices in more than 86 countries.

## Program Administration

When OGE last reviewed Commerce's ethics program in 2018, the program was centrally administered by the Ethics Law and Programs Division (ELPD), a division of the Office of the Assistant General Counsel for Administration and Transactions, within the Office of the General Counsel. The then Chief of ELPD served as the DAEO, while the Assistant General Counsel for Administration and Transactions was the ADAEO. Both were career members of the senior executive service. In addition to the DAEO and ADAEO, a Deputy Chief within ELPD was responsible for managing the day-to-day operation of the ethics program with support from other full-time ethics officials.

Since OGE's 2018 review, Commerce has restructured its ethics program. The Secretary designated the General Counsel, a PAS official, to serve as the Department's DAEO.<sup>2</sup> Additionally, the ethics program is now a stand-alone office within OGC and has been renamed the Ethics Law and Programs Office (ELPO). The new Chief of ELPO is a career member of the senior executive service and serves as Commerce's ADAEO.<sup>3</sup>

The ADAEO is now responsible for managing the day-to-day operations of the Department's ethics program. The ADAEO is assisted by a Deputy Chief who joined the ELPO staff in October 2022. Commerce's response to OGE's 2022 Annual Questionnaire indicated that 25 employees, including the DAEO and ADAEO, performed ethics duties in 2022. Commerce anticipates a need for even more staffing to address an increase in operational work initiatives resulting from the passage of the CHIPS and Science Act of 2022, Infrastructure Investment and Jobs Act, among other new legislative efforts.

In recognition of the unique role of Commerce's Office of the Inspector General (OIG), and per OIG's request, the former DAEO designated two attorneys within OIG's Office of Counsel to the Inspector General to serve as deputy ethics officials (DEO) in 2019. These two DEOs provide ethics-related services to all current and former Commerce OIG employees. These services include: collecting and reviewing public and confidential financial disclosure reports filed by OIG staff before they are submitted to ELPO for final review and certification,<sup>4</sup> providing ethics advice,<sup>5</sup> conducting supplemental ethics training for OIG employees on OIG-specific topics or issues when authorized by the DAEO or ADAEO, and assisting human

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<sup>2</sup> OGE received timely notification of the DAEO's designation, as required by 5 CFR 2638.107(a).

<sup>3</sup> OGE received timely notification of the ADAEO's designation as well.

<sup>4</sup> ELPO retained responsibility for the review and final certification of the public report filed by the Inspector General, a PAS official.

<sup>5</sup> OIG employees still retain the option of seeking ethics advice directly from ELPO.

resource officials in identifying OIG employees required to file confidential reports. Both DEOs are subject to the oversight of the DAEO and ADAEO and are required to provide statistics and other information to them as necessary to respond to questions or requests for information.

According to Commerce's response to OGE's Ethics Program Review Questionnaire, since 2021, ELPO has worked to strengthen Commerce's ethics program through the following new initiatives:

- Establishing a pre-appointment vetting process for all political appointees
- Updating use of Commerce's Learning Center training platform for required ethics training for over 10,000 confidential financial disclosure report filers
- Updating ethics outreach and materials and continuing efforts to facilitate and conduct specialized ethics trainings requested by various operating units throughout the Department
- Conducting supplemental ethics training for political appointees
- Improving the functionality and appearance of the ELPO website

### Model Practices

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 Commerce:

- Raising the stature of the ethics program by appointing Commerce's General Counsel to serve as DAEO and increasing the ethics program's visibility emphasizes the importance of ethics at Commerce.

## **Financial Disclosure**

Title I of the Ethics in Government Act requires that agencies administer public and confidential financial disclosure systems. Financial disclosure prevents, identifies, and resolves conflicts of interest by providing 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.

ELPO formulates policies and procedures for the overall administration of Commerce's public and confidential financial disclosure programs. ELPO is also responsible for reviewing and certifying public reports for all political appointees, as well as the public and confidential reports filed by career employees and by federal advisory committee members located throughout Commerce. In 2022, 1,090 employees were required to file public reports and 12,502 employees were required to file confidential reports.

To assess Commerce's compliance with financial disclosure program requirements, OGE assessed the required written procedures for administering both the public and confidential financial disclosure systems and examined a sample of the financial disclosure reports that were required to be filed in 2022. OGE also evaluated whether Commerce had established procedures

to ensure that the human resources office promptly notifies ethics officials of new and departing employees and whether new employees and supervisors receive notices advising them of their ethics-related obligations and responsibilities, as required.

### **Financial Disclosure Written Procedures**

Each executive branch agency must establish written procedures for collecting, reviewing, evaluating, and, where applicable, making publicly available financial disclosure reports filed by the agency's officers and employees.<sup>6</sup> OGE examined Commerce's written financial disclosure procedures and determined they met applicable requirements.

### **Notices to DAEO Regarding Positions Requiring Financial Disclosure**

Agency human resources offices play a vital role in ensuring the effective administration of the ethics program. Without the necessary information about agency employees, ethics officials cannot successfully carry out their important work. Among other things, 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>7</sup> This helps to ensure the timely collection of financial disclosure reports.

OGE's last review of Commerce's ethics program found that there was reasonable assurance that Commerce's human resources office was promptly notifying ethics officials of appointments to and terminations from positions whose incumbents were required to file public financial disclosure reports. However, OGE could not conclude the same regarding the prompt notification of appointments to positions whose incumbents were required to file confidential financial disclosure reports—specifically regarding employees who were not new to Commerce, but were assigned new duties or responsibilities that triggered the confidential filing requirement. This resulted in OGE recommending that ethics officials coordinate more closely with human resources officials and develop written procedures to assist them in meeting their ethics-related responsibilities. OGE closed both recommendations in May 2020 based on initial coordination efforts made by the former DAEO (and ELPD then staff) and the establishment of required written procedures. Despite closing the recommendation, OGE recognized that greater coordination between both offices would be a long-term effort requiring a continual reevaluation of processes and procedures from both offices to ensure they worked as intended.

During the current review, to help assess whether coordination efforts were improving, OGE examined Commerce's response to the Annual Questionnaire regarding how often human resource officials notified ethics officials of new appointments and terminations in 2021 and 2022 and examined a sampling of public and confidential reports.

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<sup>6</sup> See 5 U.S.C. § 13122(d)(1).

<sup>7</sup> See 5 C.F.R. § 2638.105(a)(1) and (2).

Commerce's response to the Annual Questionnaire in 2021 indicated that in most cases, human resource officials were notifying ELPO of appointments to public and confidential filing positions. However, it was only in some cases that human resource officials notified ethics officials of terminating public filers. Ethics officials cited the reorganization within the human resources office and personnel, and the need to re-socialize human resources officials about their ethics program responsibilities as the primary reason for any failure to provide the required notification. Ethics officials also indicated they were seeking to improve communication between human resource officials and their office.

OGE also examined Commerce's response to the 2022 Annual Questionnaire which showed some signs of improvement. Commerce indicated that in most cases human resource officials were now notifying ethics officials of terminating public filers.

During its current review, OGE was advised that in August 2022, ELPO provided a memorandum to Commerce's Chief Human Capital Officer (CHCO) as an initial step to bolster coordination and to re-familiarize the human resource policy leads with OGE's regulatory program requirements. OGE was also advised that ELPO briefed the Principal Human Resource Management offices for each bureau and office within the department on these requirements and asked human resource officials to send a preliminary message to all bureaus and offices to remind them of the requirements by sharing the CHCO memorandum and the confidential financial disclosure job aid customized for Commerce.

OGE also learned that a draft human resources policy document is currently in coordination. Once issued, this will formalize the requirements and provide institutionalized documentation. Additionally, ELPO has had each bureau/office chief of staff or equivalent managing executive designate an ethics program liaison. While ELPO already had these informal contacts, this more official designation will provide more accountability and transparency for the leadership of each office/bureau. OGE was advised that ELPO has already begun to use these contacts to improve coordination and compliance.

### Recommendation

1. Continue coordination efforts with Commerce human resource officials and finalize the human resources policy document to help ensure all OGE regulatory ethics program related requirements are met.

### **Public Financial Disclosure**

Within 30 days of assuming a covered public filing position, an individual must file a public financial disclosure report.<sup>8</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>9</sup> The reports are required to be reviewed for potential conflicts of interest and certified

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<sup>8</sup> See 5 C.F.R. § 2634.201(b).

<sup>9</sup> See 5 C.F.R. § 2634.201(a) and (e).

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>10</sup>

### OGE's Examination of Public Reports

OGE examined a sample of 116 public financial disclosure reports required to be filed in 2022. Of these 116 public reports, 40 were new entrant, 40 were annual, and 36 were termination reports.<sup>11</sup> OGE examined these reports to determine whether they had been collected, reviewed and certified as required. Table 1 below presents the results of OGE's examination.

**Table 1. Examination of Commerce's Public Financial Disclosure Reports (2022)**

	New Entrant		Annual		Termination		Total
<b>Reports Examined</b>	40		40		36		116
<b>Filed Timely</b>	36	(90%)	40	(100%)	33	(92%)	109 (94%)
<b>Certified Within 60 days</b>	32	(80%)	29	(73%)	34	(94%)	95 (82%)

As noted in Table 1, of the 116 public reports OGE examined, 94% were filed timely, and 82% were certified within 60 days of receipt. For 11 (28%) of the 40 annual reports examined, certification after 60 days of receipt ranged from 63 days to 131 days. According to ethics officials, certification after 60 days occurred in some cases due to ethics officials needing additional information from the filer before a final review and certification could occur.

As noted in the **Notices to DAEO section**, OGE found that there is reasonable assurance that ELPO was notified in a timely manner of appointments to or departures from positions requiring public financial disclosure.

### **Confidential Financial Disclosure**

Within 30 days of assuming a covered confidential filing position, an individual must file a confidential financial disclosure report.<sup>12</sup> The individual must also subsequently file an annual report by February 15 each year.<sup>13</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>14</sup>

<sup>10</sup> See 5 C.F.R. § 2634.605.

<sup>11</sup> ELPO uses OGE's Integrity system, a web-based electronic report filing system, to administer the department's public financial disclosure filing system.

<sup>12</sup> See 5 C.F.R. § 2634.903(b).

<sup>13</sup> See 5 C.F.R. § 2634.903(a).

<sup>14</sup> See 5 C.F.R. § 2634.605.

## OGE's Examination of Confidential Reports

OGE examined a sample of 80 confidential financial disclosure reports filed in 2022 to determine whether they had been collected, reviewed, and certified as required. Of these 80 reports, 40 were new entrant reports, and 40 were annual reports.<sup>15</sup> Table 2 below presents the results of OGE's examination.

**Table 2. Examination of Commerce's Confidential Financial Disclosure Reports (2022)**

	New Entrant		Annual		Total	
<b>Reports Examined</b>	40		40		80	
<b>Filed Timely</b>	35	(88%)	40	(100%)	75	(94%)
<b>Certified Timely</b>	35	(88%)	37	(93%)	72	(90%)

As indicated in Table 2 above, 94% of all sampled confidential reports were filed timely, while 90% were certified within 60 days of receipt.

Of particular note, OGE found that 88% of the new entrant reports examined were filed timely. OGE's last review of Commerce's ethics program found that only 68% of the new entrant confidential reports examined were filed timely. OGE acknowledges the significant progress that has been made and encourages Commerce to continue efforts to ensure all reports are filed timely.

## **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>16</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**

Senate-confirmed Presidential appointees (PAS), 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.

<sup>15</sup> ELPO uses the Department of the Army's Financial Disclosure Management (FDM) system, a web-based electronic report filing system, to administer the department's confidential financial disclosure program.

<sup>16</sup> See 5 C.F.R. Part 2638 subpart C.



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>17</sup>

According to Commerce ethics officials, new PAS officials receive their ethics briefing from either the DAEO or ADAEO and the ethics attorney assigned to support that PAS official for ethics purposes. OGE was advised that these briefings include a discussion of the PAS official's ethical obligations and post-appointment items needed for compliance with their ethics agreement. Initial ethics training is simultaneously provided with this ethics briefing. Also addressed at that time are any issues of particular interest the PAS official may have. In addition to the ethics briefing and initial ethics training, all new PAS officials are provided with written material to keep.

OGE determined that all seven new PAS appointees confirmed in 2021 received the required ethics briefing within 15 days of their respective appointments.

### **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, notice of the time frame for completing initial ethics training and information regarding the filing of new entrant financial disclosure reports.<sup>18</sup> Agencies must also establish written procedures for issuing notices to prospective employees, which the DAEO annually reviews.

OGE examined samples of notices sent to prospective employees in 2022 and determined that all relevant content requirements were met.

#### Written Procedures

OGE's last review found that Commerce had not established written procedures for issuing notices to prospective employees or new supervisors. Therefore, OGE recommended that Commerce establish those procedures, as required. OGE closed both recommendations in May 2020, based on the examination of guidance the former DAEO provided to human resource officials for issuing notices to prospective employees.

OGE was advised during the current review that despite several attempts made by the former DAEO to seek implementation of formal written procedures by human resource officials, this was not done by the time the former DAEO retired in June 2021. Absent established written procedures, annual reminders were prepared and transmitted to human resource officials to ensure required notices were issued as required.

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<sup>17</sup> See 5 C.F.R. § 2638.305.

<sup>18</sup> See 5 C.F.R. § 2638.303.

Written procedures are critical for continuity. In the absence of an agency's experienced ethics officials, comprehensive written procedures allow for the continued administration of the ethics program. The annual review of an agency's written procedures prompts ethics officials to consider whether organizational changes, guidance from OGE, experience, or other factors indicate changes are necessary or would increase efficiency.

#### Recommendation

2. Establish written procedures for issuing notices to prospective employees, as required by 5 C.F.R. § 2638.303.

### **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 5 CFR § 2638.103; a copy of, a hyperlink to, or the address of a website containing the Principles of Ethical Conduct; and such other information as the DAEO deems necessary for new supervisors. Agencies must also establish written procedures for issuing notices to new supervisors that the DAEO annually reviews.

The prospective employees who received the new employee notices discussed above were all appointed to supervisory positions. OGE determined that the notices provided to prospective employees also met content requirements for notices to new supervisors.

#### Recommendation

3. Establish written procedures for issuing notices to new supervisors, as required by 5 C.F.R. § 2638.306.

### **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 concepts related to: 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>19</sup> Agencies must also establish written procedures for IET that the DAEO annually reviews.

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<sup>19</sup> See 5 C.F.R. § 2638.304.

At the time of OGE's fieldwork, ELPO indicated that they were in the process of updating policies and procedures to include more detailed written procedures for providing initial ethics training.

#### Recommendation

4. Establish written procedures for initial ethics training, as required by 5 C.F.R. § 2638.304.

#### Initial Ethics Training for New Political Appointees

ELPO is responsible for ensuring that all political appointees at Commerce satisfy the IET requirement. The DAEO or ADAEO provides the required IET to all new PAS officials, with the ethics attorney who provides primary support to that PAS official. A senior ELPO attorney provides the IET to all non-career SES and Schedule C appointees. In addition to live verbal briefings, these senior-level officials are provided written ethics material to keep. After reviewing the material, OGE determined that the briefings and the ethics reference material provided to new political appointees met applicable content and format requirements. Based on training records provided to OGE, all 106 new political appointees received the required IET in 2021.

#### Initial Ethics Training for New Career Employees

In 2021, Commerce had 1,924 new employees who were required to receive IET. Of these, 1,920 (99%) received IET within three months of starting at Commerce. The four remaining employees eventually received IET, although more than three months of starting at Commerce.

#### **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 government ethics law and regulations, such as concepts related to: 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>20</sup>

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<sup>20</sup> See 5 C.F.R. § 2638.308.

According to Commerce ethics officials, in 2021, virtual lectures were provided to public filers throughout the department to satisfy the annual training requirement. Written materials were also provided to public filers to keep. OGE examined the PowerPoint presentation and the materials provided during the virtual lectures and found that they met applicable training content trainings. According to Commerce's response to OGE's 2021 Annual Questionnaire, and OGE's examination of Commerce's training database, 99% of public filers had received annual training by the end of 2021.

### **Annual Ethics Training for Confidential Filers**

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 USC § 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 concepts related to: 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>21</sup>

In 2021, ELPO made a computer-based ethics training presentation available to all confidential filers via Commerce's Learning Center Portal to satisfy the annual training requirement for confidential filers.<sup>22</sup> OGE examined the training materials and determined that the training met applicable content requirements.

According to Commerce's response to OGE's Annual Questionnaire, 10,545 confidential filers were required to receive annual ethics training in 2021. Of these confidential filers, Commerce reported that 10,249 (97%) received the training by the end of 2021.

### **Additional Ethics Outreach Efforts**

Consistent with OGE's findings during its last review, in addition to conducting the requisite initial and annual ethics training for both public and confidential filers, ELPO makes efforts to keep Commerce employees aware of ethics-related issues and requirements throughout the year. OGE highlights two examples below identified during the current review:

- ELPO conducts ethics training tailored for specific audiences throughout the department. For example, ELPO provided tailored training to new commercial service officers,

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<sup>21</sup> See 5 C.F.R. § 2638.307.

<sup>22</sup> Managed by Commerce's Office of Training and Knowledge Management, the Commerce Learning Center is an enterprise-wide system used to manage professional development, plan training and provide access to online learning and learning resources. The system also tracks course registrations and views training history, certifications, and curricula.

interns, and export control officers in 2022, and to procurement officials and property managers/custodians in 2021.

- ELPO provided refresher training to ethics officials responsible for reviewing public and confidential financial disclosure reports in 2022. The training presentations OGE examined addressed the basic reporting requirements for both public and confidential financial disclosure reports, common reviewer mistakes, and reviewer tips and resources.

#### Model Practice

- Providing tailored ethics training to specific groups of employees throughout the year mitigates ethics-related risks.

### **Advice and 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>23</sup> A robust ethics counseling program is necessary to ensure that employees receive the guidance they need to comply with the ethics rules.

ELPO provides ethics counseling to all Commerce employees, including PAS officials. According to the ADAEO, a primary ethics official and a backup are assigned to provide advice and counseling to PAS officials to ensure an ethics official is always available to promptly respond when Commerce's most senior employees require guidance in avoiding conflicts of interest. Written counseling files are located on a searchable database to which all ethics officials within ELPO have access.

To evaluate ELPO's advice and counseling program, OGE examined 72 examples of written advice provided by Commerce ethics officials in 2021. The advice OGE examined covered varying ethics topics, including gifts, financial conflicts, outside activities, and widely attended gatherings. OGE found the advice provided to be consistent with applicable statutes and regulations and determined that it was provided timely to requesting employees.

#### Model Practice

- Making advice and counseling records available to all ethics officials helps ensure consistency and transparency.

### **Conflict Remedies**

The primary criminal conflict of interest law prohibits an employee from participating in an official capacity in a particular matter in which they have a financial interest. Congress

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<sup>23</sup> See 5 C.F.R. § 2638.104 (c)(4).

included two provisions that permit an agency to issue a waiver of this prohibition in individual cases. Agencies must consult with OGE, where practicable, before issuing such a waiver. Commerce granted three 18 U.S.C. § 208 waivers in 2021 and consulted OGE before issuing the waiver on each occasion.

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. This written notice is commonly known as an “ethics agreement.” Nine Commerce PAS officials confirmed in 2021 had ethics agreements. Eight of the nine provided timely notification to OGE that they had complied with all terms of their respective ethics agreements.

For the one PAS official who did not comply with all terms of his ethics agreement timely, ethics officials advised OGE that it was because the filer could not divest or forfeit his restricted shares in the asset within the 120-day divestiture deadline. The company could only distribute the balance of the filer's restricted shares after the divestiture deadline and the filer could not forfeit the restricted shares until the company distributed them to him. OGE eventually received notification from ethics officials that the official complied with all terms of his ethics agreement, including forfeiting the restricted shares.

## **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 (Justice). The Commerce OIG is responsible for referring potential violations of the criminal conflict of interest laws to Justice and concurrently notifying OGE of the referral.

In 2021, Commerce’s OIG concurrently notified OGE of two referrals made to Justice – one in May and the other in December - regarding potential violations of the criminal conflict of interest laws. Commerce OIG subsequently notified OGE that Justice declined to prosecute the December referral. OGE is currently following up on the status of the May referral.

## **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.

According to Commerce’s response to OGE’s 2021 Annual Questionnaire, 316 SGEs served at the department in some capacity in 2021, of whom 265 served on Federal Advisory Committee Act (FACA) committees.

To evaluate the ethics-related services provided to the SGEs, OGE selected three Commerce FACA committees comprised of SGEs for examination. These committees were 1)

the National Science Advisory Board, 2) the Advisory Committee on Earthquake Hazards Reduction, and 3) the National Artificial Intelligence Advisory Committee.

### **National Science Advisory Board**

OGE examined a sample of 12 confidential reports filed by SGEs on this committee in 2021. Of these 12 confidential reports, all were found to have been filed, reviewed, and certified timely. OGE also determined that the ethics training provided to the SGE committee members met relevant requirements.

### **Advisory Committee on Earthquake Hazards Reduction**

OGE examined all 17 confidential reports filed by SGEs on this committee in 2022. Of these 17 confidential reports, all were found to have been filed, reviewed, and certified timely. OGE also determined that the ethics training provided to the SGE committee members met relevant requirements.

### **National Artificial Intelligence Advisory Committee**

OGE examined all 27 confidential reports filed by SGEs on this committee in 2022. Of these 27 confidential reports, all were filed before the first committee meeting in May 2022; however, OGE noted they were not certified until September 2022 - one month before the committee's second meeting in October. OGE determined that the ethics training provided to the SGE committee members met relevant requirements.

### **Recommendation**

5. Ensure that advisory committee SGE confidential reports are certified within 60 days of receipt unless additional information is being sought or remedial action is being taken, in accordance with 5 C.F.R. § 2634.605(a).

### **Agency Comments**

The U.S. Department of Commerce (Commerce) is grateful for the opportunity to review and comment on the U.S. Office of Government Ethics plenary review of the Commerce ethics program covering calendar year 2022. In particular, Commerce appreciates the OGE program review team efforts to help Commerce identify areas for improvement and recognition of our model practices.

The Department and its employees are committed to upholding the public's confidence and maintaining a strong ethical culture. In response to the specific recommendations:

1. Continue coordination efforts with Commerce human resource officials and finalize the human resources policy document to help ensure all OGE regulatory ethics program related requirements are met.

The Ethics Law and Programs Office is in the final stages of coordination with Commerce Human Resources to issue the policy to formally institutionalize the human resources ethics responsibilities. ELPO continues to work on close coordination with human resources, including identifying and institutionalizing other inter-office communications between human resources officials and the ethics program.

2. Establish written procedures for issuing notices to prospective employees, as required by 5 C.F.R. § 2638.303.

The above-referenced policy on the ethics responsibilities of human resources officials will establish the written procedures for issuing notices to prospective employees.

3. Establish written procedures for issuing notices to new supervisors, as required by 5 C.F.R. § 2638.306.

The above-referenced policy on the ethics responsibilities of human resources officials will establish the written procedures for issuing notices to new supervisors.

4. Establish written procedures for initial ethics training, as required by 5 C.F.R. § 2638.304.

The Ethics Law and Programs Office is in the process of updating and improving how initial ethics training is assigned, completed, and tracked through the department enterprise-wide learning management system. These new procedures will be established in written procedures. In the interim, the Department is drafting temporary written procedures to memorialize existing practices.

5. Ensure that advisory committee SGE confidential reports are certified within 60 days of receipt unless additional information is being sought or remedial action is being taken, in accordance with 5 C.F.R. § 2634.605(a).

The Ethics Law and Programs Office is in the process of re-evaluating procedures for advisory committees to improve compliance. In 2022, ELPO initiated efforts by speaking at the annual Committee Management Officer meeting with the Designated Federal Officials to re-socialize ethics program requirements. ELPO is also preparing enhanced policy and procedures to standardize processing of financial disclosures for advisory committee SGE members. Review of existing records indicates that advisory committee members in question filed their reports. Further, each member received written guidance based on the content of their financial disclosure reports prior to the first meeting. This means each report was reviewed and assessed prior to the meeting. Each member attended in-person ethics training, discussing in detail their ethical obligations at the first meeting. The cause for delay in certification is unclear as the attorney responsible is no longer with the office.

The Ethics Law and Programs Office continues these and other efforts to collaborate with clients and improve programmatic compliance and establishing additional rigor around ensuring that confidential reports are reviewed and certified within the regulatory timelines.



The Department is dedicated to effectively promoting the highest ethical standards for our employees, integrating ethics into operational initiatives, and ensuring that the public has the utmost confidence in the integrity of the work of the Department. OGE's support and constructive collaboration towards this goal is appreciated.