



Ethics Program Review

U.S. Department of Health and Human Services
Office of the Secretary

Report No. 20-48
September 29, 2020



The United States Office of Government Ethics (OGE) conducted a review of the United States Department of Health and Human Services (HHS) Office of the Secretary ethics program from June through August 2020. The review covered program activities for calendar year 2019. The following summarizes the results of that 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.¹ 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 focused its review on the administration of the ethics program within the HHS Office of the Secretary² and on the ethics functions performed by the Office of General Counsel (OGC) Ethics Division, which is responsible for overseeing the HHS ethics program department-wide. Specifically, this review examined program administration, financial disclosure, education and training, ethics counseling, agency-specific ethics rules on outside employment, conflict remedies, enforcement, and special government employees.

Methodology: As part of its review, OGE examined a variety of documents provided by the Ethics Division, including the HHS response to OGE’s 2019 Annual Agency Ethics Program Questionnaire (Annual Questionnaire), written procedures for administering the ethics program,

¹ See 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.

² For purposes of this report, the Office of the Secretary refers to the Immediate Office of the Secretary, the Office of the Deputy Secretary, the Executive Secretariat, the Office of the Assistant Secretary of Health, the Office of Civil Rights, the Office of Global Affairs, the Office of the Assistant Secretary for Planning and Evaluation, the Office of the Assistant Secretary for Administration, the Office of the Assistant Secretary for Legislation, the Office of the Assistant Secretary for Public Affairs, the Office of Intergovernmental and External Affairs, the Office of National Security, the Office of Health Reform, and the Office of the General Counsel.

samples of public and confidential financial disclosure reports filed in 2019, ethics training materials, and a sample of the ethics counseling provided to employees. In addition, OGE clarified with Ethics Division ethics officials the information gathered and followed up on issues identified during the review.

Program Administration

The Ethics Division directly administers the HHS ethics program. The Designated Agency Ethics Official (DAEO) leads the Ethics Division and serves as the Associate General Counsel for Ethics. The DAEO is responsible for overseeing the HHS ethics program department-wide and exercises final authority for all ethics matters. The Alternate Designated Agency Ethics Official (ADAEO) is the primary deputy to the DAEO, and assists the DAEO in the day-to-day operations of the HHS ethics program. The Ethics Division staff consisted of 32 full-time ethics officials as of August 2020³ who assist the DAEO in carrying out the day-to-day management of the department's ethics program. HHS' responses to OGE's 2019 Annual Questionnaire indicated that 518 employees, including the DAEO and ADAEO, performed ethics program duties throughout the department in 2019.

Although HHS ethics officials indicated that no significant changes within HHS impacted the ethics program in 2019, the Ethics Division did experience a number of attorney and support staff vacancies throughout that year. For example, in the first half of 2019, the Principal Deputy Associate General Counsel for Ethics Advice and Policy position, who also serves as the HHS ADAEO, was vacant. HHS filled this position in July 2019. OGE notes that at the time of its review, the Ethics Division was also working to fill two other staff vacancies.

Deputy Ethics Counselors

The administration of the HHS ethics program department-wide is decentralized. Therefore, in addition to the staff in the Ethics Division, responsibility for providing ethics services to the employees of most of the HHS operating and staff divisions rests with a network of Deputy Ethics Counselors (DECs) located within each HHS operating and staff division. These DECs are generally senior-level management officials appointed, in writing, as ethics officials by the DAEO, in consultation with the head of each operating or staff division.⁴ Employees who serve as Ethics Coordinators assist each DEC in carrying out their ethics-related duties. The Ethics Division conducts training for DECs and Ethics Coordinators and maintains a procedural manual, referred to as the DEC Green book, which details DEC ethics functions, responsibilities, and authorities.

³ Also assisting the Ethics Division staff were two contractor employees, who provided administrative support to the division's Food and Drug Administration (FDA) and National Institutes of Health (NIH) satellite offices, and one detailed employee from another HHS division.

⁴ OGE notes that in addition to establishing policies and procedures for the overall administration of the HHS ethics program, the Ethics Division also serves as a DEC to employees in several divisions within the Office of the Secretary.

Agency Leadership Support

During the review, OGE found evidence of the Secretary of HHS demonstrating his support for the department's ethics program. For example, at the beginning of his tenure in 2018, the Secretary emailed all employees an "All HHS Employees Ethics Awareness Reminder," stating his expectation that employees do their part to meet their ethical obligations and support the HHS ethics program. This message also highlighted the HHS DAEO and the network of DEC's that support the ethics program and provided links to where employees could obtain additional ethics information. In addition, as part of the 2019 annual ethics training for HHS' political appointees, a direct quote from the Secretary highlighting the importance of creating and maintaining an ethical culture was included in the training slide presentation. The Secretary also recorded an introductory video message supporting the HHS ethics program and the work performed by agency ethics officials, which the Ethics Division used to kick off the 2019 Annual Deputy Ethics Counselor/Ethics Coordinator Workshop. OGE recognizes these examples of high-level support of an agency's ethics program as model practices.

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 model practices:

- The Secretary of HHS visibly demonstrating support for the department's ethics program by expressing his expectations that employees conduct themselves with integrity and adhere to ethical standards through various outreach platforms.
- The Ethics Division's longstanding practice of maintaining a detailed written guide for HHS ethics officials to assist them in ensuring consistency and continuity within HHS's decentralized ethics program.

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.⁵ OGE examined HHS's written procedures and found them in compliance with applicable requirements and OGE guidance.

⁵ See 5 U.S.C. app. § 402(d)(1).

Notices to DAEO

Agency human resources offices play a vital role in ensuring the effective administration of the ethics program. Without 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.⁶

OGE found there is reasonable assurance that the Ethics Division is notified of appointments when public filers enter covered positions. The basis for this determination was the coordination between the Ethics Division and the Office of Human Resources to conduct pre-appointment clearance reviews of all public reports submitted by prospective employees being considered for public filing positions throughout the department. OGE also found there is reasonable assurance that the Ethics Division is notified of appointments to positions whose incumbents are required to file confidential financial disclosure reports, notwithstanding the late new entrant confidential reports OGE identified during its review. The basis for this determination was that designated points of contact notify the Ethics Division when employees are assigned to covered confidential positions within the Immediate Office of the Secretary. Many of the DEC's and their staffs outside of the Ethics Division are also human resource officials who process incoming and outgoing employees. Therefore, these DEC's are in a position to know when a new employee is entering a covered position.

Moreover, those points of contact who are not human resource officials have established relationships with human resource officials who notify the DEC when employees are appointed to covered positions. The DEC's also work with a prospective employee's supervisor to confirm whether the employee is required to file a report. Combined, these efforts provide reasonable assurance that the Ethics Division is notified of the relevant appointments.

Public Financial Disclosure

Within 30 days of assuming a covered public filing position, an individual must file a public financial disclosure report.⁷ 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.⁸ 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.⁹

In 2019, the Ethics Division was responsible for the review and certification of 311 of the 1,622 public reports that were required to be filed department-wide. This includes all reports

⁶ See 5 C.F.R. § 2638.105(a)(1) and (2).

⁷ See 5 C.F.R. § 2634.201(b).

⁸ See 5 C.F.R. § 2634.201(a) and (e).

⁹ See 5 C.F.R. § 2634.605.

filed by PAS officials, non-career SES, and Schedule C appointees department-wide and employees in certain divisions within the Office of the Secretary. To evaluate the administration of the public financial disclosure system within HHS' Office of the Secretary, OGE selected a sample of 158 reports to examine.¹⁰ Of the 158 public reports examined, 43 were new entrant reports, 73 were annual reports, and 42 were termination reports. Table 1 below presents the results of OGE's examination.

**Table 1. OGE's Examination of Public Financial Disclosure Reports
Required to be Filed in 2019**

	New Entrant		Annual		Termination		Total
Reports Examined	43		73		42		158
Filed Timely	43	(100%)	73	(100%)	40	(95%)	156 (99%)
Certified Timely	43	(100%)	72	(99%)	42	(100%)	157 (99%)

As shown in Table 1 above, almost all of the reports OGE examined were filed and certified timely. OGE also did not detect any actual or potential conflicts of interest that the Ethics Division had not already addressed during its review.

Model Practice

- The Ethics Division's longstanding practice of conducting pre-appointment clearance reviews for prospective employees who would serve in a public financial filing position.

Confidential Financial Disclosure

Within 30 days of assuming a covered confidential filing position, an individual must file a confidential financial disclosure report.¹¹ The individual must also subsequently file an annual report by February 15 each year.¹² 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.¹³

The Ethics Division is responsible for the review and certification of confidential reports filed within certain Office of the Secretary components. In 2019, the Ethics Division reviewed 58 reports filed by employees of the Office of the Secretary. A total of 29,945 confidential reports were required to be filed department-wide.

To evaluate the administration of the confidential financial disclosure system within HHS Headquarters, OGE examined a total of 30 new entrant reports and 45 annual reports, including 20 new entrant reports that were reviewed and certified by DEC's within the Office of the

¹⁰ HHS' public filers submit their report through Integrity, OGE's web-based electronic report filing system.

¹¹ See 5 C.F.R. § 2634.903(b).

¹² See 5 C.F.R. § 2634.903(a).

¹³ See 5 C.F.R. § 2634.605.

Assistant Secretary for Planning and Evaluation, the Office of the Assistant Secretary for Financial Resources, the Office of the Assistant Secretary for Administration, and the Office of Civil Rights. Table 2 below presents the results of OGE's examination.

**Table 2. OGE's Examination of Confidential Financial Disclosure Reports
Required to be Filed in 2019**

	New Entrant		Annual		Total	
Reports Examined	30		45		75	
Filed Timely	22	(73%)	44	(98%)	66	(88%)
Certified Timely	30	(100%)	45	(100%)	75	(100%)

As indicated in Table 2 above, 88 percent of the confidential reports OGE examined were filed timely and all were certified timely. OGE is not making a formal recommendation, however, HHS is encouraged to take appropriate steps to help ensure new entrant reports are filed timely. As with the public system, OGE did not identify any actual or potential conflicts of interest that the Ethics Division had not already addressed during its review.

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 officials; 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.¹⁴ 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

Certain PAS officials 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.¹⁵

OGE confirmed that the two PAS officials appointed in 2019 completed their ethics briefing within 15 days of appointment. The DAEO provided these briefings concomitantly with the officials' required initial ethics training.

¹⁴ See 5 C.F.R. Part 2638 Subpart C.

¹⁵ See 5 C.F.R. § 2638.305.

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.¹⁶

OGE examined a sample of written offers of employment HHS sent to prospective employees in 2019 and the process for providing them. OGE determined there is a reasonable assurance that prospective employees are consistently receiving the required ethics-related information when they receive a written offer of employment. OGE notes, however, that the Ethics Division had not yet established formal written procedures for issuing these notices at the time of examination. OGE was advised that these procedures were being developed, in coordination with the Office of Human Resources, and would be issued shortly. Prior to the conclusion of OGE's review, the Ethics Division drafted formal written procedures in the format of Standard Operating Procedures (SOPs) for providing notices to prospective employees and provided the draft policy to OGE. The draft procedures met applicable requirements.

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 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;¹⁷ 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.¹⁸

OGE examined a sample of the notices sent to new HHS supervisors in 2019 and the process for providing them. OGE found that there was reasonable assurance that new supervisors are consistently receiving the required notices in a timely manner. However, the Ethics Division had not established formal written procedures for providing the notices at the time of examination. Prior to the conclusion of OGE's review, the Ethics Division drafted formal written procedures in the format of SOPs for providing notices to new supervisors and provided the draft policy to OGE. The draft procedures met applicable requirements.

Initial Ethics Training

Each new employee subject to the Standards of Conduct must complete initial ethics training 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

¹⁶ See 5 C.F.R. § 2638.303.

¹⁷ See 5 C.F.R. § 2638.103.

¹⁸ See 5 C.F.R. § 2638.30

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.¹⁹

Initial Ethics Training for New Political Appointees

The Ethics Division is responsible for ensuring that all new political appointees at HHS receive the initial ethics training (IET). Ethics Division officials advised OGE that in-person, ethics briefings are provided to all new PAS officials, including the Secretary and Deputy Secretary of HHS, within the first 15 days of their entering on duty, typically on their first day of appointment. The DAEO conducts these briefings, which usually take 90 minutes. The briefings include a discussion of the PAS officials' ethics-related obligations and satisfy the additional training requirement for PAS officials found at 5 C.F.R. § 2638.305. In addition to the verbal briefing, all new PAS officials are also provided with written material to keep. In 2019, the DAEO provided in-person briefings to the Commissioner of the Administration on Children, Youth and Families, and the Commissioner of the Food and Drug Administration.

For senior-level positions other than PAS officials, such as non-career SES and Schedule C appointees, HHS also satisfied the IET requirement through in-person briefings with a senior member of the Ethics Division staff.

OGE reviewed the material provided to new political appointees and determined that it met applicable content requirements. OGE also confirmed that all new political appointees whose public reports OGE examined during its evaluation of the public financial disclosure system received the required IET in 2019.

Initial Ethics Training for New Career Employees

The Ethics Division conducts bi-weekly in-person briefings as part of the HHS orientation session for new career employees, in addition to requiring the employees to complete an online IET training module within their first three months on duty. OGE examined the written materials used to provide training to new employees and found that it met content requirements. Moreover, based on an evaluation of the current process and a review of IET training records provided by the Ethics Division, OGE determined there is reasonable assurance that IET is provided to all new employees within the Office of the Secretary within their first three months on duty.

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.

¹⁹ See 5 C.F.R. § 2638.304.

§ 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.²⁰

To satisfy the training requirement for non-political public filers within the Office of the Secretary in 2019, the Ethics Division required them to view an interactive, computer-based ethics training presentation that was made available to them on HHS' Learning Portal.²¹ OGE examined the training materials and determined they met applicable content requirements. OGE also examined HHS's 2019 training completion records and confirmed that all non-political public filers whose reports OGE examined during its evaluation of the public financial disclosure system received the required annual ethics training in 2019.

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 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.²²

To satisfy the annual training requirement for confidential filers and certain other employees, the Ethics Division required these employees to view the interactive, computer-based ethics training presentation in 2019. In addition, the DAEO decided to require certain non-filers to receive the annual training. As a result, all employees within the Office of General Counsel and the Immediate Office of the Secretary were required to receive training in 2019.

²⁰ See 5 C.F.R. § 2638.308.

²¹ The HHS Learning Portal-Learning Management System is a software application for the administration, documentation, tracking, and reporting of training programs, classroom and online events e-learning programs, and training content.

²² See 5 C.F.R. § 2638.307.

OGE evaluated HHS' 2019 training completion records and was able to verify that each employee whose confidential financial disclosure report OGE examined as part of this review received the required training.

Additional Ethics Outreach Efforts

In addition to conducting the requisite initial and annual ethics trainings for covered HHS employees, the Ethics Division offers continuous learning opportunities throughout the year. Some of these training opportunities in 2019 included:

- Monthly “stay-in-touch calls” with DEC’s to keep them abreast of upcoming ethics deadlines and new ethics rules and/or guidance.
- Training for newly appointed DEC’s and Ethics Counselors who are responsible for certifying public and confidential reports to understand their role in the financial disclosure process.
- The HHS Annual Deputy Ethics Counselor/Ethics Coordinator Workshop and quarterly meetings with ethics officials to provide them with refresher training on pertinent ethics topics.

Model Practices

- The Ethics Division provides continuous learning opportunities throughout the year for HHS ethics officials.
- For 2019, the Ethics Division required certain non-filers to receive annual ethics training.

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.²³ A robust ethics counseling program is necessary to ensure that employees receive the guidance they need to comply with the ethics rules.

To evaluate the Ethics Divisions’ advice and counseling program, OGE examined a sample of 42 examples of written advice provided by the Ethics Division in 2019. The advice covered a board range of ethics topics, including gifts, criminal conflict of interest matters, widely attended gatherings, and outside activities. OGE found the advice to be consistent with applicable statutes and regulations and responsive to the questions asked. The advice was also rendered timely, which is key to preventing real or potential conflicts of interest and other ethics violations.

²³ See 5 C.F.R. § 2638.104 (c)(4).

In addition to providing counseling in response to questions posed, the Ethics Division provides in-person post-employment briefings to all departing political appointees before leaving HHS. According to the Ethics Division, these briefings allow ethics officials to work directly with the appointee to address their particular circumstances and provide tailored ethics advice. Topics addressed during the briefing include financial disclosure requirements, seeking employment, and post-employment rules. In addition to the briefing, HHS ethics officials email departing employees written materials that outline the basic post-employment restrictions.

Model Practice

- The Ethics Division continues to provide in-person, post-employment briefings to departing political appointees.

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.²⁴ 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.

HHS has issued jointly with OGE a supplemental standards of conduct regulation.²⁵ This regulation imposes requirements applicable to employees HHS-wide, as well as requirements applicable only to employees at certain HHS components.²⁶

In accordance with the HHS supplemental regulation, employees who wish to engage in certain outside employment or activity are required to file a Request for Approval of Outside Activity (HHS-520).²⁷ Covered employment or activity includes outside professional and consultative work, writing and editing, teaching and lecturing, and holding office in professional societies. HHS also has a supplemental financial disclosure regulation that requires any employee from whom an outside employment or activity had been previously approved to also file an Annual Report of Outside Activity (HHS-521).

The Ethics Division evaluates and approves, as appropriate, outside employment and activity requests for PAS officials, non-career SES officials, Schedule C employees, DEC's, and employees from the Office of the Secretary. DEC's have the authority to approve outside activities for employees from their respective operating or staff divisions.

While OGE examined tracking records used by the Ethics Division to manage the HHS-520 outside activity requests for 2019, and found no apparent concerns with the 94 employees who were granted approval for an outside activity, OGE was not able to review tracking records

²⁴ See Executive Order 12674 and 5 C.F.R. § 2635.105.

²⁵ See 5 C.F.R. part 5501

²⁶ The HHS supplement imposes additional requirements on employees at the Food and Drug Administration, the National Institutes of Health, the Office of the General Counsel, and the Office of the Inspector General.

²⁷ See 5 C.F.R. § 5501.106

pertaining to the HHS-521 system. According to an Ethics Division official, the HHS-521 tracking reports were stored in hardcopy format and were located at HHS Headquarters.

Consistent with guidance from the Office of Management and Budget, all staff are working remotely during the COVID-19 pandemic. The materials OGE requires in order to make its assessment were inaccessible from a remote location. The Ethics Division staff would be required to physically enter their offices to retrieve and transmit this report to OGE. OGE's policy during the COVID-19 pandemic prohibits asking agencies to send staff to their offices or otherwise violate social-distancing or other mitigation policies to retrieve requested materials. OGE will assess HHS's full compliance with its supplemental requirements when circumstances permit.

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.²⁸ 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.²⁹ The Ethics Division did not issue any such waivers in 2019 for regular employees. However, HHS routinely issues waivers for special government employees and provides copies to OGE on a quarterly basis.

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.³⁰ This written notice is commonly known as an "ethics agreement." Both HHS PAS officials confirmed in 2019 provided timely certification to OGE that they had complied with all terms of their respective ethics agreements.

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.³¹ HHS' Office of the Inspector General is responsible for referring potential violations of the criminal conflict of interest statutes to DOJ and concurrently notifying OGE of the referral.

According to HHS' response to OGE's 2019 Annual Questionnaire, the department made no such referrals to DOJ involving HHS employees in 2019. However, according to the questionnaire, 41 disciplinary actions were taken HHS-wide based wholly or in part upon

²⁸ See 18 U.S.C. § 208.

²⁹ See Executive Order 12674.

³⁰ See 5 U.S.C. app. § 110.

³¹ See 5 C.F.R. § 2638.206.

violations of the Standards of Conduct or HHS's supplemental standards of conduct regulation³² Relevant to OGE's review, of the 41 disciplinary actions taken, two involved employees from staff divisions within the Office of Secretary.

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.³³

According to HHS's response to OGE's 2019 Annual Questionnaire, 7,961 SGEs served at the department in some capacity in 2019. Of the 7,961 SGEs, 568 were expected to serve for 60 days or less on a board, commission, or committee.

To evaluate the ethics-related services provided to SGEs, OGE selected three advisory committees comprised of SGEs for examination. These committees consisted of the: 1) Advisory Council on Alzheimer's Research, Care and Services; 2) Presidential Advisory Council on HIV/AIDS; and the 3) United States-Mexico Border Health Commission.

OGE examined the training materials used by HHS ethics officials to provide ethics training to SGEs and determined the materials met applicable content requirements. OGE's review concluded that HHS provided ethics training in 2019 to the SGEs selected for examination.

However, OGE could not fully assess the committees' compliance with financial disclosure requirements because requested confidential financial reports were filed in hardcopy by the filer and located at HHS Headquarters.

Consistent with guidance from the Office of Management and Budget, all staff are working remotely during the COVID-19 pandemic. The materials OGE requires in order to make its assessment were inaccessible from a remote location. The Ethics Division staff would be required to physically enter their offices to retrieve and transmit this information to OGE. As previously noted, OGE's policy during the COVID-19 pandemic prohibits asking agencies to send staff to their offices or otherwise violate social-distancing or other mitigation policies to retrieve requested materials. OGE will assess HHS's full compliance in this area when circumstances permit.

³² Specifically, 40 were for violations of the Standards while one was for a violation of HHS's supplemental standards. For purposes of this question on the annual questionnaire, disciplinary actions include removals, demotions, suspensions, and written reprimands or their equivalents.

³³ See 18 U.S.C. § 202(a).



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, DC 20201

September 28, 2020

MEMORANDUM

TO: Emory A. Rounds, III
Director
U.S. Office of Government Ethics

FROM: Elizabeth J. Fischmann
Associate General Counsel for Ethics
Designated Agency Ethics Official

SUBJECT: Agency Comment for the Ethics Program Review of the U.S. Department of Health and Human Services Office of the Secretary

The U.S. Department of Health and Human Services (HHS) appreciates the opportunity to work with the U.S. Office of Government Ethics (OGE) review team during their comprehensive review of the HHS Office of the Secretary's (OS) government ethics program. During the review, the OGE reviewers were always professional and courteous and we commend them for their efforts. We especially appreciate the OGE review team's effort to work with us to ensure the data and details of the content of the report are accurate. The overall stellar findings in this review reflect the strong and enduring commitment of the HHS Secretary, OGC Ethics Division, and HHS workforce to creating and maintaining a strong ethical culture. The results demonstrate this Department's compliance with all statutory and regulatory ethics requirements and highlight specific strengths in our ethics program as noted by the six model practices listed throughout the report.

With respect to OGE's findings regarding our financial disclosure programs, we are pleased that the data reflects timely public financial disclosure submission and certification percentages of 99%, though we will continue to strive for perfection. Regarding the two tardy termination reports, our review of the records confirmed that both were filed within the 30-day grace period, so neither former employee incurred a late fee associated with late submission.

We are similarly pleased that the OGE reviewers found that OS ethics officials are conducting timely initial reviews and certifications of confidential financial disclosure reports. The report notes that HHS reviewed and certified 100% of the sampled confidential reports within OGE's time-requirements. Certainly, given the nearly 30,000 confidential reports required of HHS employees in 2019, we did not anticipate that OGE would discover from its sample size of 75 reports that nine reports were submitted late by the filer. However, we do appreciate the opportunity this affords us to further improve our program. In the coming months, working closely with Deputy Ethics Counselors (DECs), Ethics Coordinators (ECs), the Assistant Secretary of Administration (ASA) and the Department's Human Resources (HR) officials, we

will comprehensively and collaboratively address the Department's Confidential Financial Disclosure program to improve the timeliness of new entrant and annual report filing.

We will study filing, review and certification data from the HHS Ethics Financial Disclosure System to detect communication breakdowns or procedural lapses affecting the timeliness of confidential disclosure report submission. As needed, we will require component ethics offices to develop new or additional procedures intended to close any gap(s) and to improve communication with recalcitrant filers.

Through our internal HHS program reviews, we will further work towards promoting and implementing communications best practices across the Department. For example, in 2020, we updated our program review guidelines. The update requires DEC's and EC's to tell us how they receive notice of employees entering/departing an OGE Form 278e filing position and entering an OGE Form 450 filing position, to identify the HR office that provides this notice, and to indicate if they are satisfied with the accuracy and timeliness of the employee information they receive from HR.

We will also redouble our efforts to promote best practices within the offices of each of the component DEC's. We have long recognized the value of sharing good ideas and best practices identified during the course of our internal program reviews. HHS internal Ethics Program Awards highlight ethics official best practices. We will continue to share practices that promote timely compliance with financial disclosure and other ethics requirements in the annual best practices list we compile and share with all HHS ethics officials. By way of example, we know that many of our component DEC's send introductory emails to new employees to provide important information about their programs, including financial disclosure reporting timeframes and we will continue to encourage and promote this and other similar practices.

Finally, we will be sure that our training sessions on financial disclosure for ethics officials reemphasize the need to timely identify financial disclosure filers and to maintain contact in order to ensure timely filing. We have already planned to include a training presentation in our upcoming DEC Workshop this October that will focus on a 'day in the life of an OGE Form 450 reviewer' and it will reiterate timeliness program requirements. In addition, during the Designated Agency Ethics Official (DAEO) address during this DEC Workshop, we will highlight various initiatives the DEC's/EC's and OGC Ethics Division have implemented and are working toward to improve the timeliness of OGE Form 450 report submission for new entrant and annual report filers.

Thank you for the opportunity to review the draft report prior to issuance. We appreciate OGE's support in maintaining a strong government ethics program at HHS and we look forward to continuing to work with OGE in advancing the integrity of the U.S. government.