

United States Office of Government Ethics

Program Review Division

Ethics Program Review

Federal Mine Safety and Health Review Commission

Results in Brief

The United States Office of Government Ethics (OGE) conducted a review of the Federal Mine Safety and Health Review Commission (Commission) ethics program in May 2012. The results of the review found that improvements are needed within the financial disclosure program to enable the Commission to comply more fully with ethics regulatory requirements. OGE believes that once these issues are addressed the ethics program will again be in full compliance.

Highlights

- Ethics officials created comprehensive standard operating procedures for the following elements of the ethics program: education and training, advice and counsel, ethics agreements and acceptances of travel payments under 31 U.S.C § 1353.

Concerns

- The Commission did not review and certify the majority of public financial disclosure reports within 60 days of the date of filing.
- The Commission did not cross-reference outside activity approvals (or denials) with outside positions listed on financial disclosure reports; two filers did not obtain prior approval for outside positions on financial disclosure reports.
- The Commission's financial disclosure procedures were not in full compliance with Section 402(d)(1) of the Ethics Act.

Contents

Objectives, Scope, and Methodology.....	3
Program Administration.....	3
Supplemental Regulation.....	3
Financial Disclosure.....	4
Conflict Remedies.....	7
Education and Training.....	7
Advice & Counsel.....	8
Enforcement.....	8
1353 Travel Acceptances.....	8
Agency Comments.....	8

Objectives, Scope, and Methodology

OGE provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance. 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. OGE has the authority to evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act and 5 CFR part 2638.

To assess the Commission's ethics program, OGE examined a variety of documents provided by agency ethics officials; other documents that the Commission forwarded to OGE, including its annual questionnaire; prior program review reports, a review of the Commission's public and confidential financial disclosure reports, outside activities approvals, and the advice and counseling rendered to Commission employees. In addition, members of OGE's Program Review Division met with Commission ethics officials to obtain additional information about the strengths and weaknesses of the agency's ethics program, seek clarification on issues that arose through the documentation analysis, and verify data collected.

Program Administration

The Commission is an independent, adjudicative agency that ensures compliance with occupational safety and health standards in the Nation's surface and underground coal, metal, and nonmetal mines. It provides administrative trial and appellate review of legal disputes arising from enforcement actions taken by the Department of Labor. Headquartered in Washington, D.C. with additional offices in Denver, Colorado and Pittsburgh, Pennsylvania, the Commission has a workforce of over 60 employees, and is led by five Presidentially appointed and Senate-confirmed appointees who serve staggered 6-year terms. The Chairman is appointed from among the Commissioners by the President.

The Commission's ethics program is organizationally located within the Office of General Counsel (OGC). The General Counsel serves as the agency's Designated Agency Ethics Official (DAEO) and has oversight responsibility for the overall ethics program. The day-to-day operation of the ethics program is managed by two attorneys, both of whom have responsibilities other than the ethics program. One attorney serves as the Alternate DAEO (ADAEO) while the other serves as the agency's Deputy Ethics Official. OGE notes that ethics program duties are divided between both ethics officials.

Supplemental Ethics Regulation

The Commission's supplement to the standards of conduct regulation at 5 CFR part 8401 prohibits employees or their spouse or minor child from having a financial interest, including compensated or uncompensated, in any company or person engaged in mining activity subject to the Federal Mine Safety and Health Act of 1977. In accordance with § 8401.103, Commission employees who are classified at GS-13 or above and Commission attorneys at any grade level are required to obtain prior written approval from their immediate supervisor and the DAEO

before engaging in any outside employment. Outside employment requests must include at a minimum the name of the person, group or organization for whom the work is to be performed; the type of work to be performed; and the proposed hours of work and approximate dates of employment.

Financial Disclosure

Title I of the Ethics in Government Act requires that agencies ensure confidence in the integrity of the Federal Government by demonstrating that officials are able to carry out their duties without compromising the public trust. High-level Federal officials demonstrate that they are able to carry out their duties without compromising the public trust by disclosing publicly their personal financial interests (OGE Form 278). Title I also authorizes OGE to establish a confidential financial disclosure system for less senior executive branch personnel in certain designated positions to facilitate internal agency conflict of interest review (OGE Form 450).

Financial disclosure serves to prevent conflicts of interest and to identify potential conflicts by providing for a systematic review of the financial interests of both current and prospective officers and employees. The financial disclosure reports also assist agencies in administering their ethics programs in providing counseling to employees. *See* 5 CFR § 2634.104(b).

OGE's examination of the Commission's financial disclosure program revealed that improvements are needed to enable the Commission to comply more fully with ethics regulatory requirements. Once these improvements are made the Commission's financial disclosure program will be considered effective. OGE highlights these issues below which were discussed with ethics officials during the examination.

- **Improve Timeliness In Review and Certification of Public Reports.** During the review, OGE examined the 23 public reports that were required to be filed in 2011.¹ Of the 23 public reports, 20 were annual and 3 were new entrant reports. Although all 20 annual reports were filed and initially reviewed by the ADAEO within 60 days of the May 15th filing due date, OGE noticed that in most instances the DAEO's final review and certification occurred 60 days later even though there was no evidence to suggest that additional information was needed to complete the certification process. OGE also found the DAEO's certification to have been done all on the same day.

OGE's review of the three new entrant reports found that two of the three had not been certified by the start of OGE's review and as a result OGE requested that the DAEO complete the certification process. Prior to the conclusion of this review, OGE confirmed that both reports had been certified.

OGE reminds ethics officials that delayed reviews can diminish an agency's ability to provide timely and specific conflict of interest advice to employees, which is essential for an effective ethics program. Public reports which do not require additional information or remedial action should always be certified within 60 days of each report's receipt date.

¹ During the review, OGE also examined the two confidential reports filed in 2012. Both confidential reports were filed and reviewed timely.

In view of the importance of financial disclosure in preventing employees from committing ethics violations, OGE recommends that the Commission improve its process to ensure that public reports are certified within 60 days, unless extensions are granted or additional clarification is required from the filer to determine that a report is complete and in compliance with applicable laws and regulations.

- **Modify Written Procedures.** While the Commission's written procedures were found to generally comply with the requirements of the Ethics Act, OGE identified areas where they could be strengthened. For example, OGE did not find these procedures to address the processes for 1) requesting and granting individual filing extensions, 2) collecting the \$200 late filing fee and requesting waivers of the late filing fee (for public reports only), 3) following-up on delinquent reports or 4) remedying possible violations when they are found. The procedures also failed to specify the deadline for submission of confidential financial disclosure reports.

Beyond being required, written procedures are important in establishing consistency and efficiency in ensuring that ethics officials follow the same step-by-step procedures for administering their portion of the financial disclosure system. When properly used and updated, written procedures provide ethics officials with the opportunity to plan for system improvement. Therefore, OGE recommends that the DAEO modify these procedures to more fully comply with the prescribed requirement.

Recommendations

- Certify public reports within 60 days, unless extensions are granted or additional clarification is required from the filer to determine that a report is complete and in compliance with applicable laws and regulations.
- Modify existing written procedures to ensure full compliance with Section 402(d)(1) of the Ethics Act.

In addition to these findings, OGE's examination also revealed areas of the financial disclosure program that were not in full compliance at the beginning of OGE's examination. However, the nature of these issues is such that the Commission has been able to take immediate corrective action. In some instances as noted below, OGE is not making formal recommendations based on improvements made prior to the conclusion of the review and/or assurances received from ethics officials of steps that would be taken during future filing cycles.

- **Ensure That All Required Commission Employees Obtain Written Prior Approval For Outside Employment.** OGE's review of the Commission's outside employment prior approval system focused primarily on whether the prior approval requirement in the Commission's supplemental regulation, at 5 CFR § 8401.102, was being met. OGE examined outside employment/activities reported on the financial disclosure reports and prior approval request submitted by non-filers. Prior approval requests submitted by non-filers had appropriate supervisory and DAEO approval and concurrence. However, OGE could not initially confirm whether prior approval had been obtained by three public filers who listed an outside activity on their public financial disclosure reports. Ethics

officials later confirmed that only one of the three filers received prior approval. The remaining two filers listed outside activities that involved participation in a homeowner's association and a national law conference. During discussions with ethics officials, OGE received assurances that neither of these outside activities posed a potential conflict. Ethics officials explained that the current review process did not include checking approvals (or denials) for outside activities against the filer's financial disclosure report. However, in view of this omission, ethics officials acknowledged that the requirement for prior approval may be unclear to employees with respect to unpaid positions involving organizations which have educational, professional or recreational objectives. Therefore, ethics officials issued a memorandum to all Commission employees on July 2, 2012 which clarified in more detail the outside prior approval requirement. Ethics officials also advised OGE that they planned to counsel the individual employee(s) and highlight this requirement during the Commission's 2012 annual ethics training. OGE supports this approach.

OGE reminds ethics officials to remain diligent toward ensuring that all Commission employees obtain prior approval in accordance with § 8104.103. This can be done in many ways including issuing periodic reminders throughout the year of the prior approval requirement.

Suggestion

OGE also suggests that written approvals (or denials) for outside activities be maintained with the filer's financial disclosure report file for use in reviewing the financial disclosure reports.

- **Continue to Monitor the Timeliness of New Entrant Public Filing.** Of the three new entrant public reports that OGE examined, two were filed late. In fact, both were filed more than one year late and were captured during the annual filing cycle. Ethics officials attributed late filing to challenges associated with obtaining timely information on Commission new hires and departures. During the review, ethics officials met with the Commission's Special Assistant to the Chairman to discuss ways to improve timely identification. Since that meeting OGE was advised that ethics officials are now being informed on the status of new hires who will be public filers. As a good management practice, OGE suggests that ethics officials continually monitor the steps established to ensure that timely new entrant identification procedures are effective.
- **DAEO Action On Filing Extensions Were Not Documented.** On the cover page of several public reports OGE noticed that filing extensions had been granted; however, there was no evidence documenting the DAEO's approval. OGE reminds ethics officials that, in accordance with 5 CFR § 2634.201, the reviewing official must approve or deny such requests in writing and maintain the record as part of the official report file.
- **Ensure That Financial Disclosure Reports Are Destroyed After 6 Years:** During discussions with ethics officials, OGE found there to be a general misunderstanding of the retention and disposal of financial disclosure reports, as required by 5 CFR §

2634.603 (g)(1) and § 2634.604(a), respectively. Regarding public reports, the ADAEO initially assumed that financial disclosure reports were not to be destroyed until six years after the termination report was filed. OGE reminded ethics officials that financial disclosure reports are to be retained for a period of six years after receipt, after which they are to be destroyed unless needed for an ongoing investigation. Subsequent to the review, the Commission confirmed that all reports retained after six-years were destroyed. As a good management practice, OGE suggests that the Commission develop a process for destruction of reports that are filed more than six years ago and incorporate this process into the Commission's written procedures to help ensure future regulatory compliance.

Conflict Remedies

The Commission has written procedures for ethics agreements. Of the five Commission PAS officials, only three had an ethics agreement. OGE found all three to have satisfied the terms of their agreement. Two Commission officials had screening arrangements for recusals that are enforced by PAS counsel and confidential assistants to avoid any actual or apparent conflicts of interest. The Commission has not issued any waivers of 18 U.S.C. § 208 in the last two years.

Education & Training

OGE's ethics education and training requirements at subpart G of 5 CFR part 2638 are generally being met. The Commission has written procedures for both initial ethics orientation (IEO) and annual ethics training. Additionally, the Commission provided OGE with the annual ethics training plan for 2012. The annual training plan includes the topics and methods of delivery of the annual training and estimates of the number of employees who will receive training in accordance with 5 CFR § 2638.706.

Initial Ethics Orientation

All five required employees received IEO in 2011. The Commission's Office of the Executive Director is responsible for providing the IEO materials to all new employees. The Commission's IEO packet includes OGE's ethics pamphlet "*A Brief Wrap on Ethics*" which covers a summary of the Standards of Ethical Conduct and the 14 Principles, a copy of the Commission's supplemental regulations and the contact information of the DAEO.

Annual Ethics Training

All 30 required employees received in-person annual training in 2011. Employees were shown OGE's video "*The Revolving Door*", which covers the topics of seeking employment and post-employment restrictions, and had a discussion led by both the ADAEO and the Deputy Ethics Official. Participants were also provided a copy of the Commission's supplemental regulation, OGE's ethics pamphlet "*A Brief Wrap on Ethics*" and the contact information for ethics officials. However, OGE noted that some of the criminal conflicts of interest statutes were not covered during the annual training. OGE is making no formal recommendation for improvement

regarding the annual training based on assurances received from the Ethics Office that all conflicts of interest statutes will be reviewed in future annual training.

Advice & Counsel

The Commission has written procedures for providing ethics-related advice and counsel. Most ethics advice is rendered in writing by the ADAEO and is kept in the Commission's ethics files. The DAEO reviews all the advice before it is provided. Written advice and counsel samples reviewed by OGE were thorough and issued in a timely manner.

Enforcement

The Commission does not have its own Inspector General nor does the agency utilize the services of an outside investigative organization to help ensure that certain program elements described at 5 CFR § 2638.203(b)(11) and (12) are carried out. In the event the DAEO receives information regarding an ethical standard violation, the DAEO would consult with OGE to determine the appropriate course of action to take.

According to ethics officials, referrals of alleged violations of the conflict of interest laws have not been made to the Department of Justice nor have disciplinary actions been taken for violations of the standards of conduct during the time period associated with this review.

Suggestion

- Establish a formal relationship with an outside investigative organization to provide investigatory services to the Commission for potential ethics violations, which can be done through a memorandum of understanding.

1353 Travel Acceptances

The Commission generally does not permit its employees to accept payments from non-Federal sources for travel, subsistence, and related expenses incurred on official travel under the authority of the General Services Administration (GSA) regulation at 41 CFR chapter 304, implementing 31 U.S.C. § 1353. However, in the event that an employee receives an offer for the payment of travel-related expenses under this provision, the Commission's procedures require employees to obtain approval of the ADAEO prior to the acceptance of travel.

The Commission submitted the required semi-annual negative reports of payments accepted from non-Federal sources to OGE in a timely manner.

Agency Comments

A draft of this report was provided to the Commission's ethics officials for review and comment. The Commission explained that, as a result of our report's recommendation, the ADAEO will be the certifying official of financial disclosure reports.