



# governmentattic.org

*"Rummaging in the government's attic"*

Description of document: Five Office of Government Ethics (OGE) single issue ethics program reviews completed between 1996 and 2001

Appeal date: 11-November-2010

Released date: 01-February-2011

Posted date: 21-February-2011

Titles of documents: "Results of the Review of Staffing, Structure and Budget Issues Affecting Department and Agency Ethics Programs," September 27, 1996  
"Report on the review of alternative and supplemental confidential financial disclosure systems," September 8, 1997  
"Results of the Review to Assess the Usefulness of 18 U.S.C. Section 208 Exemptions," February 5, 1999  
"Results of the Confidential Financial Disclosure System Single Issue Review," July 28, 1999  
"Waivers Under 18 U.S.C. § 208," April 19, 2001

Source of document: OGE FOIA Officer  
Office of Government Ethics  
Suite 500  
1201 New York Avenue, NW.  
Washington, DC 20005-3917  
Fax: 202-482-9237  
Email: [usoge@oge.gov](mailto:usoge@oge.gov)  
[FOIA request form](#) (that can be filled in, then printed, signed and either mailed or FAXed to OGE)

The governmentattic.org web site ("the site") is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

February 1, 2011

Tracking No.: OGE FOIA FY 11/17 (admin. appeal of FY 11/13)

The Office of Government Ethics (OGE) has reviewed its initial determination in response to your November 11, 2010, administrative appeal under the Freedom of Information Act (FOIA).

In your original request, which OGE received on October 29, 2010, you asked for a copy of six single issue ethics program reviews completed between 1996 and 2009. In response to your initial request, OGE provided you with the link to the OGE website where you could find one of the six single issue ethics program reviews. The remaining five single issue ethics program reviews were withheld in their entirety under FOIA Exemption 5, 5 U.S.C. §§ 552(b)(5) as inter- & intra-agency predecisional deliberative process material.

You now appeal OGE's original FOIA response to withhold the five single issue ethics program reviews in their entirety. OGE has reviewed your appeal of our decision and as a result, we have determined the following:

- (1) September 27, 1996 single issue ethics program review titled "Results of the Review of Staffing, Structure and Budget Issues Affecting Department and Agency Ethics Programs" – OGE is withholding portions of five pages of this report under FOIA Exemption 5, 5 U.S.C. 552(b)(5) as inter- & intra-agency predecisional deliberative process material. The withheld material is marked on the pages of the enclosed report. OGE notes that a final DAEOgram regarding the results of this single issue ethics program review was issued on October 24, 1996, and may be found on the OGE website at [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/1996/do96042.txt](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/1996/do96042.txt).
- (2) September 8, 1997 single issue ethics program review titled "Report on the review of alternative and supplemental confidential financial disclosure systems" – OGE is releasing this single issue ethics program review in its entirety. A copy is enclosed.
- (3) February 5, 1999 single issue ethics program review titled "Results of the Review to Assess the Usefulness of 18 U.S.C. Section 208 Exemptions" – OGE is withholding portions of three pages of this report under FOIA Exemption 5, 5 U.S.C. 552(b)(5) as inter- & intra-agency predecisional deliberative process material. The withheld material is marked on the enclosed pages.



- (4) July 28, 1999, single issue ethics program review titled "Results of the Confidential Financial Disclosure System Single Issue Review" – OGE is withholding portions of two pages of this report under FOIA Exemption 5, 5 U.S.C. 552(b)(5) as inter- & intra-agency predecisional deliberative process material. OGE notes that a final DAEOgram regarding the results of this single issue ethics program review was issued on October 20, 1999, and may be found on the OGE website at [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/1999/do99037.txt](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/1999/do99037.txt).
- (5) April 19, 2001, single issue ethics program review on evaluating agencies' procedures for consulting on, issuing, and forwarding 18 U.S.C. 208(b)(1) and (b)(3) waivers to OGE – OGE is releasing this single issue ethics program review in its entirety. OGE notes that comprehensive guidance titled "Waivers Under 18 U.S.C. § 208" was issued on February 23, 2007, and may be found on the OGE website at [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2007/do07006.txt](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2007/do07006.txt).

These single issue ethics program reviews include candid discussions between OGE and various ethics officials. In order to preserve OGE's access to the valuable opinions and information provided by these officials, we have withheld some of their names and agencies under FOIA Exemption (b)(5) as specifically noted above. We also note that these single issue ethics program reviews may discuss recommendations that were not adopted by OGE.

I am the official responsible for this FOIA determination. This constitutes the final OGE action on your FOIA request, which OGE received on October 29, 2010, as administratively appealed.

Under the terms of the FOIA, codified at 5 U.S.C. § 552(a)(4)(B) and OGE's regulations at 5 C.F.R. § 2604.304(d), you have the right to seek judicial review of this determination in the United States District Court for the district in which you reside or have your principle place of business or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email [ogis@nara.gov](mailto:ogis@nara.gov), phone 301-837-1996 or toll-free 1-877-684-6448.

Sincerely,



Don W. Fox  
General Counsel

Enclosures



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

September 27, 1996

MEMORANDUM

TO: Stephen D. Potts  
Director

THRU: Jack Covalesski  
Associate Director, OAP

Edward Pratt  
Chief, PRD

FROM: Ilene Cranisky  
Management Analyst, PRD

SUBJECT: Results of the Review of Staffing, Structure and Budget  
Issues Affecting Department and Agency Ethics Programs

The Program Review Division has completed its review of some of the elements affecting the management of department and agency<sup>1</sup> ethics programs. Factors we considered included: (1) how ethics programs are staffed, structured, and where they are located within an agency; (2) ethics officials' access to and support from agency heads; and (3) program funding. We also collected information and opinions on ethics officials' performance evaluation elements, how ethics programs can be improved, and on how to measure program effectiveness.

Overall, ethics officials were open, candid, and receptive to our review and offered many thoughtful and varying views and opinions on our review objectives. In addition to providing useful commentary for OGE management consideration, ethics officials requested that the results of this review be released. A DAEOgram has been drafted providing a summary of our findings for ethics officials.

Though we found that ethics officials' situations and opinions varied to a great extent, we did find some trends and similarities in the views expressed. However, mostly our findings are mixed and diverse concerning certain elements of our review which we believe is significant and meaningful in and of itself.

---

<sup>1</sup>For writing convenience, throughout this memorandum the terms "agency" or "agencies" is used instead of "department(s) and agency(ies)."

Mr. Stephen Potts  
Page 2

I would enjoy discussing the contents of this memorandum in greater detail at your convenience.

#### RESULTS IN BRIEF

Discussions with 17 selected ethics officials disclosed a variety of concerns about administering their ethics programs in general. These discussions led to developing some useful conclusions. However, because some of the situations and opinions were so diverse, information obtained either did not lend itself for significant analysis or placed limitations on generating meaningful recommendations for OGE management consideration. This memorandum highlights some of our most significant findings. More detailed information is contained in Attachment 1.

#### Ethics Officials Agreed On Some Issues

Though ethics officials' views and situations vary on many issues, we found areas where they either agreed or were similar. For example, ethics officials agreed that one of the most important elements in running a successful ethics program is having good access to and support from agency heads. In addition, they agreed that the Director of OGE should continue to strongly advocate support of ethics programs from the Congress and White House to raise awareness. Moreover, in agencies where ethics officials have staffing and budget constraints or limited access to the head of their agency, ethics officials strongly urged direct action by the Director of OGE. They believed that meetings should be held with specific agency heads to impress on them the importance of maintaining strong ethics programs.

Ethics officials expressed a high level of satisfaction with the support and assistance they receive from OGE and generally spoke favorably of the overall changes and improvements OGE has made and on some of our proposed plans. They are hoping that OGE will continue to assess our rules and regulations to determine where reporting or administrative burdens may be lessened. Concerning OGE's plan to develop an ethics official certification program, ethics officials supported the idea of additional training in general and urged that OGE produce more training materials--mostly videotapes--that are geared to "average" employees.

Another area of our review where ethics officials generally agreed concerned position descriptions and performance-rating elements. Most stated that they had limited interest or problems in these areas. In addition, they believed that if either document required updating or revisions, those changes could be made and would be approved.

Mr. Stephen Potts  
Page 3

Ethics officials acknowledged the difficulties in measuring the effectiveness of their ethics programs. While some stated that they were bothered by the lack of a solid quantifiable way to measure program effectiveness; others were not bothered or concerned about the lack of measurement criteria. Most said they were satisfied with the knowledge that their programs were generally complying with the ethics rules and regulations and that they have practical systems and processes in place to administer their programs.

Ethics Officials Differ  
On Other Issues

While ethics officials tended to agree on certain matters; they differ on other issues. Mostly, differences appeared in matters relating to staffing, structure, location, and funding of ethics programs. Overall, however, some very different structures and office arrangements work well in a variety of agencies.

Generally, officials are satisfied with the location of the ethics function and how the program is staffed. However, two of the ethics officials<sup>2</sup> we interviewed--who represent very differently structured and staffed offices--indicated that they were very unsatisfied and concerned about the continued viability of their program. Both stated that their access to and support from their agency head were limited. In addition, both believed that there would be improvements if the ethics program was moved from its current legal office<sup>3</sup> location.

At another agency<sup>4</sup>--which varies from the previous two as far as ethics office location and staffing--the ethics official expressed concern about the future of his ethics program due to his agency's recent restructuring and reorganization. Though he believed that his access to and support from senior management was still good, due to splitting up the ethics program function and restructuring the program's location--which is "one level down" from where it had been--he believed that employees receive the message that the level of importance of the program has

<sup>2</sup> [REDACTED]

(b)(5)

<sup>3</sup>For writing convenience, the term legal office is used to represent an Office of the General Counsel, an Office of the Solicitor, an Office of the Judge Advocate General, or a similarly functioning office.

<sup>4</sup> [REDACTED]

(b)(5)

Mr. Stephen Potts  
Page 4

been de-emphasized in general. He also stated that some of the fallout from these recent changes had yet to be determined.

At still another agency,<sup>5</sup> whose office had also undergone a recent restructuring, an ethics official stated that he is troubled as to whether certain elements of the ethics program will be accomplished. He raised the issue that though the DAEO has continual and good access to the agency head, as Alternate DAEO, he believed that he had limited access to and support from the DAEO.

Concerning budget issues, though most ethics officials had basic knowledge of the details on how the ethics program is funded, views are mixed on how best to ensure that ethics programs are and continue to be adequately supported. Line-item budgeting was raised as a possible remedy for some, but was not believed to be a panacea for all.

#### Several Factors May Contribute To Differences In Views

We recognize that several factors may contribute to the divergence in some ethics officials' opinions and perceptions, including, their "current" situations, general personality traits or attitude, level of satisfaction with their position or post, and level of seniority in their organization.

For some ethics officials, their views and perceptions have changed over time and are linked to the shifts that occur when Administrations change. According to some officials, their status within their agencies have risen or fallen when the head of the agency changes. Others, however, stated that they have not been affected by these types of changes.

#### Comments Made By Some Ethics Officials

Surprisingly, some ethics officials remarked or commented about their colleagues who consistently "complain" about staffing, structure, and access problems. These commenting officials--who stated that they felt "lucky" to have few problems in administering their programs--suggested that their colleagues may be "overdramatizing" their difficult situations. They also suggested that those officials who claim to be having problems in running their ethics programs may be lacking in some management skills or have the types of personalities where they demand and draw OGE management's attention.

---

5 [REDACTED] (b)(5)

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our review were to: (1) examine the various ways that ethics programs are structured and staffed; (2) obtain information on ethics officials' position descriptions and performance standards; (3) determine whether ethics officials believed that their programs are sufficiently funded and whether the budget process allows for adequate funding; (4) determine what ethics programs should be and how they can be made better; and (5) determine whether ethics officials know how to measure the effectiveness of their ethics program.

The objectives of this review were developed based on concerns raised by ethics officials; discussions with the Associate Director, OAP and the Chief, PRD; and as a result of two meetings held with selected ethics officials on May 7, 1996.

Agencies we included in our review were selected based on ethics officials' expressed interest in being included or for the purpose of collecting a cross-section of opinions from both small and large agencies. Structured interviews were conducted with selected ethics officials from the following 17 agencies from May through August 1996: Department of Agriculture, Department of Commerce, Department of Education, Department of Health and Human Resources, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of the Navy, Department of Transportation, Department of the Treasury, Department of Veterans Affairs, Agency for International Development, Federal Deposit Insurance Corporation, Federal Reserve System, Federal Trade Commission, U.S. Information Agency, and U.S. Postal Service.

Attachment (1)



### FINDINGS AND ISSUES

Findings and issues raised as a result our review follow.

#### I. STAFFING/STRUCTURE/LOCATION

- Most ethics officials enjoyed having the flexibility to structure and staff their programs as they saw fit, rather than OGE imposing or enforcing a specific location and structure for ethics offices.

##### Ethics Function Primarily Located In Legal Offices

- We found that the ethics function was located in legal offices for 13 of 17 agencies (76 percent) we reviewed. (This comports to the results of our 1995 Questionnaire where 99 of 131 respondents identified the DAEO position as located in a legal office.) Of those 13, about half were staffed by attorneys only (except for some limited secretarial assistance).

##### Views Vary On Where Ethics Function Should Be Located And How Ethics Offices Should Be Staffed

- Ethics officials expressed varying levels of satisfaction concerning the location and staff make-up of their ethics office. For those ethics offices staffed primarily by attorneys, some are satisfied with the staffing and while others are not.
- Opinions varied as to the appropriate or best location and staffing of ethics offices. Most agreed that there is no perfect situation and that various locations and staffing can and do work. Mostly, it appears that what "works" depends on experiences and circumstances.

For some, the staffing situations evolved over time and decisions were made based on some of the characteristics and bureaucratic idiosyncrasies of agencies. Officials tended to agree that as long as the staff was qualified (an expert in the statutes and the ethics rules and regulations) and had the appropriate amount of agency head support, the job series or education background of ethics officials was of little importance.

Location of the ethics office also seems to be of little significance. Instead, having access to and support from an agency head seems to be the key to having a successful program.

- Three officials<sup>1</sup> suggested that the ethics function be moved from its current legal office location to somewhere else. They believed that their ethics offices should be made either a separate and distinct entity, similar to an Inspector General Office, or relocated to a management or administrative unit in their agencies. Though the ethics programs at these agencies are currently generally in compliance with the ethics rules and regulations, ethics officials believed that due to other factors such as access to their agency heads or budget issues, the programs may not continue to be viable. These officials stated that this would be an area in which OGE could be useful if and when discussions are held with agency heads.

Some Ethics Offices Have Or  
Desire Mixed Staffing

- Some ethics functions--though located in legal offices--have mixed staffing, consisting of attorneys, paralegals, management analysts/specialists, and personnel experts<sup>2</sup>. In those agencies where the ethics function is handled outside of a legal office, non-attorneys primarily staff the offices<sup>3</sup>.
- There is lack of consensus on whether employees from one job discipline or another are best suited to administer an ethics program or perform the associated required functions. Some believed that attorneys' education background and training make them best suited while others disagreed.

Currently, some officials from attorney-driven programs no longer believed that their programs should be executed by attorneys only. However, these officials are unable to effect any changes within their agencies due to hiring limitations or other bureaucratic restrictions.

---

<sup>1</sup> [REDACTED] (b)(5)

<sup>2</sup>This includes the ethics offices at AID, Treasury, HUD, Federal Reserve, Education, and Commerce.

<sup>3</sup>In Justice, Interior, Agriculture, and FDIC.

- Ethics officials who administer their programs from offices that consist of a mix of staff backgrounds--primarily non-attorneys--tend to be very satisfied. They believed that the mix of backgrounds (job series) allows them the flexibility to assign ethics-related functions and duties to the most appropriately qualified employee.

#### Views On DAEO Position Varied

- Opinions varied on whether the DAEO should be a political appointee or a career employee. This was another area where ethics officials believed that it was more appropriate that agencies have flexibility in appointing DAEOs rather than OGE dictating or enforcing an appointment policy.

## II. FUNDING ETHICS PROGRAMS

- Many of the ethics officials had basic understanding on the details of how their ethics programs were funded.
- Most ethics offices are funded under a larger umbrella office such as the Office of the General Counsel. Most ethics officials were satisfied with this arrangement because they believed it allowed for a lot of flexibility. They believed that in general ethics program funding levels were fair and adequate.
- Only one<sup>4</sup> ethics official expressed dissatisfaction over his program's funding level and believes it is inadequate. Others stated that considering all Governmentwide reductions, they believed that their programs have fared well. However, a reasonable level of concern was expressed on the short and long-term budget future in general.

#### Limited Support For Line-Item Budgeting

- There was limited<sup>5</sup> support for the idea raised by some ethics officials for line-item budgeting for ethics programs. In addition, there was limited knowledge on the specifics of line-item budgeting, including its benefits and drawbacks. But, many thought that the idea had more drawbacks than benefits.

<sup>4</sup> [REDACTED] (b)(5)

<sup>5</sup> [REDACTED] (b)(5)

Ethics officials questioned how line-item budgeting would ensure that the proper amount was provided. In addition, they wondered what options would exist if additional resources were needed. Also, in times of across-the-board cuts, many believed that an ethics program line-item would suffer similar to other functions and programs:

- Only a few ethics programs currently have some form of line-item budgeting.<sup>6</sup>
- In times of dwindling budgetary resources, many believed that more creative funding strategies may need to be explored in order to keep ethics programs properly staffed and strong. However, ethics officials were unaware of additional funding strategies.

### III. POSITION DESCRIPTIONS AND PERFORMANCE ELEMENTS

- In planning for this review, one ethics official<sup>7</sup> raised concerns about his perception of a lack of correlation between ethics officials' position descriptions and performance elements used for appraisals. There was some interest expressed in our initial planning meetings to further study this issue.

However, in the course of our review, little concern or interest was actually raised on this issue. Our analysis was limited due to either documents not being provided or not being available. In addition, for those documents we did obtain, limited analysis resulted because the documents varied to such a great extent.

- Overall, most officials believed that both their position description and performance elements were as fair and reasonable as possible.
- The documents we obtained varied to such a great extent due to several reasons including ethics officials' level of seniority, whether or not they were full-time ethics officials, and whether generic position description and performance elements were used at the respective agency.

---

<sup>6</sup>The three agencies are Justice, Interior, and FDIC. It may not be appropriate to include FDIC since it is not funded like other federal agencies, rather it is funded through its member banks and its budget does not get approved by Congress and the President.

<sup>7</sup> [REDACTED] (b)(5)

Some documents were unavailable for our review because they were--at that time--undergoing revisions. Many agencies were also in the process of changing or updating appraisal systems. But, generally, ethics officials believed that if position descriptions or appraisals were very much out-of-line or non-representative of their duties, changes could be made.

#### IV. SUGGESTIONS FOR IMPROVING ETHICS PROGRAMS

- Overall, most officials are satisfied with the level of advice and assistance they receive from OGE. However, a few were displeased with our "turn-around" times when they seek opinions.
- Most ethics officials suggested that OGE continually review our rules and regulations to look for ways to eliminate unnecessary administrative burdens.

##### Public System

- Many believed that changes should be made in the public financial disclosure system. Though the level of detail for report is prescribed by statute, many thought the statute could be challenged and that reporting could be simplified or that the level of detailed information required could be reduced.

Many suggested that "type" and "amount" asset information had limited to no use in identifying conflicts. In addition, though there was agreement that transaction information is needed if the holding may be a potential conflict, most believed that too much follow-up was being performed when it was clear that the holding could not in any way be a potential conflict.

In general, ethics officials concerns focused on the requirement of public disclosure completeness. Officials believed that they should have more discretion to decide if the level of detail provided is enough to perform a conflict analysis.

- Ethics officials believed that an electronic version of the SF 278 would assist in reducing the filing burden for many filers. They are looking forward to OGE issuing such a version in the near future.

##### Confidential System

- Most believed that the changes already made to simplify the disclosure requirements for confidential filers have been positive. In addition, many are supportive of our proposed "no change" filing. However, many are still searching for



ways to further reduce the numbers of filers and suggested that the filing floor be reinstated.

Overall, the most common concern expressed by ethics officials was the general lack of usefulness of the system. Most felt that the system was nothing more than a "paperwork jungle." According to ethics officials, few to no conflicts have ever been identified through the filing of confidential reports. Most believed that some type of alternative "no conflict" system would be far more useful.

#### Education And Training

- Most officials are encouraged with OGE's plans to reduce the annual training requirements for confidential filers.
- Most were very supportive of OGE's efforts to provide useful training materials. However, officials believed that OGE should be producing more videotapes on a variety of subjects at a faster rate. They recognize that several videotapes are planned, but are concerned that OGE may not meet the planned release dates.

In general, ethics officials seek training materials geared more for the "average" employee. Most believed that the rules and regulations are unnecessarily too legalistic and, therefore, require either attorneys or other recognized experts for translation.

#### Interest In Ethics Officer Certification Program

- There was a high level of interest concerning OGE's plans to develop an ethics officer certification program. Most thought that this would be an effective way to provide early comprehensive training to new ethics officials, especially newly appointed DAEs.

Though not all were interested in participating or sending staff members to a "certification class," most thought that any additional training would be useful. Some were wary, however, that OGE would make the certification program a mandatory requirement--which they are opposed to. Only a few saw benefits to being "certified."

#### OGE Conference

- All agreed that OGE's annual conferences are beneficial and that they should be continued. Some suggested that sessions be earmarked or geared for experienced versus new ethics officials. They believed that trying to reach all levels of officials at all sessions is counterproductive.

- Many suggested that OGE sponsor more year round sessions in Washington, DC on specific technical subjects and switch-off to every other year for out-of-town conferences.

#### Other Matters

- Some ethics officials commented that they were interested in developing ways to integrate "ethics" into everyday management decision making processes and developing a generally more "ethical" workplace/environment. They suggested that OGE consider becoming involved in these sorts of efforts and that we move towards developing training aids that address "character and integrity" issues in the future.

#### V. MEASURING EFFECTIVENESS

- Officials generally do not know how to quantitatively measure the effectiveness of their ethics program, which is bothersome to some and not to others. Officials tend to use compliance-type measures to assess their programs' effectiveness. Some of the ways that ethics officials stated that they measured their success or effectiveness included knowing that their employees are: willingly seeking their advice, attending required ethics training, and filing generally timely and complete financial disclosure reports. According to ethics officials, the fact that they are consistently asked a lot of questions by employees is for them a universal "soft" measure of their success.
- Some suggested that OGE undertake large private citizen or Governmentwide employee polls or surveys to develop baseline data (and/or continual surveys) on opinions about ethics programs, financial disclosure, and overall views of government officials.





United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

September 8, 1997

MEMORANDUM

TO: Stephen D. Potts, Director

THRU: Jack Covalleski, Associate Director, Office of Agency Programs  
Ed Pratt, Chief, Program Review Division

FROM: Dale A. Christopher, Jr., Management Analyst, Program Review Division

SUBJECT: Report on the review of alternative and supplemental confidential financial disclosure systems

The Program Review Division recently performed a review of certain agencies administering alternative and/or supplemental confidential financial disclosure systems. The agencies selected for this review included the Commodity Futures Trading Commission (CFTC), the Department of Justice (DOJ), the Federal Communications Commission (FCC), the Federal Deposit Insurance Corporation (FDIC), the General Services Administration (GSA), the National Endowment for the Humanities (NEH), the National Institutes of Health (NIH), the National Science Foundation (NSF), and the Office of Personnel Management (OPM).

BACKGROUND

On April 7, 1992, the U.S. Office of Government Ethics (OGE) published in the Federal Register (57 Fed. Reg. 11800-11830) the current regulation on financial disclosure, codified at 5 C.F.R. part 2634 in place of the existing regulation. The current regulation included for the first time a requirement for a uniform system of confidential disclosure for the executive branch of Government which closely parallels, to the extent practicable, the public financial disclosure system. The current confidential financial disclosure system requirements at subpart I of part 2634 became effective on October 5, 1992. Subpart I superseded subpart D of 5 C.F.R. part 735, which outlined the model requirements for the old confidential system as well as any implementing agency regulations thereunder.

The confidential financial disclosure system was authorized by subsection 107(a)(1) of the Ethics in Government Act of 1978, as amended (the Act), wherein the supervising ethics office (i.e., OGE) may require officers and employees under its jurisdiction to file confidential financial disclosure reports in such form and

containing such information as it may prescribe by regulation. Section 201(d) of Executive Order (E.O.) 12674, as modified by E.O. 12731, charged OGE with the responsibility for promulgating regulations establishing a system of confidential disclosure by executive branch employees to complement the system of public disclosure under the Act.

The issuance of the current confidential disclosure regulation was the culmination of a long effort by OGE to bring about a uniform confidential system paralleling the public system. The authority for the old confidential financial disclosure system came from E.O. 11222, issued by President Johnson on May 8, 1965 and directed the Civil Service Commission (now OPM) to prescribe regulations requiring the submission of confidential financial disclosure reports by employees subordinate to the heads of their agencies. The regulation which the Commission issued at subpart D of 5 C.F.R. part 735 established a model confidential system which agencies were expected to implement through regulations of their own.

The authority for the old confidential financial disclosure system also supposedly resided in subsection 207(a)<sup>1</sup> of the original Act, Public Law 95-521. However, there ensued some confusion over the validity of that authority, and on December 9, 1985 subsection 207(a) was amended to delineate more clearly that authority by specifying that the President could require the filing of confidential financial disclosure reports by officers and employees of the executive branch in such form and containing such information as the President shall prescribe by regulation. President Reagan subsequently issued E.O. 12565 on September 25, 1986, which amended E.O. 11222 by directing that a system of non-public (confidential) financial disclosure be established for the executive branch, that such a system complement the public system established by the Act, and that OGE develop regulations implementing the non-public (confidential) system.

On December 2, 1986, OGE published in the Federal Register a proposed confidential financial disclosure regulation. A 60-day comment period was opened which was extended another 30 days to allow ample time for the submission of comments. OGE received about 40 comment letters from various Federal agencies and one Federal employees union. The comments contained significant criticism of the confidential disclosure system envisioned in the proposed regulation, which would have differed markedly from the public disclosure system. Consequently, OGE dropped the idea of establishing a confidential system not based generally on the public system established by the Act.

---

<sup>1</sup> Subsection 207(a) was the precursor to current subsection 107(a), which was one of the amendments made to the Act by the Ethics Reform Act of 1989.



While the current regulation, based generally on the public system established by the Act, is intended to provide uniformity for executive branch financial disclosure, under 5 C.F.R. § 2634.905(c), an individual or class of individuals, including special Government employees (SGE), may be excluded from all or a portion of the confidential reporting requirements if an agency determines that the use of an alternative procedure approved in writing by OGE is adequate to prevent possible conflicts of interest.<sup>2</sup> In addition, an agency may, subject to OGE approval, require additional confidential financial disclosure information that supplements the information required by the standard confidential form (Form 450)<sup>3</sup> and/or the standard public form (SF 278), if necessary because of special or unique agency circumstances (see 5 C.F.R. § 2634.601(b)).<sup>4</sup>

#### SCOPE AND METHODOLOGY

We selected 9 of the 25 agencies that have received written approval from OGE to implement an alternative and/or supplemental confidential financial disclosure system. Our review process consisted primarily of meeting with ethics officials; reviewing the alternative and supplemental forms, instructions, and written procedures where available; and examining correspondence between the agencies and OGE during the approval process. The review was conducted during May and June 1997.

#### CATEGORIES OF SYSTEMS

The systems in place at the nine agencies we examined can be divided into five basic categories, three of which are alternative and two of which are supplemental systems. Some agencies

---

<sup>2</sup>Under new paragraph (d) of 5 C.F.R. § 2634.905, beginning with the next annual filing cycle in the fall of 1997, agencies may also permit confidential filers to use OGE's new Confidential Certificate of No New Interests (OGE Optional Form 450-A) in lieu of an incumbent Form 450.

<sup>3</sup>For simplicity, the term "Form 450" will be used throughout this report to designate either the Standard Form 450 or the OGE Form 450, both having been used by the agencies during the period covered by our review.

<sup>4</sup>In October 1995, OGE decided that agencies administering supplemental systems did not have to issue supplemental regulations to address special or unique agency circumstances. While 5 C.F.R. § 2634.103(a) clearly requires that supplemental regulations be approved by OGE, the provision on supplemental regulations is regarded as permissive, rather than imperative, where the supplemental reporting requirements have been approved previously by OGE in writing.

administer more than one type of system. The following is summary of our findings, arranged by category.

#### ALTERNATIVE SYSTEMS

The alternative systems we examined consisted of agencies collecting certificates of no conflict, certificates of no new interests with regard to previously filed Forms 450, or substitute forms in lieu of the Form 450. The substitute forms differ from the other two types of certificates primarily in that they require affirmative disclosure on behalf of the filers, rather than simply requiring them to sign a certification statement.

##### Certificates Of No Conflict

Four of the agencies included in our review, DOJ, GSA, NEH, and NSF, collect or have collected certificates of no conflict from certain employees. GSA, NEH, and NSF only require(d) certificates from SGEs serving on peer review panels. DOJ, however, collects certificates from certain litigators and other designated regular employees.

The alternative systems at NEH and NSF are administered quite similarly. In fact, these two agencies, among others, jointly requested permission from OGE to implement their systems. Essentially, both agencies require SGE members of their peer review panels (panelists) to certify prior to the panel meetings that they do not have any conflicts that would preclude them from serving impartially on panels that review applications and recommend the award of grants. However, they differ in that only NEH provides panelists with the identities of grant applicants. Upon reviewing the applications, NEH panelists complete the certification statement, certifying that they do not have any conflicts with the applicants. NSF, on the other hand, only provides panelists with examples of the types of affiliations or relationships that may present conflicts with applicants. NSF panelists then simply certify that, to their knowledge, they do not have any such relationships. Upon actually convening the panels, both NEH and NSF require panelists to leave the room during discussions regarding an applicant with whom they have a conflict.

Officials from both agencies stated that collecting the certificates and requiring panelists to leave the room if conflicting issues arise are considerably more effective measures than requiring panelists to file Forms 450. They contended that the Form 450 would collect superfluous information in certain areas and would not necessarily collect relevant information in others. Additionally, NEH officials stated that they simply would not have the staff resources to review the Forms 450 if they were required from the hundreds of panelists who serve each year.

GSA administered a similar one-time system in 1996 for SGE panelists who assisted in the review and evaluation of design proposals for the National World War II Memorial. Similar to the NEH system, panelists were provided lists of potential offerors prior to the panel meetings and were required to sign a statement certifying that they did not have a financial interest in any of the offerors that would pose an actual or apparent conflict.

GSA officials echoed the sentiments of officials from NEH and NSF, stating the Form 450 did not focus on the information necessary to identify potential conflicts for their unique panel. They added that prospective panelists may have been reluctant to serve on the panel had they been required to disclose all the information requested on the Form 450.

As previously mentioned, DOJ collects certificates of no conflict from certain litigators and other employees. Filers are to complete a statement for each case assigned to them, certifying that they have no conflicts with the case.

DOJ officials stated that it would actually be easier to collect Forms 450 on an annual basis rather than collecting the certificates for each case assigned. However, the certificates are far more effective and efficient tools for identifying potential conflicts.

We examined a sample of certificates filed at each of the four DOJ divisions that require them: Antitrust, Civil Rights, Criminal, and Justice Management. All of the required certificates were on file for the Antitrust and the Justice Management Divisions, and 27 of the 28 certificates were on file for the Civil Rights Division. However, DOJ officials stated that the Criminal Division had not been collecting the required certificates. To remedy this error, the Criminal Division went through their case list and retroactively prepared a certificate for every court of appeals and Supreme Court brief filed by the division within the past few years. However, the certificates that were prepared were not in the format that was approved by OGE. DOJ officials stated that they had already spoken to officials in the Criminal Division and informed them that this format was unacceptable.

#### Certificates Of No New Interests

Two agencies, GSA and OPM, administered systems allowing confidential filers to sign statements certifying that they had not acquired any new financial interests since the last filing of their confidential report, rather than file an incumbent Form 450. Both agencies were granted approval by OGE for a one-time test of their systems during the 1996 annual confidential filing cycle.

According to GSA officials, 1599 (42 percent) of GSA's 3781 confidential filers filed a certificate of no new interests in

1996. Of these, 69 filers erroneously filed an incumbent Form 450 and a certificate of no new interests. Additionally, 40 filers requested copies of their previous year's Form 450, presumably to determine if they had acquired any new interests.

While the percentage of filers who filed the certificate appears substantial, GSA officials actually considered the percentage to be smaller than they had anticipated. While they could not provide any verifiable explanation for the perceived low percentage, they did state that it was possible that the deputy standards of conduct counselors at the various GSA components may not have provided filers with the cover memorandum prepared by ethics officials at GSA headquarters which explained the appropriate use of the certificate.

GSA officials stated they would utilize the new OGE Optional Form 450-A if it were available for the 1997 annual filing cycle. If not, they planned to request approval from OGE to continue to use their own certificate.

According to an OPM official, an even smaller percentage of confidential filers took advantage of the alternative certificate at OPM. Only 11 (8 percent) of 145 confidential filers filed a certificate of no new interests in 1996, including 1 filer who filed both a certificate and a Form 450. According to the OGE attorney who was on detail at OPM during the 1996 filing cycle, ethics points of contact at the division level may not have provided filers the explanatory memorandum she prepared. An OPM official added that filers may have erred on the side of caution by filing an incumbent Form 450 when a certificate would have sufficed. Notwithstanding the limited use of the alternative certificate in 1996, OPM intends to use the OGE Optional Form 450-A if available, or otherwise request OGE approval to continue using their own certificate.

#### Substitute Forms

Two agencies, NIH and NSF administer alternative systems by which they collect substitute forms in lieu of the Form 450 from certain SGE advisory committee members. As previously discussed, substitute forms differ from the other two types of alternative forms in that they require affirmative disclosure by the filer, rather than simply the filer's signature certifying that no conflicts exist or that they have not acquired any new interests.

NIH requires SGE advisory committee members to file a new entrant Form 450 upon appointment to a committee. Subsequently, prior to each committee meeting, filers are required to file a "Verification of Review of Financial Interests" certificate (verification certificate). Similar to the certificates of no new interests used by GSA and OPM, filers may certify on the verification certificate that no information has changed from that

reported previously. However, if any information has changed, filers must disclose the name and kind of organization in which they have acquired or divested of an interest, as well as the nature of the interest.

The development of the verification certificate was in response to a Department of Health and Human Services' (HHS) Office of Inspector General (OIG) recommendation that a process of ongoing review to identify changes in a committee member's financial interests be implemented. OGE approved the use of the verification certificate on a trial basis and requested that NIH report the results of the trial so that OGE could determine if the use of the verification certificate should be approved on a permanent basis or expanded to other agencies.

In its subsequent report to OGE, NIH stated that a random sample of over 1,700 committee members indicated, "a high level of satisfaction" with the certificate. Additionally, NIH estimated the average amount of time required to review a Form 450 to be approximately 45 to 50 minutes compared to only 5 to 10 minutes for a verification certificate. NIH also stated in their report that the timeliness of collection for the verification certificates is significantly better than with the Form 450. Finally, NIH reported that the use of the verification certificate, "...promoted an ease of identification of interests which may create potential conflicts and increased the agency's ability to comply with conflict-of-interest obligations."

OGE recently approved the use of the NIH verification certificate by other HHS agencies, based on the highly favorable results of the trial. During our review, an HHS official agreed that only the NIH verification certificate would be used by other HHS agencies and that any material deviation from the form would require further OGE review and consideration for approval.

NIH officials stated that the verification certificate system was the most effective way to collect relevant information. They added that since the results of the HHS OIG investigation called for the review of updated information on an ongoing basis, collecting new entrant Forms 450 annually, as required by OGE regulation, would not satisfy the OIG criticism. Additionally, NIH officials stated that it is often difficult enough to collect the verification certificates from the committee members, let alone trying to have them complete a new Form 450 each year.

NIH officials admitted that maintaining all the Forms 450, verification certificates, and any corresponding waivers is administratively burdensome. Additionally, one official expressed frustration with not having received enough training to effectively identify potential conflicts. However, we were subsequently informed that training for the NIH committee management officers



responsible for collecting and reviewing the Forms 450 and verification certificates was scheduled for June 1997.

In addition to requiring SGE peer review panelists to file certificates of no conflict, NSF requires SGE members of its general advisory committees to file a substitute form (NSF Form 1230A) in lieu of the Form 450. The Form 1230A is a three-part form requiring the reporting of financial interests, positions and arrangements, and other interests or relationships. It varies from the Form 450 in that it only requires disclosure of interests that could be affected by any NSF policy deliberation that could come before the committee, impair the member's impartiality in the policy deliberation, or cause a reasonable person with knowledge of all the relevant facts to question the member's impartiality. The Form 450 on the other hand requires the disclosure of interests and arrangements regardless of whether they pose a potential conflict of interest.

NSF ethics officials consider the substitute form to be very effective. They restated the sentiments of their original approval request by indicating that the use of the Form 450 would have shortcomings in some areas and require unnecessary information in others.

#### SUPPLEMENTAL SYSTEMS

The supplemental systems we examined consisted of agencies requiring supplemental confidential forms from certain employees, or collecting additional information through the use of supplemental instructions directing confidential filers to add the information to their Forms 450.<sup>5</sup>

#### Supplemental Forms

Two agencies, FDIC and FCC, collect supplemental forms from certain employees. The collection of these forms at both agencies is necessitated by agency-specific statutory restrictions on holding certain financial interests which may not necessarily be captured on an SF 278 or Form 450.

FDIC requires the filing of three supplemental financial disclosure forms from certain employees to ensure compliance with FDIC-specific statutory restrictions on having certain financial interests: the FDIC Confidential Report of Interest in FDIC-Insured Depository Institution Securities; the FDIC Confidential Report of Indebtedness; and the FDIC Confidential Statement of

---

<sup>5</sup>Because the SF 278 is statutorily based, agencies cannot collect information on the form which is not already required by the statute.

Credit Card Obligation in Insured State Nonmember Bank and Acknowledgment of Conditions for Retention Notice of Disqualification.

All employees must file the FDIC Confidential Report of Interest in FDIC-Insured Depository Institution Securities within 30 days of their date of entrance on duty. Thereafter, an updated report must be filed when, under certain circumstances, an interest in an FDIC-insured depository institution is acquired subsequent to the commencement of employment. An employee must also file an additional report upon divestiture of a previously reported interest in an FDIC-insured depository institution.

The FDIC Confidential Report of Indebtedness must be filed by certain employees within 30 days of entering on duty and annually thereafter. Filers are required to report any indebtedness which is evidenced by a credit card issued by an FDIC-insured depository institution and any other indebtedness to a Federally-insured financial institution or affiliates thereof.

The FDIC Confidential Statement of Credit Card Obligation in Insured State Nonmember Bank and Acknowledgment of Conditions for Retention - Notice of Disqualification, must be filed within 30 days of certain employees acquiring a credit card from an FDIC-insured non-member bank headquartered outside of the employee's region of assignment.

During our review, an FDIC official stated that since the information collected on the supplemental forms is required to enforce statutory restrictions, the collection of these forms is absolutely necessary and is the most effective means by which to identify potential conflicts. She also stated that the supplemental forms are efficient in terms of saving time and money. For example, the forms are self-disqualifying, meaning that by signing the reports, filers certify that they are disqualified from participating in any matter affecting the entities listed on the forms. Therefore, additional disqualification statements or other ethics agreements are rarely required. Additionally, all of the forms have been computerized and can be accessed by employees via the FDIC intranet system, thereby reducing the time spent on distributing and completing the forms and saving paper in the process.

FCC requires the filing of a supplemental form (Form A54A) from confidential and public filers to collect information about income and interests in property or assets valued below the reporting thresholds of the SF 278 and Form 450 in order to meet the statutory requirements of section 4(b) of the Communications Act. Section 4(b) prohibits FCC employees from having a financial interest in any company or other entity engaged in the manufacture or sale of telecommunications equipment which is subject to regulation by the FCC. The form directs public and confidential

filers to list income and interests in property or assets valued below the reporting thresholds of the SF 278 or Form 450.

According to FCC officials, the A54A is an effective means of enforcing the statutory restrictions. Additionally, they stated that employees who have prohibited holdings are generally asked to divest at the time of their initial filing of an SF 278 or Form 450 and the A54A. Therefore reviews of financial disclosure reports filed during subsequent years rarely uncover holdings by FCC employees that are prohibited.

### Supplemental Instructions

Two agencies, CFTC and NIH, use supplemental instructions to collect information from confidential filers that may not otherwise be collected on the Form 450. These supplemental instructions differ from the supplemental forms utilized by FDIC and FCC in that they allow the requested information to be reported on the Form 450 itself, rather than requiring filers to complete a separate form.

CFTC's supplemental instructions direct confidential filers to indicate on their Forms 450 if any reported holdings are in excess of \$25,000 for any individual stock or mutual fund. This is to ensure that the filer does not have a significant beneficial interest in a firm that is required to file reports with CFTC under the Commodity Exchange Act, as prohibited by CFTC's Code of Conduct at 17 C.F.R. § 140.735.

The CFTC official responsible for collecting and reviewing the approximately 300 confidential reports each year stated that about 25 reports (8 percent) contain indications that a reported holding is in excess of \$25,000. However, he added that very few of these result in the filer having to divest of the interest. Another CFTC official stated that having such an interest in a firm is not necessarily prohibited. He explained that the \$25,000 threshold is simply a "red flag" that alerts the reviewer that further examination is necessary. Once such an interest is identified, the reviewer determines if the entity must file reports under the Commodity Exchange Act. If so, a determination is made as to whether or not the interest would be considered significant (and thus prohibited) with respect to the value of the firm's total outstanding stock. Generally, the interest is not deemed to be significant, considering the large size of many of the companies required to file reports with CFTC.

During our review, we questioned CFTC officials as to how the \$25,000 determination is made for public filers considering the relevant valuation category on the SF 278 ranges from \$15,000 to \$50,000 and the supplemental instructions only apply to confidential filers while the prohibition applies to all CFTC employees. We were informed that any reported interest falling within that range or above would require further examination,

assuming the interest was identified as potentially prohibited. With respect to all other CFTC employees, CFTC officials stated that all non-filing employees (about 100 to 150) must file a CFTC Form 185 upon entering on duty and annually thereafter, certifying that they have no financial interests or outside employment activities which would violate the Code of Conduct.

The supplemental system at NIH consists of instructions requiring SGE members of advisory committees to disclose any sources of non-Federal research support, even if below the Form 450 reporting thresholds, available for direct support of their research endeavors through research or training grants, cooperative agreements, or contracts. As with the NIH alternative system, this system was the result of another HHS OIG recommendation that NIH revise the financial disclosure system to more specifically request information on advisory committee members' involvement in non-Federal grants and contracts. According to the OIG examination of NIH's financial disclosure system for SGE advisory committee members, these particular research interests were not necessarily required to be reported on the Form 450.

Unlike the NIH verification certificate, which has already been approved for use by other HHS components, components wishing to use these or similar supplemental instructions must first receive OGE approval. NIH officials stated they were aware of this requirement but were unsure how many, if any, HHS components were considering this option.

## CONCLUSIONS

The use of alternative and supplemental financial disclosure systems appears to be an effective means by which agencies can identify potential conflicts of interest, collect information not necessarily captured by the standard forms, and enforce agency-specific statutory and regulatory restrictions. The flexibility allowed by OGE's financial disclosure regulation has been beneficial for agencies with unique circumstances, without compromising adequate conflict-of-interest identification and resolution. Without exception, the officials we interviewed expressed satisfaction with the results produced by their systems and were confident that these systems were the most efficient and practical way to collect the appropriate information and prevent conflicts for their particular agency.

Our examination of these systems revealed that virtually all were being administered appropriately and within the parameters originally approved by OGE. Moreover, officials were cognizant that any material deviation from the systems as approved by OGE would be unacceptable. Examples include DOJ officials informing the Criminal Division that they could not use their own certificate of no conflict, and NIH officials recognizing that although their verification statement could be used by other HHS components (as

allowed by OGE), use of the supplemental instructions must be approved by OGE. This is significant in light of OGE's interest in preserving a certain amount of uniformity in and oversight of financial disclosure throughout the executive branch.

While the systems vary from the standard confidential system set forth in the OGE regulation, their implementation has not diminished OGE's ability to ensure compliance with conflict-of-interest statutes and regulations. OGE should continue to monitor the administration of these systems as part of the Program Review Division's standard review procedures.







United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

February 5, 1999

MEMORANDUM

TO: Marilyn Glynn  
General Counsel, OGC & LP

THRU: Ed Pratt *E.P.*  
Chief, PRD

Jack Covalleski *Jack Covalleski*  
Senior Associate Director, OAP

FROM: Ilene Cranisky *Ilene Cranisky*  
Management Analyst, PRD

SUBJECT: Results of the Review to Assess the Usefulness of 18 U.S.C. Section 208 Exemptions

The Program Review Division (PRD) has completed its review to determine ethics officials' level of satisfaction with the 18 U.S.C. section 208 exemptions and to assess the overall usefulness of the exemptions.<sup>1</sup> We found that the majority of ethics officials are generally satisfied with the exemptions. They told us that they are often able to apply or use the exemptions to prevent actual or potential financial conflicts. Also, several indicated that they noted a reduction in the number of waivers they have issued, since the exemptions have been available. However, many believe that some changes are needed to various exemption categories to make them more practical and to reduce officials' administrative burdens. Also, several suggested additional exemptions which they believe would be beneficial. Other clarifications to the regulation and additional actions that OGE should consider taking were also suggested.

This memorandum summarizes the noteworthy comments and information we collected and provides options for your consideration based on ethics officials' suggested changes and additions. Of note, many officials expressed their appreciation on the Office of Government Ethics' (OGE) efforts to solicit their views and opinions on how well the exemptions are working. They emphasized that they were now only seeking refinements to exemptions to increase their overall effectiveness.

I am available to discuss the contents of this memorandum in greater detail at your convenience.

---

<sup>1</sup>For brevity, throughout this document we refer to 18 U.S.C. 208(b)(2) exemptions as either "208(b)(2) exemptions" or "exemptions."

### Background

On December 18, 1996, OGE published its final rule--5 C.F.R. part 2640<sup>2</sup>--which describes circumstances under which the prohibitions contained in 18 U.S.C. 208(a) could be waived. Section 208(a) prohibits employees of the executive branch from participating in an official capacity in particular matters in which they, or certain persons or entities with whom they have specified relationships have a financial interest. Section 208(b) of title 18 permits waivers of these prohibitions in certain cases. Under section 208(b)(2), OGE has the authority to promulgate executive branchwide regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a). OGE's final regulation describes those financial interests.<sup>3</sup>

### Objectives, Scope, and Methodology

As part of OGE's routine responsibility to assess the usefulness of its regulations, PRD's Annual Program Plan for 1998 included a review to evaluate the implementation of 18 U.S.C. 208(b)(2) exemptions.

The objectives of this review were to (1) examine departments' and agencies'<sup>4</sup> use of 208(b)(2) exemptions, (2) determine whether the exemptions were working as intended, (3) determine whether changes or additions to the exemptions are needed, (4) determine whether ethics officials received sufficient information/training concerning the exemptions, and (5) determine whether ethics officials provided information to employees about using/applying the exemptions.

To conduct our review, we held four "focus groups" (meetings) with ethics officials who represented 21 different agencies to solicit their views and opinions on a series of questions about the exemptions.<sup>5</sup> Attachment 1 identifies the agency ethics officials with whom we met.<sup>6</sup>

---

<sup>2</sup>Entitled Interpretation, Exemptions, and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest).

<sup>3</sup>OGE published for comment a proposed rule on September 11, 1995.

<sup>4</sup>For writing convenience, department(s), bureau(s), and agency(ies) are referred to as agency(ies).

<sup>5</sup>Meetings were held on January 13, 20, 26, and 28.

<sup>6</sup>We contacted ethics officials from several other agencies. However, they declined interest in participating in our meetings because they stated that they were either satisfied with the existing exemptions or they had limited or no useful experience in applying them; therefore, they had no comments to share.

Prior to our meetings, we provided lists of questions to all participants and invited them to suggest changes or additions to these basic questions, which, we explained, we planned to ask during our focus group sessions. No changes or additions to the questions were suggested either prior to or during our meetings.

### Results in Brief

- Though we elicited a variety of responses to our posed questions concerning ethics officials' level of satisfaction with the exemptions, whether the exemptions were working as intended, and whether they were useful, we noted several trends. The majority of officials indicated that they were generally satisfied with how the exemptions were working and they positively commented on the exemptions' usefulness. However, most agreed that several specific changes could improve their effectiveness without undermining the financial prohibition in section 208(a).
- Most officials favor raising the current de minimis amounts for interests in securities.

Concerning the *de minimis exemptions for matters involving parties* [§2640.202(a)], the majority of officials favor raising the current \$5,000 amount to \$15,000. While a small number oppose any increase or support an increase to a much higher amount, most believed that a raise to \$15,000 would further relieve some of their administrative burden.<sup>7</sup> (Several officials commented on the lack of uniformity between the SF 278's "valuation of asset categories" and the current exemption amount.) However, more importantly, most officials believe--based on their two years of applying the current \$5,000 de minimis exemption--that a raise to \$15,000 can and should now be considered "inconsequential" within the meaning of section 208(b)(2).

Concerning the *de minimis exemption for matters of general applicability* [§2640.202(b)], many officials favor raising the current \$25,000/\$50,000 amounts. Various specific amounts were discussed within group settings, including making the amounts consistent (i.e., \$50,000/\$50,000) and raising them up to \$100,000/\$300,000, but no majority opinion on amounts was expressed. Overall, officials did not appear to be as concerned with this section of the rule, even though most agreed that the de minimis amounts should increase.

- The majority suggested a change in the sector fund exemption which would make

---

<sup>7</sup>Officials' two primary administrative burdens are (1) reviewing financial disclosure reports and subsequently following-up with employees on the specific values of their holdings, and (2) writing of waivers. Some officials commented on a reduction in the number of waivers they issue, while others indicated that the number of waivers they issue has not changed in their agencies. However, officials cited no administrative relief relating to their review of disclosure reports.

all interests in sector mutual funds exempt.<sup>8</sup> Many officials cited similar examples of the tremendous administrative burdens placed on them (and on employees) associated with making determinations concerning these funds. They suggested that if OGE could not totally exempt those funds, we should consider establishing a very high de minimis amount (in the range of \$50,000 to \$100,000) to relieve, at least, some portion of their burden.

- Concerning ethics officials' training on the exemptions, the majority of headquarters-based officials indicated that their advance or early training on the regulation was sufficient. Most either attended an OGE rule-drafting session, an OGE conference session, or an Interagency Ethics Council meeting which discussed the exemptions. Most officials indicated, however, that though they feel sufficiently educated on the rule, they believe that OGE should regularly schedule (introductory level) exemption training classes in Washington, DC to ensure that newer or less experienced ethics staff are assured of training. In addition, for agencies with regional ethics counsels, officials emphasized the need for OGE to provide training in the regions.
- According to officials, varying amounts of training (or information) which focused on the exemptions were provided to agency employees, but for the most part, it was limited. Very few agencies directly provided the final rule to its employees, but many provided OGE's pamphlet.<sup>9</sup> Some agencies, however, only provided verbal briefings to employees which minimally covered the exemptions.

All ethics officials agreed that section 208(a) and the exemptions, in particular, are so complicated, that they believe that few employees are conversant about them. Officials stated that, in general, they are more concerned and focused on raising employees' awareness of potential conflicts and ensuring that employees are knowledgeable about when they should seek legal advice. None advocated the idea that employees could (or should) be in the position of applying the exemptions on their own.

#### Other Suggestions for OGE Consideration

The following suggestions were made for your consideration.

- Add a column or box to the both the SF 278 and OGE Form 450 where filers could check that the asset identified was below a de minimis amount. This modification would assist in eliminating some of the administrative burden experienced by ethics

---

<sup>8</sup> Officials suggested that supplemental regulations, which prohibited employees from specific industry holdings, could be issued in those agencies where totally exempting sector funds might be problematic.

<sup>9</sup> Pamphlet entitled "Conflicts of Interest and Government Employment."

officials in reviewing the reports.

- If OGE totally exempts sector funds, OGE should consider eliminating the need to report sector funds on the OGE Form 450.
- Consider eliminating the requirement of reporting any holding that meets the de minimis exemptions on the OGE Form 450.
- Develop an exemption that would permit employees to wind down their prior affiliations involving research activities or faculty commitments with either universities or nonprofit institutions.<sup>10</sup>
- Develop an exemption addressing negotiating for employment with universities or other nonprofits which would mirror the current exemption for leave of absence [§2640.203(b)]. This new exemption would be limited to matters of general applicability.
- Amend § 2640.203(g) to include boards of directors. Also, delete the last sentence of this exemption (which does not include the ownership of stock) to make it more useful. Prohibiting special Government employees' (SGE) ownership of stocks limits the effectiveness of this exception.
- Clarify (by example) how the "timing" of the sale of stocks (whereby an unintended profit is made) should be factored-in by ethics officials so that an employee may participate in a matter (i.e., address situations when an agency has competing considerations, such as avoiding insider trading).
- Expand the exemption for mutual insurance funds to include stock insurance funds.<sup>11</sup>[§2640.203(f)]
- Include common trust funds in the exemption as initially proposed at §2640.201(a) in the draft rule.<sup>12</sup>

---

(b)(5)

<sup>10</sup>Ethics officials from science-type agencies could potentially provide assistance in drafting an affiliation amendment. According to [REDACTED] often, employees need some time to cut their ties with their universities or nonprofit institutions because they are either heavily involved in laboratory research or student mentoring (and the university or institution can not immediately replace them).

(b)(5)

<sup>11</sup>This point was raised by [REDACTED] who expressed interest in assisting on this definition expansion.

<sup>12</sup>This point was raised by [REDACTED], who expressed interest in assisting on modifying the definition.

(b)(5)

- Overall, loosen the restrictions placed on SGEs by specifically raising the de minimis amounts for them.

Agency-Specific Concerns

No officials indicated a need for a special agency-specific exemption at this time. However, the Department of Health and Human Services (HHS) raised specific concerns regarding two sections of the rule and posed suggestions for OGE to consider, which follow.<sup>13</sup>

- Concerning amending §2640.203(g), HHS suggests that OGE expand the exemption to include consultant work. At HHS, SGEs (in particular scientists and academics) have extensive professional involvements that often exceed the time dedicated to a main employer. HHS does not feel that it can rely on the current exemption because it is never safe to assume that no other "non-Federal" employment is affected. HHS' amendment proposes that it would only apply to general matters. And, employees would still be reporting outside consulting on the OGE Form 450, so therefore HHS sees no harm.

HHS also suggests that this exemption be broadened to exempt all matters of general applicability in order to significantly increase the exemption's use. HHS views the current language which includes the phrase—"special or distinct effect" to be a barrier to using this exemption. HHS experience suggests that employees and reviewers do not know what this language means and it places a great burden on them to determine whether the effect on an employee is disproportionate or is shared as part of a class. Currently, HHS assumes that the exemptions implies that the employees and reviewers can actually and easily find out how many other persons may be similarly affected by a matter of general applicability. Since the exemption is already limited to Federal Advisory Committee Act committees, HHS believes that there are adequate safeguards to broaden the exemption to include all matters of general applicability.

- Concerning amending §2640.203(b), HHS suggests that OGE eliminate the "special and distinct effect" limitation. HHS believes that the support they provided in the section above applies here as well. Also, HHS believe that the exemption should be expanded to include all nonprofits (not just institutions of higher education, i.e., universities). HHS submits that universities are some of the biggest beneficiaries of federal grant funds and funds from various regulated industries. Therefore, it proposes that nonprofit medical institutions and other 26 U.S.C. section 501(c)(3) organizations pose no more potential for conflict than universities (and many of

(b)(5)

<sup>13</sup>In addition, [REDACTED] questioned the status of OGE's review of HHS' previously submitted comments concerning exemptions for FDA advisory committee members.

Ms. Marilyn Glynn  
Page 7

HHS' political appointees come from these organizations). HHS stated that OGE may want to consider limiting the exemption to section 501(c)(3) organizations to avoid potential conflicts with trade associations, professional associations, and other types of nonprofits that might be engaged in lobbying-type activities.

#### Conclusions and Recommendations

The information we gathered provides some useful insights on how well the exemptions are working. Officials overwhelmingly favor raising the \$5,000 de minimis to \$15,000. In addition, they support totally exempting sector funds. We agree with both of these ideas and believe that these changes will increase the exemptions' effectiveness. We recommend that these ideas and other suggested changes and additions be considered by OGE senior management.

Attachment



## LIST OF AGENCY ETHICS OFFICIALS WITH WHOM WE MET

#	Agency	Name of Ethics Official
1	Department of Commerce	Dave Maggi
2	Department of Education	Joan Bardee
3	Department of Energy	Susan Beard
4	Department of Health and Human Services	[REDACTED] - (b)(5)
5	Food and Drug Administration	Jenny Slaughter
6	National Institutes of Health	Karen Santoro
7	Department of State	Tom Heinemann
8	Department of Transportation	Bill Register
9	U.S. Coast Guard	Lt. Cmdr. Mike Lodge
10	Department of the Treasury	Hank Booth
11	Office of the Comptroller of the Currency	Barry Aldemeyer
12	Office of Thrift Supervision	Carolyn Morris
13	Department of Veterans Affairs	Jeff Green
14	Defense Logistics Agency	Carolyn Perry
15	Federal Communication Commission	Pat Carney
16	Federal Trade Commission	Ira Kaye
17	National Aeronautics and Space Administration	Andrew Falcon
18	National Science Foundation	Charlie Brown
19	National Security Agency	Major Jackie Scott
20	Naval Sea Systems Command	Nanette Oppenheimer
21	Securities and Exchange Commission	Barbara Hannigan



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

July 28, 1999

MEMORANDUM

TO: Jack Covaleski,  
Senior Associate Director, OAP

THRU: Ed Pratt *EP*  
Chief, PRD

FROM: Ilene Cranisky & David Meyers  
Management Analysts, PRD

SUBJECT: Results of the Confidential Financial Disclosure  
System Single Issue Review

The Program Review Division has completed a single issue review which focused on the confidential financial disclosure system. We surveyed ethics officials to (1) assess agencies'<sup>1</sup> use of the OGE Optional Form 450-A (the standardized certificate of no new interests),<sup>2</sup> (2) examine agency efforts aimed at reducing the number of positions required to file confidential reports,<sup>3</sup> and (3) collect their views and opinions on whether the confidential financial disclosure system is meeting its intended purpose.

Based on the 44 of 50 ethics officials from agencies that responded to our survey, we found that an overwhelming majority of them chose to implement the OGE Form 450-A. More than 75 percent of officials had allowed employees from their agencies to use the OGE Form 450-A in either 1997 or 1998 (or used the optional form in both years). Also, at all 34 agencies where the optional form was first used in either 1997 or 1998, officials indicated that they intended to permit use of the OGE Form 450-A in 1999.

---

<sup>1</sup>For writing convenience, the term agencies is used to refer to departments, bureaus or components, and independent agencies.

<sup>2</sup>For simplicity, throughout this document we refer to the OGE Optional Form 450-A as either the OGE Form 450-A or the optional form.

<sup>3</sup>OGE has advocated that agencies ensure that only those employees whose duties present potential conflicts of interest have to file confidential reports. We have strongly urged in the past few years that agencies consistently reevaluate their designations.

In those agencies where the optional form had been used, most ethics officials reported high levels of satisfaction in using the optional form among both filers and confidential report reviewers. They told us that the OGE Form 450-A is working well and that they believe that using the optional form is advantageous because it reduces filers' and reviewers' administrative burdens. However, officials also reported disadvantages, including the increased administrative burden placed on ethics officials to provide filers copies of their previous year's confidential report and ensure that optional forms are only being used by those filers who are able to make the certification.

In the 10 agencies where ethics officials did not elect to implement the optional form, they told us that the primary reasons for this decision were that officials believed that it would be too confusing for filers to switch to using the optional form and they believed that it would be too burdensome for ethics officials to track whether the OGE Form 450-A could be used by individual filers.

Concerning efforts made by agencies to ensure that only those employees whose duties present potential conflicts file confidential reports (aimed at reducing number of covered positions), overall, we found that most ethics officials--63 percent--are currently not concerned about the number of designated filing positions within their agencies. Officials at many agencies apparently have taken various steps aimed at "rightsizing" their agencies' designated positions. Officials who expressed satisfaction that appropriate positions have been designated for filing at their agencies, stated that this is due in some part to making adjustments to the designation categories in the past. Only four officials indicated that too many positions have been designated at their agencies. Comments made by those officials tended to focus on either having low level procurement authority filing thresholds or having too many employees who fall within the designated position categories.

Among the 44 ethics officials who responded to our survey, we found that 26 of them (59 percent) believe that the current confidential financial disclosure system is meeting its intended purpose--that is, it is serving as a tool to aid in detecting conflicts of interest. For those officials who do not believe that the confidential system serves as a useful tool, six recommended that in lieu of the current system, annual verbal briefings be substituted. The remaining unsatisfied respondents recommended that certain reporting requirements be eliminated or that the reporting frequency be lengthened to require filing once every other year. In addition, several officials opined that the administrative costs associated with managing the current confidential system are not worth the benefits that the system produces. However, none of these officials suggested a viable remedy for this dilemma.

Results were highly mixed and no clear trends emerged when we compared the responses provided by all ethics officials--notwithstanding use (or non-use) of the OGE Forms 450-A at their agencies--versus their opinions on (1) the number of designated filing positions at their agencies and (2) the usefulness of the current system

Mr. Jack Covaleski  
Page 3

as a tool in preventing conflicts of interest. Accordingly, we do not believe that any useful conclusions can be drawn when correlating the responses provided by ethics officials concerning the three areas of interest of our review.

This memorandum summarizes our survey's noteworthy findings. We are available to discuss these findings in greater detail at your convenience.

### BACKGROUND

In 1994, OGE conducted a single issue review and held two brown bag lunches for ethics officials which concentrated on how to improve the confidential financial disclosure system. One of the findings of the 1994 single issue review was that while OGE's 1992 regulation, at 5 C.F.R. part 2634 subpart I, offered greater flexibility to agencies on designating covered positions, it had the unintended effect of increasing the number of confidential filers at many agencies. By the mid-1994 time frame, OGE was strongly urging agencies to reevaluate their filing designations and, by DAEOgram,<sup>4</sup> we clarified the intent of designating positions. Since 1994, OGE has made several improvements to the confidential system, which focused mostly on report format-related changes and reducing the level and type of information required to be disclosed.

A significant amendment to 5 C.F.R. part 2634 was made when OGE published its final rule amendment on June 24, 1997, giving agencies a new confidential system filing option. This amendment provided agency authority to adopt and use the OGE Form 450-A as an alternative procedure.<sup>5</sup> In lieu of the OGE Form 450, the OGE Form 450-A could be used by (regular employee) annual confidential disclosure filers who could make the required certification.<sup>6</sup>

Agencies were permitted to first begin using the OGE Form 450-A for incumbent reports due by October 31, 1997. Our final rule clarified that the OGE Form 450-A may be

---

<sup>4</sup>DAEOgram issued September 14, 1994 (DO-94-031).

<sup>5</sup>OGE published for comment a proposed rule on January 15, 1997.

<sup>6</sup>A form similar to the OGE Form 450-A was tested by the Department of Education in 1995 and this test yielded highly favorable results. Following that test, OGE obtained comments from ethics officials throughout the executive branch. The general consensus of opinions gathered from these officials was the basis for OGE proposing the new OGE Form 450-A. In proposing this alternative filing system, OGE believed it would help to relieve some of the associated disclosure burdens experienced by both filers and reviewers of confidential reports. We also believed that this alternative (and optional) system would preserve general reporting uniformity and continue to guard against conflicts of interest.

used by eligible filers for a maximum of three consecutive years before filers are required to complete a new OGE Form 450 (every fourth year). At agency discretion, however, agencies were also permitted to use the OGE Form 450-A for only one or two years and then require covered employees to file a new OGE Form 450 every second or third year, respectively. OGE's final rule established that in 2000 all incumbent filers must file a new OGE Form 450, rather than an OGE Form 450-A, regardless of how recently they may have filed an OGE Form 450, unless the agency meets the exception criteria provided for in 5 C.F.R. § 2634.905(d)(5).

#### OBJECTIVES, SCOPE, AND METHODOLOGY

The primary objective of this review was to assess the use and usefulness of the OGE Form 450-A. Secondly, we examined agency attempts to ensure that appropriate employees were required to file confidential financial disclosure reports. This aspect of our review also explored ethics officials' efforts aimed at reducing the number of positions required to file confidential financial disclosure reports. Thirdly, we sought ethics officials' comments and opinions on whether the current confidential financial disclosure system is meeting its intended purpose—that is, to serve as a tool to aid in preventing conflicts of interest.

Based on statistics reported in OGE's 1998 Agency Questionnaires (Questionnaire), of the 125 Questionnaires received, 56 agencies<sup>7</sup> reported that at least 100 confidential reports were required to be filed within their agencies in 1998. These 56 agencies accounted for 99 percent of all 270,317 confidential reports required executive branch wide. The remaining 69 reporting agencies required fewer than 100 confidential reports to be filed within their agencies in 1998.

To obtain views and opinions from representatives from various sized agencies, we judgmentally selected 50 agencies based on the number of confidential reports required to be filed as reported in agency Questionnaires in 1998.<sup>8</sup> We separated agencies into the following five size categories: (1) 100 to 499; (2) 500 to 999; (3) 1,000 to 3,999; (4) 4,000 to 8,999; and (5) 9,000 or more, and we selected agencies for surveying from

---

<sup>7</sup>These 56 agency Questionnaires represent full department reporting, rather than statistical information from the component level. Our selection of 50 agencies, represents not only major departments, but also bureaus and components of those departments.

<sup>8</sup>For clarification, we selected agencies based on the "number of confidential reports filers required" (as reported in the Questionnaires), rather than "number of designated filing positions." We found that, often, ethics officials use these two phrases interchangeably, which is not our intention in this report. However, for simplicity, when we refer to filers, we mean those employees required to file confidential reports because they occupy covered positions.

each group.

Of the 50 agency officials contacted by telephone in June, almost all indicated that they preferred to respond to our survey questions in writing rather than verbally. By our deadline of July 16, 1999, we obtained responses from 44 officials.<sup>9</sup> **Attachment 1** lists those agencies whose ethics officials provided responses and includes summarized feedback to our three primary areas of concern for this review.

### PRINCIPAL FINDINGS

The following sections summarize our principal findings.

#### OGE Form 450-A is Being Used by Most Agencies and Most Officials are Satisfied

- The OGE Form 450-A is in widespread use--ethics officials from 34 of the 44 responding agencies (77 percent) permitted filers to use the OGE Form 450-A in either 1997 or 1998. (In 1997, 25 agencies put the optional form into use. The remaining 9 first allowed filers to use the optional form in 1998. All but 1 of the 25 agencies that first used the optional form in 1997, also permitted use of the OGE Form 450-A in 1998.)
- In the same 34 agencies where the optional form was first used in either 1997 or 1998, officials indicated that they intend to allow filers to use the optional form in 1999.
- Overall, of the 34 agencies using the OGE Form 450-A, 30 ethics officials reported that they are satisfied<sup>10</sup> with the results of using the optional form. Only three officials reported that they are not satisfied, while one offered no opinion regarding level of satisfaction. Interestingly, the three officials who stated that they were not

---

<sup>9</sup>Agency officials who indicated that they would be interested in participating in this single issue review, but who did not respond to our survey by our deadline, are from the Equal Employment Opportunity Commission, the National Credit Union Administration, the Department of Commerce, the Department of the Interior (headquarters), the US Marshals Service, and the Environmental Protection Agency (headquarters).

<sup>10</sup>The reported level of satisfaction included 16 officials (47 percent) who are satisfied to a great extent, 10 who are satisfied to some extent, and 4 who are satisfied to a minimal extent.

(b)(5)

satisfied with the optional form are from [REDACTED] agencies.<sup>11</sup> They told us that they do not like the fact that the optional form does not require supervisor certification and that the optional form creates new burdens for them (for example, within the defense agencies, since filers were required to attach their previous year's OGE Form 450, ethics officials needed to provide copies to all those who requested).

- Ethics officials from 23 of the 34 agencies reported that they have received favorable feedback from employees on the option to use the OGE Form 450-A; none told us of receiving any unfavorable feedback from their agencies' employees. Officials from the remaining 11 agencies using the optional form have not received any employee feedback.
- While OGE did not require that agencies maintain records on filers' use of the OGE Form 450-A, we found that 9 of the 34 agencies using the optional forms did track its use. (Attachment 2 lists those 9 agencies and provides details on filers' use of the OGE Form 450-A.) Our analysis of the statistics provided to us showed that the rate of using of the optional form--based on total number of filers within those agencies--generally ranged from 31 percent<sup>12</sup> to 61 percent<sup>13</sup> (except for two defense agencies who reported low rates of use of only 2 and 5 percent).<sup>14</sup>
- Almost all--91 percent--of the ethics officials representing the 34 agencies where the optional form has been used believe that use of the OGE Form 450-A has been advantageous because it has reduced both filers' and report reviewers' administrative burdens.
- However, among this same group of 34, 17 ethics officials (53 percent) also reported disadvantages in using the optional form. While it appears that, overall, the administrative burdens are lessened by using the optional form, officials reported that they are nonetheless burdened by fulfilling filers' requests to provide copies of previous years' confidential reports, making corrections to those optional forms that are not properly completed, and monitoring that only those employees who can make the certification are using the optional form.

(b)(5)

---

<sup>11</sup>Those agencies are [REDACTED]

<sup>12</sup>At the Nuclear Regulatory Commission in 1998.

<sup>13</sup>At the Department of Education in 1997.

(b)(5)

<sup>14</sup>One of these agencies [REDACTED] also reported that they were not satisfied with the results of using the optional form. The other agency [REDACTED] however, reported that they were satisfied.

(b)(5)

- While most ethics officials using the optional form (24 of the 34 or 71 percent), reported that they do not foresee difficulties in meeting our requirement which calls for all employees to file OGE Forms 450 in 2000 (unless the agency meets the exception criteria provided for in 5 C.F.R. § 2634.905(d)(5)), the remaining 10 officials expressed concern that requiring the submission of OGE Forms 450 in 2000 may be confusing for filers or that this requirement will increase ethics officials' burdens. One official stated that filers may resent not being able to use the optional form and, therefore, may delay submission of their OGE Forms 450. Two other officials suggested that OGE eliminate the optional form all together.<sup>15</sup> Interestingly, 3 of the 10 officials who expressed general concern admitted that they were unaware of the requirement to file OGE Forms 450 in 2000 until they responded to our survey.

Majority of Officials are not Currently  
Concerned About the Number of  
Designated Filing Positions at  
their Agencies

- Our analysis of the total number of confidential filers at our selected agencies (as reported to OGE in Questionnaires from 1993 and 1998) showed varying rates of changes in those numbers. (**Attachment 3** shows those agencies, reported numbers of filers, and percent changes.) At some agencies the number of filers greatly increased, at other agencies the number greatly decreased, while at the remainder, the number of filers remained fairly constant over time. To a certain extent, information collected during our review supports the notion that reductions may be due to direct actions taken by ethics officials that were specifically geared towards reducing those numbers.<sup>16</sup> In contrast, however, where the number of covered employees has increased, we do not think that this can only be attributed to inaction by officials, but in some cases this may be true. Due to limitations in our methodology, we were not able to quantify the extent of these correlations.
- Of the 44 responding ethics officials, 36 (84 percent) indicated that since implementing the current confidential system (OGE Form 450), they have reevaluated the filing designations.
- A majority of ethics officials--27 of 44 (63 percent)--told us that they are not currently

(b)(5)

15

<sup>16</sup>But, we also believe that changes may be due to agency downsizing initiatives, hiring increases, and reorganizations.



concerned about the number of designated filing positions. The remaining 16 (37 percent), however, did express the concern that the number of covered employees at their agencies remains too high.<sup>17</sup> Interestingly, we found that ethics officials who reported on the actions already taken (aimed at ensuring that appropriate employees were designated) that apparently worked well at some agencies, did not work as well at others. Efforts to reduce the number of positions included a grade based system or establishing a dollar procurement or grant authority thresholds. Not surprising, based on the limited information we collected, it appears that those agencies that established the highest thresholds (i.e., that for example that only GS-14s and above file) are those that are no longer concerned about the number of designated positions.

- Nine ethics officials indicated that they do believe that additional actions can be taken reduce the number of filers. Some ethics officials recognize that they will have to work closely with management officials before increasing or raising filing thresholds, since management tends to be more cautious (casts a wider net) when designating positions.

Majority of Officials Believe that the  
Confidential System is Serving its  
Intended Purpose

- More than half of the 44 ethics officials, 26 (59 percent), told us that they believe that the current confidential system is serving its intended purpose. Three officials reported that they were not sure about this issue, while the remaining 15 stated that they did not believe that system was useful.<sup>18</sup>
- Of those who do not believe that the system is useful, seven ethics officials suggested that the system be eliminated. Of those seven, two officials suggested no substitute for the current reporting requirement. The remaining five told us that annual briefings on potential or real conflicts of interest should be required in lieu of annual reporting.
- To enhance the current reporting system, ethics officials suggested a combination

---

<sup>17</sup>We did not find any significant correlation between those officials indicating that they are (or are not) concerned with the number of designated filing positions and those using (or not using) the OGE Form 450-A.

<sup>18</sup>We did not find any significant correlation between those officials who indicated that they believe (or do not believe) that the confidential system is useful and those using (or not using) the OGE Form 450-A and/or those who are (or are not) concerned with the number of confidential filers.

of changes, including reducing the filing frequency to every other year. Of those suggesting information reporting modifications, officials asked that OGE consider eliminating the requirement to report (1) diversified mutual fund and/or sector funds; (2) assets falling below the current 5 C.F.R. part 2640 de minimis amounts; and (3) liabilities.

- Several ethics officials' comments reflected their overall dissatisfaction with the high administrative costs associated with managing the current system versus the benefits derived. However, officials did not offer a viable remedy to this dilemma.

### CONCLUSIONS AND RECOMMENDATIONS

Our survey of ethics officials revealed some interesting views and opinions concerning the confidential system in general. Clearly, at agencies where the OGE Form 450-A is in use, officials are experiencing OGE-intended benefits (reductions in administrative burdens). While many officials continue to express concern over the high number of employees in covered positions, others have eliminated some of the associated high administrative costs of operating the confidential system by using the optional form, establishing stricter (or higher) filing thresholds, and working closely with management officials when designating positions. Our survey results concerning the usefulness of the confidential system as a conflict prevention tool are mixed. While the majority of surveyed officials (59 percent) indicated that the current system is serving its intended purpose, many suggested that the usefulness could be enhanced by eliminating some information currently required to be reported or by reducing filing frequency. In addition, a small number of ethics officials expressed their concern that the high administrative costs of managing the current system are not worth the benefits derived.

OGE management may want to consider summarizing the results of this review in a DAEOgram or present our findings during our 1999 Ethics Conference. We may also want to advise ethics officials who remain unsatisfied with operation of their agencies' confidential system to consider allowing the use of the OGE Form 450-A, in addition to reminding them to consider establishing higher filing thresholds as a way to reduce some of their burdens. In the upcoming year, OGE may want to focus some time and attention on those officials who do consider the confidential system to be a useful tool or on those officials who expressed concerns over the numbers of covered employees. Regarding officials from these agencies, perhaps special workshops or one-on-one assistance could be offered through our desk officer system to address their individual concerns. In the future (probably during the tenure of the next Administration), OGE may want to further explore relaxing some of the confidential system's current regulatory requirements.

**Ethics Officials' Responses on Use of OGE Form 450-A, Confidential Filing Positions, and on Whether the Confidential System Serves its Intended Purpose**

Agency	Use Of OGE Form 450-A In:			Concerned About The Number Of Confidential Filing Positions	Confidential System Serving Intended Purpose
	1997	1998	1999		
	YES or NO			YES or NO	YES/ NO/NOT SURE
Between 100 - 499 Confidential Filers					
1. Consumer Product Safety Commission	YES	YES	YES	NO	YES
2. Office of Personnel Management	YES	YES	YES	NO	NO
3. Nuclear Regulatory Commission	YES	YES	YES	NO	NO
Between 500 - 900 Confidential Filers					
4. Federal Energy Regulatory Commission	YES	YES	YES	NO	YES
5. US Information Agency <sup>1</sup>	NO	NO	--	--	YES
6. Defense Contract Audit Agency	NO	YES	YES	NO	YES
Between 1,000 - 3,999 Confidential Filers					
7. Agency for International Development	NO	NO	NO	NO	YES
8. Federal Communications Commission	YES	YES	YES	NO	YES
9. Securities and Exchange Commission	YES	YES	YES	NO	NOT SURE

---

<sup>1</sup>USIA did not respond to all survey questions because it is merging with the Department of State in October 1999.

Agency	Use Of OGE Form 450-A In:			Concerned About The Number Of Confidential Filing Positions	Confidential System Serving Intended Purpose
	1997	1998	1999		
	YES or NO			YES or NO	YES/NO/NOT SURE
10. Department of Education	YES	YES	YES	YES	NO
<b>Between 4,000 - 8,999 Confidential Filers</b>					
11. General Services Administration	YES	NO	YES	YES	YES
12. Federal Deposit Insurance Corporation	YES	YES	YES	NO	YES
13. Office of the Secretary of Defense	YES	YES	YES	YES	NO
14. Ballistic Missile Defense Organization	NO	YES	YES	NO	YES
15. Department of Veterans Affairs	YES	YES	YES	NO	NO
16. Philadelphia Regional Office	YES	YES	YES	NO	NO
17. National Aeronautics and Space Administration	YES	YES	YES	NO	YES
18. US Postal Service	NO	NO	NO	NO	YES
19. Department of Energy	NO	YES	YES	NO	NO
<b>9,000 Or More Confidential Filers</b>					
20. Defense Logistic Agency	NO	YES	YES	NO	NO
21. Department of Agriculture	YES	YES	YES	YES	NO
22. Natural Resources Conservation Service	YES	YES	YES	YES	NO
23. Department of the Air Force	NO	YES	YES	YES	NO

## Attachment 1

## Attachment 1

Agency	Use Of OGE Form 450-A In:			Concerned About The Number Of Confidential Filing Positions	Confidential System Serving Intended Purpose
	1997	1998	1999		
	YES or NO			YES or NO	YES/NO/NOT SURE
24. Air Force Materiel Command	NO	YES	YES	NO	YES
25. Department of the Army	YES	YES	YES	YES	NO
26. US Army Training & Doctrine Command	NO	YES	YES	NO	NOT SURE
27. Department of the Navy	NO	NO	NO	YES	YES
28. Naval Sea Systems Command	NO	NO	NO	YES	NO
29. Department of Health and Human Services	YES	YES	YES	NO	NOT SURE
30. Substance Abuse and Mental Health Services Administration	YES	YES	YES	YES	YES
31. Centers for Disease Control	YES	YES	YES	YES	YES
32. Agency for Health Care Policy and Research	YES	YES	YES	NO	YES
33. Department of the Interior Bureau of Reclamation	NO	YES	YES	NO	YES
34. Department of the Interior National Park Service	YES	YES	YES	YES	YES
35. Department of Justice	NO	NO	NO	NO	NO
36. Drug Enforcement Administration	NO	NO	NO	NO	YES

## Attachment 1

## Attachment 1

Agency	Use Of OGE Form 450-A In:			Concerned About The Number Of Confidential Filing Positions	Confidential System Serving Intended Purpose
	1997	1998	1999		
	YES or NO			YES or NO	YES/ NO/NOT SURE
37. Bureau of Prisons	NO	NO	NO	NO	YES
38. Department of Transportation	YES	YES	YES	YES	YES
39. Federal Highway Administration	YES	YES	YES	NO	YES
40. Federal Railway Administration	YES	YES	YES	NO	YES
41. Department of the Treasury	NO	NO	NO	YES	YES
42. Office of the Controller of the Currency	YES	YES	YES	NO	YES
43. Bureau of Alcohol, Tobacco, and Firearms	NO	NO	NO	YES	YES
44. Environmental Protection Agency San Francisco Region	NO	YES	YES	YES	NO
<b>TOTALS</b>					
YES:	25	33	34	16	26
NO:	19	11	9	27	15
NOT SURE:	-	-	-	-	3
NO RESPONSE:	-	-	1	1	-

### Agencies That Tracked Filers' Use of the OGE Form 450-A

Agency	Years and Reported Number of Filers Using Either the OGE Form 450 or the OGE Form 450-A	Percent of Filers Using the OGE Form 450-A
Consumer Product Safety Commission	<u>1997</u> OGE Form 450: 73 OGE Form 450-A: <u>45</u> Total 118	38%
	<u>1998</u> OGE Form 450: 70 OGE Form 450-A: <u>53</u> Total 123	43%
Nuclear Regulatory Commission	<u>1997</u>  No statistics maintained in 1997.	--
	<u>1998</u> OGE Form 450: 329 OGE Form 450-A: <u>147</u> Total 476	31%
Defense Contract Audit Agency	<u>1997</u>  Agency did not use the OGE Form 450-A in 1997.	--
	<u>1998</u> OGE Form 450: 831 OGE Form 450-A: <u>46</u> Total 877 (Note a)	5%
Department of Education	<u>1997</u> OGE Form 450: 504 OGE Form 450-A: <u>782</u> Total 1,286	61%
	<u>1998</u> OGE Form 450: 596 OGE Form 450-A: <u>713</u> Total 1,309 (Note a)	54%

Agency	Years and Reported Number of Filers Using Either the OGE Form 450 or the OGE Form 450-A	Percent of Filers Using the OGE Form 450-A
General Services Administration	<u>1997</u> OGE Form 450: 2,043 OGE Form 450-A: <u>1,684</u> Total 3,727  <u>1998</u>  Agency did not use the OGE Form 450-A in 1998.	45%    --
Federal Deposit Insurance Corporation	<u>1997</u> OGE Form 450: 3,169 OGE Form 450-A: <u>1,525</u> Total 4,694  <u>1998</u> OGE Form 450: 2,891 OGE Form 450-A: <u>1,640</u> Total 4,531 (Note a)	32%    36%
US Army Training & Doctrine Command	<u>1997</u>  Agency did not use the OGE Form 450-A in 1997.   <u>1998</u> OGE Form 450: 236 OGE Form 450-A: <u>4</u> Total 240	--    2%
Substance Abuse and Mental Health Services Administration	<u>1997</u> OGE Form 450: 64 OGE Form 450-A: <u>46</u> Total 110  <u>1998</u> OGE Form 450: 70 OGE Form 450-A: <u>43</u> Total 113	42%    38%



Agency	Years and Reported Number of Filers Using Either the OGE Form 450 or the OGE Form 450-A	Percent of Filers Using the OGE Form 450-A
Agency for Health Care Policy and Research	<u>1997</u>	48%
	OGE Form 450: 56	
	OGE Form 450-A: <u>51</u>	
	Total 107	
	<u>1998</u>	54%
	OGE Form 450: 49	
	OGE Form 450-A: <u>58</u>	
	Total 107	

**Note a:** Numbers reported by ethics officials in response to our survey vary slightly from those reported as responses in 1998 Questionnaire.

**For Selected Agencies—Comparison of Number of Confidential Filers in 1998  
Versus 1993 (And Percent Change) as Reported in OGE Questionnaire<sup>1</sup>**

Agency	Number of Confidential Filers in:		Percent Change 1993 to 1998
	1998	1993	
Consumer Product Safety Commission	123	292	(-) 58
Office of Personnel Management	205	655	(-) 69
Equal Employment Opportunity Commission	260	64	(+) 306
Nuclear Regulatory Commission	476	2,087	(-) 77
Federal Energy Regulatory Commission	535	878	(-) 39
US Information Agency	700	840	(-) 17
National Credit Union Administration	773	830	(-) 7
Defense Contract Audit Agency	876	1,153	(-) 24
Agency for International Development	1,049	1,701	(-) 38
Federal Communications Commission	1,050	753	(+) 39
Securities and Exchange Commission	1,133	1,471	(-) 23
Department of Education	1,365	2,711	(-) 50
Department of Commerce	4,166	6,016	(-) 31

---

<sup>1</sup>Listing shows those agencies selected for this review that are required to submit annual Questionnaire to OGE (31 of 50 agencies originally contacted).

## Attachment 3

## Attachment 3

Agency	Number of Confidential Filers in:		Percent Change 1993 to 1998
	1998	1993	
General Services Administration	4,343	8,720	(-) 50
Federal Deposit Insurance Corporation	4,628	6,428	(-) 28
Office of the Secretary of Defense	4,850	6,270	(-) 23
Department of Veterans Affairs	5,218	5,746	(-) 9
National Aeronautics and Space Administration	6,424	10,806	(-) 41
US Postal Service	7,017	6,326	(+) 11
Department of Energy	7,988	10,137	(-) 21
Environmental Protection Agency	9,269	9,375	(-) 1
Department of Justice	9,717	6,695	(+) 45
Department of the Treasury	10,196	10,432	(-) 3
Department of the Interior	11,537	12,712	(-) 9
Department of Agriculture	12,792	15,856	(-) 19
Department of Health and Human Services	13,591	13,462	(+) 1
Department of Transportation	14,347	11,618	(+) 23
Defense Logistic Agency	15,163	20,551	(-) 26

Attachment 3

Attachment 3

Agency	Number of Confidential Filers in:		Percent Change 1993 to 1998
	1998	1993	
Department of the Air Force	16,182	18,515	(-) 13
Department of the Navy	36,711	37,123	(-) 1
Department of the Army	46,807	47,017	<(-) 1



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

April 19, 2001

MEMORANDUM

TO: Marilyn Glynn  
General Counsel, OGCLP

THROUGH: Ed Pratt *EP*  
Chief, PRD

Jack Covalesski *JC*  
Deputy Director, OAP

FROM: Dale A. Christopher, Jr. *DC*  
Management Analyst, PRD

SUBJECT: Single Issue Waiver Review

The Program Review Division recently completed a single issue review to evaluate agencies' procedures for consulting on, issuing, and forwarding to OGE, 18 U.S.C. § 208(b)(1) and (b)(3) waivers. The following is a summary of our findings, conclusions, and recommendations.

BACKGROUND

18 U.S.C. § 208(a) prohibits an officer or employee of the executive branch of any independent agency of the United States, of the District of Columbia, a Federal Reserve bank director, officer, or employee, or any special Government employee (SGE), from participating in an official capacity in particular matters in which he has a personal financial interest, or in which certain persons or organizations with which he is affiliated have a financial interest. The statute is intended to prevent an employee from allowing personal interests to affect his official actions, and to protect Governmental processes from actual or apparent conflicts of interests. However, in certain cases, the nature and size of the financial interest and the nature of the matter in which the employee would act are unlikely to affect an employee's official actions. Accordingly, the statute permits waivers of the disqualification provision in certain cases, either on an individual basis or pursuant to general regulation.

Pursuant to 18 U.S.C. § 208(b)(1), an agency may determine in an individual case that a disqualifying financial interest in a particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Upon making that determination, the agency may waive the employee's disqualification notwithstanding the financial interest, and permit the employee to participate in the particular matter.

Additionally, pursuant to 18 U.S.C. § 208(b)(3), an agency may determine in an individual case that the prohibition of 18 U.S.C. § 208(a) should not apply to an SGE serving on, or an individual being considered for appointment to, an advisory committee established under the Federal Advisory Committee Act, notwithstanding the fact that the individual has one or more financial interests that would be affected by the activities of the advisory committee. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved.

Part 2640 of 5 C.F.R. describes the circumstances under which the prohibitions contained in 18 U.S.C. § 208(a) could be waived. In particular, 5 C.F.R. §§ 2640.301 and .302 describe the requirements for issuing waivers under 18 U.S.C. § 208(b)(1) and (b)(3) and list the factors to be considered when determining if a waiver is appropriate. These sections also state that unless otherwise delegated, only the Government official responsible for the individual's appointment has the authority to issue him/her a waiver. In addition, 5 C.F.R. § 2640.303 requires, when practicable, the Government official to consult formally or informally with OGE prior to granting a waiver, and requires the official to forward a copy of each waiver to the Director of OGE.

OGE's Program Review Division has conducted a single issue review of agencies' procedures for issuing waivers under § 208(b)(1) and (b)(3), including, among other things, an assessment of the extent to which agencies consult with OGE when preparing waivers and if they routinely provide OGE copies of waivers once issued. We also examined whether waivers were being issued by the appropriate Government officials and if they sufficiently complied with the content requirements.

## SCOPE AND METHODOLOGY

The following agencies were selected for this review, based on input from you, members of your staff, and the Deputy Director, OAP:

- Department of Commerce (Commerce)
- Department of Justice (Justice)
- Department of State (State)
- Federal Communications Commission (FCC)
- National Aeronautics and Space Administration (NASA)
- National Institutes of Health (NIH)
- National Science Foundation (NSF)
- Veterans Administration (VA)

We conducted telephonic and in-person interviews with officials from these agencies during March and April, 2001. We also surveyed OGE attorneys and desk officers via e-mail and in-person discussions to assess their roles and practices regarding consulting on waivers. Finally, we examined a sample of the waivers on file at OGE to assess their compliance with the law and regulation, including whether they were issued by the appropriate Government official and the extent to which OGE routinely receives copies of final waivers issued.

## RESULTS

The results of our review, and our conclusions and recommendations based on these results, follow.

### Consultations

All of the agency officials we interviewed stated that they routinely consult with either their desk officer or an OGE attorney when drafting waivers. Some officials said they always consult, while others, especially those from agencies that issue a large number of relatively standard waivers, such as NIH and NSF, consult only on more complex issues and as time allows. Our examination of OGE's agency waiver files supports the officials' statements, as they contained a number of draft waivers on which a desk officer or attorney had apparently consulted.

Most of the OGE attorneys we contacted stated that they consult with agencies considering issuing waivers; some consult to a greater extent than others. They generally become involved in consultations based on random availability, because of their relationships with particular agencies, or at the request of a desk

officer. The attorneys also noted that depending on the situation, some agencies will send a copy of the draft waiver to OGE.

Forwarding Copies to OGE

OGE does not appear to receive copies of all waivers issued, as required by 5 C.F.R. § 2640.303. Based on our examination of Agency Ethics Program Questionnaires and discussions with agency officials we determined that a total of 2,321 waivers were issued from 1998 through 2000 at the agencies included in our review. Of these, OGE apparently only received copies of 534. The following tables depict, by agency and type of waiver, the number of waivers issued during this three-year period and the number on file at OGE.<sup>1</sup>

§ 208(b)(1) Waivers

Agency	Waivers Issued (1998 - 2000)	Waivers on File (1998 - 2000)
Department of Commerce	6	-0-
Department of Justice	120	63
Department of State	10	1
Federal Communications Commission	8	3
National Aeronautics and Space Administration	14	1
National Institutes of Health	461	120
National Science Foundation	162	109
Veterans Administration	1	-0-

---

<sup>1</sup>We did not include draft waivers in our count of waivers on file at OGE.



§ 208(b)(3) Waivers

Agency	Waivers Issued (1998 - 2000)	Waivers on File (1998 - 2000)
Department of Commerce	72	-0-
Department of Justice	-0-	-0-
Department of State	-0-	-0-
Federal Communications Commission	-0-	-0-
National Aeronautics and Space Administration	1	-0-
National Institutes of Health	1404	237
National Science Foundation	62	-0-
Veterans Administration	-0-	-0-

One possible (and probably the most obvious) explanation for the divergence between the number of waivers issued and the number on file is simply the failure of agencies to provide OGE with copies. For example, the State ethics official with whom we spoke admitted that her office had not routinely provided OGE copies of waivers. Additionally, more than one official interviewed stated that although they thought copies were always forwarded to OGE, they may not have been due to some type of administrative oversight.

Another explanation proposed by ethics officials at NIH and NASA is that the Government officials issuing the waivers are not always providing the ethics office with a copy. Thus, ethics officials cannot ensure that all copies are forwarded to OGE.

Because of the number of waivers issued each year at NIH, this issue is especially notable. The former NIH Ethics Counsel stated that despite her continuous efforts to remind the institutes' deputy ethics counselors to provide her office with copies of any

Ms. Marilyn Glynn  
Page 6

waivers they had issued, she felt certain she was not receiving all of them.

At NASA, in accordance with their regulation at 14 C.F.R. part 1201, copies of waivers for headquarters employees are to be forwarded to the Associate Administrator for Management. However, according to NASA's Alternate Designated Agency Ethics Official (Alternate DAEO), this position no longer exists. Therefore, in the absence of a central repository for copies of waivers and/or procedures for ensuring his office receives copies, the Alternate DAEO is not certain that copies are always forwarded to OGE.

One final reason for the disparity may be that although agencies may provide OGE draft waivers during the consultation process, they may not forward the final version once issued. As previously mentioned, we did not include draft waivers in our count of waivers on file, as we did not consider these to meet the requirement at 5 C.F.R. § 2640.303 to forward OGE a copy of each waiver issued. However, one department, Commerce, disagreed. The Commerce ethics official with whom we met considered his practice of providing OGE drafts of waivers during the consultation process as meeting the forwarding requirement.<sup>2</sup>

Many of the OGE attorneys involved in the consultation process were unsure if copies of the final waivers issued, on which they consulted, were ever forwarded to OGE. Any copies they do receive are forwarded to OGE attorney Elaine Newton for filing.<sup>3</sup> Despite the fact that OGE appears to have a process for filing copies of waivers, we discovered a number of waivers dating back several years in the files of former OGE attorney Robert Cobb, who handled much of OGE's waiver responsibilities.

To help ensure that OGE routinely receives copies of waivers, we recommend you prepare a DAEOgram reminding agencies of the requirement to forward copies to our Office once issued. In addition to reiterating the importance of this requirement to the primary ethics officials, we should also encourage them to disseminate the reminder to the Government officials who issue waivers. We also recommend that during consultations, OGE officials remind agency ethics officials of the forwarding

---

<sup>2</sup>Notwithstanding the ethics official's stance on this point, OGE's files contained only a handful of the waivers (in draft) reported to have been issued in Commerce's Annual Agency Ethics Questionnaires for 1998-2000.

<sup>3</sup> Except those waivers issued by the Department of Health and Human Services, which are maintained by OGE Program Analyst Deborah Bortot.

requirement and ensure that any final copies received are forwarded to either Elaine Newton or Deborah Bortot, as appropriate.

### Issuing Authority

All but one of the agencies included in our review (Commerce) have delegated, in writing, the authority to issue waivers. Typically, the authority has been delegated to deputy and assistant secretaries, the heads of offices or components, and ethics officials by regulation or internal directive.

The waivers we examined appeared to be issued by the Government official delegated the authority to issue such waivers, with one exception. At FCC, in accordance with 47 C.F.R. § 104(c), the authority to grant waivers has been delegated to the Designated Agency Ethics Official (DAEO). However, the FCC waivers we examined were issued by the Alternate DAEO.

The only other notable issue we encountered with regard to the delegation of the authority to issue waivers concerned NASA. The regulation at 14 C.F.R. part 1201 delegates the issuing authority to the directors of NASA's field or component installations for field employees and to the Associate Administrator for Management for headquarters employees. However, as previously noted, the position of Associate Administrator for Management no longer exists. Although all the NASA waivers we examined were issued by installation directors for field employees, we were concerned that there was no official formally designated to issue waivers for headquarters employees. However, NASA's Alternate DAEO assured us that he is currently updating the regulation and will ensure that this authority is properly delegated.

### Waiver Content

We examined a sample of waivers issued by the agencies selected for review and found that, except at two agencies, Government officials generally consider all of the relevant factors and include all of the elements contained in 5 C.F.R. § 2640.301 or .302, as applicable. While we found isolated deficiencies in the waivers issued by a number of agencies, we only found the need for recommendations specifically targeting waiver practices at NIH and NSF.

### Isolated Deficiencies

- Several waivers appeared to be issued out of an abundance of caution, rather than because of a real conflict of interest. For example, one Justice waiver read "...whatever the outcome, these cases will not have any impact at all on the market value of the stock." Additionally, some of the State waivers

we examined read that it was not clear if the employee's work on the issues in question would involve participation in "particular matters" or would have a "direct and predictable effect on his interests." Another read that it is doubtful that the employee's involvement would be considered "personal and substantial." We question the necessity of issuing waivers in these instances.

- FCC and NASA did an adequate job of describing the disqualifying financial interests in question and the particular matters to which the waivers applied. However, in some cases, they did not identify the employees' roles in the matters.
- One Commerce § 208(b)(1) waiver effectively described the identity of the disqualifying financial interest, the matters to which the waiver applied, and the employee's role in the matters. However, it did not explicitly contain a determination that the financial interest was not so substantial as to be deemed likely to affect the employee's services to the Government.

While we realize perfect compliance with the waiver requirements of 5 C.F.R. §§ 2640.301 and .302 may not be realistic for every waiver issued, we urge the OGE officials involved in waiver consultations remind the agency ethics official to consider all of the relevant factors when determining if a waiver is appropriate and to include each of the required elements in the document.

#### NIH § 208(b)(3) Waivers

The NIH § 208(b)(3) waivers, all of which essentially follow the same format, only state that SGE advisory committee members may become involved in matters that would affect their financial interests in carrying out the functions of the committees. The specific matters are usually not identified (and may not be known at the time the waivers are issued).

Because of the large number of SGE advisory committee members at NIH, we recognize the need for such a standard and general format. However, without the particular matters being identified, we were unclear if the waivers technically met the content requirements of 5 C.F.R. § 2640.302.

#### NSF § 208(b)(3) Waivers

Prior to OGE's issuance of 5 C.F.R. part 2640, OGE approved NSF's request to institute the use of a substitute financial disclosure form for SGE members of its general advisory committees

in lieu of the SF 450 (now OGE Form 450). This three-part reporting form allows committees' Designated Federal Officials to issue § 208(b)(3) waivers for filers by simply checking a box at the bottom of the form, certifying that the need for the individual's services outweighs the potential for a conflict of interest created by "the financial interest involved."

According to OGE attorney Sid Smith, who was involved in approving the substitute form, OGE had not focused on the waiver aspect of the form, as we were reviewing it primarily for sufficiency as a disclosure alternative. Further, he suggested that we may not even have realized that the check-off box was considered by NSF to be the actual grant of a waiver, without any further supporting documentation or certification. He added that prior to 5 C.F.R. part 2640, we did not specifically require any particular format or criteria for issuing waivers, so the check-off box and simple certification may have been sufficient then.

However, Mr. Smith now believes, and we concur, that under the new rules in part 2640, a simple check-off as a § 208(b)(3) grant of a waiver is highly questionable. In particular, this practice does not appear to meet the requirements for issuing § 208(b)(3) waivers at 5 C.F.R. § 2640.302.

#### Conclusions and Recommendations

We conclude that, overall, agencies are issuing waivers in compliance with 18 U.S.C. § 208(b) and 5 C.F.R. part 2640. When practicable, agency officials consult with OGE prior to granting waivers. Moreover, with some isolated exceptions, the sample of waivers we examined appeared to be issued by the appropriate Government official and generally contained the required information.

Notwithstanding our general satisfaction with agencies' procedures for issuing waivers, we are concerned that they are not always providing OGE copies once issued. Although none of the agencies we examined appeared to have provided OGE copies of every waiver issued, this issue is especially troublesome with regard to NIH because of the large number of § 208(b)(3) waivers it routinely issued to SGE members of its numerous advisory committees.

We also believe that further scrutiny of NIH's and NSF's waiver practices is warranted. In particular, an assessment of their § 208(b)(3) waivers' compliance with the content requirements of 5 C.F.R. § 2640.302 should be undertaken.

Ms. Marilyn Glynn

Page 10

To further enhance the waiver process overall, we recommend you:

1. Send a DAEOgram to all agencies reminding them of the requirement to forward copies of waivers to our Office once issued.
2. Ensure that during consultations, OGE officials remind agency officials of the forwarding requirement.
3. Ensure that final copies received are forwarded to Elaine Newton or Deborah Bortot, as appropriate.
4. Ensure the OGE officials involved in waiver consultations remind the agency ethics official to consider all of the relevant factors when determining if a waiver is appropriate and to include each of the required elements in the waiver document.
5. Consider whether NIH's standard format for issuing 18 U.S.C. 208 (b)(3) waivers for SGE members of its advisory committees is sufficient.
6. Reevaluate the sufficiency of NSF's practice of granting 18 U.S.C. § 208(b)(3) waivers by simply having the official responsible for the employee's appointment check a box on NSF's alternative financial disclosure form asserting that the need for the individual's services outweighs the potential for a conflict of interest created by "the financial interest involved."