

GAO

Report to the Director, Office of
Government Ethics, Office of Personnel
Management

October 1988

ETHICS

Office of Government
Ethics' Policy
Development Role





United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-103987

October 5, 1988

The Honorable Frank Q. Nebeker
Director, Office of Government Ethics
Office of Personnel Management

Dear Mr. Nebeker:

As requested by the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, we have completed a review of the Office of Government Ethics' (OGE) operations. The Subcommittee asked us to determine whether OGE was carrying out its role and responsibilities in line with the Ethics in Government Act of 1978, as amended, in anticipation of hearings on OGE's reauthorization beyond September 30, 1988.

We summarized the results of our review in testimony¹ before the Subcommittee on April 13, 1988, supporting OGE's reauthorization. Our findings were also highlighted in the Committee's report.² Also, on June 17, 1988, we discussed with you several matters involving OGE's policy development and interpretation role (specifically, evaluating relevant statutes, developing regulations, and issuing opinions) as described in the Ethics in Government Act of 1978. We later agreed with the Subcommittee to report on policy-related functions that OGE has not fully implemented and to assess the actions OGE is taking or plans to take to remedy the situation.

Our review included an examination of various ethics statutes, particularly provisions of the Ethics in Government Act of 1978 that created OGE, and relevant legislative history. We interviewed Designated Agency Ethics Officials (DAEO) or their representatives in 14 executive branch agencies to obtain their views on how OGE has carried out its various responsibilities.

Appendix I provides additional information on the objective, scope, and methodology of our review.

¹Statement of Rosslyn S. Kleeman, Senior Associate Director (GAO/T-GGD-88-29, Apr. 13, 1988).

²Reauthorization of the Office of Government Ethics, Report of the Committee on Governmental Affairs, U. S. Senate, to Accompany S. 2344. (100th Congress, 2d Session; No. 100-392, June 21, 1988).

Issuing Regulations

While OGE has issued and updated various ethics regulations, it has not yet issued regulations prescribing a confidential financial reporting system for executive branch employees. Provisions in the Ethics Act indicated that the public financial disclosure system would supersede other reporting requirements and brought into question the authority for requiring confidential reporting. In December 1985, Congress provided specific authority (Public Law 99-190) for the President to create a new confidential financial disclosure system, and in September 1986, the President issued Executive Order 12565 authorizing OGE to prescribe and administer a comprehensive system of confidential financial reporting. In December 1986, OGE proposed regulations establishing an executive branch-wide system. Since then, OGE has received and at the time of our review was evaluating comments from agencies on the proposed regulations.

When we met with you in June, you were not specific as to the target date for issuing the final regulations. You said that the OGE staff faced many competing demands for their time and that OGE had encountered difficulties developing regulations to meet the varying needs of executive branch agencies. As we mentioned during our June 17 meeting, we are concerned that other priorities, such as the review of financial disclosure reports submitted during the Presidential transition, could further delay the final regulations. You indicated that OGE will issue final regulations soon, but you did not say exactly when this would occur.

We believe that OGE needs to issue final regulations. It will soon be 2 years since OGE proposed the regulations. This is too long to not have completed the rulemaking process.

While other executive departments and agencies generally have some form of confidential financial reporting, the Department of Justice does not. Even though OGE advised Justice to develop such a system in 1986, Justice officials said they were waiting for OGE to issue its regulations before doing so.³ Also, the systems that are in use have been developed without the benefit of OGE criteria and guidance.

Evaluating the Statutes

Section 402 (b) of the Ethics Act makes OGE responsible for working with the Attorney General to evaluate the effectiveness of conflict of interest laws (18 U.S.C. 202-209) and recommending any amendments deemed appropriate. Our current review and past work indicate a need

³Ethics: The Department of Justice's Ethics Program (GAO/IGD-88-112BR, July 19, 1988).

Interpreting the Statutes and Regulations

Section 402 (b) of the Ethics Act assigned OGE the responsibility of establishing a formal advisory opinion service. The act required OGE to compile and publish its opinions and to make them available to agency ethics counselors and the public.

In 1980, OGE and the Justice Department's Criminal Division agreed that OGE may issue formal opinions interpreting the conflict of interest laws in 18 U.S.C. 202-209 and that individuals relying in good faith on those opinions under specified circumstances will be protected from prosecution. In 1981, OGE developed regulations establishing a system of formal advisory opinions interpreting the conflict of interest statutes. As of June 1988, two such formal opinions had been issued, one in February 1982 and the other in January 1983. OGE issued 205 informal opinions during calendar years 1984 to 1987.

OGE's formal opinions differ from its informal opinions in several ways. Requests for formal opinions must be submitted in writing to the OGE Director and contain certain information specified in the regulations. OGE provides interested parties an opportunity to submit written comments on questions that will be the subject of a formal opinion.

Under OGE's regulations, copies of formal opinions are to be made available to the public 10 working days after issuance. No deletions are to be made affecting the substance of the opinion. The regulations provide that any person directly involved in the specific transaction or activity on which a formal opinion is issued, or in a transaction or activity which is "indistinguishable in all material respects," may rely upon the opinion. As provided in the OGE-Justice agreement and the regulations, when such persons rely upon OGE's formal opinions and do so in good faith, they will not be subject to prosecution under 18 U.S.C. 202-209 or other adverse actions.

The OGE regulations provide that when a formal advisory opinion will not be issued, OGE may provide other informational assistance. This assistance includes OGE's informal opinions. However, the regulations do not contain specific criteria or requirements for submitting requests for informal opinions, issuing and relying on the opinions, or disseminating the opinions to ethics officials and the public.

OGE's informal opinions are in the form of letters and memoranda, many of which OGE has excised identifying information from. OGE numbers, indexes, and includes these excised letters and memoranda in its library. According to OGE, it had placed 65 of the 205 informal opinions issued

Recommendations

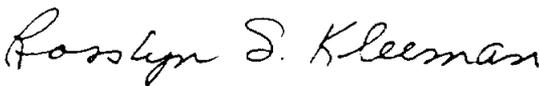
To provide agency ethics officials with needed policy guidance, we recommend that OGE

- issue final regulations establishing a confidential financial disclosure system;
- provide informal opinions to agency ethics officials in a form to facilitate their use, including guidance on how informal opinions may be sought from OGE and the extent to which they can be relied upon by the individual involved and others; and
- work with Justice to complete a comprehensive evaluation of the conflict of interest laws and, as appropriate, recommend amendments.

In August, your representatives agreed with our proposed recommendations and anticipated that final regulations establishing a confidential financial disclosure system for the executive branch, as well as complete versions of OGE's indexed, informal opinions would be issued in September 1988. They were uncertain, however, as to when a comprehensive evaluation of the conflict of interest statutes would be done.

We are sending copies of this report to the Chairman of the Senate Subcommittee on Oversight of Government Management as well as other congressional committees and interested parties.

Sincerely yours,



Rosslyn S. Kleeman
Senior Associate Director

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Objectives, Scope, and Methodology

Our objective was to determine whether OGE's programs and activities were being carried out in line with the authority and functions given it by the Ethics in Government Act of 1978 and amendments to the act. As part of our review, we reviewed the act, amendments to the act, the legislative history, and implementing regulations to identify OGE's statutory responsibilities.

We also interviewed current OGE officials, as well as the past four OGE directors, to obtain information on the programs and activities the agency had undertaken to carry out its statutory responsibilities.

In addition, we interviewed "designated agency ethics officials" or their alternates, deputies, or other representatives in 14 agencies to obtain their views on how OGE had carried out its responsibilities in the previous 5 years. The agencies were selected on a judgmental basis to obtain a mix of cabinet level departments and smaller agencies.

The 14 executive departments and agencies included the Departments of the Navy, the Treasury, Agriculture, the Interior, Transportation, State, Energy, and Education as well as the Defense Logistics Agency, the Panama Canal Commission, the Federal Home Loan Bank Board, the Office of the Vice President, the Defense Mapping Agency, and the Merit Systems Protection Board. The number of agencies represented in our sample does not permit us to generalize about the matters discussed as they relate to the federal government as a whole.

We followed generally accepted government auditing standards in our review, which we did during May 1987 through August 1988.

during calendar years 1984 to 87 in its library. Inclusion of letters and memorandum in the OGE informal advisory system is based on whether OGE believes it deals with an issue not addressed before or whether the opinion might be of assistance to readers.

OGE sends a digest of the selected informal opinions to each agency annually. Also, OGE has not said who may rely upon its informal opinions and whether or not persons relying on them in good faith are subject to prosecution or other adverse actions.

We did not evaluate the advantages and disadvantages of formal versus informal opinions. Agency ethics officials, however, said that they would like better access to OGE's informal opinions. We asked the 14 DAEOS or their representatives what, if anything, OGE could do to be more helpful to them. Of the 10 providing suggestions, 6 said OGE could improve the dissemination of its opinions, and 4 of the 6 said they wanted complete versions of all opinions. In general, the comments indicated a need for OGE to publish all its opinions and to do so in a form to permit them to be used effectively, e.g., indexed by subject.

In June, you said informal opinions will be indexed and made available soon to agency ethics officials.

Conclusions

OGE's success in developing and interpreting ethics policies and carrying out the many other functions assigned to it by the Ethics Act is necessarily dependent on staff availability. We believe, nonetheless, that completing the actions previously discussed is essential if agency ethics officials in the executive branch are to have the guidance they need to effectively administer the ethics laws and regulations in their agencies.

While OGE said it would issue final regulations on confidential financial reporting and improve the availability of its informal opinions soon, it did not indicate specifically when it would complete these actions. Along with publicizing its informal opinions, OGE needs to issue final regulations. It will soon be 2 years since OGE proposed the regulations, which is too long to not have completed the rulemaking process. Also, OGE needs to ensure that its informal opinions are made available in usable form to agency ethics officials and other interested persons.

Finally, a comprehensive evaluation of the statutes has not been done in more than 25 years and is required by the Ethics Act of 1978. OGE has not indicated when it will work with Justice to evaluate the statutes.

for an evaluation of and changes to the conflict of interest statutes. For example, as we noted in a June 1987 report¹, Justice officials believed that conflict of interest statutes should be amended to provide for a range of civil as well as criminal penalties.

Of the 14 DAEOS and DAEO representatives we interviewed, 8 said the conflict of interest statutes could be improved. Among other aspects of the statutes requiring improvement, they mentioned the need to clarify the term "particular matter" used in 18 U.S.C. 208, which prohibits officers and employees from participating in matters affecting a personal financial interest and in 18 U.S.C. 207, which restricts post-employment representational activities.

Ethics officials also cited the need for the statutes to provide for civil as well as criminal sanctions for violations of the conflict of interest statutes. In general, the officials said that the criminal penalties currently prescribed can be out of proportion to the problems that arise and that Justice and ethics officials need to be able to consider both civil and criminal sanctions, thereby permitting a more flexible response to ethics problems.

In your April 4, 1988, response to questions posed by the Subcommittee on Oversight of Government Management, you said that a thorough review of all the conflict of interest statutes had not been done since 1962. You recognized in your response the need for a comprehensive review of the conflict of interest statutes because of the significant changes in the work force and the types of financial interests now held by many individuals. In particular, you indicated that provisions needing review include 18 U.S.C. 208 (specifically, the imputation of a spouse's financial interests to an employee, and the scope of the term "particular matter"), as well as provisions applicable to special government employees.

You advised the Subcommittee that OGE had begun discussions with Justice on the need for more detailed guidance for agency ethics officials to use in applying the provisions of 18 U.S.C. 208. In our June 17 meeting, you indicated that OGE has not had the staff resources to work with Justice in evaluating the conflict of interest statutes and, if necessary, recommending amendments to the statutes, as envisioned in the Ethics Act.

¹Ethics Enforcement: Process By Which Conflict of Interest Allegations Are Investigated and Resolved (GAO/GGD-87-83BR, June 1987).

Results in Brief

While more remains to be done, OGE has made significant progress in implementing the Ethics Act, especially in providing training and counseling services, assessing agency ethics programs, and reviewing financial disclosure reports. However, OGE needs to issue regulations on confidential financial reporting; evaluate, in cooperation with the Department of Justice, the need for changes to ethics laws; and better publicize OGE's opinions interpreting conflict of interest laws and regulations. While the completion dates were not set at the time we did our work, OGE had actions planned or ongoing to more fully implement these functions.

OGE Plans to More Fully Implement Its Policy Functions

As discussed in our April 13 testimony, the agency ethics officials we interviewed believe OGE has served them well as an advisor and educator. They also said OGE had helped to solve potential conflicts of interest and systemic problems in agency ethics programs. Even so, agency ethics officials identified several areas involving the executive branch's ethics policies in which OGE could be more helpful.

The Ethics Act and the legislative history make clear that OGE is responsible for providing uniform, authoritative policy guidance on ethics matters within the executive branch. Section 402 (b) outlines several specific policy-related functions of the OGE Director, including

- developing regulations on conflicts of interest and ethics in the executive branch;
- evaluating, with the assistance of the Attorney General, the conflict of interest laws and recommending any needed amendments; and
- establishing a formal advisory opinion service, whereby opinions are compiled, published, and made available to agency ethics counselors and the public, and providing informal opinions and advice.

OGE has said that its efforts to meet the executive branch's needs for ethics training, counseling, and program reviews and to carry out its policy-related responsibilities have been limited by its small staff size, totaling 26 as of August 1988. Even so, OGE provided information to us and the Senate Subcommittee on Oversight of Government Management indicating that OGE will be taking additional steps to more fully implement its policy-related functions.

