



United States  
**Office of Government Ethics**

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B. Todd Jones  
Chair  
Advisory Group on Organizational Guidelines  
c/o Office of Public Affairs  
United States Sentencing Commission  
Suite 2-500 South Lobby  
One Columbus Circle, NE.  
Washington, DC 20002

Dear Mr. Jones:

This responds to the March 19, 2002 request of the Advisory Group on Organizational Guidelines to the U.S. Sentencing Commission soliciting written public comment on issues concerning the general effectiveness of the guidelines in Chapter Eight of the U.S. Sentencing Guidelines (Guidelines). According to the Advisory Group's request, this review will focus on the application of the criteria for an effective compliance program, as listed in Application Note 3(k) to §8A1.2 of the Guidelines, and the ways in which those criteria affect the operation of Chapter Eight as a whole. In addition, the Advisory Group is considering whether there are other features of the organizational guidelines that merit review or change. We appreciate the opportunity to provide you with our input on this important subject.

We recommend that the Advisory Group consider retaining the Guidelines' seven criteria for an effective compliance program because, in our opinion, the criteria provide organizations with both sufficient guidance concerning the critical, broad principles necessary to implement and maintain a compliance program, as well as the flexibility to design a program that reflects an organization's features, industry nuances and relevant best practices. We make this recommendation because the compliance-based executive branch ethics program, which the Office of Government Ethics (OGE) oversees, is well-served by essentially the same criteria as those identified in the Guidelines.

Before demonstrating the similarity of the Guidelines' criteria to the key characteristics in the executive branch ethics program, we first provide a brief overview of OGE and its mandate. We then highlight the ethics program's fundamental features, and

note how these features further the goals of the program while enabling federal agencies to be flexible and creative in implementing their agency-specific initiatives. Finally, we conclude with an invitation to the Advisory Group to consider encouraging organizations to regularly benchmark their compliance programs not only against the criteria set forth in Application Note 3(k), but also against the best practices demonstrated by leaders in the appropriate industry or community, as well as against sound ethical principles and values that may be more stringent than applicable standards.

### **OGE and the Executive Branch Ethics Program**

The Office of Government Ethics was established under the Ethics in Government Act of 1978. As the federal agency responsible for providing overall direction to the executive branch agencies, OGE works with other agencies and departments to prevent conflicts of interest, and resolve those conflicts of interest that do occur. In its oversight capacity, OGE issues regulations interpreting the criminal conflict of interest statutes and standards of conduct, provides legal advice, develops ethics policies, administers the financial disclosure reporting program, and monitors agency ethics programs for compliance within the entire executive branch, which consists of approximately 4 million employees.

Whereas the applicable ethics rules are the same across the executive branch, the rules are administered in a decentralized manner by an individual employee chosen to be the Designated Agency Ethics Official (DAEO) by each agency head. Each DAEO, together with the approximate 10,000 agency ethics officials, has overall responsibility for the daily operations of the "ethics in government" program. Consistent with policy and regulatory changes promulgated by OGE, these ethics officials answer employee questions regarding conflicts of interest, review financial disclosure reports, train agency employees, and perform many other duties.

### **Compliance Programs as Incentives**

As you know, the Guidelines are designed so that "the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct." Guidelines, Ch. 8, Introductory Commentary. Whether an organization has taken steps prior to an offense to prevent and

detect criminal conduct is one of the most significant mitigating factors under the Guidelines. Coupled with the "just punishment" model, the incentives of the "deterrence" model not only further the purposes of sentencing, but also encourage compliance programs that set an ethical tone and foster "good corporate [or organizational] citizenship."

Similarly, the preventative focus of OGE's orientation is a fundamental component of the federal government's effort to modify the behavior of, and properly incentivize, executive branch employees. OGE's primary goal is to prevent conflicts of interest and ultimately increase public confidence in government. Although OGE is not involved directly in the prosecution of criminal conflicts of interest violations, and has virtually no role at the time of sentencing, OGE's role in overseeing the executive branch ethics program is an integral part of federal agencies' efforts to prevent ethical mishaps, to protect the business of government and, ultimately, to further the work of the executive branch. The Guidelines' "carrot and stick" approach is echoed in the government: the "ethics in government" program is intended to prevent conflicts of interest and foster high ethical standards; however, when violations do occur, transgressors are investigated and, when applicable, sanctioned or otherwise penalized.

### **An Effective Compliance Program**

The Guidelines define an effective compliance program as "a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct." Guidelines, § 8A1.2, Note 3(k). The Guidelines further explain how due diligence in seeking to prevent and detect criminal conduct requires, at a minimum, the following seven elements:

- compliance standards and procedures;
- high-level oversight;
- due care in delegation of authority;
- training;
- monitoring and auditing;
- enforcement and discipline; and
- response and prevention.

The Guidelines do not provide additional detailed guidance on what it means to be "effective." As you undoubtedly know, there is discussion about whether this lack of clarification results in flexibility or paralysis for entities faced with the challenges of developing and implementing a compliance program. We believe the

current flexible approach furthers the goal of deterrence without unduly confining any one organization.

Similar to the Sentencing Commission, OGE has not promulgated rigid parameters of what is considered an effective agency ethics program. Instead, federal agencies in the executive branch -- whose missions are as diverse as the number of agencies -- may and, indeed, are encouraged to develop customized ethics programs that address their unique issues. But each agency ethics program shares the seven, essential characteristics specified by the Guidelines. A brief demonstration of how these broad based criteria form the foundation of the executive branch ethics program follows.

- **Compliance Standards and Procedures.** Executive branch employees hold their positions as a public trust. Accordingly, it is expected that all employees will place loyalty to the Constitution, laws and ethical principles above private gain. The minimum standards for ethical behavior are set forth in the criminal conflict of interest statutes, 18 U.S.C. § 202 et seq.; the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), 5 C.F.R. § part 2635; and related Executive Orders and regulations governing outside employment and activities prohibitions, post-employment limitations, as well as procedures for public and confidential financial disclosure obligations. The Standards, in turn, address the basic obligations of public service, gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, outside activities and related issues. Of course, these rules establish minimal standards for behavior; all executive branch officials are encouraged to employ ethical decision-making in every aspect of their federal employment.

- **High-Level Oversight.** The executive branch ethics program is built upon a decentralized structure: whereas OGE seeks to provide meaningful support to the entire executive branch ethics community, it is the head of each agency who is responsible for his/her agency's program, whether at headquarters or in a field office. The agency head delegates authority for the implementation of the agency program to a designated agency ethics official, or DAEO. This decentralized structure enables the government to have a single set of rules applicable to all executive branch employees, but provides the agencies with meaningful ability to inject into their respective programs the relevant values given their agencies' cultures.

Regulations require the head of each agency to ensure that the individual selected to be the DAEO has the high-level experience necessary to manage and exercise substantial control over the agency's ethics program. The regulations further provide that the DAEO's duties generally consist of serving as a liaison with OGE, reviewing financial disclosure reports and resolving actual or potential conflicts of interest, maintaining education and training programs, and monitoring administrative actions and sanctions. It is the DAEOs who, in large part, breathe life into the federal ethics program and ensure that federal employees adhere to both general principles of ethical conduct and specific ethical standards.

- **Due Care in Delegation of Authority.** The careful delegation of authority in the executive branch program is illustrated by the use of waivers, a remedy for dealing with conflicts of interest. Pursuant to applicable law, the head of each agency has the authority to issue waivers in individual cases where an employee's disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. For example, an official might grant a waiver where the employee owned only a small amount of a particular stock. The authority to issue waivers is typically delegated to the DAEO, who, in turn, is generally required to consult with OGE prior to granting a waiver.

Compliance responsibilities extend beyond the ethics officials to numerous senior government officials through the administration of the public and confidential disclosure systems for the executive branch. Approximately 20,000 of the most senior officers and employees are required to file public reports disclosing their financial interests, as well as the interests of their spouse and minor children. Certain other less senior executive branch employees, whose duties involve the exercise of discretion in sensitive areas such as contracting, procurement, administration of grants and licenses, and regulating or auditing non-federal entities, are required to file confidential financial disclosure reports.

In addition, a unique challenge posed to the federal ethics program is the fact that our government is designed so that its top levels turn over every four or eight years. The private sector does not have to deal with this kind of planned turnover on a regular or predictable basis. Accordingly, we actively encourage government employees, whether they be Cabinet officers or senior career managers, to accept responsibility for ethical leadership by

incorporating relevant rules and values into the daily work of government.

- **Training.** OGE provides training on the conflicts of interest laws and ethics regulations both directly to federal employees and through support services to each agency ethics office. These activities include developing training materials; conducting ethics training courses; hosting an annual Government Ethics Conference; issuing ethics newsletters; posting relevant information on OGE's website; and providing advice on the criminal conflict of interest laws and the Standards. Federal agencies provide numerous types of training opportunities to officials nationwide. Training sessions are conducted by many means including in person, via satellite broadcasts and, at some agencies, through computer-based modules. Finally, the laws and regulations are communicated through other materials, including booklets, manuals, videotapes, e-mail and other electronic means.

- **Monitoring and Auditing.** OGE regularly conducts on-site reviews to determine whether each agency has an effective ethics program tailored to its mission. These OGE program reviews are systematically conducted in accordance with detailed guidelines and focus on the agency's implementation of the essential elements of an ethics program, as well as issues that may arise because of the agency's particular mission. The ethics program elements examined during such a review include: ethics program structure and staffing; public and confidential financial disclosure reporting systems; ethics education and training; counseling and advice; outside employment and activities; and post-employment counseling. If any deficiencies are found, OGE makes recommendations to improve the ethics program. Follow-up reviews are conducted to confirm the agency's compliance with OGE's recommendations.

- **Enforcement and Discipline.** The federal government works to ensure prompt and effective action is taken to remedy any actual or potential violation of law, regulation or conflict of interest. Because OGE does not have primary responsibility for investigating or prosecuting alleged violations of the criminal conflict of interest statutes, we rely on the Inspector Generals and the Department of Justice to conduct investigations and, when necessary, bring prosecutions to enforce the law. Severe civil and criminal penalties can be imposed on federal employees who violate the criminal conflict of interest statutes. In addition, administrative actions and other sanctions are regularly taken for violations of the ethical standards and related misconduct.

Ensuring that there is consistent and appropriate enforcement is one of the key issues that OGE is currently addressing.

- **Response and Prevention.** Although the fact that an employee violates a compliance standard does not necessarily mean an ethics program is weak or has a flawed component, federal agencies do take reasonable steps to respond appropriately to a detected offense and to prevent similar offenses. If a violation reflects a failure in the ethics system, corrective actions -- such as training for relevant employees -- is promptly taken. In addition, OGE also works with the effected agency so that the offense will neither create the appearance of impropriety for the agency nor cause the public to question the integrity of the agency's programs and public service as a whole. These specific responses, together with the availability and readiness of ethics officials to answer specific employee questions in a timely fashion, are critical to the success of the ethics program and, ultimately, the business of government.

#### **Benchmarking Using "Best Practices" and Core Values**

Organizations, including federal agencies, must continually strengthen and improve their compliance programs. Just like organizations ideally benchmark their compliance programs against other programs and practices in the relevant industry, OGE encourages each federal agency to employ "best practices" in implementing its ethics program. At OGE, we continuously evaluate the ethics program and work to enhance any perceived or actual weaknesses. Changes must be made to the ethics program to remedy possible shortcomings, to address changes in the law or in the financial interests of government employees, as well as to take advantage of other developments, e.g., technology. Moreover, the mere act of assessing whether a compliance program is effective undoubtedly results in changes that benefit the organization.

Some of the major initiatives OGE currently is undertaking include: reviewing thoroughly the criminal conflict of interest statutes; reviewing all ethics requirements with the view toward streamlining the requirements to make them more intuitive and less burdensome; emphasizing active, visible leadership at all levels of the executive branch; developing training modules targeted towards first line government managers and their responsibility for the ethics programs; and using technology to enhance existing procedures and compliance functions. In the course of pursuing these initiatives, OGE is mindful not to compromise the substantive portions of the preventative mechanisms, e.g., financial disclosure

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reporting requirements, that are necessary to maintain the public's confidence in the executive branch ethics program.

Finally, as should be evident, the executive branch ethics program is a compliance-based program, complete with comprehensive mechanisms to foster an ethical environment in government and retain the public's trust. As a compliance-based program, there are indeed rules, the violation of which can result in serious penalties. However, we believe federal employees can operate within the current system and also incorporate core values into their daily decisions. Hence, we at OGE encourage ethical-decision making in the government by advocating that employees consider not only the minimum standards, as set forth in the laws and rules, but also their agency's mission and a greater sense of right and wrong.

Instilling core values in all employees ultimately is critical to the success of any compliance program. In the executive branch, a successful ethics program is one where the business of the government is not impeded by ethical mishaps or scandals. Although individual employee compliance is the route chosen to achieve an administration without conflicts of interest, compliance with the rules, themselves, is not a goal. Rather, our goal is allowing the administration and each agency to focus on its mission and not be derailed by ethical problems.

### **Conclusion**

Thank you for the opportunity to provide written comments on this important issue. We hope this brief explanation of how the fundamental characteristics of the executive branch ethics program are implemented will help you evaluate the application of the Guidelines criteria, as listed in Application Note 3(k) to §8A1.2, and the ways in which those criteria affect the operation of Chapter Eight as a whole.

If we can be of further assistance to you or if you would like to discuss this matter more fully, please do not hesitate to contact us.

Sincerely,

Amy L. Comstock  
Director