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Issues Related To The Office of Government Ethics

Statement of
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ISSUES RELATED TO THE OFFICE OF GOVERNMENT ETHICS

Summary of Statement by
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Maintaining the highest ethical standards among elected officials and career civil servants is an important element of a vital public service. Toward that end, GAO identified areas requiring attention by the Office of Government Ethics (OGE) and possibly by Congress.

Most ethics laws now limit the penalties for conflicts of interest to criminal sanctions, notwithstanding the severity of the offense but the prevailing view among those administering the laws is that a range of penalties, including civil penalties, is more appropriate. We agree.

OGE needs to assess the adequacy of existing regulations and to issue regulations governing confidential financial reporting among federal employees at GS-15 and below.

Agency ethics officials say OGE has done a credible job in several areas, such as serving as an advisor and educator as well as helping to solve potential conflicts of interest and systemic problems in agency programs. OGE has not always been able to review, as quickly as required, individuals' financial disclosure forms and agencies' ethics programs. Also, OGE's training and consulting services are well received, in strong demand, but in short supply. OGE attributes these conditions largely to limited staff size--27 people in total.

The upcoming Presidential transition will likely strain even further OGE's ability to review disclosure forms, provide advice, and the like, while also continuing its regular oversight and advisory programs.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to participate in this hearing on the Office of Government Ethics' (OGE) reauthorization beyond September 30, 1988, and to highlight the results of our review of OGE's operations for this hearing.

My comments will focus on questions surrounding the appropriate role for OGE and whether OGE's current activities are consistent with those envisioned in the Ethics in Government Act of 1978. I will also discuss specific areas of concern we identified which were confirmed by designated agency ethics officials, past OGE directors, and others.

We interviewed designated agency ethics officials or their representatives in 14 agencies (a mix of cabinet level departments and smaller agencies), all 4 past directors of OGE, and current OGE officials. We analyzed the Ethics Act, its legislative history, and implementing regulations to identify areas possibly warranting the Subcommittee's attention in connection with the reauthorization.

We continue to believe the creation of OGE was an important achievement. It should be reauthorized. If Americans are to have confidence in the integrity of the federal government, the prevention of conflicts of interest among federal employees must

be assured. OGE directs conflict of interest policies applicable to almost 3 million federal workers, and has made progress in providing the guidance, training, and oversight necessary to promote ethical conduct in the federal system. Its leadership is critical, especially in view of the need to reassure the American public that the conduct of elected and career public servants is being watched.

Nonetheless, several issues related to OGE and the government's ethics system in general need attention: (1) the adequacy of existing ethics regulations needs to be assessed, (2) OGE has not met its goal of reviewing agency ethics programs every 3 years, and (3) ethics training for high-level executive branch employees is also a concern. The agencies continued cooperation with OGE will help the Office carry out its oversight functions.

DEVELOPING RULES AND REGULATIONS

OGE has amended regulations on standards of conduct (5 CFR 735) issued by the former Civil Service Commission. It has also issued regulations relating to executive branch financial disclosure requirements (5 CFR 734), post employment conflict of interest (5 CFR 737), and its own operations (5 CFR 738).

Generally, the agency ethics officials in the 14 agencies we interviewed believe the ethics regulations are helpful but several also feel the regulations can be improved. They believe the regulations in general need to be clarified and should include more examples, and older regulations should be reviewed and updated. We agree.

Implementing regulations currently exist for only one conflict of interest statute (18 U.S.C. 207) which imposes certain restrictions on the activities of former federal employees. As we reported in June 1987, (Ethics Enforcement: Process by Which Conflict of Interest Allegations Are Investigated and Resolved, GAO/GGD-87-83BR), several agency officials, including two Inspectors General, said regulations are also needed for the conflict of interest statutes involving current employees, particularly 18 U.S.C: 208 which prohibits current employees from participating in matters in which they have a financial interest. They believe that regulatory definition of key terms would help in identifying prohibited conduct. Several of the agency ethics officials we interviewed also believe there should be regulations for all conflict of interest statutes (18 U.S.C. 202-209).

OGE believes the best way to define key terms used in the conflict of interest statutes is through amendments to the statutes. Further, OGE believes that until legislative changes are made to the conflict of interest statutes, they can best

serve agency ethics officials by providing interpretative guidance such as advisory opinions, memoranda, and newsletters.

OGE began an evaluation of the standard of conduct regulations (5 CFR 735) in late 1986 because OGE believed the regulations needed improving, but the evaluation was discontinued in early 1987 because of OGE's higher priority needs. Given its limited staff, OGE may find it difficult to improve existing regulations, not to mention developing and issuing new ones.

EVALUATING ETHICS LAWS

Most agency ethics officials we interviewed said the conflict of interest laws should be revised to clarify imprecise language and provide definitions. For example, they specifically identified the term "particular matter" used in 18 U.S.C. 207 and 208 as needing clarification. Under 18 U.S.C. 207, a "particular matter involving a specific party or parties" with respect to which a former employee must avoid representational activity excludes policy determinations. However, a "particular matter" as used in 18 U.S.C. 208, which disqualifies employees from acting in matters affecting a personal financial interest, includes policy determinations.

OGE has not recommended amendments to the Attorney General to address the language of the conflict of interest laws. Rather,

OGE believes that it has provided ethics officials and others appropriate guidance to deal with any ambiguities through its process of consulting and cooperating with Justice.

Also, most agency ethics officials we interviewed believe the conflict of interest laws should provide for civil penalties in addition to criminal penalties. Similarly, Department of Justice officials told us the conflict of interest statutes should be amended to augment existing felony penalties with lesser criminal and civil penalties. These officials described the difficulty of prosecuting conflict of interest cases as felonies, and both Justice and agency ethics officials have said additional penalties could facilitate enforcement of conflict of interest laws. OGE officials agreed. And we agree.

REVIEWING PUBLIC FINANCIAL DISCLOSURE REPORTS

OGE reviews certain public financial disclosure reports including those filed by all designated agency ethics officials and Senate-confirmed presidential appointees, high-level White House officials, and the President and Vice President. Other executives' reports are reviewed by ethics officials at the agencies or by the Secretaries concerned for members of the uniformed services.

As required by the Ethics Act, OGE must review financial disclosure reports within 60 days after they are transmitted to OGE. An OGE study completed last summer showed 9 out of every 10 reports were not approved within 60 days. OGE officials said this situation occurred because in the past its review staff was also responsible for examining agencies' ethics programs. In November 1987, OGE dedicated a group to perform reviews of agency ethics programs and another group to review financial disclosure reports. OGE has not had enough experience with this new arrangement for us to determine whether OGE's overall timeliness has improved.

OGE is charged with administering the confidential (non-public) financial disclosure system, which applies for the most part to employees at or below the GS-15 level in positions involving significant discretionary authority. Confidential reporting requirements were originally established by executive order in May 1965. In 1980, Justice decided the Ethics Act superseded the earlier executive order, thus removing the legal basis for requiring confidential financial disclosure reports. However, according to OGE, all agencies except the Justice Department, have continued to use the confidential reporting systems they had in place before Justice's decision.

On the basis of legislation enacted in December 1985, the President issued an executive order in September 1986 authorizing

OGE to develop regulations for a comprehensive system of confidential financial reporting for officers and employees of the executive branch. In December 1986, OGE proposed regulations to establish such a system. OGE is processing comments it received on the proposed regulations and as of April 1, 1988, has no estimate as to when the confidential financial disclosure regulations will be issued.

INTERPRETING RULES AND REGULATIONS

When requested, OGE consults with agency ethics counselors and other officials about conflict of interest problems. In this role, OGE provides extensive advisory services through meetings with agency representatives and a telephone consulting service. More than half of the agency ethics officials we interviewed said they consult OGE on ethics matters "often" or "very often". Almost all of those using the service said OGE's consultation was helpful. Former OGE directors said that OGE's consulting services are necessary and vital.

As required by the Ethics Act, OGE established a formal advisory opinion service. OGE also issues informal advisory opinions. Most of the ethics officials we interviewed said it would be helpful if OGE compiled, indexed, and sent all of its opinions to the agencies. OGE officials said they plan to have an indexed publication of opinions available in the next 2 to 3 months.

Through its decentralized training program, OGE trains agency ethics officials and assists them in developing ethics training programs for their agencies. According to OGE, it also provided about 50 1-day training sessions in regions over the last 4 calendar years, attended by an average of 50 ethics officials and career employees at each session. It also provided training at various agencies in Washington, D.C., and the Executive Seminar Centers at Oak Ridge, Tennessee, and Kings Point, New York. Attendance for 1986 and the first 7 months of 1987 totaled approximately 5,000 persons.

Both this Committee and the House Committee on the Judiciary, when considering the 1983 OGE reauthorization, noted a growing concern that high level officials were not familiar with the conflict of interest laws. OGE still sees the need for training of high-level officials to be a problem. OGE sends a letter to all new presidential appointees informing them of their responsibility to become familiar with ethics laws and regulations. OGE also participates in sessions at the Federal Executive Institute where they can reach some, but not necessarily all, high-level officials. OGE attempted to develop a training session to inform new presidential appointees of their ethics responsibilities. A former OGE director told us that the White House needs to stress the importance of ethics training by

commanding the attendance of Deputy and Assistant Secretaries at such training.

OGE officials have seen an increasing demand for ethics training in the past 5 years. Almost one-third of the agency ethics officials with whom we spoke said OGE should provide more training. Also, the presidential transition can be expected to increase the demand for ethics training.

MONITORING COMPLIANCE

OGE reviews agencies' financial disclosure systems and other aspects of their ethics programs to identify programmatic deficiencies. It then works with the agencies to resolve problems.

OGE's reviews cover a wide range of ethics-related activities. To resolve any problems noted, OGE prefers to advise and assist the agencies and to avoid adversarial relationships. Most agency ethics officials said OGE reviews are useful, and an OGE official said the agencies are generally cooperative in complying with OGE recommendations.

OGE's reviews take from 2 to 4 weeks at an agency, and its goal is to review each agency's program once every 3 years. However, OGE has not achieved this goal. OGE has reviewed larger

agencies' systems about once every 4 years and smaller agencies' systems about once every 5 years. An OGE official said the agency does not have enough staff to do the reviews more often. Two former OGE directors said that even triennial reviews are not frequent enough.

To strengthen its monitoring, OGE has, among other steps, asked agency ethics officials to inform OGE when they refer cases to the Justice Department. Also, OGE asked some Inspectors General to voluntarily report to OGE any investigations of employees at or above the GS-15 level resulting in referrals to Justice or in administrative action. OGE is developing a form which agencies will be required to file annually to report such information as the number of cases referred to and declined by Justice and the number and types of administrative actions taken by agencies.

The Ethics Act does not charge OGE with responsibility for enforcing the criminal conflict of interest laws or administering agencies' standards of conduct in individual cases. Responsibility for enforcement of the conflict of interest laws is vested in the Department of Justice, and each agency administers its own standards of conduct. When OGE becomes aware of a potential conflict of interest, it works with the individual to resolve the problem and believes that it can be most effective in a consulting role. OGE believes this consultative approach encourages individuals filing disclosure forms and ethics

officials to come forward with their questions and concerns so they can be resolved before legal violations occur.

OGE does identify ethics problems in its reviews of individual financial disclosure reports and agencies' programs, and in other ways. When it does, the OGE Director can order corrective action, issue a public statement, refuse to sign an individual's financial disclosure statement, and/or refer the case to Justice.

Although the Ethics in Government Act gave OGE the authority to order corrective action, it does not define the corrective actions OGE may take. OGE considers corrective action to include measures such as requiring an official's recusal from a specific matter, divestiture of a financial interest, and establishment of a blind trust.

Although the Ethics Act empowers OGE to order an individual to take specific action to avoid a conflict of interest, OGE has no authority to enforce its orders. If an individual refuses to comply with an OGE order, OGE's recourse is to report the matter to the agency head, or other authority responsible for the individual's appointment, or to refer it to Justice.

The act requires OGE to refer to the Attorney General the name of any individual OGE believes has willfully falsified or failed to

file required financial disclosure information. OGE has referred such cases to Justice.

OGE is not a law enforcement agency. Without fundamental changes in the Ethics Act and a larger and different type of OGE staff, it is probably not feasible for OGE to have an enforcement function. All former OGE Directors agreed that OGE should not perform an enforcement function. Justice officials also believe the agencies properly have first-line responsibility for enforcing conflict of interest laws and disciplining individual employees. They see OGE's role as one of facilitating an understanding among executive branch officials about what the laws require.

PLANNING FOR THE PRESIDENTIAL TRANSITION

Finally, it is clear from past experience that the upcoming presidential transition will place more demands on OGE's limited resources. OGE works closely with the White House consulting on nominees and potential nominees. OGE also anticipates the transition will increase the number of contacts from the agencies and from officials new to federal service.

OGE assigns a high priority to the review of nominees' financial disclosure reports. Because the time required for the reviews depends on the size and nature of the individuals' holdings, OGE

cannot predict how much time will be required and how such reviews will impact its other work. In the last transition, OGE discontinued reviews of agency ethics programs for about 6 months because staff normally doing this work were assigned to review disclosure reports. OGE is exploring approaches to deal with the increased transition workload, including working with OPM to get 2 or 3 agency ethics personnel detailed to OGE.

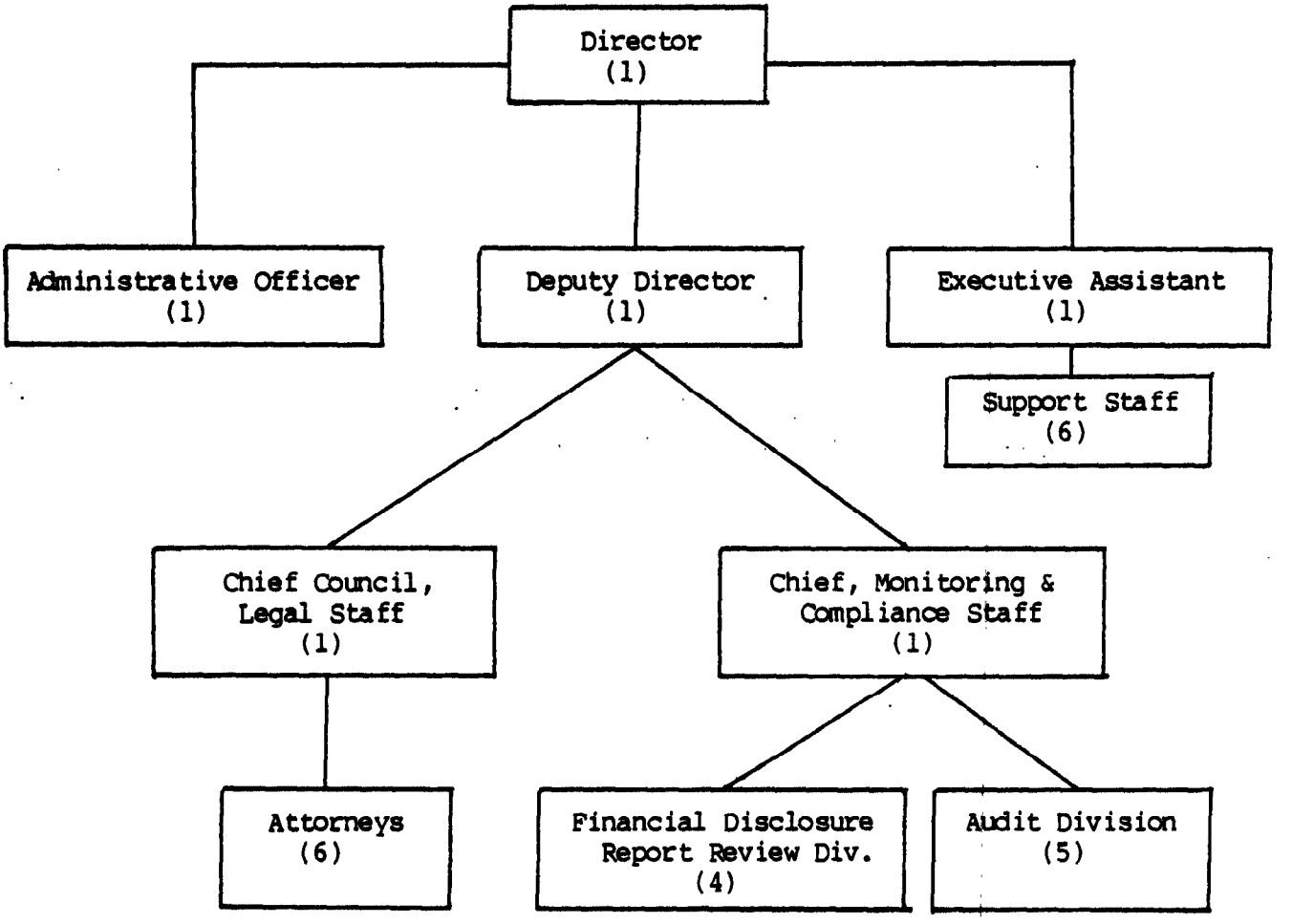
CONCLUSION

In summary, maintaining public confidence in the integrity of federal officials and employees is of critical importance. I would emphasize the importance of an ongoing program that focuses on preventing conflicts of interest on the part of federal employees through clearer standards, effective training, and strong enforcement. Generally, we and others we talked with believe OGE is doing a good job of carrying out its responsibilities in these areas, given its limited resources. OGE appears to have made an earnest attempt to address problems and issues in areas needing attention, as we have pointed out.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you may have.

ATTACHMENT I

Organization Chart for the
Office of Government Ethics
(Number of Staff as of April 1, 1988)



LAWS AND REGULATIONS REGARDING CONFLICT OF INTEREST

The Ethics in Government Act of 1978 was enacted as Public Law 95-521 on October 26, 1978. Titles I, II, and III established public financial disclosure requirements for officials in the legislative, executive, and judicial branches of the Government. Title IV established the Office of Government Ethics (OGE) to provide overall direction on policies concerned with preventing conflicts of interest by officers and employees of executive branch agencies. Title V amended the criminal conflict of interest statute (18 U.S.C. 207), which restricts certain postemployment activities of former officials and employees of the executive branch, independent agencies of the United States, and the District of Columbia. Title VI provided the authority and established procedures for appointing special prosecutors (now independent counsels) to investigate and prosecute certain executive branch officials (or officials of a national presidential campaign committee) who may have violated federal criminal law. Title VII established an Office of Senate Legal Counsel to represent the Senate, its committees and subcommittees and individual senators and staff in certain proceedings before the courts. It also conferred jurisdiction on the courts to enforce Senate issued subpoenas.

The Ethics Act has been amended five times as follows

-- Public Law 96-19 (June 13, 1979) amended certain financial disclosure provisions in the Act,

-- Public Law 96-28 (June 22, 1979) made substantial changes in the provisions of title V which restrict former government officials from representing others in certain matters before

the agencies in which they served,

-- Public Law 97-409 (January 3, 1983) amended the independent counsel provisions of title VI and extended this title for 5 years,

-- Public Law 98-150 (November 11, 1983) extended the authorization of OGE until September 30, 1988, amended and clarified provisions concerning OGE's authority, and amended certain financial disclosure provisions, and

-- Public Law 99-190 (December 19, 1985) amended section 207 to give the President authority to create a new confidential financial disclosure system.

The criminal conflict of interest statutes contained in 18 U.S.C. 202 through 209 which are applicable to federal officials and employees are, in brief

-- 18 U.S.C. §202, which provides definitions;

-- 18 U.S.C. §203, which (otherwise than as provided by law for the proper discharge of official duties) prohibits the payments to or receipt of compensation for representational services rendered by officers, employees, members of Congress, and others in relation to contracts or other matters involving the government;

-- 18 U.S.C. §204, which prohibits members of Congress from practicing in certain federal courts;

-- 18 U.S.C. §205, which prohibits officers and employees from representing other parties in contracts or other matters involving the Government;

-- 18 U.S.C. §206, which exempts retired officers of the uniformed services and certain other persons from sections 203 and 205;

-- 18 U.S.C. §207, which restricts post-employment representational activities;

-- 18 U.S.C. §208, which prohibits officers and employees from participating in matters which affect a personal financial interest; and

-- 18 U.S.C. §209, which prohibits a government employee from receiving any supplementation of salary from an outside source.

In addition to these governmentwide statutes, there are statutes which establish specific requirements or responsibilities applicable to employees of particular agencies. Regulations and guidance which relate to the ethical conduct of federal employees include: Executive Order 11222 and its implementing regulations, contained in 5 C.F.R. Part 735, which prescribe standards of ethical conduct for employees of executive departments and independent agencies; Executive Order 12565 which gives OGE responsibility for developing regulations for a confidential financial disclosure system; opinions issued by OGE and the Justice Department; rules of the House and Senate governing conduct of Members; and the various codes of conduct in the judicial branch.