



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

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OFFICE OF
GENERAL COUNSEL

Mr. David J. Apol
Acting Director and General Counsel
U.S. Office of Government Ethics
1201 New York Avenue, N.W. Suite 500
Washington, D.C. 20005

Dear Acting Director Apol:

I write in my capacity as the Designated Agency Ethics Official (DAEO) to provide you with information regarding actions taken by the Environmental Protection Agency's (EPA's) Ethics Program to strengthen our Program and to respond to concerns raised by you and your office.

Office of Government Ethics Review of EPA's Ethics Program

The Office of Government Ethics (OGE) completed a review of EPA's Ethics Program in March 2017 and documented that review in Report 17-16.¹ OGE provided EPA with eight recommendations in two areas that are delegated to EPA's Deputy Ethics Officials (DEOs): the confidential financial disclosure program and ethics requirements for special government employees (SGEs). To respond to recommendations related to the timeliness, retention, and accuracy of the confidential financial disclosure forms, EPA's Ethics Program is committed to migrating from a paper-based system to an electronic filing system by the 2020 reporting year. I am pleased to report that we have signed a Memorandum of Understanding with the Department of Treasury that allows EPA to use code from and begin the testing of an electronic filing system that is based on the Department of Treasury's current system.

With regard to the recommendations related to SGEs, EPA's Ethics Program shares OGE's concern about the discrepancies the review uncovered in the ethics training and financial disclosure filings of SGEs who serve as experts, consultants, or members of advisory committees. The Ethics Program is beginning an engagement with EPA's Office of Research and Development (ORD) to understand the particular challenges surrounding financial disclosure requirements for experts and consultants, and to then improve our support of the DEOs responsible for counseling this type of SGE. For SGEs who are advisory committee members, the Ethics Program met with the Designated Federal Officers Network to emphasize the obligation of Designated Federal Officers to train SGEs and to collect, review, and certify their financial disclosure reports. Over the course of the past year, the Ethics Program has worked with many of EPA's Federal Advisory Committee Act (FACA) committees. For example, we worked closely with the Science Advisory Panel (SAP) staff to

¹ Office of Government Ethics, Report No. 17-16: *Ethics Program Review U.S. Environmental Protection Agency*, March 2017 (Program Review).

discuss and resolve conflicts and impartiality issues as they arise. The Ethics Program and the SAP jointly met with the relevant EPA program to explain how SGEs are selected and their ethical obligations. We met with the staff of EPA's largest FACA committee, the Science Advisory Board, to explain conflicts of interest analysis and fact patterns. Most recently, the Ethics Program provided in-person ethics training to the Science Advisory Board. Similar training is being scheduled for the Human Studies Review Board and can be replicated as often as necessary. Finally, we are committed to revising the relevant existing online ethics training module and to providing training to EPA's Designated Federal Officers.

In addition to the recommendations, the Report also expressed OGE's concerns with the staffing level of the Ethics Office located in the Office of General Counsel (OGC). The OGC Ethics Office supports the DAEO and serves as the nucleus of EPA's decentralized Ethics Program. Among the responsibilities of the Ethics Office is the support and oversight of the Deputy Ethics Officials who reside in program and regional offices across EPA. At the time of the initiation of the Program Review in 2016, the OGC ethics team was a subcomponent of the OGC Immediate Office and comprised of a Senior Counsel for Ethics, who served as a non-supervisory team lead, and two staff positions (one filled with a full-time employee and one filled by two part-time employees who "shared" the position). During the time the review was ongoing, we established the OGC Ethics Office as a stand-alone office on par with OGC's law offices and converted the Senior Counsel to a supervisory position. By the time the report was issued, we had added a temporary third staff position for a two-year period. OGE expressed the following concerns:

OGC Ethics may be insufficiently staffed to ensure the long-term effectiveness of EPA's ethics program. At the very least, OGE is concerned that at current staffing levels, OGC Ethics may not be able to absorb the impact of any staffing changes, such as medical leave or retirement, or any unforeseen events. Additional responsibilities or priorities may stretch existing resources even further. Moreover, the effective administration of certain elements of the ethics program relies largely on the competency of the DEOs who are not directly supervised by OGC Ethics. Again, OGE is concerned that OGC Ethics staffing may be insufficient to provide the DEOs with continuous oversight and necessary guidance and training.²

In fact, a number of the potential events OGE identified as difficult for the OGC Ethics Office to overcome actually occurred after the Review was completed. The two full-time staff members left federal service (leaving the team with no full-time staff members for a period of time), two members of the team were granted extended absences, and the team was asked absorb additional responsibilities, including vetting potential political appointees for financial conflicts of interest. In addition to challenges faced by OGC's Ethics Office, from January 2017 to January 2018, I served as EPA's Acting General Counsel while maintaining my role as the DAEO. At times during 2017, OGC's Ethics Office had fewer staff than we did when OGE expressed its concern.

Based on a workload evaluation by the team and with the support of the General Counsel and Chief of Staff, I am expanding the capacity of the OGC Ethics Office by increasing the number

² Program Review at 5.

of staff positions. As a first step, I have already filled the two vacated staff positions. I recruited one new ethics official from within OGC and I facilitated the transfer of one ethics official from another headquarters office to the OGC Ethics Office. Second, I granted a request from a part-time employee to increase her hours by 20%. Third, I created three new staff positions on the team. One of those new staff positions will be filled through the phased reassignment of a current OGC employee with experience in the ethics requirements. The second new staff position will be filled at a junior level and the third will be filled at a senior level. These additional staff positions will double the staff positions on the team and far exceed any previous staffing level for the OGC Ethics Office. These additional resources will focus on expanding the availability of ethics officials to provide ethics advice and increasing the support and oversight of DEOs across EPA. We look forward to continuing our engagement with OGE on this and other issues raised in the Program Review.

Office of Government Ethics' Engagement with EPA Regarding the EPA Administrator

On April 6, 2018, you wrote to me as EPA's Designated Agency Ethics Official and advised me to review and analyze the reported actions of Administrator E. Scott Pruitt that you identified in your letter. The letter ended with the expectation that "that appropriate action will be taken in response."³

As you know, I initially responded to your letter on April 9, 2018, and informed you that I referred your letter to EPA's Office of Inspector General (OIG).⁴ I received confirmation from Inspector General Arthur Elkins that his Office accepted my referral and opened investigations into those issues. At present, we understand that several investigations are open and on-going, and my staff and I are providing "ready and active assistance" to the OIG inspectors, as required by Office of Government Ethics regulations.⁵

When we become aware of an ethics-related matter, the OGC Ethics Office reviews the known facts and determines the appropriate path forward. When the known facts demonstrate that all actions were consistent with ethics requirements, we may nonetheless determine that there is a need for additional training or education, but otherwise take no further action. In certain instances, the known facts are not sufficient for us to fully evaluate the matter. If the OGC Ethics Office determines additional fact-finding is necessary, we will refer the matter to EPA's Inspector General if the matter involves a criminal provision *or* a senior agency official. If the matter does not involve a criminal provision or a senior agency official, we work with the employee and the employee's supervisor, as appropriate, to obtain any additional information.

When the known facts demonstrate that some actions were inconsistent with the ethics requirements, we refer the matter to the Inspector General.⁶ If the OIG accepts a matter for investigation, OGE's regulations require ethics officials to provide support to the OIG, as

³ Letter from David J. Apol, Acting Dir. and Gen. Counsel, U.S. Office of Gov't Ethics, to Kevin S. Minoli, Principal Deputy Gen. Counsel and Designated Agency Ethics Official, U.S. Env'tl. Prot. Agency (Apr. 6, 2018).

⁴ Letter from Kevin S. Minoli, Principal Deputy Gen. Counsel and Designated Agency Ethics Official, U.S. Env'tl. Prot. Agency to David J. Apol, Acting Dir. and Gen. Counsel, U.S. Office of Gov't Ethics (Apr. 9, 2018).

⁵ 5 C.F.R. § 2638.104(c)(10).

⁶ 5 C.F.R. 2635.101(b)(11) ("Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.").

requested.⁷ If the violation is of a non-criminal provision and does not involve a senior agency official, the Office of the Inspector General historically has agreed that the Ethics Program can address the matter administratively without referral. In those instances, we work to bring the employee into compliance, if possible. As you know, regardless of the type of violation or employee involved, ethics officials do not have authority to discipline an employee. Should the supervisor determine corrective or disciplinary action is appropriate in response to a violation of the ethics requirements, however, we will provide assistance to the supervisor upon request.⁸

Since your letter in April, additional potential issues regarding Mr. Pruitt have come to my attention through sources within EPA and media reports. Consistent with my obligations under Office of Government Ethics regulations, I have referred a number of those matters to EPA's Inspector General and have provided "ready and active assistance" to the Inspector General and his office. Several of those matters were also included in your recent letter to the EPA Inspector General.⁹ To the best of my knowledge, all of the matters that I have referred are either under consideration for acceptance or under active investigation.

Engaging Deputy Ethics Officials and Supervisors to Provide them with Necessary Support

Even as we are challenged by the concerns described above, I have also challenged the OGC Ethics Office to use this moment to take a look at our Program and evaluate where we are strong and where we might do better. When we take a step back, the picture that we see is an Ethics Program implemented by Deputy Ethics Officials across the agency and that depends on first-line supervisors to help guide their employees and create an ethical culture at EPA. Our responsibility as the OGC Ethics Office is to provide DEOs and first-line supervisors with the support and resources they need to fulfill their critical roles. To ensure we are doing that well, OGC's Ethics Office is embarking on an initiative to *Engage in Ethics* with our DEOs and first-line supervisors.

The Program Review reminded us that DEOs are the front line of EPA's Ethics Program. They are our presence in the field, and are the people that the majority of EPA employees turn to when they have an ethics question. And, yet, those DEOs have accepted the DEO responsibilities as "other duties as assigned," in addition to some other area of responsibility that is seen by their supervisor and home office as their primary responsibility. The OGC Ethics Office needs to provide support and assistance to EPA's DEOs so that they can efficiently – and effectively – counsel employees on the wide range of issues that they see. More than ever, the OGC Ethics Office needs to *Engage in Ethics* with our network of Deputy Ethics Offices to ensure they have access to the resources they need.

When you accepted my invitation to address EPA's Executive Management Council on April 13, 2018, you spoke about studies that show how employees' faith in the integrity of their organization derives primarily from their immediate supervisor. If an employee's immediate

⁷ 5 C.F.R. § 2638.104(c)(9)(i).

⁸ 5 C.F.R. 2638.104(c)(9) (responsibilities of the Designated Agency Ethic Official include "Assisting the agency in its enforcement of ethics laws and regulations *when agency officials...take disciplinary action*" (Emphasis Added)).

⁹ Letter from David J. Apol, Acting Dir. and Gen. Counsel, U.S. Office of Gov't Ethics, to Arthur A. Elkins, Jr., Inspector General, U.S. Env'tl. Prot. Agency (June 15, 2018).

supervisor behaves ethically, then an employee's awareness of that ethical behavior contributes to their perception of the ethical culture of their organization. You encouraged supervisors to talk about the importance of ethics and take pride in ethical behavior. In recognition of the important role of supervisors, *Engage in Ethics* will include our engagement with EPA's First Line Supervisors Advisory Group and first-line supervisors across the agency to understand how the Ethics Program can support them as they fulfill their "heightened personal responsibility for advancing government ethics" and their obligation to "to help ensure that subordinates are aware of their ethical obligations under the Standards of Conduct and that subordinates know how to contact agency ethics officials."¹⁰

Finally, our effort to *Engage in Ethics* with DEOs and first line supervisors is designed to recognize the contributions they make to EPA's Ethics Program and thank them for their role in creating an ethical culture at the agency. The resources that we will deploy, such as an EPA-wide Ethics Helpline, an agency-wide email box (ethics@epa.gov), and a redesigned Ethics Program intranet site, are a reflection of my commitment to better serve them as the DAEO, not of any weakness in their performance. I believe that the OGC Ethics Office's work to become more visible, more accessible, and more available to our DEOs and first-line supervisors will ultimately make EPA's Ethics Program even more effective at serving the needs of employees across the agency. EPA employees work daily to make their ethical federal service a point of pride, and through the *Engage in Ethics* initiative, we will ensure that EPA's Ethics Program is doing all we can to help them achieve that goal.

Conclusion

Thank you for your continued support of EPA's Ethics Program. We would appreciate any insights or advice you and your staff may offer regarding our effort. We have appreciated your willingness to *Engage in Ethics* with us, and have benefited greatly from your guidance and assistance.

Sincerely,



Kevin S. Minoli
Principal Deputy General Counsel
& Designated Agency Ethics Official

¹⁰ 5 C.F.R. § 2638.103.