

VIA EMAIL

OGEStrategicPlan@oge.gov
Attn: Nicole Stein, Chief, Agency Assistance Branch
U.S. Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005-3917

August 24, 2017

Re: Solicitation of Input from Stakeholders Regarding the U.S. Office of Government Ethics Strategic Plan (FY 2018 — 2022), 82 Fed. Reg. 37858 (Aug. 14, 2017)

Dear Ms. Stein,

On behalf of Issue One, I am submitting comments on the U.S. Office of Government Ethics (“OGE”) Strategic Plan (FY 2018-2022) (the “Strategic Plan”) published in the Federal Register on August 14, 2017. Issue One is a nonpartisan, nonprofit advocacy organization dedicated to political reform and government ethics in order to strengthen democracy and return government to the American people. We are home to the ReFormers Caucus, the largest bipartisan coalition of former members of Congress, governors and cabinet officials ever assembled to advocate for solutions to fix our democracy.

Issue One strongly believes it is vital to the health of our democratic system that government officials live up to high ethical standards. OGE, as the supervising ethics office for the federal government’s executive branch, has an incredibly important role to play in that effort. We are pleased to see some elements of the strategic plan; in particular, an emphasis on advancing a “strong, uniform executive branch ethics program” and “holding the executive branch accountable for carrying out an effective ethics program.”¹ However, since its inception, OGE has struggled to find the appropriate balance between its compliance role and its obligation to promote high ethical standards.

Despite some recent examples to the contrary, the agency has routinely, under both Democratic and Republican administrations, failed to robustly interpret its statutory authority to conduct investigations and its inherent authority to publicly denounce ethical lapses by government officials or the shortcomings of agency ethics programs.

¹ U.S. OFFICE OF GOVERNMENT ETHICS, U.S. OFFICE OF GOVERNMENT ETHICS DRAFT STRATEGIC PLAN, FISCAL YEARS 2018 — 2022 (July 25, 2017), at 5, 9, available at [https://oge.gov/web/OGE.nsf/Resources/OGE's+Draft+Strategic+Plan+\(FY+2018+-+2022\)](https://oge.gov/web/OGE.nsf/Resources/OGE's+Draft+Strategic+Plan+(FY+2018+-+2022)).

Although OGE does not have the power to issue penalties or sanctions, that does not mean it has no power whatsoever. The agency is clearly enabled to “conduct investigations and make findings concerning possible violations of any rule, regulation, or Executive order relating to conflicts of interest or standards of conduct applicable to officers and employees of the executive branch.”²

Furthermore, the agency can clearly offer public comments in an effort to ensure that proper deference is paid to ethical standards. Yet OGE has almost never exercised these powers. Perhaps the only notable example is from nearly 30 years ago, when it issued a public memorandum concerning ethical lapses of then-Attorney General Edwin Meese III in order to provide guidance and to “remind and inform that simply avoiding criminal conduct is not the mark of public service.”³

It is critical that OGE be willing to stand up for government integrity even when that requires delivering bad news to high-ranking officials about conflicts of interest, their need to divest a financial conflict of interest or the need to recuse themselves from a government duty.

Additionally, OGE should not be content with implementing the ethics system as it currently exists. Rather, the agency should promote reforms to improve itself and the entire federal ethics system. Issue One has publicly recommended several changes to OGE that can serve as a model. Those recommendations, which seek to better empower the agency to carry out its mission, are listed below.⁴

INDEPENDENCE

- Specify in legislation that the Director of OGE may only be terminated for cause

Currently, the Ethics in Government Act states that the Director of OGE serves a five-year term, but does not define when and how he or she may be removed. Clarifying that the Director can only be removed “for cause” would help ensure the agency’s independence and was recommended as early as 1983.

TRANSPARENCY AND CONSISTENCY

- Authorize OGE to serve as a central clearinghouse for all ethics actions taken by designated agency ethics officials (DAEOs)

² 5 U.S.C. app. § 402(f)(2)(B)(i) (2012).

³ U.S. OFFICE OF GOVERNMENT ETHICS, MEMORANDUM FROM THE DIRECTOR OF THE OFFICE OF GOVERNMENT ETHICS TO DESIGNATED AGENCY ETHICS OFFICIALS, GENERAL COUNSELS, INSPECTORS GENERAL AND OTHER INTERESTED PERSONS CONCERNING GUIDANCE ON ETHICS PROGRAM ISSUES RAISED IN THE REPORT OF THE INDEPENDENT COUNSEL DATED JULY 5, 1988 (Sept. 12, 1988) at 17, available at <https://www.oge.gov/web/oge.nsf/All%20Advisories>.

⁴ A memorandum regarding these recommendations is available at <https://www.issueone.org/policy-advocacy/>.

As the central agency in the ethics process, it makes sense to have OGE serve as a clearinghouse for ethics actions taken by DAEOs and their subordinates. Having decisions from various agencies side by side would promote transparency and consistency. Given modern technology, this would be a relatively low burden for OGE.

- Authorize OGE to publish recusal agreements of high-ranking Senior Executive Service (SES) employees

When an executive branch agency grants an employee a waiver regarding a situation that raises criminal conflict of interest (CCOI) concerns, the agency makes the waiver public. The same should apply for when SES employees establish recusal agreements, detailing what government matters they will not participate in. Those agreements should be published by OGE as part of the central clearinghouse function noted above.

- Authorize OGE to impose specific standards for ethics training and mandate ethics training for all high-level executive branch officials within a certain amount of time after joining an administration

OGE has the authority to require that executive branch agencies offer ethics trainings (see 5 C.F.R. § 2638, subpart C) and sets very general requirements, but it does not detail specific standards for those trainings. Doing so would help ensure that all employees across the entire executive branch are receiving appropriate ethics training. Also, high-level officials wield more power and have higher public visibility, and thus have an even greater need for ethics training.

ENFORCEMENT POWERS

- Authorize OGE to investigate allegations of ethics violations for high-ranking employees (Presidential appointments with and without Senate confirmation, SES and Schedule C)

Since DAEOs are usually General Counsels, they are subordinate to some high-ranking agency officials — and are often themselves political appointees — raising concerns about political pressure affecting the effectiveness of any investigation they may conduct into high-ranking employees. Giving OGE the authority and responsibility to conduct those investigations would reduce the threat of political pressure and increase the chances that investigations are thorough.

- Clarify that the Director of OGE has the authority to conduct investigations, subpoena witnesses, compel production of documents and issue civil penalties for violations for high-ranking officials

To effectively conduct investigations and discipline high-ranking officials, OGE would need to be given several powers that it does not currently have. While OGE would be able to initiate investigations on its own, the agency should have the authority to respond to allegations brought by outside groups and a statutory duty to issue a public response to the complaint within a certain time frame. Furthermore, OGE's decision not to open an investigation should provide a private cause of action to appeal that decision in court, reviewable under the standards of the Administrative Procedure Act. However, to ensure appropriate protections for the federal workforce, employees who are subject to discipline imposed by OGE should be able to appeal the decision to the Merit Systems Protection Board.

- Authorize OGE to conduct random audits of public and confidential financial disclosures to ensure the accuracy of the document

OGE is generally considered to have a compliance mentality — the agency will ensure that the proper forms are filed, but does not check the accuracy of the data. This raises the specter that some financial disclosure will be incomplete or inaccurate. As a deterrent, OGE should have the authority to audit financial disclosures for cause and the responsibility to randomly and routinely audit a certain limited number of disclosures.

- Authorize OGE to conduct random reviews of decisions by ethics officials for each agency

Agency ethics officials often consult OGE about ethics issues, but those officials have the authority to issue final decisions concerning many ethics matters. To ensure that agencies are applying the highest standards and coming to the best decisions, OGE should randomly audit agency ethics decisions.

- Require OGE to approve waivers concerning CCOI laws

When offering a waiver exempting an employee from the application of CCOI laws in a specific situation, agency ethics officials must consult with OGE, but the ultimate decision remains with the agency official. To ensure that waivers are appropriate, and that agencies are not cutting corners, the law should require OGE to approve the waiver.

- Require congressional review of current OGE decisions on “compartmentalization” and require congressional approval for any future decisions

OGE has the authority to “compartmentalize” agencies for the purpose of post-employment restrictions, meaning that high-ranking officials in a compartmentalized sub-agency or agency component may be able to lobby officials in other sub-agency or agency components. Given the potential for undermining congressional intent in

establishing these post-employment provisions, Congress should have a role in reviewing and approving compartmentalization.

We urge OGE to fully live up to the ideas espoused in the strategic plan and work to ensure that government officials live up to the high ethical standards that the American people demand.

Meredith McGehee
Chief of Policy, Programs and Strategy
Issue One