

GAO

Report to the Chairman, Subcommittee on
Federal Services, Post Office and Civil
Service, Committee on Governmental
Affairs, U.S. Senate

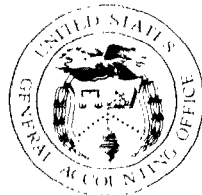
February 1992

EMPLOYEE CONDUCT STANDARDS

Some Outside Activities Present Conflict-of-Interest Issues



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General Government Division

B-245739

February 10, 1992

The Honorable David Pryor
Chairman, Subcommittee on Federal
Services, Post Office and Civil Service
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Your April 30, 1990, letter raised questions about federal employees' work-related activities outside the government. You were troubled that conflicts of interest may result when federal employees do similar work both inside and outside government. In response to your questions and concerns, this report presents information we obtained at selected agencies¹ on

- the extent and characteristics of employees' approved activities outside the federal government,
- agency regulations and procedures for monitoring these outside activities, and
- approved activities that could create the appearance of conflicts of interest.

As agreed with the Subcommittee, we also determined whether the Office of Government Ethics (OGE) had (1) provided guidance to agencies on approving and monitoring employees' outside activities and (2) reviewed agency controls over such activities.

Results in Brief

The extent of approved outside activities varied among the 11 agencies. Speaking and consulting were the most frequently approved outside activities.

Some agencies did not monitor employees' activities outside of the government to the extent needed to ensure that violations of related laws and regulations were avoided. For example, most agencies did not require

¹As agreed with the Subcommittee, we included the following 11 agencies in our review: the National Institute of Science and Technology (NIST); the Small Business Administration (SBA); the Office of U.S. Trade Representative (USTR); the Merit Systems Protection Board (MSPB); the Office of Personnel Management (OPM); the Nuclear Regulatory Commission (NRC); the Securities and Exchange Commission (SEC); the Environmental Protection Agency (EPA); the Food and Drug Administration (FDA); the Centers for Disease Control (CDC); and the National Institutes of Health (NIH).

employees to update their approvals, even though in some instances the outside activities were to occur over several years. OGE audited most of the 11 agencies' controls over outside activities and recommended improvements. However, agencies did not always implement OGE's recommendations. Subsequently, OGE took steps to improve agency compliance with OGE recommendations.

Because of overly permissive approval policies, five agencies approved some outside activities, such as speaking and consulting, that appeared to violate the standard of conduct prohibiting the use of public office for private gain. These activities preceded the January 1991 ban by Congress on the acceptance of honoraria (compensation) by most federal employees for outside speeches, articles, and appearances. The ban applies whether or not the activity relates to government work. Congress is considering proposals to apply the ban only to the above activities when they focus specifically on government work. Such a change would allow employees to again receive honoraria under some conditions now prohibited. It would also continue the prohibition on accepting compensation for certain outside activities that we question because of their close relationship to agency responsibilities.

In July 1991, OGE proposed new standards of conduct for all executive branch employees. OGE's proposed standards allow agencies to establish, when desirable, requirements for prior approval of employees' outside activities. We believe OGE needs to strengthen its standards on agency approval of outside activities. Prior review of certain kinds of outside activities, e.g., those related to the agency's responsibilities, can help agencies and employees avoid conflicts of interest. In addition, OGE needs to provide agencies with guidance on dealing with situations in which employees are to receive compensation for consulting activities that are closely related to agency responsibilities. OGE agreed to implement all of our recommendations.

Background

Since 1965, executive orders and implementing regulations have prohibited employees from engaging in outside activities that are not compatible with the full and proper discharge of the duties and responsibilities of their government employment. The prohibition includes activities that involve the acceptance of a fee or anything of value in circumstances in which acceptance may result in or create the appearance of a conflict of interest or that may result in the appearance of using public office for private gain. Further, officers and employees may not use

information gained by virtue of their government employment that is not generally available to the public, nor can they use government time, equipment, or facilities to carry out private activities.

Executive branch standard-of-conduct regulations issued in 1968 and administered by OGE contain specific guidance and requirements on employees' outside activities. Under those regulations, executive branch agencies were required to issue standard-of-conduct regulations applicable to the agency's particular functions and activities. Additionally, OGE issued advisory guidance on approving employees' outside activities, such as making paid speeches at privately sponsored seminars.

In April 1989, President Bush issued Executive Order 12674, which includes the principles of ethical conduct of government officers and employees. These principles supersede those on which the 1968 regulations were based. As authorized by that order, in July 1991, OGE published proposed employee conduct regulations that included new guidance on employees' outside activities.

An honoraria ban effective January 1, 1991, mandated by the Ethics Reform Act of 1989, prohibits most federal employees from accepting money or anything of value for a speech, article, or appearance, whether or not these activities relate to government work. Bills have been introduced in Congress to modify the honoraria ban to limit its application to activities that focus specifically on the employing agency's responsibilities, policies, or programs.

Until January 1, 1991, and for the period covered by our review, the test for acceptance of honoraria by employees except for highest level officials, who were subject to additional restrictions, included the following five questions.

1. Is the honorarium offered for carrying out government duties or for an activity that focuses specifically on the employing agency's responsibilities, policies, and programs?
2. Is the honorarium offered because of the official position held by the employee?
3. Is the honorarium offered because of the government information that is being imparted?

4. Is the honorarium offered by someone who does business with or wishes to do business with the employee in his or her official capacity?

5. Were any government resources or time used by the employee to produce the materials for the article or speech or make the appearance?

If the answer to all of these questions was no, then an offered honorarium was acceptable, although under 2 U.S.C. 441i (a) it could not have exceeded \$2,000. (See app. II for additional information on prohibitions and requirements on employees' activities outside the federal government.)

Approach

Our approach to reviewing employees' outside activities at all 11 agencies was to obtain data on employees who had been approved for outside activities at any time during fiscal years 1988 through 1990. For a universe of these employees at some agencies and a sample of employees at other agencies, we collected information on the employee (e.g., federal occupation and grade level), the type of approved outside activity (e.g., teaching, selling, consulting), and whether the employee was to be compensated. We compared approved outside activities with criteria in applicable laws, executive orders, regulations, and OGE guidance to see if the activities might create the appearance of a violation of standard-of-conduct regulations and/or conflict-of-interest statutes.

To determine how the 11 agencies monitored outside activities, we compared their regulations and practices with related federal statutes and governmentwide regulations. We reviewed their procedures and criteria for approving employees' requests to do outside activities. We also reviewed the results of Office of Inspector General's investigations done at 7 of the 11 agencies on employees' outside activities.

We assessed OGE's guidance and oversight of outside employment by reviewing its regulations, guidance, and audit reports and determining the extent to which OGE addressed outside employment in these documents. Appendix I provides additional information on the objectives, scope, and methodology of our review, including details on our sampling procedures.

Extent and Characteristics of Employees' Approved Outside Activities

As seen in table 1, the data we gathered showed that the number of employees who were approved for outside activities ranged from less than 1 percent, for OPM headquarters employees, up to 11 percent, for FDA employees.

Table 1: Employees With Approved Outside Activities

With Agency	Total employees as of October 1990	Employees with approved activities ^a	
		Number	Percent
NIST	3,061	105	3
SBA ^b	3,931	143	4
USTR	154	1	1
MSPB	307	5	2
OPM ^c	3,680	3	^d
NRC	3,130	24	1
SEC	2,271	38	2
EPA-OPTS ^e	1,308	44	3
FDA	8,614	988	11
CDC	5,462	301	6
NIH	16,181	826	5

^aData for all agencies, except NIH, are approvals during fiscal years 1988 through 1990. For NIH, we limited our review primarily to fiscal year 1990 approvals.

^bSBA approval data excluded certain types of outside activities such as "routine" or "noncontroversial" requests from employees at grade 12 and below that were approved by SBA regional offices.

^cAll OPM data are for headquarters employees only. Our review at OPM did not disclose any approvals of outside activities for OPM employees. Subsequently, OPM identified three employees who were to engage in outside activities.

^dLess than 1 percent.

^eBecause overall EPA approval data were not available, we limited our review primarily to EPA's Office of Pesticides and Toxic Substances (OPTS).

As indicated in table 1, NIH, FDA, and CDC approved the largest number of outside activities. However, differences in the percentages of employees with approved activities in the 11 agencies may be due, in part, to varying approval requirements.

Employees approved for outside activities came from a variety of federal occupations. Some occupations were more predominant than others. For example, medical officers accounted for 32 percent and 41 percent of all approved outside activities at CDC and NIH, respectively. Most of the employees receiving approval for outside activities were at grades 13 and

above. Outside speaking and consulting were common among most of the 11 agencies and accounted for the vast majority of the activities approved by 5 agencies—NIH, CDC, FDA, NIST, and FDA. Most of the employees at each agency (from about 60 to 100 percent) either were to be paid for their outside activities or were to do activities for which they customarily would be paid, such as working as a retail sales clerk.

Agency Procedures for Monitoring Outside Activities Varied Widely

Standard-of-conduct regulations and procedures for monitoring employees' outside activities varied widely among the 11 agencies. Some agencies did not monitor employees' activities outside the government to an extent adequate to ensure that violations of related laws and regulations were avoided.

All 11 agencies prohibited employees from doing certain work-related activities outside the agencies. However, the prohibitions varied in scope and specificity. For example, SEC prohibited employees from holding any outside job associated with the financial securities markets. In contrast, NRC did not prohibit outright any specific nuclear industry-related outside activities. Rather, along with some general prohibitions, NRC identified certain activities that it said could be incompatible with government employment. This included accepting employment or anything of value from certain NRC-related organizations, such as contractors, licensees, and applicants for NRC licenses. NRC employees were not to engage in these types of activities unless receiving written NRC authorization.

All 11 agencies also required employees to obtain approval of some types of outside activities. Employees' immediate supervisors at all agencies had a role in reviewing outside activities. These supervisors were to either provide information to approving officials (at 1 agency) or recommend approval or disapproval to approving officials (at 10 agencies).

Beyond these basic approval requirements, we found little consistency in the restrictions on employees' outside activities or agency approval requirements. Four agencies (SBA, USTR, SEC, and FDA) required all employees to obtain approval of work-related outside activities. The other seven agencies had less comprehensive approval requirements. For example, MSPB allowed its employees to determine when approval of their outside activities should be obtained. NIST limited its requirements to teaching, lecturing, writing, consulting, and other outside technical and professional activities. In addition, under Commerce regulations, NIST

employees were required to obtain departmental authorization for employment with foreign entities.

Most agencies did not periodically update their approvals of employees' outside activities that were to continue over several years even though employees' duties with the federal agency or the outside organization, or both, could change over this time to create conflicts of interest or other ethics problems. Annual financial disclosure reports provided information on employees' outside activities, but not all agencies used these reports to monitor the approval of such activities. Specifically, ethics officials in two agencies (SEC and USTR) said they did not use the reports to determine if supervisory approval was obtained when required.

Some agencies did not require by regulation that employees provide some information that we believe was necessary for determining whether conflict-of-interest and standard-of-conduct requirements were met. Agency officials may have at times requested employees to supply additional information. However, on the basis of our review, we found that some information essential for informed decisions was not obtained.

For example, six agencies (NIST, USTR, OPM, NRC, FDA, and CDC) did not require employees to show the amount of compensation they expected to receive from outside activities. Three agencies (NIST, USTR, and OPM) did not require employees to identify the names of outside employers. By not requiring this information, the agencies could not determine whether (1) employees met legal and regulatory restrictions on compensation from outside activities (e.g., the \$2,000 honorarium limit in 2 U.S.C. 441i (a) that applied before the ban) and (2) outside employers had financial relationships that could create a conflict of interest.

Some Outside Activities Presented Conflict-of-Interest Issues

Nine of the 11 agencies approved outside activities that presented issues involving potential violations of conflict-of-interest statutes and/or standard-of-conduct regulations.² These issues usually surfaced when employees requested approval of activities related to the agencies' responsibilities and, in some cases, the employees' federal duties.

When employees' requests presented potentially problematic situations, agencies sometimes imposed conditions on the employees before

²Insufficient data were available for us to determine whether OPM- and USTR-approved requests, four in total, presented potential conflict-of-interest or standard-of-conduct issues.

approving their requests. Four agencies effectively dealt with potential problems in this manner. The agencies' conditional approvals put the employees on notice as to their obligations and, in our view, minimized the risk of possible violations of the conflict-of-interest statutes and standard-of-conduct regulations.

Employees in five other agencies received approval of some outside activities, primarily speaking and consulting, that could not be appropriately handled with conditional approvals. Table 2 shows the extent to which these five agencies approved outside speaking and consulting activities.

Table 2: Speaking and Consulting Approved by Five Agencies

Agency	Total employees with approvals	Speaking ^a		Consulting	
		Number	Percent	Number	Percent
NIH	826	446	54	135	14
FDA	988	30	3	71	7
CDC	301	58	16	29	10
NIST	105	10	4	16	15
EPA-OPTS	44	1	0	12	27

^aConsists primarily of speaking but also includes some articles and appearances. Employees doing these activities, as well as consulting, are counted in both the speaking and consulting columns.

In most cases, employees approved for the above activities indicated in their requests that they would be paid. Although employees did not always show the amounts of compensation, available data show that the amounts were usually less than \$1,000 for each activity. However, for some employees, the cumulative amounts exceeded that amount. For example, 19 NIH employees reported that they were to receive compensation totaling from \$8,000 to about \$23,000 for outside speeches during fiscal year 1990.

Some of these outside activities were to focus specifically on the agencies' responsibilities and, in some cases, the employees' official duties. When federal employees are paid for outside activities closely related to the agencies' responsibilities, the situation may result in, or create the appearance of, using public office for private gain and thus may violate federal standard-of-conduct regulations. Whether an actual violation occurs depends on how closely the outside activity relates to the agencies' responsibilities.

In 1985, OGE issued guidance on acceptance of compensation in situations involving employees' participation in seminars, conferences, and briefings. OGE advised that compensation was inappropriate when, for instance, an outside activity depends on the use of nonpublic information³ or focuses specifically on the agency's responsibilities, policies, and programs.

On the basis of the information we had available, we believe that NIH, FDA, CDC, NIST, and EPA approved some speaking and consulting activities that were contrary to federal standard-of-conduct regulations and OGE's 1985 guidance. These agencies approved activities that appeared to focus specifically on the agencies' responsibilities and/or the employees' federal duties. For example, NIH approved a request from the branch chief responsible for clinical hematology to receive \$2,000 for a speech on gene transfer. The employee's position description and information in the request indicated that the speech focused specifically on NIH's responsibilities and on the employee's official duties relating to hematology.

In another case, CDC approved a request from the chief of a surveillance activity to give a speech on "Nosocomial Pneumonia" for compensation (amount not given in the request) at an infectious disease seminar. The employee's position description showed he was in the hospital infections program of the Center for Infectious Diseases and that his duties included national surveillance and epidemiological studies of nosocomial infections.

We believe that some agencies approved activities that were questionable as to the appropriateness of accepting compensation because of the agencies' overly permissive policies and practices regarding such activities. For example, NIH officials explained that medical doctors and other employees in highly specialized fields of expertise came to work with NIH believing that they could share their knowledge with others in the profession who have similar interests and responsibilities.

NIH officials also said that designating the requested activities as official duties of the employees could have a significant impact on NIH's budget; NIH's budget is not affected when outside organizations cover the costs for NIH employees' outside activities, such as making speeches and presenting

³OGE referred in its 1985 opinion to provisions of the 1968 standard-of-conduct regulation (5 C.F.R. 735) on misuse of information. The regulation prohibits an employee from directly or indirectly using, or allowing the use of, official information obtained in connection with an employee's government duties that has not been made available to the general public.

papers. However, under recently granted authority, NIH and other agencies can avoid this budgetary impact. As a result of the Ethics Reform Act of 1989 and interim GSA regulations issued in March 1991, agencies now have authority to accept payments for travel, subsistence, and related expenses from nonfederal sources when employees attend meetings and similar functions relating to their official duties.

Regulations and guidance issued by the Department of Health and Human Services (HHS) and three of its component agencies did not include some restrictions that OGE recommended in its 1985 guidance. Although the OGE memorandum was not binding on the agencies, we believe that it provided useful criteria for distinguishing between official duties and outside activities. Similar criteria were later included both in standard-of-conduct regulations proposed by OGE and bills introduced in Congress on acceptance of honoraria discussed later in this report.

At NIST and EPA, some employees were approved to do outside consulting activities relating to the agencies' responsibilities and involving the use of information generated as a result of the employees' federal duties, as the following examples illustrate.

- EPA approved a request of an EPA chemist to assist a foundation with restructuring its quality assurance program to be consistent with that of EPA's contract laboratory program. The employee was to receive \$60 an hour for up to 120 hours of service over a 12-month period. According to EPA records, the employee worked in an EPA branch responsible for the contractor laboratory program, and the employee's duties included developing environmental-related standards and criteria as part of that program.
- NIST approved a physicist's request to consult for compensation (amount undisclosed) with a private company in developing "a polarized electron source as a commercial product." The employee's official duties included research on spin-polarized electrons, which were to be used in the commercial product. The employee said that (1) the work depended on information obtained as an agency employee; (2) the work involved a source developed in his official capacity; and (3) the outside employer supplied the employee's division at NIST with equipment, such as electron spin polarization analyzers. A Department of Commerce attorney advised NIST that the consulting could be inappropriate. NIST's records did not show whether or how the attorney's concerns were resolved. In November 1991, after we questioned this approval, the employee advised NIST that a consulting agreement never materialized.

Statutory Proposals Would Continue Honoraria Ban on Certain Government-Related Activities

All of the government-related outside activities previously discussed were approved before January 1991. Congress banned the acceptance of compensation for certain outside activities, effective January 1, 1991. Under the ban, most federal employees are prohibited from accepting money or anything of value for a speech, article, or appearance, whether or not these activities relate to government work.

Due to the broad scope of the ban, Congress began, in January 1991, considering proposals to allow federal employees to receive honoraria under certain circumstances. House and Senate bills include criteria prohibiting the acceptance of compensation for appearances, speeches, and articles that relate primarily to or focus specifically on an agency's responsibilities, policies, or programs. These bills address the acceptance of compensation for some of the activities previously discussed that appear to have been contrary to standard-of-conduct regulations and OGE guidance.

OGE Has Proposed New Standards and Guidance for Agencies

In July 1991, OGE proposed regulations on uniform standards of ethical conduct for executive branch employees. These regulations update standards first established more than 25 years ago. OGE's proposed standards include provisions dealing specifically with outside activities but, in our view, can be strengthened regarding (1) prior agency approval of outside activities and (2) consulting by employees on subjects related to the agency's responsibilities.

Standard on Approval of Outside Activities Can Be Strengthened

The OGE-proposed regulations on employees' outside activities consist largely of references to prohibitions and limitations on employees' outside activities, including the compensation they may receive for such activities. The standards permit agencies to issue supplemental regulations to require employees to obtain approval before engaging in outside activities, when it is desirable for administering the agency's ethics program.

In our view, OGE's standards need to better recognize the value of prior review and approval of employees' outside activities. Our work at the 11 agencies showed that, along with appropriate agency approval criteria, the requirement for employees to obtain prior review of their agency-related outside activities is necessary to avoid violations of conflict-of-interest statutes and standard-of-conduct regulations. OGE's standards identify numerous restrictions on employees' outside activities. Without such prior review and approval, employees could inadequately consider these

restrictions and subject themselves to criminal sanctions for violating conflict-of-interest statutes.

As part of the approval process, some agency officials took care to stipulate specific conditions that employees should observe in their outside activities to avoid problems. We also found in agencies that had established weak requirements for approval, employees were found to have violated standards of conduct. In these situations, violations might have been avoided with stronger approval requirements. For example, OPM had limited requirements for approval of outside activities. In addition, EPA's administration of its approval requirements was highly decentralized, and requirements were weakly enforced at one of the two EPA offices we visited. According to information furnished by their Offices of Inspector General, both agencies had investigated and disciplined employees regarding outside activities more often than any of the other nine agencies.

Agency-Related Outside Consulting Requires Guidance

OGE's proposed standards prohibit compensation for teaching, speaking, and writing when the subject matter focuses specifically on the employing agencies' responsibilities, programs, and operations. However, the standards do not specifically address consulting by federal employees when the subject matter of the consulting focuses specifically on the employing agencies' responsibilities, programs, and operations. Our work showed that employees at some agencies did outside consulting for compensation that was closely related to the employing agencies' responsibilities, programs, and operations and, in some instances, the employees' official duties. Employees engaged in these consulting activities could be viewed as using public office for private gain.

OGE Audits Usually Covered Agency Controls Over Employees' Outside Activities

Between January 1986 and December 1990, OGE reviewed 9 of the 11 agencies' ethics programs and specifically addressed outside activities in 17 of the 22 resulting audit reports. OGE did not mention outside activities in the remaining five reports. As a result of its audits, OGE made recommendations to address weaknesses that included inappropriate NIH and FDA criteria for approving outside activities related to the agencies' responsibilities. NIH revised its manual after receiving OGE's audit report, but when we did our work at FDA, it had not responded to OGE's recommendations. OGE was again reviewing NIH's approval criteria at the time of our review.

Other agencies also had not fully implemented OGE recommendations. For example, MSPB agreed with OGE to establish written policies on approval of outside activities but had not done so at the time of our review.

We earlier reported that OGE had repeatedly recommended to some agencies over several years to correct weaknesses that we found still existed in 1990.⁴ OGE has taken steps since that time to improve agency acceptance and implementation of OGE recommendations, including, for example, sending audit reports to agency heads instead of ethics officials and being more aggressive on follow-up of open recommendations. OGE had not audited some agency ethics programs as frequently as it desired because of limited OGE staff. OGE increased the size of its audit staff from 2 auditors in 1989 to 12 as of September 1991. In addition to the above, OGE has since received additional enforcement authority to obtain corrective action when the Director of OGE determines such action is needed. Under its 1988 reauthorization act, OGE is authorized in some cases to order actions and, if necessary, notify the president and Congress in order to correct deficiencies in agency ethics programs.

Conclusions

The information we gathered indicated that some employees engaged in activities outside the federal government, such as speaking and consulting, that were focused specifically on the agencies' responsibilities and/or related directly to the employees' duties. Generally, the employees were to be compensated for their outside speaking and consulting. We believe the risk that these situations may result in or create the appearance of a conflict of interest can be minimized if agencies apply appropriate criteria to distinguish between matters that are official duties and outside activities. Criteria for these distinctions are included in OGE's proposed standard-of-conduct regulations and in bills being considered by Congress. However, the current criteria are not applied to consulting. OGE needs to provide agencies with guidance on consulting because this activity can also present conflict-of-interest issues when the consulting relates to an agency's responsibilities.

The risk of conflict-of-interest problems for federal employees can also be reduced if agencies require employees to request prior approval for activities that may pose such problems. Such risk is increased when employees engage in outside activities that are related to the agency's mission and operations. Evidence we gathered indicates that approval

⁴Office of Government Ethics' Oversight Role (GAO/T-GGD-90-48, June 5, 1990).

requirements, along with adequate prior agency review of such activities using appropriate criteria, periodic updates of approvals, and monitoring of approvals as part of the financial disclosure process, can help avoid conflict problems.

Recommendations

To help avoid ethics problems relating to employees' outside activities, we recommend that the Director, OGE take the following steps:

- Ensure that HHS, Commerce, and EPA fully adopt and comply with applicable restrictions on employees' compensation for outside speeches, articles, and appearances that relate to federal responsibilities.
- Provide agencies with guidance and criteria on the acceptance of compensation for consulting activities that relate to agencies' responsibilities, programs, and operations.
- Revise the proposed OGE standard-of-conduct regulations to require that each agency establish, when appropriate and necessary on the basis of its particular mission and operations, adequate prior agency review of employees' outside activities and periodic update of approvals.

Agency Comments

In commenting on a draft of our report, the OGE Director summarized actions OGE will take to implement all three of our recommendations. (See app. VII.) The Director's written comments followed several discussions we had with OGE officials to clarify our recommendations and agree on actions that OGE would take to respond to our report.

Concerning our first recommendation, OGE said that following the completion of its review of the NIH ethics program, it made a number of recommendations in November 1991 to HHS and NIH addressing problems noted in our report. OGE recommended, among other things, that HHS issue guidance to component agencies and employees correcting the HHS standard-of-conduct regulations to reflect the standards for outside speaking and writing activities contained in OGE's 1985 guidance. OGE agreed to include a review of agency-related outside activities in its next audits of Commerce and EPA employees to ensure that these agencies comply as well.

In response to our second recommendation, OGE believed that its standard-of-conduct regulations, when issued in final form, will appropriately address consulting activities. OGE said the proposed regulations provide authority for agencies to issue supplemental agency

regulations that prohibit compensated outside employment by all or any category of agency employees. OGE agreed to stress in the proposed regulations that (1) the principle that employees are to avoid the appearance of conflicts of interest and (2) the prohibition against use of public office for private gain apply to all outside activities. OGE also agreed to determine on the basis of its future audit work whether more specific guidance on consulting should be provided on a governmentwide basis.

Regarding our third recommendation, i. e., agency approval of employees' outside activities, OGE agreed to strengthen its proposed standard-of-conduct regulations. OGE said the regulations will be revised to provide that an agency shall require prior approval of employees' outside employment and activities when it is determined to be necessary and desirable for the purpose of administering the agency's particular mission and operations.

In addition to OGE's comments, we received written comments on a draft of our report from seven other agencies (Commerce, SBA, USTR, MSPB, OPM, NRC, and HHS). Generally, the thrust of these agencies' comments was to suggest changes to improve the accuracy of the data presented in our report, and we have made these changes where appropriate. In its comments, HHS also recognized that its definition of job-relatedness of outside activities differed from ours. HHS said it would defer decisions on departmental changes until it has considered OGE's report on the matter (issued in November 1991) and until related reviews are completed by NIH and the HHS Office of General Counsel.

In addition, Commerce emphasized in its comments that employees are permitted use of their professional expertise in outside activities. We agree with Commerce in concept, but Commerce must also consider other relevant criteria, such as whether the activity focuses specifically on the agency's work. In this regard, our first recommendation to OGE addresses Commerce's (and other agencies') compliance with applicable requirements when approving outside activities. All of the written comments that we received, along with our evaluation of the comments, are included as appendixes to this report.

As agreed with the Subcommittee, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Director, OGE; the heads of the agencies directly responsible for the matters discussed in this report; and other interested parties.

The major contributors to this report are listed in appendix XV. Please contact me at (202) 275-5074 if you or your staff have any questions or need any assistance.

Sincerely yours,



Bernard L. Ungar
Director, Federal Human Resource
Management Issues

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Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
CDC	Centers for Disease Control
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
HHS	Department of Health and Human Services
HIV	Human Immunodeficiency Virus
MSPB	Merit Systems Protection Board
NIH	National Institutes of Health
NIST	National Institute of Standards and Technology
NRC	Nuclear Regulatory Commission
OA	Outside activities
OGE	Office of Government Ethics
OIG	Office of Inspector General
OPM	Office of Personnel Management
OPTS	Office of Pesticides and Toxic Substances
OSWER	Office of Solid Waste and Emergency Response
SBA	Small Business Administration
SEC	Securities and Exchange Commission
SES	Senior Executive Service
USTR	Office of United States Trade Representative

Objectives, Scope, and Methodology

At the request of the Subcommittee on Federal Services, Post Office and Civil Service, Senate Committee on Governmental Affairs, we examined federal employees' approved activities outside the federal government at 11 executive branch agencies.¹ Specifically, as agreed with the Subcommittee, our objective was to obtain information at the 11 agencies on the

- extent and characteristics of employees' approved activities outside the government,
- agency regulations and procedures used for monitoring these outside activities, and
- approved activities that could create the appearance of conflicts of interest.

Additionally, we agreed with the Subcommittee to determine whether the Office of Government Ethics (OGE) had (1) provided guidance to agencies on approving and monitoring employees' outside activities and (2) reviewed agency controls over such activities. As agreed with the Subcommittee, we focused our review primarily on outside activities that had been approved by the selected agencies. Except for some limited work at the Office of Personnel Management (OPM) and the Environmental Protection Agency (EPA) to identify unapproved activities, we did not attempt to identify any hidden universe of employees working outside the agencies without approval.

Of the 11 agencies selected, 3 have responsibilities for private sector enterprise—the National Institute of Science and Technology (NIST), the Small Business Administration (SBA), and the Office of United States Trade Representative (USTR). Two agencies have jurisdiction over personnel matters for the federal government—the Merit Systems Protection Board (MSPB) and OPM. Four agencies have regulatory responsibilities—the Nuclear Regulatory Commission (NRC), the Securities and Exchange Commission (SEC), EPA, and the Food and Drug Administration (FDA). Three agencies are in the Department of Health and Human Services (HHS) and have jurisdiction over health matters—the Food and Drug Administration (FDA), the Centers for Disease Control (CDC), and the National Institutes of Health (NIH). We analyzed the regulations and procedures for monitoring outside activities used by these 11 agencies.

¹For purposes of this report, outside activity includes outside employment and activities, such as consulting, lecturing, writing, sales, and self-employment. Included as well are services to advisory boards, commissions, and similar organizations. Such activities were included whether paid or unpaid. We included all activities that were required to be approved by regulations issued by the 11 agencies.

Because of EPA's decentralized responsibility for approving outside activities, we limited our review of approvals at that agency primarily to two offices, the Office of Pesticides and Toxic Substances (OPTS) and the Office of Solid Waste and Emergency Response (OSWER.) However, as discussed in appendix III, our work at OSWER showed that it did not have reliable data on its approvals. Therefore, the EPA approval data in this report are for OPTS only.

To determine the extent and characteristics of outside activities, we defined the universe of interest as those employees who received approval for one or more outside activities during the 3 fiscal years from 1988 through 1990. In order to further standardize the universe, we focused our review at most agencies on individuals employed as of October 1990. Because of records constraints at NIH and NRC, we selected employees on board as of August 1990. In addition, due to the large volume of NIH approvals and the condition of NIH records, we limited our review at the agency primarily to fiscal year 1990 approvals.

Generally, in determining the extent of approved outside activities, our approach was to exclude employees approved to do outside activities during the 3 fiscal years if they left the agency during this period. We also did not consider those outside activities that were approved before the 3-year period and continued into the 3-year period, unless the agency required reapproval at least once every 3 years.

We reviewed records of approvals stored at the 11 agencies' headquarters only. All agencies except EPA and SBA stored all or almost all of these records at their headquarters. We did not review all employees' requests at EPA because the requests were stored in locations around the country. We also did not have easy access to certain SBA records of approvals that were maintained in field offices.

For those employees included in our review, we completed a standard data collection instrument to uniformly record from employees' requests and other agency records certain characteristics of the employees and their approved activities. Specifically, we gathered data on (1) employees' federal occupations; (2) their federal grade levels (categorized as grade 12 and below, grades 13 through 15,² and Senior Executive Service (SES) employees or employees at SES-equivalent pay levels, such as certain

²Grades 13 through 15 include supervisors and management officials who formulate, determine, or influence agency policies.

medical officers at CDC, FDA, and NIH); (3) type of outside activity (e.g., speaking, selling, or consulting); and (4) compensation, if any.

To assess agencies' controls and guidance over outside activities, we compared regulations, policies, procedures, and practices of the 11 agencies with related federal statutes and governmentwide regulations. Specifically, we determined (1) whether any approvals were required, (2) the types of outside activities requiring approval and the approval criteria used, (3) what information was required to be included in outside activity requests, (4) whether employees were required to periodically update approvals of outside activities continuing beyond 1 year, and (5) whether agencies used the financial disclosure process to check for required approvals of outside activities. We also obtained information on investigations of employees' outside activities made by agency Offices of Inspector General (OIG) or other internal investigative units during the calendar years 1986 through 1990. OIGs had completed such investigations at 7 of the 11 agencies.

To determine whether outside employment posed potential conflicts of interest and, if so, how each agency dealt with those issues, we completed data collection instruments for either the universe or a sample of employees, depending on the number of requests approved by each agency, for outside activities approved during the period of our review. These instruments were used to uniformly gather (1) information on employees' federal occupations and the associated responsibilities and duties and (2) similar information for the same employees' outside activities. We compared approved outside activities with criteria in applicable laws, executive orders, regulations, and OGE guidance to determine if the activities might create the appearance of a violation of standard-of-conduct regulations and/or conflict-of-interest statutes.

Additionally, we recorded information, when available from agency records on approval of outside activities, on any employer relationships with the agencies and outside organizations arising out of contracts, grants, and licenses. When we and/or the agency noted possible conflicts of interest, we documented any conditions imposed by the agency on the outside activities or other procedures used by the agency to deal with the possible conflicts.

We asked the agencies to provide pertinent reports, files, and individual records to identify employees who had been approved to engage in outside activities. We relied on information provided by the agencies on their

approvals to determine the extent, characteristics, and possible conflicts associated with employees' approved outside activities. Data were not available for us to verify whether information provided by employees in their requests for such approvals was accurate.

To review related OGE policy and oversight responsibilities, we examined that agency's regulations and guidance on employees' outside activities. We reviewed OGE audit reports issued during the calendar years 1986 through 1990 and determined from OGE what actions agencies took on its recommendations on employees' outside activities. We discussed with OGE officials their plans for providing additional guidance and supervision over outside employment. We reviewed OGE's proposed standard-of-conduct regulations issued for comment in July 1991 to determine how these regulations addressed outside activities. We also reviewed bills under consideration by Congress affecting certain outside activities of federal employees.

Sampling Strategy for Review of Outside Activity Requests

We used sampling procedures as part of our work on two of our objectives—to determine (1) the extent and nature of federal employees' outside activities and (2) the potential for conflict-of-interest issues to be posed by such activities. The 11 agencies differed not only in what types of outside activities were to be approved and monitored but also in how information on employee requests for approval was maintained. For these reasons, different selection procedures were required for different agencies.

The results of our review of agency approvals are not generalizable to all executive branch agencies. Rather, the results can be generalized only to the individual agencies we reviewed and, in some cases, to the employees included in our samples. Table I.1 shows the sampling procedures used at each agency.

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Objectives, Scope, and Methodology**

Table I.1: Summary of Sampling Procedures Used

Agency	Study method	Universe size	Study size	Generalizable to
NIST	Universe	105	105	All employees with approvals except one NIST office
SBA	Universe	143	143	All employees with approvals by SBA headquarters
USTR	Universe	1	1	All employees with approvals
MSPB	Universe	5	5	All employees with approvals
OPM ^a	Systematic	3,680	149	All headquarters employees
NRC	Universe	24	24	All employees with approvals
SEC	Universe	38	38	All employees with approvals
EPA- OPTS	Universe	44	44	All OPTS employees with approvals
FDA ^a	Systematic	8,614	301	All employees
CDC ^a	Simple random	301	157	All employees with approvals
NIH ^b	Universe	826	826	All employees with approvals

^aAt OPM, FDA, and CDC, the sample size was sufficient to provide a 95-percent confidence level, plus or minus 5 percent.

^bAt NIH, we limited our review primarily to employees approved for outside activities during fiscal year 1990 only. In addition, we used a judgmental sample of 73 employees approved for paid activities during fiscal years 1988 through 1990 to determine if those activities posed conflict-of-interest issues.

Four of the agencies (USTR, MSPB, NRC, and SEC) had files on employees with approved requests readily available, and the number was small enough for us to review the entire universe of employees with approved requests. For three other agencies (NIST, SBA, and EPA), requests were readily available for certain employees but not for others because the requests were not all maintained at one location. We reviewed the universe of requests that were readily available at these three agencies as follows:

- At NIST, we reviewed all approved requests filed at headquarters. According to NIST officials, the requests we reviewed included all but 1 percent of the approved requests; this 1 percent was filed in a NIST field office.
- At SBA, data were stored at headquarters for headquarters employees, field employees at grades 13 and above, and those employees at GS-12 and below who submitted “nonroutine” requests. Nonroutine requests, as defined by SBA, were those involving outside activities that could be controversial, have high public visibility, or involve policy-related interactions with SBA or other governmental units. We selected 64 headquarters employees and 79 field employees meeting the above criteria. Our sampling method provided for generalization to all employees at SBA headquarters, all field employees at grades 13 and above, and those SBA employees who had nonroutine requests.

- At EPA, employees were assigned to 1 of 12 offices in the Washington, D.C., area in addition to 5 laboratories and 10 regions. Within each office were subunits, each with a deputy ethics official in a different location who was to review requests for the employees in the subunit at that location. Thus, EPA's outside activity requests were maintained by 88 deputy ethics officials in Washington, D.C., and other offices around the country. According to EPA officials, data on approvals were maintained by the 88 ethics officials. To review approved outside activities, we selected 2 of the 12 EPA offices—OPTS, with three deputy ethics officials, and OSWER, with five deputy ethics officials.

At OPTS, we identified 44 employees with approved requests from ethics files. At OSWER, similar files were not available. OSWER officials did not have a system of records on such approvals and said they were unfamiliar with EPA's approval requirements. We reviewed employees' financial disclosure reports, which were to disclose employees' outside activities, and identified some outside activities for which employees should have requested EPA approval. Because OSWER did not enforce EPA approval requirements and because our work did not produce a well-defined universe of approvals for OSWER, we did not include OSWER in our limited EPA universe. The results of work at EPA, therefore, are not generalizable to EPA but are representative of OPTS only.

At three agencies (OPM, FDA, and CDC), the universe to be studied was large enough to require sampling. For these agencies, we used approaches that allowed us to generalize our findings to the universe of employees within these agencies with a 95-percent confidence level, plus or minus 5 percent. Our procedures for randomly drawing the samples at these three agencies were as follows:

- OPM provided us with a list of 3,680 headquarters employees. From this list, we selected every 20th name for inspection of official personnel folders, which we were told would contain any approved requests. For the sample of 149 readily available files we reviewed, we found no requests for the 3 fiscal years (1988 to 1990) covered by our review. We also reviewed financial disclosure reports filed by 14 of the 149 employees, and we found that 1 of the 14 reported an outside activity that may have required OPM review. However, OPM's criteria were not clear as to whether the activity required OPM review. In commenting on a draft of our report, OPM said it had located records on three employees involved in outside activities. OPM furnished some records showing these three employees were to engage in

outside activities, and we incorporated data on these three employees where appropriate.

- At FDA, we used two employee lists to achieve a final sample of approved requests. We were supplied a list of 73 SES employees and a list of 8,541 other employees. From the SES list, we selected every 4th employee, and from the other list, we selected every 22nd employee. We wanted to determine whether ethics files maintained for these employees contained any requests. We selected for review 18 SES and 390 non-SES employees. However, FDA could locate only 283 of the non-SES employee files, so we were able to scan files for only 301 (18 SES and 283 non-SES) employees. From these files, we identified approved requests for 6 SES and 32 non-SES employees.
- CDC provided us with a computerized list of 301 employees whose outside activity requests were approved. We randomly selected a final sample of 157 employees.

At NIH, we used data on the universe of NIH employees for determining the extent and characteristics of approved outside activities during fiscal year 1990 only. We determined that NIH had at least 826 employees with outside employment requests during this one fiscal year. From these data, we identified certain characteristics of NIH employees and their outside activities, such as federal grade level and subject matter of outside speeches.

To analyze requests for possible conflict-of-interest issues, we selected for review a judgmental sample of requests submitted by 75 NIH employees and approved during fiscal years 1988 through 1990. This sample was chosen from an initial random sample of employees with paid and unpaid activities, from which we selected only employees who were to be paid for outside activities and who indicated the amounts of payment. NIH could not find records for 2 of the employees, leaving us with 73 employees for review. As a result of the judgmental selection of these 73 employees, our findings from information derived from their requests are not generalizable beyond the 73 employees.

We requested written comments on a draft of our report from all agencies included in our review. We received written comments in time for them to be considered in preparing our final report from all agencies, except EPA. HHS provided comments on its component agencies, and Commerce furnished comments covering NIST.

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Objectives, Scope, and Methodology

Our review, made from July 1990 through September 1991, was in accordance with generally accepted government auditing standards.

Prohibitions and Standards on Employees' Outside Activities

Prohibitions and guidance on federal employees' activities outside the government can be found in laws; executive orders; governmentwide regulations; agency-specific regulations; and OGE letters, memoranda, and formal advisory opinions. The criminal statutes of title 18 of the U.S. Code (18 U.S.C. 201 through 209, referred to as the conflict-of-interest statutes) impose a number of prohibitions on employees' outside activities. Among other prohibitions, employees are not to (1) accept compensation for services related to any particular matter before a federal commission, department, or agency if the United States is a party or has a direct and substantial interest;¹ (2) act as an agent or attorney for prosecuting a claim against the United States;² (3) participate personally and substantially as a government employee in any particular matter in which the employee has a financial interest;³ and (4) receive any supplementation of salary as compensation for services as a government employee from any source other than the United States.⁴

Federal employees are also subject to standards of conduct that restrict outside activities. Standards of conduct were established by President Johnson in Executive Order 11222 dated May 1965. The intent of those standards was that employees avoid any action that might result in or create the appearance of

- using public office for private gain,
- giving preferential treatment to any organization or person,
- impeding government efficiency or economy,
- losing complete independence or impartiality of action,
- making a government decision outside official channels, or
- affecting adversely the confidence of the public in the integrity of the government.

The executive order, as amended, specifically prohibits outside employment, including teaching, lecturing, or writing, that might conflict with employees' official government duties. However, the order also says that teaching, lecturing, and writing are generally to be encouraged when provisions of the order and related laws and regulations are observed. The

¹18 U.S.C. 203.

²18 U.S.C. 205.

³18 U.S.C. 208.

⁴18 U.S.C. 209.

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order directs each federal agency to supplement the standards of conduct with regulations applicable to its particular functions and activities.

Governmentwide regulations⁵ implementing the above order were issued in 1968 and are now administered by OGE. Presidential appointees covered by the regulation are not to receive compensation for any consultation, lecture, discussion, writing, or appearance when the subject matter is devoted substantially to the responsibilities, programs, or operation of the agency or draws substantially on official nonpublic data or ideas. Each agency included in our review had also issued its own standards of conduct supplementing the 1965 executive order and the governmentwide standard-of-conduct regulations.

Over the years, OGE has issued advisory letters and memoranda providing guidance to agencies on administering their ethics programs. An OGE memorandum issued in 1985 provides criteria similar to that applicable to presidential appointees (described previously) prohibiting the acceptance by any federal employee of compensation for outside speeches, articles, and appearances that focus specifically on the agency's responsibilities.

In April 1989, President Bush issued Executive Order 12674 (as modified by Executive Order 12731 of October 1990), which prescribed principles of ethical conduct for government officers and employees. These principles supersede those on which the 1968 regulations are based. The order listed 14 fundamental principles of ethical service that each executive branch employee is to respect and follow. A number of the principles dealt with employees' outside activities by stating that employees are not to (1) allow the improper use of nonpublic government information to further any private interest, (2) use public office for private gain, (3) give preferential treatment to any private organization or individual, or (4) engage in outside employment or activities that conflict with official government duties and responsibilities. Section 102 of the order specifically prohibits the receipt of any outside earned income by presidential appointees to full-time noncareer positions. The order charged OGE with issuing a single, comprehensive, and clear set of executive branch standard-of-conduct regulations.

An honoraria ban, effective January 1, 1991, mandated by the Ethics Reform Act of 1989, prohibits most federal employees from accepting money or anything of value for a speech, article, or appearance, whether or

⁵5 C.F.R. 735.

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not these activities relate to government work. Several bills have been introduced in Congress to modify the honoraria ban in order to limit its application to activities that focus specifically on an agency's responsibilities, policies, and programs.

In July 1991, as authorized by Executive Order 12674, as amended, OGE issued proposed Standards of Ethical Conduct for Employees of the Executive Branch, which contained standards and guidance on employees' outside activities. The proposed standards are to replace parts of the previously mentioned governmentwide regulations issued in 1968 and related agency regulations.

Extent and Characteristics of Approved Outside Activities

Information we gathered showed that the percentages of employees approved for outside activities varied widely. The federal grade levels, occupations, and other characteristics of the employees and their approved outside activities also varied.

Extent of Approved Activities Varied Widely Among the 11 Agencies

On the basis of the data we gathered at the 11 agencies, we found that the number of employees approved for outside activities ranged from less than 1 percent for OPM headquarters employees up to 11 percent for FDA employees. (See table III.1.)

Table III.1: Summary of Approved Outside Activities (OA)

Agency	Total number of employees as of Oct. 1990	Employees with approved OA ^a		Number of OA approvals	Average approvals per employee
		Number	Percent		
NIST	3,061	105	3	122	1.16
SBA ^b	3,931	143	4	186	1.30
USTR	154	1	1	1	1.00
MSPB	307	5	2	5	1.00
OPM ^b	3,680	3 ^c	0	3	1.00
NRC	3,130 ^d	24	1	24	1.00
SEC	2,271	38	2	39	1.03
EPA-OPTS ^b	1,308	44	3	48	1.09
FDA	8,614	988 ^c	11	1,244	1.26
CDC ^e	5,462	301 ^c	6	501	1.66
NIH	16,181 ^d	826 ^a	5	2,362	2.86

^aFor 9 of the 11 agencies, our time period for OA approvals was fiscal years 1988-90. For USTR, we included OA approved from April 1, 1989, through September 30, 1990, because USTR did not have files for approved OA before April 1, 1989. We used fiscal year 1990 data for NIH because NIH could not readily provide all data necessary for requests approved during fiscal years 1988 and 1989.

^bThe OA approval data excludes approvals made by SBA regional offices for employees at grades 12 and below. In addition, OPM data are for headquarters only, and EPA data are for the one office indicated. (See app. I for further details.)

^cFor FDA and CDC, we sampled a universe of employees with approved OA on the basis of a representative sample of employees in those agencies. At OPM, we limited our review to headquarters employees only. Based on our sample, we did not find any approved OA for OPM employees for fiscal years 1988-1990; however, OPM provided us with three examples shown in the table. For the other agencies, we obtained actual data for all employees, except as explained previously for SBA and EPA.

^dThese figures are as of August 1990. Other data are as of October 1990.

^eCDC had a total of 6,052 employees as of October 1990. We excluded 427 employees in various categories (wage grade, stay-in-school, public health associates, and student volunteers) as well as 163 experts and consultants as of October 1990.

As table III.1 shows, each of the three HHS agencies approved more outside activities than any of the other eight agencies. Employees in these three HHS agencies, and certain other agencies, such as SBA, averaged more than one approval each over the 3 fiscal years. We included all types of outside activities in our review, including speeches, which could require a day or even less time, and regular employment, which could last several months or years.

Differences in the numbers and percentages of employees with approved activities in the 11 agencies are, at least in part, a result of varying approval requirements among the agencies. As discussed in appendix IV, only four agencies (SBA, USTR, SEC, and FDA) required all employees to obtain approval of work-related outside activities of all types. The other seven agencies had more limited requirements for such approvals.

In addition, agencies did not always have accurate data or did not maintain easily accessible data on employees' outside activities. At EPA and OPM, because of their decentralized approval and record-keeping procedures, we did additional work to identify outside activities they approved over the 3 fiscal years, as discussed next.

EPA Lacked Complete Approval Data

Because of EPA's decentralized approval process, we selected for our review 2 of 15 EPA offices—OPTS and OSWER. OPTS had three and OSWER had five deputy ethics officials each, and all eight officials were located at different suboffices where they approved and stored requests for approval of outside activities. Most of these ethics officials did not maintain lists of employees approved for outside activities.

From a review of ethics files at OPTS, we found 44 requests for approved activities during the 3 fiscal year period. At OSWER, officials working for the deputy ethics officials told us that they did not know where the requests were stored. We reviewed files of two of the five OSWER deputy ethics officials and found only two requests. At OSWER, over the 3 fiscal years 1988 through 1990, the number of employees filing financial disclosure reports averaged 263. We reviewed the reports filed by employees for all 3 years and found that a total of 20 employees listed outside activities that we believed should have received prior approval by EPA under its regulations but that were not approved, according to OSWER files. The controls over employees' outside activities exercised by EPA and the other selected agencies are discussed in appendix IV.

OPM Lacked Good Files on Approvals

Because OPM had no listing or central files showing employees with outside activities, we randomly sampled employees' official personnel files, where we were told any such approved outside activity requests would be stored. We reviewed 149 of these files (as available for every 20th employee) and found no approved requests for the 3 fiscal year period. We also reviewed financial disclosure reports that were available for 14 of these 149 employees. According to OPM officials, most of the 149 employees were in positions for which disclosure reports were not required. Only 1 of the 14 employees indicated outside employment. However, because OPM's criteria for requiring approval of outside activities were vague (discussed in app. IV), it was unclear whether this employee's outside employment required OPM approval. After we completed our work at OPM, it provided information indicating that three employees were to engage in outside activities during the period covered by our review. OPM said its filing system needed attention and was receiving it.

Characteristics of Employees Receiving Approval and Their Activities

Employees receiving approval to do outside activities were in a variety of federal occupations and most were at grade 13 and higher. Speaking, lecturing, writing, and consulting were frequent outside activities of employees in the 11 agencies, particularly in the 3 HHS agencies. Most of the employees approved for outside activities indicated that they were to be paid or that they were to do activities for which employees customarily were paid.

Employees Were in Various Federal Occupations

To show the types of federal occupations involved, we arrayed the occupations by frequency with which employees in the occupations received approvals for outside activities.¹ As table III.2 shows, from one to five occupations accounted for more than 50 percent of the employees with approvals by each agency.

¹To categorize employees' federal occupations, we used the occupations listed in OPM's Federal Personnel Manual Supplement 292-1 (1985).

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Table III.2: Federal Occupations of Employees With the Most Approved OA

Agency	Total employees with OA approved	Government occupation ^a	Employees in occupation		Employees in occupation with approved OA		Percent of OA approved by agency ^d
			Number	Percent ^b	Number	Percent ^c	
NIST	105	Physicist	393	13	30	8	29
		Chemist	231	8	10	4	10
		Computer Scientist	156	5	10	6	10
		Engineer	458	15	16	4	15
		Total					
SBA	143	General Attorney	207	5	29	14	20
		Business & Industry Specialist	415	11	21	5	15
		Program Manager	162	4	22	14	15
		Loan Specialist	825	21	12	2	8
Total						58	
USTR	1	Administrator	4	3	1	25	100
MSPB	5	General Attorney	127	41	5	4	100
OPM	3 ^e						
NRC	24	Nuclear Engineer	629	20	6	1	25
		General Engineer	509	16	5	1	21
		Health Physicist	208	7	3	1	13
		Total					5
SEC	38	Attorney	870	38	20	2	53
EPA- OPTS	44	Biologist	209	16	14	7	32
		Environmental Protection Specialist	272	21	6	2	14
		Chemist	164	13	4	2	9
Total						55	
FDA	988	Secretary/Clerical	1,063	12	121	11	12
		Consumer Safety Officer	1,798	21	181	10	18
		Medical Officer	220	3	125	57	13
		Health Scientist	146	2	91	62	9
		Chemist	1,137	13	64	6	6
Total						58	
CDC	301	Medical Officer	553	10	96	17	32
		Biologist ^f	41	98	29	7	10
		General Health Scientist	236	4	21	9	7
		Engineer ^g	81	2	19	23	6
Total						55	
NIH	826	Medical Officer	1,687	10	339	20	41
		Chemist	892	6	95	11	12
		Total					53

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^aOccupations listed together accounted for at least 50 percent of the employees with approved OA at each agency. The occupations were taken from OPM's Federal Personnel Manual Supplement 292-1 (1985).

^bRepresents number of employees in the occupation as a percentage of total agency employees, except for EPA-OPTS, for which total employees in the occupation are for that office only.

^cRepresents number of employees in the occupation with approved OA as a percentage of total employees in that occupation.

^dRepresents number of employees in the occupation with approved OA as a percentage of the number of all employees with approved OA.

^eData were provided by OPM after our review and were not complete enough for further analysis.

^fBiologists for EPA includes the categories of microbiologists and fish biologists. For CDC, the category of biologist includes microbiologists.

^gEngineers for CDC includes three series: safety, environmental, and mechanical engineers.

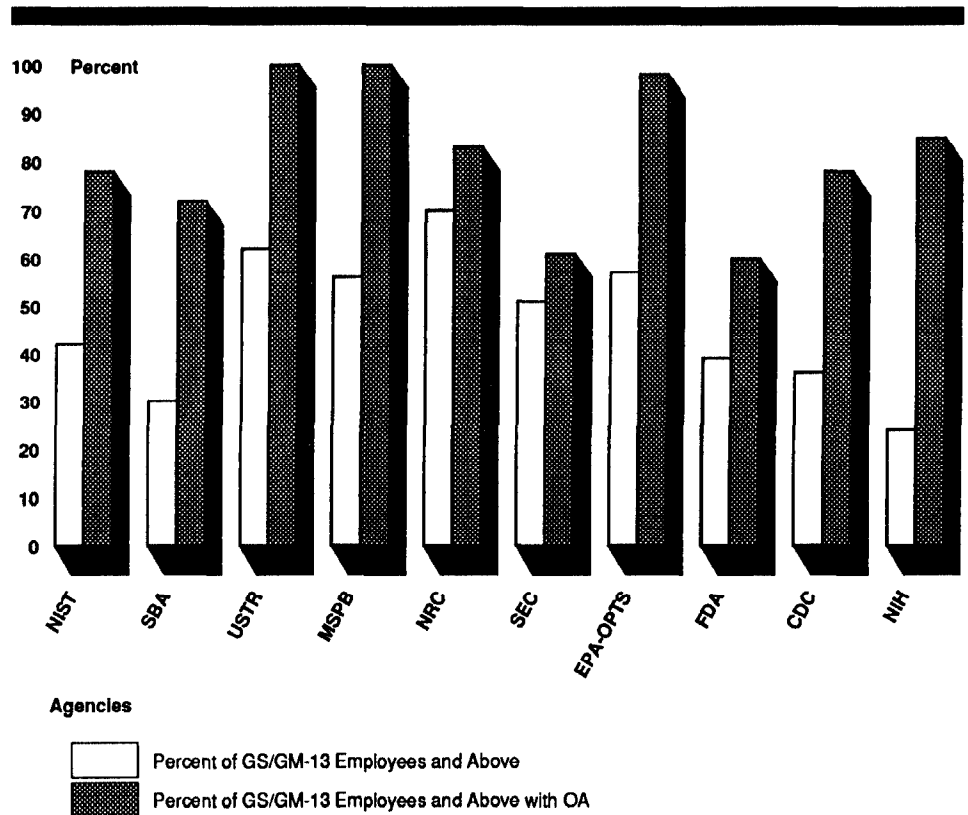
As shown in table III.2, employees in some federal occupations had received approval for outside activities more frequently than employees in other occupations. For example, medical officers accounted for 13 percent, 32 percent, and 41 percent of all employees with approved outside activities at FDA, CDC, and NIH, respectively. Attorneys accounted for 20 percent, 53 percent, and 100 percent of employees with approvals by SBA, SEC, and MSPB, respectively. Employees in these occupations, among others, received approval for outside activities at rates greater than their overall representation in the respective agencies. For example, 10 percent of NIH's employees were medical officers, and 41 percent of its approvals were for these employees.

Employees at Grades 13 and Above Accounted for Most Outside Activities

A greater proportion of employees at grade 13 and above were approved for outside activities than those at grade 12 and below. Specifically, from 60 percent up to 100 percent of the total employees with approved activities at each of the 10 agencies were at grade 13 and above, including SES, as figure III.1 shows.

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**Figure III. 1: Grade 13 and Above
Employees Accounted for Most of the
Approved OA**



Note: OPM is not shown because data OPM provided after our review were not complete enough for further analysis.

Source: Agency data.

As indicated earlier, the agencies' approval requirements varied, and this variance may at least partially explain the larger amount of outside activity approved for employees at grade 13 and above than for those at grade 12 and below. Some agencies, such as NIH and CDC, required approvals only for outside teaching, writing, consulting, and some other activities that would tend to be done more frequently by employees at grade 13 and above.

Even so, when agencies required approval of all types of outside activities, employees at grade 13 and above still accounted for a higher percentage of the outside activities than those at grade 12 and below. For example, SBA, USTR, SEC, and FDA required approval of all types of outside activities. As

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can be seen in figure III.1, most of the outside activities approved by all four agencies were for employees at grade 13 and above.

Some agency officials said grade 13 and above employees are more likely to comply with approval requirements because more employees at and above these levels are required to file financial disclosure reports at least annually. These reports require employees to include certain outside activities and thus provide the agencies with a method for verifying whether approval of the activities has been obtained when required.

Compared to total employees with OA by agency, the number of SES employees with approved outside activities ranged from none for USTR and EPA-OPTS to 110 (13 percent) for NIH. As table III.3 also shows, the percentage of total SES employees approved for outside activities at each agency ranged from zero to 43.

Table III.3: Senior Executives or Equivalents With Approved OA Compared to Total Employees

Agency	Total employees and number in the SES ^a			Total employees with OA and number of SES employees with OA approvals ^a			Percentage of total SES with approved OA
	Total	Number	Percent	Total	Number	Percent	
NIST	3,061	111	4	105	13	12	12
SBA	3,931	50	1	143	9	6	18
USTR	154	22	14	1	0	0	0
MSPB	307	21	7	5	1	20	5
OPM	3,680	55	2	3	^b	^b	^b
NRC	3,130	252	8	24	5	21	2
SEC	2,271	57	3	38	5	13	9
EPA-OPTS	1,308	21	2	44	0	0	0
FDA	8,614	73	1	988	22	2	30
CDC	5,462	28	1	301	12	4	43
NIH	16,181	714	4	826	110	13	15

^aSES equivalents included certain officials such as commissioned medical officers earning salaries equal to those of SES employees.

^bData were provided by OPM after our review and were not complete enough for further analysis.

**Speaking, Writing,
Consulting, and Teaching
Were Frequent Outside
Activities**

Most agencies had approved requests from employees to do outside speaking, writing, consulting, and teaching. Table III.4 shows the three most frequently approved outside activities at each agency.

**Appendix III
Extent and Characteristics of Approved
Outside Activities**

Table III.4: Most Prevalent Types of OA by Grade Level

Agency	Number of employees with OA				3 most prevalent types of OA ^a											
	Total	GS-12 and below	GS-GM 13 - 15	SES	Total	GS-12 and below	GS-GM 13 - 15	SES	Total	GS-12 and below	GS-GM 13 - 15	SES	Total	GS-12 and below	GS-GM 13 - 15	SES
NIST	106	23	69	13	Teaching				Consulting				Writing			
					34	3	28	3	16	2	12	2	15	0	12	3
SBA	143	40	94	9	Board / Committee Members				Sales				Teaching			
					32	5	24	3	28	14	14	0	16	0	14	2
USTR	1	0	1	0	Research											
					1	0	1	0								
MSPB	5	0	4	1	Arbitrator				Administrative Judge				Real Estate/Leasing			
					3	0	3	0	1	0	1	0	1	0	0	1
OPM ^b	3															
NRC	24	4	15	5	Teaching				Board Member				Lecturing			
					10	1	6	3	2	0	1	1	2	0	2	0
SEC	38	15	18	5	Attorneys				Teaching				Sales			
					10	3	7	0	10	2	6	2	7	6	1	0
EPA ^c	44	1	43	0	Sales				Consulting				Teaching			
					13	0	13	0	12	0	12	0	4	0	4	0
FDA ^d	988	392	574	22	Sales				Teaching				Consultants			
					181	91	90	0	181	30	151	0	71	0	60	11
CDC ^c	301	67	222	12	Board Members/Officers				Teaching				Speaking			
					81	12	63	6	56	12	44	0	48	0	42	6
NIH	826	127	589	110	Speaking				Consulting				Board Membership			
					446	36	343	67	135	13	103	19	117	6	82	29

^aIn descending order by total OA.

^bData was provided by OPM after our review and was not complete enough for further analysis.

^cAbove data are for OPTS only.

^dThe figures for FDA and CDC are estimates based on a weighted sample.

**Appendix III
Extent and Characteristics of Approved
Outside Activities**

Federal standard-of-conduct regulations encourage teaching as an outside activity by federal employees. Eight of the 11 agencies encouraged employees to teach outside the agencies. As table III.4 shows, teaching was among the three most frequently approved outside activities for 7 of the 11 agencies.

Employee requests at four agencies (SBA, SEC, EPA, and FDA) were approved to do sales work more often than some other outside activities. The types of sales varied, with real estate sales being more common than other types. Sales work in retail businesses, such as clothing stores and gift shops, was approved at some agencies.

**Most Employees Were to Be
Paid for Their Outside
Activities**

Most employees in the 11 agencies with approved outside activities indicated they were to receive payment for those activities or were to do activities for which employees customarily receive payment, as indicated in table III.5.

**Appendix III
Extent and Characteristics of Approved
Outside Activities**

Table III.5: Paid and Unpaid Approved OA

Agency	Total employees with approved OA	Payment stated or customary ^a									
		Employees with stated OA payment		Employees with payment unstated but customary ^b		Total employees with OA paid and customarily paid		Employees with stated unpaid OA		Employees with unknown OA payment	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NIST	105	95	90	1	1	96	91	8	8	1	1
SBA	143	94	66	1	1	95	66	44	31	4	3
USTR	1	0	0	0	0	0	0	0	0	1	100
MSPB	5	2	40	3	60	5	100	0	0	0	0
OPM	3 ^c	0	0	0	0	0	0	0	0	3	100
NRC	24	13	54	4	17	17	71	5	21	2	8
SEC	38	9	24	15	39	24	63	12	32	2	5
EPA- OPTS	44	26	59	15	34	41	93	0	0	3	7
FDA	988	765	77	31	3	796	81	192	19	0	0
CDC	301	182	61	2	1	184	61	113	38	4	1
NIH	826	759	92	0	0	759	92	59	7	8	1

^aThis table was prepared considering paid outside activities first. Therefore, employees who had multiple outside activity requests were counted as having paid activities if at least one of those activities was for compensation.

^bRepresents approved OA for which employees customarily receive compensation, such as working as salespersons at department stores or video rental outlets.

^cData were provided by OPM after our review and were not complete enough for further analysis.

Controls Over Employees' Outside Activities

All agencies restricted employees from engaging in certain activities outside the agencies. In addition, all agencies required some or all types of outside activities to be approved by the agencies, and all agencies required the involvement of immediate supervisors in the review of their subordinates' requests to engage in outside activities. Otherwise, the agencies' requirements and procedures for approving and monitoring employees' outside activities varied widely.

To assess agencies' regulations and procedures, we used a list of questions dealing with the agencies' control of employees' outside activities. Table IV.1 shows established restrictions on outside activities and certain requirements for approving and monitoring outside activities for the 11 agencies.

Appendix IV
Controls Over Employees' Outside Activities

**Appendix IV
Controls Over Employees' Outside Activities**

Table IV.1: Agency Controls Over Employees' Approved OA

Outside activity questions	NIST	SBA	USTR
1. Are some types of outside activities restricted by the agency? ^a	Yes	Yes	Yes
2. Is prior written approval of OA required by agency criteria?	Yes, limited ^b	Yes	Yes
3. Is there a standard request form an employee must complete?	Yes	No	No
4. What is the role of the employee's supervisor in the process for approving OA?	Recommend approval/disapproval	Recommend approval/disapproval	Recommend approval/disapproval
5. Is the final approval of OA requests centralized?	Yes, mostly ^d	No ^e	Yes
6. How often must continuing OA (lasting more than 1 year) be reviewed?	Not required	Not required	Not required
7. Are employees' financial disclosure reports checked to see if all OA required to be approved received approval?	Yes	Yes	No

**Appendix IV
Controls Over Employees' Outside Activities**

MSPB	OPM	NRC	SEC	EPA	FDA	CDC	NIH
Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
No	Yes, limited ^b	Yes, limited ^b	Yes	Yes, limited ^b	Yes	Yes, limited ^b	Yes, limited ^b
No	No	No	No	No	Yes	Yes	Yes
Recommend approval/disapproval	Recommend approval/disapproval	Recommend approval/disapproval	Recommend approval/disapproval	Recommend approval/disapproval	Recommend approval/disapproval	Recommend approval/disapproval	Provide information
Yes	No	Yes	No ^e	No	No	Yes	Yes, mostly
Not required	Not required	Not required	Not required	Not required ^f	Annually	Annually ^g	Annually ^g
Yes	Yes, limited ^h	Yes	No	Yes, limited ⁱ	Yes	Yes	Yes

^aAlthough all agencies restricted certain outside activities, some agencies had narrower restrictions by disallowing employees to work outside the agency in specific occupations. For example, SEC disallowed any outside occupations dealing with securities as well as the practice of law (except in very limited circumstances, such as the legal representation of certain family members).

^bApproval was required only for certain types of OA.

^cAt SEC and EPA, some supervisors recommended approval or disapproval, while others only provided information.

^dAll but 1 percent of the OA requests were approved at NIST headquarters. The other 1 percent were to be approved at a NIST field office.

^eBoth SBA and SEC approved requests differently, depending on whether the requests were considered "routine" or "nonroutine." At SBA, routine (noncontroversial) requests of regional office employees at grades GS-12 and below were approved by regional counsels. All other requests routine requests of employees at grades GS-13 and above, regardless of location, and all non routine requests were approved by the Standards of Conduct Committee at SBA headquarters. At SEC, routine requests (those not involving professional outside activities) could be approved by division directors, office heads, or regional administrators. The Director, Office of Personnel, had to approve all nonroutine outside activity requests (those involving professional outside activities), or in rare cases, would refer them to SEC's 5-member Commission.

^fCertain deputy ethics officials (and their staff) check outside activity reported on financial disclosure statements of GS/GM-13s and above against reported OA requests.

^gEmployees must annually file a special report as to whether their OA has changed. If the employee reports a change, then a new OA request must be submitted.

^hSome OPM units review financial disclosure reports against approval on file; some do not.

ⁱOfficials in one of two EPA offices we studied checked outside activities reported in financial disclosure statements against available outside activity requests. In the second EPA office, by reviewing employees' filing of financial disclosure statements for FY 1988-1990 for two branches, we determined that 8 percent of these employees needed to receive advance approval of their outside activities but had not done so. Therefore, we believe that no such checks were done in the two branches of the second EPA office.

Agencies Imposed Some Restrictions on Outside Activities

The agencies included some restrictions on outside activities similar to those contained in the conflict-of-interest statutes (18 U.S.C. 201-209), an executive order, and federal ethics regulations. As an example of these restrictions, SEC prohibited employees from holding outside occupations associated with the financial securities industry. Two other agencies (NRC and FDA) imposed general restrictions but did not identify specific types of activities that were absolutely prohibited. NRC identified certain activities that it said were incompatible with government employment. These activities included, among other things, accepting employment or anything of value from certain NRC-related organizations such as contractors, licensees, and applicants for NRC licenses. NRC employees were not to engage in these types of activities unless they received written NRC authorization.

FDA's policy was generally not to approve requests submitted by employees responsible for regulatory activities ("control activity" employees)¹ to work for an organization whose business activities are subject to FDA regulation. Exceptions were made if the regulated activities were an

¹According to FDA, "control activity" employees included those classified at GS-11 or above or those below GS-11 with responsibilities allowing the employee to cause an economic advantage or disadvantage in a nonfederal enterprise (such as investigators and regulatory analysts).

insignificant part of the organization's total operations (10 percent or less of its annual gross sales) or if the outside employment was in the unregulated part of the business.

Approval Requirements Were Common Among the 11 Agencies

All 11 agencies required employees to obtain approval of some types of outside activities, and all but one agency (MSPB) had written requirements for employees to request approval before they began the outside activities. Beyond these basic approval requirements, there was little consistency in approval requirements and procedures among the 11 agencies.

Four agencies (SBA, USTR, SEC, and FDA) had comprehensive requirements for approval of outside activities. These agencies required all employees, regardless of their positions in the agencies and the types of outside activity involved, to obtain agency approval before engaging in work-related outside activities. Activities excluded from these agencies' approval requirements were those activities involving charitable, nonprofit, professional, civic, and religious organizations. Approval requirements for the other seven agencies, discussed later, were less comprehensive.

HHS prescribed limited approval requirements for its component agencies. It required prior written approval for (1) certain writing or editing activities; (2) certain types of teaching and lecturing; (3) all professional and consultative activities; (4) certain office-holding activities in professional societies; and (5) any other outside activity for which the head of a component agency (such as FDA, CDC, and NIH) imposes additional requirements. Commerce did not prescribe any Department-wide regulations for approval of outside activities but did prohibit employment with any foreign government, corporation, partnership, instrumentality, or individual unless authorized by the Department. By administrative order, Commerce required approval of official or quasi-official activities involving (1) written or spoken communications devoted substantially to the responsibilities, programs, or operations of the agency or (2) use of nonpublic information.

All 11 Agencies Required the Involvement of Immediate Supervisors for Approvals

Employees' supervisors at all 11 agencies were a part of the process for reviewing and approving outside activities. NIH supervisors were to provide information to other officials who were to determine whether to approve the outside activities. Supervisors at the other 10 agencies were to recommend approval or disapproval.

Agency Approval Requirements Can Be Improved

Although the approval requirements varied among the agencies, we believe all 11 agencies could improve, to varying degrees, their procedures and controls for approving and monitoring employees' outside activities by taking one or more of the following actions:

- requiring approval of some additional outside activities that could present conflicts of interest;
- requiring approvals to be kept current when employees engage in continuing outside employment (e.g., lasting more than 1 year);
- requiring employees to supply information in their requests sufficient for decisions to be made on possible conflicts of interest; and
- using the financial disclosure process to monitor approval of employees' outside activities.

Some Agencies Excluded Activities From Approval That Could Present Conflicts of Interest

We believe the requirements in some agencies did not adequately ensure that the outside activities of all employees were appropriate under laws, executive orders, and executive branch regulations imposing restrictions on federal employees' outside activities. Seven agencies had requirements for approval of outside activities that were limited or vague, as follows:

- MSPB did not require employees to obtain prior written approval of any proposed outside activities, unless the employees believed those activities might pose a conflict with their MSPB duties. An MSPB official told us that in 1988, OGE encouraged MSPB to require prior approval for all outside employment. The official said MSPB began advising its employees in training sessions and orientation briefings to request approval before beginning outside work. However, MSPB had not established written prior approval requirements.
- NIST limited activities requiring approval to employment with certain foreign entities and outside teaching, lecturing, writing, consulting, or other technical or professional activities.

- OPM regulations required employees to obtain prior written approval when they were to serve as members of nongovernment training committees or teach, lecture, or write. Additionally, OPM regulations required employees to notify their supervisors if they were to be involved in “substantially regular” outside employment. OPM officials said that this notification requirement was equal to a prior approval requirement. The regulations did not define the terms “substantially regular.”
- NRC limited its approval requirements to employment related to the nuclear industry. Therefore, employees doing other activities, such as selling real estate or practicing law outside the nuclear industry, did not have to obtain NRC approval.
- EPA required employees to obtain approval if they were to engage in “regular self-employment,” including sales or service; provide consulting services; hold state or local public office; or work with an EPA contractor or a holder of an EPA assistance agreement. EPA also required employees who were to work with a firm regulated by an EPA office to which the employee was assigned to obtain approval of those activities. EPA’s regulations did not define “regular self-employment.”
- CDC and NIH limited their approval requirements to certain outside activities as defined in HHS regulations or added by the agencies, namely (1) certain writing or editing services, (2) certain types of teaching, (3) professional and consultative services, (4) the holding of certain offices in professional societies, and (5) testimony in private litigation.

When vague or narrowly-defined approval requirements exist, agencies may not be aware of employees’ outside activities that may pose possible conflict-of-interest and employee standard-of-conduct violations. For example, MSPB employees could engage in any outside activities, including activities related to the agency’s mission and operations, without a clear and specific requirement for approval. Under MSPB regulations, approval of an outside activity would not be required unless the employee decided that the agency’s review was necessary. If the employee decided such review was necessary, the approval still would not be required before the activity began.

Required Advance Approvals Not Always Obtained

Our review of agencies’ approvals showed that the agencies generally approved employees’ requests to engage in outside activities before those activities began. However, some FDA employees were to begin outside activities before obtaining required FDA approval. Of the 38 FDA employees in our sample, 20 (53 percent) received the approvals after their outside employment was scheduled to begin. Of these employees, 12 received final

approval within 3 months, and 8 received approval more than 3 months after the outside work was to begin.

Most Agencies Did Not Require Approvals to Be Kept Current

Eight of the 11 agencies did not require by regulation or other written guidance that employees periodically update information on their previously approved and continuing outside employment. Thus, the agencies were not to be provided information current enough to determine whether employees' outside activities continued to pose no conflicts of interest and whether other requirements continued to be met. Employees at some agencies, such as EPA and SEC, may have been expected to supply the information, but these two agencies and six other agencies did not require in writing that all employees approved for outside activities periodically update information on their activities.

Three agencies (FDA, CDC, and NIH) required employees to annually provide information on their previously approved and continuing outside employment. This information was to be obtained so the agencies could review current outside activities and determine if they were still appropriate when compared to current federal duties. Two agencies (CDC and NIH) required employees to submit annually a brief report indicating whether their outside employment had changed. If it had changed, employees were to submit revised requests for approval. FDA required new requests to be submitted for approval each year for all continuing outside employment.

Agencies Did Not Always Require Sufficient Information on Employees' Outside Activities

Some agencies did not have written criteria requiring employees to provide certain information on their outside activities that was necessary, in our opinion, for determining whether conflict-of-interest and standard-of-conduct requirements were met. Although some agency officials may have at times obtained information beyond that required, certain agencies had approved requests for outside activities without obtaining certain essential information, such as the name of the outside organization and whether compensation was to be received. As table IV.2 shows, the required information varied among the agencies.

**Appendix IV
Controls Over Employees' Outside Activities**

Table IV.2: Information Required for Inclusion in Employees' OA Requests

Information Item	Agencies requiring information inclusion ^a										
	NIST	SBA	USTR	MSPB	OPM ^b	NRC	SEC	EPA	FDA	CDC	NIH
1. Nature of outside activity or service	y	y	n	y	y	y	y	y	y	y	y
2. Outside employer name	n	y	n	y	n	y	y	y	y	y	y
3. Outside employer address	n	y	n	n	n	n	n	n	y	y	y
4. Outside employer business	n	y	n	n	n	y	n	y	y	y	y
5. For self-employment, clients anticipated	n	n	n	n	n	n	n	y	y	y	y
6. If self-employment, partners' names, if any	n	n	n	n	n	n	n	n	y	y	y
7. If outside employer has connection with government	y	y	n	n	n	n	n	y	y	n	y
8. Whether OA is to be compensated	y	y	n	y	y ^b	y	y	y	y	y	y
9. Amount of compensation	n	y	n	y	n	y	y	y	n	n	y
10. Time to be devoted (hours/day/week)	y	y	n	y	y	n	n	y	y	y	y
11. Hours to be absent from work	n	n	n	n	n	n	n	y	y	y	y
12. Anticipated duration of OA	y	y	n	n	n	n	y	n	y	y	y

^aA "Y" response means that the agency specified these items to be included in requests either by regulation or in a standard approval form. Four agencies have standard forms: NIST, FDA, CDC, and NIH. A "N" response means that these items were not specified to be in request either by regulation or in a standard form.

^bOPM regulations require its employees to obtain approval only for paid outside employment done on a substantially regular basis; thus, by implication, all requests made are understood to be for compensation.

In our opinion, agency officials responsible for approving outside activities needed to know, at a minimum, the name of the outside organization to determine if the organization had an actual or potential operational relationship with the government agency, such as that of grantee, loan recipient, or contractor. The officials needed to know whether the employee would receive compensation and if so, the amount to be received. This was necessary to determine if statutory or regulatory limits

on such compensation were met, such as a \$2,000 limit on certain outside activities imposed by 2 U.S.C. 441i, which was in effect before the January 1991 honoraria ban.

Information on outside organizations and compensation was not always required by the agencies. For example, three agencies did not require employees to identify the name of the outside employer; five agencies did not require the amount of compensation; and five agencies did not require information on the duration of the outside employment.

When agencies required that specific information be included in the request, they did not always receive all of it. For example, of the 44 EPA-OPTS employees reviewed, 29 employees in one OPTS unit received approval of outside activities even though 7 of them had not included some required information in their requests. Of these seven employees, six were to do consulting work in scientific areas, such as pharmacology. Their requests did not include certain information required by EPA regulations, such as (1) a full description of the services to be performed, (2) whether they would be compensated, (3) the estimated time to be spent, or (4) the potential clients.

Generally, the agencies did not standardize the way employees presented information in order to facilitate the submission and review of requests. Rather, most agencies allowed employees to submit memorandums describing their proposed outside activities. Only 4 of the 11 agencies (NIST, FDA, CDC, and NIH) used standard forms for identifying and providing information on employees' outside activities.

Agencies Did Not Always Use the Financial Disclosure Process for Monitoring Approvals

Several agencies used the financial disclosure process to remind employees of requirements to obtain required approval of outside activities. In some cases, agencies also used the financial disclosure reports filed by employees to determine whether required approvals were obtained. Although we believe these practices provide a useful check on employees' compliance with approval requirements, not all agencies followed these practices.

As indicated in table IV.1, officials at 9 of the 11 agencies said they determine if outside employment shown in financial disclosure reports had received required approvals. Two agencies (USTR and SEC) did not make such determinations. At two of the nine agencies (OPM and EPA), numerous

ethics officials reviewed disclosure reports, and practices varied among reviewing officials.

Agencies Sometimes Investigated and Disciplined Employees Regarding Outside Activities

Requirements for prior review and approval of employees' outside activities can help employees avoid potential violations of standard-of-conduct and conflict-of-interest statutes. We found that employees at two agencies (OPM and EPA) who had unclear and limited approval requirements accounted for most of the investigations of employees' outside activities.

Of the 11 agencies studied, all but one (USTR) either had an OIG within the agency or had a departmental OIG (such as the Commerce OIG for NIST, and the HHS OIG for FDA, CDC, and NIH) that was responsible for audits and investigations. According to a USTR official, its Office of the General Counsel was responsible for investigating ethics matters, including outside activities.

At 7 of the 11 agencies, OIGs had investigated a total of 23 cases involving employees' outside activities. According to agency officials at four agencies (NIST, USTR, MSPB, and CDC) who would have been responsible for any such investigations, either no outside activities had been investigated or the investigation office reported no awareness of violations pertaining to outside activities. Four of the 23 investigations completed by the agencies were closed without finding that employees violated a law or regulation. Data on the final actions for two investigations were not available for our review. For the remaining 17 investigations, agency officials said actions following the investigations were as follows:

- In eight investigations, employees were removed from their federal positions or resigned from their positions.
- In seven investigations, employees received or were to receive reprimands, counseling, and/or suspension.
- In one investigation, an employee's outside activity was disapproved.
- In one investigation, the agency had no record that any actions were taken against the employee but revised its guidance to address the issue.

Of the 23 investigations, 7 were done at EPA and 5 at OPM, accounting for more than half of the total. Two EPA employees resigned from EPA, and two were given reprimands. For the remaining three EPA employees, the investigations showed no violations occurred or data were not available from the OIG on actions taken. EPA had a highly decentralized approval

process. Some EPA ethics officials we spoke with did not have records on who had been approved for outside activities, and these officials were not entirely familiar with ethics requirements related to outside activities. In addition, our review of a sample of financial disclosure reports showed that some EPA employees were engaged in outside activities but had not obtained the required agency approval to do so.

Of the five OPM employees, two were involuntarily removed, one resigned, one received a reprimand, and one received counseling after the OIG investigations of their outside activities. According to an OIG official, it was not always clear whether these employees were required to obtain approval of their outside activities. As discussed previously, OPM's regulation, which is to guide employees on when to obtain approval, included vague and undefined terms.

Conflict-Of-Interest Issues

Almost any outside activity of a federal employee can, depending on the circumstances, present a potential violation of standards of conduct. For example, if carried to an extreme, the amount of time spent on the outside activity may interfere with the full and efficient performance of the employee's official federal duties and violate the standard that all employees put forth honest efforts in their federal jobs. Depending on what the employee is doing outside the agency, he or she may violate other conduct standards, such as the standard that employees are not to use public office for private gain.

Federal employees may engage in outside activities that are totally unrelated or only remotely related to the employees' federal duties or the agency's responsibilities (e.g., an employee who works at a local fast-food restaurant on weekends). In these situations, the risk of a standard-of-conduct violation or financial conflict of interest is minimal when compared to an outside activity that focuses on or relates to the employee's official duties and/or the agency's responsibilities. When the employee receives compensation for a job- or agency-related outside activity, the risk is increased. In these situations, the outside activity may allow the employee or the nonfederal employer, or both, to improperly benefit from the employee's position with the federal government or, at a minimum, create the appearance of improper benefit. Depending on the particular set of relationships, an employee's outside activity may not only violate an agency's standard-of-conduct regulation but also one or more of the conflict-of-interest statutes (18 U.S.C. 201 through 209).

Employees' Outside Activities Were Often Agency Related

The agencies we reviewed approved employees' outside activities that were related to the agency responsibilities or the employees' federal duties, as table V.1 shows.

**Appendix V
Conflict-Of-Interest Issues**

Table V.1: Similarity Between Federal Position Employment and Approved OA, by Agency

Agency	Total number of employees with approved OA	Employees with similar federal and outside positions		Employees dealing with similar subject matters in and outside of government		Employees with both similar positions and of subject matters in and outside government	
		Number	Percent	Number	Percent	Number	Percent
NIST	105	10	10	68	65	6	6
SBA	143	18	13	40	28	12	8
USTR	1	0	0	0	0	0	0
MSPB	5	4	80	0	0	0	0
OPM	3	0	0	0	0	0	0
NRC	24	3	13	15	63	3	13
SEC	38	11	29	20	53	11	29
EPA-OPTS	44	1	2	19	43	1	2
FDA	988	241	24	467	47	211	21
CDC	301	50	17	240	80	44	15
NIH	73 ^a	2	3	69	95	2	3

^aA sample of NIH employees with OA requests approved during fiscal years 1988-1990 was used for this table. This is the only table for which this sample was used.

The mere existence of a relationship between the federal and nonfederal activities of employees does not create a potential violation of standard-of-conduct regulations or conflict-of-interest statutes. However, such relationships dictate that approving officials examine the relationships and assess the risk that the employees and/or the outside organizations could improperly benefit from the employees' federal positions. On the basis of such assessments, the officials would then need to take appropriate steps to deal with the situation.

Our review showed that 9 of the 11 agencies we reviewed approved outside activities in situations that involved potential violations of standard-of-conduct regulations or conflict-of-interest statutes.¹ In these situations, the agencies could have (1) disapproved the requests or (2) approved the requests subject to conditions regarding the particular conflict, such as that the employee not use certain nonpublic government information in the outside activity or not personally participate in federal government matters affecting the outside employer.

¹USTR and OPM provided data on outside activities for four employees. We did not have sufficient information to determine whether the activities presented conflict-of-interest or standard-of-conduct issues.

Four of these nine agencies imposed specific restrictions on the employees' outside activities, which we believe adequately addressed potential conflict-of-interest situations. However, in our view, the other five agencies did not adequately deal with some potential conflict situations. The situations involving all nine agencies are discussed next.

Four Agencies Addressed Almost All Conflict-Of-Interest Issues Through Restrictions on Employees' Activities

Four agencies (NRC, MSPB, SBA, and SEC) addressed potential conflict situations (except in two approvals by SEC) by imposing restrictions on employees' outside activities to deal with actual or potential relationships between such activities and federal responsibilities. To illustrate, most (i.e., 15) of the 24 requests approved by NRC involved outside activities that were related to the employees' federal duties or NRC's responsibilities and, as such, presented potential conflict situations. When approving related activities, NRC cited in the approval documents restrictions on the scope of the employees' outside activities.

The following case illustrates NRC's handling of these situations. An NRC hydrogeologist requested approval to teach hydrogeology at a university. According to the request, the employee was to receive \$3,000 for a semester from the university, which was an NRC licensee and contractor. Although the request showed that the employee would not cover hydrogeologic issues related to nuclear licensing in the courses, when approving the request NRC imposed a number of specific restrictions on the employee's teaching. For example, NRC said the employee should not, as an NRC employee, participate in matters involving the university, use NRC information not available to the general public, or receive any compensation that depended on the university receiving or executing a government contract.

MSPB similarly addressed potential conflict-of-interest situations when approving requests included in our review. MSPB imposed specific written restrictions on the outside activities to address the situations involved. For example, an administrative judge at MSPB requested approval to arbitrate disputes between investors and brokerage houses. When approving the request, MSPB required the employee to discuss each arbitration case in advance with his supervisor.

SBA and SEC approved the requests of some employees who were to participate in outside activities with individuals or organizations that had or could have financial or legal relationships with the federal government.

Such relationships could place employees in situations that could violate one or more of the conflict-of-interest statutes.

SBA dealt with these situations when approving requests by citing in the approval documents a number of conditions that the employees were to observe. For example, SBA approved requests of some employees to sell insurance outside the agency in circumstances that could pose conflict-of-interest situations because of potential SBA relationships with the outside parties. SBA's Standards of Conduct Committee, which was responsible for providing guidance on employees' outside activities, prohibited all SBA loan specialists, but not other SBA employees, from selling insurance. The committee believed such activity could present potential conflicts of interest because this activity could involve large commissions, which could tempt employees to persuade recipients and applicants of SBA assistance to purchase insurance. SBA approved requests submitted by employees in positions such as procurement specialist, auditor, and clerk to sell insurance. In approving these types of requests, SBA imposed specific written restrictions on the employees' activities.

At SEC, 10 (26 percent) of the 38 employees who requested approval of outside activities were lawyers practicing law outside the government. Five requests were for assisting relatives with legal matters. However, SEC approved requests of two attorneys who were to assist in ongoing litigation on pro bono (unpaid) status. One employee was to work with an environmental action organization in its litigation against EPA. The other employee was to assist a former client in a state criminal matter. Both cases involved litigation in federal courts.

SEC approved both requests on the condition that the employees receive no compensation for these activities. In so doing, SEC addressed the possible violation of 18 U.S.C. 203. Even so, we believe the employee's actions on the environmental case could have presented a violation of 18 U.S.C. 205, which prohibits a federal employee from acting as an attorney in prosecuting any claim against the United States. We could not assess the risk that the employee's activities would violate the statute because SEC had no record of exactly how the employee assisted the environmental group in its appeal of a court decision in the litigation involving EPA. However, SEC's approval did not indicate that any conditions were imposed on the activity to prevent violation of 18 U.S.C. 205 or that the employee was cautioned about this statutory prohibition.

SEC's approval of the other employee's outside activity did not raise similar concerns to us because SEC records indicated that both the employee and the SEC ethics official recognized the potential conflict with 18 U.S.C. 205 and agreed to take steps to avoid any violation of that statute in this particular matter.

Five Agencies Approved Some Activities That Focused on the Agencies' Responsibilities

NIH, FDA, CDC, NIST, and EPA approved some outside activities that posed potential problems. These activities posed potential problems because (1) the activities were specifically related to the agencies' responsibilities and, in some cases, the employees' official duties and (2) the employees were to receive compensation for the activities. OGE had provided executive branch agencies with criteria for making these determinations for certain outside activities. Under OGE criteria, whether an outside activity is appropriate or not depends on the degree to which the activity focuses on agency responsibilities and duties. On the basis of these criteria, we believe that some of the activities approved by the five agencies presented possible violations of federal standard-of-conduct regulations.

Prohibitions and OGE Criteria on Receipt of Outside Compensation

As discussed in appendix II, federal employees are subject to a number of prohibitions under laws, executive orders, and regulations regarding the receipt of compensation for their outside activities. In addition to prohibitions in federal conflict-of-interest laws, employees are prohibited by executive order from taking any action that might result in, or create the appearance of, using public office for private gain. Executive branch regulations include prohibitions on the use of official government information that has not been made available to the general public to further a private interest. The regulations also prohibit an employee from receiving compensation for participating in an outside seminar or conference when it appears that the employee's title and position in the agency is to be used to attract participants to the program.

As indicated by the above restrictions, agencies must consider a number of factors when determining whether an employee may accept compensation for an outside activity. OGE recognized that agencies did not always have adequate guidance for making these decisions. In October 1985, OGE provided guidance to agencies for determining when employees may

properly participate for compensation in privately sponsored seminars on subjects related to their employing agencies' activities.² The OGE guidance did not specifically address the approval of other types of outside activities, such as consulting, when employees are to receive compensation.

In its 1985 guidance, OGE said that activities such as private briefings, seminars, and conferences are fraught with standard of-conduct concerns, and agencies must carefully evaluate such activities using information in the 1985 guidance before approving an employee's compensation. OGE said the permissibility of employees' compensation for participation in such activities depends on, among other things, how closely the subject matter of the discussion relates to the agency's responsibilities. OGE said an employee will be prohibited from receiving compensation when (1) the activity focuses specifically on the agency's responsibilities, policies, and programs; (2) the employee may be perceived as conveying the agency's policies; (3) the activity interferes with the employee's official duties; or (4) the activity depends on the use of nonpublic information.

Agencies Did Not Fully Adopt and Follow OGE'S Guidance

Some of the agencies we evaluated adopted and applied criteria for approving speeches, articles, and appearances for compensation that were less restrictive than those included in OGE's 1985 guidance. Although the OGE guidance was advisory to the agencies, we believe the guidance was useful for distinguishing between official duties and outside activities. The guidance reflects the approach taken by the Department of Justice's Office of Legal Counsel. This approach is also being considered by Congress in proposals for modifying a ban on acceptance of honoraria for certain outside activities. In addition, OGE has since proposed similar criteria in its standard-of-conduct regulations issued for comment in July 1991 (also discussed in app. VI).

Some NIH officials said that disapproving some employees' requests to engage in job-related outside activities could create difficulties for both the employees and the agency. NIH officials explained to us the dilemma they face when medical doctors and other employees in highly specialized fields of expertise are requested to make speeches, write articles, and do related activities outside the agency for compensation. They said these employees

²See "The Informal Advisory Letters and Memoranda and Formal Opinions of United States Office of Government Ethics, 1979-1988." According to OGE, guidance in its October 28, 1985, memorandum (85 x 18) reflected the approach taken by the Department of Justice's Office of Legal Counsel in an opinion on the outside employment of government employees. (2 Op. Off. Legal Counsel 231 (1978).)

came to work with NIH believing that they could share their knowledge with others in the profession who have similar interests and responsibilities. They could see no harm in approving these outside activities, whereas not approving them could be detrimental to NIH's mission and to the employees involved.

They also said that approving the activities as official duties of the employees could have a significant impact on NIH's budget. Budgetary impact is avoided when outside organizations cover the costs. This attitude toward approving employees' activities was reflected in agency regulations and practices regarding certain employees and certain types of outside activities, as discussed next.

The HHS regulations and implementing guidance issued by NIH and CDC did not fully incorporate some key provisions of the OGE guidance and did not adequately address agency-related consulting. FDA had not issued any guidance to supplement the general guidance contained in HHS' regulations on receipt of compensation for speeches and lectures related to official duties.

The NIH and CDC guidance did not include the OGE restriction that employees were not to engage in outside activities for compensation that focused specifically on those agencies' responsibilities, policies, and programs. According to NIH's guidance, scientists were generally permitted to lecture in their field of government expertise and to receive honoraria. The scientists could discuss research done by NIH, provided the material discussed had been publicly presented. The NIH guidance did not prohibit acceptance of honoraria when the lectures were to focus specifically on the employee's official duties and/or NIH's responsibilities.

NIH guidance provided that some activities may be done as outside work even though they are related to an employee's official duties. The NIH manual cites the example that it would generally be permissible for an intramural scientist to lecture on his/her field of expertise as an outside activity and receive an honorarium even if research done at NIH were discussed, provided that the material discussed had already been publicly presented. This example does not incorporate the provisions of the OGE guidance that prohibit employees from receiving compensation for lectures or articles when the activity focuses specifically on the employing agency's responsibilities, policies, and programs; the employee may be perceived as conveying the agency's policies; or the activity interferes with the employee's official duties.

NIST officials said they used Department of Commerce regulations when deciding whether to approve employees' requests for outside activities. These regulations said that no employee was to receive anything of monetary value for any consultation, lecture, discussion, writing, or appearance when the subject matter (1) is to be devoted substantially to Commerce's responsibilities, programs, or operations or (2) draws substantially on information not already available to the public, i.e., not disseminated widely among segments of the public that may be affected by or interested in that information.

EPA's regulations said that employees may engage in outside activities involving speaking, lecturing, and teaching if these activities do not deal with specific matters pending before EPA.

Speeches, Consulting, and Some Other Paid Activities Focused on Agencies' Responsibilities

These five agencies (CDC, NIH, FDA, NIST, and EPA) approved speeches and other outside activities that were related directly to the respective agencies' mission, responsibilities, or programs. In most cases, employees requesting the approvals were to receive compensation for the activities. Table V.2 summarizes data we obtained relating to the extent of speeches, articles, or appearances and consulting approved by the agencies.

Table V.2: Approved Speeches, Articles, or Appearances and Consulting, by Agency

Agency	Total employees with approved OA	Employees with approved speeches, articles, or appearances ^a				Consulting ^b	
		Number	Percent of total	Paid		Number	Percent of total
				Total	Percent		
NIST	105	10	10	9	90	16	15
EPA-OPTS	44	1	2	1	100	12	27
FDA	988	30	3	30	100	71	7
CDC	301	58	19	50	86	29	10
NIH	826 ^c	446	54	446	100	135	16

^aSome employees were approved to speak, write, or appear, as well as consult. Such employees are counted as approved for both of these activity categories.

^bAlmost all consulting was to be done for compensation, according to employees' requests.

^cData for NIH are the universe of those employees with requests approved during fiscal year 1990. Other data are for fiscal years 1988 through 1990.

Many employees with approved outside activities at NIH, CDC, and FDA were medical officers or scientists. Their federal duties included government

medical research and testing or controls in technical, scientific areas such as investigating the causes and treatment of Acquired Immune Deficiency Syndrome (AIDS); cancer, skin, heart, and lung diseases; and musculoskeletal problems. Employees approved for outside activities at the other two agencies (NIST and EPA) were in other types of federal occupations, such as engineer and environmental protection specialist.

Generally, the employees at the five agencies were to receive compensation for their outside activities, usually less than \$1,000 for each activity. Although the cumulative amounts varied, in fiscal year 1990, 19 NIH employees received from \$8,000 to about \$23,000 for outside speeches.

Examples of Approved Activities Focusing on Agencies' Responsibilities And/or Employees' Duties

Our review of randomly selected employees who had been approved for outside activities at each agency showed that some of these activities involved subject matters focusing specifically on the agency's responsibilities, policies, or programs and, in some cases, the employees' official duties. In addition, it appears that employees were requested to participate and receive compensation because (1) of the employees' federal positions and/or (2) government information not generally available to the public was to be presented by the employee. Although the subject matter of the speeches and other activities varied as did the particular relationships between the agencies and outside activities, the following are examples of activities that appear to focus primarily on the respective agency's responsibilities and/or the employee's federal duties.

NIH Examples

1. In August 1989, NIH approved a request from the chief of a NIH clinical hematology branch to receive \$2,000 for a speech entitled "Retroviral mediated gene transfer into hematopoietic stem cells" at the Division of Hematology, University of Vienna. NIH also approved the employee's acceptance of travel and subsistence expenses from the sponsor. According to NIH records, the request was finally approved after the July 14, 1989, lecture had been given and after disapproval by several NIH officials on the basis that the lecture had been conducted in an official capacity.

The employee indicated in his request for approval of the outside activity that it was related to his official duties, and the request was annotated that it was "related to professional competence, but not an official responsibility appropriate for use of government funds." According to a comparison between the request and the employee's position description,

the speech appeared to have focused specifically on NIH's responsibilities and the employee's official duties relating to hematology.

2. In August 1990, NIH approved a request from a senior investigator in NIH's National Cancer Institute to do nine evening and weekend consultations during 1990 and 1991 with a private sector company for \$1,000 per consultation (totaling \$9,000). According to the request, the consultations were to relate to "pathological analysis of determinants of tumor cell resistance to chemotherapy and prognostic determinants in human cancers."

The employee indicated on his request form that his official duties did not relate in any way to this proposed activity. NIH required the employee and a representative of the private company to sign a consulting agreement. The agreement included restrictions such as that the outside work would not interfere with the employee's NIH responsibilities, the employee would not release nonpublic NIH information, and the outside company would not have any proprietary interest in any NIH work the employee had done or would do. The agreement also said that the consulting would be independent of any NIH collaborative agreements.

The NIH approval and the signed consulting agreement did not address the relationship between the employee's other official duties (i.e., those unrelated to collaborative agreements) and the outside activity. According to information provided by NIH on the employee's position, his NIH duties included analyses similar to those to be done in the nine consultations for the private company. Thus, it appears that this outside activity was to focus specifically on the agency's responsibilities and the employee's duties relating to cancer research.

CDC Examples

1. In May 1990, CDC approved a request from the chief of a CDC surveillance activity to give a speech at an infectious disease seminar. CDC approved the speech after it had been given. The speech took place in May 1990 at a hospital in Detroit, was presented to practicing physicians in training, and addressed "Nosocomial Pneumonia." The request showed that the employee was to be compensated for the speech but did not show the amount of compensation. The employee indicated on the request form that his official duties did not relate in any way to the proposed outside activity.

According to the employee's position description, he was in the hospital infections program of the Center for Infectious Diseases, which does

national surveillance and epidemiologic studies of nosocomial infections and makes authoritative recommendations on their prevention, surveillance, and control. The employee was responsible for managing a group of professionals involved in nosocomial infections surveillance and investigations. Therefore, it appears the employee's speech was to focus specifically on the Center for Infectious Diseases' responsibilities and the employee's official duties relating to nosocomial infections.

2. In June 1990, CDC approved a request from a CDC project director to lecture on "HIV-2 infection,"³ which the employee said in his request was related to his official duties. According to the hospital's invitation to the employee, the lecture was to be given at a university's school of medicine to an audience that would include research scientists who dealt with the biology of HIV and clinicians providing care for those infected with HIV. The conference goal was to provide participants with the latest scientific information in specific areas from leaders in their respective fields. The university was to provide the employee \$1,000, all travel expenses, and per diem.

According to the employee's position description, he was a medical officer of epidemiology in the Division of HIV/AIDS, Center for Infectious Diseases, and was responsible for studies on HIV/AIDS, including HIV-2 infection. On the basis of this position description, it appears that the employee's speech was to focus specifically on the agency's responsibilities and the employee's duties relating to HIV/AIDS epidemiologic and laboratory studies.

DA Examples

1. FDA approved a request submitted in September 1988 from an FDA pharmacologist for a paid speech entitled "Inhalation vs. Ingestion: Implications for Fetal Dose" at a health effects institute. The employee indicated on his request form that he would be paid for the speech and reimbursed for his expenses but did not show the amounts. His request said (1) he would discuss with fellow researchers "methods to assess development toxicants," (2) his official duties related to this activity because ongoing protocols and published work with which he was involved occasionally addressed the same issues to be covered in his speech, and (3) the institute requesting the speech received grants and contributions from another federal agency (EPA).

³HIV stands for human immunodeficiency virus.

The employee's position description showed that he was in the Division of Reproductive and Developmental Toxicology at FDA's National Center for Toxicological Research. The employee's official duties included research in developmental toxicology and teratological. Thus, it appears that the employee's speech focused specifically on the Center's responsibilities and the employee's duties relating to research on toxicological effects.

2. In January 1989, FDA approved a request from an employee in FDA's National Center for Toxicological Research to provide outside consultation services to a private company. According to the request, the employee was to do risk estimates and review risk assessments for products not regulated by FDA. The request showed the employee would be compensated for his services (estimated to require about 100 hours annually) and expenses but did not show the dollar amounts.

The employee indicated on the request form that the consulting services related to his official duties, which he said included doing risk estimates and developing risk assessment methodology. In addition, FDA reviewing officials were informed by the employee that this was the type of work he performed as part of his official duties.

NIST Examples

1. NIST approved a March 1989 request from a physicist to give a lecture on "Polymer Glasses: Recent Developments" at a private sector laboratory. The laboratory was to refund the employee's travel expenses and pay him \$300 for the speech, according to the request. The employee said in the request that (1) the type of activity could be and previously had been done as an official activity, (2) the speech depended on information obtained as a federal employee, and (3) his NIST duties involved "understanding polymers at a basic level." According to the employee's position description, he worked in a NIST polymer blends group and was responsible for research and development of models relating to polymeric materials and polymer blends.

Commerce said the above approval was consistent with advice provided by OGE and Justice. Commerce said the subject matter of the employee's lecture was not "substantially devoted" to laboratory work at NIST, did not focus specifically on the NIST polymer program, and consisted of public information. However, the information in the employee's request, highlighted above, indicated that the lecture was closely related to his NIST duties, and his acceptance of compensation for the lecture could, in our view, have created the appearance of using his public office for private gain, which is a violation of federal standards of conduct.

2. NIST approved a physicist's request in August 1988 to consult with a private company for developing a polarized electron source as a commercial product. The employee indicated in his request that he would be compensated but did not show the amount of compensation. According to the request, the employee's official duties included research on electronic and magnetic properties of solids, including the use of spin-polarized electrons, which were also to be used in the commercial product. According to the request, the company had a patent on the source, which the employee had helped to develop before and during his NIST employment.

The employee said on the request that the work depended on information obtained as an agency employee, involved a device developed in his official capacity, and the outside employer was a supplier to the employee's work group at NIST of equipment such as an electron spin polarization analyzer. NIST records showed that a Department of Commerce lead attorney on conflict-of-interest questions considered that it could be inappropriate for the employee to consult with the company because of (1) the possible disclosure of inside information and (2) the contractual relationship between the company and NIST. At the time of our review, NIST records did not show whether or how the attorney's concerns about the employee's proposed outside activity were resolved.

On the basis of NIST records, it appears that the employee's consulting duties were to focus specifically on his official duties and NIST's responsibilities. After receiving a copy of our draft report for comment, NIST officials provided us with a memorandum dated November 8, 1991, from the employee in which he stated the above consulting agreement never materialized. The employee said he did not aggressively pursue the consulting because, even though his request was formally approved, management advised him that avoiding any appearance of a conflict of interest could be "a delicate matter."

EPA Example

1. In October 1988, EPA approved a request of an EPA chemist to assist a nonprofit foundation with restructuring its quality assurance program to be consistent with that of EPA in general and its Contract Laboratory Program in particular. The employee was to receive \$60 an hour for up to 120 hours of services over a 12-month period.

According to EPA records, the employee worked in an EPA branch that was responsible for developing quality assurance activities and participated in a national program for providing chemical analysis services through

contractor laboratories. Related EPA files and records contained no evidence that approving officials questioned whether the outside activity was related to the employee's official duties. According to the employee's position description, her duties included directing the activities of up to 20 contractor laboratories by responding to all issues daily. Thus, it appears the employee's services to the foundation focused specifically on EPA's responsibilities. The employee's division was responsible for developing environment-related policies and criteria.

When approving outside activities such as those illustrated in the previous examples, approving officials sometimes advised the employees of restrictions on their outside activities, such as not to use nonpublic information. However, this was not always done. For example, FDA rarely included restrictions when approving the activities included in our review. In any event, restrictions on the activities were not, in our view, sufficient protection against possible standard-of-conduct violations because of the close relationship between the activities and the agencies' responsibilities.

In June 1987, OGE issued an audit report to an HHS ethics official on the NIH ethics program. The report addressed NIH's procedures for approving employees' outside activities. OGE said in its report to HHS that OGE's greatest concern was the propriety of NIH employees' outside activities, particularly a "blurring" of the distinction between what is properly done as an official duty and an outside activity. OGE cited possible violations of HHS regulations and raised questions about five employees' possible violations of criminal conflict-of-interest statutes.

OGE made recommendations to HHS to deal with the situations found at NIH. HHS responded that the safeguards in use were sufficient but did agree to make changes to related NIH manual provisions. HHS also found no conflicts of interest by the five NIH employees mentioned in the OGE report. We found during our review that NIH had revised its manual but, as discussed previously, the NIH criteria for approving outside activities were still not consistent with the criteria in OGE's 1985 guidance because NIH did not appropriately restrict employees' speeches that focused specifically on the agency's responsibilities, policies, or programs. OGE had also made similar recommendations regarding FDA's approval of outside activities.

In May 1991, OGE was again reviewing NIH's guidance and practices on approval of employees' outside activities. An OGE official said NIH had improperly allowed employees to receive compensation for outside activities, including consulting, that focused specifically on NIH's

responsibilities and that depended on NIH-generated information. According to both OGE and NIH officials, some employees had re-described their outside activities from speaking to consultants after Congress banned the acceptance of honoraria (discussed later) in January 1991. OGE was reviewing about 20 such instances at the time of our review to determine if possible violations of the statutory ban had occurred. An OGE official said OGE was continuing to work with HHS and NIH officials to develop guidance consistent with the OGE advisory opinion and related statutes.

Statutory Ban on Honoraria Imposed in January 1991 Is Being Reconsidered

Generally, the outside activities that we reviewed were approved during fiscal years 1988 through 1990 and thus before Congress banned the acceptance of compensation (honoraria) for some outside activities of most federal employees. Specifically, effective January 1, 1991, the Ethics Reform Act of 1989 banned the acceptance of honoraria for speeches, articles, and appearances. The ban was applied to situations in which employees' outside activities were both related and unrelated to the employees' federal duties and the agencies' responsibilities. Soon after the ban became effective, it became the subject of several court cases.

Due to the broad scope of that ban, in January 1991 Congress began considering proposals to restore the ability of most federal employees to receive honoraria for such activities to what it was before the ban.⁴ Specifically, a Senate bill was introduced that included a limited ban on receipt of honoraria for lower level employees. The bill used criteria from the OGE advisory memorandum issued in 1985 and discussed previously. A House bill, introduced in September 1991, includes criteria prohibiting the acceptance of honoraria when the purpose of an appearance or the subject of a speech or article relates primarily to the agency's responsibilities, policies, or programs. These bills address the acceptance of compensation for some of the employees' outside activities (not consulting) that were sometimes agency-related, as discussed in this appendix, and that appear to have been contrary to standard-of-conduct regulations and OGE guidance applicable before January 1, 1991.

⁴Several House bills and S. 242 were introduced in January 1991. More recently, in September 1991, H.R. 3341 was introduced to modify the honoraria ban and for other purposes.

Office of Government Ethics Regulations and Audits

OGE addressed employees' outside activities in proposed standard-of-conduct regulations and audits of agency ethics programs. Although the regulations provide needed guidance, we believe the standards relating to outside activities can be improved. In addition, agencies have not always accepted and implemented recommendations resulting from OGE's audits. Recent changes affecting OGE authority and audit program address this situation.

OGE's Proposed Standards of Conduct Provide Needed Guidance

In July 1991, OGE circulated for comment proposed uniform standards of conduct applicable to all executive branch employees. We believe that executive branch agencies need OGE's proposed standards of conduct. Current regulations used by executive branch agencies implement standards issued in 1965 and related executive branch regulations issued in 1968.

On the basis of a review we did in 1979 at six agencies, we recommended that OPM¹ strengthen standard-of-conduct regulations by specifically addressing those issues subject to varying interpretations from agency to agency.² We found in that review that agency restrictions on outside activities, among other areas, differed extensively. In some cases, the differences resulted from different statutes applied to the agencies and different agency responsibilities and duties. However, differences also resulted from agency interpretations of general standards in Executive Order 11222 and the lack of regulations implementing the standards.

OPM agreed with our recommendation in 1979 that additional guidance was needed to resolve the problems of differing interpretations. OPM was to develop new regulations, but until OGE's proposed regulations circulated in 1991, no changes to OPM's 1968 standard-of-conduct regulations had been made to address our recommendations.

OGE's proposed standards of ethical conduct are designed to reduce inconsistencies among executive branch agencies in how standards are interpreted and applied. According to OGE, once the proposed standards become final, most agencies should not find it necessary to issue supplemental regulations, except for three specific needs identified by OGE—to apply the standards to one or more components of an agency,

¹Until 1989, OGE was a part of OPM.

²Federal Agency Standards of Conduct Need Improvement (FPCD-80-8, Oct. 18, 1979).

prohibit certain financial interests, or require employees to obtain approval of outside activities.

OGE addressed employees' outside employment and other outside activities in several sections of the proposed standards. For example, two sections provide guidance on the following:

- means (divestiture, disqualification, and waiver) for avoiding a violation of 18 U.S.C. 208, which prohibits self-dealing by federal employees (i.e., personally and substantially participating in any particular matter that will affect the employee's own financial interest);
- prohibitions on use of public office for private gain, use of nonpublic information, misuse of government property, and abuse of official work time.

OGE Can Strengthen Its Standard on Approval of Outside Activities

OGE's proposed standards include guidance dealing specifically with employees' outside activities. Regarding the approval of outside activities, the standards allow agencies to determine whether employees must obtain agency approval before engaging in outside activities and do not provide specific guidance or requirements on when and how these determinations are to be made.

OGE would permit agencies to impose prior approval requirements when such requirements are desirable for administering the agency's ethics program. According to supplementary information provided with the proposed standards, OGE recognized that some agencies have such requirements but said many do not. An OGE official added that OGE's rationale for not proposing that agencies require employees to receive approval of their outside activities was that OGE could not determine what activities needed prior approval at every agency. The OGE official also said certain activities could cause conflicts of interest at some agencies but not at others. Therefore, according to information OGE provided with the proposed regulations, any requirements applicable to all executive branch employees would have to include so many exceptions and qualifications that it would be cumbersome to interpret and administer.

We believe that OGE's standards understate the importance of requirements for employees to obtain prior approval of their outside activities. Such requirements can assist employees in complying with numerous provisions of laws, executive orders, and regulations regarding their outside activities. As proposed, the standards consist largely of prohibitions and limitations

on employees' outside activities, including the compensation they may receive for such activities. The standards cite provisions of the conflict-of-interest statutes, the Hatch Act, and the U.S. Constitution as well as provisions of the proposed standards and existing regulations, both agency-specific and those applicable to the entire executive branch, with which employees' outside activities must comply.

Employees may not be familiar with all applicable requirements and so may not be able to comply with them without assistance from agency officials. In our opinion, a requirement that employees are to request agency officials familiar with those requirements to review planned outside activities that could pose possible conflicts of interest would help protect the employees against such conflicts as well as help to ensure confidence in the integrity of federal programs. Each agency could develop requirements for approving outside activities on the basis of its particular mission and operations.

**OGE Needs to Provide
Agencies With Guidance on
Agency-Related Consulting**

OGE's proposed standards do not specifically address consulting activities that are related to official duties. We believe, on the basis of our review of employee consulting activities, that agencies need OGE guidance on the permissibility of agency-related consulting.

The standards include guidance similar to that included in OGE's 1985 guidance on employees' acceptance of compensation for outside teaching, speaking, and writing activities that relate to employees' official duties. The standards describe situations in which these activities are related to an employee's official duties, thus prohibiting the acceptance of compensation. One of these situations is when the subject matter of the activity focuses specifically on the employee's official duties or on the responsibilities, programs, or operations of the employee's agency. Employees doing consulting activities in these situations might be viewed as using public office for private gain.

According to an OGE official, consulting encompasses a broad range of activities; and appropriately defining the term so as to not unduly prohibit proper outside activities would be difficult. We agree that consulting can embrace a range of activities. However, we do not believe that defining and regulating consulting would pose any greater difficulty than doing so for those activities already addressed by the standards, namely, certain speeches, articles, and appearances. In addition, like these other activities, agencies would need to carefully examine requests and supporting

information provided by employees before determining whether the activity was appropriate.

**OGE Audited Agency
Controls Over
Employees' Outside
Activities**

During the 5 calendar years from 1986 through 1990, OGE reviewed ethics programs of 9 of the 11 agencies included in our review, plus the Department of Commerce. OGE had not reviewed ethics programs of NIST and USTR during this 5-year period. OGE had reviewed OPM's ethics program during this period, but the related OGE audit report did not address outside activities. As shown in table VI.1, as part of its review of the remaining eight agencies' ethics programs, OGE had commented in its reports on aspects of the agencies' controls over employees' outside activities.

**Appendix VI
Office of Government Ethics Regulations and
Audits**

Table VI.1: OGE Audits and Recommendations on Agencies' Control of Employees' OA, January 1986 Through December 1990

Agency	Year of OGE report	Place of audit	OA Audits and Recommendations ^a			
			Described Procedures	Reviewed OA requests	Individual OA deficiencies noted	Recommendations made to correct procedures
Commerce ^b	1987	Headquarters ^c	Y	Y	Y	Y
SBA	1990	Headquarters	Y	Y	N	N
N	1989	Philadelphia	Y	N	N	N
N	1988	Seattle	Y	Y	Y	N
N	1988	Atlanta	Y	N	N	N
N	1988	New York	Y	N	N	N
MSPB	1988	Headquarters	Y	N	N	N
OPM	1986	Headquarters	N	N	N	N
USTR ^d			d	d	d	d
NRC	1990	Chicago	Y	Y	N	N
	1988	Dallas	N	N	N	N
	1988	Headquarters	N	N	N	N
SEC	1990	New York	Y	N	N	N
	1988	Fort Worth	N	N	N	N
	1986	Headquarters	N	N	N	N
EPA	1989	Philadelphia	Y	N	N	N
	1989	Headquarters	Y	Y	N	N
	1988	Seattle	Y	Y	N	Y
	1988	New York	Y	Y	Y	N
	1988	Atlanta	Y	Y	Y	Y
FDA	1988	Dallas	Y	N	N	N
	1988	Headquarters	Y	Y	Y	Y
CDC	1990	Headquarters	Y	Y	N	N
NIH	1987	Headquarters ^e	Y	Y	Y	Y

^aThe "Y" responses indicate that our review of OGE's audit and trip reports showed that its evaluations did include the task or outcome as shown. A "N" means that our review of the OGE reports did not show that the task or outcome was included in OGE's review.

^bOGE had not done an audit at NIST during Jan. 1986 - Dec. 1990.

^cCommerce was included because certain OGE recommendations were for the Department of Commerce as a whole. This 1987 OGE review included headquarters, 1 field installation, and 4 of 12 bureaus. NIST was not one of those bureaus.

^dOGE had not audited USTR as of January 1991.

^eOGE also included in its ethics review the National Cancer Institute and the National Heart, Lung, and Blood Institute.

In total, OGE issued 22 audit reports on one or more reviews done at the 9 agencies' headquarters and field offices during the 5-year period. For these 22 reports, OGE mentioned controls over outside activities (by describing approval procedures) in 17 of them. In half of the 22 OGE audit reports, OGE limited its discussion of employees' outside activities to describing approval procedures and/or the review of requests from employees for approval of outside activities.

As indicated in table VI.I, OGE made recommendations concerning approval of outside activities to Commerce and four agencies—MSPB, EPA, FDA, and NIH. In its 1987 report on Commerce and four of its bureaus (other than NIST), OGE recommended that Commerce establish requirements for prior approval of outside activities for all of Commerce. OGE made this recommendation because of its concerns about approval of employees' speaking, lecturing, and writing outside Commerce that may, or appear to, conflict with employees' official duties. At the time of our review, Commerce had not amended its regulations to establish prior approval requirements for all outside activities. As stated previously, Commerce had required approval of certain activities, and NIST had established prior approval requirements for its employees before the OGE recommendation.

OGE recommended that MSPB establish written criteria requiring employees to obtain prior approval, in writing, for all outside activities. MSPB agreed to implement OGE's recommendation but at the time of our review, in May 1991, had not done so. An MSPB official said MSPB was waiting for OGE's new standard-of-conduct regulations before establishing prior approval requirements.

OGE recommended that two EPA regional offices improve control over employees' outside activities. In one of these reviews, on the basis of evidence reviewed, OGE found that some employees had not obtained the required prior approval of outside activities listed in the employees' financial disclosure reports. In the other review, OGE suspected that prior approvals had not been obtained.

OGE recommended that one of the regional offices emphasize employees' awareness of the need to meet prior approval requirements and that the other office obtain documentation for approval of outside employment for which no approvals were on file at the EPA regional office. The audit reports did not show actions taken by the two EPA offices on OGE's recommendations.

OGE recommended that FDA provide guidance on approval of employees' outside professional and consulting services, public appearances, writing, and editing. According to OGE, approving officials did not understand the distinction between official duties and outside activities. OGE also had concerns and recommendations regarding insufficient information in both FDA employees' requests for approval of outside activities and their financial disclosure reports. However, FDA had not responded to OGE concerning these OGE recommendations at the time of our review. The regulations of FDA's parent agency, HHS, contained general and basically permissive language on approval of such activities. As discussed in appendix V, OGE had made several recommendations to HHS regarding NIH's criteria and practices on employees' speaking, lecturing, consulting, and other activities outside of NIH and was again reviewing this matter at NIH at the time of our review.

The cited information on OGE's reports and recommendations concerning employees' outside activities points to a problem we earlier reported with some federal agencies' response to OGE reports.³ We reported that OGE had repeated recommendations to some agencies over several years to correct weaknesses that we found still existed when we did our work at those agencies in 1990. OGE took steps since that time to improve this situation. These steps included sending audit reports to the agency heads rather than ethics officials responsible for the programs being audited. OGE also adopted a more aggressive follow-up policy regarding its open recommendations. Further, OGE had not been able to audit agency ethics programs as frequently as it had desired due to limited audit staff. In 1989, OGE had two auditors to review the ethics programs of all executive branch agencies. As of September 1991, the number of auditors available to do these reviews had increased to 12.

In addition to the above improvements, as a result of its reauthorization in 1988, OGE received additional enforcement authority to obtain corrective action when the OGE director determines such action is needed. Under that authority, OGE issued regulations effective February 1990 providing for the issuance of notices of deficiencies and corrective orders by OGE to agency heads when their ethics programs do not comply with applicable requirements. If the deficiencies still exist after a specified time period, OGE is to notify the president and Congress of the deficiencies.

³Office of Government Ethics' Oversight Role (GAO/T-GGD-90-48, June 5, 1990).

Comments From the Office of Government Ethics

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States
Office of Government Ethics
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

December 9, 1991

Bernard L. Ungar
Director, Federal Human Resource
Management Issues
United States General Accounting Office
441 G Street NW.
Washington, DC 20548

Dear Mr. Ungar:

This Office has carefully reviewed the draft report, B-245739, Employee Conduct Standards, (hereinafter "Report") that you sent us for comment. We appreciate the substantial effort your staff put into preparing the draft Report. Based upon our discussions with your staff regarding appropriate modifications to the Report, we have agreed to take the following actions:

- Ensure that HHS fully adopts and complies with applicable restrictions on employees' compensation for outside speeches, articles, and appearances that relate to federal responsibilities, and to specifically review outside activities at Commerce and EPA during our next audit of their ethics programs.

- Change the introductory section of the subpart of the proposed regulations dealing with outside activities to stress that the appearance principle and the prohibition against use of public office for private gain apply to all outside activities. This would include consulting. Further, employee consulting activities will be examined during the course of our audit work to determine whether more specific guidance on consulting should be provided on a government-wide basis.

- Strengthen the proposed standard of conduct regulations regarding agency approval of employees' outside activities to provide that an agency shall require prior approval of employees' outside activities when it is determined to be necessary and desirable for the purpose of administering its ethics program or carrying out its mission and operations.

There is a great deal of information in the Report that is of considerable interest to this Office and that confirms the existence of problems that we had reason to believe exist at particular agencies. In addition, we would like to express our

OGE-106
October 1989


see comment 1.

see comment 2.

**Appendix VII
Comments From the Office of Government
Ethics**

appreciation for the professionalism of your staff during the many discussions we had with them concerning this Report.

Sincerely,



Stephen D. Potts
Director

The following are GAO's comments on the Office of Government Ethics' December 9, 1991, letter.

GAO Comments

1. In addition to OGE's letter, we obtained oral comments from OGE in several discussions we had with the OGE Director and other OGE officials after they received our draft report for comment. We summarized the results of these discussions in the Agency Comment section on pages 14 and 15 of this report. In addition, on the basis of these discussions, we made changes to our report as appropriate to clarify the intent of our recommendations and more accurately reflect some technical details of our findings.

2. OGE had recently completed an audit of the NIH ethics program and made recommendations to HHS and NIH regarding the approval of outside activities. As indicated in its letter, OGE will also review outside activities at Commerce and EPA during the next audits of their ethics programs.

Comments From the Department of Commerce

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

5 DEC 1991

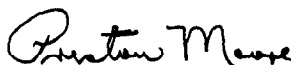
Mr. Richard L. Fogel
Assistant Comptroller General
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Thank you for your letter requesting comments on the draft report entitled, "Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues."

We have reviewed the enclosed comments of the Assistant General Counsel for Administration and believe they are responsive to the matters discussed in the report.

Sincerely,


Preston Moore

Enclosure

Appendix VIII
Comments From the Department of
Commerce



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

Honorable Richard L. Fogel
Assistant Comptroller General
United States General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Fogel:

Thank you for the opportunity to review and comment upon the draft of the General Accounting Office (GAO) report: *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues*. The GAO report focused on certain outside activities of eleven offices or agencies, including the National Institute of Standards and Technology (NIST), an operating unit of the Department of Commerce. As your study indicated, NIST had a relatively low percentage of employees who engaged in outside speaking or consulting during the period under review.

In general, we found the report helpful in identifying potential further improvements to our program for monitoring and controlling the outside activities of our employees. We have identified a few matters which should be corrected or clarified, however. These are set forth at Tab 1. We take seriously our responsibilities to avoid conflicts and any appearances of conflict that might undermine public confidence in our operations.

NIST has a primary statutory responsibility to assist industry in the development of technology and to provide United States industry with a national clearinghouse of current information about the cutting-edge of scientific and technical development. To this end, NIST has attempted to recruit and retain leading American scientists. Under a long-established Federal policy, NIST has encouraged these scientists to engage in outside teaching, writing and speaking in situations which do not present a conflict problem. These activities further the professional development of NIST scientists and advance the agency's mission.

The report recommends that Federal employees should be required to obtain prior approval before engaging in certain compensated outside activities. In this regard, you identify information and procedures necessary for effective review. Commerce agrees that the risk of conflict-of-interest problems for Federal employees can be reduced when agencies require employees to request prior approval for many outside activities. That is why prior approval for outside activities is required at NIST and a number of other

e comment 1.

**Appendix VIII
Comments From the Department of
Commerce**

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operating units within the Department.¹ Our plans to adopt Department-wide regulations for prior approval of outside activities have been delayed pending issuance of Government-wide standards of conduct. As you know, these new regulations will supersede Commerce's regulations. The proposed standards of conduct provide for supplemental agency regulations to establish agency-specific rules for outside employment. Consistent with GAO's report and Office of Government Ethics (OGE) advice, we will establish Department-wide rules for outside employment approvals.

The report questions the propriety of approving outside activities in some cases where such activities relate to an employee's area of professional expertise. Most of the cases discussed in your report from other agencies involve such activities. We believe that the continued effectiveness of our scientific programs depends on the ability of scientists to engage in such activities so long as the subject matter of those activities is not devoted substantially to the responsibilities, programs or operations of the agency and does not draw on official data or ideas not in the public domain. See 15 CFR 0.735-12(c)(2) (Tab 3).

You recommend that:

[T]he OGE Director should ensure that HHS, Commerce, and EPA fully adopt and comply with applicable restrictions on employees' compensation for outside speeches, articles, and appearances that relate to federal responsibilities.

Commerce has attempted to comply with these restrictions in all cases.

As you note in your report, in 1985 OGE issued an informal advisory memorandum on accepting compensation for such activities.² OGE concluded that most employees could receive compensation for such activities so long as the subject matter involved did not focus specifically on the employing agency's responsibilities, policies, and programs; did not convey (or

¹ For instance, the National Oceanic and Atmospheric Administration (NOAA) requires employees to get approval for outside employment in any functional area associated with a NOAA mission such as fishery research, weather forecasting, mission, such, or hydrology. See NOAA Administrative Order 202-735C, section 4.02 (Tab 2).

² OGE Informal Advisory Memorandum 85 x 18 (October 25, 1985) (Tab 4).

Appendix VIII
Comments From the Department of
Commerce

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appear to convey) the agency's policies; and did not interfere with the employee's official duties.

The language of the OGE guidelines is similar to the language contained in Commerce regulations at 15 CFR 0.735-12(c)(2), which state:

No employee shall receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Department of Commerce, or which draws substantially on official data or ideas which have not become part of the body of public information. (Tab 3).

In applying each of these standards, we have needed to make the same determination, namely whether the subject matter involved focuses on responsibilities, policies, and programs of the employee's office. In making the determination, we have followed an opinion issued by the Office of Legal Counsel (OLC) at the Department of Justice in 1978.³

This OLC opinion concluded that a Federal attorney could teach a university course on Federal grant-in-aid programs, although he had as his responsibility providing legal advice to the Law Enforcement Assistance Administration, a major grantor agency. In reaching this conclusion, OLC stated:

A Federal employee will naturally be requested and inclined to teach in an area of his professional expertise. To this extent, teaching may always be related to the activities of the employing Government agency. In our view, it is only where the course focuses more specifically on departmental responsibilities, where the employee may be perceived as conveying departmental policy, where the fee is out of line with the effort entailed. . . . or where the activity interferes with the performance of official duties that teaching should be discouraged.

The United States Senate Committee on Governmental Affairs recently noted the standards established in the 1985 OGE and 1978 OLC opinions and individual agency regulations for approving

³ 2 Op. Off. Legal Counsel 361 (1978) (Tab 5).

re comment 2.

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Comments From the Department of
Commerce

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compensation to employees for outside activities.⁴ In its report on S. 242, a bill which would modify the rule prohibiting the receipt of honoraria by certain Government employees, the Committee explained:

See comment 3.

. . . many Government employees pursue a wide variety of interests outside their official duties which are totally unrelated to their Government responsibilities. Others engage in outside speaking or writing on their own time in areas of their professional expertise. Many of these activities involve the payment of honoraria under circumstances that do not present a threat to public confidence in the ethical conduct of the Government. . . . Many employees speak and write on subjects related to their professions, and such activities were allowable before the ban under conditions prescribed by the Office of Government Ethics and individual agencies The ethics and related laws, regulations, and standards that applied before the ban were sufficient and they will still apply if the ban is modified.⁵

Of particular importance to the scientific agencies, including NIST, under the standards established by OGE, OLC and individual agencies, the Committee recognized that scientists should be permitted to speak and write for a fee in their fields of expertise and to discuss research performed in their laboratories, provided that the material was already public.⁶ NIST has always adhered to this approach and will continue to do so in the future.

See comment 4.

We are encouraged by your findings that the NIST system is effectively working to reduce real or perceived conflicts of interest.

Sincerely,



Barbara S. Fredericks
Assistant General Counsel
for Administration

Enclosures

See comment 1.

⁴ Honoraria Amendments to the Ethics in Government Act, S. Rep. No. 102-29, 102d Cong. 1st Sess. 9-10 (1991) (Tab 6).

⁵ Id. at 3-7.

⁶ Id. at 10.

The following are GAO's comments on the Department of Commerce's December 5, 1991, letter.

GAO Comments

1. We did not include the list of technical corrections and other materials provided by Commerce with its comments. We reviewed all these materials and made various technical changes to our report as appropriate in response to Commerce comments.

2. We agree with Commerce as to the thrust of the Justice and OGE opinions regarding the use of an employee's professional expertise. However, whether an outside activity is permissible depends on how closely the activity, e.g., the subject matter of a discussion, relates to the agency's responsibilities. On the basis of our review, we believe that NIST and four other agencies approved some compensated outside activities that were specifically related to the respective agency's responsibilities and in some cases the employee's official duties. Although we recognize that the relatedness and permissibility of such activities require judgment, the acceptance of compensation for these activities in the circumstances appears to have been contrary to OGE guidance.

3. Commerce selectively quoted provisions of the Committee's report. Specifically, the quotes are from the "Background and Need for Legislation" section of the report in which the Committee discussed the goal of achieving the appropriate balance between public trust in ethical conduct of government and freedom of employees to pursue professional growth. Elsewhere in the Committee report and in the related bill (S. 242), the Committee clearly proposed the adoption of criteria on acceptance of honoraria consistent with the formal guidance established by OGE and in effect before the ban. We applied these criteria to outside activities approved by NIST and are questioning some of its approvals because the close relationship between the activities and NIST responsibilities could create the appearance of using public office for private gain, which is in violation of government standards of conduct.

4. Commerce did not present a full discussion of the criteria proposed in the Justice and OGE opinions, OGE regulations, Committee report, and Senate and House bills (S. 242 and H.R. 3341) on the permissibility of accepting honoraria for outside writing and speaking. For example, Commerce did not mention in its comments a key stipulation in all of the above documents that the acceptance of honoraria by an employee would be inappropriate when the subject matter of a speech or article focuses

Appendix VIII
Comments From the Department of
Commerce

specifically on the agency's responsibilities. On the basis of its comments, it appears that Commerce has not fully adopted appropriate criteria for reviewing employees' requests for certain outside activities. We have made recommendations to OGE on ensuring that Commerce (and some other agencies) comply with all applicable requirements established in law and regulations.

Comments From the Small Business Administration

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

DEC 11 1991

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

We have reviewed your draft report entitled, "Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues," (GAO/GGD-91).

Our review did not reveal any substantial factual errors. We appreciate your conclusion that the Small Business Administration adequately addressed potential conflict-of-interest situations.

We thank you for the opportunity to comment on the draft report. If you need any additional information, please contact Mr. Peter L. McClintock, Assistant Inspector General for Auditing, at 205-6590.

Sincerely,

Patricia Saiki
Patricia F. Saiki
Administrator

Comments From the U.S. Trade Representative

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

December 2, 1991

Mr. Richard L. Fogel
Assistant Comptroller General
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

We have reviewed your draft report entitled Employee Conduct Standards : Some Outside Activities Present Conflict of Interest Issues. As you are aware, only one out of a total of 154 employees in the Office of the United States Trade Representative (USTR), sought and received approval for outside employment during the period covered by the Report.

This approval was for an official in the USTR's Office of Administration for consulting work wholly unrelated to his official responsibilities. That employee retired from government service six months after requesting approval for outside employment, and never actually engaged in that outside employment while a USTR employee.

Based on these facts, we have the following comments on your report:

1. At page 29, Appendix I, the Report states that in order to standardize the universe, you "focused your review on individuals employed by most agencies as of October 1990." Also, on that page, you state that your approach "was to exclude employees approved to do outside activities during the three fiscal years if they had left the agency during that period."

In the case of USTR, the approval for outside employment was granted on, or about, August 10, 1989, and the employee retired on April 2, 1990. Based on your criteria, he should not have been included in the report.

2. At page 10 of the Report, you state that USTR did not require employees to show the actual amount of compensation they expected to receive from outside activities nor did USTR require employees to identify the names of outside employers. These statements are inaccurate. USTR requires employees seeking outside employment to divulge the name of the employer and the amount of compensation. In the case of the sole approval granted by USTR for outside employment, both the prospective employer and the amount of compensation were discussed with the employee. However, because the employee retired from government service

Now on p. 23.

See comment 1.

Now on p. 7.

See comment 2.

See p. 7.

**Appendix X
Comments From the U.S. Trade
Representative**

before taking up such employment, a formal memorandum reducing these facts to writing, was never prepared.

Now on p. 52.

See comment 2.

3. Similarly on page 70 of the Report, you state that USTR (among other agencies) did not require employees to update information on their previously approved and continuing outside employment. This is incorrect. USTR does require updating of previously approved, ongoing, outside employment. As mentioned earlier, in the one instance where outside employment was approved, it never even commenced, so no further updating was necessary.

Now on p. 58.

See comment 3.

4. At page 82, Appendix V, footnote 1 states "USTR and OPM had no record of approved outside employment during 3 fiscal years 1988, 1989, and 1990 covered by our review." This is inconsistent with the rest of the report which concludes that USTR approved outside employment for one official.

Now on pp. 7 and 54.

See comment 4.

5. Finally, the Report states, at pages 10 and 74, that USTR did not use financial disclosure reports to determine if approval was obtained where required. Although this was my response to your questionnaire, this conveys an inaccurate impression. USTR is a very small agency with only 154 permanent employees. Of these, 32 file public financial disclosure forms (SF-278) and 66 file confidential financial disclosure reports (OA-39). None of these forms listed any outside employment. Thus, there was no reason to use these forms to determine whether approval was required.

We are, of course, committed to ensuring that employees are fully aware of the restrictions on outside employment. All employees are required to have annual ethics training where they are specifically instructed that advanced approval must be obtained for any outside employment. In addition, new entrants are given an ethics briefing where this instruction is also given. In this way, we believe all employees are aware of the rule. In fact, we have had several inquiries about the possibility of outside employment, but none have actually materialized.

If you have any further questions, please call me at 395-3150.

Sincerely,

Barbara L. Gordon

Barbara L. Gordon
Assistant General Counsel

The following are GAO's comments on the U. S. Trade Representative's December 2, 1991, letter.

GAO Comments

1. As USTR recognized in its comments, we did not limit our review at every agency to just those employees on board as of October 1990. The USTR employee in question is included in our report.

2. USTR does not require by regulation that the data in question be furnished by employees requesting agency approval of outside activities or that employees periodically update their requests. Our analysis was based on requirements documented in regulations and other written guidance to employees, and our report so indicates. However, we recognize that agency officials may on a case-by-case basis request employees to supply such information for initial approval and periodic update of approvals when it is determined to be needed. We revised our report to recognize that this practice sometimes occurred.

3. This footnote has been clarified.

4. We found no USTR written requirement during our review for officials who review disclosure reports to determine if required approvals of any outside activities indicated in such reports were obtained. Although USTR determined that none of the forms indicated outside employment, we believe that the requirement to regularly use disclosure reports to verify outside employment approvals is a useful control.

Comments From the Merit Systems Protection Board

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

The General Counsel

November 25, 1991

Dear Mr. Fogel:

This is in response to the draft GAO report entitled: Employee Conduct Standards. We believe that the report creates a misimpression of the Merit Systems Protection Board's outside employment policy. We appreciate this opportunity to correct that misimpression.

The MSPB is a small agency with two principal functions: to adjudicate Federal employee appeals and to conduct special studies of the civil service and other merit systems in the executive branch. The Board does not award any grants and does not regulate the private sector. As a result the possibility of conflicts of interest arising are relatively small. Nonetheless, and even though the Office of Government Ethics (OGE) does not require it, the Board has an active program designed to approve outside employment in advance.

Your report does not accurately reflect the dimensions of the MSPB's program. For example, in Table IV.2 the report suggests that the Board makes outside employment determinations without possession of essential information such as the name of the outside employer. This is not true. Our April 14, 1980, memorandum concerning outside employment requires employees to report "the entire circumstances" surrounding the receipt of compensation, including the source of the income. The source of income, of course, is the proposed employer. Moreover, a review of the employee requests and MSPB responses on outside employment, which GAO staff reviewed for this report, demonstrate that the Board had sufficient information to make accurate conflict of interest determinations on outside employment. Indeed, elsewhere in the report the MSPB is praised for the sensitivity it exhibits to potential conflicts of interest in approving requests for outside employment.

See comment 1.



The Bicentennial of the U.S. Constitution 1787-1987

**Appendix XI
Comments From the Merit Systems
Protection Board**

Mr. Richard L. Fogel
Assistant Comptroller General
Page 2

See comment 2.

Similarly, the report's speculation that MSPB's procedures would permit an employee to unintentionally violate the conflict of interest laws by assisting others in filing appeals to the Board is unfounded. No Board employee has ever engaged in such conduct, and the employees have received sufficient training to know that this type of activity is prohibited. For example, the Board's regulations at 5 CFR 1201.31(b) highlight potential conflict of interest problems in serving as an employee's representative, and 18 U.S.C. § 203 and § 205 prohibit compensated services for such activities. Beyond this, however, the Board's current practices would ensure that such proposed activity would be submitted to the Board's ethics officials for approval in advance. The report's contrary conclusion appears to be based on the premise that the MSPB does not have written guidelines requiring advance approval for all outside employment. While it is true that the Board's written guidelines could be interpreted to mean that not all types of outside employment must be approved in advance, the lack of explicit written guidelines does not mean that the MSPB does not require advance approval. Through training and through contacts with supervisors, Board employees are aware that all outside employment must be approved in advance. That this system is successful can be seen from the fact that there is no significant diversion from this practice in the requests for outside employment which were reviewed by GAO staff as part of this study.

See comment 3.

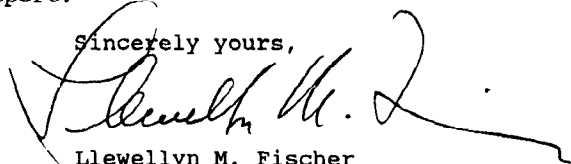
We also believe that the report is incorrect in asserting that the MSPB failed to implement an OGE recommendation to establish written policies on approval of outside activities. This assertion appears to be based on a misreading of OGE's August 2, 1988, letter reporting the results of its review of the MSPB's ethics program. In that letter, OGE recognized the Board's system requiring employees to obtain advance approval to engage in certain types of outside employment (a system which the GAO report does not appear to recognize), and "encourage[d]" the Board to extend the system to all outside employment. Nothing in OGE's letter suggested that the MSPB should establish any additional written policies on approval of outside employment. Because OGE did not recommend that the Board establish any new written policies, the comments concerning the Board's alleged failure to comply with OGE's recommendation should be deleted.

Appendix XI
Comments From the Merit Systems
Protection Board

Mr. Richard L. Fogel
Assistant Comptroller General
Page 3

Finally, in our view, the Board's system of approving outside employment in advance has been appropriate for an agency of about 300 employees with functions possessing little potential for conflicts of interest. We believe that the success of the system is borne out by its ease of administration and lack of significant problems. However, we are aware of the trends in ethics programs, even in small agencies, to formalize procedures. Accordingly, we are in the process of adopting many of the recommendations contained in your report.

Sincerely yours,



Llewellyn M. Fischer
General Counsel

Mr. Richard L. Fogel
Assistant Comptroller General
U.S. General Accounting Office
441 G Street NW.
Room 3858C
Washington, DC 20548

The following are GAO's comments on the Merit Systems Protection Board's November 21, 1991, letter.

GAO Comments

1. We changed table IV.2 to show this MSPB requirement. We agree that MSPB appropriately dealt with the requests we reviewed. However, we also found that MSPB could strengthen its approval policy by requiring in writing that employees obtain approval of their outside employment.

2. We clarified our report by deleting the hypothetical example and emphasizing the general shortcoming of MSPB's current approval policy. Namely, employees engaging in any outside activity are not required to obtain prior MSPB approval. Rather, under MSPB policy, employees receiving compensation for outside employment are to notify the designated MSPB ethics official. This notification is required only if the employee believes the situation might create a conflict of interest.

3. We revised our report to show that OGE encouraged rather than recommended MSPB to extend its approval requirements to all outside employment.

Comments From the Office of Personnel Management

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

NOV 25 1991

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
General Accounting Office
Washington, DC 20548

Dear Mr. Fogel:

Thank you for sharing with me your draft report entitled Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues. The Office of Personnel Management (OPM) is one of 11 agencies whose internal policies and practices on its employees' outside activities are discussed in the draft report. The draft report contains recommendations which will be made to the Director of the Office of Government Ethics (OGE).

The draft report includes some information which should be useful in the process of finalizing the "Outside Activities" provisions in the uniform standards of ethical conduct regulations being issued by OGE pursuant to Executive Order 12674, as amended. This information should also be useful to agencies as they develop regulations supplementing OGE's regulations. However, the draft report includes two erroneous findings about OPM's policies and practices concerning its employees' outside activities.

First, according to the draft report at page 44, "the number of employees who were approved for outside activities . . . [was] zero for OPM headquarters employees" during fiscal years 1988 through 1990. This finding is based on the GAO review team's random examination of the Official Personnel Folders of 149 of the more than 3000 employees at OPM headquarters, and 12 of those employees' public financial disclosure reports or confidential statements of employment and financial interests. The fact that the random sample yielded no approved requests, we suggest, does not lead to the conclusion that there were no approvals at OPM. Indeed, we know that such a conclusion would be inaccurate. What the GAO review team may have discovered is that OPM's internal instruction to file approval documents in the Official Personnel File (OPF) is not being complied with in all instances.

OPM's internal standards of conduct regulations and instructions contain notice and approval requirements for employees engaged in outside employment and activities. Those directives require OPM employees to obtain written approval before serving as members of committees or boards which plan or advise on training courses or programs offered by non-government organizations, especially when the courses or programs are designed for, or are of particular

See comment 1.

Now on p. 33.

**Appendix XII
Comments From the Office of Personnel
Management**

-2-

interest to, Federal employees; and before accepting appointments as faculty members for after-hours teaching. In addition, an employee who engages in any kind of outside paid employment on a substantially regular basis is required to notify his immediate supervisor as to the employment. Employees who engage in any kind of outside employment or activity are encouraged to obtain advance approval from their supervisors.

OPM employees are complying with these directives. Enclosed are copies of three memoranda from employees at OPM headquarters, submitted to their supervisors, which record their outside employment and activities during the period covered by the review. */ These records are being furnished merely as representative examples of compliance with OPM's notice and approval procedures, and to illustrate that, contrary to the finding in the draft report, there are such records at OPM.

In the course of obtaining the enclosed memoranda, we found that OPM's internal requirement for filing such documents in the employee's OPF is not always being followed. The OPF is a centrally maintained, permanent record. If filed in an employee's OPF, information about that particular employee's outside employment could be readily available as needed for a survey such as the one made by the GAO review team. However, the draft report has raised a question about the general effectiveness of having OPFs as designated repositories of this information. We will consider changing this policy.

See page 35.

Thus, we believe your report should show that, based upon the results of the sampling method used by GAO for review of outside activity requests at OPM, there appeared to be a lack of compliance with the requirement for filing records of outside employment and activities in employees' Official Personnel Folders. Such a finding is far different from the ones presented in the text and tables of the draft report, i.e., (1) that OPM did not have any records of approved outside employment at any time during fiscal years 1988 through 1990, and (2) that not a single OPM headquarters employee received approval for an outside activity during that period. Indeed, we urge that OPM be omitted from the tables in the final report, since the zero figure shown for OPM in the draft report is based on the incorrect conclusion that pertinent records do not exist within OPM.

See comment 2.

Now on pp. 12 and 55.

Second, the draft report finds, at pages 18, 19, and 75 through 78, that due to shortcomings in OPM's approval requirements, OPM had disciplined employees for engaging in outside activities more

*/ If these memoranda are included with this letter in the final report, OPM asks that identifying information be removed from them to protect the privacy of the employees to whom they pertain.

**Appendix XII
Comments From the Office of Personnel
Management**

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often than had most other agencies. The draft report cites five such cases which purportedly occurred at OPM during the 3-year period covered by the review, based on the GAO review team's examination of investigations done by OPM's Office of the Inspector General.

During the 3-year period covered by the review, there were two cases at OPM, not five, which involved matters within the scope of the draft report. In one case, an OPM supervisor was removed after he received a fee for appearing in court to testify in a divorce case on behalf of the ex-wife of a person whose retirement application was being adjudicated by employees working under the OPM supervisor. In the other case, an OPM psychologist was reprimanded for his outside work as a consultant to a company which developed an entrance examination being challenged by the Department of Justice.

It appears that the three additional cases were cited by mistake in the draft report. Officials in OPM's Office of the Inspector General (OIG) have advised that, in response to a general request in connection with this matter, they furnished the GAO review team information about five cases, involving six OPM employees, for fiscal years 1986 through 1990. Two of the five cases were the ones described above.

Of the other three cases, one involved an OPM employee who received counseling about a flyer he distributed to announce his new financial management consulting business. In the flyer, he had given the appearance of using his Government position for a private purpose, by stating: "I have over 30 years experience in financial management and procurement having been employed in the private sector by CPA firms and in the public sector by GAO, Defense, Navy, and OPM." Another case involved an OPM employee who resigned after he was investigated by the OPM OIG for misuse of Government time and property in connection with his private financial services firm. Neither of these two cases presented any issue within the scope of the GAO draft report. The remaining case, which involved two OPM employees and was investigated in early 1987, did not occur within the 3-year period covered by the draft report and, as found by the OPM OIG, indicated no violation of the regulations regarding outside activities.

These cases do not support the conclusion drawn in the introduction to the draft report at page 18 that the situations involved in these cases at OPM "might have been avoided with stronger approval requirements." Moreover, OPM's total of two disciplinary actions for unapproved outside activities is in line with the totals for such cases at the other agencies covered in the draft report.

See comment 3.
Now on p. 12.

**Appendix XII
Comments From the Office of Personnel
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Despite the confusion over the results of the review team's survey, we concur with the review team's observation that there is room for improvement in OPM's internal policies and practices regarding its employees' outside activities. The draft report is an impetus for improvement in this area here at OPM, and provides several starting points for such improvement to be made.

Thank you again for the opportunity to comment on the draft report.

Sincerely,



Constance Berry Newman
Director

See comment 4.

Enclosures

The following are GAO's comments on the Office of Personnel Management's November 25, 1991, letter.

GAO Comments

1. Our report at various places shows what we did to identify employees approved for outside activities by OPM and what we found as a result of our work. At the time of our review, OPM was unable to provide us with any specific records or information on approval of outside activities. We did not suggest in our report that employees were not complying with OPM's requirements. Rather, we were unable to locate any information at OPM to indicate that any of its employees had obtained approval to engage in outside activities. We included data in our report at the appropriate places on the three employees identified by OPM as engaging in outside activities. We also added comments to recognize that OPM believed that its system of filing outside activity approvals might be ineffective and might be changed.
2. Our report has been clarified as to the time period represented by the investigations. We requested data at all 11 agencies on investigations of employees' outside activities for the 5 calendar years 1986 through 1990. Thus, the data for OPM and other agencies were for a comparable period of time.
3. We disagree with OPM and believe that the data we obtained on investigations made of OPM employees' outside activities indicated that stronger approval requirements might have helped to prevent such investigations.
4. We have not included the enclosures, which were OPM records on employees' outside activities.

Comments From the Nuclear Regulatory Commission

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

November 20, 1991

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Fogel:

This is in response to your request of October 25, 1991 for the Nuclear Regulatory Commission's (NRC) comments on the draft report, entitled Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues. The NRC staff appreciates the opportunity to comment on the draft report and offers the following thoughts for your consideration.

The original draft report did not accurately describe the NRC regulations governing the approval of employee outside activities. At GAO's request we discussed the report with Mr. James T. Campbell, Assistant Director of your General Government Division, and provided him with informal comments. As a result of that conversation, Mr. Campbell submitted for our review revised pages. Those pages accurately describe the pertinent NRC regulations. Although the report summarizes NRC regulations, it does not describe NRC's implementation of those regulations. In our discussions with Mr. Campbell, we suggested that it would be useful if the report indicated that although the NRC regulations establish a process under which employees may receive approval for outside employment with an NRC licensee, or others affected by NRC decisions, in actuality the NRC rarely approves such requests, unless the employee wishes to teach at a university which has a NRC license.

Although you do not make such a recommendation, there are inferences throughout the report that GAO believes that agencies should require employees to obtain prior approval before engaging in any outside activity. In promulgating its outside employee approval regulation, the Commission rejected that approach. It determined that approval would not be required when the employee is engaged in activities, such as selling real estate or shoes, that would not present any potential conflicts of interest or appearances of impropriety. We commend this approach, believing that in such instances there is no compelling governmental

See pp. 6 and 48.

See comment 1.

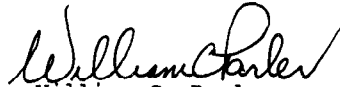
**Appendix XIII
Comments From the Nuclear Regulatory
Commission**

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interest suggesting the need for such a approval. If an employee is engaging in outside employment that does not present conflict of interest concerns, yet interferes with the employee's ability to perform his governmental duties satisfactorily, this should be dealt with as a fitness for duty issue, rather than as a conflict of interest matter.

We appreciate your consideration of these comments.

Sincerely,


William C. Parler
General Counsel

**Appendix XIII
Comments From the Nuclear Regulatory
Commission**

The following are GAO's comments on the Nuclear Regulatory Commission's November 20, 1991, letter.

GAO Comments

1. We have clarified our report at the appropriate places to present our view that agencies need to establish prior approval requirements on the basis of each agency's particular mission and operations. Thus, approval would not necessarily be required for all outside activities.

Comments From the Department of Health and Human Services

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

DEC 3 1991

Mr. Richard L. Fogel
Assistant Comptroller General
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Enclosed are the Department's comments on your draft report, "Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "R. Kusserow".

Richard P. Kusserow
Inspector General

Enclosure

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ON
THE GENERAL ACCOUNTING OFFICE'S DRAFT REPORT, "EMPLOYEE
CONDUCT STANDARDS: SOME OUTSIDE ACTIVITIES PRESENT
CONFLICT-OF-INTEREST ISSUES"

General Comments

The conclusions of the General Accounting Office (GAO) report indicate that the questionable outside activities presented the appearance of violations rather than actual violations of the standards of conduct. The Department recognizes that appearances can sometimes be damaging as actual violations and cautions its personnel to be cognizant of such situations and to avoid them.

The Department is sensitive to the importance of ethical standards for Federal employees. However, rules on outside activities need to take into consideration the importance of the effectiveness of interaction between Federal scientists and professionals with those in academia and industry.

The GAO report makes repeated references to the fact that the Department, its component agencies, and other agencies did not incorporate in its instructions aspects of a 1985 Office of Government Ethics (OGE) advisory opinion which restricted employees from engaging in outside activities. The Department recognizes that there is a difference of opinion between it and GAO in defining the job relatedness of outside activities. However, the Department defers comments at this time because it expects to receive in the near future the OGE report on OGE's recent audits of the National Institutes of Health (NIH) and the Alcohol, Drug Abuse, and Mental Health ethics programs. Moreover, the Department commented extensively on OGE's proposed executive branch-wide standards of conduct and OGE is reconsidering its position in light of our views and those of other science-oriented agencies. NIH has further initiated a thorough review of its instructions on outside activities. The final decisions on changes that will be made throughout the Department will await the OGE report and guidance to ensure that these views can be incorporated into the new policies. The HHS Office of the Special Counsel for Ethics is also completing an independent review of these matters and has established a permanent branch at NIH which, among other functions, will assist NIH in drafting new policies that meet its concerns as well as those of OGE and GAO.

Further, the report does not recognize the full emphasis the Food and Drug Administration (FDA) places on preventing conflict-of-interest situations from arising. To ensure that activities are carried out in a professional, objective manner that is free of even the appearance of conflict-of-interest, FDA has established extensive regulations governing employee

See comment 1.

**Appendix XIV
Comments From the Department of Health
and Human Services**

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comment 2.

behavior in a number of areas, including outside employment. FDA established a comprehensive Ethics Awareness Training program for all employees and managers which discusses the regulations and the responsibilities and procedures required when an individual engages in outside activities or when other potential conflict situations arise. In addition, FDA requires an annual review of each outside activity to ensure that it continues to comply with the regulations.

comment 3.

FDA's supplementary regulations regarding outside activities extend to all employees regardless of grade or position. Each employee must obtain approval for the specific activity from his or her supervisor. It is the supervisor's responsibility to assure that the proposed activity does not violate the conflict-of-interest regulations, which include those prohibiting private gain from public office. FDA uses the Department of Health and Human Services forms for documenting the outside activity approval by the first-line supervisor and reviewing officials. The documentation is carefully reviewed by FDA to ensure that there is indeed no conflict with the employee's official duties. As part of the review process, FDA notifies supervisors whenever potential conflicts are noted and recommends disapproval of the activity when warranted.

The Department believes the preventive activities of FDA greatly augment the regulations and assure that FDA employees comply with conflict-of-interest regulations. NIH and the Centers for Disease Control (CDC) have similar rules and procedures.

Technical Comments

on p. 7.

1. On page 10, paragraph 1, the statement that "Specifically, ethics officials in three agencies (SEC, OSTR, and FDA) said they do not use the reports to determine if supervisory approval was obtained when required" is incorrect. FDA uses the financial disclosure reports to monitor approval of outside activities. Note that Table IV.1, page 61, question 7, correctly indicates that this is a FDA practice.

comment 4

on p. 8

2. On page 12, paragraph 3. Although a statement referring to the issue does not appear on the DHHS Form 520, FDA is acutely aware of the potential for a conflict-of-interest situation to arise and stresses this concern in the Ethics Awareness Training program. The report would more accurately reflect the FDA practices if it included a discussion about the training program.

comment 5.

Now on p. 9.

3. On page 13, paragraph 2, GAO states that "We believe that NIH, FDA, CDC, NIST and EPA approved some speaking and consulting activities that were contrary to federal standard-of-conduct regulations and OGE's 1985 guidance." During the informal discussions regarding the report, GAO identified several specific instances where they questioned whether an outside activity could be in conflict with the individual's official duties. FDA reviewed each of the cases and concluded that, while it could appear that there was a conflict in a few instances, there was no conflict. All of the cases were reviewed and approved in accordance with FDA standards and regulations. FDA's comments on each of the cases in question have been provided to GAO.

See comment 6.

Now on p. 12.

4. On page 20, paragraph 1, GAO reported that FDA has not implemented OGE's recommendations. FDA has not formally responded to the OGE recommendations, but has implemented guidance from the report. For example, OGE recommended that FDA direct employees to more adequately describe financial interests and outside activities in confidential reports and DHHS Form 520 when filed. As indicated above, FDA established an Ethics Awareness Training program that specifically addresses the issues and details what should be included in confidential reports, identifies the proper procedures for filing and approving outside activity requests, and informs employees of their reporting requirements. All FDA employees are required to take the Ethics Awareness Training. Furthermore, FDA closely examines the submissions to assure compliance with the regulations. OGE also recommended that FDA provide more explicit training for managers. This is now a part of FDA's continuing education efforts.

See comment 7

Now on p. 38.

5. On page 53, paragraph 1, the last sentence incorrectly includes FDA as an agency that ". . . required approvals only for outside teaching . . . that would tend to be done more frequently by higher-graded employees. . . ." FDA requires approval for all outside activities. This is stated correctly in the following paragraph.

See comment 8.

Now on p. 39.

6. On page 55, the table identifies 714 Senior Executive Service (SES) employees at NIH. The actual SES work force at NIH is 190 or 1.2 percent of the total work force. Consequently, these figures should be corrected, or clarified if the statistical group includes non-SES employees.

See comment 9.

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Comments From the Department of Health
and Human Services

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ow on p. 41.
ee comment 9.
ow on p. 43.
ee comment 10.
ow on p. 53.
ee comment 11.
ow on p. 63.
ee comment 12.
ow on p. 64.
ee comment 13.
ow on p. 67.
ee comment 14.
ow on p. 67.
ee comment 15.

7. On page 57, Table III.4, the section Number of Employees with OA. Under the column SES, the number of employees listed for FDA should read 4, not 73.
8. On page 59, Table III.5, "Paid and Unpaid Approved OA by Agency," indicates that for NIH out of a universe of 1,109 approved outside activities, 208 or 19 percent were compensated and 901 or 81 percent were not. The latter category should be correctly identified as compensated activities where there was no specific amount of compensation stated. It should be noted that prior to September 1990, NIH employees were not required to list compensation for activities with not-for-profit organizations.
9. On page 72, Table IV.2, Information Item 3, "Outside employer address." There should be an "x" in the FDA column for this item. The DHHS Form 520 requires the information.
10. On page 93, the report inaccurately states that NIH guidance permits lecturing on non-public information. The NIH instruction states clearly that any material discussed must have already been publicly presented.
11. On page 94, "Speeches, Consulting, and Some Other Paid Activities Focused on Agencies' Responsibilities." While FDA does allow employees to participate in outside activities that could relate to the agency's mission, in no case is a FDA employee permitted to engage in an outside activity that is a part of his or her official duties or focus specifically on those duties. It is the supervisor's responsibility to determine whether requested activities relate to official duties and to caution the employee not to release non-public information or to discuss FDA business if the requested activity appears to be similar to official duties. The Ethics Awareness Training specifically addresses this issue.
12. Page 101, "FDA Examples." As discussed with the evaluators, these were reviewed by FDA and determined to have adhered to the prescribed regulations. Also, the last sentence of the first paragraph, should read ". . . (2) his official duties related to . . . FDA . . . ," instead of CDC.
13. On page 102, paragraph 3, the last sentence should read, "In addition, related FDA records" instead of CDC.

The following are GAO's comments on the Department of Health and Human Services' December 3, 1991, letter.

GAO Comments

1. In December 1991, in commenting on our draft report, OGE provided us with a copy of its report to HHS in which OGE said that HHS' regulation is contrary to OGE policy. OGE questioned numerous approved outside activities of NIH employees and said NIH's system of approval of outside activities is in need of great reform. OGE made recommendations to the HH designated agency ethics officials and the NIH Director regarding employees' outside activities. OGE also recommended that NIH establish an office of ethics to administer and monitor the NIH ethics program. We have updated our report to show the results of OGE's recent review of the NIH ethics program.

2. Our review was limited to employees' outside activities and did not include an evaluation of agencies' ethics programs. Therefore, we have not attempted to describe for FDA, or the other selected agencies, their ethics training programs. We describe, particularly in table IV.1, the FDA controls applicable to outside activities. However, as shown on page 51, FDA did not always follow required prior approval procedures; more than half of the approvals we reviewed were made after the outside employment was to begin.

3. We do not argue that HHS' procedures are as it has described them. Our work showed, however, that the procedures were not always followed. In more than half of the cases we reviewed, supervisors did not approve such activities until after they began or were completed. This late review and approval of outside activities indicated that supervisors did not always ensure compliance with guidance that says employees are not to be compensated by other organizations for speeches made outside the agency that focus specifically on the agency's responsibilities, policies, and programs.

4. We revised the sentence in question to exclude reference to FDA.

5. As stated above, the scope of our review did not encompass agencies' ethics training programs.

6. We did not determine that actual conflicts of interest existed. Rather, on the basis of the information we gathered, the employees' outside activities appeared to have violated federal standard-of-conduct regulations.

Although the FDA approvals may have been consistent with agency standards and regulations, we found that HHS regulations applicable to FDA employees were not in accord with OGE guidance. OGE has since reported similar findings to HHS.

7. We revised our report to show that FDA had not responded to OGE's recommendations. As mentioned previously, the information we gathered indicated that FDA did not comply with prior approval requirements for most of the outside activities that we reviewed at that agency.

8. We deleted the reference to FDA in this paragraph.

9. Our numbers represent more than just FDA's senior executives, as indicated in table III.3, note a. We included both SES employees and employees paid at rates equivalent to SES pay rates, such as FDA commissioned medical officers.

10. The employees shown as unpaid in the table were shown as unpaid in the related NIH documents, and the column is appropriately labeled. We are aware that NIH did not until recently require that the amounts of compensation be reported by employees requesting approval of outside activities. However, employees were required before September 1990 to indicate whether they would be compensated.

11. We revised table IV.2 to show that FDA requires this information.

12. We deleted the statement that NIH guidance permits lecturing on nonpublic information. We also clarified our point that NIH guidance differs from the OGE guidance on distinguishing between matters that are official duties and outside activities.

13. As stated previously, the evidence we gathered did not support HHS's contention regarding FDA's monitoring of employees' outside activities. Such activities were often approved after they began, which is contrary to HHS policy, and in some cases were also approved when they appeared to be contrary to OGE guidance.

14. As indicated above, we believe that the regulations used by FDA are contrary to OGE guidance. We corrected the reference to CDC.

15. Corrected.

Major Contributors to This Report

**General Government
Division, Washington,
D.C.**

James T. Campbell, Assistant Director, Federal Human
Resource Management Issues
Gary V. Lawson, Evaluator-in-Charge
Jeffrey W. Dawson, Evaluator
Annette A. Hartenstein, Evaluator
Sandra M. Scantlebury, Evaluator
William R. Chatlos, Technical Advisor

Atlanta Regional Office

Magdalene Harris, Evaluator

**Office of General
Counsel, Washington,
D.C.**

Kathleen A. Gilhooly, Senior Attorney

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

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