



April 21, 2017

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

Dear Ranking Member Cummings:

This letter responds on behalf of the U.S. Office of Government Ethics (OGE) to your letter dated April 7, 2017, regarding a senior White House appointee.

At the outset, it is necessary to describe the relevant financial disclosure and conflict of interest processes in order to provide context for OGE's response. Senior White House appointees are required to file new entrant public financial disclosure reports within 30 days of being appointed.¹ The White House is authorized to grant an extension, upon a showing of good cause, of up to 45 days and, upon a written showing of good cause, a second extension of up to 45 additional days.² The approval of a second extension must be in writing.³ After appointees file their reports, the White House's ethics officials review the reports for compliance with financial disclosure requirements and substantive ethics requirements.⁴ White House ethics officials are expected to work with an appointee to resolve any potential conflicts of interest that they identify through their review of the financial disclosure reports.⁵

Only after the White House has certified the appointee's financial disclosure report does the White House transmit the report to OGE.⁶ OGE then conducts a second-level review.⁷ As part of this review process, OGE advises White House ethics officials of any deficiencies in an appointee's compliance with financial disclosure requirements. In turn, the White House ethics officials work with the appointee who filed the report in order to resolve them. It is normal for an appointee to make changes to a financial disclosure report and to add information during this review process. After the report is revised, OGE seeks information about how the White House is addressing any potential conflicts of interest identified during the review process. OGE then

¹ 5 U.S.C. app. § 101(a).

² 5 C.F.R. § 2634.201(f).

³ *Id.*

⁴ 5 U.S.C. app. § 106(a); 5 C.F.R. § 2634.605.

⁵ 5 U.S.C. app. § 106(a); 5 C.F.R. § 2634.605.

⁶ 5 U.S.C. app. § 103(c).

⁷ 5 U.S.C. app. § 106(a).



makes a determination regarding apparent compliance with financial disclosure and conflict of interest rules and either certifies or declines to certify the financial disclosure report.⁸

This process can take weeks and sometimes months. Until the process has been completed, OGE is not in a position to make the compliance determination discussed in the preceding paragraph. Preliminary communications and documents related to the review of financial disclosure reports are generally not releasable because they contain highly personal financial information that is subject to Exemption (b)(6) under the Freedom of Information Act.⁹ The releasable information that feeds into OGE's determination is generally captured in the final revised financial disclosure report, which is publicly available.¹⁰ Members of Congress and the public can obtain copies of the financial disclosure report by filing an OGE Form 201 with OGE or the White House.¹¹

OGE recently received the financial disclosure report of the senior White House appointee identified in your letter. OGE has begun its review of this report, but the process is in its early stages. OGE is still gathering information and seeking any needed revisions to the report. OGE has not yet made the compliance determination discussed above as to this official or, for that matter, most other senior White House appointees. Nevertheless, it is possible to share an overview of applicable conflict of interest requirements and processes.

The primary criminal conflict of interest statute prohibits senior White House appointees and other executive branch employees from participating personally and substantially in particular matters directly and predictably affecting their financial interests.¹² Among other things, this prohibition extends to the financial interests of companies in which they have ownership interests.¹³ It is important to note, however, that the criminal conflict of interest statute is not a prohibited holdings statute. Instead, it requires an appointee to refrain from participating in the matter affecting the appointee's financial interests or the financial interests of persons whose interests are imputed to the appointee.¹⁴ Thus, the most common mechanism for resolving conflicts of interest is to recuse from particular matters that would affect the appointee's personal and imputed financial interests.

Recusal is not the only means for resolving conflicts of interest. Other remedies for resolving conflicts of interest can include reassignment, divestiture, waiver, or the establishment of a qualified blind or diversified trust.¹⁵ In some cases, an employee can rely on an exemption to

⁸ 5 U.S.C. app. § 106(b); 5 C.F.R. § 2634.605.

⁹ 5 U.S.C. § 552(b)(6).

¹⁰ 5 U.S.C. app. § 105.

¹¹ 5 C.F.R. § 2634.603.

¹² See 18 U.S.C. § 208(a).

¹³ See, e.g., OGE Informal Advisory Opinion 92 x 2 (1992).

¹⁴ See 18 U.S.C. § 208(a).

¹⁵ See, e.g., Memo from Amy L. Comstock, Director, U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Nominee Ethics Agreements*, DO-01-013 (2001) (discussing remedies for conflicts of interest in the analogous case of Presidential nominees); 5 C.F.R. pt. 2634, subpt. D.

the criminal conflict of interest statute.¹⁶ OGE and the Department of Justice have established regulatory exemptions for certain types of financial interests because the conflicts of interest they pose are too remote or inconsequential to be likely to affect the integrity of an employee's service to the government.¹⁷

The White House can direct an appointee to sell, or otherwise divest, an asset in order to avoid a conflict of interest or the appearance of one.¹⁸ If selling the asset will result in a capital gain, the appointee may be eligible for a Certificate of Divestiture to offset the tax burden of complying with the government's conflict of interest requirements.¹⁹ (Note, however, that a special government employee is not eligible for a Certificate of Divestiture.²⁰) The appointee, the appointee's spouse, and the appointee's dependent or minor child are eligible to receive a Certificate of Divestiture.²¹ A trustee is also eligible when the asset is held in a trust, except in certain cases in which ineligible persons are also beneficiaries of the trust.²² The person requesting a Certificate of Divestiture must commit in writing to divesting the asset even if a Certificate of Divestiture is not issued.²³

To request a Certificate of Divestiture, the appointee must contact the White House's ethics officials.²⁴ If the White House supports the appointee's request, the ethics officials will assemble the necessary documents and submit the request to OGE.²⁵ OGE will then review the submission to determine whether (1) the request meets applicable procedural requirements and (2) divestiture is reasonably necessary to avoid a conflict of interest.²⁶ OGE will either issue a Certificate of Divestiture to the appointee through the White House's ethics officials or notify the ethics officials that the request has been denied.²⁷ Over the past three years, this process has on average taken three weeks, except in cases when OGE has been asked to expedite the process.

The appointee is advised not to sell the asset until the agency ethics official provides the appointee with the Certificate of Divestiture or notifies the appointee that OGE has denied the request.²⁸ A Certificate of Divestiture is valid only if obtained before selling an asset.²⁹ Within 60 days of the sale, the appointee must reinvest the proceeds of the sale in "permitted property."³⁰ Permitted property is limited to United States government obligations (*i.e.*,

¹⁶ 18 U.S.C. § 208(b)(2).

¹⁷ See 5 C.F.R. pt. 2640, subpt. B.

¹⁸ See 5 C.F.R. § 2635.403(b).

¹⁹ 26 U.S.C. § 1043; 5 C.F.R. pt. 2634, subpt. J.

²⁰ 5 C.F.R. § 2634.1003.

²¹ *Id.*

²² *Id.*

²³ 5 C.F.R. § 2634.1005(a)(3).

²⁴ See Memo from Robert I. Cusick, Director, U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Procedures for Requesting a Certificate of Divestiture*, DO-06-030 (2006).

²⁵ See OGE Program Advisory PA-16-04 (2016).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ 5 C.F.R. § 2634.1006(a).

Treasuries), diversified mutual funds, and diversified exchange-traded funds.³¹ For this purpose, “diversified” means that the fund does not have a stated policy of concentrating in any industry, business, single country other than the United States, or the bonds of a single state within the United States.³² The appointee will need to pay the deferred capital gains when the appointee later sells the permitted property.³³

Pending the divestiture, the appointee must recuse from particular matters in which the asset poses a conflict of interest. Recusal is achieved by not participating in a particular matter.³⁴ A White House appointee is not normally required to file a disqualification statement or other document regarding the recusal.³⁵ Thus, the important requirement is only that the appointee not participate.

In your letter, you indicate that a company’s most recent annual report is dated February 13, 2017, and lists this appointee as a “Director.”³⁶ Your letter also indicates that her financial disclosure report indicates that she terminated her positions as President and CEO in January 2017.³⁷ At this time, OGE does not know whether these two documents refer to different positions or whether one of these documents is potentially incorrect. If her financial disclosure report needs correction, OGE will ask her to update the report. It also is possible that she may have terminated all of her positions with the company in January 2017, in which case the company’s annual report may be somewhat imprecise as to the timing of her separation.

If, for some reason, she has retained a position as an officer or director, several ethics provisions must be considered. One criminal statute prohibits her from representing any person, including a business entity, before the government.³⁸ Another statute, which entails civil monetary penalties, prohibits her from receiving compensation for service as an officer or member of the board of any association, corporation, or other entity.³⁹ If her government salary is set above the level of pay associated with a GS-9 position, an Executive Order prohibits her from earning any income for services outside the government.⁴⁰ Therefore, it is unlikely that she is receiving compensation for any outside position with this company, and she has likely been advised to refrain from representing that company or its clients before the government. OGE has no information to indicate otherwise.

³¹ 5 C.F.R. § 2634.1003.

³² *Id.*; 5 C.F.R. § 2640.102(a).

³³ 26 U.S.C. § 1043(c).

³⁴ 5 C.F.R. § 2640.103(d).

³⁵ 5 C.F.R. § 2640.103(d)(2). *But see* Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112–105, § 17, 126 Stat. 291, 303-04 (requiring notice of recusal in the limited case of an appointee negotiating for post-government employment).

³⁶ Letter from Rep. Elijah E. Cummings, Comm. on Oversight and Gov’t Reform, House of Representatives, to Walter M. Shaub, Jr., Director, U.S. Office of Gov’t Ethics 2 (Apr. 7, 2017).

³⁷ *Id.*

³⁸ See 18 U.S.C. § 205.

³⁹ 5 U.S.C. app. § 502(a)(4).

⁴⁰ Exec. Order No. 12,674, pt. 1, § 102 (Apr. 12, 1989), *modified by* Exec. Order No. 12,731 (Oct. 17, 1990).

Whether or not she retains a position with this company, a recent Executive Order prohibits her from participating for two years from the date of her appointment in any particular matter involving specific parties in which that company, or any client she served in the two-year period prior to her appointment, is a party or represents a party.⁴¹ However, this recent Executive Order authorizes the White House to issue a waiver for any reason.⁴² In addition, this recent Executive Order has eliminated a transparency provision that existed in the earlier Executive Order that it replaced.⁴³ As a result, OGE does not know whether she has received a waiver under this recent Executive Order.

She is also subject to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct).⁴⁴ The Standards of Conduct establish an additional recusal obligation as to any particular matter involving specific parties in which a former employer or client she served in the past year is a party or represents a party.⁴⁵ Notwithstanding this recusal obligation, the White House could authorize her to participate in such a matter under certain circumstances.⁴⁶ Unlike a waiver under the Executive Order, an authorization under this Standards of Conduct provision is available only if she meets a certain legal standard. The authorization is made in writing only at the discretion of the issuing official or upon request by the employee, and copies of such authorizations are not usually provided to OGE.

As your letter points out, the Standards of Conduct would also prohibit misuse of position to benefit this company, its clients, or her former clients.⁴⁷ However, OGE is not aware of information that would suggest she has misused her position to benefit any of them or provide them access to White House officials.

In response to your question regarding a Certificates of Divestiture, a Certificate of Divestiture has not been issued to this appointee. Although this circumstance may suggest that she has not divested her interest in her company, it is not conclusive. An appointee is not required to obtain a Certificate of Divestiture when divesting any asset. An appointee is, however, required to file a periodic transaction report (OGE Form 278-T) within 30 days of any sale of a covered asset, such as this company, and that report is ultimately transmitted to OGE for review and second-level certification.⁴⁸ As of this date, OGE has not received from the White House a periodic transaction report reflecting the sale of this asset. It is possible that she filed one and the White House has not yet completed its review of that report.

⁴¹ Exec. Order No. 13,770, § 1, par. 6 (Jan. 28, 2017).

⁴² *Id.* § 3(a).

⁴³ Compare Exec. Order No. 13,490, § 4(c)(5) (Jan. 21, 2009), with Exec. Order No. 13,770, § 4(c). See also U.S. OFFICE OF GOV'T ETHICS, ANNUAL REPORT ON EXECUTIVE ORDER 13490, at 10 (2010) ("All waivers are made publicly available on either the OGE website or the White House website when issued."), <https://goo.gl/iXIotZ>.

⁴⁴ See 5 C.F.R. pt. 2635.

⁴⁵ 5 C.F.R. § 2635.502.

⁴⁶ 5 C.F.R. § 2635.502(d).

⁴⁷ 5 C.F.R. § 2635.702.

⁴⁸ 5 U.S.C. app. § 103(l).

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I hope this explanation addresses the issues your letter raises. If your staff has questions, OGE's Chief of Staff, Shelley K. Finlayson, is available to assist them. She can be reached at 202-482-9292.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter M. Shaub, Jr.", written in a cursive style.

Walter M. Shaub, Jr.
Director

cc: The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515