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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

November 20, 2016

The Honorable Walter M. Shaub
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005

Dear Director Shaub:

As the Ranking Member of the Senate Committee with jurisdiction over the Office of Government Ethics, I write today to request your assistance with understanding how your office plans to address the potential for conflicts of interest in the upcoming Administration of President-elect Donald Trump.

As you know, President-elect Trump is a businessman with considerable financial interests in the United States and around the world. The full extent of his financial interests remains unclear, in part because he was the first presidential candidate in modern history to decline to release his tax returns to the American public. These unique circumstances raise important questions about how the Administration of President-elect Trump will avoid conflicts of interest and ensure integrity of executive branch programs and operations.

As you know, the Office of Government Ethics oversees the executive branch ethics program and works with ethics practitioners in more than 130 agencies to implement this effort. The Office of Government Ethics also plays a critical role in the 2016 Presidential Transition by making sure that prospective nominees are free of conflicts of interest. This role includes providing guidance regarding the federal laws that prohibit certain officials from participating personally and substantially in an official capacity in any matter that will have a direct and predictable effect on their financial interests. Unless an official receives a waiver or an exemption applies, the official with a conflict of interest must disqualify him or herself from participating in the matter. Criminal penalties may apply to officials who violate this statute.

As the independent ethics watchdog of the federal government, the Office of Government Ethics must provide assurances to the American people that your agency will advance a strong ethics program that holds the Administration of President-elect Trump accountable for any conflicts of interest. To better understand how your office plans to address the potential for conflicts of interest in the upcoming Administration of

President-elect Donald Trump, I ask that you please provide the following information by December 5, 2016:

1. **Handling of Trump Organization** – For constitutional reasons, the President is exempt from certain conflict of interest rules, such as the prohibition on acting in matters affecting his personal financial interest or representing his own claims and business interests to the government. However, the President remains subject to many related statutes, such as prohibitions on bribery and embezzlement. President-elect Trump and the Trump Organization reportedly have business with the federal government, lease federal property, and have regulatory and enforcement matters presently being adjudicated by federal government agencies.
    a. What guidance has Office of Government Ethics (OGE) provided to agency ethics officials regarding the protocols for handling matters directly affecting President-elect Trump and the Trump Organization?
    b. Will OGE recommend safeguards to protect federal officials from fear of reprisal in dealings with the Trump Organization?
    c. Will OGE take steps to ensure Trump Organization employees do not have privileged access to decision-makers or access to nonpublic government information?
    d. President-elect Trump reportedly intends to transfer control of the Trump Organization to his three oldest children.[1] Does this transfer meet the standards of a qualified blind trust, as defined under the Ethics in Government Act?

2. **President-elect Trump's Financial Conflicts** – President-elect Trump's previous financial disclosure reports reveal potential financial conflicts of interest in several areas of the economy and foreign relations. While Presidents are exempt from conflict of interest rules for constitutional reasons, Presidents of both parties, dating back to Lyndon Johnson, have taken significant steps to avoid the appearance of a conflict.[2]
    a. Please identify the information that must be included in the President's annual financial disclosure, when a President must file his first disclosure, and whether the public will receive access to these disclosures.
    b. What steps does OGE require a President to take if any conflicts of interest are apparent on the face of a financial disclosure?
    c. What steps will OGE require to *prevent* acquisition of new conflicts by President-elect Trump and his Trump Organization?

3. **Transition Team** – President-elect Trump's three oldest children are members of the Presidential Transition team while continuing to serve as executives and

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[1] *Three Trump Children Seen Managing President-Elect's Company*, REUTERS (Nov. 11, 2016).

[2] CYNTHIA BROWN AND L. PAIGE WHITAKER, CONG. RESEARCH SERV., LEGAL SIDEBAR, CONFLICTS OF INTEREST AND THE PRESIDENCY (2016).

officers in the Trump Organization.[3] As leaders on the Transition team, his children will be party to sensitive government information and empowered to discuss matters of government policy and operations with the leadership of several federal agencies.

   a. What guidance has OGE provided to agency ethics officials regarding the handling of non-transition business communications from Mr. Trump's children and the Trump Organization during the transition?

4. **President-elect Trump's Oldest Children and Jared Kushner** – President-elect Trump has reportedly expressed interest in obtaining security clearances for his three oldest children and his son-in-law, Jared Kushner.[4]
   a. What guidance has OGE provided to President-elect Trump's oldest children and Mr. Kushner concerning the management of their conflicts of interest while participating in executive branch deliberations?
   b. Does President-elect Trump have legal authority to appoint these individuals to government positions?
   c. Are President-elect Trump's children and Mr. Kushner exempt from conflict of interest laws?
   d. Has OGE provided guidance to these individuals to ensure they disqualify themselves from matters in which they have financial interests and to prevent inadvertent disclosure of confidential government information?

5. **Ongoing Financial Disclosure Obligations** – President-elect Trump has disclosed a large portfolio of financial interests that include securities interests in several investment companies.[5] President-elect Trump will be under an ongoing obligation to file public reports of any securities transactions so that the public may understand his financial interests.
   a. What guidance has OGE provided to President-elect Trump to ensure he continues to file any required financial disclosures of securities transactions?
   b. How often will President-elect Trump be required to file such disclosures?
   c. Will OGE or the White House Counsel be responsible for assessing fines for any late filings?

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[3] Brian Naylor & Barbara Sprunt, *From Lobbyists to Loyalists, See Who's on Donald Trump's Transition Team*, NPR (Nov. 16, 2016).

[4] Jim Acosta et al., *Trump Transition Team Asked about Security Clearance for His Children*, CNN (Nov. 15, 2016).

[5] Gregor Aisch et al., *What's in Donald Trump's 104-Page Financial Disclosure?*, N.Y. TIMES (May 18, 2016).

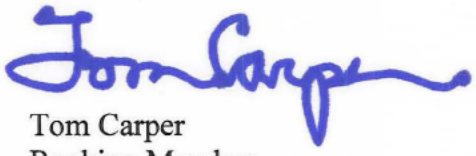
6. **Outside Fiduciary Positions** – President-elect Trump has disclosed that he serves as chairman or board member of hundreds of companies.[6] As a board member or officer, he owes those entities and their investors' legal fiduciary duties that have the potential to interfere with his duties as president.
    a. What guidance has OGE provided to President-elect Trump regarding his outside positions and the steps he should take to address potential conflicts of interest?
    b. What safeguards will OGE establish to prevent conflicts of interest between his legal fiduciary obligations to these companies and his legal obligations and duties as President?

7. **Misuse of Image** – Longstanding White House policy across Administrations prohibits the use of the President's name or image in advertising or for the endorsement of any commercial product or service.
    a. What guidance has OGE provided to President-elect Trump regarding the use of his name and image for the endorsement of the Trump Organization or his children's businesses?

If you or members of your staff have any questions about this request, please feel free to contact Roberto Berrios of my staff at (202) 224-2627. Thank you very much for your attention to this matter.

With best personal regards, I am

Sincerely yours,



Tom Carper
Ranking Member

cc: The Honorable Ron Johnson
Chairman

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[6] David Goldman, *Donald Trump's 500 Businesses Would Pose 'Unprecedented Ethical Dilemma'*, CNN (Mar. 17, 2016).

MARK R. WARNER
VIRGINIA

COMMITTEES:
FINANCE
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET
INTELLIGENCE
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510–4606

January 4, 2017

Ms. Shelley K. Finlayson
Legislative Affairs Liaison
U.S. Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005-3917

Dear Ms. Finlayson,

I have recently been contacted by (b)(6) [redacted] of Radford, Virginia. Attached please find a copy of that correspondence.

I would appreciate it if you could look into this matter and provide me with an appropriate response. Thank you.

Sincerely,

Mark R Warner

MARK R. WARNER
United States Senator

MRW/lm

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(b)(6) [redacted] (8333832)

Contact Information:

(b)(6) [redacted]

Incoming Message:

Date: 12/1/2016

I am disappointed in the U. S. Government Ethics Office for sending sarcastic tweets. I don't know what these people make, but I do know that taxpayers pay their salary. As a taxpayer, I expect federal employees to act like grownups. This behavior would rarely be tolerated in the private sector. So, I suggest that the person(s) responsible for this behavior be fired, with cause, no severance and no unemployment benefits. I am tired of political candidates, political parties, sniping, and nastiness. I exercised my right to vote in the presidential election because I consider it a right and a responsibility, not because either candidate was easy to stomach. And I don't want to see sniping tweets from government employees. As my elected representatives I hope that you will insist on mature behavior and hard work from federal employees.

United States Senate
WASHINGTON, DC 20510

January 5, 2017

Mr. Walter M. Schaub, Jr.
Director
Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005

Dear Mr. Shaub:

We write today to request information on your agency's implementation of the Ethics in Government Act and how the process to address potential conflicts of interest is proceeding with respect to President-elect Donald Trump's intended cabinet nominees.

As you are aware, President-elect Trump has announced the names of those he intends to nominate to serve in his Cabinet, and the Majority in the Senate has announced hearing dates for many of them, starting as early as Tuesday of next week. Under the precedent established by previous Presidential transitions, these hearings have not been conducted unless and until the nominees have submitted a substantial set of materials to the Senate, including a signed letter from the Office of Government Ethics certifying that there are no unresolved conflict of interest. Nominees must, at or before the commencement of the first Senate committee hearing to consider their nomination, file an updated statement with the appropriate Senate committee. Failure to adhere to these long-standing conflict of interest requirements may subject an appointee to criminal or civil penalties under federal law.

Many of the President-elect's Cabinet nominees are extremely wealthy individuals with complex financial situations. In the past, similarly situated Cabinet nominees have taken many months to complete and execute an ethics agreement to bring them into compliance with the Ethics in Government Act and federal criminal conflict of interest law. For example, it has been widely reported that Penny Pritzker's ethics agreement took six months to complete.

The law contemplates an expedited review of financial disclosure statements in circumstances such as a presidential transition. But even under these circumstances, neither your office nor the nominees are exempt from the requirements of the law. We are concerned that, in a rush to schedule numerous hearings all at once next week, pressure may be put on your office to rush through your legally required reviews in a way that could compromise full compliance with the law.

To that end, we would appreciate if you would tell us whether you have been asked to conduct an expedited review of a financial disclosure statement under a timeline you believe would not allow you to fulfill your responsibilities under the Ethics in Government Act.

We appreciate the important role your office places in assuring that public servants remain free from conflicts of interest and that public service remains a public trust. It is important that Congress supports your office's ability to fulfill its responsibilities under the Ethics in Government Act and neither accepts nor participates in any inappropriate pressure on you to limit the execution of your responsibilities. We would appreciate a response to this letter as rapidly as possible, and no later than 48 hours prior to the commencement of any confirmation hearings.

Thank you very much for your attention to this matter.

Sincerely,

Charles E. Schumer
United States Senator

Elizabeth Warren
United States Senator

United States Senate
WASHINGTON, DC 20510

January 12, 2017

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW
Washington, D.C. 20005

Dear Mr. Shaub:

Thank you for your continuing efforts to ensure Senate committees, like the Senate Environment and Public Works Committee [EPW] on which we serve, have the information we need to review potential conflicts of interest faced by nominees of President-elect Trump.

We are in receipt of the Office of Government Ethics [OGE] certified financial disclosure report [Form 278] of Edward Scott Pruitt, nominee to be the Administrator of the Environmental Protection Agency [EPA]. After reviewing Mr. Pruitt's information, we are concerned that the record presented may not provide a complete picture of ethical issues faced by this nominee.

Since the Supreme Court's decision in *Citizens United*, we have entered into an unprecedented and dangerous time in which massive and often anonymous corporate political spending threatens to corrupt our government. OGE's ethics review focuses primarily on a nominee's personal financial interests, and appears not to address a nominee's history of political solicitations and activity. Corporations spend their money to get results, so it is now more important than ever that we have a full disclosure of a nominee's ties to the industries he or she will be charged with regulating. This is particularly important where a nominee may have solicited or raised "dark money" from interests to which they thus may be beholden.

During his tenure as Attorney General of Oklahoma, Mr. Pruitt has blurred the distinction between official and political actions, often at the behest of corporations he will regulate if confirmed to lead EPA. While the disclosures Mr. Pruitt made to OGE may be sufficient to ascertain his personal financial conflicts of interest, they do not document conflicts he may have as a result of political activities. Public reporting based on documents produced by Freedom of Information Act requests illustrate how Mr. Pruitt and members of his staff have worked closely with fossil fuel lobbyists to craft his office's official positions. Public reporting has also identified numerous potential conflicts of interest not disclosed on his Form 278 or addressed in his ethics agreement. For example:

- Pruitt indicated on his Form 278 that he has served in various positions, including Chairman, of the Rule of Law Defense Fund [RLDF] since 2014. Because RLDF is organized under section 501(c)(4) of the Internal Revenue Code, it can receive unlimited contributions from individuals, corporations, and partnerships and need not disclose the identities of its donors, donors who may have been solicited directly by Mr. Pruitt in exchange for the RLDF advocating certain positions.

- Although Mr. Pruitt served as Chairman of the Republican Attorney Generals Association [RAGA] for two terms, his affiliation was not listed on his OGE disclosures. Since 2014, RAGA has received nearly $4 million from fossil fuel-related entities, many of which are either companies regulated by EPA or industry trade associations.[1] According to campaign finance records and the RLDF's 990s, hundreds of thousands of dollars have passed between the RLDF and RAGA. Recently released emails show that RAGA has provided services such as chartered airplane flights to its members. Mr. Pruitt's OGE disclosures do not include information about any gifts or in-kind donations Mr. Pruitt received from RAGA or other groups with which he's been involved.
- It has been reported that Mr. Pruitt is, or has been, affiliated with at least three other political action committees [PACs]: Liberty 2.0, Oklahoma Strong Leadership, and Scott Pruitt for Attorney General. These PACs have received contributions from numerous corporations that are regulated by EPA.[2] Many of these are challenging EPA standards in court along with Mr. Pruitt. Mr. Pruitt's OGE disclosures do not include any of this information.[3]

To better understand the types of information Mr. Pruitt is required to disclose and the potential conflicts of interest that may remain outstanding, we would appreciate answers to the following questions:

- Did Mr. Pruitt provide OGE any information about the identity of RLDF donors, amounts contributed, and any promises made or actions taken by him or the RLDF in exchange for donations made to it?
- Did Mr. Pruitt provide OGE any information about his positions with RAGA, any role he played soliciting money for RAGA, what resulted from those solicitations, or any promises made or actions taken by him or RAGA in exchange for donations made to it?
- Did Mr. Pruitt provide OGE with any information about gifts, such as any RAGA-sponsored chartered flights he may have been on?
- Did Mr. Pruitt disclose contributions to section 527 PACs operating on his behalf?
- Does OGE require nominees to provide information about the types of groups described above as part of its vetting process? If so, is OGE satisfied that it has received complete disclosures from Mr. Pruitt? Is OGE aware of any other avenues that will require Mr.

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[1] These include Devon Energy, ExxonMobil, Koch Industries, Murray Energy, and Southern Company, and several industry trade associations, such as the American Petroleum Institute, American Fuel and Petrochemical Manufacturers, and National Mining Association. All of these entities have been involved in litigation Mr. Pruitt has pursued against the EPA and representatives from at least three had private meetings with Republican Attorneys General and staff at RAGA events.

[2] Murray Energy was the leading contributor to Liberty 2.0 in the 2016 election cycle and executives from Devon Energy and Alliance Resources maxed out to Oklahoma Strong Leadership in 2016. Devon Energy, Koch Industries, Arch Coal, and ExxonMobil all contributed thousands to Scott Pruitt for Attorney General when he was last up for reelection during the 2014 cycle.

[3] Just last week we learned that a new 501(c)(4) organization, Protecting America Now, has formed specifically to support Mr. Pruitt's confirmation. This new dark money organization is promising anonymity to donors who contribute to its efforts on behalf of Mr. Pruitt. With so many fossil fuel interests having publicly supported to Mr. Pruitt's political organizations in the past, it would come as little surprise if many of these same interests are now supporting his nomination anonymously.

Pruitt to disclose this information to EPA's Designated Agency Ethics Official during his tenure as Administrator, if confirmed?

For your information, attached to this letter is a letter we are sending today to EPA requesting additional information on its recusal and waiver process. The EPW Committee has scheduled Mr. Pruitt's confirmation hearing for January 18th. Accordingly, we respectfully request responses to these questions prior to the date of the hearing.

Sincerely,

Thomas R. Carper
United States Senator

Sheldon Whitehouse
United States Senator

Benjamin L. Cardin
United States Senator

Bernard Sanders
United States Senator

Jeffrey A. Merkley
United States Senator

Kirsten Gillibrand
United States Senator

Cory A. Booker
United States Senator

Edward J. Markey
United States Senator

Tammy Duckworth
United States Senator

Enclosure: letter to Kevin Minoli, Designated Agency Ethics Official, U.S. Environmental Protection Agency

LAMAR ALEXANDER, TENNESSEE, CHAIRMAN

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http://help.senate.gov

United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

January 6, 2017

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, DC 20005

Dear Director Shaub:

I write to request information regarding the status of your ethics review of Elisabeth ("Betsy") DeVos, President-elect Trump's designee to be Secretary of the Department of Education. The Senate Health, Education, Labor, and Pensions ("HELP") Committee is scheduled to hold a confirmation hearing on Ms. DeVos on Wednesday, January 11th.

Only in rare instances has the Senate HELP Committee held a confirmation hearing without first receiving a letter from the Office of Government Ethics (OGE) explaining the steps the nominee will take under an ethics agreement to address financial conflicts as required by law, as well as a certified financial disclosure form (OGE-278). In fact, all of President Obama's Cabinet nominees in HELP's jurisdiction provided certified OGE-278s and ethics agreements prior to their hearings.

Given Ms. DeVos' very significant financial resources and the high position of public trust to which she will be nominated, it is essential that our Committee fully understand in advance of the hearing what are the potential conflicts of interest and the steps she will take in order to comply with federal ethics laws and regulations.

Earlier this week, the nominee provided answers to the questions posed on the HELP Committee questionnaire. While that document makes significant disclosures, it has made me further question the status of the OGE process. It is my understanding that a nominee submitting a financial disclosure form is the first step in an ethics review. The financial disclosure form then undergoes an ethics review by the agency to which the nominee is being nominated. The nominee must enter into a formal, signed agreement with the agency's ethics official to resolve any "actual or apparent" conflicts of interest, and have his or her disclosure and agreement certified by the OGE.

These ethics agreements are critically important, as they bind nominees to any necessary recusals, divestitures, resignations, waivers, qualified trusts, outside earned income limitations,

and resolve severance and other payments. It is the nominee's pledge to abide by the specific steps in the ethics agreement. OGE's certification that those steps will resolve any financial conflicts is critical in order for the Senate to fully consider a nomination.

Given the nominee's significant assets and potential conflicts, I am seeking a better understanding regarding where the nominee stands in the process and seeking answers to the following questions:

1. Have OGE and the Department of Education received all the necessary information from Mrs. DeVos?
2. Has the report been filed with OGE?
3. Has an ethics agreement been completed?
4. Has OGE reviewed and certified both Ms. DeVos' financial disclosure form (OGE-278) and ethics agreement?
5. Are there outstanding ethics issues that still need to be resolved?
6. Can you provide an estimate of how long it will take to reach and certify an agreement?

I would appreciate any information you can share about the timing and status of the DeVos review. Thank you for your immediate attention to this matter.

Sincerely,

Patty Murray

Patty Murray
United States Senator

Cc: The Honorable Lamar Alexander
United States Senator

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FIFTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051

http://oversight.house.gov

January 12, 2017

The Honorable Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue NW
Washington, D.C. 20005

Dear Director Shaub:

On December 19, 2015, the Committee requested information related to the Office of Government Ethics' publicly-released guidance and other public interactions. The Committee's questions about blurring the line between public relations and official ethics guidance have resurfaced in the wake of OGE's communications with the incoming administration on ethics questions via Twitter and through the press.

On November 30, 2016, the OGE official Twitter account issued a series of tweets in response to the President-elect's announcement that he will address potential conflicts of interest related to his business interests and personal financial assets. The public OGE account tweeted:

> .@realDonaldTrump OGE is delighted that you've decided to divest your businesses. Right decision!
>
> .@realDonalTrump [*sic*] As we discussed with your counsel, divestiture is the way to resolve these conflicts
>
> .@realDonaldTrump this aligns with OGE opinion that POTUS should act as if 18 USC 208 applies. bit.ly/2fRpIG0
>
> .@realDonaldTrump Bravo! Only way to resolve these conflicts is to divest. Good call!
>
> .@realDonaldTrump this divestiture does what handing over control could never have done.
>
> .@realDonaldTrump – we told your counsel we'd sing your praises if you divested, we meant it.
>
> .@realDonaldTrump OGE applauds the "total" divestiture decision. Bravo!

> .@realDonaldTrump Brilliant! Divestiture is good for you, very good for America!
>
> .@realDonaldTrump We can't repeat enough how good this total divestiture will be.[1]

It was not clear whether the tweets constituted official OGE guidance or something less formal. It is clear, however, the tweets publicized private discussions with the President-elect's counsel. The tweets also created the appearance that OGE approved the President-elect's divestiture plan, which caused further confusion.

The line between official OGE policy and informal commentary was also blurred in May 2015. At that time, OGE offered public comments in response to former Secretary of State Hillary Clinton's failure to disclose honoraria paid to the Clinton Foundation in return for speeches made by her or her husband while she was Secretary of State. Specifically, OGE spokesman Vincent Salamone issued the following statement:

> Disclosure of speaking fees is not required when a public filer or the filer's spouse is acting as an agent of an organization and payment is made directly to that organization. The rule is different when the speaking is done in a personal capacity and the fees are directed or donated to charity, in which case disclosure would be required.[2]

The commentary offered in response to the Clinton case created confusion. Your agency had not conducted any investigation of the circumstances of the speeches that would have allowed it to determine whether the Clintons were acting as agents of the Clinton Foundation. Ethics experts stated that there was little evidence the speeches had anything to do with the Clinton Foundation.[3] The Office of Government Ethics also declined to comment when asked by the press whether this exception has previously appeared in the agency's public guidance or regulations.[4]

Your agency's mission is to provide clear ethics guidance, not engage in public relations. The Committee is thus continuing its examination of OGE's operations. OGE's statutory authorization lapsed at the end of fiscal year 2007 and the Committee has jurisdiction in the House of Representatives for reauthorizing the office. To help the Committee understand how you perceive OGE's role, among other things, please make yourself available for a transcribed interview with Committee staff as soon as possible, but no later than January 31, 2017. The Committee may also need to interview additional witnesses pursuant to this review.

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[1] Office of Gov't Ethics (@OfficeGovEthics), Twitter (Nov. 30, 2016), https://twitter.com/OfficeGovEthics/status/804020923800158209.
[2] Josh Gerstein, *Hillary's speech disclosures come under fire*, POLITICO, May 20, 2015.
[3] *Id.*
[4] *Id.*

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

Please contact Jack Thorlin of the Committee staff at (202) 226-4240 to schedule the transcribed interview requested herein or with any questions regarding this request. Thank you for your attention to this matter.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

January 6, 2017

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Elizabeth Warren
United States Senator
317 Hart Senate Office Building
Washington, DC 20510

Dear Senators Schumer and Warren:

I write in response to your letter dated January 5, 2017, requesting information about the work of the U.S. Office of Government Ethics (OGE) to implement the Ethics in Government Act in connection with the individuals whom the President-elect has announced he intends to nominate.[1] This response addresses the issues your letter raises.

As OGE's Director, the announced hearing schedule for several nominees who have not completed the ethics review process is of great concern to me. This schedule has created undue pressure on OGE's staff and agency ethics officials to rush through these important reviews. More significantly, it has left some of the nominees with potentially unknown or unresolved ethics issues shortly before their scheduled hearings. I am not aware of any occasion in the four decades since OGE was established when the Senate held a confirmation hearing before the nominee had completed the ethics review process.

The Ethics in Government Act establishes a requirement that covered nominees to Presidentially-appointed, Senate-confirmed positions must obtain OGE's certification of their financial disclosure reports.[2] That this certification must be obtained prior to the hearing is evidenced by the additional requirement that nominees must "make current" their financial disclosure reports as to earned income by the date of the hearing.[3] Further evidence is found in the requirement that, "The [OGE] Director shall forward a copy of the report of each nominee to

[1] These individuals are not nominees because the President-elect cannot nominate them until he assumes the office of the President on January 20, 2017, but this letter refers to them as "nominees" for the sake of convenience.

[2] ~~*See* 5 C.F.R. §§101(b), 103(c), 106(b).~~ Corrected: *See* 5 U.S.C. app. §§ 101(b), 103(c), 106(b).

[3] ~~*See* 5 C.F.R. §§101(b).~~ Corrected: *See* 5 U.S.C. app. § 101(b)(1).

the congressional committee considering the nomination."[4] This timing is significant because the need for OGE's certification prior to the hearing creates the leverage necessary to compel nominees to disclose their assets fully and resolve all conflicts of interest.

The nominee financial disclosure process is complex. It involves assisting nominees to make complete and accurate disclosure of complex financial holdings and arrangements, identifying conflicts of interest uncovered through reviews of nominees' disclosures, and developing comprehensive written ethics agreements that resolve all identified conflicts of interest. This work is labor-intensive. As a result, the process is necessarily measured in weeks, not days. OGE's staff and agency ethics officials must have adequate opportunities to ensure that the Senate receives a complete accounting of each nominee's relevant financial interests and an explanation of the steps the nominee will take to resolve conflicts of interest. To provide a window into the complexity of this work, I have enclosed non-exhaustive checklists that we have developed for financial disclosure reviews, OGE's Nominee Ethics Guide, the Appendix to the Nominee Ethics Guide, and a copy of OGE's Ethics Agreement Guide.[5]

This normally intensive process has been further complicated by both the Senate hearing schedule and the announcement of nominees prior to consulting OGE for an evaluation of any ethics issues. In the past, the ethics work was fully completed prior to the announcement of nominees in the overwhelming majority of cases.[6] Under this traditional process, the names of nominees were not made public until OGE "precleared" them and, therefore, there was no opportunity for undue influence on the independent ethics review process.

During this Presidential transition, not all of the nominees presently scheduled for hearings have completed the ethics review process. In fact, OGE has not received even initial draft financial disclosure reports for some of the nominees scheduled for hearings. Despite the challenges current circumstances present, OGE's staff and agency ethics officials have been working diligently in an effort to deliver expedited reviews that meet the Senate's schedule. As a measure of our success, I note that we have precleared 58% of the financial disclosure reports that we have received from the President-elect's Transition Team. By the same date eight years ago, we had precleared 21% of the financial disclosure reports that we had received from the transition team.

We remain committed to completing the ethics work on each nominee as quickly as possible without compromising the integrity of our ethics work or the nominee's future activities on behalf the American public. I am optimistic that we will be able to continue expediting our ethics reviews of the President-elect's nominees to meet reasonable timeframes without sacrificing quality. It would, however, be cause for alarm if the Senate were to go forward with

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[4] 5 U.S.C. app. § 103(b).

[5] All of these materials are available on the Presidential transition page of OGE's website at the following address: https://www.oge.gov/web/oge.nsf/Resources/PRESIDENTIAL+TRANSITION.

[6] I have enclosed OGE's Transition Guide for more information on the process. A copy of this document is also available on the Presidential transition page of OGE's website.

hearings on nominees whose reports OGE has not certified. For as long as I remain Director, OGE's staff and agency ethics officials will not succumb to pressure to cut corners and ignore conflicts of interest.

Sincerely,

Walter M. Shaub, Jr.
Director

Enclosures

Cc: The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

January 9, 2017

The Honorable Patty Murray
Ranking Member
U.S. Senate Committee on Health, Education,
Labor and Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, DC 20510

Dear Ranking Member Murray:

This responds to your letter of January 7, 2017, requesting specific information regarding the ethics review of a named individual who has been announced as an intended nominee of the President-elect. The U.S. Office of Government Ethics (OGE) generally avoids providing information about individual nominees, but believes that the information regarding the nominee financial disclosure process provided below is responsive to your request.

It is necessary to avoid formally sharing information regarding OGE's ongoing work on individual nominations whenever releasing such information could undermine the purposes of the nominee ethics review process by slowing the effective review the financial disclosure report and completion of an ethics agreement to resolve identified conflicts of interest, potentially leading to the release of incomplete or incorrect information, or harming individual nominees and the overall recruitment for positions the President needs to fill in order to carry out his constitutional responsibilities. OGE adheres to this nondisclosure practice as closely as possible, particularly if other information may satisfy the interests underlying the request.

In this instance, the additional information about OGE's work and the nomination process provided below may address the concerns underlying your request. As explained below, if OGE has not transmitted a certified financial disclosure report and an ethics agreement to the Senate, the ethics work on a particular nomination has not been completed. Until all of the ethics work is completed, OGE cannot provide any assurance that conflicts of interest have been identified and resolved. Our responses to your specific questions below provide an explanation of the steps necessary to complete this important work.

QUESTIONS 1, 4 AND 5

A nominee submits a draft public financial disclosure report (OGE Form 278e) through OGE's electronic filing system (*Integrity*). Ethics officials review the draft financial disclosure report, ask follow-up questions, and provide instructions for revising

the report. Multiple rounds of questions and revisions are almost always needed before a report can be finalized to meet the complex disclosure requirements of the Ethics in Government Act. Once the report is complete, as a result of these revisions, OGE and agency ethics officials analyze the information contained in the report to identify potential conflicts of interest with the duties of the position for which the nominee is being nominated. OGE and agency ethics officials then work together to prepare an ethics agreement outlining steps the nominee must take to avoid conflicts.

Until OGE has precleared a report, OGE does not have all necessary information from a nominee and has not resolved all potential conflicts of interest. Often, there are delays while a nominee searches for information that OGE has requested, while a nominee enters the information into the draft financial disclosure report, while a nominee considers his or her willingness to take the steps necessary to resolve conflicts of interest, or while a nominee considers the ethics agreement that OGE and agency ethics officials have drafted. OGE's staff and agency ethics officials typically complete their work quickly. The two primary determinants in the timing of this process are the complexity of the nominee's holdings and the nominee's level of responsiveness to questions from agency ethics officials. However, the requirement to obtain OGE's certification prior to a hearing invariably provides the necessary leverage to secure the cooperation and legal compliance from nominees. Of course, that leverage is greatly diminished if a hearing is held prior to OGE's preclearance and subsequent certification.[1]

Once complete, OGE preclears (that is, tentatively approves) the nominee's report and ethics agreement. The nominee then finalizes the report and OGE is able to certify it. Shortly thereafter, the report is transmitted to the Senate.

QUESTION 2

Nominees submit their initial draft reports through OGE's electronic filing system, *Integrity*. The White House—or, during a Presidential transition, the transition team—receives the report and holds it until ready to release the report to OGE and the agency. The length of time that the White House or transition team holds the report before releasing it varies widely.

The date of initial submission of the draft is recorded as the date of "filing" on the face of the report. However, filing is actually a two-step process. *Integrity* does not allow the nominee to complete the process of "filing" until OGE has precleared (tentatively approved) the report. After OGE has precleared the report, the nominee must log back into the system and formally file the report by certifying that the information in the finalized report is correct. OGE then certifies the report and sends the report to the Senate. Therefore, until OGE has precleared a nominee's financial disclosure report, the

[1] In a letter last week, I indicated that I was unaware of any such thing ever having happened. Subsequent news reports have brought to my attention two instances, both of which occurred 16 years ago during the unusual circumstance of a Presidential transition that was delayed several weeks due to litigation. Even if there were any other instances, the fact that there may have been extremely rare breaches of the ethics process in the past is not a justification for a subsequent breach. (*See* http://www.politico.com/f/?id=00000159-70db-d0f6-a75d-ffffb2ae0002.)

nominee cannot comply with the legal requirement under 5 U.S.C. app. § 101(b)(2) to "file" the required report prior to a hearing, for the simple reason that the electronic filing system does not permit the nominee to complete the two-step process of "filing" that report until the report has been precleared.

QUESTION 3

The commitments that nominees make in their ethics agreements ensure that they will be able to carry out their duties as Presidential appointees. The ethics agreement outlines the specific steps a nominee will take to avoid conflicts of interest identified in his or her financial disclosure report. OGE and agency ethics officials draft each ethics agreement using standardized language from OGE's ethics agreement guide, which is tailored to the nominee's unique circumstances. The nominee must agree to take the steps outlined in the agreement to resolve his or her conflicts of interest; for example, resignation of positions, divestiture of holdings, or recusal. When OGE is satisfied that the report is complete and the ethics agreement has resolved all ethics issues, OGE preclears the report, the nominee finalizes it, and OGE is then able to certify it. Shortly thereafter, the report is transmitted to the Senate.

QUESTION 6

It is impossible to predict how long the process will take for any individual nominee because OGE is dependent on the nominee to provide needed information, respond to questions, and accept the terms of an ethics agreement. Many factors affect the timing of this process, including the responsiveness of the nominee. Another factor is the complexity and extent of the nominee's financial holdings and arrangements. It usually takes even the most responsive nominees time to gather the information they are required to produce, particularly if they are wealthy. Multiple rounds of questions and revisions are usually needed before a report can be finalized because the financial disclosure requirements in the Ethics in Government Act are quite complex. Some nominees also find it difficult to untangle their complex financial investments and employment arrangements quickly, especially if they wish to do so without incurring otherwise avoidable financial losses. For these reasons, the financial disclosure vetting process for a potential nominee can take weeks and, in the case of extremely wealthy individuals, sometimes months. Through focused effort, OGE's and agency ethics officials help nominees to complete their work on these reports as quickly as possible without sacrificing quality.

I hope you have found the information provided regarding the nominee financial disclosure process helpful. I also hope this response provides clarity about the significance of the Senate not having received a certified financial disclosure report and an ethics agreement from

OGE prior to holding a hearing on a nominee. If you require more detailed information about this specific named individual, the President-elect's transition team may be able to provide it.

Sincerely,

Walter M. Shaub, Jr.
Director

cc: The Honorable Lamar Alexander
Chairman

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

December 12, 2016

The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security
and Governmental Affairs
United States Senate
513 Hart Senate Office Building
Washington, DC 20510-6250

Dear Ranking Member Carper:

Thank for your letter dated November 20, 2016, regarding the role of the United States Office of Government Ethics (OGE) in preventing conflicts of interest. Your letter initially set a response deadline of December 5, 2016, but your office extended that deadline to December 12, 2016. I have enclosed OGEs responses to the questions posed in your letter.

If your staff has any questions or would like to discuss these responses, they may feel free to contact OGE's Chief of Staff, Shelley K. Finlayson, at (202) 482-9292.

Sincerely,

Walter M. Shaub, Jr.
Director

Enclosure

cc. The Honorable Ron Johnson
Chairman

RESPONSES TO THE QUESTIONS POSED IN THE NOVEMBER 20, 2016, LETTER OF THOMAS R. CARPER, RANKING MEMBER, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, UNITED STATES SENATE (DECEMBER 12, 2016)

Before responding to each of your questions, some background on OGE and its legal authorities may prove helpful. As your letter correctly indicates, OGE oversees the executive branch ethics program and works with ethics practitioners in more than 130 federal agencies to carry out its important mission of preventing conflicts of interest on the part of the approximately 2.7 million federal employees. However, OGE is not, as your letter indicates, an "independent" agency, with the protections and authorities[1] that such status would confer. Instead, OGE is an executive agency with the limited authorities that the Ethics in Government Act vests in it.[2]

As your letter suggests, OGE has some involvement in ethics issues related to Presidents. For example, the Stop Trading on Congressional Knowledge Act (STOCK Act) imposes limited ethics-related restrictions on the President.[3] The STOCK Act bars the President from: using nonpublic information for private profit; [4] engaging in insider trading;[5] participating in an initial public offering;[6] intentionally influencing an employment decision or practice of a private entity solely on the basis of partisan political affiliation;[7] and participating in a particular matter directly and predictably affecting the financial interests of any person with whom he has, or is negotiating for, an agreement of future employment or compensation.[8] In addition, OGE is authorized to review the President's annual, periodic transaction, and termination financial disclosure reports.[9] OGE's regulations on gifts from outside sources and gifts from employees also apply to the President.[10]

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[1] Such protections and authorities typically include: a restriction on removing the agency head, except for cause; a requirement that Congress be notified of the agency's independent budget request; and bypass authority for unrestricted communications with Congress. *See, e.g.,* 5 U.S.C. §§ 1202(d), 1204(k)-(l), 1205-1206, 1211(b), 1212(e), 1217-18 (2012); 5 U.S.C. app. §§ 3(b), 5, 6(f) (2012).

[2] 5 U.S.C. app. §§ 401-408 (2012).

[3] *See* STOCK Act, Pub. L. No. 112–105, § 2(3)(B)(i), 126 Stat. 291 (2012), as amended.

[4] *See* STOCK Act, Pub. L. No. 112–105, § 9(a), 126 Stat. 291 (2012) (linked to the subject of OGE's regulation on the misuse of nonpublic information at 5 C.F.R. § 2635.703 (2016)).

[5] *See* STOCK Act, Pub. L. No. 112–105, § 9(b), 126 Stat. 291 (2012).

[6] *See* STOCK Act, Pub. L. No. 112–105, § 12, 126 Stat. 291 (2012). However, note that, except for identifying and advising covered executive branch officials, OGE is not involved in interpreting section 12 because that section amends the Securities and Exchange Act of 1934, 15 U.S.C. 78u-1. *Cf.* OGE LA-14-02 (Mar. 7, 2014).

[7] *See* STOCK Act, Pub. L. No. 112–105, § 18, 126 Stat. 291 (2012), (codified at 18 U.S.C. § 227 (2012)). Note, however, that the Ethics in Government Act does not authorize OGE to make any finding that a criminal law has been violated. 5 U.S.C. app. § 402(f)(5).

[8] *See* STOCK Act, Pub. L. No. 112–105, § 17, 126 Stat. 291 (2012). Note that OGE has interpreted future employment or compensation as employment or compensation that will commence after a covered individual's government service has ended. *See* OGE LA-13-06 (Apr. 25, 2013); OGE LA-12-01 (Apr. 6, 2012).

[9] *See* 5 U.S.C. app. §§ 101(f)(1), 103(b), 106 (2012).

[10] *See* 5 C.F.R. 2635.102(h) (2016). Note that an exception to the gift rules generally permits the President to accept gifts from outside sources, but that exception does not except him from overarching considerations relating to the acceptance of gifts. *See* 5 C.F.R. §§ 2635.204(j), 2635.202(c) (2016); *see also* 81 Fed. Reg. 81,641, 81,648-49 (Nov. 18, 2016) (to be codified at 5 C.F.R. § 2635.201).

At the same time, OGE's involvement in ethics issues related to the President has significant limits. For example, although the bribery statute applies to the President, a 1980 memorandum of understanding between OGE and the U.S. Department of Justice withholds from OGE authority to issue binding opinions on the statutory prohibition against bribery.[11] Similarly, although the President is subject to the Emoluments Clause[12] and the Presidential Emoluments Clause[13] of the United States Constitution, OGE lacks authority and expertise to address issues arising under those clauses. In addition, provisions of the Ethics in Government Act limiting outside earned income and outside employment are inapplicable to the President because they employ the terms "officer" and "employee," which are subject to definitions that exclude the President in the same title of the United States Code.[14] Most important to the questions raised in your letter, the primary criminal conflicts of interest statute, 18 U.S.C. § 208, is inapplicable to the President, though OGE has for more than three decades asserted authority to make nonbinding recommendations regarding a President's conflicts of interest.[15]

While OGE's role in ethics issues involving the President is limited, OGE has significant involvement in ethics issues related to the President's nominees. The law requires OGE to review the financial disclosure reports of most Presidential nominees for civilian positions requiring Senate confirmation. If confirmed, these individuals become, upon assuming their government positions, subject to the criminal conflict of interest laws at 18 U.S.C. §§ 201-208, as well as the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) and other OGE regulations. Those who are not special government employees also become subject to 18 U.S.C. § 209.[16] Therefore, OGE reviews their financial disclosure reports not only for compliance with applicable disclosure requirements but also for conflicts of interest. OGE approaches this work from the perspective of managing risk, preparing ethics agreements to prescribe concrete steps they must take to reduce the potential for conflicts of interest to arise. OGE then transmits their nominee packages directly to the Senate.[17]

With this background, please find below OGE's responses to each of the questions posed in your November 20, 2016, letter.

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[11] See 18 U.S.C. § 201 (2012).
[12] U.S. Const., art. I, § 9, cl. 8.
[13] U.S. Const., art. II, § 1, cl. 7.
[14] *See* 5 U.S.C. §§ 2104 (officer), 2105 (employee); 5 U.S.C. app. §§ 501 (Outside earned income limitation), 502 (Limitations on outside employment), 505(2) (modifying the definitions of "officer" and "employee" in title 5, United States Code to exclude from those definitions special government employees for purposes of title V of the Ethics in Government Act).
[15] *See* 18 U.S.C. § 202(c) (2012); *see also* OGE opinion 83x16 (October 20, 1983) available online at https://www.oge.gov/web/oge.nsf/Legal%20Advisories/01F8E09232041FD185257E96005FBBE8/$FILE/64ed9ad9bd294b45a88ac8729a97968a3.pdf?open.
[16] For additional information, you may find it helpful to review OGE's Transition Guide, OGE's Nominee Ethics Guide, and the appendix to OGE's Nominee Ethics Guide. All three of these documents are available online at: https://www.oge.gov/web/oge.nsf/Resources/PRESIDENTIAL+TRANSITION.
[17] For more information about OGE's mission, structure and operations, you might find it useful to review OGE's newly released agency profile publication, which is available online at https://www.oge.gov/web/oge.nsf/0/AAD52FD1763F7B6A85258082005E8840/$FILE/OGE%20Agency%20Profile%20Book%20Spread%20View.pdf

QUESTION 1:

1. ***Handling of Trump Organization***—*For constitutional reasons, the President is exempt from certain conflict of interest rules, such as the prohibition on acting in matters affecting his personal financial interest or representing his own claims and business interests to the government. However, the President remains subject to many related statutes, such as prohibitions on bribery and embezzlement. President-elect Trump and the Trump Organization reportedly have business with the federal government, lease federal property, and have regulatory and enforcement matters presently being adjudicated by federal government agencies.*

   a. *What guidance has Office of Government Ethics (OGE) provided to agency ethics officials regarding the protocols for handling matters directly affecting President-elect Trump and the Trump Organization?*

For approximately the past 18 months, OGE has worked diligently to prepare the executive branch ethics community for the types of ethics issues that demand greater focus during a Presidential transition. As part of that preparation, OGE undertook significant regulatory reforms and provided extensive guidance and training to agency ethics officials across the executive branch. The effort included, among other measures, strengthening OGE's regulations on seeking employment, gifts from outside sources, and requirements for the executive branch ethics program.[18] 81 Fed. Reg. 48,687 (July 26, 2016); 81 Fed. Reg. 81,641 (November 18, 2016) (gifts from outside sources); and 81 Fed. Reg. 36,193 (June 6, 2016) (ethics program requirements). The effort also included proposed revisions to OGE's financial disclosure regulations. 81 Fed. Reg. 69,204 (October 5, 2016). In addition, OGE developed and distributed a number of new guidance and resource materials to ethics officials on topics such as nominee financial disclosure, ethics agreements, and post-employment restrictions.[19] OGE provided extensive training to agency ethics officials on ethics issues related to the transition, including: a three-day training event regarding the Presidential transition with over 500 in-person participants and thousands of online viewers; a full day of financial disclosure training, with separate tracks for beginner and advanced reviewers; and a transition readiness program, comprising six distance learning events. This transition-specific training was in addition to the regular training that OGE presents in order to ensure that agency ethics officials have the requisite skills to support executive branch officials. In fiscal year 2016, OGE received nearly 7,000 registrations for its training courses, and recorded sessions from its past training events were viewed online over 20,000 times across the year.

OGE also worked extensively with the nonpartisan Partnership for Public Service and a number of agency service providers to advance the Partnership's transition readiness project. This project involved the development of guidance, training, and an expansive database of resource materials[20] for the transition teams of both major party Presidential candidates. In

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[18] Significantly, OGE's regulatory revisions to ethics program requirements included expanded ethics training requirements for executive branch employees, with specific emphasis on impartiality and misuse of position.

[19] These materials are all available on OGE's website at www.oge.gov.

[20] For additional information, you may want to review the Partnership for Public Service's Center for Presidential Transition online at http://presidentialtransition.org/.

conjunction with this project, OGE met separately with each of the two transition teams and provided additional technical information and training on establishing transition procedures and operating *Integrity*,[21] OGE's electronic public financial disclosure filing system. OGE also developed a page on its website dedicated to the Presidential transition, which is linked through a prominent banner on the homepage of its website.[22] OGE contributed other information and materials to websites operated by the General Services Administration, as well.[23]

b. Will OGE recommend safeguards to protect federal officials from fear of reprisal in dealings with the Trump Organization?

OGE believes that a strong ethical culture inherently depends on protecting whistleblowers. For this reason, OGE is supportive of the important work of the U.S. Office of Special Counsel, which is the agency authorized to investigate and administratively prosecute executive branch officials for whistleblower retaliation, and the U.S. Merit Systems Protection Board, which is the agency authorized to adjudicate claims of whistleblower retaliation.

c. Will OGE take steps to ensure Trump Organization employees do not have privileged access to decision-makers or access to nonpublic government information?

As an initial matter, it bears emphasizing that members of President-elect's Transition Team (PETT) will necessarily interact with executive branch officials, some of whom may have decision-making authority. Such interaction is not only permitted but encouraged by the authorities that establish processes for Presidential transitions.[24] Moreover, the PETT is not a federal agency and its members are not executive branch employees.[25] Therefore, the ethics restrictions applicable to federal employees are inapplicable to PETT members, and OGE has no authority over them.[26]

OGE is aware of a memorandum of understanding (MOU) between the Chief of Staff to the President and the Chair of the PETT that addresses the confidentiality of nonpublic government information. That agreement addresses the responsibilities of PETT members with regard to nonpublic information and related conflicts of interest.[27] The MOU also references a Code of Ethical Conduct for the transition, as well as the public disclosure requirements of the Presidential Transition Act, as amended.[28] OGE has no role in drafting either such an MOU or a

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[21] Available online at https://integrity.gov/efeds-login/ or simply integrity.gov.
[22] Available online at https://www.oge.gov/web/oge.nsf/Resources/PRESIDENTIAL+TRANSITION.
[23] Available online at https://presidentialtransition.usa.gov/.
[24] *See* Pub. L. No. 88-277 (1963), Pub. L. No. 94-499 (1976), Pub. L. No. 100-398 (1988), Pub. L. No. 106-293 (2000), Pub. L. No. 111-283 (2010), Pub. L. No. 114-136 (2016); Exec. Order 13,727 (May 6, 2016).
[25] *See* Pub. L. No. 88-277, § 3(a)(2) (1963); *see also* Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team, Letter for the Director, Office of Government Ethics, 12 Op. O.L.C. 264, 265 n.1, (Nov. 18, 1988).
[26] *See* 5 U.S.C. app. § 402(a) (2012).
[27] *See* Mem. of Understanding between Denis R. McDonough, Chief of Staff to the President, and Michael R. Pence, Chair of the President-elect's Transition Team (Nov. 15, 2016), available online at https://presidentialtransition.usa.gov/files/2015/11/16-11-15-Final-Signed-MOU.pdf.
[28] *See id.* In addition, the disclosure provisions of the Presidential Transition Act, as amended, require the PETT, as a condition of receiving funds and services from the government, to make public (1) the names and most recent employment of all transition personnel who are members of agency transition teams, and (2) information regarding the sources of funding that support the transition activities of each transition team member. Presidential Transition

transition code of ethical conduct. The Office of Management and Budget or the PETT may be able to supply additional information about these documents.

It is OGE's understanding that the requirements set forth in the MOU and the Code of Ethical Conduct are contractual and cannot be enforced against PETT members using the mechanisms generally applicable to federal employees. Federal employees who interact with the PETT, however, continue to be subject to the full range of executive branch ethics laws, including restrictions on the use of nonpublic information and the use of public office for private gain established in the Standards of Conduct.[29] Accordingly, federal employees may not provide PETT members with nonpublic information unless the requirements of the MOU and the Presidential Transition Act, as amended, have been met. Their employing agencies have authority to impose disciplinary sanctions for violations of these authorities.[30]

With regard to other potential contacts between outside organizations, such as the one mentioned in your question, executive branch employees are subject to requirements in the Standards of Conduct related to impartiality, misuse of position, and release of nonpublic information.[31] To ensure that employees comply with these requirements, OGE will continue providing training and guidance to the nearly 4,500 agency ethics officials in the executive branch, who in turn will continue to provide training and guidance to the 2.7 million federal employees in their agencies. OGE similarly supports Offices of Inspectors General through training and guidance related to the enforcement of ethics laws and regulations.

d. President-elect Trump reportedly intends to transfer control of the Trump Organization to his three oldest children. Does this transfer meet the standards of a qualified blind trust, as defined under the Ethics in Government Act?

OGE does not have any independent knowledge of facts that would either support or refute the premise of this question. As to the question itself, the Ethics in Government Act prescribes specific requirements for establishing a qualified blind trust.[32] Transferring operational control of a company to one's children would not constitute the establishment of a qualified blind trust, nor would it eliminate conflicts of interest under 18 U.S.C. § 208 if applicable.[33]

Act of 1963, 3 U.S.C. § 102 note, Sec. 6(b)(1), *amended by* Edward 'Ted' Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-136, 130 Stat. 301.

[29] *See* 5 C.F.R. §§ 2635.702-2635.703 (2016). In addition, the MOU states that a government employee may not allow the improper use of nonpublic information to further his or her own private interest or that of another. This provision is enforceable, through normal disciplinary procedures, by the employing agency of any employee who violates it.

[30] *See, e.g.,* 5 U.S.C. ch. 75 (2012).

[31] *See* 5 C.F.R. 2635, subparts E and G (2016).

[32] *See* 5 U.S.C. app. § 102(f) (2012).

[33] *Id.*

QUESTION 2:

2. ***President-elect Trump's Financial Conflicts***—*President-elect Trump's previous financial disclosure reports reveal potential financial conflicts of interest in several areas of the economy and foreign relations. While Presidents are exempt from conflict of interest rules for constitutional reasons, Presidents of both parties, dating back to Lyndon Johnson, have taken significant steps to avoid the appearance of a conflict.*

   a. *Please identify the information that must be included in the President's annual financial disclosure, when a President must file his first disclosure, and whether the public will receive access to these disclosures.*

The President-elect's first annual public financial disclosure report will be due on or before May 15, 2018.[34][35] Traditionally, Presidents voluntarily file an annual financial disclosure report by May 15 during their first year in office, but OGE does not know whether the President-elect will choose to adhere to that tradition. Because the STOCK Act requires that his annual public financial disclosure report be posted online, it will be posted on either OGE's website or the White House's website.[36] The items below describe the information that a President is required to disclose in an annual public financial disclosure report (OGE Form 278e).[37]

- *Filer's Positions Held Outside United States Government*

  Part 1 of the OGE Form 278e discloses positions that the filer held at any time during the reporting period (excluding positions with the United States Government). Positions are reportable even if the filer did not receive compensation. This section does not include the following: (1) positions with religious, social, fraternal, or political organizations; (2) positions solely of an honorary nature; (3) positions held as part of the filer's official duties with the United States Government; (4) mere membership in an organization; and (5) passive investment interests as a limited partner or non-managing member of a limited liability company.

[34] *See* 5 U.S.C. app. § 101(a) and (d) (2012).

[35] Note that in 2012 the STOCK Act amended the Ethics in Government Act, in part, by requiring Presidents to file periodic transaction reports in order to disclose each covered transaction. *See* 5 U.S.C. app. § 103(l) (2012). In the case of the President-elect, this requirement will apply only to transactions occurring on or after January 20, 2017. The deadline for disclosing each such transaction is "[n]ot later than 30 days after receiving notification of any transaction required to be reported under section 102(a)(5)(B), but in no case later than 45 days after such transaction." *Id.*

[36] *See* STOCK Act, Pub. L. No. 112–105, 126 Stat. 291, § 11(b) (2012), as amended by Pub. Law No. 113-7, § 1(b)(2) (2013). Note that the public posting requirement applies equally to periodic transaction reports. *Id.*

[37] 5 U.S.C. app. § 102 (2012); 5 C.F.R. part 2634, subpart C (2016).

- *Filer's Employment Assets & Income and Retirement Accounts*

  Part 2 of the OGE Form 278e discloses the following:

  - Sources of earned and other non-investment income of the filer totaling more than $200 during the reporting period (e.g., salary, fees, partnership share, honoraria, scholarships, and prizes); and

  - Assets related to the filer's business, employment, or other income-generating activities that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents).

  This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note that the type of income is not required to be identified if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF).

- *Filer's Employment Agreements and Arrangements*

  Part 3 of the OGE Form 278e discloses agreements and arrangements that the filer had during the reporting period with an employer or former employer (except the United States Government), such as the following:

  - Future employment;

  - Leave of absence;

  - Continuing payments from an employer, including severance and payments not yet received for previous work (excluding ordinary salary from a current employer);

  - Continuing participation in an employee welfare, retirement, or other benefit plan, such as pensions or a deferred compensation plan; and

  - Retention or disposition of employer-awarded equity, sharing in profits or carried interests (e.g., vested and unvested stock options, restricted stock, future share of a company's profits, etc.).

- *Spouse's Employment Assets & Income and Retirement Accounts*

  Part 5 of the OGE Form 278e discloses the following:

  - Sources of earned income (excluding honoraria) for the filer's spouse totaling more than $1,000 during the reporting period (e.g., salary, consulting fees, and partnership share);

  - Sources of honoraria for the filer's spouse greater than $200 during the reporting period; and

  - Assets related to the filer's spouse's employment, business activities, other income-generating activities that (1) ended the reporting period with a value greater than $1,000, or (2) produced more than $200 in income during the reporting period (e.g., equity in a business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents).

  Information disclosed in Part 5 does not include assets or income from United States Government employment or assets that were acquired separately from the filer's spouse's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note that the type of income is not required to be identified if the amount of income is $0 - $200 or if the asset qualifies as an EIF. Amounts of income are not required for a spouse's earned income (excluding honoraria).

- *Other Assets and Income*

  Part 6 of the OGE Form 278e discloses each asset, not already reported, that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in investment income during the reporting period. For purposes of the value and income thresholds, the filer aggregates the filer's interests with those of the filer's spouse and dependent children. This section does not include the following types of assets: (1) a personal residence (unless it was rented out during the reporting period); (2) income or retirement benefits associated with United States Government employment (e.g., Thrift Savings Plan); and (3) cash accounts (e.g., checking, savings, certificates of deposit, money market accounts, etc.) at a single financial institution with a value of $5,000 or less (unless more than $200 of income was produced). Additional exceptions apply. Note that the type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an EIF.

- *Transactions*

  Part 7 of the OGE Form 278e discloses purchases, sales, or exchanges of real property or securities in excess of $1,000 made on behalf of the filer, the filer's spouse or dependent child during the reporting period. This section does not include transactions that concern the following: (1) a personal residence, unless rented out; (2) cash accounts (e.g., checking, savings, certificates of deposit, money market accounts, etc.) and money market mutual funds; (3) Treasury bills, bonds, and notes; and (4) holdings within a federal Thrift Savings Plan account. Additional exceptions apply.

- *Liabilities*

  Part 8 of the OGE Form 278e discloses liabilities over $10,000 that the filer, the filer's spouse, or the filer's dependent child owed at any time during the reporting period. With regard to a President, this section does not include the following types of liabilities: (1) loans secured by a personal motor vehicle, household furniture, or appliances, unless the loan exceeds the item's purchase price; and (2) revolving charge accounts, such as credit card balances, if the outstanding liability did not exceed $10,000 at the end of the reporting period. Additional exceptions apply.

- *Gifts and Travel Reimbursements*

  Part 9 of the OGE Form 278e discloses:

  - Gifts totaling more than $375 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period; and

  - Travel reimbursements totaling more than $375 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.

  For purposes of this section, the filer need not aggregate any gift or travel reimbursement with a value of $150 or less. Regardless of the value, this section does not include the following items: (1) anything received from relatives; (2) anything received from the United States Government or from the District of Columbia, state, or local governments; (3) bequests and other forms of inheritance; (4) gifts and travel reimbursements given to the filer's agency in connection with the filer's official travel; (5) gifts of hospitality (food, lodging, entertainment, etc.) at the donor's residence or personal premises; and (6) anything received by the filer's spouse or dependent children totally independent of their relationship to the filer. Additional exceptions apply.

Note that annual filers are not required to complete Part 4 of the OGE Form 278e. Part 4 discloses sources (except the United States Government) that paid more than $5,000 in a

calendar year for the filer's services during any year of the reporting period. The filer discloses payments both from employers and from any clients to whom the filer personally provided services. The filer discloses a source even if the source made its payment to the filer's employer and not to the filer. The filer does not disclose a client's payment to the filer's employer if the filer did not provide the services for which the client is paying.

b. What steps does OGE require a President to take if any conflicts of interest are apparent on the face of a financial disclosure?

Congress amended 18 U.S.C. § 202 in 1989 to clarify that 18 U.S.C. § 208 does not apply to a President.[38] [39] Even prior to that amendment, OGE did not construe 18 U.SC. § 208 as applicable to a President.[40] Nevertheless, it has been the consistent policy of the executive branch that a President should conduct himself "as if" he were bound by this financial conflict of interest law.[41] Given the unique circumstances of the Presidency, OGE's view is that a President should comply with this law by divesting conflicting assets,[42] establishing a qualified blind trust,[43] or both. However, although every President in modern times has adopted OGE's recommended approach, OGE has no power to require adherence to this tradition.

c. What steps will OGE require to prevent acquisition of new conflicts by President-elect Trump and his Trump Organization?

Please refer to OGE's response to (2)(b), above.

QUESTION 3:

*3. **Transition Team**—President-elect Trump's three oldest children are members of the Presidential Transition team while continuing to serve as executives and officers in the Trump Organization. As leaders on the Transition team, his children will be party to*

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[38] *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, § 401 (1989); *see also* 18 U.S.C. § 202(c) (2012).

[39] Note that, as mentioned earlier, the STOCK Act separately imposes one limited conflict of interest restriction on the President. That law prohibits the President from participating in any particular matter directly and predictably affecting the financial interests of any person with whom he has, or is negotiating for, an agreement of future employment or compensation. STOCK Act, Pub. L. 112–105 at § 17. OGE has interpreted future employment or compensation as employment or compensation that will commence after a covered individual's government service has ended. *See* OGE LA-13-06 (Apr. 25, 2013); OGE LA-12-01 (Apr. 6, 2012). However, it is Congress, not OGE, that possesses authority to address violations of law by sitting Presidents. U.S. Const., art. II, § 4.

[40] *See* OGE Opinion 83 x 16 (Oct. 20, 1983). Setting aside constitutional arguments, the merits of which are the subject of differing views, the inapplicability of the prohibition under 18 U.S.C. § 208(a) stems from the statute's use of the terms "officer" and "employee," which are generally construed to have the meanings assigned in 5 U.S.C. §§ 2104-05. *See* Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team, 29 Op. O.L.C. 127, 128 (Jul. 22, 2005) ("Title 18 does not define 'officer' or 'employee,' but we have found the definitions in title 5 to be the most obvious source of a definition for title 18 purposes" (internal quotation marks omitted)); *see also* Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service, 26 Op. O.L.C. 32 (May 8, 2002) ("Because title 18 sets out no definition of 'officer' or 'employee,' we have looked to the definitions in title 5 as the most obvious source of a definition' for title 18 purposes" (internal quotation marks omitted)).

[41] *See* OGE Advisory 83 x 16 (Oct. 20, 1983) (and authorities cited therein).

[42] In lieu of a blind trust, the proceeds could be reinvested in diversified mutual funds. *See* 5 C.F.R. § 2640.201(a) (2016).

[43] *See* 5 U.S.C. app. § 102(f) (2012).

sensitive government information and empowered to discuss matters of government policy and operations with the leadership of several federal agencies.

a. What guidance has OGE provided to agency ethics officials regarding the handling of non-transition business communications from Mr. Trump's children and the Trump Organization during the transition?

As explained in response to Question 1(c), OGE lacks authority over the Presidential transition team and its members, but will continue to provide training and guidance to agency ethics officials regarding provisions of the Standards of Conduct related to impartiality, misuse of position, and release of nonpublic information.

QUESTION 4:

*4. **President-elect Trump's Oldest Children and Jared Kushner**—President-elect Trump has reportedly expressed interest in obtaining security clearances for his three oldest children and his son-in-law, Jared Kushner.*

a. What guidance has OGE provided to President-elect Trump's oldest children and Mr. Kushner concerning the management of their conflicts of interest while participating in executive branch deliberations?

To the best of OGE's knowledge, these individuals are private citizens who have not been appointed to positions as officers or employees of the federal executive branch. For this reason, the criminal conflicts of interest law, 18 U.S.C. § 208, is inapplicable to them. Please refer to OGE's response to Question 1(c) for discussion of documents governing their activities in the capacity of PETT members.

b. Does President-elect Trump have legal authority to appoint these individuals to government positions?

The Constitution of the United States authorizes the President to appoint officers and employees in the executive branch.[44] Various statutes and regulations outside OGE's purview may address the exercise of that authority.[45] The U.S. Department of Justice, the U.S. Office of Personnel Management, the U.S. Office of Special Counsel, and the U.S. Merit Systems Protection Board may have some role in interpreting such authorities.

c. Are President-elect Trump's children and Mr. Kushner exempt from conflict of interest laws?

Please refer to OGE's response to Question 4(a).

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[44] U.S. Const., art. II, § 2, cl. 2.
[45] *See, e.g.*, 5 U.S.C. § 3110 (2012).

d. Has OGE provided guidance to these individuals to ensure they disqualify themselves from matters in which they have financial interests and to prevent inadvertent disclosure of confidential government information?

Please refer to OGE's response to Question 4(a).

QUESTION 5:

5. ***Ongoing Financial Disclosure Obligations**—President-elect Trump has disclosed a large portfolio of financial interests that include securities interests in several investment companies. President-elect Trump will be under an ongoing obligation to file public reports of any securities transactions so that the public may understand his financial interests.*

a. What guidance has OGE provided to President-elect Trump to ensure he continues to file any required financial disclosures of securities transactions?

OGE provides assistance to the PETT and the White House. As part of this effort, OGE will be providing the PETT and, after January 20, 2016, the White House assistance in complying with applicable financial disclosure requirements. OGE has also made information available on its website in the form of legal advisories, a public financial disclosure guide, and training materials.[46] In addition, OGE's electronic filing system is available to assist public filers with satisfying public financial disclosure requirements.[47] A President's public financial disclosure reports are filed with OGE.[48]

b. How often will President-elect Trump be required to file such disclosures?

Annual public financial disclosure reports are filed annually on or before May 15 each year.[49] Periodic transaction reports are filed by the earlier of 45 days after the transaction or 30 days after receiving notification of the transaction.[50] Additional information regarding periodic

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[46] OGE's legal advisories are available online at https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories. OGE's online Public Financial Disclosure Guide is available online at https://www.oge.gov/Web/278eGuide.nsf. Examples of OGE's training materials are available online at https://www.youtube.com/user/OGEInstitute and https://plus.google.com/+OGEInstitute. Checklists for nominee financial disclosure reports, which would also be useful for a President's representatives, are available at https://www.oge.gov/Web/OGE.nsf/0/BC975C546E68A21C852580560045BE83/$FILE/Financial%20Disclosure%20Checklists.pdf. A guide for Presidential nominees and an appendix to that guide, both of which contain information that would be useful for a President's representatives are available at https://www.oge.gov/Web/OGE.nsf/0/908088E45E5A64778525801B00590DD5/$FILE/Final%20Nomination%20Guide%20Spreads%20Optimized%20Web.pdf and https://www.oge.gov/Web/OGE.nsf/0/0EA56347F998FFA78525801B0058E0F9/$FILE/Final%20Appendix%20Spreads%20Web%20.pdf, respectively. A guide for the transition team is available online at https://www.oge.gov/Web/OGE.nsf/0/915128106F6180848525801B0059371D/$FILE/Transition%20Guide%20Spread.pdf.

[47] That system is available online at https://integrity.gov/efeds-login/.

[48] 5 U.S.C. app. § 103(b) (2012).

[49] 5 U.S.C. app. § 101(c) (2012).

[50] 5 U.S.C. app. § 103(l) (2012).

transaction reports can be found in OGE's legal advisories.[51] Termination financial disclosure reports are filed on or before the thirtieth day after terminating employment in a filing position.[52]

c. Will OGE or the White House Counsel be responsible for assessing fines for any late filings?

Having never encountered this issue, OGE does not currently know whether a sitting President can be assessed late filing fees.[53] If so, the Counsel to the President is responsible for collecting them.[54]

QUESTION 6:

*6. **Outside Fiduciary Positions**—President-elect Trump has disclosed that he serves as chairman or board member of hundreds of companies. As a board member or officer, he owes those entities and their investors legal fiduciary duties that have the potential to interfere with his duties as president.*

a. What guidance has OGE provided to President-elect Trump regarding his outside positions and the steps he should take to address potential conflicts of interest?

The President-elect has indicated publicly that he will announce a plan for resolving his conflicts of interest on December 15, 2016. Although OGE offered to provide recommendations, OGE has not been involved in developing that plan. Please refer to Question 2(b) for discussion of OGE's views on conflicts of interest.

b. What safeguards will OGE establish to prevent conflicts of interest between his legal fiduciary obligations to these companies and his legal obligations and duties as President?

Please refer to Question 2(b).

*7. **Misuse of Image**—Longstanding White House policy across Administrations prohibits the use of the President's name or image in advertising or for the endorsement of any commercial product or service.*

a. What guidance has OGE provided to President-elect Trump regarding the use of his name and image for the endorsement of the Trump Organization or his children's businesses?

The policy to which this question refers is outside OGE's purview. Furthermore, OGE is not familiar with that policy or its interpretation and application by the White House.

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[51] *See* OGE LA-12-04 (Jun. 20, 2012); OGE LA-13-01 (Jan. 18, 2013).
[52] 5 U.S.C. app. § 101(e) (2012).
[53] *See* 5 U.S.C. app. § 104 (2012); *cf.* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000).
[54] 5 U.S.C. app. § 104(d) (2012); 5 C.F.R. § 2634.704 (2016).

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

January 16, 2017

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

Dear Chairman Chaffetz:

In a letter dated January 12, 2017, you requested that I attend a transcribed interview with your Committee staff to answer questions about the role of the U.S. Office of Government Ethics (OGE). Over the weekend, your office modified your original request and proposed a private meeting with you and the Ranking Member and your respective staffs to take place on January 23. Through staff, I requested that meeting be open to the public. I recently received word from your Chief of Staff that you are not able to accommodate that request. I write to ask you to reconsider. Allowing the public to attend our meeting—or, at the very least, to view it through live broadcast or the attendance of the news media—would ensure transparency and educate the public about how OGE guards the executive branch against conflicts of interest.

As you know, I have devoted most of my career to government ethics. I believe passionately that ethics matters and that if Americans do not have confidence that their government leaders' decisions are free from conflicts, the integrity of our government suffers. I have had the honor of helping thousands of officials from both parties ensure that their work is free from any conflicts of interest. In recent weeks, I have spoken publicly about my concerns about the President Elect's current plan to not divest—as well as to applaud some of his nominees' ethics agreements, such as Rex Tillerson's. My remarks were intended to educate the public about the shortcomings of the President Elect's current plan and made in the hopes of persuading him to make adjustments that will resolve his conflicts of interest. I believe these remarks to be in line with OGE's mission.

OGE is an independent agency that aims to prevent conflicts of interest in the executive branch. A core function of OGE is to educate the public about government ethics and "promote transparency of the executive branch ethics program by raising the visibility of the ethics

program and OGE, and by ensuring that ethics information is publicly available."[1] Since the election, there has been significant public interest in OGE and government ethics issues. Our office has received an unprecedented volume of telephone calls, emails, and letters from members of the public related to our executive branch ethics program. As these communications make clear, the public wants to understand conflicts of interest in government and the role that OGE plays in preventing conflicts from hindering effective governance. Holding our meeting in public is in accordance with OGE's educational function and will further ensure transparency in how we approach ethical governance.

Although I am willing to attend a private meeting if you insist, I am hopeful that you will agree that a public meeting is preferable. If a different date would allow for a public meeting, I would be happy to discuss alternative dates with you or your staff.

Sincerely,

Walter M. Shaub, Jr.
Director

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

[1] *See* https://www.oge.gov/web/oge.nsf/Mission%20and%20Responsibilities; *see also, e.g.*, 5 C.F.R. § 2638.108(a)(16) ("The Office of Government Ethics conducts outreach to inform the public of matters related to the executive branch ethics program.").

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

January 17, 2017

The Honorable Thomas R. Carper
Ranking Member
Committee on Environment and
Public Works
United States Senate
456 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Benjamin L. Cardin
United States Senator
509 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Bernard Sanders
United States Senator
332 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Sheldon Whitehouse
United States Senator
530 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Jeff Merkley
United States Senator
313 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Kirsten Gillibrand
United States Senator
478 Russell Senate Office Bldg.
Washington, DC 20510

The Honorable Cory A. Booker
United States Senator
359 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Edward Markey
United States Senator
255 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Tammy Duckworth
United States Senator
SD-G12 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Ranking Member Carper and Senators Cardin, Sanders, Whitehouse, Merkley, Gillibrand, Booker, Markey, and Duckworth:

This responds to your letter of January 12, 2017, requesting specific information regarding the ethics review of a named individual who has been announced as an intended nominee of the President-elect. The U.S. Office of Government Ethics (OGE) generally avoids providing information about individual nominees, but believes that the information regarding the nominee financial disclosure process provided below is responsive to your request.

It is necessary to avoid formally sharing information regarding OGE's work on individual nominations whenever releasing such information could undermine the purposes of the nominee ethics review process. As described below, preclearing a nominee financial disclosure report involves an extensive deliberative process between OGE, the nominee, and agency ethics officials. Accordingly, OGE adheres to this nondisclosure practice as closely as possible, particularly if other information may satisfy the interests underlying the request.

In this instance, additional information about OGE's work and the nomination process is provided below to address the concerns underlying your request. As explained below, if OGE has transmitted a certified financial disclosure report and an ethics agreement to the Senate, it means that OGE is satisfied that all financial conflicts of interest have been identified and resolved. Note that OGE is focused on financial conflicts of interest and not on what might be described as "intellectual conflicts of interest" or the political viewpoints of nominees, which are often the subject of media and public scrutiny of nominees but which are outside the scope of OGE's review. OGE's determination is based on the information contained in the report, the agency's advice regarding possible financial conflicts of interest, and whether the report complies with the Ethics in Government Act and government ethics regulations, all in light of the agency's functions and the nominee's proposed duties.

A nominee submits a draft public financial disclosure report (OGE Form 278e) through OGE's electronic filing system (*Integrity*). Ethics officials review the draft financial disclosure report, ask follow-up questions, and provide instructions for revising the report. Multiple rounds of questions and revisions are almost always exchanged before a report meets the complex disclosure requirements of the Ethics in Government Act.

We note that the disclosure requirements of the OGE Form 278e are dictated by the Ethics in Government Act.[1] Moreover, as your letter correctly stated, OGE's ethics review focuses on a nominee's personal financial interests, not a nominee's history of political solicitations and activity. Your letter asked about reportable positions and "affiliations." Nominees are required to report certain positions held, during the current calendar year and during the two-year period preceding such calendar year, as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States.[2] They are not, however, required to report positions held in any religious, social, fraternal, or political entity or any positions solely of an honorary nature.[3] OGE's view is that a position with a political action committee, for example, qualifies for this exclusion from disclosure by virtue of being political in nature.

The exclusion does not extend, however, to earned income from an excluded position, which must be disclosed in Part 2 of the OGE Form 278e. Nominees must report salaries, fees, commissions, wages, and any other compensation for personal services (other than from

[1] *See* 5 U.S.C. app. § 102.
[2] *See* 5 U.S.C. app. § 102(a)(6)(A).
[3] *See id*.

United States Government employment) in excess of $200 from any one source, including income from positions that need not be reported in Part 1 of the OGE Form 278e.[4]

Your letter also asked about reportable gifts. Nominees are not required to complete the portion of the report that covers gifts and travel reimbursements.[5]

Each nominee is legally responsible for ensuring that the information he or she reports is "true, complete and correct."[6] The financial disclosure system does not require or authorize either OGE or agency ethics officials to independently investigate or verify the information that a nominee reports; however, OGE and agency ethics officials recognize that the reporting requirements are complex and work diligently to help each nominee to fully comply with the requirements based on the information the nominee provides. OGE and agency ethics officials review a nominee's report for internal inconsistencies and self-evident omissions. OGE staff also asks extensive questions that lead to more complete reporting.

For this work, OGE's staff draws on decades of collective experience in reviewing financial disclosure reports to help filers to identify the types of assets, positions, and liabilities that filers commonly overlook or forget to report. Examples of the types of items that OGE staff discusses with filers are found in sample checklists on OGE's website.[7] Multiple rounds of questions and revisions are usually needed before a nominee's report can be finalized. This back and forth process can take weeks or, in the case of extremely wealthy individuals, sometimes months. Through focused effort, OGE and agency ethics officials help nominees complete their reports as quickly as possible without sacrificing quality.

Once the nominee confirms that the report contains all of his or her legally reportable information, as a result of the revisions discussed above, OGE and agency ethics officials analyze the information contained in the report to identify potential conflicts of interest with the duties of the position for which the individual is being nominated. OGE and agency ethics officials then work together to prepare an ethics agreement. The ethics agreement outlines the specific steps a nominee will take to avoid the identified conflicts of interest and ensures that the nominee will be able to carry out his or her duties as a Presidential appointee. OGE and agency ethics officials draft each ethics agreement using standardized language from OGE's ethics agreement guide, which is tailored to the nominee's unique circumstances.[8] The nominee must agree to take the steps outlined in the agreement to resolve his or her conflicts of interest; for example, resignation of positions, divestiture of holdings, or recusal.

When the nominee has confirmed that the report is "true, complete and correct" and has agreed to take the steps outlined in the ethics agreement to resolve the identified conflicts of interest, OGE can begin to finalize its work. OGE ensures that it is satisfied that the report is

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[4] *See* 5 C.F.R. § 2634.302(a)(1).
[5] *See* 5 C.F.R. § 2634.304(c).
[6] Public financial disclosure report filers must make the following certification: "I certify that the statements that I have made in this report are true, complete and correct to the best of my knowledge." *See* OGE Form 278e, at 1.
[7] These checklists are available online at https://www.oge.gov/Web/OGE nsf/0/BC975C546E68A21C852580560045BE83/$FILE/Financial%20Disclosure%20Checklists.pdf.
[8] The OGE PAS Nominee Ethics Agreement Guide is available online at https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+(MS+Word).

complete and the ethics agreement has resolved all ethics issues. OGE then preclears the report (i.e., provides staff-level assurance that it is cleared for certification by OGE's Director). After OGE has precleared the report, the nominee must log back into the electronic filing system and formally file the report by certifying that the information in the finalized report is correct. Ethics officials at the agency to which the nominee is being nominated then review the report. If they are satisfied with the report, they certify the report and send it to OGE with an opinion indicating that all conflicts of interest have been resolved. Next, OGE reviews the report for final certification, certifies the report, and transmits both the report and the ethics agreement to the Senate.

Your letter asked whether there are "other avenues" that will require the nominee to disclose additional information to the Designated Agency Ethics Official (DAEO), if confirmed. When OGE certifies a report, it means that both the DAEO and OGE are satisfied that all potential conflicts of interest apparent at the present time have been identified and addressed. However, the nominee financial disclosure report is a snapshot in time. If confirmed, the nominee, after becoming an appointee, is subject to periodic transaction, annual, and termination financial disclosure reporting requirements.[9]

In addition, promptly after appointment, the nominee—now an appointee—must complete an initial ethics briefing. The initial ethics briefing must include the following content:[10]

> (1) If the individual acquired new financial interests reportable under section 102 of the [Ethics in Government] Act after filing the nominee financial disclosure report, the agency ethics official must appropriately address the potential for conflicts of interest arising from those financial interests.
>
> (2) The agency ethics official must counsel the individual on the basic recusal obligation under 18 U.S.C. 208(a).
>
> (3) The agency ethics official must explain the recusal obligations and other commitments addressed in the individual's ethics agreement and ensure that the individual understands what is specifically required in order to comply with each of them, including any deadline for compliance. The ethics official and the individual must establish a process by which the recusals will be achieved, which may consist of a screening arrangement or, when the DAEO deems appropriate, vigilance on the part of the individual with regard to recusal obligations as they arise in particular matters.

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[9] *See* 5 U.S.C. app. §§ 101(d), 101(e), 103(l).
[10] 5 C.F.R. § 2638.305(f) (2017). The recently updated regulations at 5 C.F.R. part 2638 are not yet in print but are available online at http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=c8d1bb7d7982feb93026d4806f7f436b&r=PART&n=5y3.0.10.10.11#se5.3.2638_1305.

> (4) The agency ethics official must provide the individual with instructions and the deadline for completing initial ethics training, unless the individual completes the initial ethics training either before or during the ethics briefing.

In addition, the nominee must complete new employee ethics training and, later, annual ethics training.[11] An appointee must also demonstrate compliance with the ethics agreement signed as part of the nomination process. The DAEO works closely with the appointee to ensure full compliance.[12] OGE tracks ethics agreement compliance by requiring the DAEO to notify OGE when compliance efforts are complete. Finally, an appointee has an ongoing obligation to comply with ethics statutes and regulations, including the criminal conflict-of-interest laws, the Ethics in Government Act, and the *Standards of Ethical Conduct for Employees of the Executive Branch*.

In other words, even if a nominee has fully complied with the requirements of the nominee financial disclosure process, it is possible for that nominee, once confirmed, to face potential conflicts involving interests that were not identified or addressed in his or her financial disclosure report or ethics agreement. This potential is the reason for the executive branch requirements for briefings, training, ongoing disclosure, and consultations with agency ethics officials. Executive branch officials, especially those at the highest levels, should regularly seek the advice of their agency ethics officials in order to avoid potential conflicts of interest when performing the important duties with which the public has entrusted them.

I hope you have found the information provided regarding the nominee financial disclosure process helpful.

Sincerely,

Walter M. Shaub, Jr.
Director

cc: The Honorable John Barrasso
Chairman
Committee on Environment and
Public Works
United States Senate
307 Dirksen Senate Office Bldg.
Washington, DC 20510

[11] *See* 5 C.F.R. §§ 2638.304, 2638.308 (2017).
[12] *See* 5 C.F.R. § 2638.104(c)(13) (2017).