

**Remarks of Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics,  
as prepared for delivery at 4:00 p.m. on January 11, 2017, at the Brookings Institution**

I wish circumstances were different and I didn't feel the need to make public remarks today. You don't hear about ethics when things are going well. You've been hearing a lot about ethics lately.

I need to talk about ethics today because the plan the President-elect has announced doesn't meet the standards that the best of his nominees are meeting and that every President in the past four decades has met. My hope is that, if the Office of Government Ethics can provide some constructive feedback on his plan, he may choose to make adjustments that will resolve his conflicts of interest.

I'll limit the scope of my remarks today, and I won't be talking about nominees whose ethics packages have not gone to the Senate. With that limitation, there's still much that can be said. For starters, I'm happy to report that it's not all bad news. OGE has been able to do good work during this Presidential transition. I'm especially proud of the ethics agreement we developed for the intended nominee for Secretary of State, Rex Tillerson.

Mr. Tillerson is making a clean break from Exxon. He's also forfeiting bonus payments worth millions. As a result of OGE's work, he's now free of financial conflicts of interest. His ethics agreement serves as a sterling model for what we'd like to see with other nominees. He clearly recognizes that public service sometimes comes at a cost. The greater the authority entrusted in a government official, the greater the potential for conflicts of interest. That's why the cost is often greater the higher up you go.

We've had similar success with some of the President-elect's other intended nominees. Some of them haven't quite gotten there yet, as I explained in recent letters to the Senate. But with an example like Mr. Tillerson's ethics agreement, I anticipate we'll get them there, too. In connection with this work, it's important to recognize that OGE is not the enforcement mechanism but the prevention mechanism. OGE is non-partisan and does its work independently. Our goal—*our reason for existing*—is to guard the executive branch against conflicts of interest.

We can't risk creating the perception that government leaders would use their official positions for profit. That's why I was glad in November when the President-elect tweeted that he wanted to, as he put it, "in no way have a conflict of interest" with his businesses. Unfortunately, his current plan cannot achieve that goal.

It's easy to see that the current plan does not achieve anything like the clean break Rex Tillerson is making from Exxon. Stepping back from running his business is meaningless from a conflict of interest perspective. The Presidency is a full-time job and he would've had to step back anyway. The idea of setting up a trust to hold his operating businesses adds nothing to the equation. This is not a blind trust—it's not even close.

I think *Politico* called this a "half-blind" trust, but it's not even halfway blind. The only thing this has in common with a blind trust is the label, "trust." His sons are still running the businesses, and, of course, he knows what he owns. His own attorney said today that he can't "un-know" that he owns Trump tower. The same is true of his other holdings. The idea of limiting direct communication about the business is wholly inadequate. That's not how a blind trust works. There's not supposed to be any information at all.

Here too, his attorney said something important today. She said he'll know about a deal if he reads it in the paper or sees it on TV. That wouldn't happen with a blind trust. In addition, the notion that there won't be new deals doesn't solve the problem of all the existing deals and businesses. The enormous stack of documents on the stage when he spoke shows just how many deals and businesses there are.

I was especially troubled by the statement that the incoming administration is going to demand that OGE approve a diversified portfolio of assets. No one has ever talked to us about that idea, and there's no legal mechanism to do that. Instead, Congress set up OGE's blind trust program under the Ethics in Government Act. Under that law anyone who wants a blind trust has to work with OGE from the start, but OGE has been left out of this process. We would have told them that this arrangement fails to meet the statutory requirements.

The President-elect's attorney justified the decision not to use a blind trust by saying that you can't put operating businesses in a blind trust. She's right about that. That's why the decision to set up this strange new kind of trust is so perplexing. The attorney also said she feared the public might question the legitimacy of the sale price if he divested his assets. I wish she had spoken with those of us in the government who do this for a living. We would have reassured her that Presidential nominees in every administration agree to sell illiquid assets all the time. Unlike the President, they have to run the gauntlet of a rigorous Senate confirmation process where the legitimacy of their divestiture plans can be closely scrutinized. These individuals get through the nomination process by carefully ensuring that the valuation of their companies is done according to accepted industry standards. There's nothing unusual about that.

For these reasons, the plan does not comport with the tradition of our Presidents over the past 40 years. This isn't the way the Presidency has worked since Congress passed the Ethics in Government Act in 1978 in the immediate aftermath of the Watergate scandal. Since then, Presidents Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama all either established blind trusts or limited their investments to non-conflicting assets like diversified mutual funds, which are exempt under the conflict of interest law.

Now, before anyone is too critical of the plan the President-elect announced, let's all remember there's still time to build on that plan and come up with something that *will* resolve his conflicts of interest. In developing the current plan, the President-elect did not have the benefit of OGE's guidance. So, to be clear, OGE's primary recommendation is that he divest his conflicting financial interests. Nothing short of divestiture will resolve these conflicts.

This has been my view from the start. The media covered some messages I sent the President-elect through Twitter. While some people got what I was doing, I think some others may have missed the point. I was trying to use the vernacular of the President-elect's favorite social media platform to encourage him to divest. My thinking was that more pointed language would have been too strong at a time when he was still making up his mind. I reiterated my view in a written response to questions from the Senate, which is posted on OGE's website. I've been pursuing this issue because the ethics program starts at the top. The signals a President sends set the tone for ethics across the executive branch. Tone from the top matters.

I've had the honor and great privilege of serving as Director of the Office of Government Ethics for four years now. But I've been in ethics for much longer than that, having come up through the ranks as a career government ethics official. Over the years, I've worked closely with countless officials in administrations of both major parties. Ethics has no party.

The job hasn't always been easy, though, especially when I've had to ask nominees and appointees to take painful steps to avoid conflicts of interest. I can't count the number of times I've delivered the bad news that they needed to divest assets, break open trusts, and dissolve businesses. Most of these individuals have worked with us in good faith. Their basic patriotism usually prevails, as they agree to set aside their personal interests to serve their country's interests. Sometimes these individuals have required more persuasion, but every OGE Director has been buoyed by the unwavering example of Presidents who resolved their own conflicts of interest.

As I said, every President in modern times has taken the strong medicine of divestiture. This means OGE Directors could always point to the President as a model. They could also rely on the President's implicit assurance of support if anyone balked at doing what OGE asked them to do. Officials in any administration need their President to show ethics matters, not only through words but also through deeds. This is vitally important if we're going to have any kind of ethics program.

Now, some have said that the President can't have a conflict of interest, but that is quite obviously not true. I think the most charitable way to understand such statements is that they are referring to a particular conflict of interest law that doesn't apply to the President. That law, 18 U.S.C. § 208, bars federal employees from participating in particular matters affecting their financial interests. Employees comply with that law by "recusing," which is a lawyerly way of saying they have stay out of things affecting their financial interests. If they can't stay out of these things, they have to sell off their assets or get a waiver. That's what Presidential appointees do. But Congress understood that a President can't recuse without depriving the American people of the services of their leader. *That's* the reason why the law doesn't apply to the President.

Common sense dictates that a President can, of course, have very real conflicts of interest. A conflict of interest is anything that creates an incentive to put your own interests before the interests of the people you serve. The Supreme Court has written that a conflict of interest is, and I'm quoting here, "an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of corruption."

That same Court referred to what it called a "moral principle" underlying concerns about conflicts of interest. The Court cited, and I'm quoting again, "the Biblical admonition that no man may serve two masters, a maxim which is especially pertinent if one of the masters happens to economic self-interest." A President is no more immune to the influence of two masters than any subordinate official. In fact, our common experience of human affairs suggests that the potential for corruption only grows with the increase of power.

For this reason, it's been the consistent policy of the executive branch that the President should act as though the financial conflict of interest law applied. One of my tweets and my letter to Congress cited an OGE opinion issued during the Reagan administration that articulated this very policy.

Back when he was working for the Justice Department, the late Antonin Scalia also wrote an opinion declaring that a President should avoid engaging in conduct prohibited by the government's ethics regulations, even if they don't apply. Justice Scalia warned us that there would be consequences if a President ever failed to adhere to the same standards that apply to lower level officials. The sheer obviousness of Justice Scalia's words becomes apparent if you just ask yourself one question: Should a President hold himself to a lower standard than his own appointees?

I appreciate that divestiture can be costly. But the President-elect would not be alone in making that sacrifice. I've been involved in just about every Presidential nomination in the past 10 years. I also have been involved in the ethics review of Presidents, Vice Presidents, and most top White House officials. I've seen the sacrifices that these individuals have had to make.

It's important to understand that the President is now entering the world of public service. He's going to be asking his own appointees to make sacrifices. He's going to be asking our men and women in uniform to risk their lives in conflicts around the world. So, no, I don't think divestiture is too high a price to pay to be the President of the United States of America.

As we all know, one of the things that make America truly great is its system for preventing public corruption. For a long time now, OGE has helped developing countries set up their own systems for detecting and preventing conflicts of interest. Our executive branch ethics program is considered the gold standard internationally and has served as a model for the world. But that program starts with the Office of the President. The President-elect must show those in government—and those coming into government after his inauguration—that *ethics matters*.

All of this is to say there are reasons why experts and others are expressing concern. These calls for divestiture have been bipartisan. You have the examples of President Obama's ethics counsel, Norm Eisen, and President Bush's ethics counsel, Richard Painter. The conservative Wall Street Journal recommended divestiture. So did conservative columnist Peggy Noonan.

It's plain to see that none of this reflects any partisan motivation. All you have to do is imagine what will happen if the President-elect takes this advice and divests. He'll be stronger. He'll have a better chance of succeeding. So will the ethics program and the government as a whole. And, in turn, America will have a better chance of succeeding. We should all want that. I know I want that.

In closing, I would just like to add that I'm happy to offer my assistance and the assistance of my staff. Thank you.

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 OGE's 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<sup>1</sup> that such status would confer. Instead, OGE is an executive agency with the limited authorities that the Ethics in Government Act vests in it.<sup>2</sup>

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.<sup>3</sup> The STOCK Act bars the President from: using nonpublic information for private profit;<sup>4</sup> engaging in insider trading;<sup>5</sup> participating in an initial public offering;<sup>6</sup> intentionally influencing an employment decision or practice of a private entity solely on the basis of partisan political affiliation;<sup>7</sup> 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.<sup>8</sup> In addition, OGE is authorized to review the President’s annual, periodic transaction, and termination financial disclosure reports.<sup>9</sup> OGE’s regulations on gifts from outside sources and gifts from employees also apply to the President.<sup>10</sup>

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<sup>1</sup> 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).

<sup>2</sup> 5 U.S.C. app. §§ 401-408 (2012).

<sup>3</sup> *See* STOCK Act, Pub. L. No. 112-105, § 2(3)(B)(i), 126 Stat. 291 (2012), as amended.

<sup>4</sup> *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)).

<sup>5</sup> *See* STOCK Act, Pub. L. No. 112-105, § 9(b), 126 Stat. 291 (2012).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *See* 5 U.S.C. app. §§ 101(f)(1), 103(b), 106 (2012).

<sup>10</sup> *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.<sup>11</sup> Similarly, although the President is subject to the Emoluments Clause<sup>12</sup> and the Presidential Emoluments Clause<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup>

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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<sup>11</sup> See 18 U.S.C. § 201 (2012).

<sup>12</sup> U.S. Const., art. I, § 9, cl. 8.

<sup>13</sup> U.S. Const., art. II, § 1, cl. 7.

<sup>14</sup> 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).

<sup>15</sup> 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](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/01F8E09232041FD185257E96005FBBE8/$FILE/64ed9ad9bd294b45a88ac8729a97968a3.pdf?open).

<sup>16</sup> 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>.

<sup>17</sup> 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](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.<sup>18</sup> 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.<sup>19</sup> 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<sup>20</sup> for the transition teams of both major party Presidential candidates. In

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<sup>18</sup> 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.

<sup>19</sup> These materials are all available on OGE's website at [www.oge.gov](http://www.oge.gov).

<sup>20</sup> 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*,<sup>21</sup> 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.<sup>22</sup> OGE contributed other information and materials to websites operated by the General Services Administration, as well.<sup>23</sup>

*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.<sup>24</sup> Moreover, the PETT is not a federal agency and its members are not executive branch employees.<sup>25</sup> Therefore, the ethics restrictions applicable to federal employees are inapplicable to PETT members, and OGE has no authority over them.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> OGE has no role in drafting either such an MOU or a

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<sup>21</sup> Available online at <https://integrity.gov/efeds-login/> or simply [integrity.gov](https://integrity.gov).

<sup>22</sup> Available online at <https://www.oge.gov/web/oge.nsf/Resources/PRESIDENTIAL+TRANSITION>.

<sup>23</sup> Available online at <https://presidentialtransition.usa.gov/>.

<sup>24</sup> 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).

<sup>25</sup> 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).

<sup>26</sup> See 5 U.S.C. app. § 402(a) (2012).

<sup>27</sup> 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>.

<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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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.

<sup>29</sup> 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.

<sup>30</sup> See, e.g., 5 U.S.C. ch. 75 (2012).

<sup>31</sup> See 5 C.F.R. 2635, subparts E and G (2016).

<sup>32</sup> See 5 U.S.C. app. § 102(f) (2012).

<sup>33</sup> *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.<sup>34 35</sup> 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.<sup>36</sup> The items below describe the information that a President is required to disclose in an annual public financial disclosure report (OGE Form 278e).<sup>37</sup>

- *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.

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<sup>34</sup> See 5 U.S.C. app. § 101(a) and (d) (2012).

<sup>35</sup> 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.*

<sup>36</sup> 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.*

<sup>37</sup> 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.<sup>38 39</sup> Even prior to that amendment, OGE did not construe 18 U.S.C. § 208 as applicable to a President.<sup>40</sup> 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.<sup>41</sup> Given the unique circumstances of the Presidency, OGE's view is that a President should comply with this law by divesting conflicting assets,<sup>42</sup> establishing a qualified blind trust,<sup>43</sup> 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**

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

<sup>39</sup> 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.

<sup>40</sup> 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)).

<sup>41</sup> See OGE Advisory 83 x 16 (Oct. 20, 1983) (and authorities cited therein).

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

<sup>43</sup> 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.<sup>44</sup> Various statutes and regulations outside OGE's purview may address the exercise of that authority.<sup>45</sup> 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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<sup>44</sup> U.S. Const., art. II, § 2, cl. 2.

<sup>45</sup> 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.<sup>46</sup> In addition, OGE's electronic filing system is available to assist public filers with satisfying public financial disclosure requirements.<sup>47</sup> A President's public financial disclosure reports are filed with OGE.<sup>48</sup>

- 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.<sup>49</sup> Periodic transaction reports are filed by the earlier of 45 days after the transaction or 30 days after receiving notification of the transaction.<sup>50</sup> Additional information regarding periodic

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

<sup>47</sup> That system is available online at <https://integrity.gov/efeds-login/>.

<sup>48</sup> 5 U.S.C. app. § 103(b) (2012).

<sup>49</sup> 5 U.S.C. app. § 101(c) (2012).

<sup>50</sup> 5 U.S.C. app. § 103(l) (2012).



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

*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.<sup>53</sup> If so, the Counsel to the President is responsible for collecting them.<sup>54</sup>

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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<sup>51</sup> See OGE LA-12-04 (Jun. 20, 2012); OGE LA-13-01 (Jan. 18, 2013).

<sup>52</sup> 5 U.S.C. app. § 101(e) (2012).

<sup>53</sup> 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).

<sup>54</sup> 5 U.S.C. app. § 104(d) (2012); 5 C.F.R. § 2634.704 (2016).