

From: [Director of OGE](#)
To: ["Passantino, Stefan C. EOP/WHO"](#)
Subject: Copy of Letter from OGE Director Responding to Letter from Cause of Action Institute
Date: Friday, February 17, 2017 4:59:52 PM
Attachments: [Letter 17 Feb 2017.pdf](#)
[Cause of Action Institute - Letter Dated 14 Feb 2017.pdf](#)

Please find attached a letter from OGE Director Walter M. Shaub, Jr. in response to the February 14, 2017, letter from Mr. Eric Bolinder on behalf of Cause of Action Institute, which was copied to Counsel to the President Don McGahn II. For your convenience, I have also attached the letter from Cause of Action Institute.

Would you please forward this to Mr. McGahn? The original will follow by standard mail.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286
Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



February 17, 2017

Eric R. Bolinder
Counsel
Cause of Action Institute

(b)(6)

Dear Mr. Bolinder:

I am in receipt of your February 14, 2017, letter expressing concern that employees of the White House Office may not be covered by 5 C.F.R. part 2635. This letter is to reassure you that their coverage is well settled.¹ In addition, regulations applicable to the White House Office provide that, "Employees of the Executive Office of the President are subject to the executive branch-wide standards of ethical conduct at 5 CFR part 2635...." 3 C.F.R. § 100.1.²

Sincerely,

Walter M. Shaub, Jr.
Director

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

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

The Honorable Donald F. McGahn
White House Counsel
1600 Pennsylvania Avenue, NW
Washington, DC 20500

¹ See, e.g., 5 C.F.R. § 2635.204(h), example 1 (illustrating applicability of the Standards of Conduct to White House employees).

² See also 64 Fed. Reg. 12,881 (Mar. 16, 1999) (acknowledging that 5 C.F.R. part 2635 "superseded" EOP's former standards of conduct and "established uniform standards of ethical conduct that apply to all executive branch personnel").





Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

February 14, 2017

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

RE: PETITION FOR RULEMAKING

Dear Director Shaub:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. In light of recent events, CoA Institute is concerned that both the Office of Government Ethics (“OGE”) and the public, including legal and ethics experts, may be confused about the coverage of the OGE regulations concerning product endorsements. Although many commenters have claimed OGE’s ethics regulations extend to presidential advisors, such as Kellyanne Conway, our review of the relevant statutes and regulations concludes that such individuals may not be covered. Unfortunately, OGE’s recent letter to Congress and the White House Designated Ethics Officer fails to address this potential problem with the current rules. We in no way endorse or approve of Ms. Conway’s actions; however, that does not mean that they were illegal or in violation of your ethics rules. We write today to petition OGE to initiate a rulemaking correcting or clarifying these regulations.

BACKGROUND

Appearing on Fox News last week, Counselor to the President Kellyanne Conway encouraged viewers to “[g]o buy Ivanka’s stuff, is what I would tell you . . . I’m

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

going to give it a free commercial here, go buy it today.”² Many government watchdogs, including us here at CoA Institute, perked up upon hearing this. There are, as you know, strict rules prohibiting the endorsement of products by government employees.³ In light of those rules, Ms. Conway’s comments seemed, on their face, to be clearly illegal. Indeed, many attorneys and ethics experts have publicly suggested that Ms. Conway violated the law and should be held accountable.⁴ Don W. Fox, who formerly served as general counsel and acting director of OGE, claimed this was “a clear violation of rules prohibiting misuse of public office for anyone’s private gain.”⁵ Citizens for Responsibility and Ethics in Washington (“CREW”) promptly filed an ethics complaint with your office, citing Ms. Conway’s comments.⁶ Most importantly, the U.S. House Committee on Oversight and Government Reform (“OGR”) sent a letter to you asking for an investigation.⁷ You responded by letter today, indicating you have opened such an investigation.⁸

As a government watchdog, we here at CoA Institute share in the concerns about Ms. Conway’s conduct. Government employees working on the taxpayer dime should not be using their official position to endorse a product or provide “free commercials.” Ms. Conway’s comments were wholly inappropriate, especially given her relationship to the presumed beneficiary. For a great number of Executive Branch employees, this conduct would almost certainly be illegal. However, upon review of the relevant regulations and statutes, we believe that OGE regulations may not extend to cover Ms. Conway’s conduct given her employment in the White House. In light of this, OGE needs to analyze its existing regulations and conduct a rulemaking to correct or clarify them.

² Joe Concha, *Conway Promotes Trump Daughter’s Merchandise: ‘Go buy Ivanka’s stuff’*, THE HILL (Feb. 9, 2017), <http://bit.ly/2kX8A19>.

³ 5 C.F.R. § 2635.702.

⁴ See, e.g., Linda Qiu, *What You Need to Know About Kellyanne Conway’s Endorsement of Ivanka Trump Products*, POLITIFACT (Feb. 9, 2017), <http://bit.ly/2IMMrUX>; Rob Tornoe, *Former Ethics Czar: Kellyanne Conway Broke the Law on Fox News*, PHILLY.COM (Feb. 9, 2017), <http://bit.ly/2knmg9Y>.

⁵ Drew Harwell, Tom Hamburger, and Rosalind S. Helderman, *White House Says Conway has been ‘Counseled’ After Touting Ivanka Trump’s Products*, WASH. POST (Feb. 9, 2017), <http://wapo.st/2ldByxG> (quoting former OGE general counsel and former acting director

⁶ Letter from Noah Bookbinder, Exec. Dir., CREW, to Walter M. Shaub, Jr., Dir., OGE, & Donald F. McGahn, White House Counsel (Feb. 9, 2017), available at <http://bit.ly/2IHv9LO>.

⁷ Max Greenwood, *Top Oversight Lawmakers Ask Ethics Office to Recommend Discipline for Conway*, THE HILL (Feb. 9, 2017), <http://bit.ly/2k8ECvo>.

⁸ Letter from Walter Shaub, Dir., OGE, to Jason Chaffetz, Chairman, OGR, & Elijah E. Cummings, Ranking Member, OGR, (Feb. 13, 2017), available at <http://bit.ly/2kPYnXg>.

DISCUSSION

The relevant regulation, 5 C.F.R. § 2635.702, bars an “employee” from engaging in product promotion. 5 C.F.R. § 2635.102 defines “employee” as “any officer or employee of an agency, including a special Government employee.” 5 U.S.C. § 105 reads, “For the purposes of this title, ‘Executive Agency’ means an Executive Department, a Government corporation, and an independent establishment.” The White House is obviously not a “Government Corporation.” Furthermore, “Executive Department” is defined by an exhaustive list in 5 U.S.C. § 101 that does not include the White House or any of its offices. The analysis, then, centers on whether or not the White House Office is an “independent establishment.”

The statutory definition of independent establishment is confusing and ambiguous.⁹ However, the D.C. Circuit tackled this quagmire in *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995). There, the court evaluated whether the Executive Residence qualifies as an independent establishment for the purposes of a Title VII claim.

First, we note that elsewhere Congress has used the term “independent establishment” in distinction to the Executive Residence. Specifically, Congress has authorized “[t]he head of any department, agency, or independent establishment of the executive branch of the Government [to] detail, from time to time, employees of such department, agency, or establishment to the White House Office, the *Executive Residence at the White House*, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration.” 3 U.S.C. § 112 (1988) (emphasis added). That Congress distinguished the Executive Residence from the independent establishments, whatever they may be, suggests that Congress does not regard the Executive Residence to be an independent establishment, as it uses that term.

Id. at 1490.

The court held that Congress referred to an “independent establishment” and the “Executive Residence” as two separate entities. Right next to Executive Residence on that same, distinguished list is the “White House Office.” Following the D.C. Circuit’s reasoning, the White House Office is also not an independent establishment. Therefore, because the White House Office does not fall into either of

⁹ See, e.g., Mark Liberman, *An Independent Establishment is an Establishment which is Not Part of an Independent Establishment*, Language Log (Apr. 20, 2011), available at <http://bit.ly/2lgObYC>.

the other two covered categories, Government Corporations and Executive Departments, it appears that 5 C.F.R. § 2635.702 may not cover Kellyanne Conway as Counselor to the President.¹⁰

Unfortunately, your February 13, 2017 letter does not take any of the above into account. You indicate that you will be opening an investigation into Ms. Conway, citing 5 C.F.R. § 2635.702. In an enclosed letter, you also encourage the White House to open its own investigation.¹¹ The regulations and examples you cite in the enclosure deal with presidential appointees who are plainly covered by the statutory definitions set above.¹² You provide no legal analysis indicating why Ms. Conway would be covered by this regulation or if it extends to the White House. Given OGE's stated mission, you must immediately address this issue.¹³

PETITION FOR RULEMAKING

Pursuant to 5 U.S.C. § 553(e), CoA Institute petitions OGE to act swiftly and initiate an exploratory process and rulemaking to correct or clarify covered persons under 5 C.F.R. § 2635.702. This rulemaking could take the form of an amended regulation or an explanatory guidance document. It is possible that there are statutory or constitutional bars that prevent OGE from regulating the conduct of White House staff, especially staff serving at the pleasure of the President. It is also possible that OGE reaches the legal conclusion that Ms. Conway is already covered by the existing regulation, despite CoA Institute's analysis suggesting otherwise. If either are the case, OGE must make this abundantly clear in its regulations, letters to agency ethics officials, and public-facing documents. Given recent events, Executive Branch officials and the American public must be able to clearly understand how relevant ethics laws and regulations apply to the White House. It is OGE's duty as the government's top ethics agency to clarify the scope of its regulatory coverage and instill confidence in the public.¹⁴

¹⁰ The regulation is clear, however, that it does not apply to the President or the Vice President, creating more confusion in how to read it given the statutory definitions.

¹¹ Letter from Walter Shaub, Dir., OGE, to Stefan C. Passantino, Designated Agency Ethics Official, White House (Feb. 13, 2017), *available at* <http://bit.ly/2kPYnXg>.

¹² *Id.* (OGE cites Example 1 from 5 C.F.R. § 2635.702(c), which references an independent agency commissioner, not a White House official).

¹³ *See* 5 C.F.R. § 2600.101(a) ("OGE exercises leadership in the executive branch of the Federal Government to prevent conflicts of interest on the part of executive branch employees and resolve those conflicts of interest that do occur.").

¹⁴ *Id.* ("OGE fosters high ethical standards for executive branch employees which, in turn, strengthens the public's confidence that the Government's business is conducted with impartiality and integrity.").

Director Walter M. Shaub
February 14, 2017
Page 5

Thank you for your swift attention to this matter. If you have any questions about this petition, please contact me by telephone at (b)(6) or by e-mail at (b)(6).

Sincerely,

(b)(6)

Eric R. Bolinder
COUNSEL

cc:

Chairman Jason Chaffetz
US House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Ranking Member Elijah Cummings
US House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Donald F. McGahn
White House Counsel
1600 Pennsylvania Avenue, NW
Washington, DC 20500

From: [Walter M. Shaub](#)
To: (b)(6) Don McGahn's (b)(6) Stefan
Cc: [David J. Apol](#)
Subject: Letter from OGE Director W. Shaub to S. Passantino
Date: Monday, February 13, 2017 5:49:48 PM
Attachments: [Letter from OGE Director to White House DAEO 2-13-17.pdf](#)

Don and Stefan,

Attached is a letter regarding Kellyanne Conway, as a follow up to Stefan's conversation with Dave Apol on Thursday. The original will follow via United States mail. Please contact us if you have any questions.

Walt

Walter M. Shaub, Jr.

Director

U.S. Office of Government Ethics

1201 New York Avenue, NW, Suite 500

Washington, DC 20005-3917

Telephone: 202.482.9292

Email: walter.shaub@oge.gov



February 13, 2017

Stefan C. Passantino
Deputy Counsel to the President
and Designated Agency Ethics Official
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Passantino:

I write to you in your capacity as the Designated Agency Ethics Official for the White House, pursuant to written designation by President Donald J. Trump on January 24, 2017. I am following up on your conversation on February 9, 2017, with David J. Apol, General Counsel of the U.S. Office of Government Ethics (OGE) regarding Kellyanne E. Conway, Special Counselor to the President.

During the conversation on February 9, 2017, Mr. Apol requested that you notify OGE of any disciplinary or other corrective action taken by the White House in connection with Ms. Conway's public statements regarding the business interests of the President's daughter, Ivanka Trump.¹ Subsequently, OGE received a letter from Chairman Jason E. Chaffetz (R-Utah) and Ranking Member Elijah E. Cummings (D-Maryland) of the House Committee on Oversight and Government Reform asking OGE to review Ms. Conway's statements, act promptly on any findings, and report back to the Committee with a recommendation for disciplinary action if warranted.²

Although Press Secretary Sean Spicer stated during a press conference on February 9, 2017, that, "Kellyanne has been counseled, and that's all we're going to go with," OGE has not yet received notification of any disciplinary or other corrective action against Ms. Conway.³ When OGE has reason to believe that an employee may have violated the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), OGE is authorized to recommend that the employing agency investigate the matter and consider taking disciplinary

¹ See 5 C.F.R. § 2635.702.

² OGE received a similar letter from Representative Ted W. Lieu, as well as one signed by 42 Members of Congress.

³ *White House: Conway has been 'counseled' for urging people to buy Ivanka's products*, POLITICO, Feb. 9, 2017, available at <http://www.politico.com/video/2017/02/white-house-conway-has-been-counseled-for-urging-people-to-buy-ivankas-products-062202> (video). See also Louis Nelson, *White House: Conway has been 'counseled' for urging people to buy Ivanka's products*, POLITICO, Feb. 9, 2017, available at <http://www.politico.com/story/2017/02/kellyanne-conway-ivanka-nordstrom-white-house-react-234856>; Drew Harwell, Tom Hamburger and Rosalind S. Helderman, *White House says Conway has been "counseled" after touting Ivanka Trump's products*, The Washington Post, Feb. 9, 2017, available at https://www.washingtonpost.com/politics/conway-may-have-broken-key-ethics-rule-by-touting-ivanka-trumps-products-experts-say/2017/02/09/fd1cc64a-ceeda-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.5cd0f41fd54c.



action against the employee.⁴ Under the present circumstances, there is strong reason to believe that Ms. Conway has violated the Standards of Conduct and that disciplinary action is warranted.

At issue is the section of the Standards of Conduct prohibiting employees from misusing their official positions.⁵ The misuse of position prohibition is rooted in the first principle of the government ethics program.⁶ Established by Executive Order of President George H. W. Bush and codified in OGE's government-wide regulations, this principle holds that, "Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain."⁷ Executive branch officials should use the authority entrusted to them for the benefit of the American people and not for private profit.

The facts as OGE understands them are as follows. You previously advised OGE that all new senior White House appointees received their required initial ethics training. OGE's regulations require that initial ethics training must cover the misuse of position prohibition, as one of four mandatory subjects.⁸ On the morning of Thursday, February 9, 2017, the hosts of a news program interviewed Ms. Conway from the White House's James S. Brady Briefing Room.⁹ She was unquestionably appearing in her official capacity.¹⁰ She used that interview, however, as an opportunity to market Ms. Trump's products, stating, "*Go buy Ivanka's stuff, is what I would tell you. I hate shopping, I'm going to go get some myself today.*"¹¹ Shortly thereafter, she added: "*This is just a wonderful line. I own some of it, I fully – I'm going to give a free commercial here. Go buy it today everybody, you can find it online.*"¹² As Ms. Conway made these statements, she appeared on screen in a tight frame between the official seal of the White House and the American flag.¹³

These facts, if true, would establish a clear violation of the prohibition against misuse of position. I note that OGE's regulation on misuse of position offers as an example the hypothetical case of a Presidential appointee appearing in a television commercial to promote a product.¹⁴ Ms. Conway's actions track that example almost exactly. Therefore, I recommend that the White House investigate Ms. Conway's actions and consider taking disciplinary action against her.

⁴ 5 U.S.C. app. § 402(f)(2)(A)(ii); 5 C.F.R. § 2638.503.

⁵ See 5 C.F.R. § 2635.702.

⁶ See 5 C.F.R. part 2635, subpart G.

⁷ E.O. 12,674, sec. 101(g) (Apr. 12, 1989) (as modified by Executive Order 12731); 5 C.F.R. § 2635.101(b)(1).

⁸ 5 C.F.R. § 2638.304(e)(1)(iii).

⁹ Richard Pérez-Peña and Rachel Abrams, *Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns*, The New York Times, Feb. 9, 2017, available at <https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html>.

¹⁰ One of the program's hosts introduced her to viewers as "Kellyanne Conway, Special Counselor to the President of the United States." *Kellyanne Conway addresses rumors about Sean Spicer's job, Fox & Friends*, Feb. 9, 2017, available at http://video.foxnews.com/v/5316971350001/?playlist_id=930909787001#sp=show-clips (video: relevant portion begins at approximately 0:08) ("Fox Video Clip").

¹¹ See Fox Video Clip (beginning at approximately 8:40).

¹² See *id.* (beginning at approximately 9:25).

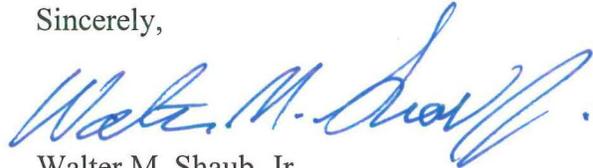
¹³ See *id.*

¹⁴ 5 C.F.R. § 2635.702(c), example 1.

Stefan C. Passantino
Deputy Counsel to the President
and Designated Agency Ethics Official
Page 3

I request that you notify OGE in writing of the findings of your investigation and any disciplinary or other corrective taken in connection with this matter by February 28, 2017.¹⁵ Please be advised that OGE will share a copy of that written notification with Representatives Chaffetz and Cummings.

Sincerely,



Walter M. Shaub, Jr.
Director

cc. Mr. Donald F. McGahn II
Counsel to the President

Rep. Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives

Rep. Elijah E. Cummings
Ranking Minority Member
Committee on Oversight and Government Reform
U.S. House of Representatives

¹⁵ See 5 U.S.C. app. § 403(a)(2).

From: [Matthew A. Marinec](#)
To: [Walter M. Shaub](#)
Subject: Call with OGE Cancelled
Date: Monday, December 12, 2016 10:37:07 AM

Mr. McGahn's Assistant Jo Lynch contacted me this morning to cancel today's call with Mr. McGahn and Ms. Donaldson.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286
Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics

Don McGahn, Ann Donaldson & Jo Ann Lynch

From: [Director of OGE](#)

To: [Shelley K. Finlayson](#); [David J. Apol](#); (b) (6)

Cc: (b) (6)

Subject: Call with OGE

OGE will call (b) (6)

Recurring appointment every Monday and Thursday for 45 minutes.

If any adjustments need to be made please contact me.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Don McGahn, Ann Donaldson & Jo Ann Lynch

From: [Director of OGE](#)
To: [Shelley K. Finlayson](#); [David J. Apol](#); (b) (6) [Walter M. Shaub](#)
Cc: (b) (6)
Subject: Call with OGE

Updating the Monday, 1/2/17 appointment only to instead take place on Tuesday, 1/3/17 at 11:00 am.

OGE will call (b) (6).

If any adjustments need to be made please contact me.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Don McGahn, Ann Donaldson & Jo Ann Lynch

From: [Director of OGE](#)
To: [Shelley K. Finlayson](#); [David J. Apol](#); (b) (6) [Walter M. Shaub](#)
Cc: (b) (6)
Subject: Call with OGE

Updating the Monday, 1/9/17 appointment only to instead take place on Tuesday, 1/10/17 at 10:30 am.

OGE will call (b) (6)

If any adjustments need to be made please contact me.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Don McGahn, Ann Donaldson & Jo Ann Lynch

From: [Director of OGE](#)
To: [Shelley K. Finlayson](#); [David J. Apol](#); (b) (6) [Walter M. Shaub](#)
Cc: (b) (6)
Subject: Call with OGE

Updating the Monday, 1/9/17 appointment only to instead take place on Tuesday, 1/10/17 at 4:30 pm.

OGE will call (b) (6)

If any adjustments need to be made please contact me.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Don McGahn, Ann Donaldson & Jo Ann Lynch

From: [Director of OGE](#)
To: [Shelley K. Finlayson](#); [David J. Apol](#); (b) (6) [Walter M. Shaub](#)
Cc: (b) (6)
Subject: Canceled: Call with OGE
Importance: High

Today's meeting is cancelled per correspondence from Jones Day.

If we are able to reschedule I will send out an updated appointment.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Don McGahn, Ann Donaldson & Jo Ann Lynch

From: [Director of OGE](#)
To: [Walter M. Shaub](#); [Shelley K. Finlayson](#); [David J. Apol](#); (b) (6)
Cc: (b) (6)
Subject: Conference Call with OGE

OGE will call Mr. McGahn's office at (b) (6)

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286