

**From:** [Walter M. Shaub](#)  
**To:** [Shelley K. Finlayson](#)  
**Subject:** FW: Letter from OGE Director W. Shaub to S. Passantino  
**Date:** Monday, February 13, 2017 5:50:22 PM  
**Attachments:** [Letter from OGE Director to White House DAEO 2-13-17.pdf](#)

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**From:** Walter M. Shaub  
**Sent:** Monday, February 13, 2017 5:50 PM  
**To:** (b)(6) Don McGahn; 'Passantino, Stefan C. EOP/WHO'  
**Cc:** David J. Apol  
**Subject:** Letter from OGE Director W. Shaub to S. Passantino

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

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UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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

<sup>1</sup> See 5 C.F.R. § 2635.702.

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

<sup>3</sup> *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-eeda-11e6-b4ff-ac2cf509efe5\\_story.html?utm\\_term=.5cd0f41fd54c](https://www.washingtonpost.com/politics/conway-may-have-broken-key-ethics-rule-by-touting-ivanka-trumps-products-experts-say/2017/02/09/fd1cc64a-eeda-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.5cd0f41fd54c).



action against the employee.<sup>4</sup> 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.<sup>5</sup> The misuse of position prohibition is rooted in the first principle of the government ethics program.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> She was unquestionably appearing in her official capacity.<sup>10</sup> 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.*"<sup>11</sup> 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.*"<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.

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

<sup>5</sup> See 5 C.F.R. § 2635.702.

<sup>6</sup> See 5 C.F.R. part 2635, subpart G.

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

<sup>8</sup> 5 C.F.R. § 2638.304(e)(1)(iii).

<sup>9</sup> 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>.

<sup>10</sup> 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](http://video.foxnews.com/v/5316971350001/?playlist_id=930909787001#sp=show-clips) (video: relevant portion begins at approximately 0:08) ("Fox Video Clip").

<sup>11</sup> See Fox Video Clip (beginning at approximately 8:40).

<sup>12</sup> See *id.* (beginning at approximately 9:25).

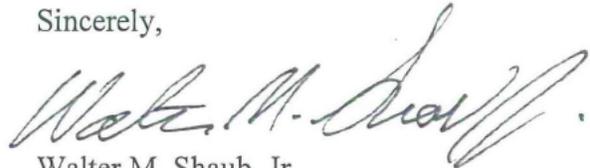
<sup>13</sup> See *id.*

<sup>14</sup> 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.<sup>15</sup> 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

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<sup>15</sup> See 5 U.S.C. app. § 403(a)(2).

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



March 9, 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:

Thank you for your timely response to my February 13, 2017, letter regarding Kellyanne E. Conway, Special Counselor to the President. While I appreciate your explanation of the White House's ethics education and counseling efforts, I am concerned about the response for two reasons.

I remain concerned about Ms. Conway's misuse of position. Your letter concedes that her televised statements from the White House press briefing room implicated the prohibition on using one's official position to endorse any product or service. When an employee's conduct violates 5 C.F.R. § 2635.702, disciplinary action serves to deter future misconduct. Not taking disciplinary action against a senior official under such circumstances risks undermining the ethics program.

I am more concerned about the extraordinary assertion that "many" of OGE's regulations are inapplicable to employees of the Executive Office of the President. The assertion is incorrect, and the letter cites no legal basis for it.<sup>1</sup> Presidential administrations have not considered it appropriate to challenge the applicability of ethics rules to the entire executive branch. It is critical to the public's faith in the integrity of government that White House employees be held to the same standard of ethical accountability as other executive branch employees.

Sincerely,

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

Walter M. Shaub, Jr.  
Director

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<sup>1</sup> OGE also disagrees with the separate assertion in a footnote to your letter that White House employees are outside OGE's purview. The underlying theory that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105 has never been applied in the context of government ethics, nor should it be.



Stefan C. Passantino  
Deputy Counsel to the President  
and Designated Agency Ethics Official  
Page 2

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Committee on Oversight and Government Reform  
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