



June 13, 2017

The Honorable Elizabeth Warren  
United States Senate  
317 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Edward J. Markey  
United States Senate  
255 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Sheldon Whitehouse  
United States Senate  
530 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Mazie K. Hirono  
United States Senate  
730 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senators Warren, Whitehouse, Markey, and Hirono:

I am in receipt of your letter dated May 17, 2017, regarding Stephen K. Bannon, Assistant to the President and White House Chief Strategist. You requested information about the ethics requirements that apply to Mr. Bannon as a Presidential appointee.

Executive branch employees are subject to a variety of ethics laws and rules designed to ensure the impartiality of the government's decision making. These authorities include the anti-bribery and criminal conflict of interest statutes;<sup>1</sup> the Ethics in Government Act;<sup>2</sup> the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct);<sup>3</sup> certain restrictions established in President Bush's 1989 Executive Order on ethics;<sup>4</sup> the Stop Trading on Congressional Knowledge Act;<sup>5</sup> and other legal provisions. Certain political appointees are also subject to additional restrictions established in Executive Order 13770 (Jan. 28, 2017).<sup>6</sup> Presidential appointees in the White House are subject to these authorities to the same extent as other executive branch employees.<sup>7</sup>

As you stated in your letter, Executive Order 13770 requires every "appointee" in each executive agency appointed on or after January 20, 2017, to sign an ethics pledge.<sup>8</sup> The pledge states in part that the appointee will not, for a period of two years from the date of appointment,

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<sup>1</sup> 18 U.S.C. §§ 201-209.

<sup>2</sup> 5 U.S.C. app. §§ 101 *et seq.*

<sup>3</sup> 5 C.F.R. part 2635.

<sup>4</sup> Exec. Order 12674 (Apr. 12, 1989), as amended by Exec. Order 12731 (Oct. 17, 1990).

<sup>5</sup> Pub. L. No. 112-105, 126 Stat. 291 (2012), as amended.

<sup>6</sup> Exec. Order 13770 (Jan. 28, 2017).

<sup>7</sup> Note, however, the Department of Justice (DOJ) recently opined that the anti-nepotism statute does not apply to the White House Office. See *Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office*, OFFICE OF LEGAL COUNSEL, U.S. DEP'T JUSTICE, 41 Op. O.L.C. 1 (Jan. 20, 2017).

<sup>8</sup> See section 1 of Exec. Order 13770 (Jan. 28, 2017).



participate in any particular matter involving specific parties that is directly and substantially related to a former employer or client.<sup>9</sup> Section 2 of the order defines the term “directly and substantially related to my former employer or former clients” to mean particular matters in which the appointee’s former employer or a former client “is a party or represents a party.”<sup>10</sup> Additionally, section 2 of the order defines the term “particular matter involving specific parties” to have the same meaning as set forth in OGE’s regulations but also to include “any meeting or other communication relating to the performance of one’s official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.”<sup>11</sup>

Section 3 of Executive Order 13770 provides that the President or his designee may grant a waiver of restrictions contained in the ethics pledge. That section of the executive order lacks a legal standard with which to evaluate the appropriateness of issuing a waiver.<sup>12</sup> As a practical matter, the waiver must also be issued in writing, given that the waiver must be “signed” and given that the executive order requires a “copy” of the waiver to be “furnished” to both the appointee covered by the waiver and the head of the appointee’s agency.<sup>13</sup> In addition, the executive order provides that a waiver “shall take effect” after it is signed,” which precludes the possibility of a waiver having retroactive effect.<sup>14</sup>

The Standards of Conduct establish an additional recusal obligation with respect to former employers and clients. Specifically, an appointee may not participate in any particular matter involving specific parties in which a person with whom he has a covered relationship is a party or represents a party, if the appointee determines that a reasonable person with knowledge of the relevant facts would question the appointee’s impartiality in the matter. Covered relationships include a former employer or a client the appointee served in the past year.<sup>15</sup> Notwithstanding this recusal obligation, the White House may authorize an appointee to participate in such a matter when the agency designee makes a determination, after considering certain relevant factors, that the interest of the government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.<sup>16</sup>

The White House is responsible for monitoring compliance with ethics requirements, including those established under Executive Order 13770, and investigating potential ethics violations with respect to appointees serving in the White House.<sup>17</sup> For its part, OGE cannot impose disciplinary action on an executive branch employee other than an OGE employee.<sup>18</sup>

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<sup>9</sup> See section 1(6) of Exec. Order 13770 (Jan. 28, 2017).

<sup>10</sup> See section 2(d) of Exec. Order 13770 (Jan. 28, 2017).

<sup>11</sup> See section 2(s) of Exec. Order 13770 (Jan. 28, 2017).

<sup>12</sup> See section 3 of Exec. Order 13770 (Jan. 28, 2017).

<sup>13</sup> See section 3(b), (c) of Exec. Order 13770 (Jan. 28, 2017).

<sup>14</sup> See section 3(b) of Exec. Order 13770 (Jan. 28, 2017) (“A waiver shall take effect when the certification is signed by the President or his designee.”).

<sup>15</sup> 5 C.F.R. § 2635.502.

<sup>16</sup> 5 C.F.R. § 2635.502(d).

<sup>17</sup> See section 4(a) of Exec. Order 13770 (Jan. 28, 2017); 5 C.F.R. § 2635.106.

<sup>18</sup> See 5 U.S.C. app. § 402.

When OGE has reason to believe that an employee may have violated the Standards of Conduct, the law authorizes OGE to make only a recommendation that the employing agency investigate the matter and consider taking disciplinary action against the employee.<sup>19</sup> When an agency declines to take disciplinary action against an employee in connection with an ethics violation, OGE's only recourse is to notify the President.<sup>20</sup>

Separate from these recusal obligations under Executive Order 13770 and the Standards of Conduct, appointees serving in the White House are covered by criminal conflict of interest laws.<sup>21</sup> With regard to potential violations of the criminal conflict of interest laws, agency officials are obligated to expeditiously report any information on potential violations of federal criminal law to the Attorney General.<sup>22</sup> Once such a referral is made, the agency is required to notify OGE.<sup>23</sup> However, OGE is specifically prohibited from making a finding that any criminal law is being or has been violated.<sup>24</sup>

Like other appointees, Mr. Bannon is also subject to financial disclosure requirements. These requirements include a requirement to file a new entrant public financial disclosure report within 30 days of appointment to the government.<sup>25</sup> New entrant reports include information about the financial interests of the filers, their spouses, and their dependent children, as well as certain positions outside the government.<sup>26</sup> The White House is authorized to grant a filing extension, upon a showing of good cause, of up to 45 days and, upon a written showing of good cause, a second extension of up to 45 additional days.<sup>27</sup> The approval of a second extension must be in writing.<sup>28</sup> After appointees file their reports, the White House's ethics officials review the reports for compliance with financial disclosure requirements and substantive ethics requirements.<sup>29</sup> White House ethics officials are expected to work with an appointee to resolve any potential conflicts of interest that they identify through their review of the financial disclosure reports.<sup>30</sup>

In addition to filing a new entrant report, Mr. Bannon must satisfy other financial disclosure requirements. He will have to file periodic transaction reports within 30 days of receiving notice of any covered transaction.<sup>31</sup> He will have to file an annual financial disclosure report by May 15 each year.<sup>32</sup> In addition, he will have to file a termination financial disclosure report within 30 days of terminating his federal service.<sup>33</sup> The process for resolving conflicts of

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<sup>19</sup> 5 U.S.C. app. § 402(f)(2)(A)(ii)(I); 5 C.F.R. § 2638.503.

<sup>20</sup> See 5 U.S.C. § 402(f)(2)(A)(iv)(II).

<sup>21</sup> See, e.g., 18 U.S.C. §§ 201, 203-209.

<sup>22</sup> See 28 U.S.C. § 535(b).

<sup>23</sup> See 5 U.S.C. § 402(e)(2).

<sup>24</sup> See 5 U.S.C. § 402(f)(5).

<sup>25</sup> 5 U.S.C. app. § 101(a).

<sup>26</sup> 5 U.S.C. app. § 102.

<sup>27</sup> 5 C.F.R. § 2634.201(f).

<sup>28</sup> *Id.*

<sup>29</sup> 5 U.S.C. app. § 106; 5 C.F.R. § 2634.605.

<sup>30</sup> 5 U.S.C. app. § 106; 5 C.F.R. § 2634.605.

<sup>31</sup> 5 U.S.C. app. § 103(l).

<sup>32</sup> 5 U.S.C. app. § 101(d).

<sup>33</sup> 5 U.S.C. app. § 101(e).

interest identified during the review of these subsequently filed financial disclosure reports is the same as that associated with new entrant financial disclosure reports.

With regard to your question about conflicts of interest recusals, the primary criminal conflict of interest statute prohibits senior White House appointees and other executive branch employees from participating personally and substantially in particular matters directly and predictably affecting their financial interests.<sup>34</sup> Among other things, this prohibition extends to the financial interests of companies in which they have ownership interests.<sup>35</sup> It is important to note, however, that the criminal conflict of interest statute is not a prohibited holdings statute. Instead, it requires an appointee to refrain from participating in the particular matter affecting the appointee's financial interests or the financial interests of persons whose interests are imputed to the appointee.<sup>36</sup> Thus, the most common mechanism for resolving conflicts of interest is to recuse from particular matters that would affect the appointee's personal and imputed financial interests.

Recusal is not the only means for resolving conflicts of interest. Other remedies for resolving conflicts of interest can include reassignment, divestiture, waiver, or the establishment of a qualified blind or diversified trust.<sup>37</sup> In some cases, an employee can rely on an exemption to the criminal conflict of interest statute.<sup>38</sup> OGE and the Department of Justice have established regulatory exemptions for certain types of financial interests because the conflicts of interest they pose are too remote or inconsequential to be likely to affect the integrity of an employee's service to the government.<sup>39</sup>

The White House can direct an appointee to sell, or otherwise divest, an asset in order to avoid a conflict of interest.<sup>40</sup> If selling the asset will result in a capital gain, the appointee may be eligible for a Certificate of Divestiture to offset the tax burden of complying with the government's conflict of interest requirements.<sup>41</sup> Pending the divestiture, the appointee must recuse from particular matters in which the asset poses a conflict of interest. Recusal is achieved by not participating in a particular matter.<sup>42</sup> A White House appointee is not normally required to file a disqualification statement or other document regarding the recusal.<sup>43</sup> Thus, the important requirement is only that the appointee not participate. The White House ethics office is also responsible for providing an appointee with training, giving him guidance regarding the specific

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<sup>34</sup> See 18 U.S.C. § 208(a).

<sup>35</sup> See, e.g., OGE Informal Advisory Opinion 92 x 2 (1992).

<sup>36</sup> See 18 U.S.C. § 208(a).

<sup>37</sup> See, e.g., Memo from Amy L. Comstock, Director, U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Nominee Ethics Agreements*, DO-01-013 (2001) (discussing remedies for conflicts of interest in the analogous case of Presidential nominees); 5 C.F.R. part 2634, subpart D.

<sup>38</sup> 18 U.S.C. § 208(b)(2).

<sup>39</sup> See 5 C.F.R. part 2640, subpart B.

<sup>40</sup> See 5 C.F.R. §§ 2635.402(e)(2), 2635.403(b); see also 5 U.S.C. §§ 106(b)(3), 402(f)(2)(A)(iii)(I),

<sup>41</sup> 26 U.S.C. § 1043; 5 C.F.R. pt. 2634, subpart J.

<sup>42</sup> 5 C.F.R. § 2640.103(d).

<sup>43</sup> 5 C.F.R. § 2640.103(d)(2). *But see* Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 17, 126 Stat. 291, 303-04 (requiring notice of recusal in the limited case of an appointee negotiating for post-government employment).

requirements applicable to him, monitoring his compliance with applicable requirements, and taking appropriate action in the event of a violation of applicable requirements.<sup>44</sup>

Only after the White House has certified the appointee's financial disclosure report does the White House transmit the report to OGE.<sup>45</sup> OGE then conducts a second-level review.<sup>46</sup> As part of this review process, OGE advises White House ethics officials of any deficiencies in an appointee's compliance with financial disclosure requirements. In turn, the White House ethics officials work with the appointee who filed the report in order to resolve them. It is normal for an appointee to make changes to a financial disclosure report and to add information during this review process. After the report is revised, OGE asks the White House whether it has addressed any potential conflicts of interest identified during the review process. OGE then makes a determination regarding apparent compliance with financial disclosure and conflict of interest rules and either certifies or declines to certify the financial disclosure report.<sup>47</sup>

As discussed above, two legal authorities require Mr. Bannon to recuse from certain matters involving his former employer, Breitbart News Network. Paragraph 6 of the ethics pledge under Executive Order 13770 requires him to recuse from particular matters involving specific parties in which this former employer is a party or represents a party.<sup>48</sup> The order also requires him to recuse from any meeting or other communication with his former employer relating to the performance of his official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting (or other event) is open to all interested parties.<sup>49</sup> Mr. Bannon can be excused from these requirements under paragraph 6 if he receives a written waiver, which will become effective when it is signed and not on an earlier date.<sup>50</sup> The Standards of Conduct also require him to recuse from any such matter whenever a reasonable person with knowledge of the relevant facts would question his impartiality with regard to his former employer, unless he first receives an authorization pursuant to 5 C.F.R. § 2635.502(d).<sup>51</sup>

On May 31, 2017, the White House posted a waiver on its website that pertains to some, but not all, of these recusal obligations under paragraph 6 of the ethics pledge.<sup>52</sup> The waiver states that it covers "all appointees in the Executive Office of the President," where Mr. Bannon is an appointee. The document appears to be a partial waiver of the ethics pledge restriction as to

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<sup>44</sup> See 5 C.F.R. §§ 2635.106, 2638.104, 2638.304, 2638.308, 2638.504(a).

<sup>45</sup> 5 U.S.C. app. § 103(c).

<sup>46</sup> 5 U.S.C. app. § 106(a).

<sup>47</sup> 5 U.S.C. app. § 106(b); 5 C.F.R. § 2634.605.

<sup>48</sup> See sections 1(6), 3(d) of Exec. Order 13770 (Jan. 28, 2017).

<sup>49</sup> See sections 1(6), 3(s) of Exec. Order 13770 (Jan. 28, 2017); see also OGE DO-09-011, 2 (2009) (explaining that, to satisfy the requirement of "all interested parties," the meeting must include at least five parties and further explaining that, "The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view. . . . Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters.").

<sup>50</sup> See section 3(b) of Exec. Order 13770 (Jan. 28, 2017).

<sup>51</sup> 5 C.F.R. § 2635.502(a).

<sup>52</sup> See Mem. from the Counsel to the President to Appointees in the Exec. Office of the President, *Waiver Certification Under Section 3 of Executive Order 13770 for Communications and Meetings with News Organizations* (undated and unsigned), available at <https://goo.gl/3MEJWr>.

certain types of communications with all “news organizations,” an undefined class of organizations that would be construed to include Mr. Bannon’s former employer, Breitbart.

Significantly, the waiver is only a partial waiver. As to Mr. Bannon, it authorizes him to communicate with Breitbart and to participate in meetings with his former employer, but only if the subjects of discussion are limited to “matters of broad policy and particular matters of general applicability.”<sup>53</sup> Given the limited scope of this waiver, Mr. Bannon remains barred, under both Executive Order 13770 and the Standards of Conduct,<sup>54</sup> from participating in any “particular matter involving specific parties” in which Breitbart is a party or represents a party. He also remains barred, under Executive Order 13770, from participating in any meeting, event, or other communication with Breitbart when the subject of discussion is a particular matter involving specific parties, whether or not Breitbart is a party or represents a party.

The waiver is problematic because it is unsigned and undated, and it purports to have “retroactive” effect.<sup>55</sup> These deficiencies are inconsistent with the language of Executive Order 13770. As discussed earlier, the order expressly provides that a waiver is effective only after it has been signed: “A waiver shall take effect when the certification is signed by the President or his designee.”<sup>56</sup> More importantly, the putative retroactivity is inconsistent with the very concept of a waiver, which is to take decisions regarding the appropriateness of an employee’s participation in covered matters out of the employee’s hands. By engaging in a prohibited matter at a time when the appointee does not possess a waiver, the appointee violates the rule. Although the White House may later decide that such a violation does not warrant disciplinary action, the subsequent issuance of a waiver would not change the fact that a violation occurred.<sup>57</sup>

It is important to emphasize that, as with other White House appointees, OGE is not in a position to have direct knowledge of Mr. Bannon’s daily assignments and activities. OGE does not know whether Mr. Bannon participated in any prohibited matter or whether he confined his activities to matters in which he was permitted to participate. OGE is aware of media reports regarding his activities,<sup>58</sup> but OGE has neither independently validated these reports nor received

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<sup>53</sup> *Id.*

<sup>54</sup> See 5 C.F.R. § 2635.502(a), (d). Note that there is no indication that he has received a separate authorization under 5 C.F.R. § 2635.502(d). See Mem. from the Counsel to the President to Appointees in the Exec. Office of the President, *Waiver Certification Under Section 3 of Executive Order 13770 for Communications and Meetings with News Organizations* (undated) (“This limited waiver does not affect the application of any other provision of law, including . . . the Standards of Ethical Conduct for Executive Branch Employees (5 C.F.R. part 2635). . . .”), available at <https://goo.gl/3MEJWr>.

<sup>55</sup> See White House Press Office, “*Ethics Pledge Waivers Released by the White House[:]* List of Ethics Waivers Issued as of May 31st, 2017,” THE WHITE HOUSE (May 31, 2017).

<sup>56</sup> See section 3(b) of Exec. Order 13770 (Jan. 28, 2017).

<sup>57</sup> See, e.g., OGE DO-10-005 (Apr. 22, 2010).

<sup>58</sup> See Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington to Donald F. McGahn, Counsel to the President (Mar. 30, 2017), available at <https://goo.gl/mTh9eY>; David Folkenflik, *Ex-Breitbart Executive Brings Alt-Right Ties to the White House*, NATIONAL PUBLIC RADIO (Nov. 15, 2016), available at <https://goo.gl/GFaHIF>; Hadas Gold, *Breitbart’s bid for congressional pass put off*, POLITICO (Mar. 27, 2017), available at <https://goo.gl/k91gjC>; Jonathan Swan, *Steve Bannon privately unloaded on Breitbart reporter*, AXIOS (Feb. 15, 2017), available at <https://www.axios.com/steve-bannon-privately-unloads-on-breitbart-2263308411.html>; Lloyd Grove, *Steve Bannon: I Didn’t Order Breitbart Hit on Reince Priebus*, THE DAILY BEAST (Feb. 15, 2017), available at <https://goo.gl/50dIHs>; Oliver Darcy, *‘There are no sacred cows’: Breitbart’s*

the information necessary to draw any conclusion with respect to his compliance with the ethics pledge.

The White House's decision to post the waiver online was preceded by a data call that OGE issued on April 28, 2017, for certain executive branch waivers and authorizations.<sup>59</sup> As with similar oversight activities conducted by OGE, OGE will prepare a report regarding the waivers and authorizations it has obtained in connection with this data call and publish a copy of the completed report on its website. As part of preparing that report, OGE will follow up with the White House and other agencies to request additional information, including whether they are aware of any violations of the ethics pledge. The information OGE obtains will be incorporated into its report.

I hope this information addresses the issues your letter raises. If members of your staff have questions, OGE's Chief of Staff, Shelley K. Finlayson, is available to assist them. She can be reached at 202-482-9314.

Sincerely,

WALTER  
SHAUB

Walter M. Shaub, Jr.  
Director

Digitally signed by WALTER SHAUB  
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of Government Ethics, cn=WALTER SHAUB,  
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*honeymoon with establishment win of Trump White House may be over*, BUSINESS INSIDER (Mar. 8, 2017), available at <https://goo.gl/1ThazQ>; Lachlan Markay, *Bannon May Have Violated Ethics Pledge by Communicating With Breitbart*, DAILY BEAST (Mar. 30, 2017), available at <https://goo.gl/ZB09o6>; Breitbart TV, *Watch: Breitbart Editor-in-Chief Alex Marlow Interviewed by NBC's 'Today'*, BREITBART (Mar. 17, 2017), available at <https://goo.gl/j4s07H>.

<sup>59</sup> See OGE PA-17-02 (Apr. 28, 2017).