

THE WHITE HOUSE

WASHINGTON

September 15, 2017

David J. Apol, Esquire
Acting Director
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, D.C. 20005

Dear Mr. Apol:

I am writing in response to your request that we address the issues raised in two letters from Senators Warren, Whitehouse, Carper, Cummings and Leahy – the first letter dated April 21, 2017 was addressed to Deputy Counsel to the President and Designated Ethics Official for the White House Office, Stefan C. Passantino and the second letter dated May 16, 2017 was addressed to then Director of the Office of Government Ethics (“OGE”), Walter Shaub. Both letters relate to Mr. Passantino’s compliance with federal ethics regulations and Executive Order 13770.

The White House has a process for handling conflicts of interest with respect to the ethics team in the White House Counsel’s Office. On January 24, 2017, the President appointed Mr. Passantino the Designated White House Ethics Official. On that same date, the President appointed me the Alternate Designated White House Ethics Official. An Alternate Designated White House Ethics Official is delegated authority to coordinate and manage the ethics program in the White House Office along with the Designated White House Ethics Official.¹ This ensures that White House employees have access to more than one ethics official and that ethics guidance is offered when either official is unavailable or unable to perform his duties. As it relates to issues that create a conflict of interest or the appearance of a conflict of interest for the Designated White House Ethics Official, the Alternate Designated White House Ethics Official provides principal ethics guidance to White House employees – the reverse is the case when the Alternate Designated Ethics Official has been recused.

Mr. Passantino and all other White House appointees must comply with the Standards of Conduct and Executive Order 13770 restrictions regarding representation of former clients unless an authorization or a waiver has been granted.² Mr. Passantino was not issued a waiver and therefore those restrictions are applicable to him regarding his former clients, who include Secretary Ben Carson, Secretary Tom Price, and Mr. Carl Icahn.

As Mr. Shaub correctly articulated in his June 28, 2017 response, Mr. Passantino, under the Standards of Conduct, may not participate in any “particular matter involving specific parties” in

¹ See 5 C.F.R. § 2638.104 (2017).

² See generally 5 C.F.R. § 2635.101; Exec. Order 13770 (Jan. 28, 2017).

which a client he served in the past year is a party or represents a party, whenever he or the White House Office determines that a “reasonable person” with knowledge of the relevant facts would question his impartiality in the matter.³ As it relates to section 2(s) of Executive Order 13770, Mr. Shaub expands its applicability to any communications or meetings “involving” a client the employee served within the past two years prior to his appointment. In fact, Executive Order 13770 specifically states in pertinent part that “[p]articular matter involving specific parties’ shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating to the performance of one’s official duties *with* a former employer or former client . . .”⁴

Mr. Passantino has appropriately recused himself from any particular matter involving his former clients, including Mr. Icahn, where the former client is acting in his personal capacity. Factually, it was determined by the Presidential Transition Team that Mr. Icahn “will be advising the President in his individual capacity and will not be serving as a federal employee or a Special Government Employee and will not have any specific duties.”⁵ At no time has the White House Office found it necessary to revisit this issue, nor do I believe as the Alternate Designated White House Ethics Officer that it is necessary to do so. That Mr. Passantino restated the fact that Mr. Icahn does not work at the White House is not personal and substantial involvement in a particular matter. Mr. Passantino did not deliberate, discuss, analyze or otherwise make a determination regarding Mr. Icahn. Indeed, there was no determination or analysis to be made regarding Mr. Icahn’s status. Mr. Passantino merely reiterated what was already determined – that “[Mr. Icahn] is simply a private citizen whose opinion the [P]resident respects and whom the [P]resident speaks with from time to time” and that “Mr. Icahn does not have a position with the administration nor a policymaking role.”⁶ Since joining the administration as Deputy Counsel to the President, Mr. Passantino has had no communication with Mr. Icahn and has appropriately recused himself from all matters regarding former clients. This is evidenced by Mr. Shaub’s letter that documents Mr. Passantino’s awareness of his obligations. Former Director Shaub further acknowledges that Mr. Passantino took affirmative steps to recuse himself from communications between OGE and the White House in connection with nominations of former clients.⁷ Finally, consistent with our practice since the inception of this Administration, to the extent any particular matters arise relative Mr. Icahn or any of Mr. Passantino’s former clients, I am charged with handling such matters and will do so accordingly.

³ 5 C.F.R. § 2635.501(a) (2017); 5 C.F.R. § 2635.502(b) (2017).

⁴ Exec. Order 13770 (Jan. 28, 2017) (emphasis added).

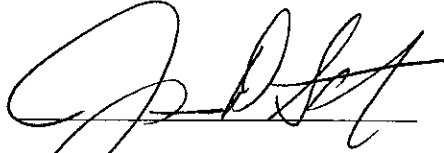
⁵ The Trump-Pence Transition Team, “President-Elect Donald J. Trump Names Carl Icahn Special Advisor to the President on Regulatory Reform,” (December 21, 2016) (online at <https://greatagain.gov/icahn-advisorregs-cd3c949af118>).

⁶ Jennifer A. Dlouhy, “‘Purest Definition of a Conflict’: Icahn’s \$126 Million Gain on Biofuel Deal Draws Criticism,” Bloomberg (March 1, 2017) (online at <https://www.bloomberg.com/news/articles/2017-02-28/icahn-s-126-million-gain-on-biofuel-deal-prompts-criticism>).

⁷ Letter to Senators Warren, Carper, Whitehouse, Leahy and Congressman Cummings, from Walter Shaub, Director of the Office of Government Ethics (June 28, 2017).

Thank you for your inquiry on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. D. Schultz', written over a horizontal line.

James D. Schultz
Special Assistant to the President
Senior Associate Counsel to the President
Alternate Designated White House Ethics Official