



March 22, 2018

The Honorable Raja Krishnamoorthi  
United States House of Representatives  
515 Cannon House Office Building  
Washington, DC 20515

Dear Congressman Krishnamoorthi:

This responds to your letter dated March 1, 2018, regarding the application of ethics laws and rules to Senior Advisor to the President Jared Kushner. In particular, your letter raises questions about the ethical implications of a senior White House official holding a broad portfolio of government responsibilities while also maintaining a financial interest in active business entities, personally guaranteeing loans to business entities, and meeting with potential investors and creditors in those business entities.

Executive branch employees are subject to a variety of ethics laws and rules designed to ensure the impartiality of the government's decision making.<sup>1</sup> The complexity of these laws and rules combined with an employee's complex financial holdings can create significant risk for the employee, the government, and public confidence in government decisionmaking. To mitigate these risks, OGE often counsels the divestiture of potential conflicting assets. Where an employee and the employee's agency decide to permit the employee to maintain potentially conflicting private interests, the employee and the agency must take actions to avoid running afoul of the ethics laws and rules in the conduct of his or her duties as discussed more fully below.

Relevant to your inquiry, the primary financial conflict of interest statute prohibits executive branch employees from participating personally and substantially in particular matters directly and predictably affecting their financial interests.<sup>2</sup> This prohibition extends to the financial interests of companies in which they have ownership interests, but generally not to companies to which they are indebted unless the official action would have some effect on the loan itself. It is important to note that the criminal conflict of interest statute is not a prohibited holdings statute. Instead, it requires an employee to refrain from participating in the particular matter affecting the employee's financial interests or the financial interests of persons whose interests are imputed to the employee.<sup>3</sup> For employees who retain their outside financial interests, a common mechanism for resolving conflicts of interest is to recuse from particular

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<sup>1</sup> See, e.g., 18 U.S.C. §§ 201-209 (Conflicts of Interest); 5 C.F.R. pt. 2635 (Standards of Ethical Conduct for Employees of the Executive Branch); Executive Order No. 13,770 (Jan. 28, 2017) (Ethics Commitments by Executive Branch Appointees).

<sup>2</sup> See 18 U.S.C. § 208(a).

<sup>3</sup> See *id.* (imputing to an employee the interests of "his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment").



matters that would affect the employee's personal and imputed financial interests.<sup>4</sup> Other remedies for resolving conflicts of interest include selling or otherwise divesting an asset, reassignment, waiver, or the establishment of a qualified blind or diversified trust.<sup>5</sup> In some cases, an employee can rely on an exemption to the criminal conflict of interest statute.<sup>6</sup> OGE is prohibited by statute from making a finding that a criminal law, including a criminal conflict of interest law, has been or is being violated.<sup>7</sup>

Your letter also inquires about the ethical implications of a senior White House official having personally guaranteed loans to a private business entity with large outstanding debt obligations. Subpart E of the Standards of Conduct prohibits an employee from participating in any particular matter involving specific parties in which a person with whom he or she has a covered relationship is a party or represents a party, if the employee determines that a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter.<sup>8</sup> The employee's agency, in this instance the White House, may authorize an employee 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>9</sup> Alternatively, the agency may require recusal after making an independent determination that a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter.<sup>10</sup> The definition of "covered relationship" includes a person with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction.<sup>11</sup> We note in response to your inquiry that personally guaranteeing a large loan to a business or receiving a large loan on non-commercially available terms typically does not constitute a "routine consumer transaction."

Your letter also inquires about the ethical implications of a senior White House official meeting with potential investors and creditors in those business entities while the official is in a position to directly benefit the investors and offer its principals favorable policy outcomes. If private business connected to those entities were discussed at such a meeting, the prohibitions on misuse of position could be implicated.<sup>12</sup> More importantly, if there was a connection between the potential loan and an official act, it could raise an issue under 18 U.S.C. § 201 (bribery and illegal gratuities). Additionally, your letter asks whether Mr. Kushner's actions as detailed in a February 28, 2018 *New York Times* article constitute a breach of his ethical obligations to the American people.

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<sup>4</sup> See 5 C.F.R. §§ 2635.402(e)(2), 2635.403(b); see also 5 U.S.C. app. §§ 106(b)(3), 402(f)(2)(A)(iii)(I).

<sup>5</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. pt. 2634, subpt. D.

<sup>6</sup> 18 U.S.C. § 208(b)(2).

<sup>7</sup> See 5 U.S.C. app. § 402(f)(5).

<sup>8</sup> 5 C.F.R. § 2635.502.

<sup>9</sup> 5 C.F.R. § 2635.502(d).

<sup>10</sup> 5 C.F.R. § 2635.502(c).

<sup>11</sup> See 5 C.F.R. § 2635.502.

<sup>12</sup> See 5 C.F.R. §§ 2635.702 (Use of public office for private gain), 2635.704 (Use of Government property), 2635.705 (Use of official time).

With respect to both of these final two questions raised in your letter, the White House is in a position to ascertain the relevant facts related to possible violations and is responsible for monitoring compliance with ethics requirements, including those established under Executive Order 13770, the criminal conflict of interest statutes, and the Standards of Conduct.<sup>13</sup> The White House is also responsible for initiating any appropriate disciplinary or corrective action in individual cases.<sup>14</sup> I have discussed this matter with the White House Counsel's Office in order to ensure that they have begun the process of ascertaining the facts necessary to determine whether any law or regulation has been violated and whether any additional procedures are necessary to avoid violations in the future. During that discussion, the White House informed me that they had already begun this process. I have asked the White House to inform me of the results of that process. I am also forwarding this letter, as well as your letter to me, to the Counsel to the President for his review and a determination as to what action is warranted.

I hope this letter 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,



David J. Apol  
Acting Director and General Counsel

cc. The Honorable Donald F. McGahn II  
Counsel to the President

Stefan C. Passantino  
White House Designated Agency Ethics Official

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<sup>13</sup> When questions arise as to an employee's compliance, the law authorizes OGE only to make a recommendation that the employing agency look into the matter and consider taking appropriate action. If an agency were to decline the recommendation, OGE's only recourse would be to notify the President. *See* 5 U.S.C. app. § 402(f)(2)(A).

<sup>14</sup> *See* 5 C.F.R. § 2635.106.