

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



February 16, 2017

The Honorable Mark Pocan
1421 Longworth House Office Building
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Pocan:

This letter responds to your letter dated February 10, 2017, requesting that the U.S. Office of Government Ethics (OGE) review statements made by Kellyanne E. Conway, Counselor to the President, regarding the business interests of the President's daughter. You also request that OGE take action to prevent violations of the prohibition on misuse of position.

On February 9, 2017, OGE began consulting with the White House regarding this matter. Later that day, OGE received a letter from Chairman Jason E. Chaffetz (R-Utah) and Ranking Member Elijah E. Cummings (D-Maryland) of the House Oversight and Government Reform Committee requesting that OGE review Ms. Conway's statements, act promptly on any findings, and report back to the Committee with a recommendation for disciplinary action if warranted. Thereafter, OGE received a letter dated February 9, 2017, from Representative Ted W. Lieu, as well as your February 10, 2017, letter.

On February 13, 2017, OGE sent the enclosed letter to the White House's Designated Agency Ethics Official recommending that the White House investigate the matter and consider disciplinary action. That same day, OGE provided the enclosed response to Chairman Chaffetz and Ranking Member Cummings, explaining the applicable legal process¹ that Congress established, committing to pursue that process, and committing to report back to the Committee.

In order to further address the concerns your letter raises, OGE will provide you with a copy of its letter reporting back to Chairman Chaffetz and Ranking Member Cummings upon conclusion of this matter.

Sincerely,

Walter M. Shaub, Jr.
Director

Enclosures

cc: *(identified individually in an enclosure)*

¹ See 5 U.S.C. app. § 402; 5 C.F.R. part 2635, subpart E.



CC:

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

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

The Honorable John Sarbanes
Member
2444 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Barbara Lee
Member
2267 Rayburn House Office Building
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Washington, DC 20515

The Honorable Zoe Lofgren
Member
1401 Longworth House Office
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Washington, DC 20515

The Honorable Betty McCollum
Member
2256 Rayburn House Office Building
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Washington, DC 20515

The Honorable Gwendolynne S.
Moore
Member
2252 Rayburn House Office Building
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Washington, DC 20515

The Honorable Chellie Pingree
Member
2162 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable David Price
Member
2108 Rayburn House Office Building
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Washington, DC 20515

The Honorable Jan Schakowsky
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Washington, DC 20515

The Honorable Carol Shea-Porter
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1530 Longworth House Office
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U.S. House of Representatives
Washington, DC 20515

The Honorable Mark Takano
Member
1507 Longworth House Office
Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Ted W. Lieu
Member
236 Cannon House Office Building
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Washington, DC 20515

The Honorable Michelle Lujan
Grisham
Member
214 Cannon House Office Building
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Washington, DC 20515

The Honorable James P. McGovern
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438 Cannon House Office Building
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The Honorable Jerrold Nadler
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The Honorable Jared Polis
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Washington, DC 20515

The Honorable Jamie Raskin
Member
431 Cannon House Office Building
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Washington, DC 20515

The Honorable Bradley S. Schneider
Member
1432 Longworth House Office
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The Honorable Darren Soto
Member
1429 Longworth House Office
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Washington, DC 20515

The Honorable Paul Tonko
Member
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Washington, DC 20515

The Honorable Donald S. Beyer
Member
1119 Longworth House Office
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Washington, DC 20515

The Honorable Earl Blumenauer
Member
1111 Longworth House Office
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Washington, DC 20515

The Honorable Katherine Clark
Member
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The Honorable John K. Delaney
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The Honorable Mark DeSaulnier
Member
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The Honorable Alcee Hastings
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2353 Rayburn House Office Building
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The Honorable Henry C. Johnson, Jr.
Member
2240 Rayburn House Office Building
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The Honorable Marcy Kaptur
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The Honorable Rick Larsen
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The Honorable Brendan F. Boyle
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The Honorable David N. Cicilline
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Washington, DC 20515

The Honorable Steve Cohen
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2404 Rayburn House Office Building
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Washington, DC 20515

The Honorable Val Demings
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The Honorable Theodore E. Deutch
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2447 Rayburn House Office Building
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The Honorable Pramila Jayapal
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Washington, DC 20515

The Honorable Jared Huffman
Member
1406 Longworth House Office
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The Honorable Bill Keating
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The Honorable Brenda L. Lawrence
Member
1213 Longworth House Office
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Washington, DC 20515

The Honorable Bennie G. Thompson
Member
2466 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velazquez
Member
2302 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



February 13, 2017

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 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, D.C. 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

I am in receipt of your letter dated February 9, 2017, requesting that the U.S. Office of Government Ethics (OGE) review statements made by Kellyanne E. Conway regarding the business interests of the President's daughter, act promptly on any findings, and report back to the Committee with a recommendation for disciplinary action if warranted.¹ Prior to receiving your letter, OGE had begun consulting with the White House regarding this matter, pursuant to OGE's regulations for addressing potential violations by individual employees of the executive branch.² This letter is to explain the applicable legal process and to confirm that OGE will take the actions you request in your letter.

As you know, Congress has not provided OGE with any actual investigative authority or resources for hiring investigators. Unlike the Committee, OGE cannot issue subpoenas, question witnesses, compel the production of documents, or take action against individuals who refuse to cooperate.³ Unlike employing federal agencies, OGE cannot take disciplinary action against an executive branch employee other than an OGE employee.⁴ Thus, OGE is limited with respect to the actions it can take.

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), the law

¹ OGE received a similar letter from Representative Ted W. Lieu, as well as a separate letter signed by 42 Members of Congress.

² See 5 C.F.R. part 2638, subpart E.

³ See 5 U.S.C. app. § 402.

⁴ See *id.*



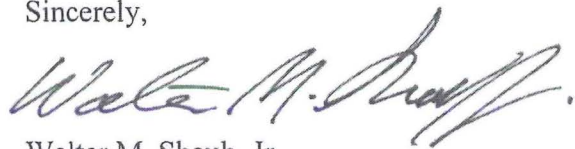
Chairman Jason E. Chaffetz
Ranking Member Elijah E. Cummings
Page 2

authorizes OGE to make only an informal recommendation that the employing agency investigate the matter and consider taking disciplinary action against the employee.⁵ In the enclosed letter to the Designated Agency Ethics Official for the White House, OGE exercises this authority and requests a response by February 28, 2017.

Only in the event that this informal process fails to resolve the matter does the law authorize OGE to recommend disciplinary action.⁶ Even in that case, however, Congress limited OGE's authority by requiring that, before OGE may make a recommendation, OGE must provide the employee with written notice of the alleged violation and an opportunity to respond either orally or in writing.⁷ Congress also required OGE to establish a formal procedure for the employee's response, which OGE has established through regulations that provide the employee 30 days to respond.⁸ Thereafter, OGE's General Counsel is required to provide OGE's Director with written findings and recommendations, which the Director must carefully consider before issuing a nonbinding recommendation that the employing agency take disciplinary action against the employee.⁹ OGE is also authorized to notify the President if the agency fails to take appropriate disciplinary action; however, such notice would be ineffective in this case because any decision not to take disciplinary action will have been made by the President.¹⁰

OGE will move deliberately to complete this process as expeditiously as possible. As explained above, however, completing the legal process that Congress established for OGE will likely take until late April or early May, due to the legally mandated timeframes involved. OGE will report back to you as promptly as possible thereafter.

Sincerely,



Walter M. Shaub, Jr.
Director

Enclosure

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

⁶ 5 U.S.C. app. § 402(f)(2)(B); 5 C.F.R. § 2638.504.

⁷ 5 U.S.C. app. § 402(f)(2)(B)(ii)(I); 5 C.F.R. § 2638.504(b)(1).

⁸ 5 U.S.C. app. § 402(f)(2)(B)(ii)(II); 5 C.F.R. § 2638.504(c).

⁹ 5 U.S.C. § 402(f)(2)(A)(iv)(I); 5 C.F.R. § 2638.504(d), (e).

¹⁰ 5 U.S.C. § 402(f)(2)(A)(iv)(II); 5 C.F.R. § 2638.504(e)(2).

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.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-ceda-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).

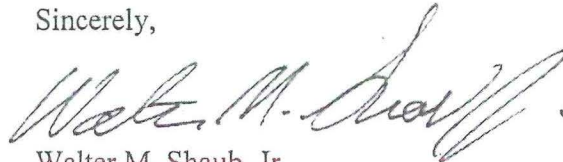
¹³ See *id.*

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).