

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



June 28, 2017

The Honorable Elizabeth Warren
United States Senator
317 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Sheldon Whitehouse
United States Senator
530 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Thomas R. Carper
United States Senator
513 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Patrick Leahy
United States Senator
437 Russell Senate Office Bldg.
Washington, DC 20510

The Honorable Elijah E. Cummings
Member of Congress
2163 Rayburn House Office Bldg.
Washington, DC 20510

Dear Members of Congress:

I write in response to your May 16, 2017, letter regarding the White House's Designated Agency Ethics Official and Deputy Counsel to the President, Stefan C. Passantino.

As noted in your letter, 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;¹ the Ethics in Government Act;² the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct);³ certain restrictions established in President Bush's 1989 Executive Order on ethics;⁴ the Stop Trading on Congressional Knowledge Act;⁵ and other legal provisions. Certain political appointees are also subject to additional restrictions established in Executive Order 13770.⁶ Presidential appointees in the White House, including its Designated Agency Ethics official, are subject to these authorities to the same extent as other employees.

Of relevance to your inquiry, Mr. Passantino is subject to restrictions with respect to former clients under the Standards of Conduct and Executive Order 13770.⁷ Under the Standards of Conduct, he may not participate in any "particular matter involving specific parties" in which

¹ 18 U.S.C. §§ 201-209.

² 5 U.S.C. app. §§ 101 *et seq.*

³ 5 C.F.R. part 2635.

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

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

⁶ See section 1 of Exec. Order 13770 (Jan. 28, 2017).

⁷ See section 1(6) of Exec. Order 13770 (Jan. 28, 2017); 5 C.F.R. § 2635.502(a), (b)(iv).



a client he served in the past year is a party or represents a party, whenever he or his agency determines that a “reasonable person” with knowledge of the relevant facts would question his impartiality in the matter.⁸ This Standards of Conduct restriction is narrower than the separate restriction under the Executive Order. The Executive Order restriction covers any “particular matter involving specific parties” in which a client he served in the two-year period prior to his appointment is a party or represents a party; it also covers most communications and meetings involving such a client.⁹ Unlike the Standards of Conduct restriction, the Executive Order restriction is not subject to the “reasonable person” test.

Neither restriction applies if the former client is an executive agency or, when acting in an official capacity, an employee of one.¹⁰ As OGE advised Mr. Passantino, he may participate in a matter in which the former client is involved in an official capacity as an executive branch employee. However, as OGE also advised Mr. Passantino, he may not participate if the former client is acting in a personal capacity, whether or not the former client is an executive branch employee. Accordingly, Mr. Passantino advised OGE that he would recuse from personnel matters involving individuals who had been his clients during the relevant time periods.

As to your inquiry regarding Secretary Carson and Secretary Price, Mr. Passantino was required to recuse from their nominations. These former clients were acting in their personal capacities in connection with their consideration for cabinet posts in the new Administration, from the time of their initial consideration through the time of their appointments. As with all White House appointees, OGE lacks direct knowledge of most of Mr. Passantino’s official activities, but OGE does regularly interact with him in connection with Presidential nominations. OGE’s staff reports that he did not participate in communications between OGE and the White House in connection with the nominations of Secretary Carson and Secretary Price.

As to your inquiry regarding Mr. Passantino’s other former client, Carl Icahn, the analysis is more complex. The White House has taken the legal position that Mr. Icahn does not meet the applicable standard to be regarded as an executive branch employee.¹¹ Based on this legal position,¹² Mr. Icahn’s involvement in a matter before the White House would occur solely in his personal capacity.¹³ As such, Mr. Passantino is subject to the former client restrictions with respect to Mr. Icahn. For that reason, it is concerning that your letter cites a news report that

⁸ See 5 C.F.R. § 2635.502(a), (c).

⁹ See section 2(s) of Exec. Order 13770 (Jan. 28, 2017).

¹⁰ See 5 C.F.R. § 2635.502 (recusal from certain matters involving a “covered person”); see also 5 C.F.R. § 2635.102(k) (“person” does not include an executive agency or any officer or employee thereof).

¹¹ See Eric Lipton, *Icahn Raises Ethics Flags With Dual Roles as Investor and Trump Adviser*, THE NEW YORK TIMES (Mar. 26, 2017) (noting that the applicability of government ethics laws to Mr. Icahn turns on whether he is an executive branch employee), available at <https://goo.gl/NOiM18>; see also Eric Wolff, *Icahn’s ethanol push fuels ethics storm*, POLITICO (Mar. 10, 2017), available at <https://goo.gl/xr5JSW> (citing a 1977 opinion of the Office of Legal Counsel and explaining that the question as to whether Mr. Icahn qualifies as an employee is a legal one).

¹² See *Status of an Informal Presidential Advisor as a “Special Government Employee,”* 1 Op. O.L.C. 20 (1977) (holding that an individual who performs certain roles for the White House should be regarded as an employee, even absent an identifiable act of appointment), available at <https://goo.gl/POj4pa>. OGE lacks access to sufficient information about the roles Mr. Icahn performs for the White House to present the question to the U.S. Department of Justice for its determination.

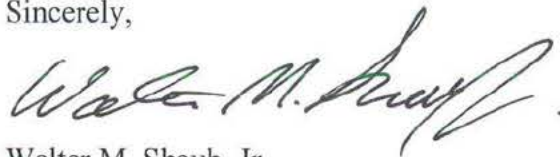
¹³ See section 1(6) of Exec. Order 13770 (Jan. 28, 2017); see also 5 C.F.R. §§ 2635.102(k), 2635.502(a), (b)(iv).

Mr. Passantino delivered the White House's legal position on Mr. Icahn's employment status to the media.¹⁴

OGE lacks the information needed to assess this news report. Specifically, OGE does not know whether Mr. Passantino participated in the formulation of the White House's legal position, which was a "particular matter involving specific parties" in which Mr. Icahn was a party. OGE also does not know the factual circumstances surrounding Mr. Passantino's reported delivery of that legal position to the media, which could also have been a "particular matter involving specific parties" in which Mr. Icahn was a party.¹⁵ However, the White House is in a position to ascertain the relevant facts and is responsible for monitoring its appointees' compliance with ethics requirements, including those established under Executive Order 13770 and the Standards of Conduct.¹⁶ Therefore, by copy of this letter, I am bringing the matter to the attention of the Counsel to the President for his review and a determination as to whether action is warranted.¹⁷

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 M. Shaub, Jr.
Director

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

¹⁴ Jennifer A. Dlouhy, Ari Natter, and Bill Allison, 'Purest Definition of a Conflict': Icahn's \$126 Million Gain on Biofuel Deal Draws Criticism, BLOOMBERG MARKETS (Feb. 27, 2017; updated Mar 1, 2017) ("Bloomberg") ("He is simply a private citizen whose opinion the president respects and whom the president speaks with from time to time," said Stefan Passantino, deputy counsel to the president for compliance and ethics. "Mr. Icahn does not have a position with the administration nor a policymaking role."), available at <https://goo.gl/9tphTH>.

¹⁵ See 5 C.F.R. § 2641.201(h).

¹⁶ When questions arise as to an appointee's compliance, the law authorizes OGE only to make a recommendation that the employing agency look into the matter and consider taking appropriate action. See 5 U.S.C. app. § 402(f)(2)(A)(ii)(I). 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)(iv)(II).

¹⁷ I note that, based on a review of documents recently released by the White House, Mr. Passantino does not appear to have received a waiver or authorization to deliver the White House's legal position to the media. See *Ethics Pledge Waivers Released by the White House*, WHITE HOUSE PRESS OFFICE (May 31, 2017), available at <https://goo.gl/MYKr2I>. The most nearly applicable document is an Executive Order waiver addressed to all appointees in the Executive Office of the President (EOP) that covers certain communications with news organizations. 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), available at <https://goo.gl/3MEJWr>. However, that waiver does not cover the restriction under Executive Order 13770 regarding participation in a "particular matter involving specific parties," nor does it cover the separate Standards of Conduct restriction. (There are also questions as to the waiver's validity, inasmuch as it is unsigned, undated, expressly retroactive, and issued by a member of the class of persons it purports to cover.)