



July 30, 2020

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

Dear Congressman Krishnamoorthi:

This responds to your letter dated July 13, 2020, raising conflict of interest concerns related to certain stock holdings. Specifically, your letter raised initial questions related to stock holdings owned by the Vice President's Chief of Staff, as well as additional questions related to the role of the U.S. Office of Government Ethics (OGE) in preventing conflicts of interest, and requested certain records.

With regard to your initial questions (1-8) relating to the stock holdings and recusals of the Vice President's Chief of Staff, it is critical to note the decentralized nature of the executive branch ethics program under the Ethics in Government Act. As you know, day-to-day provision of ethics advice to the nearly 3 million civilian executive branch employees is necessarily carried out by the more than 5,000 ethics officials in over 130 agencies, as well as the White House and the Office of the Vice President (OVP). Employing agencies and offices, such as OVP, are in the best position to ascertain relevant facts, develop remedies, and monitor compliance, given their knowledge of the duties of and matters before each employee. OGE regulations detail these responsibilities, including providing training, advice, and financial disclosure review and certification,<sup>1</sup> as well as resolving conflicts of interests identified through disclosure and counseling,<sup>2</sup> evaluating certificate of divestiture requests to determine if they meet the standard to send to OGE,<sup>3</sup> and assisting their agency's enforcement of ethics laws.<sup>4</sup>

Under the Ethics in Government Act, OGE is responsible for providing overall direction of executive branch policies related to preventing conflicts of interest and serves as the supervising ethics office for the decentralized executive branch ethics program.<sup>5</sup> OGE also provides advice, upon request, to agency ethics officials, and provides a second level review for some filers' financial disclosure reports.<sup>6</sup> Employing agencies and offices are responsible for the direct and ongoing monitoring of their employees' compliance with ethics requirements and are in the best position to ascertain the relevant facts. They are also responsible for making

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<sup>1</sup> See 5 C.F.R. § 2638.104.

<sup>2</sup> 5 C.F.R. § 2638.104(c)(6) ("Taking appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, directed divestitures, waivers, authorizations, reassignments, and other appropriate means").

<sup>3</sup> 5 C.F.R. § 2634.1005(b); 5 C.F.R. § 2638.104(f)(8).

<sup>4</sup> 5 C.F.R. § 2638.104(c)(9).

<sup>5</sup> 5 U.S.C. app. §§ 109(18)(D), 402.

<sup>6</sup> See *OGE.gov: Annual Financial Disclosure Frequently Asked Questions* (7/13/20), <https://bit.ly/3eW9xCO> ("OGE only reviews the reports for presidential appointees in positions requiring Senate confirmation, certain White House appointees, and the most senior ethics official at each agency.").



appropriate referrals to an Inspector General or the Department of Justice, taking disciplinary or corrective action, and employing other means available to them in their enforcement of ethics laws and regulations.<sup>7</sup> OGE regularly provides advice to employing agencies and offices, such as OVP, and contacts agency ethics officials when OGE becomes aware of potential problems to ensure that the agency is analyzing and taking actions regarding the issues that are raised. Specific records of advice given and training provided to an employee are maintained by the employing agency or office.

Your letter also included additional questions (1-6) related to OGE's role in preventing conflicts of interest. In particular, you requested information regarding the primary criminal conflict of interest statute that prohibits executive branch employees from participating personally and substantially in particular matters directly and predictably affecting their financial interests.<sup>8</sup>

Although it is true that OGE often recommends that executive branch employees divest potentially conflicting assets to reduce risk by fully and permanently resolving conflict of interest concerns, divestiture is only one of several possible remedies available to executive branch employees, including OVP employees, to address potential conflicts.<sup>9</sup> Other remedies are possible because the criminal conflict of interest statute is not a prohibited holdings statute. Instead, it requires an employee to refrain from participating in particular matters affecting the employee's financial interests or the financial interests of persons whose interests are imputed to the employee.<sup>10</sup> Thus, recusal from particular matters that would affect an employee's personal and imputed financial interests is a common mechanism for resolving conflicts of interest.

An employing agency or office, such as OVP, implements recusals for their employees.<sup>11</sup> This decentralized implementation of the ethics program is created by the Ethics in Government Act.<sup>12</sup> It allows OGE, with approximately 70 employees, the ability to work with and support the more than 5,000 ethics officials in over 130 agencies and offices, such as OVP, who work directly with the nearly 3 million civilian executive branch employees. It also facilitates OGE's role in leading and overseeing the overall ethics program.

With respect to certificates of divestiture (CDs), OGE issues regulatory standards and provides additional background on its website.<sup>13</sup> Employing agencies and offices, such as OVP,

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<sup>7</sup> 5 C.F.R. § 2638.104(c)(9).

<sup>8</sup> See 18 U.S.C. § 208(a). Among other things, this prohibition also extends to the financial interests of companies in which they have ownership interests.

<sup>9</sup> Other remedies can include recusal, reassignment, waiver, or the establishment of a qualified trust. See, e.g., Memo from OGE Director Comstock, *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>10</sup> See 18 U.S.C. § 208(a).

<sup>11</sup> See 5 C.F.R. § 2638.104(c)(6). If it is not possible to permit recusal without disqualification from matters so central or critical to the performance of assigned duties that an employee's ability to perform in his position would be materially impaired, or if recusal would adversely affect the efficient accomplishment of an agency's mission because of its frequency or the difficulty of reassigning responsibilities, then other resolutions must be explored. See, e.g., OGE Informal Advisory Opinion 92 x 12 (1992).

<sup>12</sup> 5 U.S.C. app. §§ 101 et seq.

<sup>13</sup> 5 C.F.R. § 2634.1005; see also *Certificate of Divestiture Request Format* (2019), <https://bit.ly/2OITbms>; *Certificate of Divestiture Fact Sheet - Office of Government Ethics* (2020), <https://bit.ly/3fRpMSQ>.

evaluate CD requests to determine if they meet the standard to send to OGE.<sup>14</sup> There are various reasons a CD might not be issued. For example, if the employee will continue to hold similar assets requiring recusal, a CD will not be issued. In addition, it is important to note that when an employing agency or office determines an employee must divest an asset, a CD is not required. A CD is a tax benefit, not a remedy to address potential conflicts. Specifically, a CD allows an eligible person to defer capital gains tax on property sold to comply with conflict of interest requirements.<sup>15</sup> The purpose of a CD is to minimize the burden that would result from paying capital gains tax.<sup>16</sup> Consequently, there may not be a corresponding CD for all assets that an employee must divest and there are various reasons it may not be issued.<sup>17</sup>

Finally, questions (1-5) request certain records that, based on the decentralized ethics program as described above, are best requested from the OVP. As a courtesy, I am forwarding a copy of this letter, as well as your letter to OGE, to OVP's Designated Agency Ethics Official (DAEO).

I hope these responses are helpful to you. If you require additional information or have questions, please contact OGE's Chief of Staff, Shelley K. Finlayson, at 202-482-9314.

Sincerely,

Emory A. Rounds, III  
Director

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<sup>14</sup> 5 C.F.R. § 2634.1005(b); 5 C.F.R. § 2638.104(f)(8).

<sup>15</sup> 5 C.F.R. § 2634.1001(a).

<sup>16</sup> 5 C.F.R. § 2634.1001(b).

<sup>17</sup> CDs are also not issued when property has already been divested, the request is not timely, property is donated, or the request is for everything in a managed account. See *A Primer on Certificates of Divestiture* (2014), <https://bit.ly/3f4rjDV>.