

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



January 17, 2017

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Environment and  
Public Works  
United States Senate  
456 Dirksen Senate Office Bldg.  
Washington, DC 20510

The Honorable Benjamin L. Cardin  
United States Senator  
509 Hart Senate Office Bldg.  
Washington, DC 20510

The Honorable Bernard Sanders  
United States Senator  
332 Dirksen Senate Office Bldg.  
Washington, DC 20510

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

The Honorable Jeff Merkley  
United States Senator  
313 Hart Senate Office Bldg.  
Washington, DC 20510

The Honorable Kirsten Gillibrand  
United States Senator  
478 Russell Senate Office Bldg.  
Washington, DC 20510

The Honorable Cory A. Booker  
United States Senator  
359 Dirksen Senate Office Bldg.  
Washington, DC 20510

The Honorable Edward Markey  
United States Senator  
255 Dirksen Senate Office Bldg.  
Washington, DC 20510

The Honorable Tammy Duckworth  
United States Senator  
SD-G12 Dirksen Senate Office Bldg.  
Washington, DC 20510

Dear Ranking Member Carper and Senators Cardin, Sanders, Whitehouse, Merkley, Gillibrand, Booker, Markey, and Duckworth:

This responds to your letter of January 12, 2017, requesting specific information regarding the ethics review of a named individual who has been announced as an intended nominee of the President-elect. The U.S. Office of Government Ethics (OGE) generally avoids providing information about individual nominees, but believes that the information regarding the nominee financial disclosure process provided below is responsive to your request.



It is necessary to avoid formally sharing information regarding OGE's work on individual nominations whenever releasing such information could undermine the purposes of the nominee ethics review process. As described below, preclearing a nominee financial disclosure report involves an extensive deliberative process between OGE, the nominee, and agency ethics officials. Accordingly, OGE adheres to this nondisclosure practice as closely as possible, particularly if other information may satisfy the interests underlying the request.

In this instance, additional information about OGE's work and the nomination process is provided below to address the concerns underlying your request. As explained below, if OGE has transmitted a certified financial disclosure report and an ethics agreement to the Senate, it means that OGE is satisfied that all financial conflicts of interest have been identified and resolved. Note that OGE is focused on financial conflicts of interest and not on what might be described as "intellectual conflicts of interest" or the political viewpoints of nominees, which are often the subject of media and public scrutiny of nominees but which are outside the scope of OGE's review. OGE's determination is based on the information contained in the report, the agency's advice regarding possible financial conflicts of interest, and whether the report complies with the Ethics in Government Act and government ethics regulations, all in light of the agency's functions and the nominee's proposed duties.

A nominee submits a draft public financial disclosure report (OGE Form 278e) through OGE's electronic filing system (*Integrity*). Ethics officials review the draft financial disclosure report, ask follow-up questions, and provide instructions for revising the report. Multiple rounds of questions and revisions are almost always exchanged before a report meets the complex disclosure requirements of the Ethics in Government Act.

We note that the disclosure requirements of the OGE Form 278e are dictated by the Ethics in Government Act.<sup>1</sup> Moreover, as your letter correctly stated, OGE's ethics review focuses on a nominee's personal financial interests, not a nominee's history of political solicitations and activity. Your letter asked about reportable positions and "affiliations." Nominees are required to report certain positions held, during the current calendar year and during the two-year period preceding such calendar year, as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States.<sup>2</sup> They are not, however, required to report positions held in any religious, social, fraternal, or political entity or any positions solely of an honorary nature.<sup>3</sup> OGE's view is that a position with a political action committee, for example, qualifies for this exclusion from disclosure by virtue of being political in nature.

The exclusion does not extend, however, to earned income from an excluded position, which must be disclosed in Part 2 of the OGE Form 278e. Nominees must report salaries, fees, commissions, wages, and any other compensation for personal services (other than from

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<sup>1</sup> See 5 U.S.C. app. § 102.

<sup>2</sup> See 5 U.S.C. app. § 102(a)(6)(A).

<sup>3</sup> See *id.*

United States Government employment) in excess of \$200 from any one source, including income from positions that need not be reported in Part 1 of the OGE Form 278e.<sup>4</sup>

Your letter also asked about reportable gifts. Nominees are not required to complete the portion of the report that covers gifts and travel reimbursements.<sup>5</sup>

Each nominee is legally responsible for ensuring that the information he or she reports is “true, complete and correct.”<sup>6</sup> The financial disclosure system does not require or authorize either OGE or agency ethics officials to independently investigate or verify the information that a nominee reports; however, OGE and agency ethics officials recognize that the reporting requirements are complex and work diligently to help each nominee to fully comply with the requirements based on the information the nominee provides. OGE and agency ethics officials review a nominee’s report for internal inconsistencies and self-evident omissions. OGE staff also asks extensive questions that lead to more complete reporting.

For this work, OGE’s staff draws on decades of collective experience in reviewing financial disclosure reports to help filers to identify the types of assets, positions, and liabilities that filers commonly overlook or forget to report. Examples of the types of items that OGE staff discusses with filers are found in sample checklists on OGE’s website.<sup>7</sup> Multiple rounds of questions and revisions are usually needed before a nominee’s report can be finalized. This back and forth process can take weeks or, in the case of extremely wealthy individuals, sometimes months. Through focused effort, OGE and agency ethics officials help nominees complete their reports as quickly as possible without sacrificing quality.

Once the nominee confirms that the report contains all of his or her legally reportable information, as a result of the revisions discussed above, OGE and agency ethics officials analyze the information contained in the report to identify potential conflicts of interest with the duties of the position for which the individual is being nominated. OGE and agency ethics officials then work together to prepare an ethics agreement. The ethics agreement outlines the specific steps a nominee will take to avoid the identified conflicts of interest and ensures that the nominee will be able to carry out his or her duties as a Presidential appointee. OGE and agency ethics officials draft each ethics agreement using standardized language from OGE’s ethics agreement guide, which is tailored to the nominee’s unique circumstances.<sup>8</sup> The nominee must agree to take the steps outlined in the agreement to resolve his or her conflicts of interest; for example, resignation of positions, divestiture of holdings, or recusal.

When the nominee has confirmed that the report is “true, complete and correct” and has agreed to take the steps outlined in the ethics agreement to resolve the identified conflicts of interest, OGE can begin to finalize its work. OGE ensures that it is satisfied that the report is

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<sup>4</sup> See 5 C.F.R. § 2634.302(a)(1).

<sup>5</sup> See 5 C.F.R. § 2634.304(c).

<sup>6</sup> Public financial disclosure report filers must make the following certification: “I certify that the statements that I have made in this report are true, complete and correct to the best of my knowledge.” See OGE Form 278e, at 1.

<sup>7</sup> These checklists are available online at

[https://www.oge.gov/Web/OGEnsf/0/BC975C546E68A21C852580560045BE83/\\$FILE/Financial%20Disclosure%20Checklists.pdf](https://www.oge.gov/Web/OGEnsf/0/BC975C546E68A21C852580560045BE83/$FILE/Financial%20Disclosure%20Checklists.pdf).

<sup>8</sup> The OGE PAS Nominee Ethics Agreement Guide is available online at

[https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+\(MS+Word\)](https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+(MS+Word)).

complete and the ethics agreement has resolved all ethics issues. OGE then preclears the report (i.e., provides staff-level assurance that it is cleared for certification by OGE's Director). After OGE has precleared the report, the nominee must log back into the electronic filing system and formally file the report by certifying that the information in the finalized report is correct. Ethics officials at the agency to which the nominee is being nominated then review the report. If they are satisfied with the report, they certify the report and send it to OGE with an opinion indicating that all conflicts of interest have been resolved. Next, OGE reviews the report for final certification, certifies the report, and transmits both the report and the ethics agreement to the Senate.

Your letter asked whether there are "other avenues" that will require the nominee to disclose additional information to the Designated Agency Ethics Official (DAEO), if confirmed. When OGE certifies a report, it means that both the DAEO and OGE are satisfied that all potential conflicts of interest apparent at the present time have been identified and addressed. However, the nominee financial disclosure report is a snapshot in time. If confirmed, the nominee, after becoming an appointee, is subject to periodic transaction, annual, and termination financial disclosure reporting requirements.<sup>9</sup>

In addition, promptly after appointment, the nominee—now an appointee—must complete an initial ethics briefing. The initial ethics briefing must include the following content:<sup>10</sup>

(1) If the individual acquired new financial interests reportable under section 102 of the [Ethics in Government] Act after filing the nominee financial disclosure report, the agency ethics official must appropriately address the potential for conflicts of interest arising from those financial interests.

(2) The agency ethics official must counsel the individual on the basic recusal obligation under 18 U.S.C. 208(a).

(3) The agency ethics official must explain the recusal obligations and other commitments addressed in the individual's ethics agreement and ensure that the individual understands what is specifically required in order to comply with each of them, including any deadline for compliance. The ethics official and the individual must establish a process by which the recusals will be achieved, which may consist of a screening arrangement or, when the DAEO deems appropriate, vigilance on the part of the individual with regard to recusal obligations as they arise in particular matters.

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<sup>9</sup> See 5 U.S.C. app. §§ 101(d), 101(e), 103(l).

<sup>10</sup> 5 C.F.R. § 2638.305(f) (2017). The recently updated regulations at 5 C.F.R. part 2638 are not yet in print but are available online at [http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=c8d1bb7d7982feb93026d4806f7f436b&r=PART&n=5y3.0.10.10.11#se5.3.2638\\_1305](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=c8d1bb7d7982feb93026d4806f7f436b&r=PART&n=5y3.0.10.10.11#se5.3.2638_1305).

(4) The agency ethics official must provide the individual with instructions and the deadline for completing initial ethics training, unless the individual completes the initial ethics training either before or during the ethics briefing.

In addition, the nominee must complete new employee ethics training and, later, annual ethics training.<sup>11</sup> An appointee must also demonstrate compliance with the ethics agreement signed as part of the nomination process. The DAEO works closely with the appointee to ensure full compliance.<sup>12</sup> OGE tracks ethics agreement compliance by requiring the DAEO to notify OGE when compliance efforts are complete. Finally, an appointee has an ongoing obligation to comply with ethics statutes and regulations, including the criminal conflict-of-interest laws, the Ethics in Government Act, and the *Standards of Ethical Conduct for Employees of the Executive Branch*.

In other words, even if a nominee has fully complied with the requirements of the nominee financial disclosure process, it is possible for that nominee, once confirmed, to face potential conflicts involving interests that were not identified or addressed in his or her financial disclosure report or ethics agreement. This potential is the reason for the executive branch requirements for briefings, training, ongoing disclosure, and consultations with agency ethics officials. Executive branch officials, especially those at the highest levels, should regularly seek the advice of their agency ethics officials in order to avoid potential conflicts of interest when performing the important duties with which the public has entrusted them.

I hope you have found the information provided regarding the nominee financial disclosure process helpful.

Sincerely,

Walter M. Shaub, Jr.  
Director

cc: The Honorable John Barrasso  
Chairman  
Committee on Environment and  
Public Works  
United States Senate  
307 Dirksen Senate Office Bldg.  
Washington, DC 20510

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<sup>11</sup> See 5 C.F.R. §§ 2638.304, 2638.308 (2017).

<sup>12</sup> See 5 C.F.R. § 2638.104(c)(13) (2017).