

February 14, 2017

Walter M. Shaub, Jr.
Director
US Office of Government Ethics
1201 New York Ave., NW
Suite 500
Washington, DC 20005

RE: PETITION FOR RULEMAKING

Dear Director Shaub:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. In light of recent events, CoA Institute is concerned that both the Office of Government Ethics (“OGE”) and the public, including legal and ethics experts, may be confused about the coverage of the OGE regulations concerning product endorsements. Although many commenters have claimed OGE’s ethics regulations extend to presidential advisors, such as Kellyanne Conway, our review of the relevant statutes and regulations concludes that such individuals may not be covered. Unfortunately, OGE’s recent letter to Congress and the White House Designated Ethics Officer fails to address this potential problem with the current rules. We in no way endorse or approve of Ms. Conway’s actions; however, that does not mean that they were illegal or in violation of your ethics rules. We write today to petition OGE to initiate a rulemaking correcting or clarifying these regulations.

BACKGROUND

Appearing on Fox News last week, Counselor to the President Kellyanne Conway encouraged viewers to “[g]o buy Ivanka’s stuff, is what I would tell you . . . I’m

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

going to give it a free commercial here, go buy it today.”² Many government watchdogs, including us here at CoA Institute, perked up upon hearing this. There are, as you know, strict rules prohibiting the endorsement of products by government employees.³ In light of those rules, Ms. Conway’s comments seemed, on their face, to be clearly illegal. Indeed, many attorneys and ethics experts have publicly suggested that Ms. Conway violated the law and should be held accountable.⁴ Don W. Fox, who formerly served as general counsel and acting director of OGE, claimed this was “a clear violation of rules prohibiting misuse of public office for anyone’s private gain.”⁵ Citizens for Responsibility and Ethics in Washington (“CREW”) promptly filed an ethics complaint with your office, citing Ms. Conway’s comments.⁶ Most importantly, the U.S. House Committee on Oversight and Government Reform (“OGR”) sent a letter to you asking for an investigation.⁷ You responded by letter today, indicating you have opened such an investigation.⁸

As a government watchdog, we here at CoA Institute share in the concerns about Ms. Conway’s conduct. Government employees working on the taxpayer dime should not be using their official position to endorse a product or provide “free commercials.” Ms. Conway’s comments were wholly inappropriate, especially given her relationship to the presumed beneficiary. For a great number of Executive Branch employees, this conduct would almost certainly be illegal. However, upon review of the relevant regulations and statutes, we believe that OGE regulations may not extend to cover Ms. Conway’s conduct given her employment in the White House. In light of this, OGE needs to analyze its existing regulations and conduct a rulemaking to correct or clarify them.

² Joe Concha, *Conway Promotes Trump Daughter’s Merchandise: ‘Go buy Ivanka’s stuff’*, THE HILL (Feb. 9, 2017), <http://bit.ly/2kX8Al9>.

³ 5 C.F.R. § 2635.702.

⁴ See, e.g., Linda Qiu, *What You Need to Know About Kellyanne Conway’s Endorsement of Ivanka Trump Products*, POLITIFACT (Feb. 9, 2017), <http://bit.ly/2IMMrUX>; Rob Tornoe, *Former Ethics Czar: Kellyanne Conway Broke the Law on Fox News*, PHILLY.COM (Feb. 9, 2017), <http://bit.ly/2knmg9Y>.

⁵ Drew Harwell, Tom Hamburger, and Rosalind S. Helderman, *White House Says Conway has been ‘Counseled’ After Touting Ivanka Trump’s Products*, WASH. POST (Feb. 9, 2017), <http://wapo.st/2ldByxG> (quoting former OGE general counsel and former acting director).

⁶ Letter from Noah Bookbinder, Exec. Dir., CREW, to Walter M. Shaub, Jr., Dir., OGE, & Donald F. McGahn, White House Counsel (Feb. 9, 2017), available at <http://bit.ly/2Hv9LO>.

⁷ Max Greenwood, *Top Oversight Lawmakers Ask Ethics Office to Recommend Discipline for Conway*, THE HILL (Feb. 9, 2017), <http://bit.ly/2k8ECvo>.

⁸ Letter from Walter Shaub, Dir., OGE, to Jason Chaffetz, Chairman, OGR, & Elijah E. Cummings, Ranking Member, OGR, (Feb. 13, 2017), available at <http://bit.ly/2kPYnXg>.

DISCUSSION

The relevant regulation, 5 C.F.R. § 2635.702, bars an “employee” from engaging in product promotion. 5 C.F.R. § 2635.102 defines “employee” as “any officer or employee of an agency, including a special Government employee.” 5 U.S.C. § 105 reads, “For the purposes of this title, ‘Executive Agency’ means an Executive Department, a Government corporation, and an independent establishment.” The White House is obviously not a “Government Corporation.” Furthermore, “Executive Department” is defined by an exhaustive list in 5 U.S.C. § 101 that does not include the White House or any of its offices. The analysis, then, centers on whether or not the White House Office is an “independent establishment.”

The statutory definition of independent establishment is confusing and ambiguous.⁹ However, the D.C. Circuit tackled this quagmire in *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995). There, the court evaluated whether the Executive Residence qualifies as an independent establishment for the purposes of a Title VII claim.

First, we note that elsewhere Congress has used the term “independent establishment” in distinction to the Executive Residence. Specifically, Congress has authorized “[t]he head of any department, agency, or *independent establishment of the executive branch* of the Government [to] detail, from time to time, employees of such department, agency, or establishment to the White House Office, the *Executive Residence at the White House*, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration.” 3 U.S.C. § 112 (1988) (emphasis added). That Congress distinguished the Executive Residence from the independent establishments, whatever they may be, suggests that Congress does not regard the Executive Residence to be an independent establishment, as it uses that term.

Id. at 1490.

The court held that Congress referred to an “independent establishment” and the “Executive Residence” as two separate entities. Right next to Executive Residence on that same, distinguished list is the “White House Office.” Following the D.C. Circuit’s reasoning, the White House Office is also not an independent establishment. Therefore, because the White House Office does not fall into either of

⁹ See, e.g., Mark Liberman, *An Independent Establishment is an Establishment which is Not Part of an Independent Establishment*, Language Log (Apr. 20, 2011), available at <http://bit.ly/2lgObYC>.

the other two covered categories, Government Corporations and Executive Departments, it appears that 5 C.F.R. § 2635.702 may not cover Kellyanne Conway as Counselor to the President.¹⁰

Unfortunately, your February 13, 2017 letter does not take any of the above into account. You indicate that you will be opening an investigation into Ms. Conway, citing 5 C.F.R. § 2635.702. In an enclosed letter, you also encourage the White House to open its own investigation.¹¹ The regulations and examples you cite in the enclosure deal with presidential appointees who are plainly covered by the statutory definitions set above.¹² You provide no legal analysis indicating why Ms. Conway would be covered by this regulation or if it extends to the White House. Given OGE's stated mission, you must immediately address this issue.¹³

PETITION FOR RULEMAKING

Pursuant to 5 U.S.C. § 553(e), CoA Institute petitions OGE to act swiftly and initiate an exploratory process and rulemaking to correct or clarify covered persons under 5 C.F.R. § 2635.702. This rulemaking could take the form of an amended regulation or an explanatory guidance document. It is possible that there are statutory or constitutional bars that prevent OGE from regulating the conduct of White House staff, especially staff serving at the pleasure of the President. It is also possible that OGE reaches the legal conclusion that Ms. Conway is already covered by the existing regulation, despite CoA Institute's analysis suggesting otherwise. If either are the case, OGE must make this abundantly clear in its regulations, letters to agency ethics officials, and public-facing documents. Given recent events, Executive Branch officials and the American public must be able to clearly understand how relevant ethics laws and regulations apply to the White House. It is OGE's duty as the government's top ethics agency to clarify the scope of its regulatory coverage and instill confidence in the public.¹⁴

¹⁰ The regulation is clear, however, that it does not apply to the President or the Vice President, creating more confusion in how to read it given the statutory definitions.

¹¹ Letter from Walter Shaub, Dir., OGE, to Stefan C. Passantino, Designated Agency Ethics Official, White House (Feb. 13, 2017), *available at* <http://bit.ly/2kPYnXg>.

¹² *Id.* (OGE cites Example 1 from 5 C.F.R. § 2635.702(c), which references an independent agency commissioner, not a White House official).

¹³ *See* 5 C.F.R. § 2600.101(a) ("OGE exercises leadership in the executive branch of the Federal Government to prevent conflicts of interest on the part of executive branch employees and resolve those conflicts of interest that do occur.").

¹⁴ *Id.* ("OGE fosters high ethical standards for executive branch employees which, in turn, strengthens the public's confidence that the Government's business is conducted with impartiality and integrity.").

Director Walter M. Shaub

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Thank you for your swift attention to this matter. If you have any questions about this petition, please contact me by telephone at (202) 470-2396 or by e-mail at eric.bolinder@causeofaction.org.

Sincerely,



Eric R. Bolinder
COUNSEL

cc:

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