



February 14, 2017

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

The Honorable Elijah Cummings
Ranking Member
House Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

Since 1981, the Project On Government Oversight (POGO) has been working to achieve a more effective, accountable, open, and ethical federal government. I know you both share POGO's good government values. In that light, we thank you for inviting us to share our ideas and proposals with you on how to uphold and protect the independence and vital role of the Office of Government Ethics (OGE) and to strengthen ethics in the executive branch. We strongly support this Committee's bipartisan oversight work on ethics issues as they arise in the executive branch, and thank you for your most recent work urging OGE to examine ethics violations by Counselor to the President Kellyanne Conway.¹

OGE provides "overall leadership and oversight of the executive branch ethics program"² and serves an essential function in the federal government. However, as the director of OGE stated at a hearing before the Subcommittee on Government Operations in 2015, the office lacks authority to investigate complaints of ethics noncompliance.³ We believe this authority should be granted: as federal ethics laws experts, OGE is uniquely qualified to investigate ethics complaints and should be granted express authority to do so, and to issue binding corrective and disciplinary actions in noncriminal cases.⁴ Such authority is a

¹ Letter from House Oversight and Government Reform Committee to Office of Government Ethics regarding Conway Ethics Violation, February 9, 2017. <https://oversight.house.gov/wp-content/uploads/2017/02/Letter-to-OGE-re-Conway-Endorsement-FINAL.pdf>

² The Office of Government Ethics, Mission and Responsibilities. <https://www.oge.gov/Web/OGE.nsf/Mission%20and%20Responsibilities> (Downloaded February 3, 2017)

³ Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization Hearing before the House Subcommittee on Government Operations, 114th Congress, December 16, 2015. <https://oversight.house.gov/hearing/merit-systems-protection-board-office-of-government-ethics-and-office-of-special-counsel-reauthorization/>

⁴ 5 U.S.C. Appendix, § 402(b)(9) (allows the OGE director to order "corrective action on the part of agencies and employees which the Director deems necessary."); 5 U.S.C. Appendix, § 402(f)(2) (allows OGE to recommend disciplinary actions and order certain corrective actions); 5 CFR § 2635.106(b) ("corrective action may be ordered or disciplinary action recommended

natural extension of the work the office already does, would make the agency more effective, and would improve government accountability because ethics investigations and enforcement would be conducted by an entity other than the agencies involved in the alleged violations.

The recent actions by White House staff, which were in violation of regulations prohibiting executive branch employees from using their position to endorse any product for the private gain of family, friends, or associates,⁵ illustrate why this enforcement power is necessary for OGE.

Currently, investigations, determinations, and disciplinary actions, including reprimand, suspension, demotion, or dismissal, are primarily left to the employing agency in noncriminal cases.⁶ As a result of contradictory statutory and regulatory language, there appears to be some confusion about OGE's role and its ability to conduct investigations and issue binding orders. The Director of OGE may investigate and make findings and orders, but only in limited circumstances.⁷ Despite the fact that the legal framework states the OGE director may issue decisions and corrective actions,⁸ OGE's own regulations state that the OGE director may only issue "a nonbinding recommendation that appropriate disciplinary or corrective action be taken against the employee."⁹

We believe that for OGE to be effective, Congress should expand the law to ensure OGE has clear, independent authority to investigate complaints and to issue binding corrective and disciplinary actions when there is an ethics violation. Alternatively, if the agency does not act on the disciplinary recommendation in a timely fashion, then OGE's authority could closely mirror that of the Office of Special Counsel (OSC), which can investigate complaints of alleged prohibited personnel practices (PPP) to the extent necessary to determine whether there are reasonable grounds to believe the PPP has occurred.¹⁰ The OSC can then direct the agency to remedy the violation by filing a complaint containing a recommendation for a disciplinary action with the Merit Systems Protection Board (MSPB).¹¹ The offending employee is then afforded due process in front of the Board and OSC's disciplinary recommendation is enforced. Absent providing OGE with the authority to issue binding disciplinary actions, we suggest OGE be granted the same, clear investigatory power and that its disciplinary actions be afforded the same enforcement by the MSPB.

Additionally, to enable the OGE to work independently and to insulate the office from political pressure, we suggest amending the law to specify that a President can only remove the director before his or her five-year term is over for cause.¹² Directors of similar independent agencies, such as OSC, have this type

by the Director of the Office of Government Ethics under the procedures at part 2638 of this chapter."); 5 CFR § 2638.504 (allows OGE to conduct further proceedings if an agency head has not conducted an investigation within a reasonable time).

⁵ Letter from Danielle Brian, Project On Government Oversight, to The Honorable Jeff Sessions, Attorney General of the United States, urging an investigation into White House officials promoting the business interests of President Donald Trump's daughter, February 9, 2017. <http://www.pogo.org/our-work/letters/2017/doj-investigate-ethics-violations-white-house.html>; 5 CFR §§ 2635.702, 2635.704, and 2635.705.

⁶ 5 U.S.C. Appendix, § 402(f)(2)(A)(i), (ii), and (iv) (OGE recommendations are made to the employing agency); 5 CFR § 2635.106(b) ("It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases."); 5 CFR § 2638.503 (limiting OGE's authority to make "recommendations" and provide "advice").

⁷ 5 U.S.C. Appendix, § 402(f)(2)(A)(iii); 5 CFR § 2635.106(b); 5 CFR § 2638.504.

⁸ 5 CFR § 2638.504(e).

⁹ 5 CFR § 2638.504(e)(2).

¹⁰ 5 U.S.C. § 1214.

¹¹ 5 U.S.C. § 1215.

¹² 5 U.S.C. Appendix, §401(b).

of protection. The OSC's authorizing law states that "the Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."¹³

In addition, to allow for further oversight and increase transparency around ethics compliance, we suggest that OGE publicly post final submissions of ethics paperwork for executive branch officials occupying positions for which the pay is set at Levels 1 or 2 of the Executive Schedule. Final submissions should include signed ethics pledges pursuant to Executive Order 13770, ethics pledge waivers pursuant to Executive Order 13770, waivers under 18 U.S.C. § 208, authorizations under 5 CFR § 2635.502, waivers under 5 CFR § 2635.503, Certificates of Divestiture and requests for Certificates of Divestiture, financial disclosure reports, ethics training records, authorizations to accept gifts of free attendance at widely attended gatherings, STOCK Act notices of employment negotiations (limited to employment for which the government employee was hired), disciplinary actions and reprimands related to ethics violations, and any documents demonstrating compliance with ethics agreements.

Proactive posting of these records increases public awareness of executive branch ethics oversight. It would also eliminate the need to request these documents through the Freedom of Information Act (FOIA), often subject to considerable delay depending on the executive agency and its backlog. For example, POGO has been waiting over seven years for a response to a Freedom of Information Act request to the Department of Defense for ethics waivers signed during the Obama administration¹⁴; this kind of delay can be avoided by a proactive posting of ethics documents on OGE's website.

Finally, we ask that this Committee work with OGE and civil society experts to identify the gold standard of ethics pledges for incoming executive branch officials and to codify those standards. As it is, every new administration introduces its own ethics pledge and standards, creating ambiguity during the time between administrations. By codifying ethics best practices, this Committee can ensure there are no gaps and that each administration holds its appointees to the same standards.

Thank you again for inviting us to share our ideas and proposals with you on how to uphold and protect the independence and vital role of OGE and to strengthen ethics in the executive branch. I look forward to working with you on these suggestions.

Sincerely,



Danielle Brian
Executive Director

¹³ 5 U.S.C. § 1211(b).

¹⁴ Letter from Stephanie L. Carr, Department of Defense Office of Freedom of Information, to Scott Amey, Project On Government Oversight, about Mr. Amey's August 6, 2010, FOIA request for ethics waivers and recusal agreements/records, January 26, 2017. http://www.pogoarchives.org/m/foia/20170126_dod_2010_ethics_request.pdf