

TO: Editorial Boards
FROM: Issue One
DATE: May 23, 2017
RE: Time to Revisit the Office of Government Ethics (OGE)

EXECUTIVE SUMMARY

In the aftermath of the Watergate scandal involving President Richard Nixon, Congress established the Office of Government Ethics (OGE) in 1978 to provide oversight of the executive branch and prevent — and resolve — conflicts of interest. The agency was eventually made independent in 1989 and currently oversees ethics standards for 2.7 million civilian employees in more than 130 executive agencies and the White House.

Since that time, the OGE has rarely been more than a footnote in a president's legacy. But President Donald Trump's refusal to work within the confines of long-standing tradition to protect against real and potential conflicts of interest have brought unprecedented attention to OGE. Now, its mission and its work are daily, front-page news.

Consider that in just one week:

1. The Trump administration rebuffed OGE's request for copies of the waivers that have been granted to former lobbyists who now work for the White House or other federal agencies.
2. The president's son-in-law and special adviser, Jared Kushner, [still owns 90 percent](#) of the assets within his vast real estate empire. A conflict of interest while he serves in the Trump administration is inevitable, but the White House refuses to release the ethics agreement he signed with OGE.
3. President Trump's attorneys urged him to submit a financial disclosure [without certifying](#) that the information was true. OGE reminded the president that such a course of action was unacceptable. If the information in the certified disclosure statement is not true, OGE has the power to impose administrative fines or to refer the case to the Justice Department.

Issue One urges you to editorialize about the importance of protecting the ethics and integrity of our government, regardless of who is elected to office, and highlight policy solutions that are needed to strengthen the Office of Government Ethics.

The attached editorial memo lays out the case for why — and how — strengthening OGE should be on top of the congressional to-do list.

The following recommendations for potential statutory reforms would strengthen the Office of Government Ethics, and are more fully articulated in the attached memo:

- Specify in legislation that the director of OGE may only be terminated for cause
- Authorize OGE to serve as a central clearinghouse for all ethics actions taken by designated agency ethics offices
- Authorize OGE to publish recusal agreements of high-ranking Senior Executive Service employees
- Authorize OGE to impose specific standards for ethics training and mandate ethics training for all high-level executive branch officials within a certain amount of time after joining an administration
- Authorize OGE to investigate allegations of ethics violations for high-ranking employees (presidential appointments with and without Senate confirmation, SES and Schedule C)
- Clarify that the director of OGE has the authority to conduct investigations, subpoena witnesses, compel production of documents, issue civil penalties for violations for high-ranking officials
- Authorize and require OGE to standardize and codify an ethics executive order

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INTRODUCTION

It all started with a few [tweets](#). Soon after Donald Trump was elected the 45th president of the United States, the obscure Office of Government Ethics (OGE) began garnering headlines and soundbites from the national press who suddenly rediscovered OGE's critical [role](#) in dealing with conflicts of interest related to the executive branch.

Just recently, OGE is “requiring the Cabinet secretaries and other Senate-confirmed officials to fill out a new Certification of Ethics Agreement Compliance,” according to NPR. The purpose of the requirement is to determine “whether the appointees have followed through on pledges to resign from private-sector positions that posed conflicts of interest, divest financial holdings they had promised to sell and recuse themselves from any issues where they have a conflict.

Additional, OGE has told the White House to deliver copies of the waivers it has granted to administration officials who would normally have to recuse themselves from matters in which they have a financial interest. OGE gave the White House a [deadline](#) of June 1, 2017. As reported by the *New York Times*, the White House is [refusing](#) to comply, in a “highly unusual move,” which lead the OGE director to state, “I have never seen anything like it.”

While these actions give the appearance that OGE is flexing its muscle, the reality is that the agency has long been a backwater with limited tools to promote ethical behavior in the executive branch. The agency's role over the past few decades has found it more concerned with the technical details of compliance rather than serving as the branch's leading voice for promoting meaningful ethics standards and robustly enforcing ethics laws and regulations.

The recent public profile of OGE Director Walter M. Shaub, Jr. and his statements and actions vis-a-vis the Trump administration could best be described as “the mouse that roared,” since his more vocal declarations about potential ethics conflicts in the current administration are anathema to his typical public profile.

For decades, critics have pointed out that the OGE does not have the tools it needs to effectively and competently fulfill its mission. Some of the gaps in the law have existed since its inception. Others have become more evident with the passage of years and different administrations. And still others have been highlighted with the arrival of the new administration under President Donald Trump.

BACKGROUND

Originally created in 1978 following the Watergate scandal involving President Richard Nixon, the OGE became an independent agency in 1989.

By statute, the director of the OGE is charged with providing the “overall direction of

executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.”

In addition to developing rules and regulations pertaining to conflicts of interest, the OGE director is responsible for conducting investigations, reviewing financial disclosure statements, monitoring and investigating compliance with ethics law and rules, ordering corrective action and referring alleged violations of conflict of interest laws to the attorney general, among other powers.

Implementing and administering those statutes falls to approximately 6,700 individuals spread across 130 agencies of the executive branch of the federal government. These so-called Designated Agency Ethics Officers (DAEOs) ensure that executive branch officials and employees comply with ethics statutes and agency ethics regulations covering issues such as receiving gifts, conducting official businesses inside and outside of the government, nepotism or other areas of potential conflicts of interest.

The agency is also responsible for working with incoming high-level executive branch officials — [Secretary of State Rex Tillerson](#) or [Treasury Secretary Steve Mnuchin](#), for example — to address and resolve conflicts of interest related to their assets, investments and business holdings. The Ethics in Government Act of 1978 requires political appointees to submit detailed disclosure reports of assets and holdings that could appear as a conflict of interest. OGE reviews these documents and signs off on compliance agreements.

It is important to note that under current law, the OGE oversees compliance with executive branch ethics rules, but refers complaints and/or potential violations to an agency’s inspector general, the FBI or the Justice Department. But that is just the start of the issues facing the small government agency in the modern political climate.

A few of the following headlines from the first quarter of this year:

- Justice Department Nominee Senator Jeff Sessions (R-AL) failed to disclose his ownership of oil interests on land in Alabama;
- White House does not discipline White House Counselor Kellyanne Conway for promoting Ivanka fashion line on TV;
- After his ‘Lego Batman’ remarks, Treasury Secretary Mnuchin said he would exercise ‘greater caution’;
- Former White House National Security Advisor Michael Flynn initially failed to disclose Russia-linked payments on ethics form;
- Ethics office cites Trump nominees, Senate for taking unprecedented approach;
- Filing from President Trump’s nominees threaten to overwhelm federal ethics office;
- As inquiries flood ethics office, the OGE looks to U.S. House of Representatives for action.

COMPOUNDING THE PROBLEM

President Trump arrived in office making an astounding [claim](#), “The President can’t have a conflict of interest.” Furthermore, he made clear that he would not disclose his tax returns nor would he follow the tradition of divesting his assets to protect against conflicts of interest. This break in protocol stunned much of the nation and brought the Office of Government Ethics into the forefront of the national political debate as its head, Walter Shaub, began speaking out, through Twitter and public events, about his hope and expectation that President Trump would follow precedent, regardless of whether the president was covered under the requirements of the Ethics in Government Act. President Trump refused to do so.

Then, in building his cabinet and his administration, President Trump, a businessman, nominated a larger number of individuals from business, many of whom have complex holdings and more private-sector ties than previous administrations. OGE plays a critical role in working with nominees to arrive at agreements on how to deal with conflicts of interest through qualified blind trusts, divestments or other mechanisms to avoid conflicts. Reaching those agreements can be a long and arduous process, made more so by the number of business people entering the administration.

Furthermore, the White House’s decision to not publicly disclose which officials have received waivers from the revolving door restrictions included in the ethics [executive order](#) that President Trump signed in January raised the profile of OGE. In the Obama administration, these waivers were eventually posted on the Government Ethics website. The OGE chair, [Walter Shaub](#), stated that he has “no idea how many waivers have been issued.”

In the meantime, the volume of work that the OGE is required to handle has delayed other facets of its mission, including staff training and writing new guidelines.

This memo identifies potential statutory reforms that would strengthen the Office of Government Ethics, equip it to pursue its mission and maintain a strong government grounded in integrity and trust in our national leaders. If the 2016 election highlighted anything, it is that a majority of Americans care about the conflicts of high-ranking government employees and their complex financial dealings. Now more than ever, Americans need to believe their leaders put the country’s interests above their own.

INDEPENDENCE

- Specify in legislation that the Director of OGE may only be terminated for cause Currently, the Ethics in Government Act states that the Director of OGE serves a five-year term, but does not define when and how he or she may be removed. Clarifying that the Director can only be removed “for cause” would help ensure the agency’s independence and was recommended as early as 1983.

TRANSPARENCY AND CONSISTENCY

- Authorize OGE to serve as a central clearinghouse for all ethics actions taken by designated agency ethics officials (DAEOs)

As the central agency in the ethics process, it makes sense to have OGE serve as a clearinghouse for ethics actions taken by DAEOs and their subordinates. Having decisions from various agencies side by side would promote transparency and consistency. Given modern technology, this would be a relatively low burden for OGE.

- Authorize OGE to publish recusal agreements of high-ranking Senior Executive Service (SES) employees

When an executive branch agency grants an employee a waiver regarding a situation that raises criminal conflict of interest (CCOI) concerns, the agency makes the waiver public. The same should apply for when SES employees establish recusal agreements, detailing what government matters they will not participate in. Those agreements should be published by OGE as part of the central clearinghouse function noted above.

- Authorize OGE to impose specific standards for ethics training and mandate ethics training for all high-level executive branch officials within a certain amount of time after joining an administration

OGE has the authority to require that executive branch agencies offer ethics trainings (see 5 C.F.R. sec. 2638, subpart C) and sets very general requirements, but it does not detail specific standards for those trainings. Doing so would help ensure that all employees across the entire executive branch are receiving appropriate ethics training. Also, high-level officials wield more power and have higher public visibility, and thus have an even greater need for ethics training.

ENFORCEMENT POWERS

- Authorize OGE to investigate allegations of ethics violations for high-ranking employees (Presidential appointments with and without Senate confirmation, SES and Schedule C)

Since DAEOs are usually General Counsels, they are subordinate to some high-ranking agency officials — and are often themselves political appointees — raising concerns about political pressure affecting the effectiveness of any investigation they may conduct into high-ranking employees. Giving OGE the authority and responsibility to conduct those investigations would reduce the threat of political pressure and increase the chances that investigations are thorough.

- Clarify that the Director of OGE has the authority to conduct investigations, subpoena witnesses, compel production of documents and issue civil penalties for violations for high-ranking officials

To effectively conduct investigations and discipline high-ranking officials, OGE would need to be given several powers that it does not currently have. While OGE would be able to initiate investigations on its own, the agency should have the authority to respond to allegations brought by outside groups and a statutory duty to issue a public response to the complaint within a certain time frame. Furthermore, OGE's decision not to open an investigation should provide a private cause of action to appeal that decision in court, reviewable under the standards of the Administrative Procedure Act. However, to ensure appropriate protections for the federal workforce, employees who are subject to discipline imposed by OGE should be able to appeal the decision to the Merit Systems Protection Board.

- Authorize OGE to conduct random audits of public and confidential financial disclosures to ensure the accuracy of the document

OGE is generally considered to have a compliance mentality — the agency will ensure that the proper forms are filed, but does not check the accuracy of the data. This raises the specter that some financial disclosure will be incomplete or inaccurate. As a deterrent, OGE should have the authority to audit financial disclosures for cause and the responsibility to randomly and routinely audit a certain limited number of disclosures.

- Authorize OGE to conduct random reviews of decisions by ethics officials for each agency

Agency ethics officials often consult OGE about ethics issues, but those officials have the authority to issue final decisions concerning many ethics matters. To ensure that agencies are applying the highest standards and coming to the best decisions, OGE should randomly audit agency ethics decisions.

- Require OGE to approve waivers concerning CCOI laws

When offering a waiver exempting an employee from the application of CCOI laws in a specific situation, agency ethics officials must consult with OGE, but the ultimate decision remains with the agency official. To ensure that waivers are appropriate, and that agencies are not cutting corners, the law should require OGE to approve the waiver.

- Require congressional review of current OGE decisions on “compartmentalization” and require congressional approval for any future decisions

OGE has the authority to “compartmentalize” agencies for the purpose of post-employment restrictions, meaning that high-ranking officials in a compartmentalized sub-agency or agency component may be able to lobby officials in other sub-agency or agency components. Given the potential for undermining congressional intent in establishing these post-employment provisions, Congress should have a role in reviewing and approving compartmentalization.

CONCLUSION

The arrival of the Trump administration has shaken Washington to its core. Expected norms and traditions have been thrown out of the window by a president who makes tweaking the status quo a part of his political appeal and whose profile as an outsider was key to his path to the White House. Furthermore, President Trump has directly challenged long-standing ethical standards concerning personal conflicts-of-interest, transparency and perhaps even direct financial gain.

At the same time, the Office of Government Ethics, an agency with a well-earned reputation as timid, weak and conflict averse, has come into much greater public view as Director Shaub has spoken out about this administration’s contraventions of not only norms but also long-standing ethical standards and rules governing the executive branch.

For decades – and largely by design – the OGE has existed as a mouse of an agency, focused on mostly on the bureaucratic work of properly filled out forms and conducting trainings. Investigations — **real** investigations — of ethical violations were and are rare. This was especially true for high-ranking officials, resulting in a sort of double-standard where rank-and-file executive branch employees felt the lash of non-compliance while the “big dogs” escaped unscathed.

Our nation can ill afford such a weak watchdog of our nation’s ethical standards —those that are at the bedrock of the public’s faith in our government. Congressional action to address the long-established statutory weaknesses and failures of the OGE is long overdue.

Issue One is a nonpartisan, nonprofit advocacy organization dedicated to political reform and government ethics — including calling for a stronger Office of Congressional Ethics (OCE) and Office of Government Ethics (OGE) — in order to strengthen democracy and return government to the American people.