

Congress of the United States

Washington, DC 20510

May 16, 2017

Walter Shaub
Director
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, D.C. 20005

Dear Director Shaub,

We write today to request information about the ethics rules that President Trump's Deputy White House Counsel and Designated Agency Ethics Official, Stefan Passantino, is required to follow regarding current Administration officials for whom he provided paid legal services prior to joining the Administration, which now appears to result in a financial conflict of interest. We also request your assistance with understanding the role your office or other government offices will play in ensuring Mr. Passantino's compliance with these rules.

Mr. Passantino's Financial Connections to Special Advisor Carl Icahn and Other Trump Administration Officials

Billionaire investor Carl Icahn serves as a "special advisor to the president on issues related to regulatory reform."¹ The White House has treated Mr. Icahn as an informal advisor, allowing him to avoid complying with basic ethics requirements that apply to other federal employees, such as requirements to disclose conflicts of interest, recuse himself from participating in issues on which he has conflicts, or divest from financial assets that pose potential conflicts.² As a result, Mr. Icahn has been advising President Trump while simultaneously serving as the Chairman of the Board and majority shareholder of Icahn Enterprises, a "diversified holding company."³

The White House has not offered any justification for its unofficial classification of Mr. Icahn or the decision to allow him to forego basic ethics procedures for government employees. Several of us have written to both White House Counsel, Don McGahn, and Mr. Icahn seeking

¹ The Trump-Pence Transition Team, "President-Elect Donald J. Trump Names Carl Icahn Special Advisor to the President on Regulatory Reform" (December 21, 2016) (online at <https://greatagain.gov/icahn-advisor-regs-cd3c949af118>).

² See Senator Elizabeth Warren, "Senators Lodge Concerns About Icahn's Control of Renewable Fuel Standards" (February 21, 2017) (online at https://www.warren.senate.gov/?p=press_release&id=1455).

³ Icahn Enterprises L.P., "Investor Relations" (online at <http://www.ielp.com/investor.cfm>); Jennifer A. Dlouhy, Ari Natter, and Bill Allison, "'Purest Definition of a Conflict': Icahn's \$126 Million Gain on Biofuel Deal Draws Criticism," *Bloomberg Markets* (March 1, 2017) (online at <https://www.bloomberg.com/news/articles/2017-02-28/icahn-s-126-million-gain-on-biofuel-deal-prompts-criticism>).

information on Mr. Icahn's role in the White House and any financial disclosures he has been required to file, but have received no response.⁴

As you know, Mr. Passantino is the Designated Agency Ethics Official ("DAEO") for the Executive Office of the President.⁵ In his capacity as the DAEO, he is "responsible for coordinating and managing the...ethics program"⁶ by enforcing the executive branch's financial disclosure requirements included in Title I of the Ethics in Government Act of 1978 and 5 C.F.R. Part 2634.⁷ In addition, he is responsible for ensuring that the classification of Mr. Icahn is appropriate, determining which ethics rules do and do not apply to Mr. Icahn, and ensuring that Mr. Icahn is complying with these rules.

However, Mr. Passantino's public disclosures show that he previously worked as an attorney at various law firms, where he provided legal services for Mr. Icahn.⁸ Specifically, prior to his White House service, and until January 2017, Mr. Passantino was employed as a partner at the law firm Dentons US, LLP. From July 2004 to July 2015, he was a partner at McKenna, Long & Aldridge LLP, until that firm merged with Dentons. According to his financial disclosures, Mr. Passantino received "compensation exceeding \$5,000 in a year" within the past two calendar years from Icahn Capital LP, a "wholly owned subsidiary" of Icahn Enterprises, after providing the company with "legal services."⁹

Mr. Passantino's ethics disclosures also indicate that he provided "legal services" to Dr. Ben Carson, the current Secretary of Housing and Urban Development, and Tom Price for Congress, the official campaign of now-Secretary of Health and Human Services Tom Price.¹⁰

Federal Ethics Requirements

President Trump signed Executive Order 13770 on January 28, 2017, committing all political appointees in the Trump Administration to an "Ethics Pledge."¹¹ Among other

⁴ Letter to Don McGahn, White House Counsel, from Senators Whitehouse, Stabenow, Brown, Klobuchar, Franken, Baldwin, and Warren (February 13, 2017).

⁵ U.S. Office of Government Ethics, "DAEO List" (May 8, 2017) (online at <https://www.oge.gov/Web/OGE.nsf/Resources/DAEO+List>).

⁶ 5 C.F.R. § 2635.107 (online at <https://www.law.cornell.edu/cfr/text/5/2635.107>).

⁷ U.S. Office of Government Ethics, "Designated Agency Ethics Official and Alternate Designated Agency Ethics Official" (online at <https://www.oge.gov/Web/278eGuide.nsf/Content/Definitions~Designated+Agency+Ethics+Official+and+Alternate+Designated+Agency+Ethics+Official>).

⁸ OGE Form 278e for Stefan Passantino, Deputy Counsel to the President (updated on February 22, 2017).

⁹ See OGE Form 278e for Stefan Passantino, Deputy Counsel to the President (updated on February 22, 2017); Icahn Enterprises, "Icahn Enterprises L.P. Announces Hiring of Dr. Richard C. Mulligan" (March 1, 2017) (online at <http://www.ielp.com/releasedetail.cfm?ReleaseID=1015132>); New entrants to the executive branch are required to file a Form 278e, which includes their "sources of compensation exceeding \$5,000 in a year" over the "preceding two years to [the] filing date." See U.S. Office of Government Ethics, "2.01: Reporting Periods" (online at <https://www2.oge.gov/Web/278eGuide.nsf/2cf9ac792bc0654a85257ea1005f838a/5df300cba7fca98485257f450074e3a4?OpenDocument>).

¹⁰ OGE Form 278e for Stefan Passantino, Deputy Counsel to the President (updated on February 22, 2017).

¹¹ President Donald J. Trump, "Executive Order 13770," *WhiteHouse.gov* (January 28, 2017) (online at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>).

provisions, the Ethics Pledge requires that an appointee not “participate in any particular matter involving specific parties that is directly and substantially related to” any person that the appointee “served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment.” The ban extends for two years after the date of appointment.¹²

In addition, federal ethics regulations require executive branch employees performing “official duties” to “avoid an appearance of loss of impartiality.”¹³ An employee “should not participate in a particular matter” when he or she is in a “covered relationship” with a person who “is or represents a party” in that matter.¹⁴ An executive branch employee is considered to be in a “covered relationship” with individuals “for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.”¹⁵

Given these ethics requirements, it appears that Mr. Passantino may be legally required to recuse himself from (or receive a waiver allowing him to participate in) any matters related to Mr. Icahn, Dr. Carson, or Dr. Price. But there is no record of Mr. Passantino recusing himself, and on at least one occasion, he has commented to the media on Mr. Icahn’s relationship with the Administration¹⁶ – indicating that he has not recused himself.

Questions

On April 21, 2017, we sent a letter to Mr. Passantino expressing our concerns and asking him to clarify his relationship with Mr. Icahn, Dr. Carson, and Dr. Price and whether he has recused himself on ethics matters related to these individuals.¹⁷ We have yet to receive a response. As such, we ask your office to provide us with clarity on the ethics requirements that apply to Mr. Passantino’s interactions with Mr. Icahn, Dr. Carson, and Dr. Price, and the entities responsible for enforcing them. We request that you provide us with answers to the following questions no later than June 5, 2017.

1. Please provide an overview of relevant ethics laws, executive orders, precedents, and legal opinions regarding Mr. Passantino’s role as both a Deputy White House Counsel and White House DAEO.
 - a. Given the content of Mr. Passantino’s financial disclosures, which of these laws, precedents, executive orders, and legal opinions apply to Mr. Passantino’s involvement in matters related to Mr. Icahn?

¹² *Id.*

¹³ 5 C.F.R. § 2635.501 (online at <https://www.law.cornell.edu/cfr/text/5/2635.501>).

¹⁴ *Id.*

¹⁵ 5 C.F.R. § 2635.502 (online <https://www.law.cornell.edu/cfr/text/5/2635.502>).

¹⁶ Jennifer A. Dlouhy, Ari Natter, and Bill Allison, “‘Purest Definition of a Conflict’: Icahn’s \$126 Million Gain on Biofuel Deal Draws Criticism,” *Bloomberg Markets*.

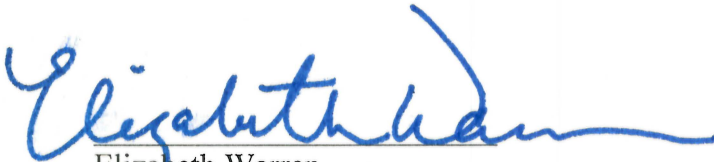
¹⁷ Letter to Stefan C. Passantino, Deputy White House Counsel and Designated Agency Ethics Official, from Senators Warren, Whitehouse, Carper, and Leahy, and Representative Cummings (April 21, 2017) (online at https://www.warren.senate.gov/files/documents/2017_04_21_%20Passantino_Letter_on_Icahn.pdf).

- b. Given the content of Mr. Passantino's financial disclosures, which of these laws, executive orders, precedents, and legal opinions apply to Mr. Passantino's involvement in matters related to Dr. Carson and Dr. Price?
2. Does Mr. Passantino's involvement in matters related to Mr. Icahn, Dr. Carson, and Dr. Price appear to be compliant with the relevant laws, executive orders, precedents, and legal opinions?
 - a. Are you aware of whether Mr. Passantino has recused himself from any matters relating to Mr. Icahn, Dr. Carson, or Dr. Price?
 - b. Alternatively, are you aware of any involvement by Mr. Passantino on issues relating to Mr. Icahn, Dr. Carson, or Dr. Price?
 - c. Are you aware of whether Mr. Passantino requested or the White House provided a waiver from Executive Order 13770, or an authorization under 5 C.F.R. § 2635.502, to allow him to work on particular matters related to Mr. Icahn, Dr. Carson, or Dr. Price?
3. If Mr. Passantino is not following relevant laws, executive orders, precedents, and legal opinions, what are the potential consequences for him? Which government officials in the White House or elsewhere are responsible for determining if Mr. Passantino is in compliance, and with enforcing these consequences if he is not?
4. Did Mr. Passantino request or did OGE provide any guidance related to Mr. Passantino's apparent conflicts of interest and recusal requirements related to any work on matters pertaining to Mr. Icahn, Dr. Carson, or Dr. Price?
 - a. If so, please describe the nature of the guidance given, and provide a copy of any such written guidance.
 - b. Did Mr. Passantino follow this guidance?
5. Have any other White House officials requested or has OGE provided guidance regarding Mr. Passantino's conflicts of interest and recusal requirements related to Mr. Icahn, Dr. Carson, and Dr. Price?

- a. If so, please describe the nature of the guidance given, and provide a copy of any such written guidance.
- b. Was this guidance followed?

Please do not hesitate to reach out to Brian Cohen of Senator Warren's staff at 202-224-2245, Joe Gaeta of Senator Whitehouse's staff at 202-224-2921, John Kilvington of Senator Carper's staff at 202-224-2241, Erica Chabot of Senator Leahy's staff at 202-224-4242, or Krista Boyd of Representative Cummings' staff at 202-225-9493 with any questions or concerns.


Sincerely,



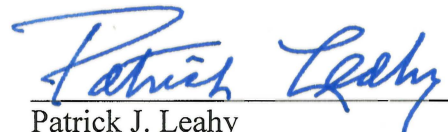
Elizabeth Warren
United States Senator



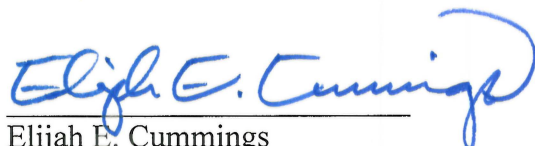
Sheldon Whitehouse
United States Senator



Thomas R. Carper
United States Senator



Patrick J. Leahy
United States Senator



Elijah E. Cummings
Member of Congress