

Congress of the United States
Washington, DC 20510

July 25, 2017

Don McGahn
White House Counsel
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. McGahn,

We are writing today to request information on your efforts to determine whether Stefan Passantino, the top ethics official in the White House, violated ethics rules in his work on matters related to Carl Icahn.

Billionaire investor Carl Icahn serves as a “special advisor to the president on issues related to regulatory reform.”¹ The White House has taken the position that Mr. Icahn is not a government employee, but is “simply a private citizen whose opinion the president respects and whom the president speaks with from time to time.”² Mr. Icahn himself has confirmed he is exempt from 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.³ 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” with vast interests affected by federal government policies.⁴

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

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 Eric Lipton, “Icahn Raises Ethics Flags With Dual Roles as Investor and Trump Adviser,” *New York Times* (March 26, 2017) (online at <https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html>).

³ *Ibid.*

⁴ 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>).

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

managing the ethics program for the White House⁶ 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. According to a February 28, 2017, report, Mr. Passantino informed *Bloomberg* that "Mr. Icahn does not have a position with the administration nor a policymaking role."⁸

This public comment presents a concern because Mr. Passantino's public disclosures show that Mr. Icahn was one of Mr. Passantino's clients in his work as an attorney.⁹ 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 2003 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."¹⁰ Mr. Passantino is thus subject to a set of ethics requirements, including the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), and Executive Order 13770, among other restrictions, that prohibit him from working on specific party matters that relate to Mr. Icahn.¹¹

On April 21, 2017, we sent a letter to Mr. Passantino asking him to clarify his relationship with Mr. Icahn.¹² When Mr. Passantino did not respond, we sent a letter to the

⁶ 5 C.F.R. § 2638.201 (online at <https://www.gpo.gov/fdsys/pkg/CFR-2008-title5-vol3/pdf/CFR-2008-title5-vol3-sec2638-201.pdf>).

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 Jennifer A. Dlouhy, Ari Natter, and Bill Allison, "'Purest Definition of a Conflict': Icahn's \$126 Million Gain on Biofuel Deal Draws Criticism," *Bloomberg* (February 28, 2017) (online at <https://www.bloomberg.com/news/articles/2017-02-28/icahn-s-126-million-gain-on-biofuel-deal-prompts-criticism>).

⁹ OGE Form 278e for Stefan Passantino, Deputy Counsel to the President (updated on February 22, 2017).

¹⁰ 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>).

¹¹ See Letter from Walter Shaub, then-Director, U.S. Office of Government Ethics, to Senators Warren, Whitehouse, Carper, Leahy, and Representative Cummings (June 28, 2017) (online at [https://www.oge.gov/web/OGE.nsf/All%20Documents/31377C04969A53878525814E006093BE/\\$FILE/Letter%20from%20OGE%20Director%20W%20Shaub%206-28-17.pdf?open](https://www.oge.gov/web/OGE.nsf/All%20Documents/31377C04969A53878525814E006093BE/$FILE/Letter%20from%20OGE%20Director%20W%20Shaub%206-28-17.pdf?open)).

¹² 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).

Office of Government Ethics (OGE) to obtain additional information on the ethics rules that Mr. Passantino is required to follow with regard to Mr. Icahn.¹³

The White House's refusal to answer even basic questions about Mr. Passantino's role with regard to Carl Icahn creates a cloud of suspicion. The White House's ethics program—and the attorney who advises it—should be a model for the federal government and above reproach. Instead, the failure to be transparent about Mr. Passantino's ethics compliance or any measures taken to hold him accountable for a lack of compliance sends a public message of indifference to the ethics rules that bind our federal workforce.

In a June 28, 2017 response, then-OGE Director Walter Shaub made clear that both the Standards of Conduct and Executive Order 13770 prohibit Mr. Passantino from engaging in any “particular matter involving specific parties” in which Mr. Icahn is a party.¹⁴ Mr. Shaub explicitly stated that because the White House “has taken the legal position that Mr. Icahn does not meet the applicable standard to be regarded as an executive branch employee,” Mr. Passantino is “subject to the former client restrictions with respect to Mr. Icahn.” Mr. Shaub stated it was “concerning” that Mr. Passantino reportedly “delivered the White House's legal position on Mr. Icahn's employment status to the media.”¹⁵ Mr. Shaub noted that “based on a review of documents recently released by the White House, Mr. Passantino does not appear to have received a waiver or authorization to deliver the White House's legal position [on Mr. Icahn] to the media.”¹⁶

Mr. Shaub noted that “OGE does not know whether Mr. Passantino participated in the formulation of the White House's legal position [regarding Mr. Icahn's role as an informal advisor], which was a ‘particular matter involving specific parties’ in which Mr. Icahn was a party,” and stated that “the White House is in a position to ascertain the relevant facts.” In the June 28th letter, then-Director Shaub brought Mr. Passantino's potential violation to your attention for your “review and a determination as to whether action is warranted.”¹⁷

In response to Mr. Shaub's letter, White House spokeswoman Lindsay Walters “accused Shaub and the Democrats of ‘distorting facts and attempting to tarnish the White House for purposes of a partisan agenda.’”¹⁸ It is unclear which facts the White House feels were distorted because the White House has not responded to a February 13, 2017 request for information,¹⁹

¹³ Letter from Senators Warren, Whitehouse, Carper, Leahy, and Representative Cummings to Walter Shaub, then-Director, U.S. Office of Government Ethics (May 16, 2017) (online at https://www.warren.senate.gov/files/documents/2017_05_15_OGE_Passantino.pdf).

¹⁴ Letter from Walter Shaub, then-Director, U.S. Office of Government Ethics, to Senators Warren, Whitehouse, Carper, Leahy, and Representative Cummings (June 28, 2017) (online at [https://www.oge.gov/web/OGE.nsf/All%20Documents/31377C04969A53878525814E006093BE/\\$FILE/Letter%20from%20OGE%20Director%20W%20Shaub%206-28-17.pdf?open](https://www.oge.gov/web/OGE.nsf/All%20Documents/31377C04969A53878525814E006093BE/$FILE/Letter%20from%20OGE%20Director%20W%20Shaub%206-28-17.pdf?open)).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Cristina Alesci and Jill Disis, “Ethics watchdog says White House lawyer might have broken rules,” *CNN* (June 29, 2017) (online at <http://money.cnn.com/2017/06/29/news/ethics-white-house-passantino/index.html>).

¹⁹ Letter from Senators Whitehouse, Stabenow, Brown, Klobuchar, Franken, Baldwin, and Warren to Don McGahn, White House Counsel (Feb. 13, 2017) (online at: <https://www.whitehouse.senate.gov/news/release/senators-demand-answers-about-icahns-white-house-role>).

and has yet to comment on OGE's identification of a potential ethics violation by the top White House ethics official.

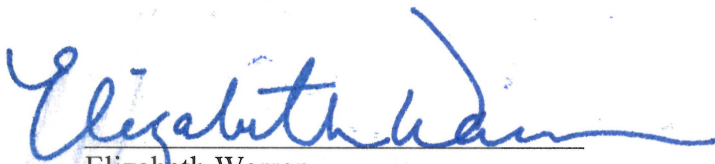
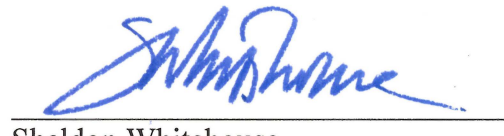
Mr. Shaub said in a July 17, 2017, CNN interview that the tone being set by the President and senior White House staff is that ethics compliance "isn't a high priority." Former Director Shaub also said, "[W]e've seen sort of the level of carelessness about ethics on the part of senior appointees" and that he is "very concerned about the risk to the integrity of government and the perception about the risk [to] the integrity of government."²⁰

You have the ability to make compliance with ethics laws a priority for White House appointees. As a step toward that end, we request answers to the following questions no later than August 1, 2017:

1. Was Mr. Passantino involved in the formulation of the White House's legal position determining Mr. Icahn's status as an informal advisor to the President? If so, what was the nature of his involvement?
2. Did Mr. Passantino receive a waiver from conflict of interest requirements to engage in work regarding Mr. Icahn? If yes, please provide a copy of this waiver. If not, please explain why he did not receive such a waiver.
3. Did Mr. Passantino receive a waiver or authorization to deliver the White House's legal position on Mr. Icahn to *Bloomberg* or any other news organization? If so, please provide a copy of this waiver and/or authorization. If not, why did he provide this comment?
4. Have you taken any action in response to OGE's letter? Have you determined if Mr. Passantino violated ethics requirements? If so, what steps has the White House Counsel's office or any other White House official taken to discipline Mr. Passantino?

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, Roberto Berrios of Senator Carper's staff at 202-224-2441, 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

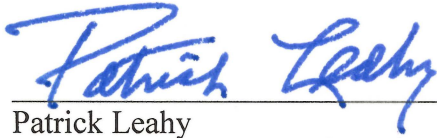
²⁰ *Ibid*



Thomas R. Carper
United States Senator



Elijah J. Cummings
Member of Congress



Patrick Leahy
United States Senator

CC: David J. Apol, Acting Director, U.S. Office of Government Ethics