



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005
Attn: Nicole Stein, OGE Strategic Plan

Via email

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to Solicitation of Input From Stakeholders Regarding the U.S. Office of Government Ethics Strategic Plan (FY 2022-2026), U.S. Office of Government Ethics, 86 Fed. Reg. 35796 (July 7, 2021)

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits this comment in response to the Office of Government Ethics’ (“OGE” or “the Agency”) July 7, 2021 solicitation of comments regarding OGE’s Fiscal Year 2022-2026 Strategic Plan (“Strategic Plan”). CREW is a nonpartisan government watchdog organization committed to ensuring an ethical and accountable government and, to that end, frequently relies on public financial disclosure reports and other information obtained under the Ethics in Government Act (EIGA). CREW appreciates this opportunity to collaborate with OGE as it begins the process of improving and strengthening itself following its numerous failures during the previous administration.

CREW has a single thematic point that we encourage OGE to keep in mind as it revises its Strategic Plan and implements any other changes to improve the executive branch ethics program. Specifically, CREW encourages OGE to consider the importance and centrality of transparency and the related role of public pressure in our ethics regime. The limitations on OGE’s authority under EIGA restrict OGE’s ability to hold senior executive branch officials accountable through traditional channels. These limitations were highlighted during the previous administration, as the president,¹ the White House, and numerous agency heads repeatedly flaunted their disregard for ethics advice and counsel.² This concerted effort to undermine OGE and the ethics program more broadly allowed many senior

¹ Andy Sullivan, Emily Stephenson, and Steve Holland, “Trump says won’t divest from business while president,” Reuters, Jan. 11, 2017, available at <https://www.reuters.com/article/us-usa-trump-finance/trump-says-wont-divest-from-his-business-while-president-idUSKBN14V21I>.

² See, e.g., Sinéad Baker, “Trump aides ‘take pride’ in violating ethics laws because it upsets the media at no cost to them, report says,” *Business Insider*, Aug. 26, 2020, available at <https://www.businessinsider.com/trump-aides-proud-to-violate-hatch-act-ethics-laws-reports-2020-8>.

executive branch officials to evade compliance with their most basic ethical obligations, including full and timely compliance with divestiture and disclosure requirements for conflicting assets³ and the timely filing and release of public financial disclosure reports.⁴ As a result of this flagrant and unprecedented attack on our executive branch ethics obligations,⁵ the executive branch developed a culture of disregard and disdain for the standards of ethical conduct.

Ultimately, while some of the fault lines that President Trump and the broader Trump era exposed originate in the laws and regulations that make up the ethics regime, others were the result of OGE's inability to recognize and react to the scope of the attack on the program itself. We understand OGE has limited legal authority to compel recalcitrant executive branch officials to comply with the law, but we also believe OGE did not fully utilize other tools at its disposal, including loudly communicating the prior administration's systemic ethical failures to Congress, the public, and other outside stakeholders. Here, we offer suggestions to improve your Strategic Plan to ensure that OGE is once again able to carry out its critical mission.

CREW Suggestions

- OGE should include a section in the Strategic Plan that directly addresses the unique problems presented by an ethically-deficient president and

³ See, e.g., U.S. Department of Commerce, Office of Inspector General, Investigation into Multiple Allegations That Secretary of Commerce Wilbur L. Ross, Jr., Failed to Comply with His Ethics Agreement and Violated Conflict of Interest Laws, Dec. 3, 2020; Letter from Deputy Inspector General Mitch Behm to Chairman Peter DeFazio, U.S. House of Representatives Committee on Transportation and Infrastructure, Mar. 2, 2021, enclosing U.S. Department of Transportation, Office of Inspector General, Report of Investigation on Chao – Ethics Violation (Misconduct); Alan Rappeport, U.S. Ethics Office Declines to Certify Mnuchin's Financial Disclosure, *New York Times*, Apr. 4, 2019, <https://www.nytimes.com/2019/04/04/us/politics/steven-mnuchin-ethics-office.html>.

⁴ See, e.g., Meredith Lerner and Meghan Faulkner, "Ex-USAGM chief Michael Pack's office stonewalled ethics program," *CREW*, Jul. 20, 2021, available at <https://www.citizensforethics.org/reports-investigations/crew-investigations/ex-usagm-chief-michael-pack-office-stonewalled-ethics-program/>; Meredith Lerner and Walter Shaub, "White House declined John McEntee's termination financial disclosure, then rehired him," *CREW*, May 11, 2020, available at

<https://www.citizensforethics.org/reports-investigations/crew-investigations/white-house-declined-john-mcentees-termination-financial-disclosure-then-rehired-him/>; Paul Blumenthal, "Trump's Record of Ethically Tainted Cabinet Officials Rises with Acosta's Exit," *Huffington Post*, Jul. 12, 2019, available at

https://www.huffpost.com/entry/trump-cabinet-ethics-cloud_n_5d28d5f9e4b02a5a5d5a793f; and, Alan Rappeport, "U.S. Ethics Office Declines to Certify Mnuchin's Financial Disclosure," *New York Times*, Apr. 4, 2019, available at <https://www.nytimes.com/2019/04/04/us/politics/steven-mnuchin-ethics-office.html/>.

⁵ See, e.g.; Donald Sherman, "Kellyanne Conway eclipses 50 Hatch Act violations on Twitter," *CREW*, Oct. 21, 2019, available at <https://www.citizensforethics.org/reports-investigations/crew-reports/kellyanne-conway-eclipses-50-hatch-act-violations-on-twitter>.

administration, and steps OGE plans to take should such a situation arise again.

Former President Donald Trump entered office with the most significant and flagrant conflicts of interest in the history of our country;⁶ and critically, his unwillingness to ameliorate those conflicts undermined the entire executive branch ethics program. OGE's Strategic Plan fails to recognize that reality. While we understand that holding the president accountable for ethical violations presents some complicated constitutional questions, it is critical that you not take those issues as an excuse to avoid the subject entirely. In drafting this section we suggest that you develop a serious response to the systemic problem of executive branch culture such a situation presents.

Specifically, you must improve Strategic Goal 3: Help Top Executive Branch Officials Resolve Conflicts of Interest and Demonstrate Ethical Leadership. While CREW appreciates your attention to the specific problems presented by ethically deficient high-level officials (including presidentially-appointed officials who are not confirmed by the Senate), we believe this section of the Strategic Plan is and will remain significantly flawed without a specific discussion of the problems presented by the president and ways OGE can address such problems. For example: we encourage you to discuss how to improve your policies related to public disclosure of the president's ethics compliance and conflicts of interest. The Trump era demonstrated that private discussions with and referrals to the President related to his and his administration's ethical violations were nearly meaningless tools in the fight to ensure compliance and accountability. OGE must recognize that problem and develop a plan to address it. Second, we encourage you to discuss how you plan to address a president's significant and ongoing violations of the Constitution's Emoluments Clauses. OGE is one of the agencies tasked with ascertaining and ameliorating violations of the Emoluments Clauses--a duty that you were unable to fulfill during the last administration. As such, your plan must include the steps you will take to ensure that you are fulfilling your responsibility to help uphold the Constitution.

- OGE should commit to preparing a yearly public risk assessment in a report to Congress detailing the administration's level of compliance with the ethics program, the specific failures in agencies and high level officials, and a section detailing how to bring the administration fully into compliance.

The best way for OGE to address an administration's systemic ethical failures is to conduct an overall risk assessment of the administration as a whole. CREW encourages OGE to take a system-wide risk assessment approach to the ethics

⁶ See CREW, "President Trump's 3,400 conflicts of interest," Sep. 24, 2020, *available at* <https://www.citizensforethics.org/reports-investigations/crew-reports/president-trumps-3400-conflicts-of-interest/>.

program, focusing not only on individual agencies and their specific compliance issues, but also on how the executive branch is functioning as a whole. OGE's current agency-specific questionnaires provide strong substantive analyses of where individual agencies have technical failures, and CREW appreciates their importance in ensuring that agencies comply with the ethics program. However, OGE's brief summary provides only a cursory summary of the functioning of the ethics program as a whole. A system-wide report, and its attendant risk analysis, would focus attention on where an administration is succeeding and where it is failing in its obligation to create an ethical executive branch, including any lapses of ethical leadership at the top. And by referring that analysis to Congress, OGE would help encourage system-wide compliance through strategic Congressional oversight. This report would also serve to inform the public of the administration's commitment to the ethics program--a powerful tool in ensuring that an administration meets ethical obligations.

- OGE should establish a public liaison program to better enable civil society to flag potential non-compliance with EIGA.

CREW appreciates OGE's recognition in Sections 4.1 and 4.2 of the Strategic Plan of civil society's importance in enforcing the ethics program. However, we believe that the Strategic Plan should include a section committing to improving your *collaborative* relationship with civil society stakeholders, who can help supplement OGE's efforts to ensure a robust and effective executive branch ethics program.

While CREW frequently deems it necessary to involve individual OGE officials to help resolve disputes with agencies over access to ethics records requested via OGE Form 201 requests, we believe it is in the public interest for OGE to establish a more formalized program for civil society engagement on such issues. We therefore recommend that OGE create a public liaison program--similar to the FOIA public liaison programs agencies have established--to enhance OGE's ability to collaborate with and receive input from civil society stakeholders. Such a program could significantly improve, among other things, public access to critical ethics records subject to disclosure under EIGA.

- OGE should improve Strategic Goal 1 by including a section specifically committing to enhancing its process for handling potential violations of the criminal conflict of interest statute by high-level officials who intentionally delay divestment or other means of complying with the ethics laws.

One of OGE's major systemic failures during the Trump era was the ethics program's apparent inability to conduct serious and timely investigations of certain

high-level executive officials' material conflicts of interest. This failure contributed to the creation of a culture where top officials flaunted their ethical obligations with impunity because they believed they were above the law.⁷ This contributed to the crisis of public faith in government that OGE is now trying to address.

OGE should take substantive measures to ameliorate this problem, including by committing in the Strategic Plan to a strict interpretation of its authority to refer to DOJ and Congress potential instances of violations of criminal laws. For senior political appointees, noisy referrals would help demonstrate to the public that OGE is taking its responsibility to hold high-level officials to the exacting standards that a functioning ethics program requires. These referrals should include a specific recommended area of attention, including apparent criminal violations of the ethics regime, the results of OGE's own inquiries, and any steps you could not take to ascertain the truth.

- OGE should create a mechanism to alert the public and the government's other investigatory bodies of repeated agency or official noncompliance with the ethics regime.

As part of your plan to expand transparency in your dealings with agencies and to marshal the public's help in demanding compliance with the ethics program, we encourage you to develop and release public reports when agency officials (and the agencies they run) do not cooperate with OGE. One way that agency officials during the Trump era managed to evade compliance with ethics rules was by refusing to cooperate with agency ethics officials or OGE, thereby forcing you to take extraordinary measures to carry out your duties under the ethics laws and regulations.⁸ For example, it appears that you were unable to reach an agreement to review the White House ethics program, a failure which resulted in your inability to

⁷ CREW filed multiple criminal complaints against high-level executive branch officials, including Vice President Pence's Chief of Staff Marc Short and then-Secretary of Commerce Wilbur Ross for apparent violations of the criminal conflict of interest law, 18 U.S.C. § 208, and felt it necessary to remind Postmaster General Louis DeJoy about his responsibilities under the law.
<https://www.citizensforethics.org/legal-action/legal-complaints/marc-short-criminal-complaint-fbi/>;
<https://www.citizensforethics.org/news/press-releases/crew-files-criminal-complaint-against-wilbur-ross/>;
<https://www.citizensforethics.org/news/press-releases/louis-dejoy-conflicts-of-interest-letter/>.

⁸ See, e.g., OGE, Results from the Annual Agency Ethics Program Questionnaire, 2020, available at <https://www.oge.gov/web/oge.nsf/0/BF327B2CC50A959D8525870C00663796/%24FILE/AQ%20Summary%20Report%20FINAL.pdf>; OGE, Special Review of the Executive Branch Agency Waivers & Authorizations, Sep. 2017, available at [https://www2.oge.gov/Web/oge.nsf/resources/Special%20Review%20of%20Executive%20Branch%20Agency%20Waivers%20and%20Authorizations/\\$FILE/Final%20Report%20Package%20.pdf](https://www2.oge.gov/Web/oge.nsf/resources/Special%20Review%20of%20Executive%20Branch%20Agency%20Waivers%20and%20Authorizations/$FILE/Final%20Report%20Package%20.pdf); and, OGE Letter to Sens. Carper and Warren, Aug. 21, 2020, available at [https://www.oge.gov/Web/OGEnsf/Congressional%20Correspondence/A2D459653899409E852585D0006DE86C/\\$FILE/Letter%20to%20Senator%20Carper%20and%20Senator%20Warren.pdf?open](https://www.oge.gov/Web/OGEnsf/Congressional%20Correspondence/A2D459653899409E852585D0006DE86C/$FILE/Letter%20to%20Senator%20Carper%20and%20Senator%20Warren.pdf?open).

“complete the substantive portion of the review.”⁹ Additionally, you were apparently unable to obtain required ethics questionnaires from the Trump White House, the National Security Council, and the Council of Economic Advisors because the agencies simply did not submit them.¹⁰ And finally, we recently learned of your struggle, and ultimate failure, to ensure that all employees of the United States Agency for Global Media (USAGM) complied with their ethical obligations.¹¹ Your report, released months after the events it discussed, demonstrated that the Director of the agency repeatedly refused to comply with his own obligations, and refused to allow senior employees in the agency to comply as well. In fact, many former employees appear to have never complied with their obligations, a failure that OGE has still apparently been unable to correct despite reviewing USAGM’s ethics program.¹²

We encourage you to seek help in these situations. We note that private referrals to the president related to non-compliant agencies (such as you outline in Section 2.3) are not a powerful enough mechanism to assure compliance--particularly when the president in office does not take ethical compliance seriously. You should commit to releasing that information to the public as well as the White House.

Conclusion

OGE is at a crossroads. The previous administration’s intentional, brazen, and concerted attack on the fundamentals of ethical governance has decimated public trust in government. OGE’s inability to effectively respond to that attack demonstrated the need for systemic reform, both in our ethical laws and regulations, and in the way OGE interacts with Congress, the White House, and the public. This Strategic Plan represents OGE’s first foray into this new era. It is an opportunity to demonstrate that OGE has learned from the previous era, and to show that the agency is willing and able to adapt to its changed circumstances. The current draft plan is an encouraging start to this process, but it needs significant changes and additions to fully encompass the scope of OGE’s necessary reforms. This comment represents CREW’s initial general suggestions as you revise the plan. OGE has a crucial role to play in ensuring that our government has the necessary institutional structures to protect itself against those who would seek to manipulate it for personal gain. We look forward to working with you throughout this process.

⁹ OGE Letter to Sens. Carper and Warren, Aug. 21, 2020.

¹⁰ OGE, Results from the Annual Agency Ethics Program Questionnaire, 2020.

¹¹ Lerner and Faulkner, “Ex-USAGM chief Michael Pack’s office stonewalled ethics program,” Jul. 20, 2021.

¹² OGE, United States Agency for Global Media Ethics Program Review Follow-Up Report, Apr. 5, 2021, available at [https://oge.gov/Web/oge.nsf/Ethics%20Docs/B41BC77A3A469247852586AE00694692/\\$FILE/2021%20AGM%20First%20Follow%20Up%20Inspection%20Report.pdf?open](https://oge.gov/Web/oge.nsf/Ethics%20Docs/B41BC77A3A469247852586AE00694692/$FILE/2021%20AGM%20First%20Follow%20Up%20Inspection%20Report.pdf?open).