CREW | citizens for responsibility and ethics in washington

April 25, 2017

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Committee on Environment and Public Works
United States Senate
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper,

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests that the U.S. Senate Committee on Environment and Public Works review and investigate the General Services Administration's ("GSA") determination that Trump Old Post Office LLC ("Trump OPO") is in full compliance with the conflict of interest provision of its Ground Lease ("Lease") with GSA. That provision prohibits any federal elected official from deriving benefits from the Lease or admitting to any share or part of it, but President Trump has a financial interest in Trump OPO, and it provides him significant financial benefits. GSA's Contracting Officer failed to provide a sufficient legal or rational basis for why Trump OPO is not violating the Lease, and GSA acted improperly when it failed to exercise its rights to terminate the Lease or take other appropriate legal action against Trump OPO.

Old Post Office Lease

On August 5, 2013, GSA entered into a lease with Trump Old Post Office LLC.[1] As the Tenant, Trump OPO obtained the right to renovate the Old Post Office Building and to convert it into to a luxury hotel ("Hotel") operating under a 60-year lease.[2] Under the Lease, Trump OPO became obligated to pay GSA at least $250,000 per month.[3]

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[1] Ground Lease by and between the United States of America (as "Landlord") and Trump Old Post Office LLC (as "Tenant"), Lease No. GS-LS-11-1307, Aug. 5, 2013 ("Trump OPO Ground Lease"), *available at* https://www.gsa.gov/portal/getMediaData?mediaId=233119; *see also* Press Release, GSA Selects the Trump Organization as Preferred Developer for DC's Old Post Office, Feb. 7, 2012, *available at* https://www.gsa.gov/portal/content/123671.

[2] Trump OPO Ground Lease, Section 4.1, at 32.

[3] *Id.* at 18.

Mr. Trump has had extensive involvement with obtaining financing for the Old Post Office hotel project. On August 12, 2014, in his capacity as President of Trump OPO, Mr. Trump signed a $170 million loan obligation with Deutsche Bank, securing financing for the loan by using the Lease as collateral.[4] This loan remains outstanding until 2024.[5]

On November 8, 2016, Mr. Trump was elected President of the United States. When Mr. Trump was sworn in on January 20, 2017, he became an elected official of the government of the United States. As a result, a conflict of interest provision of the Lease, which would bar him as an elected official from deriving benefits from the Lease, became operative.

Specifically, Section 37.19 of the Lease states:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.

The purpose of this conflict of interest provision is the same as the purpose of the Federal Acquisition Regulation's prohibition on awarding a federal contract to a government employee or a business owned or controlled by a government employee: "to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees."[6] As Deputy Commissioner Michael Gelber explained during a congressional briefing in December 2016, this standard clause "is included in many GSA leases to create a 'level playing field' and protect the interests of the American people."[7]

The Donald J. Trump Revocable Trust's Interest in Trump Old Post Office LLC

Along with the many other positions he held with the Trump Organization, President Trump resigned from Trump OPO and Trump Old Post Office Member Corp. on January 19, 2017.[8] However, he retained his interest in Trump OPO through The Donald J. Trump Revocable Trust ("Trust").[9] Specifically, the Trust retains a 77.5% interest in Trump OPO through certain holding companies. In this regard, 76.725% of Trump OPO is owned by DJT Holdings LLC ("DJT Holdings"), which in turn is owned almost entirely by Trust.[10] An

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[4] Leasehold Deed of Trust between Trump OPO and Deutsche Bank, Aug. 12, 2014, *available at* https://assets.documentcloud.org/documents/2813432/UCC-170-Million.pdf.
[5] Donald J. Trump, 2016 Executive Branch Personnel Public Financial Disclosure Report, May 16, 2016, at 57, *available at* https://assets.documentcloud.org/documents/2838696/Trump-2016-Financial-Disclosure.pdf.
[6] Federal Acquisition Regulation, 48 C.F.R. § 3.601.
[7] Letter from Rep. Elijah E. Cummings, et al. to Hon. Denise Turner Roth, Dec. 14, 2016 ("Roth Letter"), at 2, *available at* https://democrats-oversight.house.gov/news/press-releases/gsa-says-trump-must-fully-divest-ownership-of-dc-hotel-to-avoid-breach.
[8] Donald J. Trump Resignation Letter, Jan. 19, 2017, *available at* https://documentcloud.org/documents/3404759.
[9] Letter from GSA Contracting Officer Kevin M. Terry to Trump Old Post Office LLC, March 23, 2017 ("GSA letter"), at 6, *available at* https://www.gsa.gov/portal/getMediaData?mediaId=157798.
[10] *Id.*, Exhibit B to Exhibit 7 (Exhibit 7 is a December 29, 2016 letter from Adam L. Rosen of Trump OPO to GSA,

additional 1% interest in Trump OPO is held through Trump Old Post Office Member Corp., which in turn is owned largely by DJT Holdings Managing Member LLC, which is also owned entirely by the Trust.[11]

Trump OPO confirmed to GSA that each of the entities listed above (and certain other Trump family entities) have an ownership interest in the Tenant.[12] Under the applicable operating agreements, each of these entities are entitled to profits, losses, and other cash distributions, which are allocated among the "Members" in accordance with their "respective percentage interests."[13] In addition, the limited liability companies maintain capital accounts for each of the Members.[14]

Based on documents obtained by *ProPublica*, certain information about the Trust has become publicly available.[15] A certification signed by the Trustees on January 26, 2017 indicates that President Trump is the Donor and the "purpose of the Trust is to hold assets for the exclusive benefit of Donald J. Trump."[16] The certification further states that President Trump has retained the power to revoke the Trust,[17] and he is entitled to certain distributions from the Trust upon request.[18] Donald J. Trump, Jr. is the Trustee of the Trust, Allen Weisselberg is the Business Trustee of the Trust, and Eric F. Trump is the Chairman of the Advisory Board of the Trust.[19] As Trustees, they are obligated to "distribute net income or principal to Donald J. Trump at his request, as the Trustees deem necessary for his maintenance, support or uninsured medical expenses, or as the Trustees otherwise deem appropriate."[20] Notably, in an interview with *ProPublica*, an attorney for the Trump Organization "confirmed that President Trump can withdraw profits and underlying assets from his trust at any time."[21]

GSA's March 23, 2017 Determination

On March 23, 2017, GSA Contracting Officer Kevin M. Terry issued a determination that Trump OPO was in full compliance with Section 37.19, and held the Lease to be valid and in full

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and Exhibit B to that letter includes an organization chart for Trump OPO).

[11] *Id.*

[12] GSA Letter, at 4-5.

[13] *Id.* at 6.

[14] *Id.*

[15] Certification of Trustee, Jan. 26, 2017, *available at* https://www.propublica.org/documents/item/3442581-Trump-International-Hotel-Liquor-License-Filings#document/p7.

[16] *Id.*; A subsequent Certification of Trustee dated February 10, 2017 and submitted to GSA omitted the word "exclusive" from this language. GSA Letter, Exhibit 14. The February 10 version also contains additional information that was not previously provided in the January 26 certification. *See* Derek Kravitz and Al Shaw, Trump Lawyer Confirms that Trump Can Pull Money From His Businesses Whenever He Wants, *ProPublica*, April 4, 2017, *available at* https://www.propublica.org/article/trump-pull-money-his-businesses-whenever-he-wants-without-telling-us.

[17] Certification of Trustee, Jan. 26, 2017. The February 10 certification omitted this representation.

[18] GSA Letter, at 7; *see also* GSA Letter, Exhibit 14.

[19] GSA Letter, at 6.

[20] *Id.* at 7.

[21] Kravitz and Shaw, *ProPublica*, April 4, 2017.

force and effect.[22] Mr. Terry based his determination on a review of the Lease, discussions with Trump OPO, and certain documents submitted by Trump OPO, but provided no legal analysis.[23] Instead, his determination appears to have been based largely on certain measures taken by Trump OPO to address "three important issues":

1. For the duration of his term in office, "'Tenant will not make any distributions to DJT Holdings LLC [] or to any other entity in which President Trump has a direct, indirect or beneficial interest.'"[24]

2. "[A]mounts that would have been distributed to DJT Holdings LLC will instead be credited to the unrecovered capital contribution account of DJT Holdings LLC and 'treated as capital contributions to Tenant.'" The "funds will remain in Trump Old Post Office LLC instead of being distributed to DJT Holdings LLC. In addition, 'DJT Holdings LLC will not earn any return on such amounts.'"[25]

3. "[R]egarding the capital contributions, "'Tenant may only use the funds for business activities and purposes. . . .'"[26]

However, the Contracting Officer's view is inconsistent with the prior view expressed to Congress by GSA Deputy Commissioner Gelber, who informed congressional staff in December 2016 "that GSA assesses that Mr. Trump will be in breach of the lease agreement the moment he takes office on January 20, 2017, unless he fully divests himself of all financial interests in the lease for the Washington D.C. hotel. The Deputy Commissioner made clear that Mr. Trump must divest himself not only of managerial control, but of all ownership interest as well."[27]

Revenue Generated by Trump OPO

Based on Assistant to the President and Senior Advisor Jared Kushner's personal public financial disclosure report, filed on March 9, 2017, certain information about the revenue generated by Trump OPO has become publicly available.[28] Mr. Kushner is required to report on the assets and income of his spouse Ivanka Trump, who holds a 7.5% interest in Trump OPO.[29] In his personal financial disclosure report, Mr. Kushner reported rent or royalty income of $1 million to $5 million for Ms. Trump's investment in Trump OPO.[30] This income amount is

[22] GSA Letter, at 1.
[23] *Id.*
[24] *Id.* at 7 (quoting Exhibit 1.C (Letter from Sheri A. Dillon to Kevin Terry, Mar. 20, 2017)).
[25] *Id.*
[26] *Id.*
[27] *See* Roth Letter.
[28] Jared Kushner, 2016 Executive Branch Personnel Public Financial Disclosure Report, Mar. 9, 2017, *available at* http://www.documentcloud.org/documents/3534177-Kushner-Jared.html.
[29] GSA Letter, Exhibit B to Exhibit 7 (organizational chart).
[30] Jared Kushner, 2016 Executive Branch Personnel Public Financial Disclosure Report, part 5, #3.

based on the rent or royalties Ms. Trump received from her Trump OPO investment in the preceding calendar year and the current year to date.[31] Since the Hotel opened in late October 2016, it is reasonable to believe that her income amount is largely derived from a four-month period between November 2016 and February 2017. Without access to the Trump OPO operating agreement, it is not clear whether the rent or royalty income attributed to Ms. Trump is based on a licensing agreement or rental income and whether a similar share of rent or royalty income from Trump OPO is attributable to President Trump via the Trust and his interest in DJT Holdings.[32] Nor is it clear whether a corresponding amount has been distributed or placed in the DJT Holdings capital contribution account. What is clear from Mr. Kushner's disclosure is that the Trump OPO is sufficiently profitable that it can make distributions to at least one of its Members within four months of the Hotel's opening and in the still early days of the Hotel becoming operational. In addition, if Trump OPO has not already done so, it will likely make similar distributions to the DJT Holdings capital account for the benefit of President Trump in the future.

President Trump is "Admitted To" a "Share or Part in the Lease" and is Benefitting "Therefrom" in Violation of Section 37.19

For the reasons described below, CREW does not believe that the measures taken or other relevant facts support the Contracting Officer's finding that Trump OPO is in full compliance with Section 37.19. To the contrary, the terms of the Trust indicate that President Trump has been "admitted to" a "share or part in the Lease" and is benefiting "therefrom" in multiple respects.

First, the terms of the Trust give him a financial interest and the right of control and enjoyment over the Trust and its underlying assets, including Trump OPO:

- President Trump is the Donor of the Trust;
- President Trump is believed to be the sole beneficiary of the Trust;
- The purpose of the Trust is to "hold assets for the exclusive benefit of Donald J. Trump";
- The Trustees are required to distribute net income or principal "at [President Trump's] request as the Trustees deem necessary for his maintenance, support or uninsured medical expenses or as the Trustees otherwise deem appropriate";
- The Trustees consist of a close family member and close business associate rather than independent and unaffiliated persons; and
- President Trump retains the power to revoke the Trust.

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[31] OGE Public Financial Disclosure Guide, 2.01: Reporting Periods, *available at* https://oge.gov/Web/278eGuide.nsf/2cf9ac792bc0654a85257ea1005f838a/5df300cba7fca98485257f450074e3a4?OpenDocument.

[32] If a percentage of rent or royalty income under the Trump OPO operating agreement is similarly attributed to President Trump, CREW estimates that he would have received between $10.3 million to $51.7 million in rent and royalty income from Trump OPO based on his 77.5% ownership interest through the Trust during the same time period. If this were the case, some of these monies would have been distributed to the Trust via the DJT Holdings and other monies to the DJT Holdings capital contribution account.

Second, guidance issued by the Office of Government Ethics on trusts is instructive since President Trump is subject to the reporting requirements on trusts under the Ethics in Government Act ("EIGA").[33] OGE has noted that revocable living trusts create a financial interest and are reportable under section 102(f)(1) of the EIGA based on the following:

> [T]he grantor of a revocable living trust retains such rights of control and enjoyment with respect to the trust property that OGE must view the grantor as the true owner of the property; OGE believes this to be the case whether or not the grantor actually receives any distribution of trust income and whether or not the grantor actually serves as trustee.[34]

Based on OGE's guidance, President Trump is similarly subject to the reporting requirements of section 102(f)(1) as the Trust grantor who has retained rights of control and enjoyment with respect to the Trust property. Not only has he retained the right to revoke the Trust at any time, he reportedly can obtain a distribution upon request at any time. Accordingly, he should be treated as the owner of the underlying property for purposes of the Lease. Since one of the primary underlying properties of the Trust is DJT Holdings, which retains a controlling (76.725%) membership interest in Trump OPO, President Trump is admitted to shares in or part of the Lease through his interest in and control over the Trust.

Third, through his Trust interest, President Trump derives benefits from monies used for Hotel business purposes and activities in a multitude of ways. For the duration of President Trump's term in office, any distribution that would be distributed to DJT Holdings is to be credited to the unrecovered capital contribution account of DJT Holdings and treated as capital contributions to Trump OPO. Monies from the DJT Holdings capital account can then be used by Trump OPO for any business purpose or activity, and President Trump may then benefit from these monies as follows:

- Any enhancements to the Hotel made with monies from the DJT Holdings capital account will ultimately enhance the value of the leased property, which in turn attracts more paying clientele and further enhances the value of other Trump Organization properties and the amount the Trump Organization can charge for its licensing, management, and other services ("the Trump brand"). Since President Trump retains a financial interest in hundreds of companies that comprise the Trump Organization,[35] he stands to benefit from DJT Holdings capital account monies used to enhance the Hotel and therefore the Trump brand at large.

- Furthermore, the monies from the DJT Holdings capital account are available for any "business activities and purposes." The broad nature of the language used allows

[33] 5 U.S.C. app. §§ 101(f)(1), 102(f)(1).
[34] 67 Fed. Reg. 37965, 37966 (May 31, 2002).
[35] Donald J. Trump, 2016 Executive Branch Personnel Public Financial Disclosure Report, part 2.

these monies to be used to subsidize other Trump business enterprises by buying items for use at the Hotel. For example, monies from the DJT Holdings capital account can be used to purchase wine produced from Trump Vineyards Estates LLC, an enterprise in which President Trump retains a financial interest. Similarly, coffee and other fine food products that are sold by a business that operates or is licensed under the Trump brand can be purchased for use of the Hotel (*e.g.*, products licensed under Trump Mark Fine Foods LLC). As noted above, Ms. Trump received distributions of rent or royalty income, as of March 9, 2017, and therefore it is possible that similar distributions already have been made to the DJT Holdings capital account for the benefit of President Trump, and will likely be made in the future.

- Use of monies from DJT Holdings capital account to pay the Trump OPO loan from Deutsche Bank mitigates the possibility of Trump OPO defaulting on the loan and any embarrassment (and further conflicts) to President Trump that might ensue. Without full knowledge of the terms of President Trump's loan agreement with Deutsche Bank, we also cannot rule out the possibility that President Trump has personally guaranteed some or all of Trump OPO's obligation under the loan. If he did personally guarantee the loan with Deutsche Bank, allowing monies from the DJT Holdings capital account to be used to pay Trump OPO's outstanding debt obligations mitigates the likelihood of President Trump becoming personally liable on the loan.

- Any monies from the DJT Holdings capital account that are not expended will be returned to President Trump at the end of his term in office. Because monies that would normally be available for distribution to DJT Holdings are credited and placed in the capital contribution account for DJT Holdings capital account, any unexpended funds will be made available for the Trust to draw upon when President Trump leaves office. As unexpended funds accumulate, they certainly inure to the benefit of President Trump.

- Having been admitted to shares or a part in the Lease, President Trump has visited the Hotel restaurant on occasion since taking office to avail himself of benefits that accrue to the leaseholder of the premises.[36] In doing so, he has made no effort to dispel the notion that he is not the present owner and operator of the Hotel, particularly with his name emblazoned in gold letters above the Hotel entrance. The numerous members of the Administration who stay or dine at the Hotel, such as Treasury Secretary Steven Mnuchin and Secretary of State Rex Tillerson, further add to the cache of the Hotel and the image of the Trump brand at large.[37] Since taking

[36] Madeline Farber, President Trump's First Dinner Out in D.C. Was at His Own Hotel, *Fortune*, Feb. 26, 2017, *available at* http://fortune.com/2017/02/26/president-dines-trump-hotel/; Brooke Seipel, Trump Dines at DC Hotel After Spending Day at Trump Golf Course, *The Hill*, March 25, 2017, *available at* http://thehill.com/blogs/blog-briefing-room/news/president-donald-trump-international-hotel-golf-course-weekend; *see also* Aaron Rupar, Trump Press Secretary Turns Press Conference into Infomercial for Trump's DC Hotel, *ThinkProgress*, Jan. 19, 2017, *available at* https://thinkprogress.org/trump-hotel-sean-spicer-profiting-off-presidency-f6f0bbacecca.

[37] Daniel Politi, You'll Never Guess Where Trump Had First Dinner Out in D.C.: His Own Hotel, *Slate*, Feb. 26,

office there is no record of his visiting any other Washington DC restaurant for a private dinner with family and friends; the exclusive nature of his patronage to the Hotel further adds to its cache and the Trump brand at large.

Conclusion

Contrary to the conclusion reached by the Contracting Officer, the measures taken by Trump OPO and the facts surrounding the Hotel do not support the GSA's finding that President Trump is in compliance with the Lease's conflict of interest provision. To the contrary, it appears President Trump has been admitted to a share or part of the Lease and is benefitting from it. GSA acted without a sufficient legal or rational basis when it made its finding and acted improperly when it failed to exercise its rights to terminate the lease or take other appropriate legal action against Trump OPO. The Committee should therefore review and investigate the GSA's determination with respect to the Lease.

Sincerely,

Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics in Washington

2017, *available at* http://www.slate.com/blogs/the_slatest/2017/02/26/trump_chooses_his_own_hotel_for_his_first_dinner_out_in_d_c.html; Julie Bykowicz, Trump Hotel May Be Political Capital of the Nation's Capital, *Associated Press*, Mar. 5, 2017, *available at* http://bigstory.ap.org/article/cc2e2c2b6b4d4417afff3aa5f768be10/trump-hotel-may-be-political-capital-nations-capital.