

November 22, 2019

Hon. Christopher A. Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

Re: Request for Investigation of Former Deputy Assistant to the President Charles Herndon

Dear Director Wray:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Federal Bureau of Investigation (“FBI”) investigate whether former Deputy Assistant to the President and Director of White House Information Technology Charles C. Herndon violated the primary conflict of interest law applicable to executive branch employees by participating in particular matters affecting a company in which he held restricted stock, CSRA Inc. (“CSRA”).

For the first 14 months of his tenure in the White House, Mr. Herndon retained an interest in CSRA restricted stock that he had acquired through his prior employment with the company. Mr. Herndon joined the White House in January 2017 and, in May 2017, the White House and the Office of Government Ethics (“OGE”) made clear that they expected him to participate in CSRA-related matters. While it is not known whether Mr. Herndon ultimately worked on such matters before fully divesting his interest in the company in April 2018, these facts raise questions about whether he had a conflict of interest implicating 18 U.S.C. § 208. Accordingly, an investigation is warranted to determine whether he violated that law.

Background

Mr. Herndon worked for CSRA, a major government contractor, before joining the Trump administration on January 23, 2017 as Deputy Assistant to the President and Director of White House Information Technology.¹ A memorandum establishing his position indicated that he served as “the senior officer responsible for the information resources and information systems provided to the President, Vice President, and EOP by the Presidential Information Technology Community (Community).”² Among other responsibilities, Mr. Herndon was responsible for coordinating and reviewing all activities related to “procurement of, information resources and information systems” by the “Community,” which the memorandum defined to

¹ Charles C. Herndon, New Entrant Financial Disclosure Report, Feb. 19, 2017 (Part 1, Line 1), <https://bit.ly/2OrwTFf> (“Herndon New Entrant Report”); Sean D. Carberry, *CSRA wins \$500M milCloud 2.0 contract*, *Federal Computer Week*, June 12, 2017, <https://bit.ly/2Z1117o>.

² President Barack Obama, *Memorandum on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology*, at 1, March 19, 2015, <https://bit.ly/2LQv4DK>.

include the National Security Council, the Office of Administration, the U.S. Secret Service, the White House Military Office, and the White House Communications Agency.³

In a new entrant financial disclosure report filed on February 19, 2017, Mr. Herndon disclosed two types of CSRA stock. First, he disclosed \$100,001-\$250,000 worth of stock that he identified as “CSRA (Computer Share) Stock Plan.”⁴ Second, he disclosed “CRSA Unvested Restricted Stock” and selected the category “None (or less than \$1,001)” to reflect its value as of the date of his report.⁵ Mr. Herndon explained in the report that he had already divested this restricted stock: “I forfeited my unvested restricted stock upon separation. I have no other restricted stock or stock units.”⁶

On May 11, 2017, OGE issued Mr. Herndon a certificate of divestiture for the sale of CSRA stock.⁷ A certificate of divestiture allows an employee to defer payment of capital gains tax by reinvesting sale proceeds into certain non-conflicting investments.⁸ For an employee to receive a certificate of divestiture, OGE’s regulations require the employing agency to submit an “opinion that describes why divestiture of the property is reasonably necessary to comply with” conflict of interest laws, executive orders, or regulations.⁹ OGE’s regulations also require the employee to commit to divesting all property that is “similar or related” to the property covered by the certificate of divestiture. OGE will issue a certificate of divestiture only upon a determination that divestiture is, indeed, “reasonably necessary” to avoid a conflict of interest and that the employee has agreed to divest all “similar or related property.”¹⁰

The certificate of divestiture appears to refer specifically to the \$100,001-\$250,000 worth of “CSRA (Computer Share) Stock Plan” stock that Mr. Herndon still held in February 2017 when he filed his new entrant report.¹¹ Mr. Herndon sold this “CSRA (Computer Share) Stock Plan” stock on May 30, 2017, receiving between \$50,001 and \$100,000 in income from it.¹² As noted above, OGE’s regulations require the employee to commit to divesting all “similar or related property” – for Mr. Herndon, that included any unvested restricted CSRA stock.¹³

³ *Id.* at 2-3.

⁴ Herndon New Entrant Report (Part 2, Line 8).

⁵ *Id.* (Part 2, Line 9).

⁶ *Id.* (Part 3, Line 2).

⁷ Charles Herndon, Certificate of Divestiture, Certificate No. OGE-2017-061, May 11, 2017, <https://bit.ly/35f0Vmh>.

⁸ 26 U.S.C. § 1043; Office of Gov’t Ethics, Certificates of Divestiture, <https://bit.ly/2YbXXeE> (last viewed Nov. 4, 2019).

⁹ 5 C.F.R. § 2634.1005(b)(2). The White House submitted its request for a certificate of divestiture on April 28, 2017. Email from Robert Saltaformaggio to Elaine Newton, Apr. 27, 2017, records available in response to FOIA No. FY19-065, Oct. 24, 2019, <https://bit.ly/31YmyoP>.

¹⁰ 5 C.F.R. §§ 2634.1004(a)(1), 2634.1007(c).

¹¹ Herndon Certificate of Divestiture (identifying the divested property as 2583 shares of CSRA stock).

¹² Charles Herndon, 2018 Public Financial Disclosure Report, May 14, 2018 (Part 7, Line 1), <https://bit.ly/2Qy8sbF> (“Herndon 2018 Report”).

¹³ 5 C.F.R. §§ 2634.1005(a)(3), 2634.1007(c). Stock and restricted stock are “similar or related” to one another because they present the same conflict of interest for an employee with respect to the issuing company. Office of Gov’t Ethics, Conflicts of Interest Considerations: Corporate Employment, at 4, June 22, 2018, <https://bit.ly/30I1zU> (“OGE White Paper”).

On May 31, 2017, the White House released an unsigned, undated memorandum from White House Counsel Don McGahn to Mr. Herndon that waived certain ethics restrictions as to CSRA under paragraph 6 of the Trump administration's Ethics Pledge and OGE's impartiality regulation.¹⁴ The provisions of the Ethics Pledge and regulation that Mr. McGahn waived would have barred Mr. Herndon from participating personally and substantially in any particular matter involving CSRA as a party.¹⁵ The memorandum provides an example of one such matter, which it identifies as "the DISA contract."¹⁶ The waiver does not further identify DISA, but it may refer to the Defense Information Systems Agency, a component of the Department of Defense that, among other things, operates the White House Communications Agency.¹⁷

This waiver likely reveals the reason why Mr. Herndon needed to divest his financial interests in CSRA. Mr. McGahn justified issuance of the waiver by emphasizing the need for Mr. Herndon's services in particular matters involving CSRA as a party:

The Administration has an interest in the covered employee working on such issues to ensure its interests are protected and advanced. Disqualification from such activity would limit the ability of the covered employee to effectively carry out his duties on behalf of the Administration. Furthermore, in accordance with [5 C.F.R.] section 2635.502(d), the need for the covered employee's services outweighs the concern that a reasonable person may question the integrity of the White House Office's programs and operations.¹⁸

Given this explanation, it appears likely that OGE issued the certificate of divestiture based on finding that Mr. Herndon needed to participate in particular matters affecting CSRA, which would have implicated the conflict of interest law, 18 U.S.C. § 208, if he retained his "CSRA (Computer Share) Stock Plan" stock.¹⁹

¹⁴ Waiver Certifications for WHO/OVP Employees (last viewed Nov. 4, 2019), <https://bit.ly/2qMzvjl>. The White House provided the list of waivers on its "Disclosures" webpage, under the link titled "List of Ethics Waivers Issued as of May 31, 2017." See <https://bit.ly/2WTL2hv> (last viewed Nov. 4, 2019) ("Waiver List"); Memorandum for White House Information Technology Director Charles C. Herndon from Counsel to the President, White House, <https://bit.ly/2VJ6B7H> ("Herndon Waiver").

¹⁵ Executive Order 13770, sec. 1(6) (Jan. 28, 2017), <https://bit.ly/2QaZzSk>; 5 C.F.R. § 2635.502(b)(1)(iv).

¹⁶ Herndon Waiver, at 2. The waiver's language is somewhat ambiguous, but it appears that Mr. McGahn intended to authorize Mr. Herndon's participation in the "DISA contract" as an exception to an exception. The waiver authorized Mr. Herndon's participation in particular matters involving CSRA, but, as an exception to this authorization, still barred him from participating in "matters he worked on while at CSRA." An exception to that exception, however, indicated that "[t]his shall not include specific matters relating to the DISA contract in which the covered employee participated personally and substantially while an employee of CSRA." *Id.* The word "this" in the phrase "this shall not include" appears to refer to the prohibition on participating in matters in which he had participated as a CSRA employee. In other words, it appears to authorize him to participate in the DISA contract.

¹⁷ DISA website, White House Communication Agency page, <https://www.disa.mil/careers/WHCA-Recruitment> (last visited Nov. 4, 2019).

¹⁸ *Id.*

¹⁹ 18 U.S.C. § 208(a).

Issuance of the waiver was predicated on an assumption that Mr. Herndon's participation in matters involving CSRA would not implicate that conflict of interest law.²⁰ The White House released the waiver one day after Mr. Herndon sold his CSRA stock.²¹ Given this divestiture and Mr. Herndon's claim in his new entrant report that he had forfeited his restricted stock, there would have been no reason for Mr. McGahn to suspect that the conflict of interest law barred Mr. Herndon's future participation in matters involving CSRA.²² Nonetheless, Mr. McGahn emphasized that he was not waiving the conflict of interest law: "This limited waiver does not affect the application of any other provision of law, including . . . the criminal bribery, graft and conflict of interest statutes (18 U.S.C. 201-209)...."²³

On June 28, 2018, however, Mr. Herndon belatedly filed a periodic transaction report in which he disclosed his sale of a previously undisclosed financial interest in \$50,001-\$100,000 worth of CSRA restricted stock on April 1, 2018.²⁴ In Mr. Herndon's 2018 annual financial disclosure report, which he amended after filing the periodic transaction report, he offered the following explanation:

New Entrant Report entry stating that unvested restricted stock shares would be forfeited was an error. *Continued to hold shares because believed to be essentially worthless.* When CSRA was acquired in 2018 by General Dynamics, shares were sold shortly after they vested. *Filer did not work on any matters affecting financial interest of CSRA during period when unvested stock was held.*²⁵

This explanation in Mr. Herndon's annual report was inconsistent with his previously filed new entrant report. Specifically, Mr. Herndon's assertion that his new entrant report stated that the restricted stock "would be forfeited" was incorrect. Instead, his new entrant report indicated that he had already forfeited it: "I forfeited my unvested restricted stock upon separation."²⁶ The assertion in the explanation that Mr. Herndon did not work on any CSRA matters while he held the unvested stock also was inconsistent with OGE's and the White House's expectation that he would work on particular matters involving CSRA, which formed the basis for the certificate of divestiture and the ethics waiver.

²⁰ *Id.* (stating that waiver of 5 C.F.R. § 2635.502 was appropriate if "an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. § 208(a)," the primary conflict of interest law).

²¹ Waiver List (dated May 31, 2017); Charles Herndon, Periodic Transaction Report, June 28, 2018, at 1, <https://bit.ly/2rO6Yj9> ("Herndon PTR").

²² Herndon New Entrant Report (Part 3, Line 2).

²³ Herndon Waiver, at 1-2.

²⁴ Herndon PTR, Line 1.

²⁵ Herndon 2018 Report (Part 3, Line 4 endnote) (emphasis added). Mr. Herndon amended his annual report after filing his period transaction report. *Id.* (cover). We do not know when he wrote this explanation, but OGE has indicated its filing system creates an audit trail that can be checked to see when specific changes to a report were made. Office of Gov't Ethics, OGE PA-15-01, at 11-12 (2015), <https://bit.ly/2LNCyqM>.

²⁶ Herndon New Entrant Report (Part 3, Line 2).

Potential Violation

Conflict of Interest - 18 U.S.C. § 208

The conflict of interest statute, 18 U.S.C. § 208, prohibits executive branch employees from participating in certain government matters affecting their financial interests or any financial interests that are imputed to them. The purpose of the statute is to prevent an employee from allowing personal interests to affect his or her official actions, and to protect governmental processes from actual or apparent conflicts of interest.²⁷

OGE's regulations implementing the conflict of interest law explain that "an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the law has a financial interest, if the particular matter will have a direct and predictable effect on that interest."²⁸ OGE has explained that a "particular matter that has a direct and predictable effect on the issuing company's financial interests is treated as having a direct and predictable effect on the financial interests of the shareholders" and that the same is true for "stock or any other equity-related interest in a company."²⁹

It is clear that, in May 2017, the White House expected Mr. Herndon to participate in one or more particular matters involving CSRA as a party. In order to obtain a certificate of divestiture for him, the White House had to persuade OGE that divestiture was "reasonably necessary" to comply with conflict of interest requirements.³⁰ That same month, Mr. McGahn wrote in the waiver memorandum that requiring Mr. Herndon to recuse from particular matters involving CSRA as a party would limit his ability "to effectively carry out his duties on behalf of the Administration."³¹ This explanation that Mr. Herndon needed to participate in particular matters involving CSRA makes clear that divestiture was necessary to comply with the conflict of interest law, 18 U.S.C. § 208.

However, it is not known whether Mr. Herndon ultimately worked on particular matters involving CSRA. Despite the clear expectations that he would participate in such matters, Mr. Herndon later claimed, in his 2018 annual financial disclosure report, that he "did not work on any matters affecting [the] financial interest of CSRA during [the] period when unvested stock was held."³²

²⁷ 5 C.F.R. § 2640.101.

²⁸ 5 C.F.R. § 2640.103(a). A "particular matter" is a matter that is "focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1).

²⁹ OGE White Paper, at 4.

³⁰ 5 C.F.R. § 2634.1004(a)(1); Herndon Certificate of Divestiture ("I hereby determine that the divestiture of the described property is reasonably necessary to comply with 18 U.S.C. § 208, or other applicable Federal conflict of interest statutes, regulations, rules, or executive orders."). Note that the waiver that the White House issued to Mr. Herndon obviated the need for him to comply with the relevant executive order or regulation. What remained was Mr. Herndon's obligation to comply with 18 U.S.C. § 208.

³¹ Herndon Waiver, at 2.

³² Herndon 2018 Report (Part 3, Line 4 endnote).

In addition, if Mr. Herndon in fact worked on CSRA matters, it is not clear which ones. The ethics waiver referred to “the DISA contract,” but provided no further details. Any work on a contract involving CSRA would have been a particular matter affecting the company’s interest. In addition, lobbying records show that CSRA paid Holland & Knight LLP to lobby the White House in both 2017 and 2018 on the “Administration’s IT modernization initiative; health IT issues with Medicaid, Medicare and Health Exchanges.”³³ In 2017, CSRA also paid the firm to lobby the White House on a “CSRA contract for Development Environment Consolidation Contract (DECC) and potential impact on MACRA implementation; improvements in IT and professional services contracting.”³⁴ Any White House meeting with the outside lobbyists CSRA paid would have been a particular matter affecting CSRA’s financial interest.³⁵

It is also not fully clear what Mr. Herndon knew about his financial interests in CSRA while working at the White House, but the circumstances suggest Mr. Herndon may have possessed the requisite knowledge of those interests under the conflict of interest law. Mr. Herndon’s ethics filings show he held shares of restricted stock in CSRA until April 1, 2018, and that he held them continuously from the time he first entered government.³⁶ It is possible Mr. Herndon originally believed he had forfeited his unvested shares when he left CSRA. However, his explanation regarding his retention of those shares suggests that – at some point between March 28, 2017, when his new entrant financial disclosure report was last revised, and April 1, 2018, when he sold the shares twelve months later – he became aware that he still held them but made a conscious decision to keep them until they vested. The language in his annual report is vague, but Mr. Herndon asserted that he “continued to hold [the] shares” based on his claimed belief that they were “essentially worthless.” Yet, after they vested and the share price jumped more than 30 percent because General Dynamics was offering a premium as part of its acquisition of CSRA, Mr. Herndon sold them.³⁷

Although not necessary to establish a violation, Mr. Herndon almost certainly knew of the conflict of interest law. OGE’s regulations required him to complete ethics training within three months of entering government.³⁸ White House ethics official Stefan Passantino indicated in an October 2017 email to another agency that his office was conducting “mandatory” ethics training on a monthly basis for new employees.³⁹ In 2018, Mr. Herndon was also required to complete annual ethics training. Mr. Passantino reportedly continued to conduct ethics training

³³ Holland & Knight LLP, 2017 Fourth Quarter Lobbying Report, Jan. 22, 2018, <https://bit.ly/2JqXbr3>; Holland & Knight LLP, 2018 First Quarter Lobbying Report, Apr. 20, 2018, <https://bit.ly/2W7SFn1>.

³⁴ Holland & Knight LLP, 2017 Third Quarter Lobbying Report, Jan. 22, 2018, <https://bit.ly/2HwOBng>.

³⁵ See notes 34 and 35, *supra*.

³⁶ Herndon PTR, at Line 1; Herndon 2018 Report (Part 3, Line 4 endnote).

³⁷ Rich Smith, *Why CSRA Stock Just Jumped 31%*, *The Motley Fool*, Feb. 12, 2018, <https://bit.ly/31TTLSo>; Aaron Mehta, *General Dynamics completes CSRA acquisition*, *Defense News*, Apr. 3, 2018, <https://bit.ly/323hRtQ>; *General Dynamics, General Dynamics and CSRA Amend Definitive Merger Agreement to Increase Offer Price to \$41.25 Per Share*, Mar. 19, 2018, <https://bit.ly/2BZ39JX>; Herndon PTR, at Line 1.

³⁸ 5 C.F.R. § 2638.304(b), (e)(1)(i).

³⁹ Email from Deputy White House Counsel Stefan Passantino to Presidential Materials Division Director John Laster, National Archives & Records Admin., Oct. 2, 2017, <https://bit.ly/2QbQhJO>.

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described as “mandatory” in 2018.⁴⁰ By regulation, both the new employee ethics training and the annual ethics training were required to cover financial conflicts of interests.⁴¹

Conclusion

The circumstances suggest a possible violation of the conflict of interest law as a result of Mr. Herndon’s initially undisclosed retention of \$50,001 - \$100,000 worth of restricted stock in major government contractor CSRA. The White House documented his need to participate in particular matters involving the company as a party. Under the applicable regulations, OGE’s issuance of a certificate of divestiture also signifies a finding that it was “reasonably necessary” for him to divest his interests in CSRA to avoid a conflict of interest. Therefore, we urge the FBI to investigate whether this former Deputy Assistant to the President violated the conflict of interest law.

Sincerely,



Noah Bookbinder
Executive Director

⁴⁰ Carol D. Leonnig, Josh Dawsey, and Ashley Parker, [Ethics training reminds White House staff not to use encrypted messages for government business](https://www.washingtonpost.com/news/energy-environment/wp/2018/02/05/ethics-training-reminds-white-house-staff-not-to-use-encrypted-messages-for-government-business/), *Washington Post*, Feb. 5, 2018, <https://www.washingtonpost.com/news/energy-environment/wp/2018/02/05/ethics-training-reminds-white-house-staff-not-to-use-encrypted-messages-for-government-business/>.

⁴¹ 5 C.F.R. §§ 2638.304(e)(1)(i), 2638.308(f)(1)(i).