

April 28, 2020

Hon. Emory A. Rounds, III  
Director  
U.S. Office of Government Ethics  
1201 New York Ave., NW, Suite 500  
Washington, DC 20005

Re: Request for Investigation of Kushner Shadow Task Force

Dear Director Rounds:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Government Ethics (“OGE”) conduct an ethics review to determine whether the members of a “shadow” task force formed and overseen by White House Senior Advisor and Assistant to the President Jared Kushner have complied with the disclosure obligations and conflict of interest restrictions required of special government employees (“SGEs”).<sup>1</sup> This task force has assumed critical governmental functions at a time when our nation is facing a crippling pandemic, wields authority over vast sums of money, and is literally making life and death decisions. Yet its members—many of whom are private sector individuals with massive financial interests—appear to be subject to no oversight, leaving the public in the dark about whether they are acting in our best interests or their own.

The composition and actions of the task force also raise questions about whether it and its members have complied with the requirements of the Defense Production Act of 1950, as amended, which appears to be the authority on which the White House relied in assembling the task force.<sup>2</sup> These questions are both relevant to OGE’s review and may call for an investigation by the Department of Homeland Security’s (“DHS”) Office of Inspector General.

### **Factual Background**

According to multiple press reports Mr. Kushner has been given a central role in the Trump administration’s response to the coronavirus pandemic.<sup>3</sup> Since assuming that role, Mr. Kushner has assembled a team of allies both from within the government and with representatives from private industries to work with the administration’s official coronavirus

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<sup>1</sup> See 5 C.F.R. § 2638.108(a)(9) (authorizing OGE to conduct reviews of agency ethics programs).

<sup>2</sup> As discussed below, public reporting also has suggested that some task force members working with the Federal Emergency Management Agency were appointed under the authority of the Stafford Act, 42 U.S.C. §§ 5121, *et seq.* Even if accurate, this would neither change their status as SGEs nor relieve them of their obligations under conflict-of-interest and ethics laws.

<sup>3</sup> See, e.g., Allyson Chiu, Jared Kushner’s coronavirus briefing debut sparks outcry, confusion, *Washington Post*, Apr. 3, 2020, <https://wapo.st/34FICbK>.

task force.<sup>4</sup> Federal officials involved in the administration's response to the coronavirus have called this team a "shadow task force" that issues requests "they interpret as orders they must balance with regular response efforts."<sup>5</sup> Others have characterized the group "as an 'all-of-private-sector' operation in contrast to Vice President Mike Pence's 'all-of-government' task force."<sup>6</sup> Mr. Kushner's team includes, among others: his former roommate Adam Boehler and Brad Smith, the head of Medicare's innovation center, who together "organize and manage key projects"; software entrepreneur Nat Turner; and a partner and associates at private equity firm Welsh, Carson, Anderson & Stowe.<sup>7</sup> The full composition of the task force, however, has not been made publicly available.

Emerging details reveal that Mr. Kushner has expanded the areas of responsibility of the shadow task force, which has taken charge of "the most important challenges facing the federal government" including expanding public access to coronavirus testing, "ramping up industry production of needed medical supplies, and figuring out how to get those supplies to key locations."<sup>8</sup> At least some of this work "has also duplicated existing federal teams and operations."<sup>9</sup> The shadow task force also "has stepped in to coordinate decision-making at agencies including the Food and Drug Administration and the Centers for Medicare and Medicaid Services."<sup>10</sup> This "coordination" has included directives to agencies from the shadow task force "including to dispatch deliveries of medical equipment to states that had not even submitted formal requests."<sup>11</sup> In one instance, for example, the shadow task force told the Federal Emergency Management Agency ("FEMA") "to immediately deliver medical equipment" to Illinois and New Jersey "even though career officials were concerned that would redirect valuable medical necessities away from where they were most needed."<sup>12</sup>

Shadow task force members also reportedly are involved in a wide range of other work responding to the coronavirus pandemic. Some members appear to be engaged in procurement.<sup>13</sup> Mr. Kushner embedded eight junior investment analysts from New York-based Insight Partners at FEMA who, among other activities, have been interacting with vendors on FEMA's behalf to procure needed medical supplies.<sup>14</sup> A FEMA spokeswoman claimed that the Insight employees did not decide which suppliers won contracts, but their activities generated concerns among federal employees.<sup>15</sup> Reportedly Mr. Kushner and his team also "ride herd on

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<sup>4</sup> Yasmeen Abutaleb, Ashley Parker, and Josh Dawsey, Kushner coronavirus team sparks confusion, plaudits inside White House response efforts, *Washington Post*, Mar. 18, 2020, <https://wapo.st/3clKkAN>.

<sup>5</sup> *Id.*

<sup>6</sup> Adam Cancryn and Dan Diamond, Behind the scenes, Kushner takes charge of coronavirus response, *Politico*, Apr. 1, 2020, <https://politi.co/3eiSJH3>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Peter Baker, Maggie Haberman, Zolan Kanno-Youngs, and Noah Welland, Kushner Puts Himself in Middle of White House's Chaotic Coronavirus Response, *New York Times*, Apr. 2, 2020, <https://nyti.ms/2RGVGHb>.

<sup>12</sup> *Id.*

<sup>13</sup> Rachael Levy, Volunteers in Coronavirus Response Ruffle Some at FEMA, *Wall Street Journal*, Apr. 21, 2020, <https://on.wsj.com/2Vvuhe2>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

the health agencies.”<sup>16</sup> For example, Turner has involved employees from Flatiron Health Inc., a company he founded and later sold, “who have issued orders to health agencies.”<sup>17</sup> In addition, both the Flatiron and the Welsh, Carson, Anderson & Stowe employees reportedly are working on “strategy and data analytics.”<sup>18</sup>

According to a least one news report, one of the shadow task force’s most recent proposals is a national coronavirus surveillance system to determine those areas of the country that can relax social-distancing rules and those that should continue social distancing.<sup>19</sup> This proposal has been described as “a significant expansion of government use of individual patient data,” and the involvement of the private sector in the development of such a federal monitoring system has raised serious privacy concerns as well as concerns about the proper role of the federal government vis-à-vis state governments.<sup>20</sup>

The legal authority for the shadow task force is unclear. According to DHS’s acting general counsel, the Insight “volunteers” at FEMA are working under the authority of the Stafford Act, although FEMA staff “were told the volunteers were part of the White House coronavirus task force,” which they took “to mean they were federal employees on loan from the White House.”<sup>21</sup> The White House, however, has not identified the legal authority for any part of the task force.

Nor has the White House explained how ethics and conflict of interest concerns would be monitored and addressed. Public reporting, however, suggests it is governed by two rules: (1) its members signed “voluntary service agreements,” and (2) none of the task force members are doing procurement work,<sup>22</sup> although that assertion may be undermined by activities of the shadow task force members working at FEMA.

### **Legal Background**

In 1962, Congress created a new category of executive branch employees—“special Government employees”—in recognition of “the need to apply appropriate conflict of interest restrictions to experts, consultants, and other advisers who serve the Government on a temporary basis.”<sup>23</sup> The statute defines an SGE as

an officer or employee of the executive or legislative branch of the United States Government . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days

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<sup>16</sup> Cancryn and Diamond, *Politico*, Apr. 1, 2020.

<sup>17</sup> Baker, Haberman, Kanno-Youngs, & Welland, *New York Times*, Apr. 2, 2020.

<sup>18</sup> Levy, *Wall Street Journal*, Apr. 21, 2020.

<sup>19</sup> Adam Cancryn, Kushner’s team seeks national coronavirus surveillance system, *Politico*, Apr. 7, 2020, <https://politi.co/2ykdrWA>.

<sup>20</sup> *Id.*

<sup>21</sup> Levy, *Wall Street Journal*, Apr. 21, 2020.

<sup>22</sup> Cancryn and Diamond, *Politico*, Apr. 1, 2020.

<sup>23</sup> U.S. Office of Government Ethics, Special Government Employees, <https://bit.ly/3a68H3S>.

during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis . . .

18 U.S.C. § 202(a).

*Ethics and conflict of interest requirements for SGEs*

OGE guidance spells out the ethical requirements that apply to SGEs.<sup>24</sup> As that guidance stresses, “[t]he first and perhaps most important point to emphasize is that SGEs *are* Government employees for purposes of the conflict of interest laws.”<sup>25</sup> This conclusion flows from the three statutory criteria for Government employment as applied to SGEs: (1) “appointment in the civil service,” which requires only that there be “a relatively formal relationship”; (2) that the individual perform “a Federal function”; and (3) that the individual be supervised “by a Federal official.”<sup>26</sup> OGE guidance also spells out the responsibilities an appointing agency has, including the requirement to determine SGE status “prospectively, at the time the individual is appointed or retained.”<sup>27</sup>

SGEs are subject to a variety of disclosure and conflict of interest statutes. Most of those apply regardless of whether or not the SGE receives pay because “the definition of SGE expressly includes those who serve ‘without compensation.’”<sup>28</sup> On the disclosure side, SGEs are required to file either a public financial disclosure report or a confidential one.<sup>29</sup> They must file OGE Form 278 public financial disclosure reports if: (1) they perform their duties, or are expected to perform their duties, for more than 60 days in a calendar year, and (2) they are paid the equivalent of at least 120% of the minimum base pay for a GS-15.<sup>30</sup> Those SGEs who do not meet the pay and other criteria for filing public financial disclosure reports must file OGE Form 450 confidential financial disclosure reports.<sup>31</sup> No later than 30 days after assuming their position or office, SGEs must file new entrant reports.<sup>32</sup> Agencies may exclude SGEs from the requirement to file a confidential report based on a determination that the duties of the position the SGE has assumed present only a remote possibility of a real or apparent conflict of interest or their “level of responsibility is sufficiently low to make reporting unnecessary.”<sup>33</sup>

Conflict of interest statutes also apply to SGEs to varying degrees. The conflict of interest statute most relevant here, 18 U.S.C. § 208, includes SGEs in its prohibition on

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<sup>24</sup> Memorandum from Stephen D. Potts, Director, OGE to Designated Agency Ethics Officials, General Counsels and Inspector Generals, Summary of Ethical Requirements Applicable to Special Government Employees, Feb. 15, 2000 (DO-00-003) (“OGE Guidance”), <https://bit.ly/2RBRf0I>.

<sup>25</sup> *Id.* at 1 (emphasis in original).

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> OGE Guidance at 5.

<sup>29</sup> *Id.* at 19.

<sup>30</sup> *Id.* at 19. In rare circumstances, this disclosure requirement can be waived. *Id.* at 19-20.

<sup>31</sup> 5 C.F.R. §§ 2634.904(b), 2634.907; OGE Guidance at 20.

<sup>32</sup> 5 C.F.R. § 2634.903(b)(3); OGE Guidance at 20. SGEs do not file incumbent confidential reports, but are instead required to file additional new entrant reports each year upon their reappointment or redesignation as an SGE. *Id.*

<sup>33</sup> *Id.* at 21 (citing 5 C.F.R. §§ 2634.905(a), (b)).

participating personally and substantially in any particular government matter that will have a direct and predictable effect on the SGE's financial interest or any financial interest imputed to the SGE, including that of his or her spouse.

Two other conflict of interest statutes, 18 U.S.C. §§ 203 and 205, subject SGEs to certain restrictions on their outside activities, although not to the extent as full-time paid government employees. For SGEs, those statutes prohibit their participation in outside activities involving "those matters in which the SGE 'at any time participated personally and substantially as a Government employee or special Government employee.'"<sup>34</sup> The purpose of the statute is to prevent an employee from allowing personal interests to affect that employee's official actions, and to protect governmental processes from actual or apparent conflicts of interest.<sup>35</sup>

The activities of SGEs also may implicate 5 C.F.R. § 2635.702, which prohibits using a public office for private gain, although the restriction is narrower for SGEs. As OGE guidance explains, "[i]n some circumstances, private representational activity by SGEs can raise at least the appearance that they are using their official position to gain special access or attention from Government decisionmakers, which would be unavailable to the general public."<sup>36</sup> According to OGE, "[s]uch concerns are more likely to arise when the subject matter of the private representation is related to the subject matter of the SGE's official duties and the representational contacts are made to the SGE's own agency[.]"<sup>37</sup>

OGE guidance further identifies the Procurement Integrity Act as applying equally to SGEs.<sup>38</sup> This statute imposes "disqualification and reporting requirements on employees who participate in certain agency procurement matters and who receive employment contacts from bidders or offerors in those procurements."<sup>39</sup>

#### Defense Production Act requirements for SGEs

Provisions of the Defense Production Act of 1950 ("DPA") also implicate SGEs. The DPA authorizes the president to appoint to advisory and consultative positions "persons of outstanding experience and ability without compensation." 50 U.S.C. § 4560(b)(1). The DPA also authorizes the president to consult with industry, business, and other representatives to aid the national defense through the mechanism of "voluntary agreements."<sup>40</sup> Further, the DPA authorizes the president or his or her designee to establish "such advisory committees as he determines are necessary," which are subject to the provisions of the Federal Advisory Committee Act ("FACA"). *Id.* at § 4558(d)(1). The president may delegate the authority granted him or her under this provision "to individuals who are appointed by and with the advice and

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<sup>34</sup> *Id.* at 6 (quoting 18 U.S.C. §§ 203(c)(1), 205(c)(1)).

<sup>35</sup> 5 C.F.R. § 2640.101.

<sup>36</sup> OGE Guidance at 8.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 11, n.18 (citing 41 U.S.C. § 423(c)).

<sup>39</sup> *Id.*

<sup>40</sup> 50 U.S.C. §§ 4558(c)(1) and (3).

consent of the Senate, or are holding offices to which they have been appointed by and with the advice and consent of the Senate.” *Id.* at § 4558(c)(2).

Under the DPA, agency heads appointing such individuals must publish notice of the appointment in the Federal Register. *Id.* at § 4560(b)(5)(A). Further, those appointed under this provision of the DPA who are not required to file public financial disclosure reports must file confidential financial disclosure reports. *Id.* at § 4560(b)(5)(B).

Regulations implementing the DPA more specifically authorize the president to consult with, among others, industry representatives and to enter into voluntary agreements “to help provide for the defense of the United States by developing preparedness programs and expanding productive capacity and supply beyond levels needed to meet essential civilian demand.” 44 C.F.R. § 332.1(a). The administrator of FEMA coordinates the use of voluntary agreements. *Id.* at § 332.1(b)(2). The regulations also authorize sponsoring agencies to establish advisory committees to carry out voluntary agreements, and mandate that such advisory committees comply with “the requirements and procedures of the Federal Advisory Committee Act.” *Id.* at § 332.1(e).

### **Members of the Shadow Task Force Are SGEs**

From the reported facts, many members of the shadow task force appear to be SGEs. First and foremost, as outlined above, they are performing a variety of federal functions. Those functions include:

- Coordinating decision-making at the Food and Drug Administration and the Centers for Medicare and Medicaid Services;
- Directing agencies to take specific actions, such as the delivery of medical equipment to states they designate;
- Issuing orders to health agencies;
- Issuing orders to the official coronavirus task force;
- Developing and directing efforts to expand public access to coronavirus testing, the production by private industries of medical supplies, and the delivery of those supplies to key locations;
- Expanding the government’s use of individual patient data to create a national coronavirus surveillance system.
- Interacting with vendors on behalf of FEMA to buy medical supplies.<sup>41</sup>

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<sup>41</sup> This list is by no means comprehensive; it includes only those activities reported by various media outlets.

The shadow task force also is “working alongside government officials from FEMA, HHS and USAID to solve a range of logistical and technical challenges.”<sup>42</sup> Their efforts overlap with and “duplicate[] existing federal teams and operations,”<sup>43</sup> and accordingly place them squarely within the parameters of SGEs as individuals performing a variety of inherently federal functions.

Second, by all accounts Mr. Kushner created and supervises the shadow task force,<sup>44</sup> satisfying the “supervision” criterion specified in OGE Guidance.<sup>45</sup>

The third criterion for government employment—appointment in the civil service—does not require “an appointment or other formal employment paperwork.”<sup>46</sup> Rather, an individual can be “retained, designated, appointed, or employed” under the statute where “the circumstances indicate ‘a firm mutual understanding that a relatively formal relationship existed.’”<sup>47</sup> Public reporting makes clear the shadow task force consists of specifically chosen members who answer to Mr. Kushner and have assigned responsibilities, all markers of a “relatively formal relationship.”

Because the members of the shadow task force satisfy the criteria for government employment as SGEs, they must comply with disclosure requirements and conflict of interest statutes. There is no indication they have done so, however, despite the substantial potential for conflicts of interest and the risk that they may use their government positions for private gain. To the contrary, public reports document that there has been only “limited vetting of private companies’ and executives’ financial interests,” which has “rais[ed] questions about the motivations and potential conflicts” of the group.<sup>48</sup>

Furthermore, the fact that the shadow task force members have signed “voluntary service agreements,”<sup>49</sup> suggests the members are being utilized pursuant to the authority of the DPA. *See* 44 C.F.R. § 332.1(b). But the White House appears to have ignored that statute’s requirements for appointing the task force members. By all accounts Mr. Kushner has assembled the team and is overseeing it, yet as someone who was not appointed by and with the advice and consent of the Senate, he lacks the requisite authority. *See* 50 U.S.C. § 4558(c)(2). Nor is there any indication that the FEMA administrator is coordinating those agreements, as the DPA and implementing regulations require. *Id.*; 44 C.F.R. § 332.1(b)(2). Further, there has been no notice of these appointments in the Federal Register as the DPA mandates. 50 U.S.C. § 4560(b)(5)(A). Nor, contrary to the DPA and implementing regulations, is the advisory committee that Mr. Kushner established complying with the FACA. *See* 44 C.F.R. § 332.1(e).<sup>50</sup>

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<sup>42</sup> Cancryn and Diamond, *Politico*, Apr. 1, 2020.

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g.*, Baker, Haberman, Kanno-Youngs, & Welland, *New York Times*, Apr. 2, 2020.

<sup>45</sup> *See* OGE Guidance at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citing 1 Op. O.L.C. 20, 21 (1977)).

<sup>48</sup> Cancryn and Diamond, *Politico*, Apr. 1, 2020.

<sup>49</sup> *Id.*

<sup>50</sup> The multiple disclosure provisions of the FACA are triggered whenever a committee within the Executive Office of the President is advising the President and is not “composed wholly of full-time, or permanent part-time, officers

A FEMA representative has suggested that at least some of the volunteers are working under the authority of the Stafford Act,<sup>51</sup> which authorizes the president to declare a national emergency and funnel financial and other assistance through FEMA.<sup>52</sup> A provision of that statute authorizes an agency to appoint temporary personnel, experts, and consultants, 42 U.S.C. § 5149(b), but nothing in that provision exempts such appointees from the provisions governing SGEs. Moreover, the members of the shadow task force were selected and are overseen by the White House and Mr. Kushner, not the FEMA administrator. Indeed, FEMA employees understood that the “volunteers” from the private sector “were federal employees on loan from the White House” as “part of the White House coronavirus task force.”<sup>53</sup>

According to “[a]dministration officials,” the volunteers at FEMA “signed gratuitous-services agreements, went through conflict-of interest screening and that the program complied with legal and ethical rules.”<sup>54</sup> But there is no description of what that screening consisted of and which “legal and ethical rules” the White House believes applies. This missing information is critical in assessing whether the shadow task force members complied with their obligations as SGEs. Nor is this a mere technicality. As OGE’s own guidance notes, the “substantial outside activities” that SGEs frequently have “may raise difficult ethics questions.”<sup>55</sup> The circumstances in which the shadow task force is operating bring these concerns even more into the foreground, given the breadth of its work and the enormous sums of federal money being spent to accomplish its goals. Yet it appears that Mr. Kushner has assembled his team without the requisite authority and has assigned to its members inherently governmental tasks while ignoring the notice and reporting requirements that ethics laws and the DPA mandate.

### **Conclusion**

We recognize the extraordinary emergency our nation faces as we battle the COVID-19 pandemic and the need for the federal government to partner with the private sector to develop innovative solutions. But it is equally important that the government and government actors observe the conflict of interest laws designed to protect government processes, and that Americans have confidence that our government is acting to advance the national interest, not the financial interests of a select and powerful few. Now, more than ever, when private actors are being allowed to exercise the enormous power of the federal government, we must ensure that those seeking to do the government’s business comply fully with their obligations as SGEs. CREW therefore respectfully requests that OGE investigate whether the shadow task force established and directed by Mr. Kushner is complying with its disclosure requirements and conflict of interest statutes. It is critical that the public know who the task force members are and what, if any, conflicts of interest their service as SGEs pose.

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or employees of the Federal Government.” 5 U.S.C. App. § 3(2). The OGE Guidance delineates how SGEs who serve on advisory committees are to be treated for purposes of financial conflicts of interest. OGE Guidance at 11-12.

<sup>51</sup> Levy, *Wall Street Journal*, Apr. 21, 2020.

<sup>52</sup> 42 U.S.C. § 5191(b).

<sup>53</sup> Levy, *Wall Street Journal*, Apr. 21, 2020.

<sup>54</sup> *Id.*

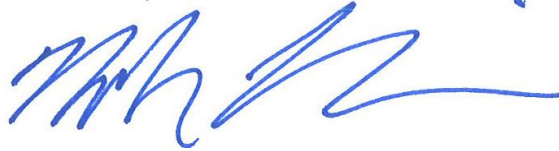
<sup>55</sup> OGE Guidance at 1.



Director Emory A. Rounds  
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Thank you for your attention to this very important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Noah Bookbinder', with a long horizontal flourish extending to the right.

Noah Bookbinder  
Executive Director

cc: White House Counsel Pat Cipollone  
Department of Homeland Security Inspector General Joseph V. Cuffari