

# United States Senate

WASHINGTON, DC 20510

March 27, 2017

Carl Icahn  
767 Fifth Avenue, 47th Floor  
New York, New York 10153

Dear Mr. Icahn:

We write because we are increasingly concerned about the role you are playing in the Trump Administration and the possibility that you are breaking federal conflict of interest laws. Reports suggest you are unfairly using your position in the White House and your access to President Trump to influence the nation's regulatory policies in order to serve your own interests and not those of the American people. Your multi-billion dollar commercial holdings are vast and riddled with conflicts of interest, and, yet, you have not divested from these holdings since taking your position in the White House. Your vast portfolio includes an 82% ownership stake in CVR Energy, an oil refiner with a market capitalization worth \$1.6 billion; you are the largest shareholder of the medical supplement manufacturer Herbalife; and you recently purchased a significant stake in the drug manufacturer Bristol-Myers Squibb (BMS). Your ownership of each of these companies – and others – raises alarming questions about how you, and the Trump Administration, are handling your many conflicts of interest.

## **Your Role in the Trump Administration**

On December 21, 2016, then President-elect Trump's transition team announced that you would be serving as "special advisor to the President on issues relating to regulatory reform."<sup>[1]</sup> That announcement further stated that you would "not be serving as a federal employee or a Special Government Employee and will not have any specific duties." Several of us have written to White House Counsel Don McGahn seeking additional information and clarity about your relationship to President Trump and the Trump Administration, whether you are complying with financial disclosure requirements, and what steps are being taken to ensure you are complying with conflict of interest laws.<sup>[2]</sup> We have received no response to these letters, and we write today to ask you to provide the information we need to understand Trump Administration policies and your role in shaping them.

During the transition, you reportedly played an active role vetting potential appointees for the Trump Administration. You publicly announced your own intimate involvement in the selection of Scott Pruitt to be Administrator of the Environmental Protection Agency,<sup>[3]</sup> and recent reports indicate you personally pressed Pruitt to support changes to the EPA Renewable

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<sup>[1]</sup>"President-Elect Donald J. Trump Names Carl Icahn Special Advisor to the President on Regulatory Reform," The Trump-Pence Transition Team, December 21, 2016.

<sup>[2]</sup> See, e.g., Letter from Senator Sheldon Whitehouse et al. to Don McGahn dated March 16, 2017; Letter from Senator Sheldon Whitehouse et al. to Don McGahn dated February 13, 2017.

<sup>[3]</sup> "Icahn: Pruitt a Great Pick for EPA," *Bloomberg Markets* (December 7, 2016) (online at: <https://www.bloomberg.com/politics/videos/2016-12-07/icahn-pruitt-a-great-pick-for-epa>).

Fuel Standard (RFS) that would save CVR Energy hundreds of millions of dollars annually.<sup>[4]</sup> Last month, you reportedly led negotiations between the Administration and the oil industry over an executive order that would direct these changes to the RFS program.<sup>[5]</sup> The day your proposal was sent to the White House, CVR Energy's stock value increased by 3.5%.<sup>[6]</sup>

Press reports also indicate that you were closely involved with the selection of the secretaries of the Department of Treasury and Department of Commerce, and the chair of the Securities and Exchange Commission (SEC), an agency which is or has been involved in multiple investigations of companies you own.<sup>[7]</sup> The SEC is presently investigating Herbalife for potential violations of the Foreign Corrupt Practices Act.<sup>[8]</sup> In February, the SEC settled claims against CVR Energy alleging a failure to disclose transaction fees to investors,<sup>[9]</sup> and the SEC settled similar claims against BMS in October 2015. Herbalife and BMS would also be heavily affected by Administration regulatory policies related to drug safety and approval matters, Medicare, Medicaid, and the Affordable Care Act. Icahn Enterprises L.P.'s 2016 annual report to the SEC is replete with additional references to federal laws and regulations that affect the many businesses you control, from tax law and policy overseen by the Department of Treasury, to regulation of the financial industry under Dodd-Frank, to climate change and environmental clean-up laws administered by EPA.<sup>[10]</sup>

#### **Questions about Your Official Status as a White House Special Advisor**

You and your representatives have routinely downplayed your role in the Trump Administration. For example, Icahn Enterprises General Counsel Jesse Lynn stated that you "at no point had the ability to influence EPA or White House policy with respect to RINs or the selection of the head of the EPA" and that you never had "material non-public information."<sup>[11]</sup> You appear to be receiving no salary from the White House, and have filed no ethics reports, indicating that you and the Administration are not acting as if you have an official role.

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<sup>[4]</sup> Zachary Mider and Jennifer A. Dlouhy, "Icahn Pressed EPA Candidates on Ethanol Rule He Wants Scrapped," *Bloomberg Markets* (March 17, 2017) (online at: <https://www.bloomberg.com/news/articles/2017-03-17/icahn-pressed-epa-candidates-on-ethanol-rule-he-wants-scrapped>).

<sup>[5]</sup> Rebecca Ballhaus, Amy Harder, and David Benoit, "Carl Icahn, Critic of the EPA, Is Helping Donald Trump Shape It," *Wall Street Journal* (December 4, 2016) (online at <https://www.wsj.com/articles/carl-icahn-critic-of-the-epa-is-helping-donald-trump-shape-it-1480863601>).

<sup>[6]</sup> 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>).

<sup>[7]</sup> James F. Peltz, "Carl Icahn dismisses conflict-of-interest fears in role as Trump advisor on regulations," *Los Angeles Times* (March 17, 2017) (online at: <http://www.latimes.com/business/la-fi-icahn-trump-adviser-20161222-story.html>); Svea Herbst-Bayliss and Steve Holland, "Exclusive - Wall Street lawyer Jay Clayton emerges as Trump's top SEC choice," *Reuters* (January 4, 2017) (online at: <http://uk.reuters.com/article/uk-usa-trump-sec-exclusive-idUKKBN14N1Y4>).

<sup>[8]</sup> Sarah N. Lynch "U.S. Investigating Herbalife Over Foreign Bribery in China," *Reuters* (January 20, 2017) (online at: <http://www.reuters.com/article/us-herbalife-outlook-idUSKBN1541QU>).

<sup>[9]</sup> Martin O'Sullivan, "CVR Energy Hid \$36M Bank Fee From Investors, SEC Says," *Law360* (February 14, 2017) (online at: <https://www.law360.com/articles/892155/cvr-energy-hid-36m-bank-fee-from-investors-sec-says>).

<sup>[10]</sup> See Icahn Enterprises, L.P., Form 10-K Annual Report for the Period Ending December 31, 2016, filed March 1, 2017, p. 17 (gaming); p. 30 (overall regulatory risks); p.38 (automotive parts); p. 42 (oil refining and fertilizer).

<sup>[11]</sup> Zachary Mider and Jennifer A. Dlouhy, "Icahn Bets Against Renewables Market He Wants Trump to Overhaul," *Bloomberg Markets* (March 17, 2017) (online at: <https://www.bloomberg.com/news/articles/2017-03-17/icahn-bets-against-renewables-market-he-wants-trump-to-overhaul>).

However, Icahn Enterprises' SEC filings cast your relationship in a different light. On two occasions, Icahn Enterprises L.P., in its March 1, 2017 10-K filing, stated that "Mr. Icahn is currently serving as a special advisor to President Donald J. Trump on issues relating to regulatory reform."<sup>[12]</sup> That information was presumably included in Icahn Enterprises' filings because – as is the standard for information presented to shareholders – it was considered material and there was a "substantial likelihood that a reasonable shareholder would consider it important".<sup>[13]</sup>

You cannot have it both ways: if your involvement with the Administration is not significant enough to require you to play by the conflict of interest rules required of other advisors to the President, it cannot also be significant enough to require you to advise your company's shareholders of the materiality of your White House position.

If reporting on your role is accurate, it appears to us that you should be classified as a "special government employee" (SGE). According to the Office of Government Ethics, the "SGE category was created by Congress as a way to apply an important, but limited, set of conflicts of interest requirements to a group of individuals who provide important, but limited, services to the Government."<sup>[14]</sup> The Department of Justice Office of Legal Counsel has opined that even a personal friend of a President serving in an unpaid capacity, like yourself, can be an SGE when he "departs from his usual role as an informal adviser" and "assumes considerable responsibility for coordinating the Administration's activities in a particular area."<sup>[15]</sup> If, in fact, your active role in this Administration has made you a SGE, it appears you are not following relevant rules and requirements. For example, a SGE may not participate "personally and substantially... [in] a particular matter in which... he has a financial interest," unless, upon a full disclosure of potential conflicts, you receive written authorization to do so.<sup>[16]</sup>

### Questions

We have numerous questions about your official or unofficial position in the White House, the policy issues and regulatory matters in which you have been involved, and the ethics and legal requirements of your position. Accordingly, we request that you provide answers to the following questions:

- 1) What is your official position in the White House? Are you considered a full-time White House employee, a Special Government Employee, or merely an unofficial adviser to the President?
- 2) Have you received any legal guidance from any Administration official to determine your official position and to address ethical issues arising out of this position? If so, who

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<sup>[12]</sup> See Icahn Enterprises 2016 10-K, pp. 23, 229.

<sup>[13]</sup> *TSC Industries Inc. v. Northway Inc.* 426 U.S. 438 (1976).

<sup>[14]</sup> Memorandum dated February 15, 2000, from Stephen D. Potts, Director, to Designated Agency Ethics Officials, General Counsels, and Inspectors General Regarding Summary of Ethical Requirements Applicable to Special Government Employees, Office of Government Ethics, Informal Advisory 00x1.

<sup>[15]</sup> "Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee," Department of Justice Office of Legal Counsel, Opinion 77-9, p. 23.

<sup>[16]</sup> 18 U.S.C. 208(a)

provided this guidance, and what was the nature of this guidance? What steps have you taken to comply with this guidance?

- 3) Have you been required to divest yourself of any holdings or recuse yourself from the deliberations of any decisions in this role?
- 4) Have you received any waivers from ethics requirements?
- 5) Have you provided any financial disclosures to the Administration? Have you completed a Form 278 financial disclosure? If you have not, who advised you not to do so?
- 6) Have you recused yourself from providing advice on any federal policies? If so, please identify the topic and score of your recusals.
- 7) Since January 20, 2017, on what policies have you consulted with the President or any other Administration official? On what policies do you intend to consult with him?
- 8) Since January 20, 2017, on what nominations have you consulted with the President or any other Administration official? On what nominations do you intend to consult with him?
- 9) On what subjects are you authorized to negotiate with outside entities on behalf of the President and the White House? What representations have you made to outside entities concerning your authority, and when did you do so?
- 10) What advice have you provided to the President or any other White House or EPA officials about the RFS policy?
- 11) What advice have you provided to the President or any other White House or HHS or other Administration officials about: (a) policies affecting drug and supplement regulations and pricing, (b) regulatory policy at FDA or HHS, or (c) regulatory policy relating to Medicare, Medicaid, VA healthcare, or the Affordable Care Act?
- 12) Do you have access to a government phone line or have you used any other government resources relevant to your "special advisor" role?
- 13) Do you have an official government email address?
- 14) How many days have you dedicated to your role as a special advisor since January 20, 2017?
- 15) Have you had access to non-public, confidential, or otherwise privileged information in the course of your duties? Have you been briefed by any federal officials? If so, please identify what information you have obtained, and names, dates, and subject matter of any briefings you have had.

The longer you and the Administration refuse to answer questions about your role in the Administration, and refuse to take all appropriate steps required under law to address your conflicts of interest, the greater the appearance that you are merely using your access for personal gain. This is absolutely inconsistent with the President's claim that he is "drain[ing] the swamp." We urge you to answer our questions and address these concerns as quickly as possible.

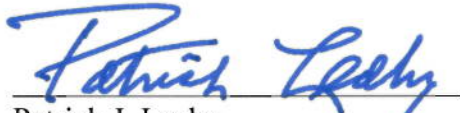
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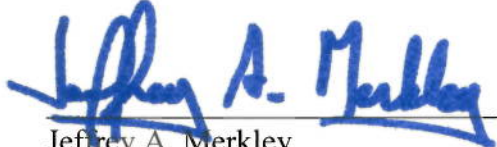
Sheldon Whitehouse  
United States Senator




Elizabeth Warren  
United States Senator

  
Patrick J. Leahy  
United States Senator

  
Sherrod Brown  
United States Senator

  
Jeffrey A. Merkley  
United States Senator

  
Tammy Baldwin  
United States Senator

  
Tammy Duckworth  
United States Senator

Cc: The Honorable Jeff Sessions, U.S. Attorney General  
Michael S. Piwowar, Acting Chairman, U.S. Securities and Exchange Commission  
Walter Shaub, Director, Office of Government Ethics