



September 5, 2019

Emory A. Rounds, III  
Director  
U.S. Office of Government Ethics  
1201 New York Avenue, N.W., Suite 500  
Washington, DC 20005

By Electronic Mail: [ContactOGE@oge.gov](mailto:ContactOGE@oge.gov)

Dear Director Rounds:

Government Accountability & Oversight, P.C. (“GAO”), a non-profit public interest law firm, writes to call on the Office of Government Ethics (“OGE”) to investigate whether Deputy Secretary of Agriculture Stephen Censky’s communications with lobbyists and other industry representatives comply with federal ethics rules and OGE guidance with respect to actual and apparent conflicts of interest.

We request this in the context of Mr. Censky’s public and behind-the-scenes role in shaping various federal policies and regulations regarding the use and sale of biofuel, policies which have a significant and undeniable impact on the U.S. economy and individual Americans. Certain of Mr. Censky’s interventions appear to involve matters outside of his jurisdiction; were they within his jurisdiction, it appears that his recusal obligation would apply. As such these interventions also warrant OGE review.

The actions at issue include apparent advocacy to influence the U.S. Department of Agriculture’s (“USDA”) analysis of policies which advocacy mirrors positions taken by Mr. Censky’s former, longtime employer the American Soybean Association (“ASA”).

As media coverage already suggests, the actions create at minimum the appearance of a conflict of interest on several levels.<sup>1</sup>

Our concerns are grounded in public information, while we note we also have recently filed suit against USDA on behalf of a public interest client for USDA’s failure to produce other, relevant public records under the Freedom of Information Act (“FOIA”).<sup>2</sup>

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<sup>1</sup> See, e.g., Lachlan Markay, “*Soy Vey: Ex-Bean Exec Joins Trump Admin, Hooks Up Pals*“, The Daily Beast, May 23, 2019, <https://www.thedailybeast.com/soy-vey-ex-bean-exec-joins-trump-admin-hooks-up-pals> .

<sup>2</sup> *Institute for Energy Research v. United States Department of Agriculture*, 19-02654 (DC DC) (September 4, 2019)

We believe the available evidence raises material questions about Mr. Censky's compliance with federal ethics rules and certain agreements senior appointees including Mr. Censky must make when accepting their positions. Further, we believe it is appropriate for OGE to review certain interactions between Mr. Censky and representatives of particular interest groups for any inappropriate influence on federal policy

## **Background**

ASA is a soybean industry trade association. Stephen Censky joined the ASA in 1994 and became CEO in 1996. He remained in that position until he was appointed Deputy Secretary of Agriculture on October 11, 2017. According to Mr. Censky's Public Financial Disclosure Report ("FD Report"), his salary and bonus as CEO totaled \$443,752 in his last year at ASA. While Mr. Censky no longer draws a salary or other compensation from ASA, his FD Report does state that he is a participant in two retirement plans sponsored by ASA. Mr. Censky also participated in a third ASA retirement plan that was rolled over to a personal 401(k) in 2018.

## **Deputy Secretary Censky's Ethics Requirements**

On December 20, 2017, Mr. Censky signed a "Certification of Ethics Agreement Compliance"<sup>3</sup> in connection with his confirmation as Deputy Secretary of Agriculture. The Certification included two relevant recusals:

6.b. "I am recusing from particular matters in which any former employee or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. 2635.502(d)."

6.c. "I am recusing from particular matters in which any former employer or client I served in the two years prior to my appointment is a party, unless I have received a waiver under Exec. Order 13770."

At the time Mr. Censky signed the Certification, he noted he had not received an "authorization" or "waiver" under the applicable federal regulation or Executive Order.

As Mr. Censky's "Certification of Ethics Agreement Compliance" states, he is bound by Executive Order 13770, which requires that "not for a period of 2 years from the date of my appointment [will he] participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, ***including regulations and contracts.***"<sup>4</sup> (Emphasis added).

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<sup>3</sup> Available at [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3523FF824DE0FB13852581FE00319198/\\$FILE/Censky%20EA%20Certification%201%20of%201.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3523FF824DE0FB13852581FE00319198/$FILE/Censky%20EA%20Certification%201%20of%201.pdf).

<sup>4</sup> See [https://www2.oge.gov/web/oge.nsf/0/A43C4DBAB9EC4DC7852580BC006FBA83/\\$FILE/Exec%20Order%2013770.pdf](https://www2.oge.gov/web/oge.nsf/0/A43C4DBAB9EC4DC7852580BC006FBA83/$FILE/Exec%20Order%2013770.pdf).

## **Deputy Secretary Censky’s Support of Policies for which ASA Has Publicly Advocated**

Deputy Secretary Censky’s former employer ASA is an outspoken advocate on federal ethanol policy. ASA generally supports the use and promotion of biofuels, and the use of biofuels is “an important market outlet for soy oil. Without it, surplus soy oil would be a drag on soybean prices.”<sup>5</sup> Consistent with this view, ASA has stated that “[i]ncreasing the RFS [Renewable Fuel Standard] volume requirements for biomass-based diesel helps farmers and rural communities by providing a market for surplus soy oil . . .”<sup>6</sup>

More specifically, ASA takes a number of high-profile lobbying positions on particular aspects of federal ethanol policy, including:

- Support for the “E15 Rule” proposed by the Environmental Protection Agency (“EPA”). According to ASA, the E15 rule would limit purchases of Renewable Identification Numbers (“RINs”), which allow trading of renewable energy credits, by certain parties, and would also impose other restrictions on the holding and trading of RINs. ASA states that it has “supported reforms to RIN compliance and trading and the EPA Proposed Rule is a positive step in that direction.”<sup>7</sup>
- “[S]trong opposition to a cap on the price of Renewable Identification Numbers (RINs),” based on the organization’s belief that such a cap “would significantly undermine the integrity of the Renewable Fuel Standard (RFS).”<sup>8</sup>
- Opposition to exemptions to the RFS granted to small refiners of petroleum by the EPA. In a May 7, 2018 letter to President Trump, ASA stated it had “become greatly concerned with reports that the Environmental Protection Agency (EPA) has waived up to 1.6 billion gallons of Renewable Fuel Standard (RFS) volume requirements for refiners.”<sup>9</sup>

ASA is entitled to represent its members as it sees fit, just as the public is entitled to know about its influence on economically significant regulatory policies and expect its compliance with federal law. The organization’s longtime CEO Mr. Censky, who was of course heavily involved in formulating ASA positions on federal biofuel policy, now appears to be serving as ASA’s advocate in his interventions on the very issues for which ASA in great part exists. Publicly available information suggests that a review of Mr. Censky’s role and actions, including his communications with lobbyists and trade associations aligned with ASA, is warranted.

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<sup>5</sup> See <https://soygrowers.com/key-issues-initiatives/key-issues/biodiesel/>.

<sup>6</sup> See <https://soygrowers.com/key-issues-initiatives/key-issues/biodiesel/>.

<sup>7</sup> See <https://soygrowers.com/news-releases/epa-proposes-rfs-rin-reforms-along-with-e15/>.

<sup>8</sup> See <https://soygrowers.com/news-releases/asa-strongly-opposes-rin-cap/>.

<sup>9</sup> See <https://soygrowers.com/wp-content/uploads/2018/05/Biofuels-President-Trump-Joint-Ag-Industry-Letter-May-7-2018.pdf>.

We note the public record with respect to the RFS generally, and the proposed E15 rule specifically, shows, e.g., the Renewable Fuels Association (“RFA”) lauding Mr. Censky for his role in biofuel policy. In February 2019, RFA’s president, Geoff Cooper stated: “The U.S. Department of Agriculture, and Deputy Secretary Censky in particular, has been an effective voice and determined advocate for farmers and renewable fuel producers . . . . USDA and Deputy Secretary Censky played a key role in the Administration’s decision to allow the year-round use of E15 and promoting ethanol in countless countries around the globe.”<sup>10</sup> Further, in May 2018, a press report stated:

EPA Deputy Administrator Andrew Wheeler, DOE Deputy Secretary Dan Brouillette and USDA Deputy Secretary Stephen Censky met to discuss potential changes to the Renewable Fuel Standard (RFS) program. The discussions came after a tentative deal was supposedly reached between Senators representing corn and refining states, as well as the Secretary of Agriculture and the Administrator of EPA at a White House meeting earlier this month. However, parts of the deal need to be negotiated further due to disagreements between officials.<sup>11</sup>

These public statements make clear Mr. Censky played an active role in setting federal ethanol policy with a focus on the issues on which his former employer ASA takes vocal positions; of further concern are certain of Mr. Censky’s communications only recently made public pursuant to FOIA. To cite just a few examples of such correspondence:

- On November 2, 2017, Mr. Censky met with the National Corn Growers Association (“NCGA”) and Archer Daniels Midland (“ADM”). These parties are aligned and indeed are openly joined with ASA on ethanol and RFS issues<sup>12</sup>. This discussion, we know, specifically discussed “the RVP issue”<sup>13</sup>, a policy component of the RFS debate<sup>14</sup> (and lobbying<sup>15</sup>)(RVP relates to the EPA’s regulations concerning “Reid Vapor Pressure” of gasoline). NCGA has advocated for a federal policy of “RVP Parity,” which would allow year-round sales of gasoline with a higher percentage of ethanol.<sup>16</sup> Following the meeting Mr. Censky emailed a NCGA representative and Anthony Reed, Senior Director of

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<sup>10</sup> <http://energy.agwired.com/2019/02/07/usda-deputy-secretary-to-address-national-ethanol-conference/>.

<sup>11</sup> <https://www.fueliowa.com/latest-news.cfm/Article/LATEST-NEWS/EPA-USDA-and-DOE-Meet-for-Further-Negotiations-on-RFS-Deal/2018-5-29>.

<sup>12</sup> <https://www.ncga.com/upload/files/documents/pdf/Letters%20and%20Testimony/President-Trump-RFS-Joint-Ag-Industry-Letter-Feb-26-2018-003.pdf>.

<sup>13</sup> November 2, 2017 email from Stephen Censky to an unidentified party @ncga.com and Anthony Reed at Archer Daniels Midland, Subject: follow-up, marked “Page 3 of 88” through “Page 5 of 88”.

<sup>14</sup> See, e.g., <https://www.epa.gov/renewable-fuel-standard-program/final-rulemaking-modifications-fuel-regulations-provide-flexibility>.

<sup>15</sup> See, e.g., <https://ethanol.org/news/news/2017/02/28/ace-comment-on-apparent-rfs-rvp-deal/>.

<sup>16</sup> See, e.g., <https://fas.org/sgp/crs/misc/IN10979.pdf>.

Government Relations at ADM, to request their internal analysis of several issues related to “RVP” and RIN policies. On its face this represents the Deputy Secretary of Agriculture requesting data from ASA-aligned parties, which data he could use to influence federal policy consistent with ASA’s positions. Given that by their policy and advocacy alignment these parties are effective proxies for Mr. Censky’s former employer, we request inquiry into whether the intervention and/or interactions complies with, properly circumvents, or violates Mr. Censky’s restrictions.

- In April 2018, Mr. Censky asked the then-RFA president and CEO Bob Dinneen for a chart showing the increase in EPA’s Small Refinery Exemptions to the RFS during the period when Scott Pruitt was Agency Administrator. Mr. Censky then provided USDA staff RFA’s chart,<sup>17</sup> with Mr. Dinneen’s advocacy disparaging the EPA and its former Administrator<sup>18</sup>; Mr. Censky then passed on Mr. Dinneen’s criticism that Secretary Pruitt was acting “secretly”. This was at the same time that Mr. Censky was interacting with trade associations and lobbyists aligned with his former employer, in order to obtain information reflecting their preferred position, to influence policy consistent with this position.
- In May 2018, Mr. Censky corresponded again with Mr. Dinneen, who wrote to protest Senator Ted Cruz’s proposal to cap the price of RINs.<sup>19</sup> Two months prior, ASA released a statement voicing its “strong opposition” to such a cap and objecting to Senator Cruz’s proposal in particular.<sup>20</sup> Mr. Censky thanked Mr. Dinneen for his message stating, *inter alia*, “Is there anything we can be doing to reinforce the Secretary’s message and keep a mistake from happening on Tuesday? Thanks for all your help” (Dinneen does not specify in this email what help Mr. Censky had provided that this references); Mr. Censky informed Mr. Dinneen that “We are loaded for bear” in the fight against a RIN price cap.
- In other communications with ASA-aligned trade associations and lobbyists, Mr. Censky informed Mr. Dinneen he had forwarded the lobbyist’s analysis on the relevant issues.<sup>21</sup>

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<sup>17</sup> Specifically, Mr. Censky passed Mr. Dinneen’s email to Robert Johansson, who was and is Chief Economist at USDA, and Seth Meyer, who was at the time Chairman of USDA’s World Agricultural Outlook Board. March 5, 2018 email from Stephen Censky to Seth Myers, Robert Johansson and Brooke Anderson, Subject: FW: New Info ... (ellipses in original), Attachment: 18-PB 21.ro (003)2.pdf, marked “Page 68 of 88”, attached.

<sup>18</sup> April 6, 2018 email from Bob Dinneen to Stephen Censky, copying Brooke Appleton, Subject: Small Refinery Exemptions, marked, “Page 57 of 60”, “58 of 60”, attached.

<sup>19</sup> May 4, 2018 email from Stephen Censky to Bob Dinneen, copying Brooke Appleton, Subject: Tuesday, marked, “Page 88 of 88”, attached.

<sup>20</sup> See ASA Strongly Opposes RIN Cap, Mar. 9, 2019, available at <https://soygrowers.com/news-releases/asa-strongly-opposes-rin-cap/> (“The American Soybean Association (ASA) today voiced strong opposition to a cap on the price of Renewable Identification Numbers (RINs), an action that would significantly undermine the integrity of the Renewable Fuel Standard (RFS). The concept of a cap on RIN prices has been proposed by Sen. Ted Cruz (R-TX)”).

<sup>21</sup> March 6, 2018 email from Stephen Censky to Bob Dinneen, copying Brooke Appleton, Subject: RE: New info... (ellipses in original), marked, “Page 59 of 88”, through “Page 61 of 88”, attached.

- Mr. Censky has regularly received analyses of federal ethanol policy biased toward the positions ASA takes, some of which he has forwarded to USDA economists, with the implicit suggestion that they should be considered in USDA's own analyses.<sup>22</sup>

### **OGE Should Review Deputy Secretary Censky's Actions and Communications**

As previously noted, Mr. Censky signed a "Certification of Ethics Agreement Compliance" that required him to recuse himself from "particular matters in which any former employer . . . I served in the two years prior to my appointment is a party or represents a party." As you know, federal ethics guidance interprets such recusals narrowly. Generally, they cover judicial or other proceedings that specifically relate to an appointee's former employer. The passage of laws that affect a broad swath of industries, companies or persons is generally not considered a "particular matter."

However, Mr. Censky is also bound by Executive Order 13770, which President Trump instituted to replace prior ethics rules with a stricter standard. That EO states that Mr. Censky cannot, in the two years following his appointment, "participate in any particular matter involving specific parties that is directly and substantially related to my former employers . . . including regulations and contracts." Given that the nature of regulations is they rarely, if ever, target only one particular private party, the inclusion of "regulations" suggests a broader restriction and is certainly not limited to judicial proceedings or other proceedings limited to a specific party.

At minimum, OGE should review Mr. Censky's communications with the ASA (if any), and with trade associations and lobbyists ASA has aligned itself with on issues of federal biofuel policy, which are effectively proxies for his former employer. OGE should determine whether, given this particular proxy relationship, Mr. Censky's advocacy for policies his former employer, and current pension plan sponsor, supports, or other efforts to influence such policies, is permissible under his restrictions and otherwise under federal law and regulation. The small sampling of Mr. Censky's communications and actions that are publicly available raise legitimate questions about Mr. Censky's compliance with the letter or the spirit of the President's strengthened ethics requirements.

Regardless of whether Mr. Censky has violated his ethics agreement with USDA or the text of Executive Order 13770, this conduct creates an appearance of partiality and impropriety that the OGE has long cautioned against.<sup>23</sup> OGE's public guidance states, in relevant part:

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<sup>22</sup> See, e.g., March 6, 2018 email from Bob Dinneen to Stephen Censky, Subject: New Info..., attachment "Impact of Options for Modifying the Renewable Fuel Standards", marked, "Page 59 of 88" through "Page 61 of 88", attached.

<sup>23</sup> See <https://www.oge.gov/web/oge.nsf/Resources/A+Refresher+on+the+Impartiality+Rule>; see also Subpart E of <https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.9&idno=5#sp5.3.263> 5.e.

[E]xecutive branch employees are subject to an important set of ethics rules contained in the Standards of Ethical Conduct for Employees of the Executive Branch. Underlying these rules is a principle that employees *must avoid even the appearance of impropriety*. The *impartiality rule* breathes life into this principle.

Under the primary conflict of interest law, an employee must not participate in any particular matter affecting the employee's financial interests, and the impartiality rule goes even further by focusing on appearance issues. This rule applies even when the employee is free of financial conflicts of interest.

Briefly stated, the impartiality rule requires an employee to consider appearance concerns before participating in a particular matter if someone close to the employee is involved as a party to that matter. This requirement to refrain from participating (or "recuse") is designed to avoid the appearance of favoritism in government decision-making.

The rule is also triggered by the employee's relationship with individuals, clients, and organizations the employee *has served professionally as an employee*, attorney, contractor, etc., *in the past year*.

The duty to recuse comes up if one of these individuals and organizations is involved and if a reasonable person with knowledge of the relevant facts would be concerned about the employee's impartiality.<sup>24</sup> (Emphasis added).

OGE's guidance makes clear that an Executive Branch official must avoid even the appearance of impartiality or impropriety in shaping federal policy, even when the official has no financial interest or conflict with respect to a particular policy. The standard is objective: if a reasonable person with knowledge of the relevant facts would be concerned about an official's impartiality, then the official's actions are improper. It does not matter whether Mr. Censky actually intended to favor his former employer, ASA, if his actions create that appearance. Here, the layperson, unaware of Mr. Censky's prior employer and its positions, would spot the questions about Mr. Censky's partiality from just this limited information available. The existence of that relationship, however, and accompanying restrictions, seriously compound this appearance of partiality and impropriety.

That public office is a public trust lies at the heart of OGE's charge. Even this limited information makes clear OGE must examine whether Mr. Censky's actions violated the public trust on one or more occasions.

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<sup>24</sup> See <https://www.oge.gov/web/oge.nsf/Resources/A+Refresher+on+the+Impartiality+Rule>.

You have stated that “OGE has introduced an executive branch-wide set of ethics rules and policies which, over time, continues to evolve as the world-leading system to promote employee standards of conduct and to protect government integrity.”<sup>25</sup> You have also emphasized the importance of “strong ethical leadership” by senior officials of the Executive Branch, and explained that “[b]y ensuring that government decisions are free from conflicts of interest, together we can protect the public’s confidence in its government and succeed in our critical missions.”<sup>26</sup>

If Mr. Censky and USDA failed to properly limit his involvement in policies on which he may not have a jurisdictional interest, this will have undermined public confidence in the development and implementation of U.S. energy and environmental policy.

The same holds true if Mr. Censky did properly have jurisdiction but was prohibited from involvement by his vow of recusal.

As the Deputy Secretary of Agriculture, Mr. Censky should be held to the highest standards of ethical conduct, including avoiding even the appearance of improper conflicted acts, or failure to properly recuse himself as required. Ensuring this is the case is OGE’s responsibility.

Accordingly, public information suggests that OGE investigation of Mr. Censky’s communications and actions is merited. Based upon the information at our disposal, a thorough review is not only warranted, but necessary to determine if any actual and/or apparent conflicts exist and to establish what conflicted actions Mr. Censky took.

Sincerely,



Chris Horner  
For Government Accountability  
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<sup>25</sup> See <https://www.oge.gov/web/oge.nsf/Director's%20Notes/F2B51365D83D4F9185258332004DB9DD?opendocument>.

<sup>26</sup> See <https://www.oge.gov/web/oge.nsf/Director's%20Notes/94B269698B97A9908525831C006A998C?opendocument>.