Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

March 13, 2017

MEMORANDUM FOR: John F. Kelly
Secretary

FROM: Joseph B. Maher
Acting General Counsel and
Designated Agency Ethics Official

SUBJECT: Authorization Pursuant to 5 C.F.R. § 2635.502 to Participate in ~~Acquisition~~ Any^ Matters ^with the Government of Australia

This memorandum reviews the applicable ethics authorities and, pursuant to those authorities, authorizes your participation in all Government matters involving the Government of Australia, including particular matters involving specific parties in which the Government of Australia ("Australia") is a party or represents a party. Two laws would otherwise prohibit your participation in matters involving the Government of Australia: President Trump's Executive Order on ethics (which the White House has waived in this circumstance) and Title 5 ethics regulations (which this memorandum waives in this circumstance). The attached "Waiver of Executive Order 13,770 for Secretary John F. Kelly" describes the background of your association with the Government of Australia and your critical role in ensuring the accomplishment of the DHS mission and homeland and national security for the United States.

Background

In accordance with your Ethics Agreement, dated January 5, 2017, unless you were authorized to participate, you committed to recusing from participation in any particular matter involving specific parties in which the Government of Australia ("Australia") is a party or represents a party, pending payment from the Government of Australia. You received payment in full from the Government of Australia on February 8, 2017.

In addition to your Ethics Agreement, you are subject to the provisions of the ethics regulations regarding impartiality in performing official duties. Pursuant to these provisions, employees who, within the last year, acted as a consultant or contractor to an entity are considered to have a "covered relationship" with that entity. When an employee has a covered relationship with a

a reasonable person with knowledge of the facts would not question the employee's impartiality in acting in the matter. 5 C.F.R. § 2635.501, et. seq. In certain circumstances, however, an employee may be authorized to participate in the foregoing types of matters if authorized by the agency.

You are also subject to the provisions of Executive Order 13770 (January 28, 2017) (the "Executive Order"). Under Section 1, paragraph 6, of the Executive Order, you are restricted for two years, beginning with your appointment date, from participating in any particular matter involving specific parties in which your former client, the Government of Australia, ("Australia"), is a party or represents a party. The White House determined that it was in the public interest to grant a waiver of this restriction, enabling you to participate in all matters involving the Government of Australia.

Analysis and Conclusion

The regulatory provisions are designed to ensure that employees take appropriate steps to avoid an appearance of loss of impartiality in the performance of their official duties. Towards that end, 5 C.F.R. § 2635.502 provides for an employee to seek authorization in certain circumstances in which his participation may call into doubt his impartiality. With respect to the Government of Australia, you have requested authorization to participate in all matters involving the Government of Australia, including particular matters involving specific parties in which the Government of Australia ("Australia") is a party or represents a party.

As Designated Agency Ethics Official, I may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question your impartially in participating in all matters involving the Government of Australia. In light of your recent teaching position with Australia, and your recent honorarium payment from Australia, a reasonable person might question your impartiality in making critical decisions on sensitive matters of homeland and national security.

Accordingly, as instructed by the regulation, I have followed the process set forth in § 2635.502(d), to consider authorizing your participation in matters involving Australia. I have considered the isolated, short-term nature of your teaching position; the fact that you no longer have a personal financial interest that is affected by Australia; the critical need for your engagement in homeland and national security; and the probability that DHS's role could be undermined on a national and international scale or could be detrimentally affected by significant inefficiencies if you are restricted from interacting with any national or international group or official solely due to the Government of Australia's involvement or participation. Based on the foregoing considerations, as more fully set forth in the attached White House Waiver Certification, I have determined that it is necessary and appropriate to authorize you to participate in all matters involving the Government of Australia.

Attachment: Waiver of Executive Order 13,770 for Secretary John F. Kelly

Authorization

In accordance with the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.502(d), I authorize Secretary John F. Kelly to participate in all matters involving the Government of Australia, including any particular matter involving specific parties in which the Government of Australia ("Australia") is a party or represents a party. In granting this authorization, I have determined that in light of all relevant circumstances, the interest of the Government in Secretary Kelly's participation in all matters involving the Government of Australia outweighs the concern that a reasonable person may question the integrity of DHS's programs and operations. I have considered relevant factors including the Government's critical need for Secretary Kelly to effectively carry out his duties as Secretary of DHS. The role of the Secretary is at the center of the Department's important national security and related missions. The successful accomplishment of these DHS missions relies on extensive, open, and collaborative communications within the Department and between the Secretary and the President, United States Government officials and foreign government officials. I have also considered the limited nature of Secretary Kelly's involvement with the Government of Australia, while he was a retired military officer, and the critical national interest served by authorizing Secretary Kelly to freely communicate with all members of the national and international community regarding all aspects of DHS's mission and operations. This authorization will significantly promote and protect the public interest by enabling Secretary Kelly to freely carry out the responsibilities of his office.

I have also considered the White House Counsel Waiver Certification, granted to Secretary on March 10, 2017, pursuant to Executive Order 13770, Section 3.

This waiver does not otherwise affect Secretary Kelly's obligation to comply with all other pre-existing government ethics rules, other provisions of the Executive Order and with the other commitments he made in his Ethics Agreement and amendments to his Ethics Agreement.

3/13/17
Date

Joseph B. Maher
Designated Agency Ethics Official

WAIVER OF EXECUTIVE ORDER 13770 FOR
SECRETARY JOHN F. KELLY

In accordance with Section 3 of Executive Order 13770 (January 28, 2017) (the "Executive Order") and after consultation with the Office of the Counsel to the President, and for the reasons stated below, I hereby submit that it is in the public interest to grant to John F. Kelly, Secretary, United States Department of Homeland Security ("DHS"), a waiver of the Ethics Pledge restriction set forth in Section 1, paragraph 6, of the Executive Order to enable him to effectively carry out his duties as Secretary of DHS. Absent this waiver, Secretary Kelly would be restricted for two years, beginning with his appointment date, from participating in any particular matter involving specific parties in which his former client, the Government of Australia, ("Australia"), is a party or represents a party.

Secretary Kelly was sworn in as Secretary of DHS on January 20, 2017. At that time, Secretary Kelly was advised of his recusal obligations under the U.S. Office of Government Ethics Standards of Conduct for Executive Branch Employees, 5 C.F.R. § 2635.502 and he has complied with the restrictions on participating in particular matters involving specific parties, including the restrictions on communications with the Government of Australia. Subsequent to his appointment, however, the President issued Executive Order 13770. This Executive Order included a restriction on official interactions with former employers and former clients, which now affects the Secretary's ability to effectively carry out the responsibilities of his position in accordance with the foregoing ethical obligations.

Managing an ongoing recusal for Secretary Kelly involving the Government of Australia will result in serious limitations and inefficiencies in the Department's ability to respond quickly and effectively to crisis situations, engage in ongoing mission activities, and exercise leadership in national and international forums. In particular, the communication restriction has prevented the Secretary from engaging with the Government of Australia on homeland security, immigration matters of national importance which relate to the President's agenda and Administration policy. It is anticipated that it will be essential for the Secretary to participate in operational activities and represent DHS in forums where representatives of the Government of Australia would be expected to be present, obtain Australia's views directly from Australian officials, and act on government matters that involve the Government of Australia. Without this waiver, the adjustments that would be necessary to maintain the Secretary's recusal are anticipated to have a serious impact on DHS's international relations and interfere with rapid, clear and streamlined communications and response times.

Pursuant to this waiver, Secretary Kelly will be permitted to interact directly with the Government of Australia, interact with the President, the international community, DHS officials, and Federal government leadership on a variety of matters involving the Government of Australia for the purposes of ensuring DHS support and leadership related to homeland and national security, immigration, cybersecurity, aviation security, emergencies, risk management, and information exchange in order to facilitate DHS operations.

Background

Prior to his confirmation, and following his retirement from the United States Marine Corps, Secretary Kelly filled the role of a Senior Fellow to the Department of Defense, National Defense University ("NDU").[1] In this position, Secretary Kelly, along with other general officer counterparts, were important contributors to ensuring the continued excellence in military leadership through their coaching and mentoring of succeeding generations of United States military leaders and future leaders.[2] Through one of these courses, at the recommendation of Australian military officers in attendance, the Government of Australia invited Secretary Kelly to participate as a mentor in the Australian Defense Joint Task Force Commanders course as a residential Senior Course Mentor. Secretary Kelly was asked to "facilitate learning by leading discussions, analyzing coursework material, and offering insights based on [his] professional military experience." His duties as a Senior Course Mentor included offering his "insights on command challenges and contemporary operations, in order to develop selected officers using a variety of theories, case studies and practical advice."[3] The Departments of the Navy and State, and the United States Marine Corps authorized Secretary Kelly to accept travel benefits and an honorarium from the Government of Australia. The United States Government approval recognized that Secretary Kelly would not owe any duties to the Government of Australia and that he did not have any ongoing commitments to the Government of Australia. No post-government employment ethics restrictions were identified in connection with this activity.[4]

Analysis

The nature of his relationship with the Government of Australia during this one-time, short-term instruction is one that technically falls within the definition of a "former client" under the Executive Order, but does not equate to the type and nature of prior business relationships envisioned in the establishment of the two-year revolving door provision found in section 1, paragraph 6 of the Executive Order.

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[1] Secretary Kelly was employed by Flatter and Associates ("Flatter"), pursuant to Flatter's contract with the NDU, to provide services as a Senior Fellow to NDU. With regard to his ethics obligations regarding his past employment with Flatter, Secretary Kelly has committed in his Ethics Agreement, signed January 5, 2017, and the supplement to his Ethics Agreement, signed February 2, 2017, to abide by the standards of conduct and ethics pledge restrictions, as stated in those agreements.

[2] In considering the underlying teaching activity that is the subject of this waiver, it is important to recognize that Secretary Kelly's forty-five years of military service makes him uniquely qualified to fill this academic role.

[3] Memorandum from Special Security Officer, Headquarters U.S. Marine Corps, Intelligence Department, Washington D.C. to DC, M&RA, Washington DC, dated July 14, 2016.

[4] Memorandum from Headquarters, U.S. Marine Corps, Civil & Administrative Law Branch to Commandant of the Marine Corps, dated July 14, 2016.

Providing a waiver in relation to this single academic engagement does not contravene the intent or spirit of Executive Order 13770. The Executive Order and implementing Ethics Pledge reinforce to each Administration appointee the importance of carrying out their official responsibilities in a manner that protects the public trust and ensures that the integrity of government operations is not tainted by the actual or appearance of favoritism from personal business interests. The Secretary's engagement, during his retirement, for which he received a relatively small monetary honorarium[5] and travel expenses was for the sole purpose of mentoring a class of military officers to enhance their professional, management, and leadership skills. He did not make any decisions relating to academic operations. Moreover, his general insights, sharing of military leadership experiences and mentoring were independent of any connection to a United States government program or policy nor did his participation support any commercial interest.

It is critical to homeland and national security for the Secretary to have regular engagements with national and international governments to effectively engage with stakeholders to develop and build consensus around DHS programs, strategy and capabilities. The scope of these efforts is both national and international in reach and his efforts will affect the operations of government and non-government entities, domestically and abroad.

During a significant national security, immigration, cybersecurity, or other incident or emergency, DHS's role could be undermined or could be detrimentally affected by significant inefficiencies if the Secretary is restricted from interacting with any national or international group or official solely due to the Government of Australia's involvement or participation. The President and all United States officials would be required to bypass the Secretary to enable necessary interaction with DHS, interfering with the organizational chain, information flow, fast response, and loss of efficiency for DHS, the nation, and the international community.

Conclusion

The significant public interest in the agility of DHS to support national security efforts, lead cybersecurity activities, carry out immigration operations, enhance aviation security, coordinate with allies, and respond to emergencies requires that the Secretary be able to fully exercise his leadership role in ongoing oversight and direction for United States government coordination and collaboration with foreign governments.

Due to the scope of Section 1, paragraph 6, of the Executive Order and the definition of "former client" in Section 2(i), a broad application of this prohibition would be detrimental to DHS, government, and national security operations. Without a waiver, the Secretary would be precluded from engaging with United States and Australian government officials, as well as the international community, on a broad range of matters involving both response activities and strategic planning. Barring such communication would have a negative impact on the government's ability to implement DHS programs, including programs established to manage immigration, cybersecurity risk, and aviation security and respond quickly and effectively to threats, emergencies and other incidents. The Secretary's recusal from these communications

[5] The honorarium was 10,000 AUD or approximately $7,500 USD. *Id.*

would also deprive the foregoing officials the opportunity to provide input and bring concerns to the attention of the Secretary. In light of his brief participation in a single academic course, focused on sharing his personal leadership experiences, Secretary Kelly's involvement with the Government of Australia in participating in this training program, is not the type of business-oriented prior client relationship that the Executive Order intended to reach in protecting the public trust.

For this reason, the Designated Agency Ethics Official for the Department of Homeland Security has determined that it is in the public interest to grant to Secretary Kelly a waiver of the Ethics Pledge restriction set forth in Section 1, paragraph 6, of the Executive Order to enable him to effectively carry out his duties as Secretary of DHS. Pursuant to Executive Order 13770, Section 3, the Department respectfully requests such a waiver from the President or his designee.

Office of White House Counsel Waiver Certification

Pursuant to Executive Order 13770, Section 3, and as the President's designee authorized to grant such waiver, it is in the public interest to grant a waiver of Section 1, paragraph 6 of the Executive Order to John F. Kelly, Secretary, United States Department of Homeland Security ("DHS") as pertains to the Government of Australia. I have determined that this waiver is required to enable him to effectively carry out his duties as Secretary of DHS. Absent this waiver, Secretary Kelly would be restricted for two years, beginning with his appointment date, from participating in any particular matter involving specific parties in which his former client, the Government of Australia, ("Australia"), is a party or represents a party. The role of the Secretary is at the center of the Department's important national security and related missions. The successful accomplishment of these DHS missions relies on extensive, open, and collaborative communications within the Department and between the Secretary and the President, United States Government officials and foreign government officials. In authorizing this waiver, I have considered the limited nature of Secretary Kelly's involvement with the Government of Australia, while he was a retired military officer, and the critical national interest served by authorizing Secretary Kelly to freely communicate with all members of the national and international community regarding all aspects of DHS's mission and operations. This waiver will significantly promote and protect the public interest by enabling Secretary Kelly to freely carry out the responsibilities of his office.

This waiver does not otherwise affect Secretary Kelly's obligation to comply with all other pre-existing government ethics rules, other provisions of the Executive Order and with the other commitments he made in his Ethics Agreement and amendments to his Ethics Agreement.

3/13/17
Date

Donald F. McGahn II
Counsel to the President

Memorandum

August 11, 2016

To: William J. Baer
Acting Associate Attorney General

From: Jonathan Sallet
Deputy Assistant Attorney General for Litigation
Antitrust Division

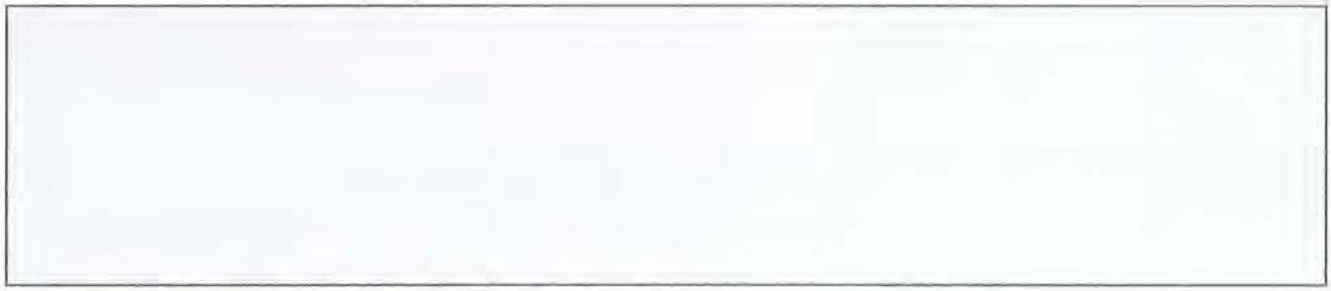
Re: Request for Authorization for Acting AAG Renata Hesse to Participate in the Division's Investigation of Vista's Proposed Acquisition of Cvent (DOJ File Number: 60-511210-0124)

I. Background

Pursuant to 5 C.F.R. §2635.502, I recommend that you authorize Renata Hesse, Acting Assistant Attorney General, to participate in the Division's civil investigation into the proposed merger involving Vista Equity Partners (Vista) and Cvent, Inc. ("Vista/Cvent").[1] Currently, Ms. Hesse is disqualified from participating in this matter by reason of a personal or business relationship,[2] and I am most senior Division official on the matter. Her spouse is a partner at [redacted] represents a customer in this investigation. In my view, approval of Ms. Hesse's participation would be appropriate because -- after taking into account certain restrictions to ensure that there is not a financial conflict of interest -- the value of her participation greatly outweighs any possible concern that a reasonable person may question the integrity of the Department's programs and operations.

The Vista/Cvent investigation, which opened on May 13, 2016, is focused on the proposed combination of two companies that [redacted]

[1] I have consulted with the DDAEO, Nina Hale, and she concurs in this recommendation.
[2] As discussed below, until recently, Ms. Hesse's husband had a financial interest in the matter which required her recusal. With the elimination of the financial interest conflict, only the appearance issue flowing from a personal and business relationship remains.



The recusal issue arises because [redacted] is represented by [redacted] Ms. Hesse's husband is a partner practicing antitrust law and competition policy at [redacted] Ms. Hesse's husband is not involved in the representation of [redacted] in this matter.

Until recently, however, Ms. Hesse's husband had a financial interest in the matter because he held an equity interest in the firm's revenues. This financial interest led to her being recused early in the investigation, as soon as staff learned of [redacted] involvement. Her participation in the matter, absent a waiver, would have violated 18 U.S.C. § 208(a). On August 10, 2016, however, Ms. Hesse's husband informed us in writing that he changed his compensation arrangement with the firm and that, effective August 1, 2016, [redacted] Ms. Hesse's husband has further confirmed in writing that he will have no involvement in this matter nor will he have access to any confidential information relating to it. Thus, neither Ms. Hesse nor her spouse has a financial interest in this case.

II. Applicable Ethics Rules

Under 5 C.F.R. § 2635.502(a), absent authorization, an official should not participate in a matter where a person or entity with which an official has a "covered relationship" is or represents a party in a particular matter. Ms. Hesse has a "covered relationship" with [redacted] as her husband's employer, under C.F.R. § 2635.502 (b)(iii). However, the "covered relationship" here does not involve the representation of a party. [redacted] client is a third-party customer.

Nonetheless, the Department has been sensitive to appearances of partiality even when a senior official has covered relationships that involve a person or entity that is not a party, but is otherwise significantly affected by a matter. In these situations, the Department applies the "catch-all" provision in § 502.[3] That provision states that, if circumstances other than those

[3] The Department has also been sensitive to appearances of partiality if a senior official participates in matters involving their former firm and the firm is representing a party, even if several years have passed since the official left the firm. I note that Ms. Hesse's former law firm, Wilson Sonsini, represents Cvent, one of the parties in this matter. Ms. Hesse left her firm in the spring of 2011, over five years ago. An official is presumptively recused for only one year in matters where her former firm represents a party. C.F.R. §2635.502 (b)(iv), and as a signer of the Obama Pledge, Ms. Hesse was subject to a second year automatic recusal. According to the Department's Ethics Office, two years is a a sufficient recusal period to guard against the likelihood that a reasonable person would question a senior official's impartiality in most circumstances that arise in which a former firm represents a party. See July 28, 2011 Memorandum from Janice Rodgers. I see no special circumstances here suggesting that

specifically provided in the regulation may cause an official's impartiality to be questioned, the Department should use the process provided in § 502 to determine whether he should or should not participate in a particular matter. For a senior official like Ms. Hesse, authorization to participate in a matter is based on a determination that the importance of the official's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. § 2635.502(d).

In addition to the importance of the official's participation, the factors to be considered in that determination include: the nature of the relationship involved; the effect that resolution of the matter would have upon the person involved in the relationship; the nature and importance of the official's role in the matter, including the extent to which the official is called upon to exercise discretion; the sensitivity of the matter; the difficulty of reassigning the matter to another employee; and adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question her impartiality. *Id.*

III. Authorization Analysis

The Vista/Cvent investigation is in the early stages, and it is hard to predict where it will lead, and whether it will generate public attention. As noted above, recusal issues stem from the fact that [redacted] a third-party customer of both the merging parties, and one of their larger customers, is represented by [redacted] the employer of Ms. Hesse's husband. [redacted]

[redacted]

I am confident that Acting AAG Hesse would be impartial in this matters and I consider the risk that her views would be subject to scrutiny as a result of her spouse's employer representing a third party to be small and manageable. Any appearance issues are outweighed substantially by the value to the Department of Acting AAG's Hesse's participation. Our efforts to investigate and potentially to litigate this matter would be significantly enhanced by her participation. She is a skilled antitrust practitioner with many years of experience, including substantial experience with enterprise software and platform-based industries. She has a long history with the Division, not only in this Front Office but in her capacity as Chief of the Networks & Technology Section that is investigating this matter. Her input and support would be of great value, and authorizing her to participate now would give her sufficient lead time to familiarize herself with the details before an enforcement decision must be made.

Ms. Hesse's continued recusal would not only deprive the Division of the value of her participation, but also would impose costs on the Department. As you know, the Antitrust Division recently learned that it needs to change its protocol regarding issuance of CIDs when an Acting AAG is recused. Based on guidance from the Office of Legal Counsel, when an Acting Assistant Attorney General is recused on a civil antitrust investigation, the authority to issue

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application of the catch-all provision would be necessary. She did not represent Cvent while she was at the firm, and this matter was certainly not pending while she was at the firm.

CIDs cannot be delegated to DAAGs. In these circumstances, only the Attorney General has the authority to sign Civil Investigative Demands. Involving the Attorney General in this aspect of the Division's work will add to the demands on her valuable time, introduce complexity and additional layers of review, and possibly delay our investigations. These costs are disproportionate to any appearance issues.

In addition, I have considered the specific factors enumerated in 5 C.F.R. § 2635.502(d) in connection with the "covered relationship," and I believe they weigh in favor of authorizing Acting AAG Hesse's participation. First, the nature of the relationship is attenuated – her husband's firm's representation of a third-party customer, as opposed to its representation of a party. Second, the impact of the matter on [redacted] will not likely be substantial. [redacted] s a large national law firm with hundreds of clients. Although [redacted] is one of the parties' concerned and larger customers, other [redacted] are also complaining, and some more vociferously than [redacted] That there is a group of concerned third-party customers who would be similarly affected by the investigation reduces the risk that a reasonable person would question Ms. Hesse's impartiality because of her attenuated relationship with just one of those third-party customers.

The third factor weighs against Acting AAG Hesse's participation because she would be the decision-maker on this matter. The fourth factor is more difficult to assess at this point, given the investigation has been open only a few months. The fifth factor regarding difficulty of re-assignment cuts in favor of Ms. Hesse's participating. As noted above, she is the most experienced of the Division's senior officials and no other Front Office person can issue CIDs when the Acting AAG is recused.

Finally, adjustments can be made to Ms. Hesse's duties. Acting AAG Hesse will not communicate with or meet with [redacted] and its counsel. However, in the event that the Vista/Cvent Matter results in third parties being provided the opportunity to meet with the Acting AAG before a final decision is made, this condition may be re-evaluated or modified in light of the circumstances at that time. No preferential treatment will be given to [redacted] in this regard, and any such modification will be done in writing.

Acting AAG Hesse's expertise and skills are greatly valued and needed here. Careful consideration of the factors suggests that the balance of interests favor Ms. Hesse's participation. I believe a reasonable person would not question the integrity of the Department's law enforcement decisions based on her participation in this matter and that, should such questions arise, the Department's interest in her participation outweighs any possible concerns.

IV. Recommendation

Depriving the Division of both Acting AAG Hesse's expertise and leadership, and imposing the costs associated with involving the Attorney General in the Antitrust Division's investigative efforts, seems disproportionate to the appearance issues at hand. Under the circumstances, I do not believe that a reasonable person would question the integrity of the Department's programs, operations, and law enforcement decisions based on her participation in the Vista/Cvent matter, and that, should such questions arise, the Department's interest in her

participation outweighs any possible concerns. Therefore, I recommend authorization, under 5 C.F.R. § 2635.502, of Ms. Hesse's participation.

APPROVED: _____

DISAPPROVED: _____

DATE: 8/22/2016

U.S. Department of Justice

Antitrust Division

September 1, 2016

To: William J. Baer
Principal Deputy Associate Attorney General

From: Jonathan Sallet JS by NBH
Deputy Assistant Attorney General,
Antitrust Division

Re: Request to Authorize Acting Assistant Attorney General Renata Hesse to Continue to Participate in the litigation of *U.S. et al. v. The Charlotte-Mecklenburg Hospital Authority, et al.* (WDNC 6/9/16)

I. Background

Pursuant to 5 C.F.R. § 2635.502, I recommend that you authorize Renata Hesse, Acting Assistant Attorney General ("A-AAG"), to participate in the Department's civil case, *U.S. et al. v. The Charlotte-Mecklenburg Hospital Authority, et al.* ("Carolina Hospitals" or "CHS").[1] Though Acting AAG Hesse participated in the investigation and made the decision to file the case in June of this year, she was recused shortly thereafter because her husband's law firm, was brought in to represent which that competes with defendant CHS, and is a possible witness at trial. This raised a question about impartiality under the standards of conduct. For the reasons discussed below, however, authorization of A-AAG Hesse's participation would be appropriate because of the value of her participation greatly outweighs any possible concern that a reasonable person would question the integrity of the Department's programs and operations.

After almost three year's investigation, the Department filed suit against CHS on June 9, 2016. The complaint alleges that the defendant, the dominant hospital group in the Charlotte, North Carolina area, used its market power to prevent insurers from introducing health plans that encourage patients to use medical providers that offer lower priced, higher-quality services. The defendant, through the imposition of anti-steering

[1] I have consulted with the DDAEO, Nina Hale, and she concurs in this recommendation. Ms. Hale consulted with Janice Rodgers, and she too concurs.

restrictions on these insurers, effectively forbids the four insurers from entering arrangements with its competitors that would involve insurers encouraging patients to use health plans formed with hospitals that offered the insurers discounted rates. The defendant allows the insurers to steer patients toward its hospitals, but not to competitors' hospitals. By these restrictions, the defendant is able to impede the development of health insurance plans that offer lower priced, high quality services, and so maintain its own higher prices.

A-AAG Hesse was very involved in the decision to bring the suit. She personally heard and evaluated CHS's defenses for why its restrictions did not have an anti-competitive effect. As a result, she authorized and signed the complaint the Division filed.

The current procedural posture of the case is as follows: In early August, the defendant answered the complaint, and simultaneously filed a motion to dismiss and a motion for judgment on the pleadings, the Division's response to which was filed on August 31, 2016. The defendant will file a reply in several weeks. Oral argument has yet to be scheduled. As a practical matter, discovery is stayed, but the Department will likely file a motion to begin discovery in the next few weeks.

Shortly after filing the complaint, the Department's litigation team began re-interviewing

A-AAG Hesse's husband is a partner practicing antitrust law and competition policy at Although not involved in the representation of in this matter, Ms. Hesse's husband had until recently a financial interest in any matter that was involved because he held an equity interest in the firm's revenues. This financial interest led to Ms. Hesse being recused on this matter as soon as staff learned of involvement on behalf of a third party, even though her husband was not involved. On August 10, 2016, however, Ms. Hesse's husband informed the Division that he changed his compensation arrangement with the firm and that, effective August 1, 2016, This action by the firm ensures that Ms. Hesse's participation in this matter will not implicate 18 U.S.C. § 208, which prohibits a government employee from participating in a matter in which he/she, his/her spouse, or minor child has a financial interest. Thus, neither Ms. Hesse nor her spouse has a financial interest in this case.

II. Applicable Ethics Rules

Under 5 C.F.R. § 2635.502(a), absent authorization, an official should not participate in a matter where a person or entity with which an official has a "covered relationship" *is or represents* a party in a particular matter. Ms. Hesse has a "covered relationship" with [redacted] as her husband's employer, under C.F.R. § 2635.502 (b)(iii). However, the "covered relationship" here does not involve the representation of a party. [redacted] is a third-party competitor.

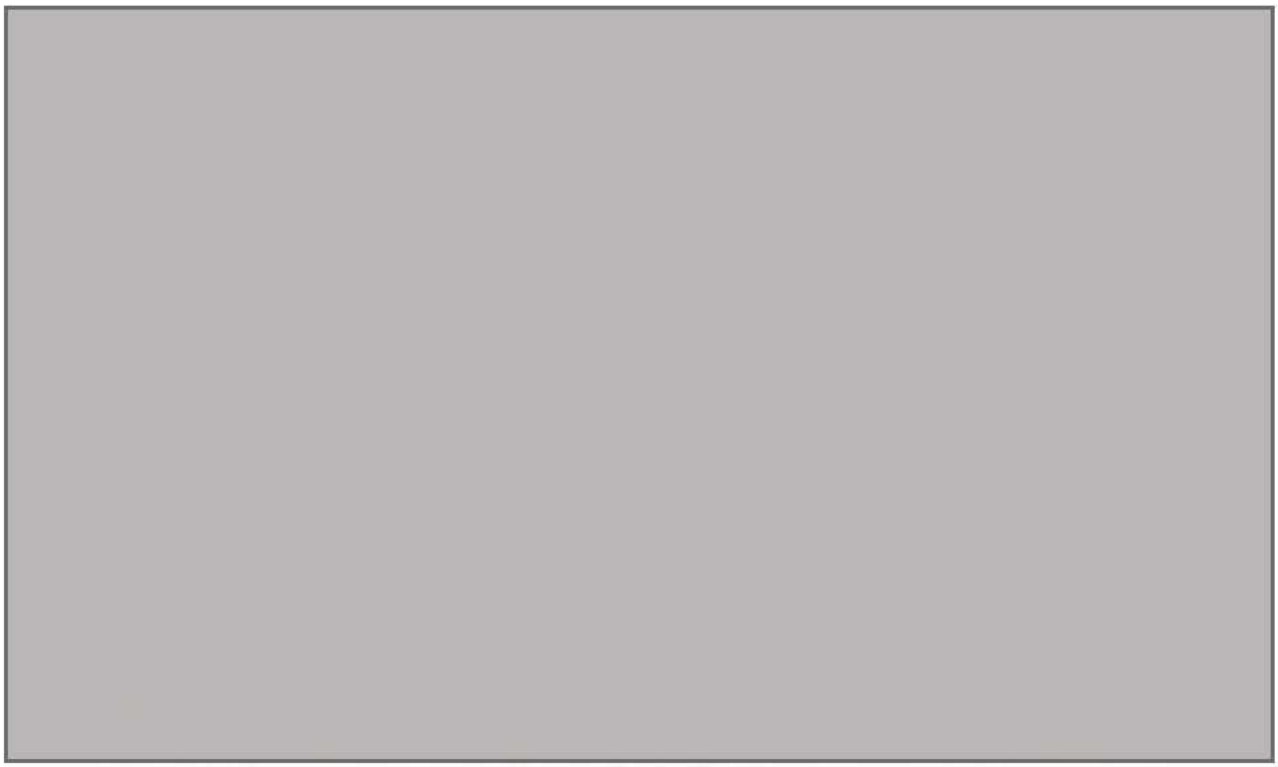
Nonetheless, the Department has been sensitive to appearances of partiality even when a senior official has a covered relationship that involve a person or entity that is not representing a party, but may be significantly affected by a matter. In these situations, the Department applies the "catch-all" provision in § 502. That provision states that, if circumstances other than those specifically provided in the regulation may cause an official's impartiality to be questioned, the Department should use the process provided in § 502 to determine whether he should or should not participate in a particular matter. For a senior official like Ms. Hesse, authorization to participate in a matter is based on a determination that the importance of the official's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. § 2635.502(d).

Under § 502, the factors to be considered in addition to the importance of the official's participation include: the nature of the relationship, the effect that the matter would have on the person involved in the relationship; the nature of the official's role in the matter, including the extent to which the official will be called upon to exercise discretion in the matter; the sensitivity of the matter; the difficulty of assigning the matter to another official; and adjustments that may be made to reduce or eliminate the likelihood that a reasonable person would question the official's impartiality.

III. Analysis and Recommendation

I have considered the specific factors enumerated in 5 C.F.R. § 2635.502(d) in connection with the "covered relationship," and I believe they weigh in favor of authorizing Acting AAG Hesse's to continue her participation in the matter. First, the nature of the relationship does not involve a party. Her husband's firm is representing a third-party competitor to the defendant.

[redacted]



The third factor weighs against Acting AAG Hesse's participation because she would be the final decision-maker, and would have substantial discretion in that capacity. The fourth factor --the sensitivity of the matter -- is more difficult to assess at this point. To the extent that it was a controversial decision to challenge the conduct, that decision has already been made. Ms. Hesse signed the complaint and the Department issued a press release quoting her. The judge's ruling on the defendant's motion to dismiss will determine what next steps will be – the commencement of discovery, or appeal. The fifth factor regarding difficulty of re-assignment weighs in favor of Ms. Hesse's participating. As noted above, she has the longest tenure of the Division's senior officials, has a long history of antitrust work, and she knows the case well from her involvement in the investigation.

Finally, while appearance issues can be mitigated by adjustments to an official's duties to reduce or eliminate the likelihood that a reasonable person would question her impartiality, such adjustment do not seem necessary here. Given that the enforcement decision has been made, and the matter is before a federal judge, she should have no need to communicate or meet with anyone from and she does not seek authorization to do so.

I believe that any appearance issues are outweighed substantially by the value to the Department of Acting AAG's Hesse's participation. Ms. Hesse is a skilled antitrust practitioner with many years of experience. The case raises complicated antitrust issues that Ms. Hesse very familiar with and helped shape, having participated in the matter for months. She made the decision to challenge the conduct before the potential conflict with arose. Her continued participation will enhance our litigation efforts. Even

though she was not able to participate in the briefing on the motion to dismiss, she would certainly be able to contribute valuable insights to the preparation for oral argument and discovery, or if necessary, appeal. [redacted]

In sum, Acting AAG Hesse's expertise and skills, and her experience on this matter, are greatly valued and needed here. Careful consideration of the factors suggests that the balance of interests favor Ms. Hesse's participation. I believe a reasonable person would not question the integrity of the Department's law enforcement decisions based on her participation in this matter and that, should such questions arise, the Department's interest in her participation outweighs any possible concerns.

IV. Conclusion

I believe A-AAG Hesse's experience and expertise are of such a nature that a reasonable person would not question the integrity of the Department's law enforcement decisions based on her participation, and, should such questions arise, the Department's interest in her participation outweighs any possible concerns. Therefore, I recommend authorization, under 5 C.F.R. § 2635.502, of her participation in the Carolina Hospitals matter.

Approved: W. Bay Date: 9-7-2016

Not Approved: _____ Date: _____

U.S. Department of Justice

Antitrust Division

November 15, 2016

To: William J. Baer
Principal Deputy Associate Attorney General

From: Jonathan Sallet
Deputy Assistant Attorney General,
Antitrust Division

Re: Request to Authorize Acting Assistant Attorney General Renata Hesse to Participate in the Division's Civil Investigation of [redacted]

I. Background

Pursuant to 5 C.F.R. § 2635.502, I recommend that you authorize Renata Hesse, Acting Assistant Attorney General ("A-AAG"), to participate in the Department's civil investigation of [redacted] Currently, Ms. Hesse is disqualified from participating in this matter by reason of a personal or business relationship,[2] and I am the most senior Division official on the matter. The recusal issue arises because [redacted] her husband's law firm, represents a third party that may be substantially affected by the outcome of the investigation. For the reasons discussed below, however, authorization of Ms. Hesse's participation would be appropriate because the value of her participation greatly outweighs any possible concern that a reasonable person would question the integrity of the Department's programs and operations.

[redacted]

[1] I have consulted with the DDAEO, Nina Hale, and she concurs in this recommendation. We have also consulted with Janice Rodgers, the Department's Ethics Officer, and she too concurs.

[2] As discussed below, until recently, Ms. Hesse's husband had a financial interest in the matter which required her recusal. With the elimination of the financial interest conflict, only the appearance issue flowing from a personal and business relationship remains.

[redacted]

[redacted]

[redacted]

Acting AAG Hesse's husband is a partner practicing antitrust law and competition policy at [redacted] However, her husband is not involved in the representation of [redacted] in this matter. Nor does her husband have a financial interest in this matter because, at his request, [redacted] This action ensures that Ms. Hesse's participation in this matter will not implicate 18 U.S.C. § 208, which prohibits a government employee from participating in a matter in which he/she, his/her spouse, or minor child has a financial interest. Thus, neither Ms. Hesse nor her spouse has a financial interest in this case.

II. Applicable Ethics Rules

Under 5 C.F.R. § 2635.502(a), absent authorization, an official should not participate in a matter where a person or entity with which an official has a "covered relationship" *is or represents* a party in a particular matter. Ms. Hesse has a "covered relationship" with [redacted] as her husband's employer, under C.F.R. § 2635.502 (b)(iii). Notably, however, the "covered relationship" here does not involve the

[redacted]

representation of a party. [redacted] is a third-party customer and competitor to both of the merging parties.

Nonetheless, the Department has been sensitive to appearances of partiality even when a senior official has a covered relationship that involves a person or entity that is not representing a party, but may be significantly affected by a matter. In these situations, the Department applies the "catch-all" provision in § 502. That provision states that, if circumstances other than those specifically provided in the regulation may cause an official's impartiality to be questioned, the Department should use the process provided in § 502 to determine whether he should or should not participate in a particular matter. For a senior official like Ms. Hesse, authorization to participate in a matter is based on a determination that the importance of the official's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. § 2635.502(d).

Under § 502, the factors to be considered in addition to the importance of the official's participation include: the nature of the relationship, the effect that the matter would have on the person involved in the relationship; the nature of the official's role in the matter, including the extent to which the official will be called upon to exercise discretion in the matter; the sensitivity of the matter; the difficulty of assigning the matter to another official; and adjustments that may be made to reduce or eliminate the likelihood that a reasonable person would question the official's impartiality.

III. Analysis and Recommendation

I have considered the specific factors enumerated in 5 C.F.R. § 2635.502(d) in connection with the "covered relationship," and I believe they weigh in favor of authorizing Acting AAG Hesse to participate in the [redacted] First, as noted above, the nature of the relationship does not involve a party, which points in favor of her participation, because the circumstances do not fit squarely within the regulation requiring recusal.

Second, in considering the potential impact of the matter on [redacted] it is difficult to say that the impact would not be substantial, given that [redacted] competes directly with the merging parties, and [redacted]

[redacted]

[redacted]

[redacted]

Ordinarily, the third factor would weigh against Acting AAG Hesse's participation because she would be the final decision-maker, and would have substantial discretion in that capacity. In this instance, however, I believe the third factor weighs less heavily against her participation. Given that the investigation just opened, and is not likely to reach a decision point on the merits before next summer at the soonest, the decisions that she will need to make in the next few months would require her to exercise less discretion than would be true later in the investigation. For example, she would be the decision maker for issuance of the Second Request to the parties, and would sign CIDs issued to non-parties. Those sorts of decisions, however, are largely driven by staff's recommendation based on investigative efforts in which the Acting AAG plays no role. By the time the case recommendation is teed up for a decision, Ms. Hesse is unlikely to still be serving as Acting AAG, and the next Administration's AAG would likely be in place.

The fourth factor --the sensitivity of the matter -- is more difficult to assess at this point, but there is much to suggest that the matter will garner a lot of attention. [redacted] It is always better to have the current head of the Antitrust Division participate on a matter as high-profile and significant as [redacted] is to the [redacted] industry than not. But, in this instance, it is especially important, given the interplay of the competitive analysis in each matter, which will of course be informed by [redacted] investigations. The Division should have the benefit of unified thinking about the industry-wide implications of [redacted] mergers. As I am recused from the [redacted] I cannot provide that benefit. Acting AAG Hesse is the decision maker on [redacted] which I understand to be closer to a decision point than is [redacted] Any reasonable person would certainly appreciate the value to the Division of her being able

[redacted]

to think about [redacted] and to be able to consult with the FTC on its matter as well. While there are other qualified deputies, re-assignment to one of them does not provide a solution. Currently, different deputies are assigned to [redacted] matters, and both deputies are extremely busy already. As you know the Division is extremely busy through the end of the year. Every matter from which the Acting AAG is recused adds to the responsibilities of an already stretched Front Office.

Finally, appearance issues can be mitigated by adjustments to an official's duties to reduce or eliminate the likelihood that a reasonable person would question her impartiality. Given that the investigation is in the very early stages, she should have no need to communicate or meet with anyone from [redacted] and she does not seek authorization to do so. In the unlikely event the need arises in the future, a modification can be considered.

In my view, depriving the Department of Acting AAG Hesse's leadership, skills and expertise would impose a hardship on the Division that is disproportionate to the appearance issue involved. [redacted] s not representing a party, and while its client may well be affected by the outcome of the matters, other market participants could be similarly affected. Any appearance issue is further minimized by the adjustments we are prepared to make. Namely, Ms. Hesse will not communicate or meet with [redacted] and we are not seeking authorization for her to do so. In sum, careful consideration of the factors suggests that the balance of interests favors Ms. Hesse's participation.

IV. Conclusion

Under the regulatory standard, and for the reasons described more fully above, I do not believe that a reasonable person would question the integrity of the Department's programs and operations based on her participation, and should such questions arise, the Department's interest in her participation outweighs any possible concern. Therefore, I recommend authorization, under 5 C.F.R. § 2635.502, for Acting AAG Hesse to participate in the [redacted] investigation, with the additional limitation that the determination does not include authorization for her to meet or communicate with [redacted]

Approved: _____ Date: 11-18-16

Not Approved: _____ Date: _____

Memorandum

August 31, 2016

To: William J. Baer
Principal Deputy Associate Attorney General

From: Sonia Pfaffenroth
Deputy Assistant Attorney General for Civil Enforcement
Antitrust Division

Re: Request for Authorization for Acting AAG Renata Hesse to Participate in the Division's Health Insurance Litigations: *U.S. v. Aetna Inc. and Humana Inc.*, 1:16-cv-01494 (D.D.C. 2016); *U.S. v. Anthem Inc. and Cigna Corp.*, 1:16-cv-01494 (D.D.C. 2016).

I. Background

Pursuant to 5 C.F.R. §2635.502, I recommend that you authorize Renata Hesse, Acting Assistant Attorney General ("A-AAG") to participate in two closely related civil litigations challenging the proposed mergers of health insurance companies – Aetna/Humana and Anthem/Cigna ("the Health Insurance Matters").[1] Ms. Hesse has been recused from the matters since early in the investigations leading to the filing of the complaints based on her spouse's participation. Ms. Hesse's husband represented a third party complainant, [redacted] I am the most senior Division official on these matters.

On July 21, the Department announced its decision to challenge both mergers. Two lawsuits were filed in the District of Columbia and are pending before different judges. One has a scheduled trial date beginning in late November, the other in early December. In my view, given these developments, and after taking into account certain restrictions to ensure that there is not a financial conflict of interest, the value of Ms. Hesse's participation during the litigation greatly outweighs any possible concern that a reasonable person may question the integrity of the Department's programs and operations.

The import of these two lawsuits cannot be overstated because their outcome will affect all facets of the health care industry – from health care providers, to private and public employers who purchase insurance for their employees, and individual consumers who need

[1] I have consulted with the DDAEO, Nina Hale. She concurs in this recommendation. Ms. Hale also consulted Janice Rodgers and she too concurs.

insurance. The merging parties are four of the five largest health insurance companies in the United States. If consummated, the challenged transactions will reduce that group to three, with each having almost twice the revenue of the next largest insurer. Competitive insurance markets are essential to providing Americans the affordable and high-quality healthcare they deserve.

The suit against Anthem and Cigna alleges that the merger would substantially eliminate competition for millions of consumers who receive commercial health insurance coverage from national employers across the United States. In addition, the complaint alleges that the elimination of Cigna, an innovative competitor, threatens competition among commercial insurers for the purchase of health care services from health care providers. The lawsuit against Aetna and Humana alleges that their merger would substantially reduce Medicare Advantage competition in more than 21 states, and will substantially reduce competition to sell commercial health insurance to individuals and families on the public exchanges in three states. These two mergers would restrict competition for health insurance products sold in markets across the country and would give tremendous power over the nation's health insurance industry to just three large companies. The lawsuits seek to preserve competition that keeps premiums down and drives insurers to collaborate with doctors and hospitals to provide better healthcare for all Americans.

As noted above, both cases are scheduled for trial with the first commencing in late November and the second in early December, each before a different judge. The trials will proceed concurrently. Discovery has commenced. The litigation teams are on a very tight schedule with well over a hundred depositions to take before the close of fact discovery in November, and expert reports are due shortly thereafter.

A-AAG Hesse's spouse is a partner practicing antitrust law and competition policy at In the summer of 2015, he was retained by

Neither A-AAG Hesse nor her spouse has a financial interest in the Health Insurance Matters. During the time frame that Ms. Hesse's husband was representing [redacted] Ms. Hesse had a financial interest in the matter because her husband held an equity interest in the firm's revenues, and his interest are imputed to her. Absent a waiver, Ms. Hesse's participation in the matter would have violated 18 U.S.C. §208(a). On August 10, 2016, however, Ms. Hesse's husband informed us in writing that he changed his compensation arrangement with the firm and that, effective August 1, 2016, [redacted]

II. Applicable Ethics Rules

Under 5 C.F.R. §2635.502, absent authorization, an official should not participate in a matter where an entity with which she has a "covered relationship" *is or represents a party*. A-AAG Hesse had a "covered relationship" with [redacted] under 5 C.F.R. §2635.502 (b)(iii) since her husband was serving as [redacted] attorney. However, the covered relationship did not involve the representation of a party, and the relationship has been terminated for purposes of the Health Insurance Matters. Nonetheless the fact remains that Hesse's spouse's client was involved to a degree in one of the Health Insurance Matters prior to the filing of the two lawsuits. That prior involvement, coupled with the spousal relationship involving the Division's most senior official, could create a lingering question regarding Ms. Hesse's impartiality were she to participate. In abundance of caution, therefore, we have applied the "catch-all" provision described in 5 C.F.R. §2635.502(a). That provision states that, if circumstances other than those specifically provided for in the regulation may cause an official's impartiality to be questioned, the Department should use the process provided in §502 to determine whether she should or should not participate in a particular matter.

The §502 process calls for a determination that the importance of the official's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. §2635.502(d). The factors to be considered include: the nature of the relationship involved; the effect that resolution of the matter would have upon the person involved in the relationship; the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion; the sensitivity of the matter; the difficulty of reassigning the matter to another employee; and adjustments that may be made in the employees duties that would reduce or eliminate the likelihood that a reasonable person would question her impartiality. *Id.*

III. Authorization Analysis

Since the beginning of the investigations, the Health Insurance Matters generated a substantial amount of public attention. During the investigation, [redacted] and others complained publicly that the proposed acquisitions present a substantial risk to competition on an unprecedented national scope. In addition, there have been Congressional hearings on the issues, and considerable reporting in the press.

Since the filing of the two lawsuits, the defendants have also taken steps try the case in the court of public opinion. In early August, Aetna and Humana announced that that they had agreed to divest certain Medicare Advantage assets to reduce competition concerns. In addition, Aetna announced that, because of $400 million in public exchange losses, it would be withdrawing from its 2017 planned expansions in public exchanges.

[redacted] submitted several detailed position papers, only one of which A-AAG's spouse helped to prepare, setting forth its reasons for the antitrust harm the mergers would cause. During the course of the investigation, Division staff engaged with [redacted] through its General Counsel. It is important to note, however, that other similarly situated entities also submitted their views of the proposed mergers. Thus, there are many other entities besides [redacted] that represented the views of health care providers, and others, before the Division.

I am confident that A-AAG Hesse would be impartial in these matters and I consider the risk that her views would be subject to scrutiny as a result of her spouse's past relationship with [redacted] to be small and manageable. Her husband's work with [redacted] on these matters is completed, and any other work that he might do for [redacted] would be on unrelated matters.

Any appearance issues are outweighed substantially by the value of A-AAG Hesse's participation to the Division. These are major cases that will raise significant substantive issues with long term implications for the Division's law enforcement efforts in the health care sector. Moreover, there will be a myriad of strategic litigation decisions that the Division's head should be able to weigh in on, if possible. [redacted] Finally, given the expedited schedules of the two cases and the resource requirements they entail, A-AAG Hesse should be involved in the decisions regarding how best to allocate the Division's limited resources to maximize our litigation efforts, and to ensure that the Division's other work is not impaired. A-AAG Hesse is a skilled antitrust practitioner with many years of experience. Given her long history with the Division, not only in this Front Office, but in her capacity as Chief of a litigating section, and as a staff attorney, her input and support would be of great value.

In addition, I have considered the specific factors enumerated in 5 C.F.R. §2635.502(d) in connection with [redacted] covered relationship, and I believe they weigh in favor of authorizing A-AAG Hesse's participation. The nature of the relationship involved – her spouse's client -- is one with a third-party, not a party. While the outcome of the matters, particularly the Anthem/Cigna matter, may have an effect on [redacted] is unlikely to be directly affected. [redacted] is not slated as a witness in the litigation. Now that the Department has challenged the mergers in court, the interests of [redacted] are aligned with those of the Department. Both the Department and [redacted] want to prevent the consummation of both mergers. Accordingly, a reasonable person with knowledge of the circumstances would have no reason to question the impartiality of Ms. Hesse's decisions that are intended to achieve that objective. In the unlikely event the

Division were to settle the cases, particularly the Anthem/Cigna matter, that outcome would go against [redacted] interests, as noted above. Even so, I do not believe a reasonable person would conclude that the Department would settle such a significant matter based on the position of [redacted] and its status as a client of her husband's.

The third and fourth factors weigh against A-AAG Hesse's participation because she would be the Acting AAG and thus the decision-maker on these two high-profile matters. Of course, in the unlikely event that settlement negotiations do re-open, Ms. Hesse would be the ultimate decision-maker. But that decision would be made in consultation with me (as the long standing Front Office manager and currently the most senior official on the two matters), and likely you as well, given the role that you have played in these matters. The fifth factor regarding difficulty of reassignment weighs in favor of A-AAG Hesse's participation. As you know, the Division is extremely busy, and when Ms. Hesse is unable to perform the duties of her office as Acting AAG because of recusal, the distribution of work to the other Front Office managers is challenging for everyone. Ideally, she should be able to perform the duties of her position, where appropriate.

Finally, adjustments to A-AAG Hesse's duties could be made to avoid communicating or meeting with [redacted] This may not be necessary, given that [redacted] is not likely to be a witness. However, [redacted] does keep in touch with the litigation team, and has a strong interest in the success of our challenges to these two mergers. In an abundance of caution, it is reasonable to restrict Ms. Hesse's encounters with [redacted] going forward, should any such opportunities present themselves.

IV. Recommendation

Depriving the Division of A-AAG Hesse's expertise, experience, and leadership seems disproportionate to the appearance issues at hand. Under the circumstances, I do not believe that a reasonable person would question the integrity of the Department's programs, operations, and law enforcement decisions based on her participation in the Health Insurance Matters, and that, should such questions arise, the Department's interest in her participation outweighs any possible concerns. Therefore, I recommend authorization, under 5 C.F.R. §2635.502, of A-AAG Hesse's participation in the Health Insurance Matters, with the restriction that she not communicate or meet with [redacted]

APPROVED: _____

DISAPPROVED: _____

DATE: 9-7-2016

Memorandum

Subject	Request for Authorization to Permit Creighton Macy to Participate in the Division's Two Health Insurance Merger cases: . *U.S. v. Aetna Inc. and Humana Inc.*, 1:16-cv-01494 (D.D.C. 2016); *U.S. v. Anthem Inc. and Cigna Corp.*, 1:16-cv-01494 (D.D.C. 2016)	Date	September 13, 2016
To	Renata B. Hesse Acting Assistant Attorney General	From	Nina B. Hale Deputy Designated Agency Ethics Official

I. Background

Pursuant to 5 C.F.R. Section 2635.502, I recommend that you authorize Creighton Macy, Chief of Staff and Senior Counsel in the Front Office, to participate in the Division's two civil cases involving health insurance -- *U.S. v. Aetna Inc. and Humana Inc.* and *U.S. v. Anthem Inc. and Cigna Corp.* (the Health Insurance Matters"). Possible recusal issues arise because Mr. Macy's former law firm, Wilson Sonsini Goodrich & Rosati ("Wilson Sonsini"), has appeared on behalf of various non-parties in these two litigations. In addition, one of the non-parties represented by Wilson Sonsini is a former client. Mr. Macy is still within his two year cooling off period.[1] Nonetheless, in my view, an authorization would be appropriate because the value of his participation outweighs any possible concern that a reasonable person may question the integrity of the Department's programs and operations.

The two lawsuits are proceeding concurrently in different courts with somewhat different theories of harm. The lawsuit against Anthem and Cigna ("*Anthem/Cigna*") alleges that the merger would substantially eliminate competition for millions of consumers who receive commercial health insurance coverage from national employers across the United States. In addition, the complaint alleges that the elimination of Cigna, an innovative competitor, threatens competition among commercial insurers for the purchase of health care services from health care providers. The lawsuit against Aetna and Humana ("*Aetna/Humana*") alleges that their merger would substantially reduce Medicare Advantage competition in more than 21 states, and will substantially reduce

[1] As Chief of Staff and Senior Counsel, Mr. Macy signed the Obama Ethics Pledge, which extends the usual one-year cooling off period for a second year.

competition to sell commercial health insurance to individuals and families on the public exchanges in three states.

Both cases are scheduled for trial this year, with the first commencing in late November and the second in early December. Discovery has commenced with a very tight schedule. Well over a hundred depositions are scheduled to take before the close of fact discovery in November, and expert reports are due shortly thereafter. Fact discovery has proved especially challenging because defendants have sought documents from another federal agency, Health and Human Services ("HHS").

Mr. Macy was an associate at Wilson Sonsini's Washington, DC office from October 2010 to June 2016. He joined the Division as the Front Office Chief of Staff on June 20, 2016.[2] Mr. Macy has completely severed his relationship with his former law firm and has no financial ties to it. Thus, Mr. Macy has no financial interest in these matters.

Wilson Sonsini represents three non-parties. [redacted] Division staff interviewed [redacted] There is a possibility that [redacted] will be deposed, but at this point, neither side has issued document subpoenas and [redacted] did not appear on the recently-exchanged preliminary witness lists.

While he was at Wilson Sonsini, Mr. Macy did a substantial amount of work for [redacted] but only in the area of antitrust. None of his work for [redacted] related to its provision of health insurance to its employees. Mr. Macy has no confidential information about this aspect of [redacted] business, nor any role it may have played in investigation leading to the filing of the *Anthem/Cigna* case.

[redacted] Defendants in the *Aetna/Humana* case issued [redacted] a document subpoena, so we issued one as well to ensure that we get all the documents defendants requested. Mr. Macy did not do any work for [redacted] when he was at Wilson Sonsini. Indeed, he was unaware that the company was a client of the firm. Accordingly, Mr. Macy has no confidential information about [redacted] does not appear on either side's preliminary witness list.

The third non-party is a yet-to-be-identified non-Anthem Blue Cross/Blue Shield Health Plan that has complained to the Division. A partner at Wilson Sonsini has made contact with the *Anthem/Cigna* litigation team on behalf of this Blue Cross/Blue Shield Plan, which is concerned that, post merger, its competitor Cigna will have access to

[2] Mr. Macy was a Trial Attorney at the Antitrust Division from 2007-2009.

information about its marketplace via its relationship with Anthem. This Blue Cross/Blue Shield Plan is one of 36 Blue Cross/Blue Shield plans that are not associated with Anthem, all of which have each received document subpoenas.

II. Applicable Ethics Rules

Under the ethics regulations, absent authorization, an official should not participate in a matter where an entity with which he has a "covered relationship" is or represents a "party." 5 C.F.R. §2635.502(a). An employee has a "covered relationship" with "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." 5 C.F.R. §2635.502(b)(iv). Thus, Mr. Macy has a covered relationship with Wilson Sonsini. Although the entities that Wilson Sonsini represents in the Health Insurance Matters are non-parties, the Department's practice is to use the process set forth in 5 C.F.R. §2635.502(d) to determine whether an official should participate in a matter such as this where a former firm is involved.[3]

Under §502(d), a decision that Mr. Macy should be permitted to participate is based on a determination, made in light of all the relevant circumstances, that the importance of his participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. In addition to the importance of the official's participation, the factors to be considered include: the nature of the relationship involved; the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship; the nature and importance of the employee's role in the matter, including the extent to which the employee will be called upon to exercise discretion; the sensitivity of the matter; the difficulty of reassigning the matter to another employee; and adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question his impartiality. C.F.R. §2635.502(d).

It is important to note that, pursuant to the Ethics Pledge, Executive Order 13490, Mr. Macy may not communicate with Wilson Sonsini or [redacted] until his two-year cooling off period expires in June 2017. Communications with Wilson Sonsini and [redacted] are unlikely to be necessary before then, and are not being sought with this authorization. The Ethics Pledge does not bar Mr. Macy's participation in these matters, since Wilson Sonsini is representing non parties. Accordingly, an "Ethics Pledge Waiver" is not necessary here.

[3] Mr. Macy also has a covered relationship with [redacted] since it is a person for whom he served as an attorney in the last year. The Department applies the same process to determine whether an official should participate where a former client may be significantly affected.

III. Authorization Analysis

As noted above, potential recusal issues arise because Mr. Macy's former law firm represents various non-parties that have received document subpoenas, and one of the third parties is a former client. I have considered carefully the specific factors set forth in 5 C.F.R. 2635.502(d), and believe they weigh in favor of authorizing Mr. Macy to participate.

The Health Insurance Matters have placed significant demands on the Division's attorneys and economists. At the time we filed the two Health Insurance Matters, each had relatively large teams of more than 40 lawyers and economists. However, the defense teams are many times larger. Both Health Insurance litigation teams have asked for an additional 20 attorneys to assist in their preparation for fast approaching discovery and trial deadlines. Attorneys are being drafted from all over the Division, as well as from other components, to take and defend depositions, review documents, [4] and to help develop the evidence on discrete issues.

As you know, the Front Office will be providing as much assistance to the litigation teams as possible. As Chief of Staff and Senior Counsel, Mr. Macy is responsible for managing the Front Office, including the four counsel. In addition, he is also responsible for overseeing, and staying well-informed regarding all cases and policy matters pending in the Division for purposes of briefing you and in his role as the main liaison with the Division's points of contact in the Office of Public Affairs, Office of the Associate Attorney General, Office of the Deputy Attorney General, and Office of the Attorney General, among others.

The value of, and need for, Mr. Macy's participation is high, and re-assignment of his duties is not practicable. Whenever Mr. Macy is unable to participate in a matter because of a conflict, the Front Office processes and his role are somewhat impaired, reducing his value to the Division and to you personally. Given the importance of the Health Insurance Matters, and their demands on the Division's resources, his inability to participate dramatically limits his usefulness as Chief of Staff. Both his workload decision-making and his liaising with other components regarding other matters are severely hampered by his lack of insight into the Health Insurance Matters. In addition, when recused, he also unable to participate substantively in a matter on an *ad hoc* basis, which he often does when the other counsel have too much to do. For example, if not recused, Mr. Macy could help with the HHS document review project or take/defend depositions. As you know, one counsel is going on paternity leave, increasing the need for Mr. Macy to have maximum flexibility both to manage the counsels' workload and if need be, take on some of the counsels' duties.

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[4] Indeed, attorneys in Operations and Office of Chief Legal Advisor, as well as the Front Office counsel, have just received notice of the potential need for them to help the litigation teams and other attorneys not already assigned to the teams to review over one million HHS documents for privilege within the next week.

Several of the regulation's other factors weigh slightly against Mr. Macy's participation, but not significantly. First, the nature of the relationship involves Mr. Macy's former firm and attorneys with whom he practiced only three months ago. But Mr. Macy was an associate who had worked there for six years, which reduces the risk that a reasonable person would question Mr. Macy's impartiality. Likewise, although the nature of his relationship with [redacted] was substantial insofar as the relative amount of work performed, Mr. Macy was an associate, not the relationship partner.

Second, the outcome of the Health Insurance Matters is not likely to affect significantly the financial interest of either Wilson Sonsini or [redacted] Wilson Sonsini is a large, national law firm with hundreds of clients. It is highly unlikely that Mr. Macy's actions could have a material impact on the firm's finances. The three clients that are implicated by the Health Insurance Matters are non-parties, whose involvement in the litigation is peripheral, and therefore likely to account for a small percentage of the firm's overall revenues. Similarly, [redacted] financial interest is not likely to be significantly affected by the outcome of the Health Insurance Matters. Of the two lawsuits, only the *Anthem/Cigna* lawsuit, which focuses on the merger's likely effect on national employers, has the potential to affect [redacted] but not significantly. A change in the price tha[redacted] pays for health insurance for its employees is not likely to directly impact its overall value as a company. Moreover, as a national employer, [redacted] interest in the outcome of the lawsuit is aligned with the Department's litigation stance of seeking to prevent the merger's consummation, which reduces the risk that a reasonable person would question Mr. Macy's impartiality regarding his efforts intended to help the Department win at trial.

The third factor, the "sensitivity of the matter," weighs against Mr. Macy's participation. The Health Insurance Matters are unquestionably high profile in an important sector of healthcare and deal with complex and relatively novel antitrust theories. The two cases have already attracted considerable attention, and will surely continue to do so as the trial dates approach.

On the other hand, as to the factor looking at the "nature and importance of the employee's role," Mr. Macy will be one of scores of attorneys participating on the matter but largely in a resource management and coordination role. He will have some degree of discretion in that capacity, but Section management will be much more involved in such decision-making and management of the matter. Of course, final decisions rest with you, as Acting AAG.

On balance, I believe that the value of Mr. Macy's participation outweighs the appearance concerns, particularly considering the protective measures in place because of his pre-existing Ethics Pledge obligations.

IV. Recommendation

Under the circumstances, I do not believe a reasonable person would question the integrity of the Department's programs, operations, and law enforcement decisions based

on Mr. Macy's participation, and that, should such questions arise, the Department's interest in his participation outweighs any possible concerns. Therefore, I recommend authorization, under 5 C.F.R. Section 2635.502, of Mr. Macy's participation in the Division's Health Insurance Matters, on the condition that he has no contact or communications with Wilson Sonsini or [redacted]

APPROVED: _____

DISAPPROVED: _____

DATE: 9/19/2016

From: Schools, Scott (ODAG)
To: Shaw, Cynthia K. (JMD)
Subject: Re: Francisco authorization/Jennings v Rodriguez
Date: Sunday, February 19, 2017 12:34:57 PM

Thanks, Cindy. I grant the waiver.

On Feb 19, 2017, at 10:49 AM, Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov> wrote:

> Hi Scott,
> Here is another authorization for Noel; a different immigration case but one involving some of the same issues as those in the immigration order and, again, needed due to a Jones Day amicus brief being filed. I recommend authorization. [redacted]
> Thanks,
> Cindy

I recommend that you authorize Noel Francisco to participate in *Jennings v. Rodriguez*, which is pending before the U.S. Supreme Court. Petitioners are federal employees in their official capacity, including the Attorney General; Respondents are a class of noncitizens who have been incarcerated while awaiting removal proceedings. At issue is whether aliens have a right to a bond hearing when they are subject to detention that lasts six months; arguments for the United States include the proposition that the case is governed by the plenary power doctrine of immigration law, which immunizes immigration laws from judicial review. Oral argument was held November 30, 2016. Subsequently, the Court directed the parties to file supplemental briefs on the constitutional issues, which they did on January 31, 2017. Reply briefs are due February 21, 2017. There is a possibility that the Court will order a re-argument in April 2017.

Mr. Francisco was, until January 20, 2017, a partner at Jones Day. Jones Day filed an amicus brief in the case in support of Respondents on October 24, 2016. Mr. Francisco did not participate in writing the amicus brief, and in fact did not know of the brief, while at the law firm.
Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.501 et seq.), an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. An employee has a covered relationship with a former employer and with former clients for one year after such service ends. An amicus is not a party; therefore Mr. Francisco does not have a covered relationship with Jones Day under Sec. 2635.501(a) since Jones Day does not represent a party. The long-standing practice of the Departmental Ethics Office, however, has been to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances

other than those specifically described in this section" would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d).

An authorization to participate in a matter that would otherwise require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency's programs and operations. 5 CFR 2635.502(d). Assuming that a reasonable person could question Mr. Francisco's impartiality in cases in which his former employer represents amici, I believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest is that of a former partner to a former law firm. However, Jones Day's only role in *Jennings v. Rodriguez* is representing 11 non-profit organizations that represent immigrant detainees ("detained legal services providers"). While the amicus brief offers individual examples of the hardships experienced by the amici's clients caused by extended detention, the amici do not represent parties in the litigation, nor do they appeal to have a financial interest in the resolution of the litigation. Neither does Mr. Francisco have a financial interest in Jones Day, and therefore no financial interest in its representation in this case. The effect that resolution of the cases will have on Jones Day's financial interests is unclear but appears negligible. Resolution of the case will most likely not have a financial impact on the legal service providers, although it will have personal impact on their clients. The legal services providers' argument, however, is not that any identified individual be granted a bond hearing, but that the Constitution requires bond hearings for certain aliens, specifically, lawful permanent residents. While the financial interest of Mr. Francisco's former law firm and its clients in resolution of the case is low, the nature and importance of Mr. Francisco's role in the matter is high. As the Acting Solicitor General, he is leading the Department's legal strategy in its immigration cases. It benefits the government to have Mr. Francisco provide oversight and continuity in the many immigration cases that are coming before this Court and the appellate courts, many of which include the plenary power doctrine. Moreover, to require recusal when the source of the conflict is an academic amicus brief in a case in which the former firm or its client has no direct financial interest seems disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco's participation outweighs the concern that a reasonable person would question the Department's integrity in this instance. We recommend that you authorize his participation.

Your approval for this authorization may be given in a reply email.

Cynthia K. Shaw
Director
Departmental Ethics Office

U.S. Department of Justice
145 N Street, NE
Washington, DC 20530
(202) 514-8196

From:	Francisco, Noel (OSG)
To:	Shaw, Cynthia K. (JMD)
Subject:	RE: authorization for Noel
Date:	Thursday, February 09, 2017 7:58:58 PM

Thank you.

From: Shaw, Cynthia K. (JMD)
Sent: Thursday, February 9, 2017 6:23 PM
To: Francisco, Noel (OSG) <nfrancisco@jmd.usdoj.gov>
Subject: FW: authorization for Noel

You are authorized to proceed.

From: Schools, Scott (ODAG)
Sent: Thursday, February 09, 2017 6:17 PM
To: Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov>
Subject: RE: authorization for Noel

Thanks, Cindy. I agree with your analysis and grant the waiver.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Thursday, February 9, 2017 6:07 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: authorization for Noel

Scott,
Below is another authorization for Noel. Happy to discuss. 514-8196.
Another one will follow for [redacted] and Chad Readler.
Cindy

I recommend that you authorize Noel Francisco to continue to work on *Washington and Minnesota v. Trump* and related immigration litigation. The case is now pending before the U.S. Court of Appeals for the Ninth Circuit. The case is a challenge to implementation of the President's January 27, 2017, Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States ("immigration order"). Other immigration cases nationwide also challenge the immigration order. On February 6, 2017, you authorized participation in the Washington case based on the exigencies of the circumstances. I believe, even without the existing exigencies, that a continued authorization is appropriate.

Jones Day filed an amicus brief in the *Washington* case on behalf of law professors on February 6, 2017. Jones Day will submit a more detailed briefing February 13, 2017, in a related case, *Darweesh v. Trump*, which is another challenge to the order, also on behalf of the law professors. Responding to the expedited hearing before the Ninth Circuit on February 7,

2017, in *Washington*, the amici urged the court, based on constitutional concerns, to deny the Government's motion for a stay of the Temporary Restraining Order preventing implementation of the immigration order. Our understanding is that the law professors do not have a personal financial or other interest in the outcome of the cases, but rather are submitting their expert academic views to the courts.
Mr. Francisco was, until January 20, 2017, a partner at Jones Day. Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.502), an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. An employee has a covered relationship with a former employer and with former clients for one year after such service ends.

An amicus is not a party, therefore Mr. Francisco does not have a covered relationship with Jones Day under sec. 2635.501(a) since Jones Day does not represent a party. The long-standing practice of the Departmental Ethics Office has been to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section [for example, the existence of a covered relationship]" would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d).
An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency's programs and operations. 5 CFR 2635.502(d). Assuming that a reasonable person could question Mr. Francisco's impartiality in cases in which his former employer represents amici, we believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest is that of a former partner to a former law firm. However, the only role that Jones Day now plays in the immigration cases is representing a group of law professors in an amicus brief. The representation began after Mr. Francisco left the firm. Mr. Francisco does not have a financial interest in the firm, and therefore no financial interest in its representation in this case. The effect that resolution of the cases will have on Jones Day's financial interests is unclear but appears negligible. Resolution of the cases will most likely have no effect at all on the financial or personal interests of the law professors. At issue in their brief is not financial harm to themselves or harm to their families, but rather constitutional concerns. The nature and importance of Mr. Francisco's role in the matter is high. As the Acting Solicitor General, he is leading the Department's legal strategy in these extremely high profile cases. In addition, these cases are proceeding at a rapid pace, requiring the government to have a point person ready to lead the government's defense. It benefits the government to have Mr. Francisco provide oversight and continuity in the highly fluid legal environment surrounding the immigration order. Recusing him from these matters would be very disruptive to the government, and reassignment is not a realistic alternative. Moreover, to require recusal when the source of the conflict is an academic amicus brief, in a case where many other entities have filed briefs arguing a variety of harms, seems disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco's participation outweighs the concern that a reasonable person would question the Department's integrity in this instance.

We recommend that you authorize his participation, so long as the source of the conflict is Jones Day's filing of amicus briefs on behalf of amici who will not be directly affected, financially or personally, by resolution of the matter.
Your approval for this authorization may be given in a reply email.

Cynthia K. Shaw
Director
Departmental Ethics Office
U.S. Department of Justice
145 N Street, NE
Washington, DC 20530
(202) 514-8196

From: Schools, Scott (ODAG)
To: Shaw, Cynthia K. (JMD)
Subject: RE: Murray authorization
Date: Sunday, February 12, 2017 5:40:19 PM

Cindy:

Thanks for the below. I grant the waiver.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Thursday, February 9, 2017 7:36 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: Murray authorization

Scott, I'm sending this in case you want to consider an authorization for Mike Murray. If you want to discuss and I'm not at 514-8196, you can call my cell at:
[redacted]
Cindy

I recommend that you authorize Michael Murray to continue to work on *Washington and Minnesota v. Trump* and related immigration litigation. The case is a challenge to implementation of the President's January 27, 2017, Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States ("immigration order"). Other immigration cases nationwide also challenge the immigration order. On February 6, 2017, you authorized participation in the Washington case based on the exigencies of the circumstances. I believe, even without the existing exigencies, that a continued authorization is appropriate.

Jones Day filed an amicus brief in the *Washington* case on behalf of law professors on February 6, 2017. Jones Day will submit a more detailed briefing February 13, 2017, in a related case, *Darweesh v. Trump*, which is another challenge to the order, also on behalf of the law professors. Responding to the expedited hearing before the Ninth Circuit on February 7, 2017, in *Washington*, the amici urged the court, based on constitutional concerns, to deny the Government's motion for a stay of the Temporary Restraining Order preventing implementation of the immigration order. Our understanding is that the law professors do not have a personal financial or other interest in the outcome of the cases, but rather are submitting their expert academic views to the courts.

Mr. Murray was, until January 23, 2017, an associate at Jones Day. Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.502), an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. An employee has a covered relationship with a former employer and with former clients for one year after such service ends.

An amicus is not a party, therefore Mr. Murray does not have a covered relationship with Jones Day under sec. 2635.501(a) since Jones Day does not represent a party. The long-

standing practice of the Departmental Ethics Office has been to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section [for example, the existence of a covered relationship]" would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d).

An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency's programs and operations. 5 CFR 2635.502(d). Assuming that a reasonable person could question Mr. Murray's impartiality in cases in which his former employer represents amici, we believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest is that of a former partner to a former law firm. However, the only role that Jones Day now plays in the immigration cases is representing a group of law professors in an amicus brief. The representation began after Mr. Readler left the firm. He does not have a financial interest in the firm, and therefore has no financial interest in its representation in this case. The effect that resolution of the cases will have on Jones Day's financial interests is unclear but appears negligible. Resolution of the cases will most likely have no effect at all on the financial or personal interests of the law professors. At issue in their brief is not financial harm to themselves or harm to their families, but rather constitutional concerns.

The nature and importance of Mr. Murray's role in the matter is significant. As Counsel in the Office of the Deputy Attorney General, he is helping to advance the Department's legal strategy in these extremely high profile cases. In addition, these cases are proceeding at a rapid pace, requiring the government to have a point person ready to lead the government's defense. It benefits the government to have Mr. Murray provide continued assistance in the highly fluid legal environment surrounding the immigration order. Recusing him from these matters would be disruptive to the government. Moreover, to require recusal when the source of the conflict is an academic amicus brief, in a case where many other entities have filed briefs arguing a variety of harms, seems disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Murray's participation outweighs the concern that a reasonable person would question the Department's integrity in this instance. We recommend that you authorize his participation, so long as the source of the conflict is Jones Day's filing of amicus briefs on behalf of amici who will not be directly affected, financially or personally, by resolution of the matter.

Your approval for this authorization may be given in a reply email.

Cynthia K. Shaw
Director
Departmental Ethics Office
U.S. Department of Justice

145 N Street, NE
Washington, DC 20530
(202) 514-8196

From: Schools, Scott (ODAG)
To: Shaw, Cynthia K. (JMD)
Subject: RE: Washington CA9 appeal - Newly filed amicus briefs
Date: Monday, February 06, 2017 4:31:29 PM

Cindy:

Given the exigencies of the circumstances and the difficulty with replacing the services being provided by Mike and Chad in connection with the brief which is due in 1.5 hours and for the other reasons stated by you, I approve their continued participation in the drafting of the brief.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Monday, February 6, 2017 4:22 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: FW: Washington CA9 appeal - Newly filed amicus briefs

Scott,
Two additional former Jones Day people—Murray and Readler—have requested authorizations. Given the time constraints, I recommend authorization. [redacted]
Cindy

I recommend that you authorize Michael Murray and Chad Readler to work on the brief for *Washington and Minnesota v. Trump* to be submitted at 6:00 p.m. today in the U.S. Court of Appeals for the Ninth Circuit.

The Department has just learned that Jones Day has filed an amicus brief in the case. Both Mr. Murray and Mr. Readler have a covered relationship with Jones Day; both were recently attorneys in that law firm in the last year. Under 5 CFR 2635.502, an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. A filer of an amicus brief is not a party to a matter, but does create an appearance of loss of impartiality that is covered by the regulation's "catch-all" provision at 2635.502(a)(2).

An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 CFR 2635.502(d).

I evaluate the regulation's factors as follows:

1. The nature of the relationship is a former attorney to a former law firm.
2. The effect of the resolution of the matter on Jones Day's financial interests is unclear. The amicus is being filed on behalf of law professors, whose interests may be more academic than financial.

3. The nature and importance of Mssrs. Murray and Readler is extremely high, given that they have been working on the matter for the past 12 hours and the work product is due within an hour and a half. To remove them from this matter at this time is extremely disruptive to the government.
4. The sensitivity of the matter is extremely high given the national attention given to the case.
5. The difficulty of reassigning the matter is high, given that the work requires being finished within an extremely tight timeframe.
6. Adjustments that may be made in the employee's duties to eliminate the likelihood that a reasonable person would question his impartiality are being made in conformity with the January 28, 2017 Executive Order, which disallows communications with former employers. Neither Mr. Murray nor Mr. Readler may communicate with Jones Day or sign the brief, which would constitute making an appearance or communication.

In sum, the exigencies of the moment compel a conclusion that Mssrs. Murray and Readler continue working on the brief due today. Those exigencies outweigh the concern that a reasonable person may question the Department's integrity in this instance.

Your approval for this authorization may be given in a reply email.

From: Murray, Michael (ODAG)
Sent: Monday, February 06, 2017 4:00 PM
To: Francisco, Noel (OSG) <nfrancisco@jmd.usdoj.gov>; Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov>
Cc: Readler, Chad A. (CIV) <creadler@CIV.USDOJ.GOV>
Subject: RE: Washington CA9 appeal - Newly filed amicus briefs

Thank you Noel. Cynthia, please let me know if you need anything else from me on this issue.

From: Francisco, Noel (OSG)
Sent: Monday, February 6, 2017 3:30 PM
To: Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov>
Cc: Readler, Chad A. (CIV) <creadler@CIV.USDOJ.GOV>; Murray, Michael (ODAG) <mmurray@jmd.usdoj.gov>
Subject: FW: Washington CA9 appeal - Newly filed amicus briefs

Cynthia,

Chad Readler and Mike Murray need the same approval that you are preparing for me.

Thanks.

From: Francisco, Noel (OSG)
Sent: Monday, February 6, 2017 3:27 PM
To: Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov>

Subject: FW: Washington CA9 appeal - Newly filed amicus briefs

See second brief for scholars.

From: [redacted]
Sent: Monday, February 6, 2017 2:29 PM
To: Francisco, Noel (OSG) <nfrancisco@jmd.usdoj.gov>; [redacted]
Subject: Washington CA9 appeal - Newly filed amicus briefs

Two new amicus briefs just got filed. Attached.

I hereby authorize Chad A. Readler, pursuant to 5 C.F.R. § 2635.502(d), to participate in *PHH Corp. v. Consumer Financial Protection Bureau*, 15-1177 (D.C. Cir.), based upon my determination that the interest of the Government in his participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations.

Jesse Panuccio
Acting Associate Attorney General

2/23, 2017

I hereby authorize Chad A. Readler, pursuant to 5 C.F.R. § 2635.502(d), to participate in *American Insurance Association and National Association of Mutual Insurance Companies v. HUD* (D.D.C.), based upon my determination that the interest of the Government in his participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations.

Jesse Panuccio
Acting Associate Attorney General

April 18, 2017

From: Schools, Scott (ODAG)
To: Shaw, Cynthia K. (JMD)
Subject: RE: 502 authorization for Noel Francisco
Date: Monday, February 06, 2017 4:30:06 PM

I approve Mr. Francisco's participation in the brief due at 6 pm today for the reasons you stated. In particular, the exigencies of the matter and his prior extensive work on the matter make it impractical to reassign the matter at this point. For these reasons, and the other reasons stated in your email, I approve his continued work on the brief.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Monday, February 6, 2017 4:11 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: 502 authorization for Noel Francisco

I recommend that you authorize Noel Francisco to work on the brief for *Washington and Minnesota v. Trump* to be submitted at 6:00 p.m. today in the U.S. Court of Appeals for the Ninth Circuit.

The Department has just learned that Jones Day has filed an amicus brief in the case. Mr. Francisco has a covered relationship with Jones Day; he was an attorney in that law firm in the last year. Under 5 CFR 2635.502, an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. A filer of an amicus brief is not a party to a matter, but does create an appearance of loss of impartiality that is covered by the regulation's "catch-all" provision at 2635.502(a)(2).

An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 CFR 2635.502(d).

I evaluate the regulation's factors as follows:

1. The nature of the relationship is a former partner to a former law firm.
2. The effect of the resolution of the matter on Jones Day's financial interests is unclear. The amicus is being filed on behalf of law professors, whose interests may be more academic than financial.
3. The nature and importance of Mr. Francisco's role in the matter is extremely high, given that he has been working on the matter for the past 12 hours and the work product is due within an hour and a half. To take him off this matter at this time is extremely disruptive to the government.
4. The sensitivity of the matter is extremely high given the national attention given to the case.
5. The difficulty of reassigning the matter is high, given that Mr. Francisco has led the development of this brief during the tight timeframe given for its submission.
6. Adjustments that may be made in the employee's duties to eliminate the likelihood that a reasonable person would question his impartiality are being made in conformity

with the January 28, 2017 Executive Order, which disallows communications with former employers. Mr. Francisco has been instructed not to communicate with Jones Day or sign the brief, which would constitute making an appearance or communication.

In sum, the exigencies of the moment compel a conclusion that Mr. Francisco continue working on the brief due today. Those exigencies outweigh the concern that a reasonable person may question the Department's integrity in this instance.

Your approval for this authorization may be given in a reply email.

Cindy

Cynthia K. Shaw
Director
Departmental Ethics Office
U.S. Department of Justice
145 N Street, NE
Washington, DC 20530
(202) 514-8196

From:	Shaw, Cynthia K. (JMD)
To:	Readler, Chad A. (CIV)
Subject:	FW: Readler authorization
Date:	Wednesday, February 15, 2017 10:56:00 AM

From: Schools, Scott (ODAG)
Sent: Sunday, February 12, 2017 5:41 PM
To: Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov>
Subject: RE: Readler authorization

Cindy:

Thank you for the recommendation. I concur and grant the waiver.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Thursday, February 9, 2017 6:32 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: Readler authorization

Scott,

I recommend that you Chad Readler to continue to work on *Washington and Minnesota v. Trump* and related immigration litigation. The case is a challenge to implementation of the President's January 27, 2017, Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States ("immigration order"). Other immigration cases nationwide also challenge the immigration order. On February 6, 2017, you authorized participation in the Washington case based on the exigencies of the circumstances. I believe, even without the existing exigencies, that a continued authorization is appropriate.

Jones Day filed an amicus brief in the *Washington* case on behalf of law professors on February 6, 2017. Jones Day will submit a more detailed briefing February 13, 2017, in a related case, *Darweesh v. Trump*, which is another challenge to the order, also on behalf of the law professors. Responding to the expedited hearing before the Ninth Circuit on February 7, 2017, in *Washington*, the amici urged the court, based on constitutional concerns, to deny the Government's motion for a stay of the Temporary Restraining Order preventing implementation of the immigration order. Our understanding is that the law professors do not have a personal financial or other interest in the outcome of the cases, but rather are submitting their expert academic views to the courts.

Mr. Readler was, until January 20, 2017, a partner at Jones Day. Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.502), an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. An employee has a covered relationship with a former employer and with former clients for one year after such service ends.

An amicus is not a party, therefore Mr. Readler does not have a covered relationship with Jones Day under sec. 2635.501(a) since Jones Day does not represent a party. The long-standing practice of the Departmental Ethics Office has been to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section [for example, the existence of a covered relationship]" would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d).

An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency's programs and operations. 5 CFR 2635.502(d). Assuming that a reasonable person could question Mr. Readler's impartiality in cases in which his former employer represents amici, we believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest is that of a former partner to a former law firm. However, the only role that Jones Day now plays in the immigration cases is representing a group of law professors in an amicus brief. The representation began after Mr. Readler left the firm. He does not have a financial interest in the firm, and therefore has no financial interest in its representation in this case. The effect that resolution of the cases will have on Jones Day's financial interests is unclear but appears negligible. Resolution of the cases will most likely have no effect at all on the financial or personal interests of the law professors. At issue in their brief is not financial harm to themselves or harm to their families, but rather constitutional concerns.

The nature and importance of Mr. Readler's role in the matter is high. As the Acting Assistant Attorney General, Civil Division, he is helping to lead the Department's legal strategy in these extremely high profile cases. In addition, these cases are proceeding at a rapid pace, requiring the government to have a point person ready to lead the government's defense. It benefits the government to have Mr. Readler provide oversight and continuity in the highly fluid legal environment surrounding the immigration order. Recusing him from these matters would be very disruptive to the government, and reassignment is not a realistic alternative. Moreover, to require recusal when the source of the conflict is an academic amicus brief, in a case where many other entities have filed briefs arguing a variety of harms, seems disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Readler's participation outweighs the concern that a reasonable person would question the Department's integrity in this instance. We recommend that you authorize his participation, so long as the source of the conflict is Jones Day's filing of amicus briefs on behalf of amici who will not be directly affected, financially or personally, by resolution of the matter.

Your approval for this authorization may be given in a reply email.

Cynthia K. Shaw
Director
Departmental Ethics Office
U.S. Department of Justice
145 N Street, NE
Washington, DC 20530
(202) 514-8196

MEMORANDUM FOR AMANDA J. PEARLMAN

FROM: Jocelyn Samuels
Director
Office for Civil Rights

SUBJECT: Authorization to Participate in June 22 Meeting Involving Spouse's Employer

The purpose of this memorandum is to authorize you, under 5 C.F.R. § 2635.502(d), to participate in a stakeholder meeting on June 22, 2016, involving, as a party or party representative, the National Center for Transgender Equality (NCTE). Your spouse is currently employed by NCTE. NCTE is a non-profit 501(c)(3) social justice organization with a mission to end discrimination and violence against transgender people through education and advocacy.

DISCUSSION

Under the Standards of Ethical Conduct of Employees of the Executive Branch, a Federal employee may not participate in a particular matter which involves specific parties if one of the parties is, or is represented by, an entity with which the employee has a "covered relationship," as defined in the regulations, and where the circumstances would cause a reasonable person to question the employee's impartiality in the matter. "Covered relationships" include persons or entities for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. 5 C.F.R. § 2635.502(b)(1)(iii). This requirement of disqualification only applies to "particular matters involving specific parties" and not to "particular matters of general applicability," such as broad policy matters. It applies, for example, to grant awards and contracts and other matters involving a specific request, determination or ruling, but not to legislation or regulations that might affect an entity as part of a group. An exception to this rule is available if the interest of the Federal Government in an employee's participation outweighs concern about a potential appearance of lack of integrity in the agency's program and operations. 5 C.F.R. § 2635.502(d).

Your spouse is an employee of NCTE. The meeting with NCTE and other stakeholders interested in LBGT issues is a particular matter involving specific parties. In order for you to participate in a particular matter in which NCTE is a party or represents a party, I must first authorize your participation after determining – in light of all the circumstances – that the interest of the Government in your participation outweighs the concern that a reasonable person may question the integrity of the programs and operations of the Department of Health and Human Services (HHS), Office for Civil Rights (OCR).

I authorized you to participate in a similar meeting on February 26, 2016. HHS's Office of Intergovernmental and External Affairs (IEA) organized the upcoming meeting and devised the invitation list on behalf of the Secretary and the LGBT Issues Coordinating Committee [hereinafter "Committee"]. IEA and the Committee often invite stakeholder groups, including NCTE, to discuss LGBT issues related to recent HHS programs and operations with Departmental leadership. NCTE will send a representative, other than your spouse, to this meeting.

Secretary Burwell will lead this meeting by summarizing recent HHS policy changes impacting the LBGT community. Meeting participants can then provide feedback on implementing those policies. IEA expects that meeting participants will primarily discuss Section 1557 of the Affordable Care Act (ACA) [hereinafter "Section 1557"]. Section 1557 extended civil rights protections banning sex discrimination to health programs and activities. Previously, civil rights laws enforced by OCR barred discrimination based only on race, color, national origin, disability, or age. OCR is responsible for enforcing Section 1557 with respect to covered programs. As a result, OCR recently issued a final rule implementing Section 1557. While OCR has already been accepting complaints under the ACA, the implementing regulations make clear that individuals can seek legal remedies for discrimination under Section 1557.

For the past several years, OCR and other HHS officials have met with many stakeholders, including NCTE, to discuss the potential practical effects of implementing Section 1557. The Department issued the final rule this year. The final rule extends all civil rights obligations to the Health Insurance Marketplaces and HHS health programs and activities, and clarifies the standards HHS applies in implementing Section 1557 across all bases of discrimination.

As the Agency Designee responsible for considering whether a relationship would cause a reasonable person to question your impartiality, I may consider the following factors in determining whether to authorize your participation: the nature of the relationship involved; the effect that resolution of the matter would have on the finances of NCTE; the nature and importance of your role in the matter; the sensitivity of the matter; the difficulty in reassigning the matter to another employee; and adjustments that may be made in your duties that would eliminate the likelihood that a reasonable person would question your impartiality. 5 C.F.R. § 2635.502(d). Each factor is considered below.

1. *Nature of the relationship.* Your spouse is salaried employee at NCTE.[1] Non-profit 501(c)(3) organizations carry less of the danger of the perception of bias that 5 C.F.R. § 2635.502 was meant to prevent, than private, for-profit entities.

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[1] You are currently approved to provide outside volunteer legal services to Transgender Legal Advocates of Washington (TransLAW). TransLAW is an unincorporated non-profit organization. For purposes of IRS recognition status, NCTE is a fiscal sponsor for TransLAW. As an active participant with TransLAW, you have a "covered relationship" with TransLAW under 5 C.F.R. § 2635.502(b)(1)(v). It is unlikely that your active participation with TransLAW creates an additional covered relationship with NCTE. Nevertheless, your relationship with NCTE stemming from your outside activity with TransLAW is so attenuated that the circumstances would not cause a reasonable person to question your impartiality in the matter.

2. *Effect of the matter on the finances of NCTE.* The regulations implementing Section 1557 and other relevant HHS policies do not affect the financial interests of NCTE. NCTE is a 501(c)(3) non-profit organization. The regulations will not affect funding or other pecuniary interests of NCTE.

3. *Nature and importance of your role.* As Chief of Staff of OCR, you coordinate the Department's efforts to implement several of HHS's policies affecting the LGBT community, including Section 1557. You act as a liaison with stakeholders and other HHS components to coordinate input on these policies. You participation in this meeting is particularly crucial since Section 1557 will be the focus.

4. *Sensitivity of the matter.* OCR has already issued the final rule so the meeting is unlikely to significantly affect Agency policy with respect to Section 1557. HHS continues to offer stakeholders several formal and informal opportunities to comment on HHS programs and operations affecting the LGBT community. HHS is willing to extend invitations to other stakeholders for future meetings.

5. *Difficulty of reassigning the matter.* While it may be possible to assign another OCR employee to participate in your place, you are most familiar with previous stakeholder input and the Department's coordinated efforts to implement Section 1557. Furthermore, no other OCR staff member familiar with Section 1557 has your same level of seniority, which is required to participate in a meeting with the Secretary on this topic. This official duty cannot be readily assigned to another employee without significant cost to the efficiency of implementing HHS policy. *See* 5 C.F.R. § 2635.502(d)(5).

6. *Adjustments to your duties.* Because of your unique knowledge of the Department's coordinated efforts regarding Section 1557, it would be both difficult and impractical to adjust your job duties. The determination and authorization provisions of the regulations were written in recognition of the reality that we cannot have unreasonably restrictive requirements of disqualification that prevent the use of the most qualified employees in matters such as this.

DECISION:

Based upon my determination, made in accordance with 5 C.F.R. § 2635.502(d), that in light of all the circumstances, the interest of the Government in your participation in the stakeholder meeting involving NCTE, your spouse's employer, as a party or party representative outweighs concern about a potential appearance of lack of integrity, the authorization as described above, is hereby granted. The authorization is expressly limited to the meeting on June 22, 2016.

Jocelyn Samuels

6/22/16
Date

cc: Kelly Selesnick, OGC/Ethics

Fischmann, Elizabeth (HHS/OGC)

From: Fischmann, Elizabeth (HHS/OGC)
Sent: Tuesday, March 14, 2017 1:18 PM
To: Verma, Seema (CMS/OA); Brookes, Brady (CMS/OA)
Cc: Benson, Paul-Jon (HHS/OGC)
Subject: authorization for conference call

Under 5 C.F.R. 2635.502, Ms. Verma is subject to recusal requirements for specific party matters in which the states of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, or Virginia are parties or represent parties. In light of the factors provided at 5 C.F.R. 2635.502(d), I am authorizing her participation as CMS Administrator in the conference call and meetings with state governors occurring today, Tuesday, March 14, 2017. The nature of the conference call and the factors, considered together, would not lead a reasonable person to question Ms. Verma's impartiality in this matter.

Elizabeth J. Fischmann

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

TO: Seema Verma, Administrator, Centers for Medicare & Medicaid Services

FROM: Thomas E. Price, M.D., Secretary, Department of Health & Human Services

SUBJECT: Limited Authorization to Participate in Matters Involving Former State Government Clients

The purpose of this memorandum is to authorize you, pursuant to 5 C.F.R. § 2635.502(d), to participate in specific-party matters where the States of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, or Virginia is a party, or represents a party, to a matter. These state governments were previously your clients through your consultancy, SVC Inc. After weighing the factors articulated in section 502(d), and consulting with the Designated Agency Ethics Official for the Department, I have determined that the governmental interest in your participation in these specific party matters outweighs any countervailing appearance concerns and authorize your participation in these particular matters as described in more detail, and subject to the limitations, below.

AUTHORIZATION LIMITATIONS

You remain subject to the application of the prior employer and prior client recusal requirements of 5 C.F.R. § 2635.502 with respect to matters involving prior employers or clients other than the States of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, or Virginia; thus, you would still have a recusal requirement from matters involving SVC Inc. and any other clients for whom you provided services.[1] Regarding Indiana, Kentucky and Iowa, you indicated that you worked personally and substantially on the Medicaid Section 1115(a) Waivers for newly eligible adults in Indiana and Kentucky as well as the managed care waiver for Iowa. Given your involvement with these specific party matters, you raised concerns that a reasonable person might question your impartiality on these sensitive matters. Under these circumstances, I have determined that this authorization does not apply to any specific party matters related to the Indiana, Iowa, and Kentucky waivers on which you personally worked. Additionally, this limited authorization does not affect your ongoing recusal obligation arising from your spouse's financial interests, including his financial interest in the Indiana Health Group. Finally, this limited authorization does not affect your obligation otherwise to comply with all other provisions of the Standards of Conduct for Employees of the Executive Branch and the HHS Supplemental Ethics Regulations.

[1] Please note that the Ethics Pledge (Executive Order 13770) separately requires recusal from specific party matters involving a former employer or former clients to whom you provided services in the two years prior to your appointment. This recusal obligation extends for two years from the date of your appointment. However, state and local governments, as former employers or clients, are excluded from the restrictions of the Ethics Pledge under Sec. 2(j) and controlling Office of Government Ethics guidance (DO-09-011).

BACKGROUND

On March 13, 2017, you were confirmed as the Administrator for the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services (HHS). CMS oversees the federal government's Medicare and Medicaid programs, which provide healthcare to almost one in every three Americans. Medicare provides health insurance to more than 55.5 million elderly and disabled Americans. Medicaid, a joint federal-state program, provides health coverage for some 69 million low-income persons, including 24 million children, and nursing home coverage for low-income elderly. CMS also oversees the State Children's Health Insurance Program (CHIP) that covers more than 8.4 million children.

As Administrator, you are responsible for directing the implementation of the Administration's policies for health care reform at CMS, including health care financing programs and health care policies more generally. Your duties include establishing overall program goals and objectives and developing policies and standards to accomplish these goals. You are responsible for the development and implementation of health quality and safety standards, including evaluation of their impact on utilization, quality, and cost of health care services. You manage the development of methods, systems, procedures and specifications for Medicare claims processing and improvement to program management. Finally, you have overall responsibility for the development, coordination, evaluation, review and promulgation of CMS policy related to eligibility, coverage of benefits, and reimbursement under the jurisdiction of CMS.

During the one year period immediately preceding your appointment, you provided consulting services to the States of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, and Virginia through SVC Inc. concerning these states' Medicaid programs and health care policies. You provided support on Medicaid reform programs including waivers and coverage expansion under the Affordable Care Act (ACA). More specifically, you were the architect of the Health Indiana Plan (HIP) and HIP 2.0, a consumer directed Medicaid program. You aided Indiana in implementing legislation, developing the federal waiver, and supporting federal negotiations in implementation of this plan.

While the majority of your work as CMS Administrator is at a policy-setting level, you may become involved in particular matters involving specific parties, including your former state clients. To effectively carry out your function as CMS Administrator, you will necessarily work with states, other HHS and federal agencies, and non-governmental organizations and industry stakeholders in administering CMS programs. These contacts may occur as a larger meeting that may not be considered a particular matter involving specific parties, or as one-on-one or small group meetings or conversations that would be a party matter. It is also possible that you may be asked to participate in the approval of state Medicaid waivers or other particular matters involving one of your former clients that would affect only that particular client, as opposed to a policy that would affect all of the 50 states.

ANALYSIS OF FACTORS UNDER THE ETHICS STANDARDS

Under the Standards of Ethical Conduct for Employees of the Executive Branch, a federal employee may not participate in a particular matter involving specific parties if one of the parties is, or is represented by, an entity with which the employee has a "covered relationship" and where the circumstances would cause a reasonable person to question the employee's impartiality in the matter. "Covered relationships" include persons or entities for which the employee has within the last year served as an employee or consultant. See 5 C.F.R. § 2635.502(b)(1)(iv). This requirement of disqualification only applies to "particular matters involving specific parties" and not to "particular matters of general applicability" or broad policy matters. It applies, for example, to litigation, grant awards, contracts and other matters involving a specific request, determination or ruling, but not to legislation or regulations that might affect an entity as part of a group. When an employee's participation in a particular matter involving specific parties gives rise to a concern about the employee's impartiality in the matter, the employee may be authorized to participate in the matter if the federal government's interest in the employee's participation outweighs the concern of a potential appearance of a lack of integrity in the agency's program and operations. See 5 C.F.R. § 2635.502(d).

You served as a consultant for the States of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, and Virginia within the last year. As such, you have a covered relationship with these states. Furthermore, because you recently provided services to these states (including states' departments, agencies and/or instrumentalities) on issues that overlap with your current position, a reasonable person could question your impartiality in matters involving these states. Therefore, you are disqualified – for one year from your last date of service to a state – from participating in any particular matter in which that state is a party, unless I first authorize your participation after determining – in light of all the circumstances – that the interest of the government in your participation outweighs the concern that a reasonable person may question the integrity of the programs and operations of the HHS.

The ethics regulations provide that I may consider the following factors in determining whether to authorize your participation:

Nature of the relationship. You provided consulting services for the states listed above on those states' Medicaid programs, Medicaid waivers, and public health policy initiatives. These state clients accounted for seven of your approximately 14 clients. Moreover, since you had multiple similarly situated state clients, it seems less likely that you would favor any particular one over another. You are no longer consulting or in any other way continuing a relationship with those state clients and have, in fact, severed your relationship with your prior consulting firm, removing even an attenuated relationship to those clients. Likewise, you have no personal financial ties to these states.

Effect of the matter on the finances of the States. As CMS Administrator, you are likely to participate in matters that are of significance to the states' financial interests. As stated above, you have broad responsibilities regarding the policies and operations of CMS, some of which are sure to affect budgets and resource allocation of all states. While the Administrator's duties primarily focus on policy matters, it is possible that you will be asked to participate personally

and substantially in specific party matters that affect the financial interests of states for whom you had previously consulted. For instance, you may be asked to offer advice or direction in the review of a state's application for a Medicaid waiver, which would directly affect that state's budget, resource allocation and whether it receives federal Medicaid funds. Inasmuch as your participation in a specific party matter is an application of or is concerned with departmental or Administration policy, it would be unlikely that such application of policy would favorably advantage any particular state and would rather be presumed to have equal application to all similarly situated states. Furthermore, the financial effect of any specific party matters involving states in which you are likely to participate is not particularly significant relative to the financial effect of your policy work, which would have an equal effect across all states.

Nature and importance of your role. You are the Administrator for CMS, a presidentially-appointed Senate-confirmed (PAS) position, one of only 19 at HHS and the only PAS for CMS. As stated above, one of your primary responsibilities will be overseeing the implementation of the Administration's policies for healthcare reform and its health care policies more generally. As the top political appointee at CMS, it is imperative that you be able to effectively work with representatives from all 50 states during implementation of the expected health care reforms and other matters as such sweeping changes to the healthcare system will profoundly affect all citizens of the United States.

While you will have considerable authority as the Administrator, your role will chiefly involve setting of departmental policy, although you might be called upon to attend meetings or weigh-in on decisions that involve one or several of your previous state clients. Nevertheless, these decisions will be made in consultation with your staff and other stakeholders.

Sensitivity of the matter. CMS oversees a budget of roughly $980 billion dollars, with Medicare, Medicaid, and CHIP affecting the lives of over 100 million Americans. Furthermore, the work of CMS affects all Americans through its impact on the health insurance system and understandably receives considerable attention from the public, press, and politicians. It is bordering on a truism that the American healthcare system is full of sensitive matters. Your involvement in specific party matters affecting the states you previously consulted may range from the routine to the significant, but even otherwise routine matters elevated to the Administrator's attention can, by that fact alone, be classed as sensitive.

Difficulty of reassigning the matter. You have significant experience in implementing reforms in state Medicaid policy. Your prior work has given you a broad understanding of and expertise in state-level health policy. A central responsibility of the CMS Administrator is developing an effective working relationship with all health policy stakeholders, including the state governments, to ensure that CMS and HHS are receiving meaningful input from all 50 states and that the citizens of each state are afforded the opportunity to address the federal government on matters under the jurisdiction of CMS. To deny access to the CMS Administrator on such issues would unduly disadvantage the citizens of your former state clients. Given your expertise, the Administration's interests in having an experienced Administrator in charge of the implementation of its policies, and to not unduly disadvantage Americans living in the states to which you formerly provided consulting services, it is critical that you are able to effectively

work with representatives from all states to advance health care in the U.S. Such activity cannot be reassigned; as such responsibilities are central to your function.

Adjustments to your duties. Because of your unique knowledge of state-level Medicaid and health policy, as well as the responsibilities conferred upon you as the CMS Administrator, it would be both difficult and impractical to adjust your job duties. As stated above, you were appointed because of your familiarity and experience in this area and to implement the Administration's policies. Unlike the recusal you are under for particular matters that affect your spouse's financial interests, it would be insurmountably difficult to carve-out matters that affected more than a tenth of U.S. states. Moreover, such a recusal again would disadvantage the citizens of your former state clients inasmuch as non-client states could both rely on and benefit from your involvement in matters and provide input into development of CMS policies for their respective citizens.

DECISION

Based upon my determination, made in accordance with 5 C.F.R. § 2635.502(d), that, in light of all the circumstances, the interest of the government in your participation in specific party matters involving the States of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, or Virginia as a party or party representative outweighs any concern about a potential appearance of lack of integrity, therefore the limited authorization as described above, and subject to the limitations above, is granted.

Thomas E. Price, M.D.
Secretary of Health & Human Services

3-20-17
Date

cc:
OGC/Ethics Division
CMS Deputy Chief of Staff

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, DC 20201

March 10, 2017

MEMORANDUM FOR HHS SECRETARY THOMAS E. PRICE, MD

FROM: Elizabeth J. Fischmann
Designated Agency Ethics Official
Associate General Counsel

SUBJECT: Limited Authorization to Participate in Certain Specific Party Matters Involving the State of Georgia

The purpose of this memorandum is to determine whether an authorization under 5 C.F.R. § 2635.502(d) is appropriate to allow your participation in certain specific party matters where your spouse's employer, the government of the State of Georgia, is a party, or represents a party, to the matter. You have asked for this authorization so that you may engage in meetings or conversations with Georgia state government officials, including the Governor, on health policy issues that are either broad policy matters or particular matters of general applicability as defined under the federal ethics rules.

Under your current recusal obligation, you are precluded from having an official meeting or conversation on Federal Government business with Georgia officials. This recusal extends to meetings or discussions on these categories of policy matters because, under the federal ethics rules, a meeting or discussion with Georgia officials would be viewed as a particular matter involving officials of Georgia as a specific party. The authorization you have asked for is limited to the category of matters described above and does not authorize your participation in any specific party matters that involve deliberation, decision or action that is focused upon the interests of the State of Georgia. Examples of prohibited matters include contracts, grants, licenses, product approvals, applications, enforcement actions, administrative adjudications, or court cases. Thus, if the Governor of Georgia asks to meet with you to discuss litigation against HHS involving the State of Georgia as a party, this authorization would not permit you to participate in that specific party matter. Likewise, if an HHS grant award is pending and you are invited to meet with Georgia officials to discuss Georgia's grant application, you will still be prohibited from participating in that specific party matter. Under this authorization, however, you will be able to meet with the Governor of Georgia to discuss the American Health Care Act and its impact on Georgia. Georgia officials would not be precluded from attending a meeting with you and other states to discuss health insurance sales across state lines.

As required by the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards), this memorandum documents your consultation with me, as the Designated Agency Ethics Official (DAEO) for the Department, of Health and Human Services, on this authorization.

DISCUSSION

Under the Standards, a federal employee may not participate in a particular matter which involves specific parties if the federal employee knows that the particular matter is likely to have a direct and predictable effect on the financial interest of a member of his household or if one of the parties is, or is represented by, an entity with which the employee has a "covered relationship," as defined in the Standards, and where circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter.

The Standards specify that a person has "covered relationships" with any person or entity for which the employee's spouse is serving as an employee. This disqualification requirement only applies to "particular matters involving specific parties" and not to "particular matters of general applicability," such as legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of person or a particular state. It also does not extend to participating in broad policy matters that are directed to the interests of a large and diverse group of persons. However, the need for this authorization arises because accepting a meeting request from or talking on the phone with a representative of the State of Georgia, such as the Governor of Georgia or his staff, to discuss any official HHS business, even non-specific party matters, would itself be considered to be a specific party matter under the executive branch ethics rules.

There is an exception to this recusal requirement. You may be authorized to participate in such matters only after a determination – in light of all the circumstances – that the interest of the Federal Government in your participation outweighs the concern that a reasonable person may question the integrity of the programs and operations of HHS.

Under the Office of Government Ethics guidance the following factors may be taken into account when making your authorization determination:

1. *Nature of the relationship.* Your spouse is currently employed as a representative in the Georgia General Assembly. She receives a fixed annual salary in this position. She will not be participating in any of the particular matters involving specific parties that are covered by this authorization. Likewise, she will not be attending any of the meetings or participating in any phone calls with Georgia officials where you will be participating. Furthermore, the implementation of healthcare policy matters in Georgia will not have an impact on her salary or her job security. The Georgia General Assembly is one of the largest state legislatures in the nation. It meets for 40 legislative days a year. She is one of 236 members and is directly elected by the constituents in the 48th District, one region of the state. Accordingly, your participation in any of the particular matters involving specific parties that are covered by this authorization will not have a financial impact on you or on your spouse's personal financial interests. These policy matters will also not have any unique effect on the constituents in the particular District that she represents. The nature of these relationships would not lead a reasonable person with knowledge of these relevant facts to question the integrity of HHS programs or operations.

2. *Effect of the resolution of matters on the finances of the State of Georgia.* Resolution of the policy matters that you would like to discuss with Georgia officials, and with other state officials, will not have a unique impact on the finances of Georgia. You will only be sharing publicly available information with state officials and gathering input from them on how national policy decisions under consideration could impact the state and its residents. Although the ultimate government-wide policy decisions could, for example, impact Georgia's Medicaid program, the national policy formulation that you are working on, would also impact other similarly situated states in the same way. Under these circumstances, including Georgia in your national policy formulation discussions will not be likely to have a special or unique impact on Georgia and would not require Georgia's exclusion from these discussions to avoid special access or appearance concerns.

3. *Nature and importance of your role and difficulty of reassigning the matter.* While it may be possible to assign this task to another employee, your personal participation is needed because of your expertise and extensive knowledge in healthcare and healthcare reform across the nation. You have unique expertise on this topic having served as a physician, a state legislator, and a United States Congressman. You will be meeting with officials from other states and this authorization will give you an opportunity to hear the views of officials from the State of Georgia and not exclude them from informational or policy discussions with you. Your leadership of this reform effort is critical to its success. Although other senior health policy experts are awaiting appointment to leadership positions at HHS, they are not yet onboard at HHS to assume this portion of your leadership duties. Changes to the nation's healthcare system are already underway and moving rapidly forward. Accordingly, your personal participation is needed. Your participation in healthcare policy discussions with all states, including the State of Georgia, will better inform HHS decision-making for Americans from all regions of the country. This robust discussion on policy issues promotes the interests of this Department and outweighs concerns that a reasonable person may question the integrity of the programs and operations of HHS.

4. *Sensitivity of the matter.* Healthcare reform in the nation is a very sensitive matter. It is important that you have a top-down view of implementation across the nation and that you be accessible to share that view with interested states. You will be able to share information that is publicly available and shared with other states that have requested a personal meeting with you to discuss healthcare reform in those respective states. Although this is a highly sensitive topic, allowing all states to participate in policy discussions with you as you formulate policy decisions for the nation's healthcare system, outweighs concerns that a reasonable person may question the integrity of the programs and operations of HHS because of your discussion of broad policy issues or particular matters of general applicability with officials of the State of Georgia.

5. *Adjustments to your duties that could be made to reduce the appearance of impartiality.* The HHS Secretary is the Department's leader in the effort to improve healthcare. As noted in factor 3 above, it is critical to the Department's mission to have the HHS Secretary communicate directly with interested states on behalf of the Department and the Administration.

Accordingly, adjusting your duties to preclude you from participating in these matters would not be in the best interest of the Department or the nation.

OPINION AFTER CONSULTATION:

Your participation in meetings or discussions with officials from the State of Georgia on policy issues related to healthcare reform would further the programmatic mission of HHS. The HHS mission includes gathering information to inform HHS policy decisions and educating the public and stakeholders, including state government officials, on healthcare reform issues. Based on weighing the factors considered above, it is my opinion that the interest of the Federal Government in your participation in the limited category of matters described above outweighs the concern that a reasonable person may question the integrity of the programs and operations of HHS.

I have read the above memorandum which constitutes my consultation with the HHS DAEO on this authorization under 5 C.F.R. § 502. By signing below, I am executing this authorization pursuant to 5 C.F.R § § 102(b) and 502(d).

Thomas E. Price MD
Secretary HHS

3-13-17
Date

cc: HHS DAEO

MEMORANDUM

TO: Donald F. McGahn II
Counsel to the President

FROM: Elizabeth Fischmann
Designated Agency Ethics Official
Associate General Counsel

DATE: April 24, 2017

SUBJECT: Request for limited waiver of Executive Order 13770

Pursuant to Executive Order 13770, Section 3, (January 28, 2017) (the Executive Order) you have been delegated authority by the President to grant a waiver. Mr. Lance Leggitt, Chief of Staff, United States Department of Health and Human Services (HHS), requires a limited waiver of Section 1, paragraph 7 of the Executive Order to enable him to effectively carry out the full range of duties of his HHS position. On behalf of Mr. Leggitt, I request your consideration of this limited waiver.

Prior to his service at HHS, Mr. Leggitt worked at the law firm of Baker Donelson as an attorney in the firm's health law practice group, where he served as the Chair of Federal Health Policy. During the course of his practice, and within the two years before the date of his HHS appointment, he advised clients on matters that required him to register under the Lobbying Disclosure Act. Absent this limited waiver, by the terms of the Executive Order, Mr. Leggitt would be restricted for two years after his appointment date, from participating in any particular matters on which he lobbied within the two years before the date of his appointment; moreover, he would be restricted from participating in the specific issue areas in which those particular matters fall.

The information provided to me indicates that Mr. Leggitt brings a unique blend of substantive health care expertise to HHS. Prior to being appointed at HHS, he had extensive health care experience working for both state and federal government entities. He worked as the Senior Health Policy Advisor in the White House from 2005 to 2006 where he was a member of the President's Domestic Policy Counsel, responsible for advising the President on policy issues related to HHS, the Department of Veterans Affairs, Department of Labor, and Department of Defense. From 2001 to 2005, he worked as a Counselor to the Deputy Secretary at HHS. His state government experience includes serving as a Special Counselor to the Governor of Virginia and as an Assistant Attorney General in the Virginia Attorney General's Office.

The Chief of Staff is at the center of HHS's public health and safety related missions. The successful accomplishment of these HHS missions relies on extensive, open, and collaborative communications within HHS and with external stakeholders and other government officials. The Chief of Staff is needed to facilitate these collaborative communications, to oversee management issues within HHS, to coordinate policy across HHS, and to facilitate any Department-wide response to a public health emergency, among many other duties. Granting this limited waiver will allow Mr. Leggitt to freely carry out the full responsibilities of his office rather than requiring him to continue to recuse from particular matters on which he lobbied and the specific issue areas in which those particular matters fall.

As you consider the merits of granting this limited waiver, it is important to note that Mr. Leggitt has no personal financial interest in his former employer, former clients, or in the particular matters on which he lobbied or the specific issue areas in which those particular matters fall. He will continue to recuse pursuant to 5 C.F.R. § 502 and Section 1, paragraph 6, of the Executive Order, for the time frames dictated by those restrictions, from participation in any particular matters involving specific parties where his former employer or former clients are parties or party representatives.

Moreover, in order to avoid potential conflicts of interest during his appointment as Chief of Staff, he has agreed that neither he, his spouse, nor any minor children of his will acquire any direct financial interest in entities involved, directly or through subsidiaries, in the following industries: (1) research, development, manufacture, distribution, or sale of pharmaceutical, biotechnology, or medical devices, equipment, preparations, treatment, or products; (2) veterinary products; (3) healthcare management or delivery; (4) health, disability, or workers compensation insurance or related services; (5) food and/or beverage production, processing or distribution; (6) communications media; (7) computer hardware, computer software, and related internet technologies; (8) wireless communications; (9) social sciences and economic research organizations; (10) energy or utilities; (11) commercial airlines, railroads, shiplines, and cargo carriers; or (12) sector mutual funds that concentrate their portfolios on one country other than the United States. In addition, he will not acquire any interests in sector mutual funds that concentrate in any of these sectors.

LIMITATIONS

This limited waiver will not affect the application of any other provision of law, including any other provision of the Ethics Pledge; the Standards of Ethical Conduct for Executive Branch Employees (5 C.F.R. part 2635); or the criminal bribery, graft and conflict of interest statutes (18 U.S.C. 201-209). In particular, as noted above, Mr. Leggitt will remain restricted by the Executive Order, Section 1, paragraph 6, from participating in any particular matter involving specific parties that is directly and substantially related to his former employer or former clients. Accordingly, although this limited waiver permits him to participate in the specific issue areas in which particular matters on which he lobbied fall, he is still required to recuse from any particular matter involving specific parties that is directly and substantially related to his former employer or former clients.

LIMITED WAIVER ISSUANCE

After consideration of the information provided above, please indicate your final decision concerning a limited waiver for Mr. Lance Leggitt by signing below.

Please do not hesitate to contact me if you have any questions or need further information.

A limited waiver pursuant to Section 3 of Executive Order 13770 (January 28, 2017), as described in detail above, is granted to Mr. Lance Leggitt.

Donald F. McGahn II
Counsel to the President

26 April 2017
Date

MEMORANDUM

TO: Carrie Hessler-Radelet, Director

Carlos Torres, Deputy Director
Carl Sosebee, Senior Advisor to the Director
Ken Yamashita, Associate Director, Office of Global Operations
M. Katherine Stroker, Acting General Counsel

FROM: Colleen Wallace
Alternate Designated Agency Ethics Official

DATE: September 22, 2016

SUBJECT: Carrie Hessler-Radelet's Participation in NPCA Connect Conference Events Involving Liberia President Ellen Johnson Sirleaf

Summary: Peace Corps Director Carrie Hessler-Radelet may participate in NPCA Connect Conference Events, including the Women of Achievement Award Ceremony and the Luncheon after the ceremony, subject to certain restrictions on her activities as described below.

Background:

The National Peace Corps Association (NPCA) is holding its annual Peace Corps Connect Conference from September 21 through 25 in Washington, DC.

On Friday, September 23, during the morning General Session, the Peace Corps Director is scheduled to participate in "Peace Corps at 55 and Beyond: A Conversation with Peace Corps Director Carrie Hessler-Radelet and NPCA President Glenn Blumhorst", which will address the future of the Peace Corps and collaborative efforts between Peace Corps and the NPCA.

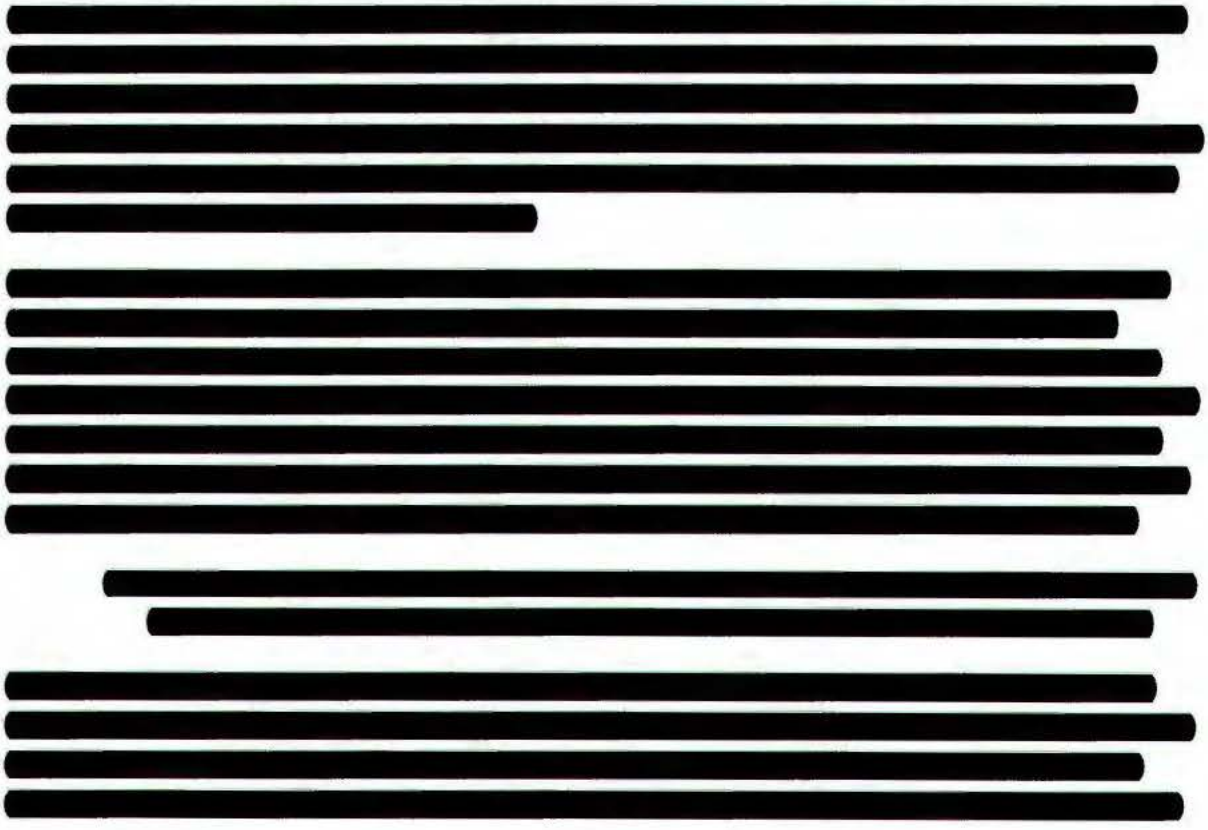
Immediately after the session with the Director, there will be an awards ceremony. During the awards ceremony, the Women of Peace Corps Legacy will present its inaugural Women of Achievement Award to Sara Goodkind, who founded the Girls Leading Our World (GLOW) program as a Peace Corps Volunteer in Romania in 1995. Liberia President Ellen Johnson Sirleaf will have an official role in the ceremony and will give remarks. Peace Corps Director Carrie Hessler-Radelet (Director) has been invited to attend the awards ceremony. She will sit in the audience and be acknowledged by several of the speakers, but she will not have a formal speaking role.

Immediately after the awards ceremony, the Director has been invited to attend a luncheon at a local restaurant with 50 participants including the former President of Malawi, donors to the Women of Peace Corps Legacy Award, the Liberia President, friends of Deborah Harding for whom the award is named, and Sarah Goodkind. President Sirleaf is expected to make remarks. The Director would not be seated at the same table as President Sirleaf, would not have a speaking role, and would pay for her own meal.

The Director's spouse serves as an economic advisor and consultant to the Liberia President and Minister of Finance.

Discussion:

Under the Standards of Ethical Conduct for Employees of the Executive Branch, a Federal employee may not participate in a particular matter which involves specific parties if one of the parties is, or is represented by, an entity or individual with which the employee has a "covered relationship," as defined in the regulations, and where the circumstances would cause a reasonable person to question the employee's impartiality in the matter. 5 CFR § 2635.502(a). An employee is considered to have a "covered relationship" with, among others, a person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. 5 CFR § 2635.502(b)(1)(iii). This requirement of disqualification only applies to "particular matters involving specific parties" and not to "particular matters of general applicability," such as broad policy matters. OGE Legal Advisory Letter 06 X 9. It applies, for example, to grant awards and contracts and other matters involving a specific request (i.e., a request to speak), determination or ruling, but not to legislation or regulations that might affect an entity as part of a group. An exception to this rule is available if the interest of the Federal Government in an employee's participation outweighs concerns about a potential appearance of lack of integrity in the agency's programs and operations. 5 CFR § 2635.502(d).



[redacted]

Cc: Maryann Minutillo, Senior Advisor to the Director
Clarissa Hughes, Special Assistant to the Director
Marcos Araus, DAEO

MEMORANDUM

TO: Carrie Hessler-Radelet, Director

Carlos Torres, Deputy Director
Carl Sosebee, Senior Advisor to the Director
Ken Yamashita, Associate Director, Office of Global Operations
M. Katherine Stroker, Acting General Counsel

FROM: Nancy G. Miller
Deputy Ethics Official

DATE: June 24, 2016

SUBJECT: Carrie Hessler-Radelet's Participation in Official VIP Visit to Liberia

Summary: Peace Corps Director Carrie Hessler-Radelet may participate in the official VIP visit to Liberia on June 27, 2016, subject to certain restrictions on her activities as described below.

Background:

Peace Corps Director Carrie Hessler-Radelet (Director) has been invited to accompany the First Lady on an official trip to Liberia and Morocco relating to the Let Girls Learn (LGL) program. It is my understanding that the purpose of the trip is to highlight the LGL program. A CNN film crew will also be present.

My understanding at the present time is that on June 27, 2016, as part of a six-hour visit in Liberia, the First Lady, the American Ambassador, the DCM, and perhaps the President of Liberia will ride from the airport to the Peace Corps Liberia training center. The Peace Corps Director will arrive separately, accompanied by Peace Corps HQ staff. At the training center, there will be a Camp Glow exhibition that is being done as part of the Peace Corps pre-service training. The visitors will be seeing various LGL-related exhibits. There may be remarks by the Country Director, the First Lady, the Peace Corps Director and President Sirleaf.

From there, the visitors will go to another venue focusing on USAID aspects of the LGL program. The Peace Corps Director will have no formal role in this portion of the event. Thereafter, the group will return to the airport and the First Lady and the Director will depart Liberia for the next stop, Morocco.

[redacted]

[redacted]

[redacted]

The Director's spouse serves as an economic advisor and consultant to the Liberian President and Minister of Finance.

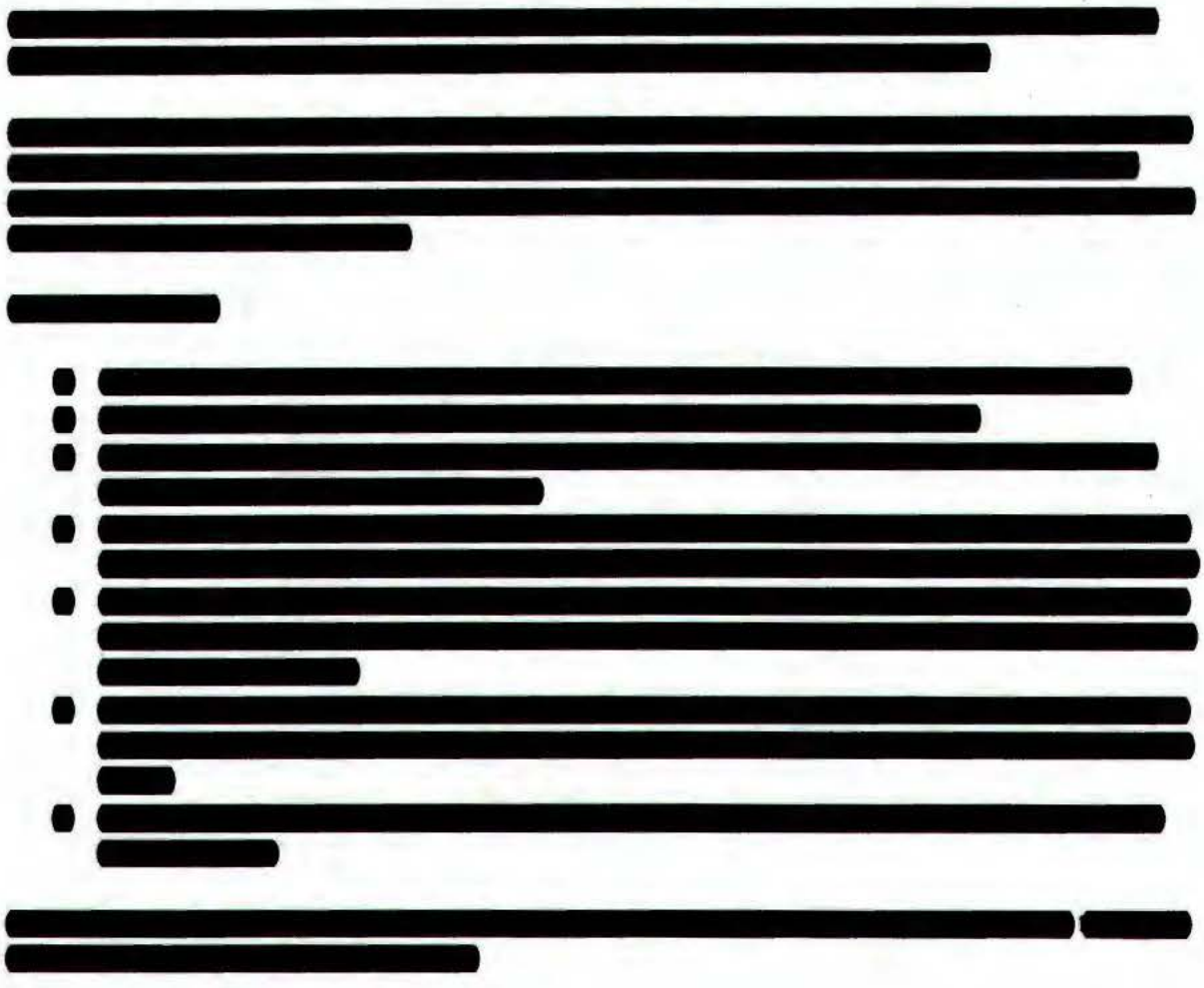
Discussion:

Under the Standards of Ethical Conduct of Employees of the Executive Branch, a Federal employee may not participate in a particular matter which involves specific parties if one of the parties is, or is represented by, an entity or individual with which the employee has a "covered relationship," as defined in the regulations, and where the circumstances would cause a reasonable person to question the employee's impartiality in the matter. An employee is considered to have a "covered relationship" with, among others, a person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. 5 C.F.R. § 2635.502(b)(1)(iii). This requirement of disqualification only applies to "particular matters involving specific parties" and not to "particular matters of general applicability," such as broad policy matters. It applies, for example, to grant awards and contracts and other matters involving a specific request (i.e. a request to speak), determination or ruling, but not to legislation or regulations that might affect an entity as part of a group. An exception to this rule is available if the interest of the Federal Government in an employee's participation outweighs concern about a potential appearance of lack of integrity in the agency's program and operations. 5 C.F.R. § 2635.502(d).

[redacted]

[redacted]

[redacted]



cc: Maryann Minutillo, Senior Advisor to the Director
Clarissa Hughes, Special Assistant to the Director
Krista Rigalo, Program Director, Let Girls Learn
Kevin Fleming, Country Director, Peace Corps Liberia
K. Colleen Wallace, Acting DAEO

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
ETHICS COUNSEL

September 26, 2016

MEMORANDUM

TO: Mary Jo White
Chair

FROM: Shira Pavis Minton
Ethics Counsel
Designated Agency Ethics Official

Danae Serrano
Deputy Ethics Counsel
Alternate Designated Agency Ethics Official

Adriel Harris
Assistant Ethics Counsel

SUBJECT: Your Participation in *Och-Ziff Capital Management, LLC (B-2790)*

This memorandum responds to your request for advice as to whether you may properly participate in the Och-Ziff Capital Management, LLC (B-2790) matter.

You seek this advice because you have a covered relationship with Cravath, Swaine and Moore LLP (Cravath) by virtue of your spouse's employment with the firm. Cravath is representing a significant witness, [redacted] in this matter. As explained below, I authorize your participation in this matter.

Background

This matter involves numerous violations of the Foreign Corrupt Practices Act (FCPA) by Och-Ziff Capital Management, LLC (Och-Ziff). During the relevant period, Och-Ziff entered into numerous transactions in which bribes were paid through intermediaries to government officials in various African countries to secure business deals. (Och-Ziff used investor funds to pay for these bribes and transactions. Staff was able to identify that certain Och-Ziff funds were the primary source of the misappropriated investor money.) [redacted]

[redacted], he is an important witness in this matter. [redacted] has retained Cravath as his legal counsel in the Department of Justice's (DOJ's) parallel criminal matter involving Och-Ziff. According to FCPA staff, the SEC has had no contact with Cravath in the course of this matter, aside from one inquiry to determine which attorneys in the firm are representing [redacted]

Applicable Law

The "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. § Part 2635, ("Standards of Conduct") require that an employee not participate in a particular matter involving specific parties in which she knows a person with whom she has a covered relationship is or represents a party, if she determines that a reasonable person with knowledge of the relevant facts would question her impartiality in the matter. 5 C.F.R. § 2635.502(a). A "covered relationship" is a close business or personal relationship with a party to a matter (or a representative of a party to the matter). The regulation provides a list of those persons and entities with whom an employee is considered to have a covered relationship for the purposes of this restriction. The employer of an employee's spouse is included on the list of such relationships. 5 C.F.R. § 2635.502(b)(1)(iii). Moreover, the Standards of Conduct include a catch-all provision, which requires the employee to consider other circumstances that may raise a question regarding her impartiality. 5 C.F.R. § 2635.502(a)(2).

A "particular matter involving specific parties" is defined as "any investigation…charge, accusation, arrest, or judicial or other proceeding" and "a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties…." 5 C.F.R. § 2641.201(h)(1).

A party to a matter is defined as a person or entity whose legal rights are affected by the proceeding. 5 C.F.R. § 2641.201(h)(1). This includes those persons or entities that are being

investigated for securities violations. Generally speaking, witnesses to a matter are not considered to be a party to a matter, unless the witness also has legal rights at issue in the case.

Discussion

This matter meets the definition of a particular matter involving specific parties because the investigation covers a specific and related set of transactions. In addition, because your spouse is employed with Cravath, you have a "covered relationship" with the firm.

[redacted] role in this matter is that of a significant witness in this matter. We have determined, based on information provided by Enforcement staff, that he is not a party to the SEC matter. As indicated above, a party to the matter is defined as a person or entity whose legal rights are affected by the proceeding. Our understanding from staff in the FCPA unit is that [redacted] has no legal rights at stake in this matter. 5 C.F.R. § 2641.201(h)(1). [redacted] Thus, we do not consider [redacted] to be a party to the matter and, as such, Cravath is not representing a party to this matter. Moreover, your spouse has had no personal involvement in working on this matter.

Nonetheless, Cravath's representation of [redacted] a significant witness in the matter, could cause a reasonable person to question your ability to be impartial in this matter because of your posture as Chair.

Notwithstanding impartiality concerns, the Standards of Conduct provide that an employee may be authorized to participate in a matter if the agency designee authorizes participation in accordance with the standards in section 502(d). Under section 502(d), an agency ethics official may authorize participation if, based on the relevant circumstances, the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors to be considered include:

1) the nature of the relationship involved;
2) the effect that resolution of the matter would have on the financial interest of the person involved in the relationship;
3) the nature and importance of the employee's role in the matter;
4) the sensitivity of the matter;
5) the difficulty of reassigning the matter to another employee; and

6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Id. at 2635.502(d).

Considering the first factor—the nature of the relationship involved—you have a covered relationship with Cravath, which represents a significant witness (but not a party) in this matter.

The second factor asks what effect that resolution of the matter would have on the [redacted] In sum, your participation is critical to the development of this investigation.

The fourth factor concerns the sensitivity of this matter. [redacted]

[redacted] As such, we treat this matter as an extremely sensitive investigation.

The fifth factor asks whether the matter can be assigned to another employee. As noted above, no other employee may act in your capacity as Chair of the Commission; therefore, this matter cannot be reassigned.

Finally, the sixth factor considers whether any adjustments may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality. No such adjustments are feasible in this matter. [redacted]

Based on our analysis of these factors, we find that the only factor that would weigh against your participation is the high level of sensitivity of this matter. However, we find that this is more than counterbalanced by the other factors, including the substantial importance of your participation in this matter.

We would also add a note concerning a separate issue that we analyzed for possible optics concerns that could arise from your participation in this matter. During the relevant period for this matter and until 2013, you held an investment in an Och-Ziff fund. We considered whether this would raise a conflicts issue that could affect your participation in this matter. We determined that this does not create a financial conflict of interest under the financial conflict of interests statute at 18 U.S.C. § 208. However, we did consider whether your participation in this matter may present an optics concern, given that you held an Och-Ziff investment in the timeframe during which the alleged violations occurred. We determined that there is little risk of

an optics problem. First, your prior investment was not one of the funds that staff identified as one of the primary sources of funding for the bribes that are at issue in this matter. Indeed, we have no information which implicates the fund you owned as being involved in this matter at all. Because of this, we have determined that your prior holding is not a basis for someone to question your impartiality in this matter. Further, we considered the same six factors that are listed above. Based on this analysis, we reaffirm that the strong government interest in your participation in this matter outweighs the risk that a reasonable person may perceive any appearance of a lack of impartiality.

Therefore, for the reasons described above, I have concluded that your participation in Och-Ziff Capital Management, LLC (B-2790) is authorized under the Standards of Conduct, 5 C.F.R. § 2635.502(d).

June 9, 2016

MEMORANDUM

TO: Mary Jo White
Chair

FROM: Shira Pavis Minton
Ethics Counsel
Designated Agency Ethics Official

SUBJECT: Your Participation State Street Corporation (B-2630)

This memorandum responds to your request for advice as to whether you may properly participate in the above referenced matter. You seek this advice because a client of your spouse is a party to the matter. I am authorizing your participation in this matter.

Applicable Law

This matter arises from State Street's misleading statements during January 2006 to November 2009 to custody clients, including registered investment companies, concerning its pricing methods for foreign currency transactions. In addition to the pending SEC matter, State Street has negotiated settlements with the civil division of the United States Attorney for the District of Massachusetts and the Department of Labor, as well as private plaintiffs in the pending class actions. The settlements with the other federal agencies are contingent upon final court approval of the class action settlement. [redacted]

The "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. Part 2635, (Standards of Conduct) require that an employee not participate in a particular matter involving specific parties which she knows is likely to affect the financial interests of a member of her household, or in which she knows a person with whom she has a "covered relationship" is or represents a party, if she determines that a reasonable person with knowledge of the relevant facts would question her impartiality in the matter. 5 C.F.R. § 2635.502(a).

Discussion

One of the harmed custody clients in this matter is [redacted] is a client of your husband's. Therefore, under the Standards of Conduct, you have a "covered relationship"[1] with [redacted] I have considered whether [redacted] status as

[1] Under the Standards of Conduct, an employee has a "covered relationship" with anyone

one of thousands of harmed parties would cause a reasonable person to question your ability to be impartial in this matter. I do not think reasonable people would find these facts a basis for questioning your ability to be impartial in this matter.

The impartiality argument seems unreasonable to me for two reasons. First, your husband is not representing [redacted] in this matter. I understand [redacted] is being represented by in-house counsel. Second, [redacted] is one of several thousand harmed parties in this matter. To assume the interests of any one of those parties would be paramount to you, seems spurious.

In the interest of completeness, I turn to the provisions of the Standards of Conduct, that apply where an official's impartiality *could* reasonably be questioned, 5 C.F.R. § 2635.502(d). As you know, under section .502(d), an employee may be authorized to participate in a matter, despite impartiality concerns, if the agency designee authorizes participation in accordance with the standards in section .502(d). Under section .502(d), an agency ethics official may authorize participation if, based on the relevant circumstances, the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors to be considered include:

1) the nature of the relationship involved;
2) the effect that resolution of the matter would have on the financial interest of the person involved in the relationship;
3) the nature and importance of the employee's role in the matter;
4) the sensitivity of the matter;
5) the difficulty of reassigning the matter to another employee; and
6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Id. at § 2635.502(d).

For the purpose of this analysis, I will assume that the facts involved here would lead a reasonable person to question your complete impartiality. As noted, my view is to the contrary, but assuming that there were concerns about your partiality, such concerns would be outweighed by the agency's interest in your participation in this matter.

[redacted]
This matter is of particular importance given the breadth of harm and the fact [redacted]

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for whom his spouse serves as an employee or consultant. 5 C.F.R. § 2635.502(b)(1)(iii).

[redacted]

For the reasons described above, your participation in State Street Corporation (B-2630) is authorized under the Standards of Conduct, 5 C.F.R. § 2635.502(d).

United States Department of State

Washington, D.C. 20520

UNCLASSIFIED

TO: Catherine M. Russell
Ambassador-at-Large for Global Women's Issues

FROM: David P. Huitema
Alternate Designated Agency Ethics Official

DATE: November 10, 2016

SUBJECT: 5 C.F.R. § 2635.502(d) Determination and Authorization

A. Determination Under 5 C.F.R. § 2635.502(d)

It is my understanding that your spouse, Thomas E. Donilon, served as National Security Advisor under President Obama from 2010 to 2013. You and your spouse are considering co-authoring, in your official capacity, an Op-Ed discussing the Obama Administration's efforts to elevate women's issues to the top of the United States' foreign policy agenda and arguing that the promotion of gender equality serves the United States' foreign policy and security interests ("the Op-Ed").

Though your participation in this matter does not pose a conflict of interest, I appreciate the concern that there could be an appearance of such a conflict based on the involvement of your spouse in an Op-Ed published in your official capacity. 5 C.F.R. § 2635.502(a) states that an employee should not participate in a matter involving a "person who is a member of his or her household . . . where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality . . . unless he has informed the agency designate of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this subsection." [1]

[1] The definition of "person" applicable to 5 C.F.R. § 2635.502(a) excludes "any officer or employee [of the Federal Government] when acting in his official capacity on behalf of [the agency or entity of the Federal Government that employs him]." 5 C.F.R. § 2635.102(k). It is my understanding that your spouse currently holds an appointment in an agency of the federal government; it is also my understanding that his involvement in this Op-Ed would not be in his official capacity on behalf of the agency that currently employs him. Therefore, he would be considered a "person" for purposes of 5 C.F.R. § 2635.502(a).

Based on the totality of the circumstances, I have determined that authorizing your participation in this matter pursuant to 5 C.F.R. § 2635.502(d) would be appropriate. 5 C.F.R. § 2635.502(d) states that:

> Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

The interest of the Government in having you and your spouse co-author the Op-Ed outweighs the concern that a reasonable person with knowledge of the relevant facts may question your impartiality or the integrity of the Department's programs and operations. The following factors are persuasive in this regard:

- The Government has an interest in the publication of this Op-Ed. Placing the promotion of gender equality at the forefront of the United States' foreign policy and security strategy is a priority of the Department and the Administration. In the judgment of the Department, the Op-Ed would help communicate those goals and efforts to a wide audience and build public support for further promotion of gender equality.

- Your personal participation in this matter is important to promoting the Government's interest. It would be difficult to assign another employee to work on this matter. As the Ambassador-at-Large for Global Women's Issues, you are the Department's key voice on the importance of advancing gender equality. Your participation is essential for the communication of the Department's priorities and achievements.

- Your spouse's participation in the matter is important to promoting the Government's interest. In light of his service as one of the highest-ranking officials of the Obama Administration for national security and foreign policy, your spouse's co-authorship helps link the Department's efforts to promote gender equality to the goals and accomplishments of the rest of the Administration. Your spouse's participation is particularly important for communicating the role that the elevation of gender equality plays in protecting the national security of the United States.

- There is no appreciable likelihood of a conflict of interest. Neither you nor your spouse will receive any compensation from co-authoring the Op-Ed. You and your spouse are both well-known figures in the national security and foreign policy communities, and there is no appreciable likelihood that your co-authorship will directly or predictably lead to any future financial benefits for you or your spouse.

B. Authorization to Participate in This Matter

You are hereby authorized under 5 C.F.R. § 2635.502(d) to participate in the co-authorship of the Op-Ed in your official capacity.

Notwithstanding the authorization above, you continue to be required to recuse from any particular matters where your participation would violate 18 U.S.C. 208(a), or from any particular matters where the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter, unless previously authorized pursuant to 5 C.F.R. § 2635.502(d).

11/10/16
Date

David P. Huitema
Alternate Designed Agency Ethics Official

TO: Heather N. Norby
Spokesperson

FROM: David P. Huitema
Alternate Designated Agency Ethics Official

DATE: April 26, 2017

SUBJECT: 5 C.F.R. § 2635.502(d) Determination and Partial Authorization

A. Determination Under 5 C.F.R. § 2635.502(d)

It is my understanding that you were previously an employee of 21st Century Fox. It is also my understanding that your role as Department Spokesperson will require you to participate in a number of particular matters where 21st Century Fox is a party, such as interview requests and press queries involving employees of 21st Century Fox.

5 C.F.R. § 2635.502(a) states that an employee should not participate in a matter involving a "person from whom the employee has, within the last year, served as . . . employee . . . where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality . . . unless he has informed the agency designate of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this subsection."

Paragraph (d) states that:

> Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Based on the totality of the circumstances, I have determined that the interest of the Government in having you participate in your official capacity as Spokesperson in matters in which 21st Century Fox is a party outweighs the concern that a reasonable person with

knowledge of the relevant facts may question your impartiality or the integrity of the Department's programs and operations. The following factors are persuasive in this regard:

- The Government has a significant interest in your participation in particular matters where 21st Century Fox is a party. 21st Century Fox is a major media company consisting of a number of press outlets that are involved in covering the Department of State and the foreign affairs of the United States, including *FOX News Channel, FOX Business Network*, FOX Television Stations, and *National Geographic Channel*. The Spokesperson is a senior counselor to the Secretary on press matters and one of the foremost public faces of the Department. To achieve the Department's public diplomacy and press strategy goals, it is important that the Spokesperson have the capacity to be aware of all press queries and to communicate the Department's message clearly and consistently to any and all media outlets and platforms. It would be highly impractical for other employees to take your place in handling all meetings, communications, and other matters involving employees of 21st Century Fox.

- There is no appreciable likelihood of a conflict of interest. You do not have a continuing relationship with 21st Century Fox or a financial interest in the company.

- Opportunities for you to use your position to further the interests of 21st Century Fox at the expense of other outlets, or otherwise engage in conduct that would cause a reasonable person with knowledge of the relevant facts to question your impartiality or the integrity of the Department's programs and operations, would be constrained by the mission and working methods of the Bureau of Public Affairs, including the Office of Press Relations, which seeks to effectively communicate U.S. foreign policy and information about the Department to the entire U.S. and global community. This necessitates cooperation with the full range of accredited journalists. While communications with individual journalists are assessed on a case-by-case basis, the Office of Press Relations and Bureau of Public Affairs permit attendance at press briefings by any accredited journalist.

- Principles of federal ethics law restrict you from showing preference or favoritism toward employees of 21st Century Fox in the course of your official duties. We have counseled you and will continue to provide guidance on the application of the federal ethics rules and there is no reason to question your integrity in this regard.

B. Partial Authorization to Participate in Matters in Which 20th Century Fox Is a Party

You are hereby authorized under 5 C.F.R. § 2635.502(d) to participate, either directly or through supervision and work with others in the Department, in the following types of matters, even if they constitute particular matters in which 21st Century Fox or its employees is a party or represents a party:

- Communications with employees of 21st Century Fox in the course of press briefings and other briefings involving a broad group of journalists;

- Meetings and communications with employees of 21st Century Fox to provide information about U.S. foreign policy or the Department of State, such as responding to press queries or requests for briefings or interviews;

- Interviews between employees of 21st Century Fox and the Spokesperson or other government officials.

Notwithstanding the authorization above, you continue to be required to recuse from any particular matters directly and predictably affecting your financial interests, as defined in 18 U.S.C. 208(a), or from any particular matters not addressed here where the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter, unless previously authorized pursuant to 5 C.F.R. § 2635.502(d).

We have determined that a reasonable person is likely to question your impartiality in other types of matters involving 21st Century Fox, such as funding, public-private partnerships, or contract matters, and that you are required to seek further authorization pursuant to 5 C.F.R. § 2635.502(d) prior to participating in those matters.

4/26/17
Date

David P. Huitema
Alternate Designed Agency Ethics Official

United States Department of State

Washington, D.C. 20520

August 31, 2016

UNCLASSIFIED

TO: John F. Kerry
United States Secretary of State

FROM: David P. Huitema
Alternate Designated Agency Ethics Official

SUBJECT: 5 C.F.R. section 2635.502(d) Determination and Authorization as to Your Contribution to Mr. Stephen Kennedy Smith's Book of Speeches Commemorating the 100th Anniversary of President Kennedy's Birth.

A. Determination Under 5 C.F.R. section 2635.502(d)

I understand that Mr. Stephen Kennedy Smith has asked you to provide an essay to be included in a book commemorating the 100th anniversary of former President John F. Kennedy's birth. We have consulted with your staff with regard to this request, and this memorandum memorializes the verbal authorization that our office provided you on August 9, 2016.

Stephen Kennedy's book will include a compilation of speeches made by former President Kennedy. I understand that your submission will be done in your official capacity as the Secretary of State of the United States and that you have determined that providing the essay furthers a United States foreign policy interest. Your particular essay will accompany President Kennedy's speech on "The Role of Negotiations." Your essay highlights the continued importance of negotiation in the conduct of foreign diplomacy as addressed in the context President Kennedy's speech. The President of the United States and other government officials will also provide essays to accompany other speeches made by President Kennedy. Mr. Smith is the author/editor of the book and as we understand, Mr. Smith and his family are personal friends of yours. However, it is our understanding that you would be willing to provide a similar type of essay for other comparable publications. Finally, we understand that you will not receive any compensation for your contribution to the book or otherwise provide endorsements for the book.

According to 5 C.F.R. section 2635.702(d), an employee may not use his official position in a manner that may give rise to an appearance of use of public office for private gain or that gives rise to preferential treatment. In the event that an employee's official duties will affect the

personal financial interests of a friend, relative, or person with whom he is affiliated in a nongovernmental capacity, the employee must comply with the steps outlined in 5 C.F.R. section 2635.502. Section 502 provides that the employee should not participate in a particular matter involving specific parties where a reasonable person with knowledge of the relevant facts would question the employee's impartiality without authorization. Because of the longstanding acquaintance you have with Mr. Smith and the Kennedy family and the fact that you are providing an official essay for inclusion in this book, we believe it prudent, out of an abundance of caution, to issue this authorization pursuant to 5 CFR 2635.502(d). Section 2635.502(d) states that:

> Where an employee's participation in a particular matter involving specific parties would not violate 18 USC section 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Though, as we understand the circumstances, your providing an essay for this book does not pose a conflict of interest under 18 U.S.C. section 208, I have considered the application of 5 C.F.R. section 2635.502 to the circumstances and have determined that authorization pursuant to 5 C.F.R. section 2638.502(d) is appropriate to allow you to provide the essay for the book. Based on the totality of the circumstances, I have determined that the interest of the Government in your participation in the book outweighs the concern that a reasonable person with knowledge of the relevant facts would question your impartiality or the integrity of the Department's programs and operations. The following factors are persuasive in this regard:

- You will not endorse or provide other promotional appearances for the book.
- Your contribution is directly related to a stated foreign policy objective.
- You do not have other outside business with Mr. Smith.
- You will not accept or receive any consideration for your contribution.
- Your essay is only one of several essays provided by others that will be included in the book.
- You would be willing to contribute a similar type of essay for other comparable publications.
- Mr. Smith does not have any business or other matters currently pending before you.

B. Authorization to Contribute to Mr. Stephen Kennedy Smith's Book of Speeches Commemorating the 100th Anniversary of President Kennedy's Birth

Based on my understanding of the above factors, you are hereby authorized under

5 C.F.R. section 2635.502(d) to contribute an essay to Mr. Stephen Kennedy Smith's book of speeches commemorating the 100th Anniversary of President Kennedy's Birth.

David P. Huitema
Alternate Designated Agency Ethics Official

United States Department of State

Washington, D.C. 20520

UNCLASSIFIED

To: Roybal Soledad

From: David P. Huitema
Alternate Designated Agency Ethics Official

Date: 10/21/2016

Subject: 5 C.F.R. § 2635.502(d) Determination and Authorization as to Your Participation in the World Telecommunications Standardization Assembly

I understand that you have been asked, as part of your official duties as Senior Advisor at the Department of State, to participate in the U.S. delegation to the World Telecommunications Standardization Assembly ("WTSA"), which will be held in Tunisia from October 25 to November 3, 2016. The WTSA is held every four years for members of the International Telecommunications Union ("ITU"), the United Nations Specialized Agency for telecommunications. The WTSA is primarily a technical meeting that seeks to define the next period of study for the ITU-T sector. You have been asked to lead the U.S. delegation's handling of issues related to gender equality. At the WTSA, your role will be to advocate for the importance of gender equality in the international community at large, including in the fields of information and communications technologies; specifically, you will campaign for the adoption of a resolution on gender equality to be adopted by the WTSA. The proposed resolution does not call for specific action on the part of the ITU or propose any change to the resources devoted to gender issues by the ITU. You will also participate in ancillary activities related to gender-equality issues. All of the matters in which you anticipate being involved at the WTSA will target the international community at large, and not a particular sector, industry, company, or the financial interests of the ITU.

I also understand that you are currently negotiating for employment with the ITU to serve as Senior Communications Campaign Officer, to begin after you leave the Department of State. In that role, you would develop and promote the ITU's Sustainable Development Goals, Broadband and Gender campaigns, and events for the newly created initiative called "Equals."

Although, as we understand the circumstances, participating in the WTSA while negotiating for employment with the ITU does not pose a conflict of interest because you will not be involved in any particular matters at the WTSA that have a direct and predictable effect on the financial interests of the ITU, there is some concern of an appearance of a conflict of interest as you will be participating in a conference that is hosted by an organization with whom you are currently negotiating employment. 5 C.F.R. § 2635.502(a) states that "[a]n employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in

this section to determine whether he should or should not participate in a particular matter . . . unless [s]he has informed the agency designate of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this subsection." Section 502(d) states that:

> Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Based upon the totality of the circumstances, I have determined that that the State Department of State's interest in your participation outweighs any concern that a reasonable person might question the integrity of the Department of State's programs and operations. I therefore authorize your participation in this matter pursuant to 5 C.F.R. § 2635.502(d). The following factors are persuasive in this regard:

- The Department of State has an interest in your participating in the WTSA as you are the only member of the U.S. delegation from the Department of State with the requisite experience who speaks Spanish, and you will spearhead U.S. efforts to convince other ITU members from Spanish-speaking countries to back U.S. policy positions on gender equality issues, including the resolution you will seek to have WTSA adopt.
- The gender equality issues in which you will be personally and substantially involved at the WTSA involve the consideration or adoption of broad policy initiatives directed to the interests of a large and diverse group of persons—*i.e.*, the international community.
- While carrying out your official duties at the WTSA, you will not engage in communications with any employees of the ITU whom you know to be involved in the hiring decision for the position for which you are currently negotiating.

Notwithstanding the authorization above, you continue to be required to recuse yourself from any particular matters in which your participation would violate 18 U.S.C. § 208(a), or any particular matters involving the ITU where the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter, unless previously authorized pursuant to 5 C.F.R. § 2635.502(d).

11/21/16
Date

David P. Huitema
Alternate Designated Agency
Ethics Official

United States Department of State

Washington, D.C. 20520

September 14, 2016

UNCLASSIFIED

TO: Samantha Power
Ambassador to the United States Mission to the United Nations

FROM: David P. Huitema
Alternate Designated Agency Ethics Official

SUBJECT: 5 C.F.R. section 2635.502(d) Determination and Authorization as to Your Contribution to Mr. Stephen Kennedy Smith's Book of Speeches Commemorating the 100th Anniversary of President Kennedy's Birth.

A. Determination Under 5 C.F.R. section 2635.502(d)

I understand that Mr. Stephen Kennedy Smith has asked you to provide an essay to be included in a book commemorating the 100th anniversary of former President John F. Kennedy's birth. We have consulted with your staff with regard to this request, and this memorandum memorializes the verbal authorization that our office provided you on July 28, 2016.

Stephen Smith's book will include a compilation of speeches made by former President Kennedy. I understand that your submission will be done in your official capacity as the Ambassador to the United States Mission to the United Nation and that you have determined that providing the essay furthers a United States foreign policy interest. Your particular essay will accompany President Kennedy's 1962 speech that reflected upon the importance of a peoples' right to choose their own governments as a path towards realizing fundamental freedoms. Your essay focuses on the paradox of democratically elected governments that repress individual rights and how US foreign policy can advance not only self-determination, but also international human rights. The President of the United States and other government officials will also provide essays to accompany other speeches made by President Kennedy. Mr. Smith is the author/editor of the book and as we understand, Mr. Smith is a personal acquaintance of yours. However, it is our understanding that you would be willing to provide a similar type of essay for

other comparable publications. Finally, we understand that you will not receive any compensation for your contribution to the book or otherwise provide endorsements for the book.

According to 5 C.F.R. section 2635.702(d), an employee may not use her official position in a manner that may give rise to an appearance of use of public office for private gain or that gives rise to preferential treatment. In the event that an employee's official duties will affect the personal financial interests of a friend, relative, or person with whom he is affiliated in a nongovernmental capacity, the employee must comply with the steps outlined in 5 C.F.R. section 2635.502. Section 502 provides that the employee should not participate in a particular matter involving specific parties where a reasonable person with knowledge of the relevant facts would question the employee's impartiality without authorization. Because of the longstanding acquaintance you have with Mr. Smith and the fact that you are providing an official essay for inclusion in his book, we believe it prudent, out of an abundance of caution, to issue this authorization pursuant to 5 CFR 2635.502(d). Section 2635.502(d) states that:

> Where an employee's participation in a particular matter involving specific parties would not violate 18 USC section 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Though, as we understand the circumstances, your providing an essay for this book does not pose a conflict of interest under 18 U.S.C. section 208, I have considered the application of 5 C.F.R. section 2635.502 to the circumstances and have determined that authorization pursuant to 5 C.F.R. section 2638.502(d) is appropriate to allow you to provide the essay for the book. Based on the totality of the circumstances, I have determined that the interest of the Government in your participation in the book outweighs the concern that a reasonable person with knowledge of the relevant facts would question your impartiality or the integrity of the Department's programs and operations. The following factors are persuasive in this regard:

- You will not endorse or provide other promotional appearances for the book.
- Your contribution is directly related to a stated foreign policy objective.
- You do not have other outside business with Mr. Smith.
- You will not accept or receive any consideration for your contribution.
- Your essay is only one of several essays provided by others that will be included in the book.
- You would be willing to contribute a similar type of essay for other comparable publications.
- Mr. Smith does not have any business or other matters currently pending before you.

B. Authorization to Contribute to Mr. Stephen Kennedy Smith's Book of Speeches Commemorating the 100th Anniversary of President Kennedy's Birth

Based on my understanding of the above factors, you are hereby authorized under 5 C.F.R. section 2635.502(d) to contribute an essay to Mr. Stephen Kennedy Smith's book of speeches commemorating the 100th Anniversary of President Kennedy's Birth.

David P. Huitema
Alternate Designated Agency Ethics Official

United States Department of State

Washington, D.C. 20520

UNCLASSIFIED

TO: Samantha Power
Ambassador to the United States Mission to the United Nations

FROM: David P. Huitema
Alternate Designated Agency Ethics Official

Date: May 27, 2016

SUBJECT: 5 C.F.R. section 2635.502(d) Determination and Partial Authorization as to Mr. Greg Barker and Chasing the Flame, LLC.

A. Determination Under 5 C.F.R. section 2635.502(d)

I understand that the Department of State and the White House have agreed to allow Mr. Greg Barker, Chasing the Flame, LLC to produce a documentary about the Obama Administration entitled *The New Diplomacy*. It is my understanding that you have been asked to participate in the film in your official capacity as the United States Ambassador to the United Nations. The President of the United States, the Secretary of State, and other government officials will also appear in this film. Mr. Greg Barker, Chasing the Flame, LLC (Producer) is producing the film in association with Home Box Office. It is my understanding that you currently have two personal, outside business agreements with Mr. Barker (on behalf of Silverbridge Productions). One relates to the production of a documentary based on your book, *Chasing the Flame*, and the other relates to an option to produce a feature film based on the same book. The documentary was released in 2009. The feature film is not yet under production; nor has there been an exercise of the option under the option agreement as of this time.

Unless authorized pursuant to 5 C.F.R. section 2635.502, an employee may not participate in a particular matter involving specific parties if the employee has a covered relationship with a party, or the representative of a party, where a reasonable person with knowledge of the relevant facts would question the employee's impartiality. Because of the contractual relationships you have with Mr. Greg Barker, your relationship with him is considered a "covered relationship" for the purposes of 5 C.F.R. section 502. Section 502(b) provides that an employee has a covered relationship with someone with whom the employee has or seeks a business, contractual or other financial relationship that involves something other than a routine consumer transaction.

Section 2635.502(d) states that:

> Where an employee's participation in a particular matter involving specific parties would not violate 18 USC section 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Though, as we understand the circumstances, your participation in this film does not pose a conflict of interest under 18 U.S.C. section 208, I have considered the application of 5 C.F.R. section 2635.502 to the circumstances and have determined that authorization pursuant to 5 C.F.R. section 2638.502(d) is appropriate to allow you to participate in the film, *The New Diplomacy*. Based on the totality of the circumstances, I have determined that the interests of the Government in your participation in the film outweighs the concern that a reasonable person with knowledge of the relevant facts would question your impartiality or the integrity of the Department's programs and operations. The following factors are persuasive in this regard:

- HBO's Chairman and CEO, Richard Plepler initially discussed the documentary idea with you in general terms, with no filmmaker attached, but at that time you declined to participate. Mr. Plepler then approached officials at the White House and the Department of State and ultimately the White House, the Department and USUN agreed that the White House, USUN, and the Department would participate in the project.
- During your discussions with Mr. Plepler and other HBO representatives, you did not recommend or identify a potential producer for the documentary.
- You did not, at any time, recommend Mr. Barker or have any input with respect to HBO's selection of Mr. Barker to produce the film, *The New Diplomacy*.
- You currently have two personal, outside business agreements with Mr. Barker (on behalf of Silverbridge Productions), one regarding the previous production of a documentary, *Sergio*, and the other regarding an option to produce a feature film based on your book, *Chasing the Flame*. You have agreed to waive, during your appointment as Ambassador to the United States Mission to the United Nations, any further royalties from the documentary *Sergio* that was based on your book, *Chasing the Flame*. In addition, you have agreed to waive, during your appointment as Ambassador to the United States Mission to the United Nations, any payments relating to the dramatization or agreements relating to the dramatization of your book, *Chasing the Flame*.
- The Producer has agreed that *The New Diplomacy* will not in any way discuss, promote or endorse other works completed by or based on the personal, non-official works of any Department of State or United States Mission to the United Nations employee. This shall include, but not be limited to the film *Sergio* or the book upon which the film is based, *Chasing the Flame*.

- Other than with respect to your Individual Release and the terms of the License Agreement and the actions contemplated by those documents, you will not sign other documents or participate in any other decisions with respect to other production matters between the U.S. Government and the Producer(s) of *The New Diplomacy*.
- The production and financial interests of *The New Diplomacy* are completely separate and apart from and have no effect on your separate contractual agreements with Mr. Barker relating to your unofficial, personal works, including, but not limited to *Chasing the Flame*.
- Under the terms of the Individual Release to the Producer which you will sign, you will retain the right to review all documents, photographs or other materials in or related to *The New Diplomacy* provided by the Producer to, inter alia, confirm that the materials do not in any way discuss, promote or endorse your other works, including but not limited the works based or to be based on your book *Chasing the Flame*. Further, you agree that you will exercise your right to disapprove materials that discuss, promote or endorse your other works.
- Other than as set forth in the agreements you provided to my office between you and Mr. Barker with respect to the documentary, *Sergio*, and the options to produce a feature film based on your book, *Chasing the Flame*, you do not have any other agreements, arrangements, or financial connections to or interests in Mr. Barker, Silverbridge Productions, Chasing the Flame, LLC or HBO.
- Mr. Barker's use of the name "Chasing the Flame" for his production company was done without your knowledge and his use of the title does not in any way indicate that you have any prior or current personal affiliation with or financial interest in his production company, Chasing the Flame. LLC. In fact, you do not have a personal affiliation with or financial interest in Chasing the Flame, LLC.

B. Authorization to Participate in the Film, *The New Diplomacy*

Based on my understanding of the above factors, you are hereby authorized under 5 C.F.R. section 2635.502(d) to participate in the film, "The New Diplomacy" being produced by Mr. Greg Barker, Chasing the Flame, LLC.

Notwithstanding the authorization above, you would continue to be required to recuse yourself from participating personally and substantially in your official capacity as Ambassador to the United States Mission to the United Nations, in any other particular matter involving specific parties in which Mr. Greg Barker, Silverbridge Productions, or Chasing the Flame, LLC is a party or represents a party.

David P. Huitema
Alternate Designated Agency Ethics official

United States Department of State

Washington, D.C. 20520

UNCLASSIFIED

April 6, 2017

Certification and Waiver Pursuant to Section 3 of Executive Order 13770

Pursuant to section 3 of Executive Order 13770, I hereby certify that Heather Norby is granted a waiver of restrictions under paragraph 6 of the Ethics Pledge on her involvement, as Spokesperson of the Department of State, in certain particular matters involving specific parties directly and substantially related to her former employer, 21st Century Fox.

Scope of Waiver

Ms. Norby is permitted to work on the following matters in the course of her official duties, even if they constitute particular matters involving specific parties directly and substantially related to 21st Century Fox, as defined in section 2 of Executive Order 13770:

- Communications with employees of 21st Century Fox in the course of press briefings and other briefings involving a broad group of journalists;
- Meetings and communications with employees of 21st Century Fox to provide information about U.S. foreign policy or the Department of State, such as responding to press queries or requests for briefings or interviews;
- Interviews between employees of 21st Century Fox and the Spokesperson or other government officials.

The waiver would not permit Ms. Norby to work on the following matters:

- Particular matters that directly and predictably affect her financial interests, as defined in 18 U.S.C. § 208;
- Funding or contracts with 21st Century Fox.

Basis for Waiver

- Performing the official duties of Department Spokesperson will require Ms. Norby to participate personally and substantially in particular matters involving specific parties that are directly and substantially related to 21st Century Fox, as defined in Executive Order 13770.
- It would be highly impractical for other employees to take Ms. Norby's place in handling all meetings, communications, and other matters involving employees of 21st Century Fox. The Spokesperson is a senior counselor to the Secretary on press matters and one of the foremost public faces of the Department. In order to achieve the Department's public diplomacy and press strategy goals, it is important that the Spokesperson have the capacity to be aware of all press queries and to communicate the Department's messaging clearly and consistently to any and all media outlets and platforms.
- Ms. Norby will not have a continuing relationship with 21st Century Fox. Nor will she have a financial interest in 21st Century Fox.
- Opportunities for the Spokesperson to use her position to further the interests of 21st Century Fox at the expense of other outlets would be constrained by the mission and working methods of the Bureau of Public Affairs, including

the Office of Press Relations, which seeks to effectively communicate U.S. foreign policy and information about the Department to the entire U.S. and global community. This necessitates cooperation with the full range of accredited journalists. While communications with individual journalists are assessed on a case-by-case basis, the Office of Press Relations and Bureau of Public Affairs permit attendance at press briefings by any accredited journalist.

- Principles of federal ethics law restrict Ms. Norby from showing preference or favoritism toward employees of 21st Century Fox in the course of her official duties. The State Department will counsel Ms. Norby on the application of the federal ethics rules and there is no reason to question her integrity in this regard.

Accordingly, this limited waiver is hereby granted with the understanding that Ms. Norby will comply with the remaining provisions of the Ethics Pledge and with government ethics rules.

Donald F. McGahn II
Counsel to the President

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 15, 2017

MEMORANDUM FOR: **ANTHONY SAYEGH**
ASSISTANT SECRETARY FOR PUBLIC AFFAIRS

FROM: Rochelle F. Granat
Assistant General Counsel
General Law, Ethics and Regulation
and Designated Agency Ethics Official

Elizabeth A. Horton
Deputy Assistant General Counsel (Ethics) and
Alternate Designated Agency Ethics Official

SUBJECT: Participation in Matters Regarding Fox News Channel

This memorandum grants you an authorization pursuant to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) to participate in matters that may involve your former client, Fox News Channel.

You are the Assistant Secretary for Public Affairs. Prior to this position, you were a contributor to Fox News Channel, from 2013 until 2017. As the Assistant Secretary for Public Affairs, you develop and implement communications strategy for the Department and advise officials within the Department and its bureaus how best to communicate issues and priorities of public interest.

Subpart E of the Standards contains provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of your official duties. Due to your former role as contributor, you have a "covered relationship" with Fox News Channel, until one year following termination of that contract.
5 C.F.R. § 2635.502(b)(1)(iv). As such, you are prohibited from participating in a "particular matter involving specific parties" when "a person with whom you have a covered relationship is or represents a party" to the matter, and the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter.
5 C.F.R. § 2635.502(a)(1). Therefore, absent authorization, or affirmative application of this reasonable person standard, you would not be permitted to participate in a particular matter involving specific parties in which Fox News Channel is a party or represents a party until the one-year period has elapsed. [1]

Pursuant to the Standards, a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." 5 C.F.R. § 2640.102(1). Examples of particular matters involving specific parties include such matters as contracts, grants, licenses, product

[1] Under the terms of the Ethics Pledge required under Executive Order 13770 (January 28, 2017), this "covered relationship" lasts two years. By separate memorandum White House Counsel has approved a waiver of the similar restrictions of paragraph 6 of the Ethics Pledge.

approval applications, litigation, and investigations. In the context of your specific responsibilities, a likely example of a particular matter involving specific parties in which Fox News Channel is a party could include a request by Fox News Channel for an interview with a senior Treasury official.

Under section 2635.502(d), even when an employee's participation in a particular matter involving specific parties likely would create an appearance of partiality, "the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Government's programs and operations." Section 2635.502(d) identifies factors to be taken into consideration, which include:

1) The nature of the relationship involved;
2) The effect that resolution of the matter would have on the financial interests of the person involved in the relationship;
3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
4) The sensitivity of the matter;
5) The difficulty of reassigning the matter to another employee; and
6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

After weighing these factors, we issue this authorization to mitigate any appearance concerns with your participation in matters involving Fox News Channel. The interest of the Government in your participation outweighs concern that a reasonable person might question your impartiality in the administration of these matters.

First, Fox News Channel is a 24-hour news network which delivers breaking news and political and business news. It has consistently been one of the top cable news networks for the past decade with over one million viewers per day. During your time with Fox News Channel, you were only a contributor, and not a full-time employee.

Second, Fox News Channel is likely to report on most, if not all, major Departmental matters. That will be the case regardless of who is in the position of Assistant Secretary for Public Affairs. You have no financial interest in Fox News Channel and are not in a position to personally benefit from this relationship. The nature of your role in matters involving Fox News Channel will be communicating information regarding the Department. Fox News Channel will be there to report on issues involving the Department and not to advocate a particular position.

Third, you were appointed as the Assistant Secretary for Public Affairs for your expertise and experience. You have over two decades of strategy, communications and policy experience. You have worked for multiple news networks and on various political campaigns. You are the Department's most senior communications official and will be expected to handle communications for the Secretary on sensitive Departmental matters. It is essential that the Department have an effective, credible voice in these communications with the media to address

the many important issues that arise in this forum. There is no practical way to segregate your duties to shield you from engagement in matters that involve one of the major media organizations and not require you to recuse from nearly all of your duties. The need for you to participate in matters that might involve Fox News Channel is core to your responsibilities as Assistant Secretary.

Lastly, due to the short time period you contributed to Fox News Channel, your limited role there, and the interest of the Department to disseminate information to the public on matters involving the operations and policies of the United States government, the risk that a reasonable person would question your impartiality is remote, and Treasury's interest in your participation in these matters outweigh any concern of partiality.

In conclusion, after careful consideration of the provisions in 5 C.F.R. § 2635.502, we authorize you to participate in any such matter in which Fox News Channel is a party or represents a party.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 29, 2017

MEMORANDUM FOR: **BRIAN CALLANAN**
DEPUTY GENERAL COUNSEL

FROM: Rochelle F. Granat
Assistant General Counsel
General Law, Ethics and Regulation
and Designated Agency Ethics Official

SUBJECT: Participation in Matters Regarding Cooper & Kirk PLLC

SUMMARY

This memorandum documents that I have granted you a limited authorization pursuant to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) to allow you to participate fully in policy matters related to housing finance reform even if an issue arises that might impact pending litigation in which your former employer, Cooper & Kirk PLLC represents one of several plaintiffs. Notwithstanding this limited authorization, you have elected to refrain from any participation in the management of the litigation, including any communication with your former employer concerning this matter.

BACKGROUND

As the Deputy General Counsel you are currently the only non-career employee in the Office of the General Counsel and you serve as Acting General Counsel. Prior to this position, you were a partner at Cooper & Kirk, from January 12, 2017 until March 9, 2017. Immediately prior to joining the firm, you served as Staff Director and General Counsel for the Senate Permanent Subcommittee on Investigations, having joined the Subcommittee in February 2015. As Deputy General Counsel and Acting General Counsel, you are a senior non-career legal and policy advisor to the Secretary, the Deputy Secretary, and other senior Treasury officials. .

Subpart E of the Standards contains provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Due to your former position with Cooper & Kirk, you have a "covered relationship" with the firm for one year following your appointment at Treasury. 5 C.F.R. § 2635.502(b)(1)(iv). As such, you are prohibited from participating in a "particular matter involving specific parties" when "a person with whom you have a covered relationship is or represents a party" to the matter, and the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter. 5 C.F.R. § 2635.502(a)(1). Therefore, absent authorization, or affirmative application of this reasonable person standard, you would not be

permitted to participate in a particular matter involving specific parties in which Cooper & Kirk is a party or represents a party until the one-year period has elapsed. [1]

Pursuant to the Standards, a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." 5 C.F.R. § 2640.102(1). Examples of particular matters involving specific parties include such matters as contracts, grants, licenses, product approval applications, litigation, and investigations.

Cooper & Kirk represents Fairholme Funds in pending litigation against the Department and the Federal Housing Finance Agency (FHFA) challenging an aspect of the conservator agreements Treasury and FHFA entered into with Fannie Mae and Freddie Mac (hereinafter, "GSE litigation"). Specifically, Fairholme is one of several plaintiffs challenging the variable net worth dividend under the agreements. You did no work related to the GSE litigation while you were at Cooper & Kirk.

I recognize that it is critical that a non-career OGC official be able to participate fully in sensitive housing finance reform policy discussions. Some of these discussions could at some point touch upon issues that might have an impact the litigation. I independently determined that to avoid any possible future impediment to your ability to provide appropriate advice to the Secretary and others on the important matter of housing finance reform, and out of an abundance of caution, a limited authorization is necessary and appropriate.

ANALYSIS

Under section 2635.502(d), even when an employee's participation in a particular matter involving specific parties likely would create an appearance of partiality, "the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Government's programs and operations." Section 2635.502(d) identifies factors to be taken into consideration, which include:

1) The nature of the relationship involved;
2) The effect that resolution of the matter would have on the financial interests of the person involved in the relationship;
3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
4) The sensitivity of the matter;
5) The difficulty of reassigning the matter to another employee; and
6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

[1] Under the terms of the Ethics Pledge required under Executive Order 13770 (January 28, 2017), this "covered relationship" lasts two years. By separate memorandum White House Counsel has approved a waiver of the similar restrictions of paragraph 6 of the Ethics Pledge.

Specifically, you served only briefly as a partner at the firm of Cooper & Kirk and while there you did not participate in any matters related to Fairholme or the GSE litigation. You have no financial interest in the matter or the firm. Consideration of options for housing finance reform is a critically important and sensitive policy matter and it will be disruptive and impractical for you to participate in some but not all aspects of this matter. As discussions of housing finance reform options proceeds, it will be increasingly difficult to readily anticipate when deliberations might evolve into consideration of the litigation. Absent your ability to participate fully in this policy matter, there will be no non-career legal input into this sensitive high priority matter. As a result, the Secretary and other policy officials will be deprived of your advice and counsel on this matter; career staff in the Office of General Counsel will be deprived of your guidance and supervision on this matter. There is no other non-career official in the Office of the General Counsel to whom this responsibility could be assigned. Given the nature of your brief tenure at the firm, it is unlikely that a reasonable person with knowledge of the facts would question your impartiality if you were to participate.

After weighing the above factors, I granted this limited authorization to mitigate any appearance concerns with your participation in housing finance reform policy discussions should discussion touch on issues that could impact litigation in which Cooper & Kirk represents a plaintiff. The interest of the Government in your participation outweighs any concern that a reasonable person might question your impartiality in the administration of these matters.

However, notwithstanding this limited authorization, I understand that you will refrain from any participation in the management of the litigation, including any communication with your former employer concerning this matter.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

August 18, 2016

MEMORANDUM FOR KODY KINSLEY
ASSISTANT SECRETARY (MANAGEMENT)

THROUGH: **Rochelle F. Granat**
Assistant General Counsel (General Law, Ethics & Regulation)
& Designated Agency Ethics Official

Elizabeth A. Horton
Deputy Assistant General Counsel (Ethics) & Alternate
Designated Agency Ethics Official

FROM: **Hanoi Veras**
Attorney Advisor

SUBJECT: **Your Participation in Matters Involving the District of Columbia**

This memorandum serves to authorize your participation as Assistant Secretary for Management (ASM) in certain matters in which the District of Columbia is a party, in particular, matters related to the administration of the retirement plans for District of Columbia judges, teachers, police, and firefighters, and matters related to Treasury facilities located in D.C.

Prior to rejoining Treasury on June 27, 2016, you were the Director of Policy and Program Support for the District of Columbia Department of Human Services. You were generally responsible for developing policy and improving and implementing processes related to homelessness and social safety benefits. The Treasury matters involving or affecting the District of Columbia that come before your office are not related to those matters you participated in or were under your purview while Director of Policy and Program Support.

The Standards of Ethical Conduct prohibit an employee from participating in a "particular matter involving specific parties" when "a person with whom he has a covered relationship is or represents a party" to the matter, and the circumstances would cause a reasonable person with knowledge of the relevant facts to question his or her impartiality in the matter 5 C.F.R. § 2635.502(a)(1). You have a covered relationship with the District of Columbia for one year from the date of your departure. This covered relationship will end on June 26, 2017.[1]

[1] The restrictions under paragraph two of the Ethics Pledge, prohibiting appointees from participating in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer, do not apply to you because Executive Order 13490 exempts the District of Columbia from the definition of former employer.

Under section 2635.502(d), even where an employee's participation likely would create an appearance of partiality, "the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." Factors that may be taken into consideration include the following:

> 1) the nature of the relationship involved;
> 2) the effect that resolution of the matter would have on the financial interests of the person involved in the relationship;
> 3) the nature and importance of the employee's role in the matter;
> 4) the sensitivity of the matter;
> 5) the difficulty of reassigning the matter to another employee; and
> 6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Id. at § 2635.502(d).

After weighing these factors, we authorize your participation in Treasury matters involving the District of Columbia, provided that they are unrelated to the District of Columbia Department of Human Services, for the following reasons:

- You were Director of Policy and Programs for approximately seven months, a very brief time, and you have had no other positions with the District of Columbia.
- While at the District of Columbia Department of Human Services, you did not personally work on or supervise any matters involving retirement programs, Federal real estate matters, or any other issues directly involving Treasury. In fact, your work there did not require you to interact with the Department of the Treasury in any manner.
- The District of Columbia is a city/local government in which you have no personal financial interests. There is also no possibility that any specific party matters in which the District of Columbia is a party would have any direct and predictable financial effect on you.[2]
- The Office of D.C. Pensions reports to the ASM. Matters involving Treasury's relationship to the District of Columbia in connection with the administration of these retirement plans are sensitive, and on the rare occasion that a matter needs to be raised to the Assistant Secretary level, it would not be practical or appropriate to direct it to another Assistant Secretary or elevate to the Deputy Secretary.
- It is unlikely that any of the matters that would potentially come before the ASM would involve the District offices with which you interacted at the time of your District employment.

[2] Further, you do not hold any specific financial interests in the District of Columbia, so 18 U.S.C. § 208, the financial conflict of interest statute applicable to Government employees, is not triggered.

- Prior to leaving Treasury for the District of Columbia Department of Human Services, you worked at Treasury for approximately three years as a Management and Program Analyst, a Special Assistant to the Deputy Assistant Secretary for Management and Budget, and then as the Senior Advisor to the Assistant Secretary for Management. You bring unique experience to your role as Assistant Secretary, and reassignment of Management matters involving the District of Columbia would be inefficient and would deprive the Department of your expertise in these matters.

In conclusion, after consideration of the provisions in 5 C.F.R. § 2635.502, we authorize you to participate in matters in which the District of Columbia is a party or represents a party with the exception of any matter that involves the District's Department of Human Services. Given the factors discussed above, we conclude that a reasonable person would be unlikely to question your impartiality.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 9, 2017

ACTION MEMORANDUM

TO: **DONALD F. MCGAHN**
WHITE HOUSE COUNSEL

FROM: Rochelle F. Granat
Assistant General Counsel for General Law, Ethics and Regulation and Designated Agency Ethics Official

SUBJECT: Waiver of Ethics Pledge Paragraph 6 for Anthony Sayegh

RECOMMENDATION

That you approve a waiver of paragraph 6 of the Ethics Pledge so that Anthony Sayegh, the Department of the Treasury's Assistant Secretary for Public Affairs, may participate in matters involving his former client, Fox News Channel.

_____ Approve _____ Disapprove _____ Let's Discuss

BACKGROUND

Executive Order 13770, "Ethics Commitments by Executive Branch Appointees," (EO) requires all Presidential appointees to sign an Ethics Pledge that, among other things, prohibits them from working on particular matters involving specific parties directly and substantially related to a former employer or client for a period of two years. Section 3 of the EO permits the President or his designee to grant a waiver of any restrictions contained in this pledge.

From 2013 until recently in 2017, Mr. Sayegh was a "contributor" for Fox News Channel. The President has appointed him as the Assistant Secretary for Public Affairs (Assistant Secretary). Pursuant to paragraph 6 of the Ethics Pledge, for two years from the date of his appointment he would not be able to participate in matters involving Fox News Channel. His ability to participate in such matters – essentially any matter in which Treasury would communicate with the major news networks - is integral to his position as Assistant Secretary for Public Affairs .

ANALYSIS

The Assistant Secretary develops and implements communications strategy for the Department and advises officials within the Department and its bureaus how best to communicate issues and priorities of public interest. Fox News Channel is a 24-hour news network which delivers breaking news and political and business news. It has consistently been one of the top cable

news networks for the past decade with over one million viewers per day.[1] It is in the interest of the Department and the public to inform the public on matters involving the operations and policies of the United States government. Fox News Channel is likely to report on most, if not all, major Departmental matters.

Mr. Sayegh has over two decades of strategy, communications and policy experience. He has worked for multiple news networks and on various political campaigns. The Assistant Secretary is the Department's most senior communications official and will be expected to handle communications for the Secretary on sensitive Departmental matters. It is essential that the Department have an effective, credible voice in these communications with the media to address the many important issues that arise in this forum. While Mr. Sayegh was only a Fox News Channel contributor, and not a full-time employee, and has no financial interest in Fox News Channel, his prior engagement with Fox News Channel triggers coverage under paragraph 6 of the Ethics Pledge.

There is no practical way to segregate the Assistant Secretary's duties to shield him from engagement in matters that involve one of the major media organizations and not require Mr. Sayegh to recuse from nearly all of his duties. The need for Mr. Sayegh to participate in matters that might involve Fox News Channel is core to his responsibilities as Assistant Secretary and outweighs any risk of an appearance of impartiality.

A waiver is therefore appropriate because: (1) it is in the Department's and public's interest; (2) it will be impossible for Mr. Sayegh to properly perform the duties of his position if he had to recuse from matters involving Fox News Channel; and (3) Mr. Sayegh's participation in matters involving Fox News Channel will have no impact on his financial interests.

CONCLUSION

Based on the above analysis, a waiver of paragraph 6 of the Ethics Pledge so that Mr. Sayegh may participate in matters involving his former client, Fox News Channel, is appropriate.

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[1] "Fox News Channel Tops Cable in Total Day Viewers for Record Eight Consecutive Months," http://press.foxnews.com/2017/02/fox-news-channel-tops-cable-in-total-day-viewers-for-record-eight-consecutive-months/

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 24, 2017

ACTION MEMORANDUM

TO: **DONALD F. MCGAHN**
WHITE HOUSE COUNSEL

FROM: Rochelle F. Granat
Assistant General Counsel for General Law, Ethics and Regulation and Designated Agency Ethics Official

SUBJECT: Waiver of Ethics Pledge Paragraph 6 for Brian Callanan

RECOMMENDATION

That you approve a narrow waiver of paragraph 6 of the Ethics Pledge, out of an abundance of caution, so that Brian Callanan, the Department of the Treasury's Deputy General Counsel, may participate fully in policy matters related to housing finance reform even if an issue arises that might impact pending litigation in which his former employer represents one of several plaintiffs.

Mr. Callanan has no financial interest in this matter and had no involvement whatsoever in the representation. Mr. Callanan will continue to refrain, however, from participation in the management of the litigation, including refraining from any communication with his former employer concerning this matter.

DFM Approve _____ Disapprove _____ Let's Discuss

BACKGROUND

Executive Order 13770, "Ethics Commitments by Executive Branch Appointees," (EO) requires all Presidential appointees to sign an Ethics Pledge that, among other things, prohibits them from working on particular matters involving specific parties directly and substantially related to a former employer or client for a period of two years. Section 3 of the EO permits the President or his designee to grant a waiver of any restrictions contained in this pledge.

From January 12, 2017, to March 8, 2017, Mr. Callanan was a partner at Cooper & Kirk PLLC. On March 9, 2017, Mr. Callanan was appointed to the non-career position of Deputy General Counsel. Notwithstanding his brief tenure at Cooper & Kirk, pursuant to paragraph 6 of the Ethics Pledge, for two years from the date of his appointment he would not be able to participate in matters involving Cooper & Kirk. The firm represents Fairholme Funds in pending litigation against the Department and the Federal Housing Finance Agency (FHFA) challenging an aspect of the conservator agreements Treasury and FHFA entered into with Fannie Mae and Freddie Mac (hereinafter, "GSE litigation"). Fairholme is one of several plaintiffs challenging the

variable net worth dividend under the agreements. Mr. Callanan did no work related to the GSE litigation while he was at Cooper & Kirk.

Currently, Mr. Callanan is the only non-career appointee in the Office of General Counsel (OGC). By virtue of having been appointed to the position of Deputy General Counsel, he currently also serves as Acting General Counsel pursuant to 31 U.S.C. § 301(f)(1). I recognize that it is critical that a non-career OGC official be able to participate fully in sensitive housing finance reform policy discussions. Some of these discussions could at some point touch upon issues that might impact the litigation. I independently determined that to avoid any possible future impediment to Mr. Callanan's ability to provide appropriate advice to the Secretary and others on the important matter of housing finance reform, and out of an abundance of caution, a waiver is necessary and appropriate. Even with the waiver, Mr. Callanan will continue to refrain from participation in management of the litigation, including refraining from any communication with his former employer concerning this matter.

ANALYSIS

Paragraph 6 of the Ethics Pledge provides in pertinent part:

> I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former client.

Section 2(d) of the Executive Order defines "directly and substantially related to my former employer" as "matters in which the appointee's former employer . . . is a party or represents a party." The GSE litigation is such a matter. The development of policy options for housing finance reform is not such a matter. Nevertheless, consideration of certain policy options could evolve into discussion of litigation strategy or the implication of the options for the plaintiffs. This possibility could implicate paragraph 6 of the Ethics Pledge.

A waiver of the Pledge to allow Mr. Callanan to participate in this policy matter without impediment (but not to extend to matters involving management of the GSE litigation) is warranted for the reasons discussed below.

Mr. Callanan served briefly as a partner at the firm of Cooper & Kirk. While at the firm, he did not participate in any matters related to Fairholme or the GSE litigation. Immediately prior to joining the firm, he served as Staff Director and General Counsel for the Senate Permanent Subcommittee on Investigations, having joined the Subcommittee in February 2017.5

It will be disruptive and impractical for Mr. Callanan to participate in some but not all aspects of this important policy matter. As discussions of housing finance reform options proceed, it will be increasingly difficult to readily anticipate when deliberations might evolve into consideration of the litigation. Absent Mr. Callanan's ability to participate in this policy matter, there will be no non-career legal input into this sensitive high priority matter. As a result, the Secretary and other policy officials will be deprived of his advice and counsel on this matter; career staff in the Office of General Counsel will be deprived of his guidance and supervision on this matter. There

is no other non-career official in the Office of the General Counsel to whom this responsibility could be assigned. Given the nature of his brief tenure at the firm, a reasonable person with knowledge of the facts would not question his impartiality if he were to participate.

I have determined that a waiver is therefore appropriate because: (1) it is in the Department's and public's interest; (2) it will be impossible for Mr. Callanan to fully perform the duties of his position if he had to recuse from aspects of the housing finance reform policy discussions; and (3) Mr. Callanan's full participation in this matter will have no impact on his financial interests.

CONCLUSION

Based on the above analysis, a waiver of paragraph 6 of the Ethics Pledge so that Mr. Callanan may participate fully in housing finance reform matters, is necessary and appropriate. The waiver record should note that Mr. Callanan will continue to refrain from participation in management of the litigation, including refraining from any communication with his former employer concerning this matter.