

**TO: Dr. Jewel H. Bronaugh
Deputy Secretary
United States Department of Agriculture**

FROM: Stuart Bender *Stuart Bender*
**Designated Agency Ethics Official and
Director, Office of Ethics
United States Department of Agriculture**

SUBJECT: Limited Authorization for You to Participate in Certain Official Matters involving Your Former Employer (the Commonwealth of Virginia) in accordance with Federal Ethics Impartiality Regulations (5 C.F.R. Section 2635.502(d)).

DATE: May 17, 2021

Introduction:

This memo provides formal authorization for you to participate, as the Deputy Secretary for the U.S. Department of Agriculture (USDA), in specific matters involving your most recent previous employer, the Virginia Department of Agriculture and Consumer Services, pursuant to the Standards of Ethical Conduct at 5 C.F.R. Section 2635.502(d). Because you are a political appointee, you are subject to both the Standards of Ethical Conduct (5 C.F.R. Part 2635) as well as President Biden’s Executive Order No. 13989 which requires Administration appointees to sign and adhere to the Ethics Pledge. The Ethics Pledge at E.O. 13989 Section 2(k) defines a former employer as:

“any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that “former employer” does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, or any United States territory or possession . or any international organization in which the United States is a member state.”

(Underlining supplied).

As noted above, the Ethics Pledge’s restrictions do **not** apply when an appointee’s former employer is an “entity of the Federal Government, State or local government” This is a common-sense exclusion of State Government from the definition of a “former employer,” since the Federal government has a long history and strong interest in working collaboratively with State Governments to benefit the public.

While the Virginia Department of Agriculture and Consumer Services is not considered a former employer for purposes of the President’s Ethics Pledge, it is considered a former employer for

purposes of the Standards of Ethical Conduct's impartiality regulations (5 C.F.R. Section 2635.502). The impartiality rule imposes a one-year cooling off period on all incoming new Federal employees regarding particular matters involving their former employer. 5 C.F.R Section 2635.502(b)(1)(iv). However, the rules also provide a common-sense method for allowing employees to participate in such matters where the potential risk of an appearance of losing impartiality on balance is determined to be minimal and outweighed by the benefit to the public. In such situation, a neutral Ethics Official must issue a written authorization, in accordance with the Standards of Ethical Conduct (at 5 C.F.R. Section 2635.502(d)), which permits an employee to work with his or her former employer. **Pursuant to the authority provided to me in Section 2635.502(d), and for the reasons detailed below, this memorandum constitutes formal authorization permitting you to work collaboratively, in your USDA position, with your former State Government employer, the Virginia Department of Agriculture and Consumer Services.**

Factual Background:

From May, 2018 until May 13, 2021, you were employed by the Commonwealth of Virginia as the Commissioner of the Virginia Department of Agriculture and Consumer Services. Established in 1877, the Virginia Department of Agriculture and Consumer Services promotes the economic growth and development of Virginia agriculture, provides consumer protection, and encourages environmental stewardship.

You were confirmed by the Senate on May 13, 2021, to be USDA's Deputy Secretary, and sworn into office on May 17, 2021. Consequently, because you resigned your Commissioner position on May 13, 2021, you are under a one year cooling off period with your former employer until May 13, 2022.

Ethics Analysis:

- I. **The Standards of Ethical Conduct impose a six-factor test for determining whether an authorization to participate is justified. Your situation meets all six factors.**

An authorization to participate despite having a covered relationship¹ is appropriate only when the interest of the Federal Government in the employee's participation outweighs the concern that a

¹ An employee is deemed to have a "covered relationship" with, among others, "any 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)(1)(iv).

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon 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;

reasonable person may question the integrity of the agency's programs and operations. The Office of Ethics makes this determination in writing by weighing six factors, as established in the Standards of Ethical Conduct:

Below is my analysis, based upon the information you have provided to the Office of Ethics:

1. The nature of the relationship involved.

You have confirmed that you once you resign from your Commissioner position, you will not have any ongoing financial ties with the Virginia Department of Agriculture and Consumer Services. Thus, you do **not** have a financial conflict of interest under 18 U.S.C. § 208(a)(1).

2. The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship.

Although the mission of the Virginia Department of Agriculture and Consumer Services aligns very closely with that of USDA, it is important to note that because you will have terminated your employment with the Commonwealth of Virginia, have no arrangement for future employment with the Commonwealth of Virginia. As a result, I have determined that your work as Deputy Secretary involving particular matters involving the Commonwealth of Virginia would have no effect upon your financial interests.

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.

USDA and the Virginia Department of Agriculture and Consumer Services both share a common mission of assisting and educating agricultural producers in the Commonwealth of Virginia. Moreover, precluding you from participating in all USDA matters involving the Commonwealth of Virginia would deprive the Federal government of your expertise in State government issues related to agriculture and the environment and create an unintended host of lost opportunities to facilitate coordination and communication between USDA and state and local government entities in the Commonwealth of Virginia.

4. The sensitivity of the matter.

Your role as Deputy Secretary in USDA's ongoing coordination with the Virginia Department of Agriculture and Consumer Services is a critical one but not particularly "sensitive" as characterized by these regulations. For example, you will not be heading up any confidential

(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.

investigation or audit of the Virginia Department of Agriculture and Consumer Services' compliance with USDA programs.

5. The difficulty in reassigning all matters involving the Virginia Department of Agriculture and Consumer Services to another employee.

As USDA's Deputy Secretary, you will be the second highest ranking official at the U.S. Department of Agriculture. It would be unnecessarily burdensome to USDA to reassign all communications about the current and potential initiatives involving USDA and the Virginia Department of Agriculture and Consumer Services. Your role as USDA's Deputy Secretary is one with a high level of public visibility and is accountable to oversight by the Congress. As the second highest ranking official at USDA, it would be difficult to reassign your duties with regard to particular matters involving the Commonwealth of Virginia to the only USDA executive who would be in a position of authority over you, the Secretary of Agriculture.

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 (e.g., limitation on participation).

Since USDA and the Virginia Department of Agriculture and Consumer Services both share a common mission of assisting and educating agricultural producers in the Commonwealth of Virginia, I do not believe that adjustments to your duties are required. Simply put, the risk of public perception issues due to your former employment relationship with the Commonwealth of Virginia is minimal and outweighed by the fact that the other party here is a State government which will be acting as USDA's partner for the betterment of its citizens.

However, out of an abundance of caution, and to ensure the public's trust and confidence, this authorization is a limited authorization. This means that while you will be able to fully participate in any **new** official USDA matters with the Commonwealth of Virginia, you will have a prudential disqualification (recusal), in your capacity as Deputy Secretary, from participating on particular matters involving specific parties (such as contracts or cooperative agreements) that you had previously personally worked on during your tenure as Commissioner of the Virginia Department of Agriculture and Consumer Services involving the Federal government.

Notwithstanding that this is a limited authorization, for the reasons detailed below, I am specifically authorizing you to participate in your official capacity as Deputy Secretary in meetings, events, and communications related to a specific non-profit educational documentary film concerning the current crisis in mental health in farming communities.

You have informed me that, as part of your duties as Commissioner of the Virginia Department of Agriculture and Consumer Services, you were involved in a non-profit documentary film concerning farmer stress and the unique mental health challenges posed by farming. I understand that you appear and speak about farming in this documentary film, in your prior capacity as Commissioner of the Virginia Department of Agriculture and Consumer Services. I understand that, aside from your Commissioner annual salary, you received no monetary compensation for your role in the documentary film and you have no ownership interest in the film. You have further

informed me that the documentary was created as a collaboration by the Virginia Department of Agriculture and Consumer Services, The Richard Bland College (a college within the College of William and Mary), and Virginia State University (an 1890 Land Grant University).

Because the issue of farmer stress and mental health in farming communities is a significant national public health issue related to food sustainability, I have determined that the Federal government will have a strong interest (outweighing any potential appearance issues), in having you attend meetings, deliver official remarks, and issue written statements raising public awareness about this documentary film and the important public health issues discussed in the film. Consequently, you are authorized to participate in non-commercial, educational activities in your official capacity to raise awareness of this documentary and advance public understanding of the pressing public health issues involving the nation's farmers discussed in the documentary film.

Conclusion

As USDA's Designated Agency Ethics Official, I have determined that your participation in those government matters where the Virginia Department of Agriculture and Consumer Services is also involved as a stakeholder will not impose a significant appearance risk, because the State government is obligated to act for the benefit of its citizenry. As a result, a member of the general public with knowledge of all the relevant factors would not question USDA's ability to be impartial in the administration of USDA programs. Moreover, your Virginia-specific expertise in agricultural education and development programs means that your future participation will be of substantial benefit for the Department of Agriculture and for successfully implementing the Department's agenda throughout the State of Virginia.

As noted above, this authorization is a **limited authorization**. This means that while you will be able to fully participate in any **new** official USDA matters with the Commonwealth of Virginia and USDA matters involving the documentary film concerning farmer mental health (as discussed above), you will have a prudential disqualification (recusal), in your capacity as Deputy Secretary, from participating on particular matters involving specific parties (such as contracts or cooperative agreements) that you had previously personally worked on during your tenure as Commissioner of the Virginia Department of Agriculture and Consumer Services involving the Federal government.

For the reasons detailed above, this memorandum constitutes the required written determination by me, as USDA's Designated Agency Ethics Official, authorizing your participation in those USDA matters involving the Virginia Department of Agriculture and Consumer Services, that you had not participated in personally when you were Commissioner. **This authorization is effective immediately and means that you may properly communicate about the educational documentary film concerning farmer mental health (described above) as well as general agricultural policies with former colleagues at the Virginia Department of Agriculture and Consumer Services in your official role as USDA Deputy Secretary.**

If you have any questions, please do not hesitate to contact me at Stuart.Bender@usda.gov or via telephone at (202) 720-2251.