April 29, 2021

MEMORANDUM

TO: Sarah Boateng
Chief of Staff
Office of the Assistant Secretary for Health

FROM: Rachel Levine
Assistant Secretary for Health
Department of Health and Human Services

SUBJECT: Limited Authorization to Participate in Matters Involving the Pennsylvania Department of Health

The purpose of this memorandum is to authorize you, under 5 C.F.R. § 2635.502(d), to participate in specific-party matters involving, as a party or party representative, the Pennsylvania Department of Health, for whom you served as an employee. After weighing the factors articulated in section 502(d), and consulting with the Department's OGC Ethics Division, 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 specific party matters as described in more detail, and subject to the limitations, below.

BACKGROUND

On January 29, 2021, you resigned from your position as Executive Deputy Secretary for the Pennsylvania Department of Health to accept an appointment as the Chief of Staff for the Office of the Assistant Secretary of Health (OASH) of the Department of Health and Human Services (HHS or Department). Upon resignation, you severed all financial ties with the Pennsylvania Department of Health, except that you retained a deferred compensation plan sponsored by the state, but the state no longer makes contributions to this plan.

Your tenure at HHS began on February 19, 2021. As the OASH Chief of Staff, your duties cover key health policy and programs of concern to the Department. Specifically, as the principal policy advisor to me in my current role as the Assistant Secretary for Health, you are involved in top-level discussions on OASH policy and program developments and ensure that I am equipped with the information necessary to ensure successful management of OASH. You may represent me in discussions with office heads and other members of the Department in conveying the Administration and Department's priorities, direction, and goals. You support me in the coordination of the Department's key public health offices and programs, a number of Presidential and Secretarial advisory committees, 10 regional health offices across the nation, the Office of the Surgeon General and the U.S. Public Health Service Commissioned Corps. The missions of the Department's broad-ranging public health offices include minority health, HIV policy, women's health, disease prevention, human research protections, and others. At times, you may also be asked to represent OASH in meetings with key stakeholders, including state and territorial governments.

You have more than 10 years of experience in government and administration. During the three years prior to your appointment, you served as the Executive Deputy Secretary of the Pennsylvania Department of Health (PADOH). In this position you served as the second in command under me while I was serving as PADOH Secretary, with the department's deputy secretaries and program areas reporting directly to you. Prior to that, you served two years as my Special Assistant at the PADOH, when I was the Physician General. From your previous roles, you bring direct state health department operational experience to HHS, which makes you effective at providing advice and counsel relative to how federal policy and regulations will impact state health departments and other stakeholders. This experience and perspective has significant value to the federal government and aids HHS in achieving its mission.

To effectively carry out your function as HHS OASH Chief of Staff, you will work with the departments of health for all states and territories, including the State of Pennsylvania, other federal agencies, non-governmental organizations, and industry stakeholders in administering HHS 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 considered a party matter. In your position as HHS OASH Chief of Staff, you must necessarily work with the Pennsylvania Department of Health.

LEGAL ANALYSIS

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. A "covered relationship" includes persons or entities for which the employee has, within the last year, served as an employee. 5 C.F.R. § 2635.502(b)(1)(iv). The disqualification requirement only applies to a "particular matter involving specific parties" (party matters) and not to "particular matters of general applicability" or broad policy matters. For example, it applies 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.

Participation in a party matter is not limited to direct contact between a federal employee and the non-federal party. Participation often includes, for example, when an employee performs work related to a matter through rendering a decision, approval, or disapproval, making a recommendation, or providing advice to another employee about a particular matter. Participation also includes the direct and active supervision of the participation of a subordinate in the matter. For example, were you to direct a subordinate how to respond to a request for information from the Pennsylvania Department of Health, you would be participating in a matter in which the Pennsylvania Department of Health was a party. Likewise, an employee engaging in advisory work relating to a party matter is often actually participating in that party matter. Were you to provide advice to me regarding a Memorandum of Understanding (MOU) with officials from the Pennsylvania Department of Health, you would be participating in a matter in

which the Pennsylvania Department of Health was a party, even if you did not have any direct contact with state public health officials or otherwise participate in the MOU.

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. 5 C.F.R. § 2635.502(d). You served as the Executive Deputy Secretary of the Pennsylvania Department of Health within the last year, and as such, you have a covered relationship with the Pennsylvania Department of Health. Because you recently provided services to this entity on issues that overlap with your duties as the OASH Chief of Staff, a reasonable person could question your impartiality regarding matters involving these entities.

Therefore, in order for you to participate in a particular matter in which the Pennsylvania Department of Health 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 HHS.

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

1. ***Nature of the relationship.*** You were employed by the Pennsylvania Department of Health for approximately five years of your 10-year career in state and federal government. You are not on a leave of absence from, nor do you have a continuing a relationship with, the Pennsylvania Department of Health. You are retaining a deferred compensation plan sponsored by the state of Pennsylvania, but the state no longer makes contributions to this plan, and you have no other personal financial interests that would create a conflict of interest with the Pennsylvania Department of Health. Markedly different from private, for-profit entities, state governments as prior employers are generally less likely to create the type of bias or appearance of special treatment that 5 C.F.R. § 2635.502 was meant to prevent.

2. ***Effect of the matter on the finances of the Pennsylvania Department of Health.*** As the OASH Chief of Staff, you will participate in matters that are of significance to the financial interests of all the departments of health for all the states and territories. As stated above, you provide advice and counsel on public health and science issues to me, some of which will affect state policies and programs subject to HHS administration, state budget and resource allocation, and the legal posture between the states and the Department. Your duties primarily focus on policy matters, and you will 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. However, the ultimate nation-wide policy decisions that you will be working on would also impact other similarly situated states in the same way. Under these circumstances, including the Pennsylvania Department of Health in your general public health advisory discussions is not likely to have a special or unique impact on the Pennsylvania

Department of Health and would not require the exclusion of the Pennsylvania Department of Health from these discussions to avoid special access or appearance concerns.

It is possible that you will be asked to participate personally and substantially in specific party matters that affect the financial interests of the Pennsylvania Department of Health. 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 health department. Rather, it would be presumed to have equal application to all similarly situated states and state health departments. 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 and state health departments. Such diffuse impact reduces reasonable impartiality concerns.

3. ***Nature and importance of your role.*** As the OASH Chief of Staff, your role is quite important. Though your role primarily involves advising me on public health and science issues, you might be expected to attend meetings or weigh-in on decisions to which the Pennsylvania Department of Health is a party. Your engagement with public officials at all levels in all 50 states and every U.S. territory is necessary as the Department tackles difficult issues such as the country's battle with COVID-19, the welfare of children who have crossed the US-Mexico border unaccompanied, the disparities and obstacles in access to healthcare, and the promotion of better health outcomes for all Americans.

   Your role will involve participation in matters where various states and state health departments, including the Pennsylvania Department of Health, are parties. Some of those matters may arise out of your role as my principal counsel on public health and science issues, especially as OASH is responsible for broad-ranging public health offices, whose missions include minority health, HIV policy, women's health, disease prevention, human research protections and others. Given the importance of your role, the government has a strong interest in your participation in these official matters.

4. ***Sensitivity of the matter.*** Matters that come before the OASH are typically some of the most sensitive in nature. The Office of the Assistant Secretary for Health manages policies and decisions that typically have nation-wide impact and are expected to receive significant attention by the media and the Congress. Some issues are controversial in nature, and decisions on such issues may result in litigation against the Department. It is important that you be accessible to advise me on these issues and share the Department's views and rationale, as well as its decisions, with interested states and state health departments and with the key stakeholder group that represents state public health agencies. You will be able to share information that is publicly available and shared with other states that have requested a personal meeting with you or me to discuss issues of importance to the respective states. Allowing *all* state health departments to participate in policy discussions as policy decisions are formulated helps to mitigate concerns that a

reasonable person may question the integrity of the programs and operations of HHS due to preferential treatment.

5. ***Difficulty of reassigning the matter.*** You have been selected to be the Assistant Secretary for Health's principal policy advisor. Concerning the State of Pennsylvania, it would be inefficient to reassign these duties, as reassignment based on a single stakeholder's participation or interest in a matter could create inconsistency in function and policy. Furthermore, reassignment to a subordinate advisor would unduly disadvantage the citizens of Pennsylvania were the Department to engage with that state in a different manner than the other states and territories.

6. ***Adjustments to your duties.*** You were brought to HHS because of your extensive experience in policy and government. Alteration to your duties would undermine the value you bring to the Department. As stated above, such changes would cause the Department to lose the benefit of your expertise in party matters involving the Pennsylvania Department of Health, which is inefficient and could harm HHS's public health advisory capabilities. The provisions of 5 C.F.R. § 2635.502 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 these.

LIMITATIONS

This authorization is limited. It does not apply to any entity covered by 5 C.F.R. § 2635.502(a) other than the Pennsylvania Department of Health. It does not remove your obligation to follow any other provision of the Ethics Pledge or any other ethics law, rule, or regulation. Finally, this authorization expires on January 29, 2022, the end date of your regulatory recusal obligation.

DECISION

In accordance with 5 C.F.R. § 2635.502(d), I have determined that, in light of all the circumstances, the interest of the government in your participation in specific party matters involving the Pennsylvania Department of Health, as a party or party representative, outweighs any concern about a potential appearance of lack of integrity. Therefore the limited authorization as described above is granted.

Rachel L. Levine, MD

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Rachel Levine

cc: OGC/Ethics Division