January 20, 2021

MEMORANDUM FOR Benjamin Sommers, M.D., Ph.D.

FROM: Sean McCluskie, Chief of Staff

SUBJECT: Limited Conflict of Interest Waiver Under 18 U.S.C. § 208(b)(1)

You have requested a conflict of interest waiver under 18 U.S.C. § 208(b)(1) so that you may continue to serve your clinical patients at Brigham & Women's Hospital (BWH), uncompensated, until you can fully transfer those patients to another physician in accordance with medical ethics and your outstanding obligations to those existing patients. You indicated that transfer is expected to be February 23, 2021. You are currently serving as the Deputy Assistant Secretary for Planning and Evaluation (ASPE) in the ASPE Office of Health Policy at the Department of Health and Human Services (HHS). Under 18 U.S.C. § 208(b)(1), the criminal conflict of interest statute, a waiver may be granted if the appointing official, or delegate, determines that the disclosed financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from" the employee. Based on the information and analysis contained in this memorandum, your request for a waiver is granted subject to the limitations described below.

The Office of Government Ethics (OGE) has been consulted concerning the issuance of this limited waiver, as specified in 5 C.F.R. § 2640.303. Additionally, the HHS Acting Designated Agency Ethics Official has reviewed this document, as required by the Delegation of Authority by the Secretary to the Heads of Operating and Staff Divisions to Grant Conflict of Interest Waivers under 18 U.S.C. §§ 203(d), 205(e), and 208(b), dated January 16, 2009, and has concluded that this waiver adequately addresses the requirements for such waivers as set forth in OGE regulations at 5 C.F.R. § 2640.301.

BACKGROUND

The ASPE Office of Health Policy provides policy perspectives that bridge Departmental programs, public and private sector activities, and the research community, in order to develop, analyze, coordinate and provide leadership on health policy issues for the Secretary. The Office of Health Policy carries out this mission by conducting policy, economic and budget analyses, assisting in the development and review of regulations, assisting in the development and formulation of budgets and legislation, assisting in survey design efforts, as well as conducting and coordinating research, evaluation, and information dissemination on issues relating to health policy.

Importantly, for the issue this waiver is meant to address, ASPE plays an integral role in providing guidance and research to the Secretary and HHS Divisions on the Coronavirus Aid,

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Relief, and Economic Security (CARES) Act and the Paycheck Protection Program and Health Care Enhancement Act (PPPCHE) Provider Relief Fund (PRF). The Provider Relief Fund supports healthcare providers in the battle against the COVID-19 pandemic. The federal government has allocated $175 billion in payments to be distributed through the PRF. Qualified providers of health care, services, and support may receive Provider Relief Fund payments for healthcare-related expenses or lost revenue due to COVID-19. Separately, the COVID-19 Uninsured Program reimburses providers for testing and treating uninsured individuals with COVID-19.

BWH is a 793-bed teaching affiliate hospital of Harvard Medical School. You have had a position and clinical practice at BWH's Division of General Medicine and Primary Care as part of your teaching appointment at Harvard Medical School since 2011, save for the years you were on leave during your prior appointment to ASPE.

BWH is a part of Brigham Health, which includes 1,200 doctors throughout New England working across 150 outpatient practices, Brigham and Women's Faulkner Hospital, and Brigham and Women's Physicians Organization. It is also part of Mass General Brigham, a single, integrated health care system that consists of 16 member institutions that encompass a range of health care organizations. In addition to its academic medical centers, these include specialty hospitals, community hospitals, a rehabilitation network, a health insurance plan, a physician network, a teaching organization and many locations for urgent and community care.

Like many hospitals throughout the country, BWH applied for and received funds from the Provider Relief Fund. Government records indicate that the current total of funds received by BWH and affiliates is around $130 million. Government records do not indicate that you, personally, received money from the PRF and your responsibilities at BWH did not include application for or decisions regarding allocations of the PRF funds.

LEGAL ANALYSIS

The criminal conflict of interest statute, 18 U.S.C. § 208(a), requires that a federal employee refrain from participating personally and substantially in an official capacity in any particular matter that will have a direct and predictable effect on his own financial interests or anyone whose financial interests are imputed to him, such as the financial interests of any organization in which the individual serves as an officer, director, trustee, or employee. The term "particular matters" includes both particular matters involving specific parties and particular matters of general applicability (PMGA). While the former consists of matters that directly affect the financial interests of specific parties in financial or legal transactions with the government, such as litigation, grants, contracts or audits, the latter is a broader category of official matters – policies, regulations, and activities that support them – that affect a discrete and identifiable class of entities.

For example, future decisions about the structure and dispensation of the PRF will, as past decisions had done, affect the financial interests of providers affected by the pandemic, either through their treatment of COVID-19 patients or due to the loss of revenue during the pandemic. In the prior Administration, ASPE (1) assisted with the launch of the PRF after the CARES Act

was enacted, (2) used its contractor, Acumen, to prepare a number of files at the request of HHS leadership, such as analysis of Medicare claims and provider cost report files to estimate Medicare spending and total spending for each provider, and (3) worked with the Health Resources & Services Administration, the department's ultimate administrator for the PRF, to support its work on the PRF. ASPE appears poised to ramp up work again on the PRF as the new Administration evaluates its policy goals for the fund and its broader COVID-19 health and economic response. As such, your work in ASPE will affect the discrete and identifiable class of providers who apply or have applied to the PRF, which we know to include BWH.

Absent a waiver of the requirements of section 208(a), you will not be permitted to participate in policy, advice or research concerning the PRF. Only in rare circumstances is a federal employee able to continue outside employment with an entity affected by particular matters in which he or she participates without obtaining a waiver, none of which apply to this situation. Under 5 C.F.R. § 2640.203(m), an employee on a leave of absence from an accredited institution of higher education does not need a waiver to participate in particular matters of general applicability that do not have a special effect on their institution. Here, however, after your appointment in ASPE, you will continue your clinical practice for several more weeks, so the leave of absence exception cannot apply to you during that time. Under 18 U.S.C. § 208(b)(1), a waiver may be granted if the appointing official or delegate determines that the disclosed financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from" the employee.

OGE has articulated several factors that agencies may consider when determining the substantiality section 208(b)(1). *See* 5 CFR § 2640.301(b). The factors relevant to this analysis are the type of interest from which the conflict arises, the identity of the person whose financial interest is affected, and the need for the employee's services in the particular matter.

Your position as an associate professor of medicine at Brigham & Women's Hospital/Harvard Medical School is a salaried position. While the financial interests of your employer must be imputed to you under 18 U.S.C. § 208(a), you are not an officer or director and do not otherwise hold a position of fiduciary responsibility at BWH. Furthermore, you have agreed to forgo compensation between the time of your appointment to HHS and your final transfer of patients to another physician, which is expected to be February 23, 2021. In light of your forgoing compensation after your appointment to ASPE, you will have no personal financial interest in the work of the Department on the PRF or other matters that affect the financial interests of BWH.

The Department is in need of your services as the new administration evaluates and implements policies to address the healthcare and economic effects of the COVID-19 pandemic. You are a Harvard trained and appointed health economist and physician whose primary research interests are the uninsured, Medicaid policy, and socioeconomic disparities in health care. You are a publicly recognized expert regarding the health care safety net, health disparities, and how public programs like Medicaid affect public health and the economy, including in the context of the 2020-2021 coronavirus epidemic. Your prior appointment in ASPE further indicates that you will be able to quickly acclimate to working within the federal government and immediately provide suitable advice and guidance to the government.

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Your official duties for the Department will not involve specific party matters and this waiver is not waiving your recusal requirement for specific party matters that affect BWH directly or PMGAs that have a special or distinct effect on BWH except as a member of a class. You agreed to forgo compensation for your remaining service as a physician in clinical practice removes any actual or apparent effect on your personal financial interests. Furthermore, your clinical practice will only last until you are able to ethically transfer your patients to another physician, which will only be until February 23, 2021, with reduced clinical sessions during that time. You fully disclosed the source of your conflict and worked with the Department to mitigate the risks of this conflict of interest. For these reasons and the foregoing, your continued clinical practice is not likely to effect the integrity of the services the Government expects you to perform.

LIMITATIONS

This waiver is limited in scope. It does not permit you to participate personally and substantially in particular matters involving specific parties in which BWH is or represents a party to the matter or decisions that directly affect BWH or have a special or distinct effect on BWH except as a member of a class. It also does not permit you to receive compensation for your clinical practice during your Government service. Finally, this waiver will expire February 23, 2021.

DETERMINATION

After weighing the factors delineated by OGE, the type of interest from which the conflict arises, the identity of the person whose financial interest is affected, and the need for the employee's services in the particular matter, plus your personal lack of compensation for this outside work and limited duration of this conflict, your proposed clinical practice at BWH does not create a conflict of interest substantial enough to affect the integrity of your Government service. Accordingly, you are granted a limited waiver, subject to the terms and conditions stated above, based on my determination, made in accordance with 18 U.S.C. 208(b)(1), that the disclosed financial interests are not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the employee.

Confirmed and acknowledged:

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BENJAMIN SOMMERS, M.D., Ph.D. Date

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Executive Summary

Benjamin Sommers, M.D., Ph.D., is currently serving as the Deputy Assistant Secretary for Planning and Evaluation (ASPE) in the Office of Health Policy at the Department of Health and Human Services (HHS). He requires a conflict of interest waiver under 18 U.S.C. § 208(b)(1) in order to continue serving his clinical patients at Brigham & Women's Hospital (BWH), uncompensated, until he can fully transfer those patients to another physician in accordance with medical ethics and his outstanding obligations to those existing patients. That transfer is expected to be February 23, 2021.

ASPE plays an integral role in providing guidance and research to the Secretary and HHS Divisions on the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the Paycheck Protection Program and Health Care Enhancement Act (PPPCHE) Provider Relief Fund (PRF), and absent a waiver, Dr. Sommers will be unable to participate in policy, advice or research concerning the PRF. Under 18 U.S.C. § 208(b)(1), the criminal conflict of interest statute, a waiver may be granted if the appointing official, or delegate, determines that the disclosed financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from" the employee. The U.S. Office of Government Ethics issued relevant factors to consider when issuing such a waiver at 5 C.F.R. § 2640.301. This waiver is needed because of an imputed, rather than a personal financial interest; the waiver does not permit Dr. Sommers to participate personally and substantially in particular matters involving specific parties in which BWH is or represents a party to the matter or decisions that directly affect BWH or have a special or distinct effect on BWH except as a member of a class; the waiver does not permit Dr. Sommers to receive compensation for his clinical practice during his Government service, and the waivers expires on February 23, 2021. The HHS Acting Designated Agency Ethics Official has reviewed this document, as required by the Delegation of Authority by the Secretary to the Heads of Operating and Staff Divisions to Grant Conflict of Interest Waivers under 18 U.S.C. §§ 203(d), 205(e), and 208(b), dated January 16, 2009, and has concluded that this waiver adequately addresses the requirements for such waivers.