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Office of the Secretary of Transportation

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MEMORANDUM FOR STEVEN S. CLIFF
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

From: Judith S. Kaleta
Deputy General Counsel
Designated Agency Ethics Official

JUDITH SUE KALETA
Digitally signed by JUDITH SUE KALETA
Date: 2021.02.16 21:28:26 -05'00'

RE: Request for a Determination Pursuant to 5 CFR § 2635.502 Involving the California Air Resources Board

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This memorandum documents my authorization to you to participate in particular matters involving specific parties in which the California Air Resources Board (CARB), a unit of the California Environmental Protection Agency, is a party or represents a party. CARB is the primary California state agency responsible for actions to protect public health from the harmful effects of air pollution. CARB is the lead agency for climate change programs and oversees all air pollution control efforts in California to attain and maintain health-based air quality standards.

After considering the relevant circumstances, and for the reasons outlined below, I have determined that you may participate in particular matters involving CARB while serving as an employee of the National Highway Traffic Safety Administration (NHTSA) at the U.S. Department of Transportation (the Department) because the interest of the Federal government in your participation in certain CARB matters outweighs any concern that a reasonable person may question the integrity of the Department's programs and operations.

In accordance with 5 CFR § 2635.502(d), you may participate in particular matters involving CARB in the manner explained in this memorandum.

Ethics Requirements for Incoming Appointees, including the President's Ethics Pledge

Executive branch employees, including incoming appointees, are subject to a set of ethics rules contained in the Standards of Ethical Conduct for Employees of the Executive Branch. Underlying these rules is a principle that employees must avoid even the appearance of impropriety. Under the primary conflict of interest law, an employee must not participate in any particular matter affecting the employee's financial interests, and the impartiality rule goes even further by focusing on appearance issues. The impartiality rule, Subpart E of 2 CFR Part 2635, applies even when the employee is free of financial conflicts of interest. § 2635.502(b)(1)(iv). Under the standards of ethical conduct, 5 CFR § 2635.502 prevents a Federal employee from

participating personally and substantially in a particular matter involving specific parties if that employee has a covered relationship with a party and "a reasonable person with knowledge of the relevant facts" would question the employee's impartiality. This requirement to refrain from participating (or "recuse") is designed to avoid the appearance of favoritism in government decision-making. 5 CFR § 2635.502(a). In addition to other relationships, the impartiality rule is triggered by the employee's relationship with individuals, clients, and organizations the employee has served professionally as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee within the past year. 5 CFR § 2635.502(b)(1)(iv).

Executive Order 13989 requires any covered appointee to sign an Ethics Pledge that includes several commitments. 86 Fed. Reg. 7029 (January 25, 2021). Paragraph 2 of the Ethics Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13989, sec. 1(2). The one year cooling off period does not extend to two years under the Ethics Pledge because CARB is excluded from the definition of former employer under the Ethics Pledge as a state employer. Exec. Order No. 13989, sec. 2(k).

Consideration of Relevant Factors Under a 5 CFR § 2635.502(d) Authorization

As a NHTSA employee, you will be a key leader in advancing the Administration's and the Department's climate goals involving the Safer Affordable Fuel-Efficient (SAFE) Rulemakings and any related actions, including litigation, consistent with Executive Order 14008 on *Tackling the Climate Crisis at Home and Abroad.* 86 Fed. Reg. 7619 (February 1, 2021). As a NHTSA senior employee and as a spokesperson for the Department on climate issues involving transportation by motor vehicle, it is in the Department's interest that you have an opportunity to work on the SAFE Rulemakings and related actions, including litigation.

Under 5 CFR § 2635.502(d), where an employee's participation likely would raise a question in the mind of a reasonable person about the employee's 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." 5 CFR § 2635.502(d) lists several factors that may be taken into consideration, as follows:

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.

CARB participated extensively in the rulemaking process that led to the issuance of the SAFE 1 and 2 rules. CARB submitted multiple written comments presenting its views on a

wide variety of technical, factual, policy, and legal issues. You participated in the development of and, in several cases, signed the CARB comments. CARB also participated in public hearings and other meetings during the rulemaking process. After issuance of the final rules, CARB was one of the petitioners challenging NHTSA's SAFE 1 Rulemaking and SAFE 2 Rulemaking. California Attorney General (AG) Xavier Becerra was a party, in his independent capacity, and the AG's Office also represented CARB as a client for the SAFE 1 Litigation and SAFE 2 Litigation. On the greenhouse gas standards for truck trailers finalized in 2016, the U.S. Environmental Protection Agency (EPA) and NHTSA were sued by industry and CARB intervened to support the Federal agencies ("Trailer" litigation). *Truck Trailer Manufacturers Association, Inc. v. United States Environmental Protection Agency,* United States Court of Appeals, District of Columbia Circuit, Case No. 16-1430, petition filed December 22, 2016. The case is pending a decision. Litigation is a particular matter involving specific parties.

On NHTSA's rulemakings, CARB filed several comment letters in response to the SAFE 1 and 2 Rulemakings, which resulted from a single notice of proposed rulemaking. The SAFE 1 Rulemaking involving the waiver for California is considered an adjudication that involves a specific party. That is, the SAFE 1 Rulemaking involves a particular matter involving California and CARB.

You have a covered relationship with CARB pursuant to 5 CFR § 2635.502(b)(iv); however, any resolution of the matters involving NHTSA's SAFE Rulemakings and associated litigation matters would not have any effect on your financial interests or the financial interests of CARB.

As a NHTSA employee in a leadership position, and based on your professional background and experience, you are uniquely situated to participate in discussions, deliberations, internal and external meetings, recommended actions, speeches, appearances, press releases and events, etc. related to NHTSA's SAFE Rulemakings and associated litigation matters. Having other officials participate in these actions on your behalf may not always be a viable alternative to your participation in such matters and may not be as effective in communicating the Department and the Administration's priorities.

You are a climate and clean air expert, with a PhD in chemistry, decades of experience in the area of air quality and climate, and a body of research on the effects on California's air quality from particulate matter produced in China. You led CARB's programs on reducing and regulating vehicle emissions and incentives for electrification of vehicles and worked with several automakers on adopting California's fuel standards. With your assistance, and that of your colleagues at CARB, California has worked on addressing climate change issues. The State's programs to reduce greenhouse gases includes a zero-emission vehicle mandate that will address air pollution in the transportation sector and put close to 1.5 million plug-in or hydrogen fuel cell vehicles on the roads by 2025. Because of the cap-and-trade program, which reduces carbon emissions from electricity generation, natural gas, transportation fuels, and large-scale industries, billions of dollars have been invested to reduce greenhouse gases in cities and towns throughout California, with an emphasis on disadvantaged communities.

Since NHTSA's SAFE Rulemakings are so central to the Department's and the Administration's priorities as they relate to climate change, and consistent with Executive Order 14008 on

Tackling the Climate Crisis at Home and Abroad, your inability to participate in NHTSA's SAFE Rulemakings could substantially limit NHTSA and the Department's ability to implement fuel emission standards on behalf of the American public. Permitting you, as a NHTSA noncareer leader, to participate in SAFE Rulemaking matters would benefit NHTSA, the Department, and the Administration by ensuring that you, as a key technical expert, lead the development and implementation of fuel efficiency standards.

Conclusion

Based on a consideration of all relevant factors, as described above, I have determined that the interest of the Federal Government in your ability to participate in NHTSA's SAFE Rulemakings, and associated litigation matters, outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations as a result of your participation in those rulemaking and litigation matters. After considering these factors, your request for an authorization to participate in all such matters is approved. The authorization shall continue for the duration of your tenure with NHTSA.

The Department's Ethics Office will continue to provide ethics advice to you to ensure that your participation in matters involving CARB is consistent with this authorization and the Standards of Ethical Conduct for Employees of the Executive Branch. If you have further questions about the scope of this authorization, please do not hesitate to contact me.