UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

JAN 10 2018

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the State of Florida

FROM: Kevin S. Minoli KSM
Designated Agency Ethics Official and
Principal Deputy General Counsel

TO: Matthew Leopold
General Counsel

As the General Counsel for the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the State of Florida. Within the last year, prior to being selected for this position, you provided legal services to the Florida Department of Environmental Protection (FL DEP). You ceased providing legal services to the FL DEP on June 30, 2017.

Under President Trump's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, Executive Order 13770 defines "former employer" to exclude state or local government entities,[1] and the Office of Government Ethics has determined that the same exclusion applies to the definition of "former client."[2] Therefore, the Ethics Pledge does not apply to your former client. But since federal ethics rules do not contain a similar exclusion for state government, those rules do apply to your former client.

I understand that you have a defined contribution plan with the State of Florida. As such,

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[1] *See* Exec. Order 13770, Section 2(j), which provides that "'former employer' does not include … State or local government."

[2] *See* Office of Government Ethics Legal Advisory 17-02 (February 6, 2017), which states that, "[w]ith respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders," and Office of Government Ethics Legal Advisory DO-09-011 (March 26, 2009), which states that "based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer."

you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. In the Agency's experience, it is unlikely that you as General Counsel will be in any position to affect the State's ability or willingness to pay these benefits to its retirees. I do not expect, then, that 18 U.S.C. § 208 will prohibit you from carrying out your official EPA duties.

However, what remains is an impartiality concern. The applicable ethics rules are set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Upon assuming the position of General Counsel, you will have a "covered relationship" with the State of Florida pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date you last provided legal services to the FL DEP, absent an impartiality determination from me, you cannot participate in any specific party matter in which the State of Florida is a party or represents a party if that matter is likely to have a direct and predictable effect upon the State or if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a). Absent this impartiality determination, your "cooling off" period with the State of Florida will last until June 30, 2018, which is one year from the date you last provided services to them.

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

(1) the nature of the relationship involved;
(2) the effect that resolution of the matter will have upon the financial interest of the person affected 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.

As General Counsel, you are the chief legal advisor to the Agency and Administrator, and part of the Agency's political team. In your role as General Counsel, you are expected to communicate freely with states and you will be asked to participate in discussions and meetings related to particular matters that affect the State of Florida. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as General Counsel in particular matters that

involve the State of Florida with the following limitation: you must recuse yourself from participation in EPA specific party matters if you participated personally and substantially in the same specific party matters while providing legal services to the FL DEP or while employed by Florida. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Within the last year, you have provided legal services to the FL DEP, which is the Florida state agency responsible for environmental management and stewardship. I note that you previously served as General Counsel for the FL DEP until you left the agency in March 2015. As a private sector attorney, you provided services to the FL DEP in a case in which the United States is not a party, and those services ended on June 30, 2017. Sensitivities regarding your impartiality will necessarily revolve around those issues in which you participated personally and substantially for the FL DEP in all of your previous roles. But, for purposes of the federal impartiality standards, we are focused only on your "covered relationship" with your former client from the last year. I also note that states share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Nature and importance of the employee's role – In your role as General Counsel, you are the chief legal advisor to the Agency. Among other things, OGC lawyers provide legal counsel to EPA policy-makers, shape national legislation affecting the environment, and provide legal support for the issuance of permits, the approval of state environmental programs, and the initiation and litigation of enforcement actions. As General Counsel, you are expected to communicate freely with states, including Florida.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you did not participate personally and substantially for the FL DEP that will rise to your level of attention, merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as General Counsel in such matters will be of importance to the Administrator, and therefore, in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the State of Florida, but not on the very same specific party matters on which you worked on personally and substantially while providing legal services to the FL DEP or while employed with the State of Florida. If the Agency determines that we have a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis along with additional relevant details before determining whether to authorize your participation. You must continue

to recuse yourself from those matters in which you had previously participated unless OGC/Ethics first determines that the Agency's interest in your participation outweighs any impartiality concern and authorizes you to participate.

Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters if necessary. To that end, I understand that you will not participate in any particular matter involving specific parties that are still pending with EPA that you worked on personally and substantially while providing legal services to the FL DEP or employed by Florida. You are cognizant of your attorney bar rules that prohibit you from participating in any matter that is the same as or substantially related to the same specific party matter that you previously participated in personally and substantially, unless your bar provides for and you first obtain informed consent and notify OGC/Ethics.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh at fugh.justina@epa.gov or (202) 564-1786

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