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

OFFICE OF
GENERAL COUNSEL

JAN 11 2018

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Litigation Related to the TSCA Risk Evaluation Rule, TSCA Prioritization Rule, and TSCA Inventory Notification (Active-Inactive) Rule

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

TO: Nancy Beck, Ph.D., DABT
Deputy Assistant Administrator
Office of Chemical Safety and Pollution Prevention

Effective April 30, 2017, you joined the United States Environmental Protection Agency (EPA) in an Administratively Determined (AD) position as the Deputy Assistant Administrator for the Office of Chemical Safety and Pollution Prevention (OCSPP). Prior to your selection, you served as the Senior Director of Regulatory Science Policy at the American Chemistry Council (ACC).

Upon joining EPA, you appropriately consulted with the Office of General Counsel's ethics office (OGC/Ethics) regarding your ethics obligations and have adhered to our advice. As an AD appointee, you understand that you are subject to the federal conflict of interest statutes and the Standards of Ethics Conduct for Employees of the Executive Branch, but you are not required to sign President Trump's ethics pledge set forth at Executive Order 13770.[1] You were advised by OGC/Ethics that you have a "covered relationship" with your former employer pursuant to the federal impartiality standards, and you cannot participate in any specific party matter involving ACC absent approval from OGC/Ethics. This recusal period is in effect until April 21, 2018.

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[1] This type of appointment falls outside the definition of "appointment" set forth at Executive Order 13770 at Section 2(b). *See* Office of Government Ethics advisories entitled "Guidance on Executive Order 13770," LA-17-03 (March 20, 2017) and "Executive Order 13770," LA-17-02 (February 6, 2017), which apply to the following OGE advisories from the last administration in full: "Who Must Sign the Ethics Pledge?" DO-09-010 (March 16, 2009); and "Signing the Ethics Pledge," DO-09-005 (February 10, 2009).

OGC/Ethics has advised you consistently that you may participate in particular matters of general applicability, including rulemakings, even if the interests of your former employer may be affected by the rule. On June 8, 2017, I issued an impartiality determination authorizing you to attend meetings at which ACC is present or represented, provided that the subject matter of the meeting is a matter of general applicability, other interested non-federal parties are present, and other EPA officials are also in attendance. Consistent with this advice, as Deputy Assistant Administrator for OCSPP you have worked on a wide range of matters as authorized by the federal ethics rules and OGC/Ethics, including the development and promulgation of final agency actions and regulations under TSCA.

Some of the final agency actions and regulations you helped EPA issue were challenged in court. Initially, consistent with the ethics requirements and advice from OGC/Ethics, you assisted in the Agency's defense and litigation efforts in these cases. When the agency was notified that your former employer, ACC had intervened in these lawsuits, you ceased your involvement and sought further ethics advice. We indicated that unless you received an impartiality determination from me, the federal impartiality standards would prohibit you from continuing your work on these specific party matters.

You now request a determination as to whether you may, as part of your official duties, participate personally and substantially in the following litigation where you participated in the promulgation of the final rule while at EPA the ACC has either intervened or filed a motion to intervene:

Case Name	**Citation**	**TSCA Rule**
Alliance of Nurses for Healthy Environments, *et al.* v. EPA; Environmental Defense Fund v. EPA	No. 17-1926 (4th Cir.) No. 17-2464	Risk Evaluation Rule
Alliance of Nurses for Healthy Environments, *et al.* v. EPA	No. 17-1927 (4th Cir.)	Prioritization Rule
Safer Chemicals Healthy Families, *et al.* v. EPA	No. 17-72259 (9th Cir.)	Risk Evaluation Rule
Safer Chemicals Healthy Families, *et al.* v. EPA; Environmental Defense Fund v. EPA	No. 17-72260 (9th Cir.) No. 17-72501	Prioritization Rule
Environmental Defense Fund v. EPA	No. 17-1201 (D.C. Cir.)	Inventory Notification (Active-Inactive) Rule

You do not have any financial conflict of interest with your former employer, so the applicable ethics rules are set forth in the Standards of Ethical Conduct for Executive Branch employees, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Pursuant to 5 C.F.R. § 2635.502(b)(1)(iv), you have a "covered relationship" with ACC

as your former employer. As explained above, for one year from the time you resigned from ACC, absent an impartiality determination from me, you cannot participate in any specific party matter in which ACC is a party or represents a party if that matter is likely to have a direct and predictable effect upon ACC 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).

Federal ethics regulations permit 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.

In reviewing these factors, I have decided to allow you to participate fully in these specific party matters. In making this determination, I have taken the following factors into consideration:

- The nature of your relationship with ACC as your former employer but with whom you do not have any financial conflict of interest, as described more fully above, and that the resolution of the litigation is not expected to have an effect on the financial interest of ACC.

- As the Deputy Assistant Administrator for OCSPP, you are responsible for advising the Administrator in matters pertaining to chemical safety, pollution prevention, pesticides and toxic substances, including the development and implementation of rulemakings under federal statutes. Although your type of appointment is not a political one, you currently serve in the only non-career position in OCSPP. As such, you must be able to effectively carry out your role in advising senior agency officials, including the Administrator.

- In your capacity as the Deputy Assistant Administrator for OCSPP, you worked on the TSCA Risk Evaluation Rule, TSCA Prioritization Rule, and TSCA Inventory Notification (Active-Inactive) Rule. As part of your official EPA duties, you were authorized to participate in developing these rules. Your expertise, skill, and experience (including your experience working on these regulations while at the EPA) are needed to

enhance the Agency's litigation efforts and to ensure that you are effectively advising the Administrator, the General Counsel, and career staff.

- All of these specific party matters originated after you left ACC.

- While you still participate in an ACC defined contribution plan, neither you nor your former employer continues to make contributions. Pursuant to federal ethics regulations, this type of employee benefit plan does not present any financial conflict of interest. *See* 5 C.F.R. § 2640.201(c).

After considering the relevant facts of the situation consistent with the factors identified in the federal ethics regulations, I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality and I am authorizing you to participate as Deputy Assistant Administrator in the litigation identified above. This determination will remain in effect for the remainder of your cooling off period, which expires later this year. After April 21, 2018, you will no longer have a covered relationship with ACC under the impartiality standards and will no longer require this determination.

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.

cc: Louise P. Wise, Deputy Assistant Administrator
Justina Fugh, Senior Counsel for Ethics