

October 2, 2020

MEMORANDUM

TO: Lawrence A. Tabak, D.D.S., Ph.D.
Deputy Director
National Institutes of Health

FROM: Elizabeth J. Fischmann
Associate General Counsel, Ethics
Designated Agency Ethics Official

SUBJECT: Appointment to Position of Deputy Ethics Counselor and
Delegation of Authority - **UPDATED**

Authority to Appoint and Delegate: Pursuant to his authority as Designated Agency Ethics Official (DAEO) for the Department of Health and Human Services (HHS) under Title I of the Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989, 5 U.S.C. app. 4, and 5 C.F.R. Part 2638, as provided in the memorandum of appointment and delegation of authority to the DAEO issued by the Secretary of Health and Human Services, dated November 12, 1997, and subject to the DAEO's continuing authority to exercise any or all of the authorities noted herein, my predecessor appointed you to the position of Deputy Ethics Counselor (DEC) for the National Institutes of Health (NIH) and the Office of the Director as of August 26, 2010. Pursuant to my DAEO designation and delegation dated October 29, 2015, I am issuing this updated appointment and delegation to you as the Deputy Ethics Counselor for the NIH to reflect the current structure of the government ethics program.

In light of regulatory changes that occurred after your original delegation took effect, I hereby affirm, consistent with 5 C.F.R. § 2638.104(e), that you continue to have the delegated authorities, duties, and responsibilities referred to in 5 C.F.R. § 2638.104(c), except for those functions set forth in 5 C.F.R. § 2634.605(c)(2) (certification of nominee financial disclosure statements) and 5 C.F.R. § 2638.104(f), that are more specifically described below, to be exercised within your agency component according to law and under the supervision of the DAEO.

In addition, subject to limitations described in the original delegation memorandum and hereby reaffirmed, you are authorized to appoint DEC's for the Institutes and Centers that comprise the NIH and for the Office of the NIH Director (IC DEC's) and to allocate the ethics functions to IC DEC's within the NIH provided that: (1) my office is apprised and concurs in advance to any

DEC personnel, implementation policy or procedure, or portfolio changes within the ethics program at NIH; (2) consistent with my continuing power to exercise the authorities delegated herein, my office retains the authority to directly instruct, consult, advise, or review the activities of the IC DEC; (3) the position descriptions or contracts of IC DEC contain an express reference to their ethics duties; (4) the IC DEC performance plans or contracts delineate a rating element or quantifiable objective relating specifically to management and operation of the ethics program; and (5) each IC DEC receives from you a copy of the document entitled “Deputy Ethics Counselor, HHS Ethics Program: Statement of Functions, Responsibilities, and Authority, August 15, 2007 (web links and attachments updated September 1, 2020) and a copy of OGE DAEOgram DO-03-011, dated June 30, 2003.

Authority Delegated: As the NIH Deputy Ethics Counselor, you continue to have authority and responsibility for the following ethics program functions within NIH, subject to such limitations and/or reservations herein described:

- (1) Administration of the public financial disclosure system in accordance with regulations at 5 C.F.R. Part 2634 and HHS policies issued by the DAEO, including the certification of completed reports;
- (2) Administration of the confidential financial disclosure reporting systems, including the supplemental reporting requirements, in accordance with regulations at 5 C.F.R. Part 2634 and Part 5502, and HHS policies issued by the DAEO;
- (3) Management of the outside activity prior approval process, including the annual reporting of outside activities, in accordance with regulations at 5 C.F.R. Part 2635, Subpart H, and Parts 5501 and 5502, and HHS policies issued by the DAEO;
- (4) Management of the agency’s compliance with cash or in-kind travel reimbursement authorities and compilation of the semi-annual reports to be submitted to the Office of the Assistant Secretary for Administration and Management for reporting to the Office of Government Ethics;
- (5) Administration of the procurement integrity ethics provisions prescribed by the General Services Administration in the Federal Acquisition Regulation, including the issuance of procurement integrity advisory opinions described at 48 C.F.R. Section 3.104-6;
- (6) Dispensing of advice and counsel to managers, supervisors, and individual employees on the statutes and regulations governing conflicts of interest, representational activities, salary supplementation, post-employment, political activity, and related ethics provisions;
- (7) Rendering determinations under the Standards of Ethical Conduct with respect to awards, honorary degrees, prohibited gifts, conflicts of interest, impartiality, and other matters requiring a disposition by an “agency ethics official” and/or an “agency designee;”

- (8) Assessing information provided by employees or others to ascertain the application of the conflict of interest statutes and regulations and resolving actual or potential conflicts or the appearance of a loss of impartiality;
- (9) Developing and maintaining an education and training program regarding ethics, political activity, and related topics;
- (10) Enforcing ethics laws, standards of ethical conduct, and related provisions through referrals for criminal investigation and/or administrative sanctions; and
- (11) Ensuring that ethics requirements are met by any advisory committee and committee managers assigned to your agency component. This includes managing the financial disclosure reporting system, identifying conflicting interests, assessing impartiality concerns, ensuring ethics training, and preparing disqualification statements, waivers, or authorizations for committee members.

For a more complete description of the delegated and reserved duties, please refer to the document entitled “Deputy Ethics Counselor, HHS Ethics Program: Statement of Functions, Responsibilities and Authority, August 15, 2007 (web links and attachments updated September 1, 2020),” which is incorporated herein by reference.

Reservations: The ability to exercise authorities described above as they relate to officers or employees holding the following positions within your agency component is excepted from your delegation and reserved to the DAEO, the Alternate DAEO, or the DAEO’s designee:

- (1) Positions designated for appointment by the President by and with the advice and consent of the Senate (PAS);
- (2) Positions designated for appointment by the President (PA);
- (3) Positions occupied by noncareer appointees described in 5 U.S.C. § 3132(a)(7) (noncareer SES) or noncareer appointees hired under other appointing authorities;
- (4) Positions of a confidential, policy-determining, policy-making, or policy-advocating character described in 5 U.S.C. § 7511(b)(2)(B) (Schedule C).

Redelegation: Subject to the limitations and requirements noted herein, you continue to have authority to delegate certain of your DEC authorities consistent with the summary description of ethics matters reflected in the attached chart entitled “Delegation of Authority for Ethics Actions” to the persons identified on the attached chart entitled “IC Deputy Ethics Counselor Appointments for NIH.” At all times, IC DEC’s must be at a sufficiently high organizational level to be consistent with sound management of these responsibilities. Consistent with guidance

from the Office of Government Ethics, DAEOgram DO-03-011 (June 30, 2003), neither you nor they may redelegate inherently governmental ethics program functions to anyone other than a federal employee. For ease of reference, I have attached a copy of this OGE opinion. Additionally, you and all IC DEC's must retain the authority to certify Public Financial Disclosure Reports (SF 278e reports) and to issue procurement integrity advisory opinions described in 48 C.F.R. § 3.104-6.

Any disputes in relation to the interpretation of, or future changes to, the attached materials shall be resolved by mutual consultation, but the determination of the DAEO shall be dispositive.

Instructions: As a DEC, you are required to have an evaluation element reflecting your ethics program management duties and responsibilities in your performance plan or contract. A member of my staff will contact you regarding this requirement.

There are three key elements for running a successful ethics program. First, you and/or your staff must acquire and maintain the needed skills to discharge properly your ethics duties, including becoming knowledgeable about ethics-related laws and regulations. Second, you must have an adequate number of staff members dedicated to your program, and they must be sufficiently qualified to help you to satisfy the program needs delineated in this appointment memorandum. Third, your program must be visible to your employees. Please ensure that NIH continue to be encouraged to see guidance concerning government ethics questions.

I encourage you to assess the staffing resources currently devoted to your program, and to do so routinely, to determine whether your program is adequately staffed.

Effective Date: This appointment and delegation is effective immediately and will remain in effect until such time as it is superseded or you leave the management position upon which this appointment is predicated. Please advise me of any personnel change as soon as possible so that I may appoint a successor DEC.

Effect on Existing Appointments and Delegations: This appointment and delegation reaffirms and updates your prior DEC appointment and delegation of authority for the NIH.

I look forward to continuing to work with you to improve the administration and effectiveness of the ethics program at the NIH.

Attachments

cc: Francis S. Collins, M.D., Ph.D.
Director, NIH