



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the
General Counsel

August 5, 2013


CERTIFICATION OF PUBLIC INTEREST WAIVER FOR JOSHUA D. WRIGHT

FROM: Christian S. White
Designated Agency Ethics Official

SUBJECT: Limited Waiver from Restrictions Related to Charles River Associates

Pursuant to the authority delegated under Section 3 of Executive Order 13490 ("Ethics Pledge"), for the reasons stated in the attached memorandum, and after consultation with the Office of the White House Counsel, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee Joshua D. Wright in the position of Commissioner at the Federal Trade Commission ("FTC" or "Commission"). Commissioner Wright previously held the position of Senior Consultant at Charles River Associates ("CRA"). Absent a waiver, Commissioner Wright would be prohibited by paragraph 2 of the Ethics Pledge from participating in any particular matter involving specific parties in which CRA is or represents a party.

I authorize Commissioner Wright to participate in particular matters involving CRA, subject to the limitations set forth below and in the attached memorandum. This waiver is deemed only applicable in those circumstances where CRA represents a party to an FTC matter involving specific parties and the matter rises to the level of Commission review. This authorization does not remove the bar on engaging in one-on-one meetings or communications with CRA as set forth in the Ethics Pledge. This waiver does not authorize Commissioner Wright to participate in contracting matters, including contract determinations, involving CRA as a party or to participate in those particular matters involving specific parties in which he participated as a Senior Consultant for CRA. This waiver does not otherwise affect Commissioner Wright's obligation to comply with the Ethics Pledge or with all other applicable federal government ethics rules.

Signed 
Christian S. White
Designated Agency Ethics Official
Federal Trade Commission

Date 8/5/13




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MEMORANDUM

TO: Joshua D. Wright
Commissioner

FROM: Christian S. White 
Designated Agency Ethics Official

SUBJECT: Limited Waiver under E.O. 13490 and Limited Authorization under 5 C.F.R.
§ 2635.502(d) for matters involving Charles River Associates

The purpose of this memorandum is to document the basis for waiving the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch ("Ethics Pledge"), and for my determination under the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards of Conduct"), 5 C.F.R. § 2635, that you may participate in certain FTC particular matters in which your former client, Charles River Associates ("CRA"), represents a party.

Background

You were sworn in as a Commissioner of the Federal Trade Commission ("FTC" or "Commission") on January 11, 2013, to a term that expires in September 2019. The FTC's mission is to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity. The FTC deals with issues that touch the economic life of every American.

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy. The FTC pursues vigorous and effective law enforcement; advances consumers' interests by sharing its expertise with federal and state legislatures and U.S. and international government agencies; develops policy and research tools through hearings, workshops, and conferences; and creates practical and plain-language educational programs for consumers and businesses in a global marketplace with constantly changing technologies.

Many of the particular matters that come before the Commission involve extensive economic analysis. While this is true for FTC matters generally (including those that originate in the agency's Bureau of Consumer Protection), specific party matters that stem from the FTC's Bureau of Competition almost always involve detailed economic analysis of alternative antitrust actions. Further, parties to FTC antitrust matters routinely obtain support from economics

experts who are affiliated with major consulting firms, such as CRA (FTC staff also occasionally uses economics experts who are affiliated with major consulting firms, including CRA). Economic experts generally affiliate with major consulting firms either through an employer-employee relationship or as an independent contractor. Economic experts commonly enter into simultaneous independent contractor affiliations with multiple consulting firms. Unlike the wide variety of large law firms that have or seek to do business before the Commission, there are a small number of large economic consulting firms that routinely have matters before the FTC. Over the past decade, the key players have included CRA, Compass Lexecon, NERA, Bates White, and LECG Corporation (now defunct). While smaller economic consulting firms occasionally may be involved in FTC matters, a major firm like CRA is involved as an expert in roughly one-third of all antitrust specific party matters pending at the FTC.

Prior to being confirmed as a Commissioner, you were affiliated with CRA as an independent contractor in the position of Senior Consultant beginning October 2009.¹ You have indicated that the title of “Senior Consultant” to CRA is a term of art distinguishing employees (who generally are labeled as “Principals” or other titles such as President or Vice-President) from independent contractors. In practice, you contracted with CRA in order to obtain the firm’s support for your individual consulting activities at your discretion. Specifically, you contracted with CRA to handle billing services and (on occasion and upon your request) to provide staffing for research needs in connection with economic consulting work that you independently secured.

I understand CRA provided billing and staffing support services to you on a single antitrust matter.² Despite receiving your payments through CRA, you retained 100% of the billings for your personal work and received a percentage of the billings CRA obtained for the services provided by its staff. Further, you did not have an exclusive relationship with CRA. In practice, you determined which firm you would affiliate with on a project-by-project basis and, on several occasions, you decided to use another consulting firm. You did not closely interact with individuals affiliated with CRA beyond those you specifically selected to support you on the single matter you sourced to CRA and you rarely had reason to be inside the CRA workplace (you performed your consulting work elsewhere). Although you acknowledge you were a consultant in the traditional sense with respect to the persons you personally serviced (*i.e.*, you were a consultant to Church & Dwight, the party who paid CRA for your personal services), you believe your relationship with CRA was an independent contractor relationship. In essence, you have characterized your relationship with CRA as that of a sole proprietor contracting with an entity to obtain administrative support and other assistance at your discretion. Despite the title of Senior Consultant, a title granted to the overwhelming majority if not all non-employee academic affiliates of CRA such as yourself, you believe it is inaccurate to state that you provided *personal services to CRA* as a consultant (*e.g.*, you did not provide consulting services to CRA regarding its business practices, you did not work for CRA clients at the firm’s request—you independently sourced the one consulting project for which CRA provided you billing and support services).

¹ Section 5 of your contract with CRA describes the relationship between you and CRA as one of an independent contractor.

² That matter involved an FTC investigation and private antitrust litigation against Church & Dwight, Inc. Pursuant to the Ethics Pledge, during your two-year “cooling-off” period, you must not participate in FTC matters where Church & Dwight, Inc. is or represents a party. Further, ethics restrictions generally prohibit you from participating in the same matter in which you participated in private practice for the life of that matter.

Ethics Pledge

As you are aware, the Ethics Pledge provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. E.O. 13490, Sec. 1, paragraph 2. The Ethics Pledge further provides that a "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. § 2641.201(h), except that it shall also include "any former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec.2(h).

The Ethics Pledge references the following definition provided in the Standards of Conduct; however, the Ethics Pledge specifically includes regulations and contracts:

5 C.F.R. § 2641.201(h)(1): *Particular matter involving a specific party or parties* – (1) *Basic concept.* The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. § 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The Ethics Pledge provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director of OMB has designated the Designated Agency Ethics Official of each agency to exercise the Section 3 waiver authority, in writing, and in consultation with the Counsel to the President or her designee.

Although I have no doubt that your characterization of your relationship with CRA is accurate, I believe the firm meets the definition of "former client" for purposes of Section 1, Paragraph 2 of the Ethics Pledge. My belief primarily stems from the firm's public marketing, with your consent, of your relationship with CRA as a consultant to the firm³ and the language in your

³ Your contract expressly gives CRA the right to disclose publicly that you are affiliated with the firm as an economic, financial or business consultant and it appears CRA took advantage of that clause. For example, the firm announced via press release that "Senior Consultant to CRA Joshua Wright [was] nominated as FTC Commissioner." CRA, Senior Consultant to CRA Joshua Wright nominated as FTC Commissioner, CRA Announcement Antitrust & Competition, http://www.crai.com/uploadedFiles/RELATING_MATERIALS/Publications/LAE/Antitrust_and_Competition_Economics/Wright%20Announcement_0912.pdf (last visited April 30, 2013). Further, the profiles of CRA Senior Consultants appear alongside the profiles for CRA senior employees in the firm's online professional directory. Finally, CRA appears to publicly announce (via press release) new Senior Consultant affiliations in the same manner it announces the hiring or promotion of senior staff.

contract with CRA suggesting the firm had some degree of control over your consulting services even if not exercised in practice.⁴ Further, simply due to your prior service as an independent contractor, you have a “covered relationship” with CRA for purposes of 5 C.F.R. § 2635.502. Accordingly, without a waiver of Section 1, Paragraph 2 of the Ethics Pledge and an authorization under 5 C.F.R. § 2635.502(d), you are prohibited from participating in FTC particular matters where CRA is a party or represents a party.

Pledge Waiver

The standard for waiving the recusal provisions in the Ethics Pledge is that it be in the public interest. E.O. 13490, Sec. 3. As a Commissioner, it directly serves the public interest that the FTC have the benefit of your participation in matters before the Commission. A number of important specific party matters involving CRA, in particular antitrust matters that raise significant competition policy questions, are likely to come before the Commission. Your recusal would deprive the Commission of one of its Presidentially-appointed decision makers and the Commission would not be able to benefit from your expertise and judgment. You are the only current Commissioner who has both a JD and a PhD in economics, and are the second Commissioner ever with that distinction, making you uniquely qualified to participate in the many complex antitrust matters before the Commission that intersect those disciplines. Moreover, many of the FTC’s antitrust matters (merger reviews in particular) are incredibly time sensitive and it can be difficult to determine with certainty whether CRA represents a party in such matters.⁵ Finally, the recusal provides an opportunity for litigants to engage in strategic and pre-emptive hiring of CRA to create a conflict that would compel your recusal. [As you have

⁴ For example, your contract provided that “[w]hile the Consultant is consulting for CRA, the Consultant shall” comply with CRA’s standard policies for consultants. You agreed you would not take on work that would materially limit your ability to fulfill commitments to CRA due to conflicts of interest concerns. Further, you were required to give CRA the first right of refusal for all of your economic, financial, litigation or business consulting work. However, you were free to take the work elsewhere if the client refused to retain CRA or if there was an instance in which CRA did not have the necessary staff expertise or availability for the particular project. In practice, I understand that you did in fact take all projects but one to other consulting firms during the term of the CRA contract.

⁵ Unlike formal notifications provided to staff regarding the status of attorney representatives, CRA’s involvement in a particular matter may not be readily apparent. Generally, FTC staff become aware of CRA’s involvement in a matter by receiving reports from parties to that matter that have been prepared by experts affiliated with CRA or by meeting in person with CRA-affiliated experts along with parties to the matter (typically, the parties’ legal representatives are also present). Economic consulting firms commonly engage in analysis that informs the parties’ assessment of antitrust risk in a particular matter without appearing in the more formal sense of submitting expert reports, white papers, or other submissions. Further complicating matters is that CRA’s involvement in FTC matters may be limited in scope and time. For example, CRA may provide an economic analysis at the initial phase of an investigation but may not otherwise appear before or communicate to FTC staff in connection with that matter. Assuming the analysis provided by CRA is no longer at issue in the matter, CRA’s continued involvement in the FTC proceeding may be unclear at any given time (particularly with respect to providing “behind the scenes” assistance).

mentioned, since you have become a Commissioner, numerous antitrust practitioners have inquired with you about your recusals related to CRA which heightens this concern.] Should you continue to be recused from matters involving CRA, the corresponding administrative burdens on your fellow Commissioners may lead to operational and procedural inefficiencies – the agency currently has a vacancy at the Commissioner level and the offices of existing Commissioners are leanly staffed.

After consultation with the Office of the White House Counsel, I have determined that it is in the public interest that you be able to participate in certain FTC particular matters relating to CRA. Your expertise and judgment in making sound decisions on major issues before the Commission is required to address significant legal and economic challenges and further the Commission's mission of protecting competition and consumers. In my judgment, the nature of your former consulting arrangement with CRA does not restrict your ability to address those concerns impartially. Accordingly, I hereby provide a limited waiver of the requirements of paragraph 2 of the Ethics Pledge as it pertains to your future involvement with particular matters related to CRA. Specifically, I authorize you to participate in FTC particular matters involving CRA, subject to the following limitations:

- This waiver is deemed only applicable in those circumstances where CRA represents a party to an FTC matter involving specific parties and the matter rises to the level of Commission review.
- This authorization does not remove the bar on engaging in one-on-one meetings or communications with CRA as set forth in the Ethics Pledge.
- This waiver does not authorize you to participate in contracting matters, including contract determinations, involving CRA as a party.⁶
- This authorization does not permit you to participate in those particular matters involving specific parties in which you participated as a Senior Consultant with support from CRA.

Standards of Conduct Waiver

The Standards of Conduct require employees to act impartially, and to avoid the appearance of impropriety. 5 C.F.R. § 2635.101(b). More specifically, the Standards of Conduct require employees to take appropriate steps to avoid a loss of impartiality in the performance of their official duties. *Id.* at § 2635.502(a). Where an employee knows that a person with whom he has a “covered relationship” is a party or represents a party to an official matter, he should not participate in that matter without informing an agency ethics official and receiving authorization to participate. Included in the definition of a “covered relationship” is any person for whom the employee has served, within the preceding calendar year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. *Id.* at § 2635.502(b)(1)(iv).

Accordingly, you have a “covered relationship” with CRA, where you held the position of Senior Consultant as an independent contractor. I conclude that a reasonable person would not question the integrity of the FTC's programs and operations based on your participation in matters that come before the Commission involving CRA as described above. Should such questions nevertheless arise, I further conclude that, given the critical responsibilities associated with your

⁶ To be clear, with this waiver, you may participate in the FTC matters where staff has retained the services of CRA without your personal and substantial participation in that contractual process.

position as Commissioner, the United States' interest in your participation outweighs the concern that a reasonable person may question the integrity of the FTC's programs and operations.

Accordingly, as the Designated Agency Ethics Official for the FTC, I hereby also provide a corresponding authorization pursuant to 5 C.F.R. § 2635.502(d) for the same reasons and with the same limitations as described above regarding the waiver of Section 1, Paragraph 2 of the Ethics Pledge.

Finally, this limited waiver and authorization does not otherwise affect your obligation to comply with the Ethics Pledge or with all other applicable federal government ethics rules.