



UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary of Commerce
for Oceans and Atmosphere
Washington, D.C. 20230

MEMORANDUM FOR: Assistant Administrators
Office Directors

MAY 14 2013

FROM: Kathryn D. Sullivan, Ph.D.
Acting Under Secretary of Commerce
for Oceans and Atmosphere

SUBJECT: Service as Officer or Board Member of Nonprofit Organizations

Effective April 5, 2013, a new regulation issued by the Office of Government Ethics (OGE) removes the conflict of interest barrier previously codified in 18 U.S.C. Sec. 208 for Federal employees to serve in an official capacity on behalf of the federal government as an officer or member of a board of directors of a non-Federal, nonprofit organization. Under previous OGE regulations and related interpretations in effect since 1996, federal employees have been permitted to serve as officers of nonprofit boards in their personal capacity or in a liaison capacity, not in a professional capacity. Waivers were available that would allow service in a professional capacity, under limited circumstances.

One of President Obama's earliest initiatives was to direct the Office of Science and Technology Policy (OSTP) to recommend a plan to achieve scientific integrity throughout the Executive Branch. OSTP developed guidance that informed each agency's development of a Scientific Integrity Policy. The OSTP guidance specifically included encouragement of service on governing boards of professional societies and nonprofit. The National Oceanic and Atmospheric Administration (NOAA), in developing its science integrity policy, embraced that goal in the guidance. In addition, OGE began a rulemaking process to consider removing barriers to such service. The regulation, effective April 5, 2013, removes a significant barrier. In light of the regulation, Department of Commerce employees may, in appropriate circumstances, serve as officers of nonprofit boards in their professional capacities. Federal employees are also still permitted to serve in personal or liaison roles with nonprofits, as before.

Attached are the Interim Guidelines to implement that regulation issued by the Office of the Assistant General Counsel for Administration of the Department of Commerce General Counsel's Office, effective April 5, 2013. An important component of those Interim Guidelines is that each agency within the Department is free to decide whether service with any particular type of organization is permissible. With the understanding that NOAA encourages such service in appropriate circumstances, particularly with regard to scientific organizations and professional societies, I am hereby authorizing the head of each NOAA Line and Staff Office to evaluate any requests for service and to make determinations under these Interim Guidelines for employees under their supervision. Any NOAA employee, including Line and Staff Office heads, is welcome to consult with Robert Detrick, Acting Chief Scientist, in making these decisions.

THE ADMINISTRATOR



The criteria that the head of each office will use to evaluate whether to approve service in an official capacity are drawn from the Interim Guidelines, and may be evaluated in consultation with an ethics official as necessary. As specified in the Interim Guidelines, s/he may authorize an employee to serve in an official capacity as an officer or board member of a nonprofit organization if s/he determines in a written memorandum that:

- such service will support the mission of the agency;
- expenditures for such service, including payment of the employee's salary when performing organization activities, can be characterized as a necessary expense;
- the official service furthers the agency's mission and the benefit to the agency outweighs any appearance concerns, taking into consideration the risk factors set forth in the Interim Guidelines, effective April 5, 2013; and
- all conditions are provided in writing to the employee.

To track our service and this process, and to meet the requirement of the Interim Guidance to notify the Commerce Assistant General Counsel for Administration of service in a professional capacity, I request that any approval of service on a nonprofit board in an official capacity, as well as any available information about service in a personal or liaison capacity, be promptly provided to Danielle Tillman (Danielle.Tillman@noaa.gov). I am very pleased that this new OGE rule will afford NOAA staff the opportunity to contribute in meaningful ways, as part of their official duties, to the advancement of our science through leadership roles in the work of nonprofit organizations.

Attachment

INTERIM GUIDELINES FOR AUTHORIZING DEPARTMENT OF COMMERCE EMPLOYEES TO SERVE AS OFFICERS OR BOARD MEMBERS OF NONPROFIT ORGANIZATIONS ON BEHALF OF THE GOVERNMENT

Effective April 5, 2013, a new regulation removes the conflict of interest barrier for Federal employees to serve in an official capacity on behalf of the Government as an officer or member of a board of directors of a non-Federal, nonprofit organization. However, other legal and program issues remain. Therefore, as noted below, a number of factors should be considered before an employee is appointed to serve with a nonprofit organization as an officer or board member.¹ These guidelines are not meant to make a substantive judgment as to whether official service is appropriate but, rather, are intended to highlight legal issues in assisting agency officials to make an informed decision concerning such official appointments.

Basis for Authorization of a Commerce Employee to Official Service with a Nonprofit Organization

Official service by a Commerce employee with a nonprofit organization can enhance the work of the agency by allowing a meaningful exchange between Federal and non-Federal experts in certain professions and areas of expertise. Such service helps the agency better understand issues and activities related to the nonprofit's mission. In addition, service may enhance the employee's professional development, skills, and experience, all of which translates into a better agency leader. Consistent with these purposes, service should preferably be with organizations such as professional societies, scholarly societies, scientific organizations, trade associations, or other types of nonprofits with a broad focus on the overall health of the field, where the agency has an interest as a stakeholder, and where the organization's interests are consonant with the agency's interests. Some agencies, for policy reasons, have indicated that they consider service with certain types of organizations as not appropriate.

Agencies are free to decide whether service with any particular type of organization is permissible and are free to implement agency-specific restrictions with respect to such service.

Accordingly, agency management officials may authorize an employee to serve in an official capacity as an officer or board member of a nonprofit organization if:

- such service will support the mission of the agency and if expenditures for such service, including payment of the employee's salary when performing organization activities, can be characterized as a necessary expense (*i.e.*, those expenses necessary to support the agency's activities that are not otherwise specifically listed in an appropriations act);
- appointment to such service is made by the head of the operating unit or Secretarial office (or the designee of such official), in consultation with an ethics official as necessary; and

¹ The new regulation raises many potential issues that have not previously been encountered. As such, this guidance is intended as interim and may later be modified based on feedback regarding issues that arise in the course of official service.

- there is a determination by agency management that the official service furthers the agency's mission and the benefit to the agency outweighs any appearance concerns, taking into consideration the risk factors set forth below.

Employees appointed to serve in an official capacity should be aware of the limitations and conditions on such service and be provided with the document "Official Service with Nonprofit Organizations—Limitations and Conditions," which is attached separately. Similarly, nonprofit organizations should be aware of the legal ramifications and conditions created by official appointments and provided (by the agency prior to appointment) with the document "Notice Regarding Service by a Federal Employee in an Official Capacity with a Non-Federal Organization as an Officer or Board Member," which is also attached separately.

Note that if an employee is not appointed to serve as an officer or board member with a nonprofit organization in an official capacity, the employee may, in the alternative, serve in an official capacity as an agency liaison with the organization, rather than as an officer or board member. Alternatively, an employee may serve with a nonprofit in a personal capacity, provided that such service is consistent with the restrictions set forth in Federal ethics laws and regulations.

Notice to OGC

After appointment, agencies must notify the Assistant General Counsel for Administration of any official appointment, including the name and title of the employee, the name of the nonprofit organization, and the employee's position with the organization. This will allow the Office of the Assistant General Counsel to maintain a Department-wide database of official appointments to nonprofit organizations.

FACTORS TO CONSIDER PRIOR TO AUTHORIZING SERVICE

The following factors should be utilized in determining whether it is appropriate to assign an employee to serve in an official capacity as an officer or board member with a nonprofit organization.

- Whether the nonprofit organization has a broad agenda and whether its policy positions are consistent with those of the agency. *Close alignment with the agency's mission supports the existence of an agency purpose in making the official assignment. Nonprofits with a broad agenda or broad stakeholder participation that supports the overall health of the field or general work of all professionals in the field are the best candidates for official service. On the contrary, nonprofits that are narrowly focused, have a history of litigation with the Federal Government, have an advocacy component, or are registered lobbying organizations are probably not appropriate candidates for official service.*
- Whether appointment to the nonprofit organization will create any concerns in view of the employee's seniority and duties. *The employee's Government duties should be related to, or consistent with, the duties of the nonprofit position. Service by senior level employees will possibly create endorsement concerns and, therefore, agencies may consider elevating approval in such cases to the head of the operating unit or Secretarial office (if not already at that level).*
- Whether the position with the nonprofit organization will entail working on internal matters that are unrelated to agency interests. *Appointments to officer positions (particularly president and treasurer) inherently raise issues because the employee may be placed in a position of organizational conflict and the agency is not likely to have any interest in the management of the organization. In order to spend appropriated funds on salaries and expenses of an employee serving in an official capacity, the agency must determine that it is a necessary expense of the agency to do so. Thus, agencies may consider*

elevating approval for positions that involve internal management to a senior level in the operating unit or Secretarial office (if not already at that level) and, where possible, should contain a limitation on participating in internal organizational activities that are not necessary to carry out the agency's work.

- *Whether sufficient resources are available to assign the employee to the organization, including whether the agency is willing and able to assign employees to serve in other, similar organizations. Management may consider limiting the number of duty hours that the employee may devote to activities involving the outside organization based on the demands of the agency's workload and the particular employee's other assignments. The expenditure of agency resources on organization activities should be proportionate to the needs of the agency. In addition, to avoid the appearance of preferential treatment, the agency should be prepared to provide similar support, including appointment of an employee to an officer or board member position, to other organizations.*
- *Whether the employee's duties with the nonprofit organization will include participation in matters pertaining to the organization's dealings with the Federal Government, such as seeking contracts, grants, or other Federal support, or communications to the Federal Government on behalf of the organization. Limits on such activities are recommended to avoid the appearance of preferential treatment.*
- *Whether the employee's regular Government duties will include participation in any agency decisions that have a direct financial effect on the organization, such as agency decisions on contracts, grants, and approval of travel orders to organization meetings. Limits on such duties are recommended to avoid the appearance of preferential treatment or bias or undue influence by the nonprofit organization on Government decision-making.*
- *Whether more than one agency employee serving in an official capacity with the organization is necessary to support the agency's mission (when appointment of more than one employee is being considered). Service by more than one employee may create appropriations issues and perceptions of Government control over a non-Federal organization, although these concerns are lessened for large organizations having multiple areas of focus relevant to the activities of the agency.*
- *Whether service as a Government liaison to the organization or service in an honorary position (as opposed to serving as an officer or board member) can meet the agency's needs and is preferable in light of the risk factors and limitations that apply if serving as an officer or board member. Some organizations may have or be willing to create an honorary position on the board. This may be more a more suitable means of accomplishing agency goals.*

OFFICIAL SERVICE WITH NONPROFIT ORGANIZATIONS LIMITATIONS AND CONDITIONS

Employees serving in an official capacity as officers or board members of nonprofit organizations are subject to limitations in the scope of the official service they may render to the organizations, as described below.

Agencies are free to impose additional restrictions on official assignments as they may deem appropriate (for example, limiting participation in organization internal matters; time restrictions; or use of agency resources, including staff).

Prior to appointment, agencies must provide the nonprofit organizations with the "Notice Regarding Service by a Federal Employee in an Official Capacity with a Non-Federal Organization as an Officer or Board Member" (as well as notice of any additional restrictions imposed by the agency).

- No participation in any fundraising activities on behalf of the organization. (Employee's name and Government title may be on organization's letterhead or other documents that are publicly-distributed in connection with an organizational fundraising activity, but employee may not sign any such documents.)
- No participation in any partisan political activities undertaken by the organization, for example, fundraising or other activities promoting a candidate for local, state, or Federal election or activities promoting a political party. (Employee's name may not be on any letterhead or other document that is publicly-distributed in connection with a partisan, political activity, even if employee does not sign the document.)
- No participation in any activities on behalf of the organization that are intended or designed (directly or indirectly) to influence members of the public to contact a member of Congress; a jurisdiction; or any Federal, state, or local government officials to favor or oppose any legislation, law, or appropriation. (Employee's name may not be on any letterhead or other document that is publicly-distributed with regard to this organizational activity, even if employee does not sign the document.)
- No advocacy on behalf of the organization before the United States Government, unless authorized to engage in such activities by agency management officials.
- No advocacy on behalf of the organization before any foreign government, unless authorized to engage in such activities by agency management officials.
- No participation in internal organizational activities that are not necessary to carry out the agency's work, such as membership drives, internal personnel decisions, and similar activities, unless the agency's mission is directly furthered by participation in such activities.
- Employees may not seek consensus advice for the Government (for example, obtaining the consensus opinion of a nonprofit organization's board on a Government matter).
- Employees may not take actions for the organization that are inconsistent with Federal Government positions on major policy issues and should be prepared, as necessary, to articulate official positions (for example, employees should abstain from voting on, or recuse themselves entirely from, a matter that is contrary to the Federal Government's interest).

- Employees should avoid expressing personal opinions on significant policy issues because they are serving in an official capacity and any views should reflect those of the agency. If expressing a personal opinion, it must be made clear that the views expressed are the employee's own opinions and do not necessarily represent those of the Government.
- Employees may not store documents obtained from the organization in a system of records organized by an individual's name or an identification number associated with a particular individual—this is potentially most problematic with organizational decisions related to personnel actions.
- Employees may not collect information (including surveys) from ten or more individuals (meaning that the employee is responsible for or initiates the information collection), unless the employee first receives an Office of Management and Budget (OMB) control number pursuant to the Paperwork Reduction Act or otherwise follows OMB procedures.
- Employees should keep their supervisors informed of any significant developments at organization meetings or otherwise relating to the organization.
- Employees should be aware that they are subject to constraints on conduct that do not apply to their non-Federal counterparts, including ethics restrictions on the acceptance of gifts, meals, and travel.
- Employees must retain some of the documents reviewed or created by the employee pursuant to the agency's records retention schedule; to ensure that the employee is aware of which documents must be retained, the employee must consult with the appropriate records officer and become familiar with any revisions made by the records officer to the agency's records retention schedule to take into account official service by employees with outside organizations.
- Employees should be aware that organizational documents of which they maintain custody and control as a result of officially representing the agency at the organization are subject to the Freedom of Information Act (FOIA) and may be released to the public.
 - Documents where custody and control has likely been established include:
 1. Documentation created by the employee to record a vote on an organizational matter.
 2. Documentation created by the employee for presentation to the organization's board or membership.
 - Custody and control may be established for any document that is provided to the employee by the organization if the employee uses the document to take action on behalf of the organization.
 - Custody and control has likely not been established for documents provided to the employee by the organization that are not used to take any action on behalf of the organization.
 - Employees should also be aware that they must search for such organizational documents as part of their search for documents in response to requests made under the FOIA.

**NOTICE REGARDING SERVICE BY A FEDERAL EMPLOYEE IN AN OFFICIAL CAPACITY
WITH A NON-FEDERAL ORGANIZATION AS AN OFFICER OR BOARD MEMBER**

Organization: _____

Employee Appointed to Serve with the Organization on Behalf of the Department of Commerce:

Employee's Position in the Organization: _____

Employee's Position and Component in the Department of Commerce: _____

The following conditions apply with regard to service by the employee identified above with the non-Federal organization identified above.

- In the event of a conflict, the employee's fiduciary duties to the Federal Government supersede the fiduciary duties to the organization under state law.
- Internal organizational documents reviewed or created by a Government employee serving in an official capacity as an officer or board member may be required to be retained by the Government employee pursuant to the agency's records retention requirements. Any such documents may be accessible by the public under the Freedom of Information Act or Privacy Act.
- Any collection of information (including surveys) of ten or more individuals where the Government employee is responsible for or initiates the information collection may first require an Office of Management and Budget control number pursuant to the Paperwork Reduction Act.
- The employee may not participate in any fundraising activities on behalf of the organization.
- The employee may not participate in any partisan political activities undertaken by the organization (for example, fundraising or other activities promoting a candidate for local, state, or Federal election or activities promoting a political party).
- The employee may not participate in any activities on behalf of the organization that are intended or designed (directly or indirectly) to influence members of the public to contact a member of Congress; a jurisdiction; or any Federal, state, or local government officials to favor or oppose any legislation, law, or appropriation.
- The employee may not participate in internal organizational activities that are not necessary to carry out the agency's work.