

# PARTICIPATION IN NON-FEDERAL ORGANIZATIONS

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The Department of Justice, Office of Legal Counsel (OLC), issued an opinion on November 19, 1996, concerning the participation of Federal employees on the Board of Directors of non-Federal entities in an official capacity. In that opinion, which was binding on all executive branch agencies, OLC was responding to a request by the Federal Bureau of Investigation (FBI) for guidance on the application of *18 U.S.C. § 208, Acts affecting a personal financial interest*, to the participation of FBI employees on the boards of non-profit organizations.

## The opinion states:

Section 208 prohibits any officer or employee of the executive branch from participating **personally and substantially** as a government official in any “**particular matter**” in which an “organization in which he/she is serving as an officer, director, trustee, general partner or employee has a financial interest.” *18 U.S.C. § 208(a)*. We conclude that this broad prohibition against conflicts of interest within the Federal government would prevent a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of *18 U.S.C. § 208*, pursuant to *18 U.S.C. § 208(b)*.

There are two primary bases, one explicit and one implicit, for the OLC finding that a conflict exists in board membership. The first is based on a straight forward application of the statute to the situation. Because service is in an official capacity, it follows that any action in furtherance of the employee’s responsibilities as a board member is also an official act of the Government. Since *18 U.S.C. § 208* expressly prohibits taking official action with respect to an organization of which the employee is an officer, the prohibited conflict is automatic and unavoidable whenever the employee acts as an officer. The second basis is implicit, but based on similar logic. Service on a board of directors or similar body imposes fiduciary responsibilities on the participant on behalf of the organization. Since a Federal employee owes full allegiance to the Federal government, acceptance of such fiduciary responsibilities in an official capacity is inconsistent with the basic duty of a Federal government employee. In either case, an impermissible conflict of interest is created.

While conflict concerns may arise based on what actions an employee takes while participating in an outside organization, typically only service in the following positions ("**significant participation**") in outside organizations automatically raises potential conflict concerns based merely on official participation: Officer [including, but not limited to: President and Vice President]; Chief Officers [Executive; Administrative; Operations; Information; Finance, etc.]; Secretary; Treasurer; Counsel; Director, or member of a board of directors; Trustee; General

partner; or employee. Often, the by-laws of the outside organization are reviewed to determine if significant participation is apparent.

Official participation by Federal employees in other than "significant" capacities will not, by itself, result in a statutory violation. For example, *18 U.S.C. § 208* would not prohibit an employee from participating officially in outside organizations through attendance for training, making an agency presentation, serving as an agency representative on a panel, or providing agency technical expertise to a committee of the organization.

Assuming that "significant participation" is involved and the employee also seeks to participate in an official capacity, the following factors must be considered:

1. Whether there is **express statutory authority** for the employee to serve ex officio on a board (e.g., the Chief of the Forest Service is required by statute to serve on the National Forest Foundation Board of Directors);
2. Whether there is clearly an **absence of fiduciary obligations** to the organization as determined under State law (e.g., evidence of non-voting or advisory status and a letter from the organization counsel addressing applicable State law); or
3. Whether the organization is engaged in activities clearly **related to statutory directives** requiring the agency to participate with other entities, such as State governments, local groups, and/or private industry, in accomplishing the statutory goals (e.g., some standard setting organizations).

Absent statutory authority, a legal release of fiduciary obligations or specific directives, employees may not serve in their official capacities when participating "significantly", (i.e., position imputes the financial interests of the organization to them; they are involved in the internal administration of the organization, etc.)

"Significant participation" in one's official capacity in an outside organization may place the agency in the position of directing and administering the affairs and operations of a non-Federal entity while using appropriated funds intended for specific mission (use of salary, time). This may expose the agency and/or the employee, to the same potential liability faced by other organization members in similar positions for actions taken or decisions made by the outside organization.

Unless "significant participation" in an official capacity is required expressly by statute, the agency must then consider whether there is a legitimate agency need to have an employee participate in any form with the organization which would benefit the agency and to what extent--in the accomplishment of its mission.

Lesser forms of participation that can achieve the same goals may include: membership - if the agency interest is simply to educate its employees; agency liaison - where the agency interest is in presenting the agency's perspective; or agency advisor to the board -where the agency provides expert technical advice that it would provide to any similarly-situated member of the public. When considering these options, the agency must be prepared to treat requests for official participation in the same manner for all similarly situated organizations.

Finally, if there is no clear authority for "significant participation" in an official capacity, and the employee and his or her agency still seeks to engage in such participation in an official capacity, he or she may request an individual waiver, under *18 U.S.C. § 208(b)*, permitting the participation. The test for approving a waiver request is that a conflicting financial interest (in this case, "significant participation" in an outside organization) is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Federal Government. USDA has not approved requests for waivers for official service in these roles.

## **PERSONAL CAPACITY**

In a personal capacity, a Federal employee may serve in a managerial/fiduciary or employment role (officer, director, trustee, general partner or employee) with a non-Federal organization. However, a Federal employee who serves in such a role subjects himself or herself to potential criminal penalties **should he or she take official action on matters involving the non-Federal organization**. If you serve as a fiduciary or an employee in a non-Federal organization, then you are considered, for purposes of 18 U.S.C. § 208, to possess the financial interests of the organization. In this light, it should be remembered that USDA may not pay for travel, expenses, official time, supplies, and equipment use that is for conducting the administrative purposes of the organization. Service in a personal capacity refers to one's participation in their private capacity. . . meaning the participation is not derived from your Federal position, title, authority; does not entail official positions or policies of USDA; does not occur on official time; and does not involve the expenditure of appropriated funds. This includes reference/links to official titles and affiliations on the organization's website unless in accordance with 5 C.F.R. 2635.807(b).

The criminal conflict of interest statute, 18 U.S.C. § 208, requires that an employee refrain from participating personally and substantially in an official capacity in any particular matter that will have a direct and predictable effect on the financial interests of any organization in which the individual serves as an officer, director, trustee, or employee. If you serve as an officer or employee of an organization the interests of that organization are likely assigned to you and thus prohibit you from taking any official action that would impact the interests of that same organization.

For purposes deemed official matters to which 18 U.S.C. § 208(a) would apply, such actions may include: (1) requesting that official travel funds be spent; accepting travel funds in kind or approving other Government resources be utilized for conducting or participating in the affairs of the organization; (2) signing a training or travel authorization to use appropriated funds to pay for yourself or a subordinate to attend a conference or other meeting of the organization; (3) speaking as an official duty activity, or directing a subordinate to speak, at any conference or other meeting of the organization where attendance fees are charged. While the financial impact may be insignificant, under well settled precedent, Section 208(a) has no *de minimis* aspect. **Contact your Agency Ethics Advisor for guidance.**

In cases that do not involve a financial interest that would be disqualifying as a matter of law under 18 U.S.C. § 208, the agency designee (Ethics Advisor) has broad discretion under 5 C.F.R 2635.502, *Personal and business relationships*, to authorize the employee's participation in the matter based on the determination that in light of all relevant circumstances, the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs.

When an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interests of a member of the employee's household, or knows that a person with whom he has a covered relationship is or represents a party to such a matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of all of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee (Ethics Advisor) of the appearance problem and received authorization from the agency designee to participate.

An employee has a "covered relationship" with a (1) person, other than a prospective employer with whom the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction; (2) a person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship; (3) a person for whom the employee's spouse, parent, or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; (4) any person for whom the employee has, within the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or (5) any organization in which the employee is a active participant.

Factors that impact the determination to allow an employee to continue participation in a matter include: (1) the nature of the relationship involved; (2) the effect that resolution of the matter would have upon the financial interests of the person involved 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. **Contact your Agency Ethics Advisor for guidance.**

## FUNDRAISING

While a USDA employee who is a member of a non-Federal organization may participate in fundraising on behalf of the organization, there are limits on the extent of such participation. You can fundraise in your personal capacity if you do so in such a fashion that it is totally divorced from your Federal job. Accordingly, you may fundraise on your own time using non-Federal resources provided that you adhere to the following guidelines: the Combined Federal Campaign (CFC) is the only generally authorized fundraising permitted in the Federal workplace. Other than as part of CFC, you may not solicit donations on behalf of a non-Federal organization inside a Federal workplace (this prohibition also would preclude mailing solicitations to Federal employees at their official addresses, or targeting Federal employees for solicitation). You may not personally solicit funds or donations from either: (1) official subordinates; or (2) persons whom you know to be "prohibited sources" to USDA.

## LOBBYING

In your *personal capacity*, you may advocate public pressure on the Congress or directly promote policy positions on behalf of non-Federal organizations to the Congress provided that such lobbying is not paid for with appropriated funds (e.g., official travel, time, etc.); and you do not identify yourself as a USDA employee.

## REPRESENTATION

Since many non-Federal organizations interact closely with the Federal government, members who are Federal employees face a risk of violating criminal prohibitions if they "represent on behalf of a non-Federal organization" before the executive or judicial branches of the Federal government. These rules are two-fold: even in your personal capacity and irrespective of whether or not you are compensated for your efforts, you may not represent the interests of the non-Federal organization before USDA or before any other Federal department or agency, any Federal court, or any officer of same, on any matter of Federal interest (e.g., a grant application, claim against the government, or contract proposal); and you may not accept or seek compensation for providing "behind-the-scenes" assistance to another who is making such a representation.

If you participate in your personal capacity in a non-Federal organization, you must avoid taking official action on matters that could predictably affect the financial interests of that organization. You must avoid even the appearance of impartiality or favoritism.

## USDA LIAISON

Where a non-Federal organization is closely aligned with a USDA program, it may be in the agency's interest to have an employee participate in a liaison capacity with the Governing board of that organization. In such a capacity, the employee is present as a USDA representative. Ethics problems concerning service in that position normally do not arise because the employee is performing an assigned duty and is not legally responsible for the management of the organization. In such a role, the employee must confine actions to advice, liaison, or consultation so that it is clear that they are representing USDA and have not taken on a fiduciary obligation to the non-Federal organization. To retain the clarity of the advisory, liaison or consultative nature of this role, an employee must not take on decision-making or administrative responsibility in the non-Federal organization. However, service as the chair or a member of a working committee or subcommittee that imposes no managerial/fiduciary duty to the organization, creates no employment relationship, and deals with technical or professional matters and not with internal administrative matters in the organization, is permissible as part of an advisory, liaison or consultative role. An employee may also communicate USDA's interests and policies to the governing body of the organization and inform USDA of the organization's positions. Travel and expenses for fulfilling this liaison role can and should be covered by USDA.

**Personal and substantial.** *To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.*

**Particular matter.** *The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Particular matters covered include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.*

ARS employees can access information on serving on boards of non-profit scholarly or professional societies, which have 501(c) tax-exempt status from the IRS, on the Ethics page of the **Axon** site.