



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

AUG 16 2010

Honorable Robert I. Cusick, Director
Office of Government Ethics
1201 New York Ave., N.W.
Suite 500
Washington, DC 20005

Dear Mr. Cusick:

I seek your assistance on a matter that has recently come to my attention. This matter involves ethics and Federal employee personnel policy stemming from a 1996 Office of Legal Counsel (OLC) interpretation of an ethics conflict of interest statute, 18 U.S.C. § 208. As you know, section 208 prohibits an officer or employee from taking part as a government official in any "particular matter" in which he has a financial interest. The statute imputes to the employee the financial interests of certain other persons and entities, including an "organization in which he is serving as officer, director, trustee, general partner or employee." 18 U.S.C. § 208(a). In a memorandum of November 19, 1996, OLC determined that because of this statute, with certain limited exceptions, a Federal employee may not serve on the board of directors of a non-Federal nonprofit entity in his official capacity absent a waiver under 18 U.S.C. § 208(b). See <http://www.justice.gov/olc/fbimem.2.htm>.

Section 208(b) permits waivers of these prohibitions in certain circumstances. First, section 208(b)(1) permits agencies to exempt employees on a case-by-case basis from the disqualification provisions of section 208(a). Similarly, section 208(b)(3) permits agencies to waive, in certain cases, the disqualification requirement that would apply to special government employees serving on a Federal advisory committee. Finally, under section 208(b)(2), the Office of Government Ethics (OGE) has the authority to promulgate Executive branchwide regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a).

We are not aware of any instance in which OGE has exercised its authority under this statute to promulgate a regulatory exemption for the entire Executive branch. In addition, we understand that agencies' utilization of waivers pursuant to the section 208(b)(1) and (b)(3) authority varies widely, with the result that some employees, particularly those with scientific or professional credentials, are denied permission to serve on the board of directors of their respective non-Federal non-profit scientific or professional societies or organizations for no legitimate reason. This presents numerous concerns.

Scientific and professional organizations serve vital functions in our society. For example, they disseminate knowledge through publications, support the development and maintenance of expert networks, offer independent and objective perspectives on

pertinent government policies, and provide professional development and certification programs for individuals and organizations. Science and many professional disciplines are a collaborative effort requiring interaction between experts working in related disciplines. Full participation in scientific and professional organizations is an important part of this collaboration and contributes to a scientist's or professional's personal and professional development.

Policies restricting Federal scientists' and professionals' involvement in professional organizations negatively impact the agencies employing such individuals. Restrictions act as a barrier to employees achieving professional stature in their respective fields, which may discourage scientists and professionals from considering Federal employment. Restrictions also serve to isolate scientists and professionals from the full exchange of knowledge and ideas necessary to stay current and participate fully as members of the greater scientific community. As a result, Federal scientists and professionals are hampered in their ability to provide the best possible advice and service to their respective agencies. These restrictions are particularly burdensome for the "research-grade" scientists whose retention and promotion evaluations depend in part on recognition of stature by one's scientific peers. U.S. Office of Personnel Management's Research Grade Evaluation Guide, Factor 4; Contributions, Impact, and Stature, September, 2006; <http://opm.gov/Fedclass/gsresch.pdf>.

While there may be legitimate reasons for ethics interpretations to place certain limits on the participation of Federal employees in outside organizations, service on the board of directors of a professional society or association should not be subject to the same restrictions as other types of outside activities. Indeed, leadership in scientific and professional societies is crucial to many scientists' and professionals' career advancement and should be encouraged, not discouraged or prohibited, by the Federal government. It benefits the agency and the employee. It is also important to recognize that the need for such restrictive agency policies is questionable because scientific and professional societies typically have in place their own code of ethics and conflict of interest policies governing their board members' activities, and Federal agencies have their own means of controlling their employees' activities.

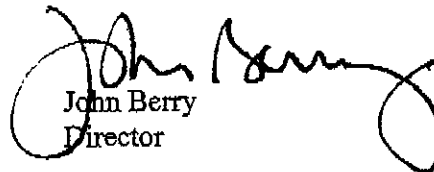
In fact, your office in a January, 2006 report to the President and Congress indicated that you were in agreement: "OGE believes that the conflict of interest identified by OLC may be more theoretical than real, particularly because employees assigned to serve on outside boards remain subject to important Federal controls, such as the authority to review and approve (or deny) the official activity in the first place, and the authority to order the individual to limit the activity, or even resign the position, in the event of a true conflict with Federal interests. In addition, an agency generally approves such activities only where the organization's interests are in consonance with the agency's own interests. In an era when "public/private partnerships" are promoted as a positive way for Government to achieve its objectives more efficiently, ethics officials find it difficult to explain and justify to agency employees why a waiver is required for official board services that have been determined by the agency to be proper." Report to the President

and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment, January, 2006, page 33.

You also indicated in that report that "[a]lthough OGE could exercise its regulatory authority to exempt financial interests arising from official service on boards of directors, we believe that this change should be effectuated by Congress. Thus, OGE recommends that Congress amend section 208 to specify that the financial interests of an organization are not imputed to an employee who serves as an officer or director of such organization in his or her official capacity." 2006 OGE report to the President and Congress, page 33.

We wholeheartedly agree with you and would like to work with you to move forward with a legislative proposal to effectuate this change. Alternatively, we would like to encourage you to consider exercising the authority Congress granted OGE under section 208(b)(2) to promulgate Executive branchwide regulations to describe these financial interests as being too remote or inconsequential to warrant disqualification pursuant to section 208. Since we understand that officials of the White House Office of Science and Technology Policy have been involved in recent discussions on this matter, we recommend that they be invited to participate in this effort.

Sincerely,



John Berry
Director