

Participation in Professional Organizations: Ethics for Federal Employees

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I. Introduction

- Private participation in professional organizations generally encouraged and in some instances supported, e.g., OPM rule on liberal excused absence, 5 C.F.R. § 251.202(a)(3)
- Official participation also may be authorized by some agencies
- Any participation in outside organizations must be consistent with ethics requirements
- Different requirements for official vs. private participation

II. Official Participation

A. General: Agencies determine whether to permit official participation, and what level of participation, based on agency's assessment of own interests, mission, statutory authority, resources; much room for agency discretion

B. Level of participation varies: Attendance at meetings, presentation of papers or speeches, service as "official liaison," participation in committees, service as officer or board member, etc.

C. Special ethics considerations if official service as officer or board member:

1. 18 U.S.C. § 208 (financial conflict of interest): Pursuant to opinions of Department of Justice, Office of Legal Counsel, conflict of interest statute prohibits official participation as officer, director or trustee, e.g., <http://www.justice.gov/olc/fbimem.2.htm>

2. Rationale: Fiduciary duties of position conflict with primary duty to Government

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3. Exceptions: OLC recognizes three exceptions—(1) participation authorized by statute; (2) waiver under 18 U.S.C. § 208(b)(1); (3) release of fiduciary obligations consistent with state law

4. 208(b)(1) waiver standard: interest not so substantial as to be likely to affect integrity of services; much discretion vested in agency; agencies vary in willingness to grant waivers, depending on such factors as agency mission and sensitivity of agency operations; OGE has issued guidance on such waivers, OGE 07 x 4a, sec. VII , http://www.usoge.gov/ethics_guidance/opinons/advop_files/2007/07x4a.html#_Toc158176348

5. Possible regulatory exemption? 2006 OGE Report noted authority to issue regulation exempting official participation from bar of section 208, http://www.usoge.gov/ethics_docs/publications/reports_plans.aspx; OGE currently working with other agencies on possible proposal; any proposal would, if finalized, lift bar of section 208—but agencies still would have to determine that official service in outside organization is consistent with agency authorities/mission/interests, and agencies would retain discretion to limit or preclude official participation based on such considerations

D. Official resources: No ethical restrictions on use of official property or time in connection with authorized official duty participation in nonprofit organizations; may be fiscal or other limits in some cases

E. Title, position, authority of office: No ethical restrictions of use of official title, position or authority of office in connection with authorized official duty participation in nonprofit organizations

F. Official fundraising: Employees may engage in official fundraising on behalf of nonprofit organization only if authorized in accordance with statute, Executive order, regulation or otherwise as determined by agency; see 5 C.F.R. § 2635.808(b)

Note: Fundraising targeting Federal employees in workplace must be consistent with Combined Federal Campaign rules, 5 C.F.R. part 950

III. Private or Unofficial Participation

A. General: Employees generally may participate, in personal capacity, in nonprofit organizations, provided they follow applicable ethical requirements

B. Common ethical issues:

1. Recusal obligations: Certain positions or relationships with nonprofit organization will require Federal employee to recuse from certain Government matters affecting

that organization; recusal means disqualification, i.e., don't participate in the matter

a. 18 U.S.C. § 208: Employees who serve as officer, director, trustee or employee of nonprofit organization may not participate in any particular matter affecting the financial interest of that organization, absent a waiver or exemption under 18 U.S.C. § 208(b); under certain circumstances, a special exemption may permit participation in matters affecting securities owned by 501(c)(3)/(4) organizations—see 5 C.F.R. § 2640.202(e)

b. 5 C.F.R. § 2635.502: Employees who have a “covered relationship,” such as active participation in an organization through service as a committee chair or significant fundraising responsibility, must follow procedures in § 2635.502 to determine whether they should participate in any particular matter in which organization is a party or represents a party

c. 5 C.F.R. § 2635.802(b): If recusal under either of above provisions would materially impair ability to perform critical or central duties of Government job, employee prohibited from engaging in outside activity

2. Representational activity:

a. 18 U.S.C. § 205: Employees may not represent organization before Government in connection with any particular matter in which U.S. is party or has direct and substantial interest

b. “Representational activity”: Communication or appearance with intent to influence Government; does not include “behind-the-scenes” assistance (but note separate prohibition on compensated assistance in prosecution of a claim); does not include routine communications that neither seek discretionary Government action nor concern an issue as to which there is potential dispute; see DO-02-018, http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2002/do02018.html

c. Limited exception for certain nonprofits: May represent nonprofit groups or organizations if majority of members are current Federal employees or their spouses/dependent children; exception does not apply to claims, proceedings in which group or organization is party, grants/contracts/agreements providing Federal funds to group or organization; see 18 U.S.C. § 205(d)(1)(B)

3. Official resources:

a. General: Use of official property and time generally limited to official business; see 5 C.F.R. § 2635.704, § 2635.705

b. Agency authorization: However, agencies may authorize some use of official property/time to support employees' outside activities with nonprofit organizations; e.g.,

agencies may follow liberal excused absence policy for employees attending organization meetings or may permit use of agency equipment to prepare papers to be presented at organization symposia; see 5 C.F.R. § 251.202

4. Title, position, authority of office: Employees may not use (or permit organization to use) official title, position or other authority of office in way that reasonably implies Government sanction or endorsement of unofficial activities, 5 C.F.R. § 2635.702(b); e.g., employees may not permit organization letterhead to identify them by their official title; see OGE Informal Advisory Letter 99 x 15

5. Fundraising: Employees may engage in private fundraising, subject to limitations in 5 C.F.R. § 2635.808

a. Limits on personal solicitation:

(1) Subordinates: May not personally solicit from official subordinate; see 5 C.F.R. § 2635.808(c)(1)

(2) Prohibited source: May not personally solicit from “prohibited source,” i.e., person seeking official action from employee’s agency, seeking or doing business with agency, regulated by agency, person having interests that may be substantially affected by employee’s duties, or any organization a majority of whose numbers fall within these categories; see 5 C.F.R. § 2635.808(c)(1)

(3) “Personally solicit”: Means person-to-person contact or use of name or identity in correspondence; but does not include mass mailings or mass solicitation through media or oral remarks to large group, unless solicitation known to target subordinates or prohibited sources; does not include “behind-the-scenes” assistance, e.g., drafting (but not signing) correspondence

b. Title, position, or authority of office: May not use (or permit others to use) title, position or authority of office to further fundraising effort; but may use general terms of address or rank, such as “the Honorable” or “Colonel”

6. Teaching, speaking and writing: Restrictions on compensation and reference to official title or position, 5 C.F.R. § 2635.807

a. Compensation: No outside compensation for teaching, speaking or writing that relates to official duties; activity relates to official position, for example, if deals in significant part with current agency policies, programs, operations (including research of other agency employees) or with employee's own recent assignments, 5 C.F.R. § 2635.807(a)(2)(i)(E)

b. Reference to official title/position: Cannot be identified in connection

with teaching, speaking or writing by official title or position, 5 C.F.R. § 2635.807(b); unless—

(1) One of several biographical details with similar prominence, or

(2) If in professional/scientific journal, agency-approved disclaimer

7. Agency-specific restrictions: Apart from rules covering all executive branch employees, some agencies also have restrictions specific to those agencies; e.g., HHS prohibits certain compensated services in the preparation of grant applications and other documents to be submitted to HHS, and DOJ prohibits certain types of legal practice; consult with agency ethics officials to determine what, if any, agency-specific restrictions may apply; see 5 C.F.R. chapters XXI through LXXVII

8. Covered noncareer officials: Additional restrictions apply to certain outside activities of certain noncareer (political) officials; see 5 C.F.R. part 2636