



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

April 9, 2013
LA-13-05

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Walter M. Shaub, Jr.
Director

SUBJECT: 18 U.S.C. § 208(b)(2) Exemption for Official Participation in Nonprofit Organizations

On March 6, 2013, the United States Office of Government Ethics (OGE) issued, pursuant to 18 U.S.C. § 208(b)(2), a new regulatory exemption to the primary conflict of interest statute applicable to employees in the executive branch, 18 U.S.C. § 208(a). 78 Fed. Reg. 14,437-14,442 (Mar. 6, 2013). That regulatory exemption, found at 5 C.F.R. § 2640.203(m), permits Government employees to participate in particular matters affecting the financial interests of nonprofit organizations in which they serve, or seek to serve or have an arrangement to serve, in their official Government capacity as officers, directors or trustees, notwithstanding the employees' imputed financial interest under 18 U.S.C. § 208(a).¹

In conjunction with the implementation of 5 C.F.R. § 2640.203(m), OGE is issuing this guidance document to explain the history and scope of the exemption, as well as to answer some initial questions received from agency ethics officials concerning the exemption. This document also highlights important considerations for agency officials who intend to assign employees to serve in an official capacity at a nonprofit organization.

History of the Exemption at 5 C.F.R. § 2640.203(m)

Government employees are generally prohibited by 18 U.S.C. § 208(a) from participating in an official capacity in any particular Government matter in which, to their knowledge, they or certain other persons specified in the statute have a financial interest, if the particular matter would have a direct and predicable effect on that interest. Pursuant to 18 U.S.C. § 208(b)(2),

¹ The exemption at 5 C.F.R. § 2640.203(m) does not apply to Government employees serving or seeking to serve in nonprofit organizations in their personal capacity. Accordingly, this memorandum does not address statutory and regulatory restrictions applicable to personal activities outside the government.

OGE is authorized to promulgate regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to the prohibition found in section 208(a).

Prior to the mid-1990s, a number of agencies had a practice of assigning employees to participate in their official capacity on the boards of directors of certain outside nonprofit organizations, where such service was deemed to further the statutory mission or personnel development interests of the agency. The nonprofit organizations included such entities as professional associations, scientific societies, and health information promotion organizations. At the time, neither the agencies involved nor the Office of Government Ethics viewed such official participation in nonprofit organizations as being prohibited by 18 U.S.C. § 208.

In 1996, however, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion concluding that the financial interests of nonprofit organizations are imputed to Government employees serving as officers, directors or trustees of those organizations in their official capacity, and therefore such service was generally prohibited under 18 U.S.C. § 208(a). *See* Memorandum of Deputy Assistant Attorney General, OLC, for General Counsel, Federal Bureau of Investigation (Nov. 19, 1996). OLC's conclusion was largely predicated on the fact that officers, directors and trustees of an outside organization owe certain fiduciary duties to the nonprofit organization under state law, which may conflict with the primary duty of loyalty that all Government employees owe to the United States. *See id.*

To address concerns raised by agencies and outside organizations since 1996, and consistent with the current Administration's efforts designed to ensure scientific integrity in the public sector, OGE determined that it was appropriate to exercise its authority under 18 U.S.C. § 208(b)(2) to exempt the imputed financial interests of nonprofit organizations in which employees serve, or seek or have an arrangement to serve, as officers, directors or trustees in their official capacity. OGE's determination was based on several factors. Most importantly, OGE felt that the risk of a conflict of interest was more theoretical than real, particularly because employees assigned to serve on outside boards remain subject to significant agency control. *See* 78 Fed. Reg. 14,439 (quoting OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 33 (2006)). For example, agencies who assign employees to a nonprofit organization retain the authority to review and approve or deny the official activity in the first place, the authority to limit the scope of the employee's activities, and the authority to require the employee to resign from the nonprofit organization, in the event of a true conflict with Federal interests. *Id.* Additionally, agencies generally approve such activities only when the organization's interests are in consonance with the agency's own interests. *Id.*

On that basis, OGE published a notice of proposed rulemaking on May 3, 2011, proposing to create an exemption to the prohibition of 18 U.S.C. § 208(a) for the imputed financial interests of nonprofit organizations in which employees serve, or seek to serve or have an arrangement to serve, as officers, directors or trustees in their official capacity. *See* 76 Fed. Reg. 24,816-24,820 (May 3, 2011). After reviewing comments received in response to the proposed rulemaking, OGE published a final rule on March 6, 2013, adopting the proposed rule with only minor modifications. *See* 78 Fed. Reg. 14,437-14,442 .

Scope of the Exemption

As with all regulatory exemptions established under 18 U.S.C. § 208(b)(2), the exemption at 2640.203(m) is limited in scope and applies only to the prohibition of 18 U.S.C. § 208(a); the exemption does not waive or otherwise affect any other provision of law regulating the conduct of Executive Branch employees. The exemption also does not constitute independent authority permitting an individual employee to serve in a nonprofit organization in an official capacity. The determination that an employee should be assigned to an organization in an official capacity must be made by someone in the employee's supervisory chain. Further, any number of other legal authorities may limit the types of activities that an employee may engage in while serving in the nonprofit organization in his or her official capacity.

For example, individuals assigned to serve in nonprofit organizations will continue to be subject to all laws governing the conduct of Government employees, including the criminal conflict-of-interest statutes (18 U.S.C. §§ 201-209) and the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635).² This is particularly important considering that an employee who is assigned to serve in a nonprofit organization in his or her official capacity functions as a Federal employee while serving in the nonprofit organization.

To avoid the possibility of an actual or potential conflict of interest, when an employee is assigned to serve in a nonprofit organization, he or she should be reminded that the following restrictions, among others, apply when the employee serves in the nonprofit organization:

- Other than in the discharge of his or her official duties, the employee may not represent anyone other than the United States, including the nonprofit organization or any employee of the nonprofit organization, before an agency or court in connection with any particular matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205.
- The employee may not receive, agree to receive, or solicit compensation for representational services, rendered either personally or by another, before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 203.
- The employee may not participate in any particular matter, including particular matters that the employee is asked to work on in his or her official capacity while serving with the nonprofit organization, that would have a direct and predictable effect on any disqualifying financial interest not waived pursuant to 18 U.S.C. §§ 208(b)(1) or (2). 18 U.S.C. § 208.

² Other authorities outside of OGE's purview may also restrict the activity of Federal employees serving in a nonprofit. For example, 18 U.S.C. § 1913 prohibits Federal employees from using appropriated funds, official time or Government equipment for lobbying activity on any issue pending before, or of interest to, the Congress or an official of any government; and 18 U.S.C. § 1719 prohibits Federal employees from using official Government postage, stationary, envelopes, or labels for any reason other than official Government business.

- The employee may not receive any supplementation of salary, including personal reimbursement of travel expenses, from the nonprofit organization, or any other person than the United States, for actions taken in his or her official capacity. 18 U.S.C. § 209.
- The employee remains subject to the Standards of Conduct for Employees of the Executive Branch while serving in the nonprofit organization. 5 C.F.R. part 2635. Thus, for example, the employee would generally be prohibited from receiving gifts from the nonprofit organization in which he or she serves, as the organization would be considered a prohibited source under 5 C.F.R. § 2635.203(d). The employee would also be prohibited from fundraising on behalf of the nonprofit organization in his or her official capacity unless in accordance with statute, Executive order, regulation or other agency determination. *See* 5 C.F.R. § 2635.808.

Furthermore, when a Federal employee is assigned to a nonprofit organization in his or her official capacity, the matters in which the employee participates while assigned to the nonprofit organization fall within the purview of the post-employment restrictions. *See, e.g.,* 18 U.S.C. § 207. As a result, once the employee leaves Government, the lifetime prohibition contained in 18 U.S.C. § 207(a)(1) prohibits the former employee from making, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of anyone other than the United States, in a particular matter involving specific parties in which he or she participated personally and substantially while serving as director, officer or trustee of the nonprofit organization. For example, a former employee who assisted in the performance of a contract while assigned to a nonprofit organization may not subsequently make, on behalf of any other person, a communication to or appearance before the Government regarding the same contract.

Scope of the Term “Nonprofit Organization”

While OGE provided a broad, non-specific definition of “nonprofit organization” in 5 C.F.R. § 2640.203(m), questions from agency officials suggest that there may be some confusion as to the scope of that term. As used in 5 C.F.R. § 2640.203(m), the term “nonprofit organization” refers to only those organizations that are not organized for profit and that receive tax-exempt status under any subsection of section 501 of the Internal Revenue Code (title 26). Thus, for example, a nonprofit corporation established under the laws of a foreign nation that is not tax-exempt under section 501 of the Internal Revenue Code would not qualify for the exemption. On the other hand, the same corporation could qualify for the exemption if it filed for and received tax-exempt status under section 501.

The term “nonprofit organization,” as used in 5 C.F.R. § 2640.203(m), was not intended to cover all entities that are established for purposes other than a return of profits. Other authorities, such as the Intergovernmental Personnel Act, allow agencies to place individual employees in, for example, state and local governments, colleges and universities, Indian tribal governments, and federally funded research and development centers. *See* 5 U.S.C. § 3371 *et seq.* Likewise, agencies may also have statutory authority to place individual employees in

organizations established under treaty or otherwise established under international or foreign law. *See, e.g.*, Letter for the Deputy Legal Adviser, Department of State, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Official Service by State Department Employees on the Boards of American-Sponsored Schools Overseas (Sept. 11, 1998); Memorandum Opinion for the General Counsel, Federal Reserve Board, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Service by Federal Officials on the Board of Directors of the Bank for International Settlements (May 6, 1997).

Agency ethics officials should keep in mind that if an entity does not qualify for the exemption, they may consider an individual waiver under 18 U.S.C. § 208(b)(1), if they determine that the financial interest imputed to the employee is not so substantial as to affect the integrity of the employee's Government service and that it is in the agency's best interest to place the individual at the nonprofit organization. *See* 18 U.S.C. § 208(b)(1). At the same time, nothing in the rulemaking requires that an agency place an individual employee in a nonprofit organization, regardless of whether the organization qualifies under the exemption.

Additional Limitations

As noted above, the exemption does not create independent authority for any individual employee to serve in a particular nonprofit organization, nor does it limit or otherwise affect an agency's discretion to define the scope of an employee's assignment or place additional limitations on the types of activities that an employee may engage in while assigned to the nonprofit organization.

In addition to the statutory and regulatory restrictions that apply to a Government employee serving in a nonprofit organization, agency supervisors may also wish to further limit or condition the employee's official duty activities associated with the nonprofit organization "in a manner consistent with the needs and interests of the agency." 78 Fed. Reg. 14,439. As OGE stated in the preamble to the final rule, "[n]othing in the regulatory exemption is intended to interfere with the discretion of agencies to assign duties and describe the limits of official assignments, including assignments that involve outside nonprofit organizations." *Id.*

Agencies are in the best position to determine what limitations or conditions are appropriate for any given assignment. OGE is aware, however, that there are a number of limitations on "lobbying, fundraising, regulatory, investigational, [and] representational activities" that agencies have historically applied to employees assigned to serve in nonprofit organizations. *Id.* These limitations include:

- Limiting or prohibiting the employee's participation in agency determinations to award grants, contracts, cooperative agreements or other agency support, such as the provision of personnel or resources, to the nonprofit organization;
- Limiting or prohibiting the employee from participating in the financial or personnel decisions of the nonprofit organization;

- Limiting or prohibiting the employee from participating in the development of regulations that could affect the nonprofit organization; or
- Prohibiting the employee from preparing or presenting requests from the nonprofit organization to obtain any Federal funds or other form of Federal support for the nonprofit organization, except in the case of requesting approval of official travel for the employee to attend or to speak at a meeting or conference of the nonprofit organization based on a determination that to do so would be in the best interest of the Government.

Determining which limitations are appropriate is solely and exclusively within the purview of the supervisors of the assigning agency, and the agency's decision to limit the employee's official activities at the nonprofit organization will often "be informed by numerous legal, policy, and managerial considerations" specific to that assignment. 78 Fed. Reg. 14,441.

Further, it is a best practice for agencies to commit the scope of an employee's permissible activities to writing in a memorandum of understanding between the agency, the employee and the nonprofit organization. Agencies may also use this document to outline any pertinent limitations and explain the actions, including recusal or resignation from the nonprofit organization, that the employee must take if an actual or potential conflict-of-interest arises in connection with the employee's service in the nonprofit organization. This is important, as activities undertaken by the employee while assigned to the nonprofit organization that are outside the scope of the limitations imposed by the agency would not be covered by the exemption and, therefore, could constitute a violation of 18 U.S.C. § 208(a).

Finally, although this memorandum discusses a number of ethics issues that surround the assignment of an employee to serve as officer, director or trustee at a nonprofit organization in the employee's official capacity, this memorandum does not provide an exhaustive list of potential issues. OGE urges agency officials to be sensitive to possible issues that may arise when considering assigning an employee to serve in an official capacity with a nonprofit organization and to confer with the agency's OGE Desk Officer if an ethics concern does arise.