

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

Consistent with guidance from the Office of Science and Technology Policy that supports service by Federal employees on the governing boards of nonprofit professional societies and other nonprofit organizations in furtherance of scientific integrity, the Department of Commerce policy is to encourage managers throughout the Department to consider appointment of employees to service with nonprofit organizations (tax-exempt under Section 501 of Internal Revenue Code) in appropriate circumstances and consistent with these guidelines. *See also* Office of Government Ethics Legal Advisory 13-05 (April 9, 2013). Managers in each operating unit and Secretarial office (“agency”) within the Department are responsible for deciding whether such service is permissible, but may consult with Department Ethics officials in making such determinations.

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 may help agency officials better understand issues and activities related to the nonprofit’s mission. In addition, official service helps the agency in recruiting better scientists and other employees and enhances the professional development, skills, and experience of the employee serving with the nonprofit organization, which helps the employee become 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.

Accordingly, agency management officials, taking into account the factors set forth below, 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 a senior official of the agency (generally at the Deputy Assistant Secretary or equivalent level or the head of a major agency component, such as the head of a line office, or higher), in consultation with an ethics official as necessary; and
- conditions are provided in writing to the employee.

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—Conditions and Procedures,” 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. Another option is for an employee to 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 relating to outside activities.

Agencies must maintain a list of all official appointments to outside organizations that will be provided upon request to the Office of the Assistant General Counsel for Administration and Transactions. The list should include the name and title of the employee, the name of the nonprofit organization, the employee’s position with the organization, and the dates of appointment and term of service. (It may also be helpful for agencies to prepare for their own records the determinations that support the appointments.) This will allow the Office of General Counsel to compile a Department-wide database of official appointments to nonprofit organizations, if needed.

FACTORS TO CONSIDER PRIOR TO AUTHORIZING SERVICE

The following factors should be considered 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 generally 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. 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 may create a perception to the public of endorsement of the organizations or its activities over that of other*

organizations; 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) may involve the employee in internal operational matters in which the agency is not likely to have an interest. In order to use appropriated funds for the 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.
 - *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, agency officials should take into account the possibility that, in order to avoid the appearance of preferential treatment, they may need 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 and other legal concerns. If a nonprofit (with which the employee is serving in an official capacity) is seeking an agency contract, grant or other Government support, the agency should contact the Office of General Counsel to ensure that adequate safeguards are in place to protect the integrity of the Government action and to avoid any organizational conflict.*
- 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 not legally required but 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 to the same nonprofit organization 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 a suitable means of accomplishing agency goals.*

OFFICIAL SERVICE WITH NONPROFIT ORGANIZATIONS

CONDITIONS AND PROCEDURES

The Department of Commerce encourages the assignment of employees to serve officially as officers or board members of nonprofit organizations if it supports agencies in carrying out their missions. Such service may enhance the professional development of the employee serving with the nonprofit organization and may assist agencies in recruiting better scientists and other employees. Please still note that an employee serving in an official capacity as an officer or board member of a nonprofit organization is subject to limitations in the scope of the official service the employee may render to the organization, as described below. Agency managers 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).

Prohibited Activities

- Participating in any fundraising activity on behalf of the organization. (The employee's name and Government title may be used on the organization's letterhead or other documents that are publicly-distributed in connection with an organizational fundraising activity, but the employee may not sign any such document.)
- Participating in any partisan political activity undertaken by the organization; including any fundraising or other activity promoting a candidate for local, state, or Federal election or an activity promoting a political party. (The employee's name may not be used in the text or on any letterhead or other document that is publicly-distributed in connection with a partisan political activity, even if the employee does not sign the document.)
- Participating in any activity on behalf of the organization that is 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 official to favor or oppose any legislation, law, or appropriation. (The employee's name may not be used in the text or on any letterhead or other document that is publicly-distributed with regard to this organizational activity, even if the employee does not sign the document.)
- Advocating on behalf of the organization before the United States Government, unless authorized to engage in such activities by agency management officials.
- Advocating on behalf of the organization before any foreign government, unless authorized to engage in such activities by agency management officials.
- Participating 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.
- Seeking consensus advice for the Government (for example, obtaining the consensus opinion of a nonprofit organization's board on a Government matter).

- Taking action on behalf of the organization that is inconsistent with Federal Government positions on major policy issues; the employee 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).
- Expressing personal opinions on significant policy issues without a disclaimer; because the employee is serving in an official capacity, any views expressed by the employee should reflect those of the agency. If expressing a personal opinion, the employee must make it clear that the views expressed are the employee’s own opinions and do not necessarily represent those of the Government.

Procedural issues and requirements

- Documents obtained from nonprofits may not be stored by the employee in an agency 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.
- The employee 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.
- The employee should keep agency supervisors informed of any significant developments relating to the organization.
- The employee should be aware that constraints on the employee’s conduct as a Federal employee do not apply to non-Federal counterparts in the organization, including ethics restrictions on the acceptance of gifts, meals, and travel.
- The employee must retain documents reviewed or created by the employee that are considered Federal records 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.
- The employee should be aware that any document the employee creates for, or receives from, the outside organization is potentially subject to the Freedom of Information Act (FOIA) and could be released to the public.
 - Documents created by the employee or documents distributed by the employee as part of the employee’s organizational duties as an officer or board member are likely required to be released to the public upon request; for example, sending an email to the organization board to record a vote on an organizational matter; creating or sending an email to the organization membership concerning the organization’s position on a matter; or creating a memorandum for presentation to the organization’s board or membership.

- Documents received by the employee from non-Federal members of the organization may be subject to public release as well. For example, receiving an email containing background information and using that information to record a vote or take other action for the organization. It is also possible, but less likely, that a received document could be subject to a FOIA request even if it is not used by the employee to take any action on behalf of the organization, for example, an FYI email from an organization board member.
- The employee should also be aware of the requirement to search for such organizational documents as part of a search for documents in response to requests to the employee's agency made under FOIA.

Prior to appointment, agencies should 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).

**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.

1. 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.
2. Internal organizational documents reviewed or created by a U.S. Government employee serving in an official capacity as an officer or board member or otherwise may be required to be retained by the Government employee pursuant to the employee's agency's records retention requirements. Any such documents may be accessible in some circumstances by the public under the Freedom of Information Act or Privacy Act.
3. 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.
4. The employee may not participate in any fundraising activities on behalf of the organization.
5. 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).
6. 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.
7. The employee may not participate in internal organizational activities that are not necessary to carry out the agency's work.
8. In the event that the organization is competing for an agency contract or other agency support, an organizational conflict may be created unless the organization has safeguards in place to ensure that the employee is adequately shielded from the matter.