

Office of Government Ethics

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Letter to a Private Attorney dated March 10, 1988

We received your request for a decision on whether "conflict of interest" statutes, particularly 18 U.S.C. § 203 and § 205, would affect a Federal employee under consideration to become a Member of a Board of Directors of a grantee of a particular program operated by [the Department employing the individual]. This Office does not render decisions, but does provide advice to individuals seeking guidance. That advice follows.

In your letter you indicated that you believe the duties of a Board Member, which may give rise to a conflict of interest, fall within three areas. The first is that of negotiating grant awards and making subsequent changes to, or modifications of, those [Department] or other Federal or District of Columbia agency awards. The second is the "give and take" that occurs in meetings between the Board Members and Federal officials during the officials' frequent visits to the grantees to instruct or advise them to take specific actions in order to comply with grant terms or be eligible for future funding. In the last area, the Boards vote on grant terms, including budgets, and must instruct their staff regarding negotiations with Federal officials.

18 U.S.C. § 203 would prohibit any Government employee who is also a Board Member from receiving, directly or indirectly, any compensation for services rendered in relation to any proceeding, application, request for ruling or other determination, contract, claim, controversy, or other particular matter in which the United States is a party or has a direct or substantial interest. Therefore, if a member of the board were paid for his or her activities in representing the organization for the purpose of getting the Federal grant, a violation of this proscription would be apparent. The services for which compensation are paid need only be related to a proceeding in which the United States is interested. Even if neither the [Department's] grantee nor the Government employee intends any improper attempts to influence official conduct, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment to the grantee, or the inefficient management of public affairs. This could result in a violation of 5 C.F.R. § 735.201a as well as 18

U.S.C. § 203. Pursuant to 18 U.S.C. § 203, therefore, there could be a violation of the statute if the Federal Government employee, as a Board Member, is paid to represent the grantee before any Government agency, department, or court, or employee thereof, on any matter in which the Government has an interest.

In advising your grantee-client, you may wish to call his attention to 18 U.S.C. § 203(b) which proscribes the reciprocal conduct of paying such compensation.

Regardless of compensation, 18 U.S.C. § 205 prohibits a Federal employees from acting as either an agent or attorney for prosecuting a claim, or as an agent for anyone before any department, agency, court, officer or commission in connection with any proceeding, application, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest. Generally, public officials are not permitted to step outside of their official roles to assist private entities or persons in their dealings with the Government. Concededly, the Federal employees under consideration may be unaware that there might be a violation of law in many of the activities of a Board Member. Nonetheless, section 205 is a general intent proscription not requiring proof of specific intent, wilfulness, or a knowing and corrupt intent.

In addition to sections 203 and 205, U.S.C. § 208(a) bars a Federal officer or employee from participating personally and substantially as a Government employee through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise, in a judicial or other application, request for ruling, contract, claim, controversy, charge, accusation, arrest, or other particular matter, in which, to his knowledge, he, his spouse or minor child, partner, or an organization in which he is serving as an officer, director, trustee, partner or employee, or anyone with whom he is negotiating for future employment, has a financial interest. This section is not limited to those in the highest echelons of Government service, or to those Government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government. Indeed, there need not be any actual corruption or any loss suffered by the Government as a result of the employee's conflict of interest in order to violate this section. Therefore, an employee in an

agency working with loan determinations to a grantee on whose Board he serves would have to recuse himself from that work.

In addition to the criminal statutory provisions, an executive branch agency's standards of conduct regulations based on Executive Order 11222 may further restrict an employee's service as a Board Member of an organization receiving Government grants. Pursuant to 5 C.F.R. § 735.203, the agency may require written approval or actually prohibit the acceptance of the directorship because the agency wishes the employee to fulfill his Government responsibility completely without recusing himself from matters affecting an outside employment or activity. Government employees should not have outside financial interests, direct or indirect, that substantially conflict with, or appear to conflict with, their Government duties and responsibilities per 5 C.F.R. § 735.204(a)(1). Therefore, an agency can prohibit the acquisition of, or take an action against any employee who acquires a financial interest that would require recusal under § 208 to such an extent that the employee's use to the Government would be affected.

Should the agency approve admittance of a Federal employee to the grantee's Board of Directors after consideration of the above, the employee must still be concerned with other standards of conduct issues. With regard to "matching" funds for the grantee or other operating funds, the employee may not solicit donations for the organization from people with whom he does business within the Government (§ 735.202(a) and § 735.201a). Additionally, he could not use, directly or indirectly, Government time, equipment, or facilities, including support services, for his outside work (§ 735.205). Nor could he use information not generally available to the public, gained through his employment, to serve the interests of the granteem (§ 735.206). He also could not use his Government title in performing the grantee's business (§ 735.201a(a)). Finally, he could not use his Government employment for a purpose that gives the appearance of using his office for private gain by anyone, giving preferential treatment, impeding Government efficiency or economy, making Government decisions outside official channels, losing his independence or impartiality, or adversely affecting the confidence of the public in the integrity of the Government (§ 735.201a).

I trust that this helps alert you to the statutory and regulatory concerns in having Federal employees serve as Members

of Boards of Directors of Federal grantees. While we would be happy to discuss this with you further, it is now more appropriate for the Federal employees under consideration to contact their Designated Agency Ethics Official for specific guidance. If service on the boards would not be approved under the Department's regulations, an expanded discussion of any of these issues is unnecessary.

Sincerely,

Frank Q. Nebeker
Director