

Outside Boards: A Discussion

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The “New” Exception

5 CFR §2640.203(m): Official Participation in nonprofit organizations.

An employee may participate in any particular matter where the disqualifying financial interest is that of a nonprofit organization in which the employee serves (or is seeking or has an arrangement to serve), solely in an official capacity, as an officer, director or trustee.

Goal

Not just a problem speech.

What the Exception Does Not Say

- Does not say what kind of non-profit
 - Must qualify for exemption under IRS Code § 501.
- Does not limit mission purpose of participation
 - Discipline specific professional development
 - 2010 OSTP memo to remove barriers
 - BUT THERE CAN BE OTHER MISSION REASONS

3 Broad Challenge Areas

- Scope of Exception
 - What kind of non-profits?
- Laundry List of Legal Risks (foreshadowing, indicating quality literature)
- How to implement!?

Scope of Exception

- Scope of Exception
 - NARROW: Limit use to professional associations?
 - Individual career track development is the driver.
 - BROAD: What if board membership with another type of non-profit advances a mission area?
 - Organizations that advocate and/or promote “good things,” local business chambers and partnerships, etc.
 - Nexus with risk laundry list (that has been foreshadowed).

Risk Laundry List, not exhaustive, and supposed to be too small to read.

- [illegible]

The Source

- Common thread is the risk of using taxpayer resources for unauthorized purposes.
- Exemption does not provide agency authority:

Note to paragraph (m): Nothing in this paragraph shall be deemed independent authority for an agency to assign an employee to serve in an official capacity with a particular nonprofit organization....

Authorization/Appropriation Risks

- Engaging in the conduct of regular business affairs, participating the control of non-federal assets, engaging in the policy matters of an organization
- Preferential treatment and the commitment of agency resources
- Using travel funds to support activity primarily intended to achieve academic sector parity in professional development
- Fundraising, lobbying, solicitation, or participation in an organization's response to investigative activity

Employee Conduct Risks

- Active (or passive) participation in fundraising and development campaigns, organization lobbying and advocacy efforts regarding legislation or appropriation, and partisan political activity
- “Representing” the organization in affairs involving a federal agency
- Confidentiality and disclosure of non-public government information, and the duty of loyalty
- Managing compliance with any/all existing recusal obligations in course of service to organization
- Avoiding prohibited gifts and potential 209 violations

Exposure Risks

- Media and constituent inquiry, and Congressional oversight
- Application of FOIA to the non-profit's internal administration records deemed to be in agency possession and control
- Tort liability protection subject to DOJ determination based upon particular action at issue

Morale/Grievance Risks

- Horizontal consistency, especially for professional development, and derivative morale /grievance risks.
 - Fairness of application between staff peers.
- Vertical consistency, especially given the paucity of executive time, and derivative morale/grievance risks.
 - Equal availability for staff if an executive is approved to use the exception.

Back to Scope of Exception

- NARROW: Professional Associations
 - Response to risk laundry list is arguably more formulaic. Same limitations for everyone promotes horizontal consistency/fairness.
- BROAD: Other non-profits for which accepting an outside position affects mission objectives.
 - Risks are more context specific. Vertical consistency risks are heightened; how can you say no to others when the boss is doing it?

Return to Goal

Something other than a problem speech.

Conceptual Framework for Approval Level

- **NARROW Scope**
 - Lends itself to more local and formulaic approval, though still various risks to manage. Supervisors should be familiar with professional development opportunities typical to subordinates career paths.
- **BROAD Scope**
 - Lends itself to higher level approval. Can involve interpretations of agency organic authority, evaluation of less intrusive alternatives, and precedent beyond professional development practices.

Discussion & Questions?

Questions:

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